

# CRIMINAL

1/1-5/8/20

## PRETRIAL

### Grand jury

#### *People v Clark*

2020 NY Slip Op 02204

3<sup>rd</sup> Dept (4/10/20 DOI)

The People faxed to the Conflict Defender a notice stating that the matter would be presented to the grand jury, but not specifying a presentment date. The next day, the People presented the matter to the grand jury. County Court properly granted the defendant's motion to dismiss the indictment pursuant to CPL 190.50 (5), since the People failed to give him a reasonable opportunity to testify before the grand jury.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02204.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02204.htm)

#### *People v Edwards*

2020 NY Slip Op 02503

(3<sup>rd</sup> Dept) (4/30/20 DOI)

People's appeal. Third Department reinstated two counts of 1<sup>st</sup> degree assault. One justice dissented, opining that grand jury proof was legally insufficient. A collision reconstruction investigator testified that the defendant's vehicle was slowing for the five seconds before the crash, while the steering wheel was being turned to the right as the road curved. One of the two passengers—both of whom suffered serious injuries—testified that the defendant slammed on the brakes before the collision. Such proof showed that the defendant took steps to reduce his speed and mitigate the risk of his reckless driving.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02503.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02503.htm)

### Jurisdictional defect

#### *People v Lawrence*

2020 NY Slip Op 00004

(3<sup>rd</sup> Dept) (1/3/20 DOI)

Indictment was jurisdictionally defective, appellate counsel ineffective. Less than 25 grams of pot possessed by the defendant was not constitute dangerous contraband for promoting prison contraband charge.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00004.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00004.htm)

#### *People v Elric YY.*

2020 NY Slip Op 00326

(3d Dept) (1/20/20 DOI)

Waiver of indictment and SCI did not set forth approximate time of offense. However, under *People v Thomas* (COA, 11/26/19, affirming *People v Lang*, 165 AD3d 1584), this was non-elemental factual information, and guilty plea forfeited such arguments regarding defects in the accusatory instrument.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00326.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00326.htm)

#### *People v Wheeler*

2020 NY Slip Op 00998

COA (2/24/20 DOI)

The defendant was convicted of 2<sup>nd</sup> degree obstructing governmental administration for backing his vehicle away from police officers. The Information lacked factual allegations providing notice of the official

function the defendant allegedly interfered with—a police stop of him in his vehicle to execute a warrant to search the vehicle—so it was jurisdictionally defective.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_00998.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_00998.htm)

### **Accusatory instrument valid**

*People v Middleton*

2020 NY Slip Op 02530

(COA) (4/30/20 DOI)

Information regarding official misconduct was jurisdictionally valid. It alleged that, while working as a treatment program aide at a correctional facility, the defendant disclosed information to an inmate regarding an unusual incident, in violation of the employee manual she signed. The defendant admitted that she printed the paperwork on a facility computer and allowed the inmate to take the document to his cell. One could infer that she meant to benefit herself or inmates.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02530.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02530.htm)

### **Delay in prosecution**

*People v Clark*

2020 NY Slip Op 01180

2<sup>nd</sup> Dept (2/24/20 DOI)

Error to deny, without a hearing, the defendant's motion to dismiss the indictment based on the People's unjustified delay in prosecution. Relevant circumstances included a delay of 22 months from the incident to the indictment; the People's failure to offer a reason for the delay; and the defendant's claim of prejudice.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01180.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01180.htm)

### **Suppression**

*People v Kamenev*

2020 NY Slip Op 00301

(2<sup>nd</sup> Dept) (1/20/20 DOI)

Police lacked probable cause to arrest the defendant, and motion to suppress lineup ID testimony and his statements to police should have been granted. Facts relied on were innocuous—that the D was seen riding a bike near the scene of the crime shortly before the shooting.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00301.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00301.htm)

*People v Nazario*

2020 NY Slip Op 00955

(4<sup>th</sup> Dept) (2/10/20 DOI)

Suppression was proper where officer did not recognize the defendant from BOLO information, which thus could not be used to validate the officer's conduct. Search of bag was improper; no proof officer reasonably suspected that the D was armed and posed a threat to his safety.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00955.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00955.htm)

*People v Colsen*

2020 NY Slip Op 01514

2<sup>nd</sup> Dept (3/9/20 DOI)

The hearing court erred in finding the lineup not unduly suggestive. The defendant was the only person with dreadlocks, which featured prominently in the complainant's description of one assailant. In the lineup, the dreadlocks were distinctive and visible, even though the D and fillers wore hats.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01514.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01514.htm)

*People v Stover*

2020 NY Slip Op 01676

3<sup>rd</sup> Dept (3/16/20 DOI)

The police did not have objective reason to approach the defendant's vehicle. There was no indication that the D was other than a customer with a valid reason to park legally at a club that had just closed.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01676.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01676.htm)

*People v Grimes*

2020 NY Slip Op 01818

4<sup>th</sup> Dept (3/16/20 DOI)

The lower court erred in ruling without resolving whether the pat frisk was lawful, and the appellate court lacked the power to review issues not ruled upon, so the matter was remitted.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01818.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01818.htm)

*People v Wallace*

2020 NY Slip Op 01796

4<sup>th</sup> Dept (3/16/20 DOI)

Officer asked what was in the defendant's bag, a level-two intrusion, without a founded suspicion. Suppression ordered.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01796.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01796.htm)

*People v Weeks*

2020 NY Slip Op 02198

2<sup>nd</sup> Dept (4/3/20 DOI)

Reversal, suppression, dismissal. The impoundment of the D's vehicle was unlawful. The vehicle was legally parked. While an officer testified that the vehicle was impounded to safeguard against burglary, there was no evidence as to a history of burglary in the area, nor any evidence as to an NYPD impoundment policy, what the policy required, or whether the arresting officer complied with the policy.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02198.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02198.htm)

*People v McCabe*

2020 NY Slip Op 02288

(3<sup>rd</sup> Dept (4/17/20 DOI)

County Court committed reversible error in denying the defendant's motion to suppress his un-Mirandized statements. After arriving at the crime scene and finding the defendant in the driveway, a police officer entered the residence where the victim was being treated by the defendant's mother. The informed the defendant that he was being detained for questioning. After handcuffing the defendant and placing him in the patrol car, the officer asked him, "What happened?" The defendant responded that he "snapped" and "wanted her to feel the pain he had." The incident had been completed, the parties identified, and medical assistance requested. The custodial questioning constituted interrogation.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02288.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02288.htm)

*People v Johnson*

2020 NY Slip Op 02576

(4<sup>th</sup> Dept) (5/4/20 DOI)

Drugs and weapons convictions upon guilty plea dismissed due to suppression error. Traffic stop for not blinking. The defendant made furtive movements toward the center console and fled. After his arrest, deputy opened car door, smelled marijuana, found crack cocaine under armrest. Upon getting search warrant, deputy seized handgun from glove compartment. No probable cause to open door and search. Requisite nexus lacking. Since deputy did not smell pot after opening door, all physical evidence suppressed.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02576.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02576.htm)

*People v Holz*  
2020 NY Slip Op 02682  
COA (5/8/20 DOI)

CPL 710.70 (2) gives a defendant the right to review of a suppression order “upon an appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty.” That provision encompasses a suppression order related to a count, satisfied by a guilty plea, to which the defendant did not plead guilty, a unanimous Court of Appeals held.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02682.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02682.htm)

## GUILTY PLEAS

### Coercion

*People v Shields*  
2020 NY Slip Op 01767  
4<sup>th</sup> Dept (3/16/20 DOI)

At an appearance prior to the plea proceeding, the court stated that, if the defendant decided to reject the plea offer and was convicted after trial, court would impose the maximum sentence on the top count and consecutive time on an unnamed additional count. Such statements constituted impermissible coercion.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01767.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01767.htm)

### Padilla violations

*People v Lantigua*  
2020 NY Slip Op 02257  
(1<sup>st</sup> Dept) (4/30/20 DOI)

Error to summarily deny CPL 440.10 motion regarding IAC as to advice on immigration consequences. In unsworn letter, counsel admitted his flawed performance. At the plea proceedings, the D received no relevant advice. The motion court should not have focused on likelihood that the defendant would have been convicted after trial. IAC claim may succeed even where the likely outcome of favorable trial is slim. The D faced only a short sentence if convicted after trial and had family here.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02557.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02557.htm)

### Peque violations

*People v Arana*  
2020 NY Slip Op 00290  
(2<sup>nd</sup> Dept) (1/20/20 DOI)

Plea court failed to address deportation. Defendant was entitled to opportunity to move to vacate his plea and seek to establish prejudice.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00290.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00290.htm)

*People v Delorbe*  
2020 NY Slip Op 02126  
COA (4/3/20 DOI)

The instant defendant failed to preserve his *Peque* claim. A year before the plea proceeding, the People provided him with a generic notice of immigration consequences. The notice adequately alerted the defendant about immigration consequences. At sentencing, the defendant did not seek to withdraw his plea

or inquire about a possible immigration impact. Judge Wilson concurred, declaring that the trial court's *Peque* responsibility could not be met by a prosecutor providing a form to the defendant. The generic notice did not permit an assessment as to the defendant's salient knowledge at the time of his plea. However, his own motion papers conclusively proved that he knew that his plea carried the possibility of deportation.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02126.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02126.htm)

*People v Pinnock*

2020 NY Slip Op 02731

1<sup>st</sup> Dept (5/8/20 DOI)

When the defendant, a noncitizen, pleaded guilty to a firearm possession charge, the plea court did not advise him that, if he was not a citizen, he could be deported as a consequence of his plea. Although the defendant did not move to withdraw his plea, there was no evidence that he knew about the possibility of deportation during the plea and sentencing proceedings. Thus, his claim fell within the narrow exception to the preservation doctrine. *See People v Peque*, 22 NY3d 168. The defendant was entitled to an opportunity to move to vacate his plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had the court advised him.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02731.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02731.htm)

**Right to counsel**

*People v Sears*

2020 NY Slip Op 01974

(4<sup>th</sup> Dept) (3/23/20 DOI)

Reversal, because the defendant's right to counsel was violated when a defense attorney who actively participated in the preliminary stages of the defense became employed as an assistant district attorney by the office prosecuting the defendant's ongoing case.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01974.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01974.htm)

**Suppression reviewability**

*People v Holz*

2020 NY Slip Op 02682

COA (5/8/20 DOI)

CPL 710.70 (2) gives a defendant the right to review of a suppression order "upon an appeal from an ensuing judgment of conviction, notwithstanding the fact that such judgment is entered upon a plea of guilty." That provision encompasses a suppression order related to a count, satisfied by a guilty plea, to which the defendant did not plead guilty, a unanimous Court of Appeals held.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02682.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02682.htm)

**Waivers of appeal**

*People v Barrales*

2020 NY Slip Op 00329

(3<sup>rd</sup> Dept) (1/20/20 DOI)

Invalid appeal waiver. Written doc did not explain issues waived and inaccurately stated that the defendant gave up the right to have counsel assigned, file an appeal or seek post-conviction relief in any court. Under COA decision in *People v Thomas* (11/26/19), waiver was unenforceable.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00329.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00329.htm)

*People v Burdo*

2020 NY Slip Op 00456

(3<sup>rd</sup> Dept) (1/24/20)

Appeal waiver invalid. County Court did not explain “separate and distinct” element. Not clear D signed written doc in open court after conferring with counsel.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00456.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00456.htm)

*People v Ecchevaria*

2020 NY Slip Op 00875

(2<sup>nd</sup> Dept) (2/10/20 DOI).

Purported waiver of the right to appeal was invalid. Particularly in light of the defendant’s young age and inexperience with the criminal justice system, the terse oral colloquy was insufficient.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00875.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00875.htm)

*People v Frias*

2020 NY Slip Op 00876

(2<sup>nd</sup> Dept) (2/10/20 DOI)

Purported waiver of his right to appeal was invalid. Erroneous statement that, by signing the written waiver, the defendant was giving up his right to appeal “any issue that may arise from this case, including sentencing.” Written waiver did not overcome flaws.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00876.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00876.htm)

*People v Brown*

2020 NY Slip Op 00944

(4<sup>th</sup> Dept) (2/10/20 DOI)

Waiver of right to appeal invalid, because lower court told the defendant he could obtain no further review of the conviction or sentence by a higher court.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00944.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00944.htm)

*People v Marcel G.*

2020 WL 2169721

2<sup>nd</sup> Dept (5/8/20 DOI)

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2<sup>nd</sup> degree robbery. The Second Department adjudicated the defendant to be a youthful offender. The purported waiver of the right to appeal was invalid. The defendant’s youth, limited education, and lack of experience with the criminal justice system warranted a more thorough explanation; and there was no indication on the record that he read the written waiver.

<http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D62758.pdf>

## TRIALS

### **Prospective jurors**

#### *People v Alleyne*

2020 NY Slip Op 00154

(2<sup>nd</sup> Dept) (1/13/20 DOI)

Juror's work trip was lame reason to excuse her after both sides rested. She was not "unavailable" within meaning of CPL 270.35 (1). Reversal and new trial.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00154.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00154.htm)

#### *People v Manning*

2020 NY Slip Op 01308

(1<sup>st</sup> Dept) (2/28/20 DOI)

Reversal due to the unjustified discharge for cause of a selected but unsworn juror, based on concerns about juror's out-of-town meeting during trial. Record did not show that his state of mind would have prevented him from rendering an impartial verdict.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01308.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01308.htm)

### **Severance**

#### *People v Moore*

2020 NY Slip Op 01645

1<sup>st</sup> Dept (3/16/20 DOI)

Court erred in denying severance of charges arising from two robberies. The defendant had important testimony to give in the first case as to a duress defense and had a genuine need to refrain from testifying in the second case due to an adverse *Sandoval* ruling.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01645.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01645.htm)

### **Courtroom closure**

#### *People v Rivera*

2020 NY Slip Op 01035

1<sup>st</sup> Dept (2/24/20 DOI)

Error to exclude family members from courtroom during testimony of undercover officers, where prosecutor did not oppose the defense request, the court made no supporting findings, and there was no request that the family members be identified.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01035.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01035.htm)

### **Self-representation**

#### *People v Trammell*

2020 NY Slip Op 02190

1<sup>st</sup> Dept (4/3/20 DOI)

Reversal and a new trial, because the defendant was deprived of his right to represent himself. His insistent entreaties were erroneously and summarily rejected. The trial court ordered 730 examinations and assigned successive defense counsel, notwithstanding valid complaints about counsel's flaws. Harmless error analysis did not apply.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02190.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02190.htm)

## **Evidentiary errors**

### ***Molineux***

*People v Ramirez*  
2020 NY Slip Op 01087  
2<sup>nd</sup> Dept (2/24/20 DOI)

An erroneous *Molineux* ruling occurred. It was not relevant that the defendant allegedly resisted arrest six months following the incident in question, after violating an order of protection against him in favor of the complainants.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01087.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01087.htm)

### ***Hearsay***

*People v Thelismond*  
2020 NY Slip Op 01368  
(2<sup>nd</sup> Dept) (2/28/20 DOI)

Reversible error in admitting recording of anonymous 911 call. The caller said somebody got shot, but not that the caller saw the shooting. So neither the excited utterance nor the present sense impression exception applied.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01368.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01368.htm)

### ***Cross examination***

*People v Vasquez*  
2020 NY Slip Op 02237  
1<sup>st</sup> Dept (4/10/20 DOI)

The defendant was convicted based on his role in the crimes along with three other participants, including Francisco Calderon. While the prosecutor improperly cross-examined Calderon, the error was harmless. Two justices dissented. The cross-examination left the impression that the defendant had participated with Calderon as a getaway driver in a spree of uncharged violent robberies. Such propensity evidence must not be admitted at trial. Further, the prosecutor argued in summation—without any basis in the record—that the defendant’s SUV was Calderon’s getaway vehicle for the other robberies. The evidence of guilt was not so overwhelming that the errors could be deemed harmless.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02237.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02237.htm)

### ***Same weapon***

*People v Deverow*  
2020 NY Slip Op 01359  
(2<sup>nd</sup> Dept) (2/28/20 DOI)

Error to admit revolver recovered from underneath a vehicle located several blocks from crime scene. Proof was insufficient to provide reasonable assurances that the revolver was the weapon used in the shooting. But error was harmless

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01359.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01359.htm)

### ***“Complainant” vs. “victim”***



*People v Horton*

2020 NY Slip Op 01530

3<sup>rd</sup> Dept (3/9/20 DOI)

The complainant should not be referred to as the “victim,” since such label dilutes the presumption of innocence. Other jurisdictions have expanded restrictions on the use of the term in additional contexts where the complainant’s credibility is in issue.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01530.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01530.htm)

***Frye hearing***

*People v Williams*

2020 NY Slip Op 02123

COA (4/3/20 DOI)

The trial court abused its discretion as a matter of law in refusing to hold a *Frye* hearing to assess the general acceptance within the scientific community of Low Copy Number (LCN) DNA evidence and the Forensic Statistical Tool (FST) used by the Office of the Chief Medical Examiner of NYC. Judicial caution should govern the admission of developing scientific evidence in criminal proceedings. Scientific community approval—not judicial fiat—was the litmus test. However, *sound* prior judicial opinions regarding general acceptance of scientific evidence could validate a trial court’s decision to admit evidence without a *Frye* inquiry.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02123.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02123.htm)

*People v Foster-Bey*

2020 NY Slip Op 02124

COA (4/10/20 DOI)

Standard DNA analysis could not connect this defendant to the subject gun, so the People sought to introduce evidence based on LCN typing and FST analysis. The trial court denied a motion to preclude such evidence, without conducting a *Frye* hearing. The defense cited a scholarly writing in contending that: LCN evidence was not generally accepted in the relevant scientific community; the NYC Office of the Chief Medical Examiner was the only government facility using that method in criminal prosecutions; and the FST had not been validated by any entity other than the OCME. The motion court relied on flawed trial-court decisions in denying the defense application. It was an abuse of discretion as a matter of law to admit the evidence without holding a *Frye* hearing. However, the error was harmless, given eyewitness testimony and the defendant’s admission.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02124.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02124.htm)

***Right to confrontation***

*People v Stone*

2020 NY Slip Op 00323

(3<sup>rd</sup> Dept) (1/20/20 DOI)

Defendant and co-D jointly tried. Error for trial court to admit a statement of the co-D that incriminated the defendant. Violation of right to confrontation.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00323.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00323.htm)

*People v Tsintzelis*

2020 NY Slip Op 02026

COA (3/27/20 DOI)

The admission of DNA lab reports through the testimony of an analyst who did not perform or supervise the DNA testing violated the defendants’ confrontation clause rights. *See People v Jones*, 27 NY3d 294; *People v Austin*, 30 NY3d 98. The errors were not harmless, since the People relied on the DNA profiles to

prove guilt. In concurring, Judge Rivera rejected the People's argument that it sufficed that, in the admitted Forensic Biology files, there was a listing of the analyst's name as a reviewer or analyst on some testing reports, and her initials appeared on each page of the files.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02026.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02026.htm)

*People v Butler*

2020 NY Slip Op 02676

2<sup>nd</sup> Dept (5/8/20 DOI)

When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine an analyst who witnessed, performed or supervised the generation of the defendant's DNA profile or used his or her independent analysis on the raw data. The People failed to establish that the analyst who testified played such a role.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02676.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02676.htm)

***Right to silence***

*People v Chapman*

2020 NY Slip Op 02330

(3<sup>rd</sup> Dept) (4/24/20 DOI)

County Court erred in admitting a redacted video of the defendant's police interrogation. The video consisted of police recounting their case against the defendant and being met largely with silence from a dismissive defendant. The evidence of selective silence lacked probative value and was highly prejudicial. There was a significant risk that the jurors deemed the defendant's failure to answer questions to be an admission of guilt.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02330.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02330.htm)

**Other trial issues**

*People v Bryan*

2020 NY Slip Op 00243

(1<sup>st</sup> Dept) (1/20/20 DOI)

Court erred in denying one-day adjournment so defense could call absent witness with material testimony.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00243.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00243.htm)

*People v Torres*

2020 NY Slip Op 00480

(1<sup>st</sup> Dept) (1/24/20 DOI)

Conviction of 2<sup>nd</sup> degree incest violated Ex Post Facto Clause, because it was based on conduct that occurred before statute became effective.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00480.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00480.htm)

*People v Tucker*

2020 NY Slip Op 00739

(4<sup>th</sup> Dept) (2/3/20 DOI)

Criminal possession of a firearm was not unconstitutional as applied to the defendant, who possessed a revolver in his home for self-defense.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00739.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00739.htm)

## **Quantum of evidence**

### ***Assault and firearm***

#### *People v Spencer*

2020 NY Slip Op 01823

4<sup>th</sup> Dept (3/16/20 DOI)

Assault and firearm counts were based on legally insufficient evidence. The People did not object when their theory of transferred intent was not reflected in the jury instruction on the assault charges. Appellate review of sufficiency was limited to the instruction as given without objection; and there was insufficient evidence that the defendant knew that either victim was present or intended any harm to either. The indictment charged him with using a loaded firearm during the assault, yet the instructions did not specify assault as the underlying crime.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01823.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01823.htm)

### ***Criminally negligent homicide***

#### *People v Derival*

(2<sup>nd</sup> Dept) (3/27/20 DOI)

Indictment for criminally negligent homicide dismissed since verdict was against the weight of the evidence. The case arose out of 2013 collisions among three vehicles. The People did not establish that the defendant failed to perceive a substantial and unjustifiable risk, thus causing the death of his passenger. No single consistent version of the accident emerged. Even the People's experts were at odds with each other. Moreover, the findings about the D's speed and improperly changing lanes were inconsistent with eyewitness testimony.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02072.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02072.htm)

### ***DWI***

#### *People v Bradbury*

2020 NY Slip Op 02577

(4<sup>th</sup> Dept) (5/4/20 DOI)

People failed to establish that the defendant operated car. Conviction upon jury verdict of two counts of felony DWI reversed. Passing motorist saw the D off the road, and the D said don't call 911, but motorist did. The D said the car had been driven by a man she had met at a bar the night before. She was intoxicated. Story was plausible. Request that the motorist not call 911 was weak evidence. No matter that the D did not give detailed description of purported man from bar.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02577.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02577.htm)

### ***Escape***

#### *People v Gonzalez*

2020 NY Slip Op 02675

2<sup>nd</sup> Dept (5/8/20 DOI)

His contention that the evidence was legally insufficient to support the attempted escape conviction was unpreserved, but reached in the interest of justice. The Second Department dismissed the count of attempted 2<sup>nd</sup> degree escape. The evidence did not establish that the defendant was under arrest when he allegedly attempted to open the door of the police car in which he was being detained.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02675.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02675.htm)

### ***Evidence tampering***

#### *People v Zachary*

2020 NY Slip Op 00165

(2<sup>nd</sup> Dept) (1/13/20 DOI)

Proof of tampering with physical evidence was legally insufficient, where police were in pursuit for a violation of the open-container law when the defendant discarded a plastic bag containing pot.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00165.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00165.htm)

### ***Falsely reporting a crime***

#### *People v Burwell*

2020 NY Slip Op 02205

3<sup>rd</sup> Dept (4/10/20 DOI)

The defendant was charged, inter alia with, knowing the information to be false, circulating via social media a false allegation that she was the victim of a racially motivated assault. The Third Department dismissed that count for falsely reporting a crime. As applied here, Penal Law § 240.50 (1) was unconstitutionally broad in criminalizing the false speech. The Twitter storm that ensued after the defendant posted false tweets did not cause “public alarm.” The retweets led to nothing more than a charged online discussion.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02205.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02205.htm)

### ***Forged instrument***

#### *People v Johnson*

2020 NY Slip Op 02708

1<sup>st</sup> Dept (5/8/20 DOI)

The evidence was legally insufficient to support the conviction of 2<sup>nd</sup> degree criminal possession of a forged instrument. The evidence was not legally sufficient. The People failed to prove that the defendant knew that four NY Rangers tickets were counterfeit. Before a game, he approached fans outside of Madison Square Garden; said “tickets, tickets;” met a man who handed him an envelope containing the forged tickets; and gave the envelope to a codefendant. The evidence suggested that the defendant sought to buy or sell tickets, not that he knew the tickets were forged. The defendant’s flight from a plainclothes officer was equivocal.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02708.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02708.htm)

### ***Justification***

#### *People v Allen*

2020 NY Slip Op 02595

(4<sup>th</sup> Dept) (5/4/20 DOI)

In manslaughter case, dissenter opined People failed to disprove the justification defense beyond a reasonable doubt. The defendant called 911 and said her boyfriend tried to kill her. There was blood on her and everywhere in house. The D had bruises and cuts. She told paramedic that the decedent tried to kill her and told police he choked her. A neighbor heard someone say, “Don’t kill me.”

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02595.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02595.htm)

### ***Larceny***

#### *People v Rivera*

2020 NY Slip Op 01192

2<sup>nd</sup> Dept (2/24/20 DOI)

Conviction reduced from grand larceny 3<sup>rd</sup> to 4<sup>th</sup> degree. As to some of items, the only evidence of the value was the complainant's testimony regarding the purchase price.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01192.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01192.htm)

### ***Robbery***

*People v James*

2020 NY Slip Op 00615

(2<sup>nd</sup> Dept) (2/3/20 DOI)

Robbery verdict was against weight of evidence where complainant struggled to recall details of crime, and her description of perpetrator did not match the defendant's appearance.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00615.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00615.htm)

### ***Sex trafficking***

*People v Hayes*

2020 NY Slip Op 00832

(1<sup>st</sup> Dept) (2/10/20 DOI)

Proof did not establish that the defendant used force, or engaged in a scheme or plan, to induce the alleged victim to engage in prostitution. Sex trafficking count dismissed.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00832.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00832.htm)

### **Summation**

*People v Ramirez*

2020 NY Slip Op 01087

2<sup>nd</sup> Dept (2/24/20 DOI)

The prosecutor made improper statements in summation—an issue that was partially unpreserved—by suggesting that jurors should disregard the grand jury testimony of a central prosecution witness, and by inviting the jurors to speculate that, if called to testify, a missing witness would have given supporting testimony. Such comments were prejudicial.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01087.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01087.htm)

### **Jury charge**

*People v Swem*

2020 NY Slip Op 02435

(4<sup>th</sup> Dept) (4/27/20 DOI)

County Court erred in denying the defendant's request for a circumstantial evidence instruction. At a crowded house party, there were multiple physical fights The victim was involved in fights with at least two others; was stabbed five times; and had one wound that was 5" deep. The defendant was seen fighting with the victim, but not holding a knife, and no blood was found in the room where they fought.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02435.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02435.htm)

### **Deliberating jurors**

*People v Kluge*

2020 NY Slip Op 00878

(2<sup>nd</sup> Dept) (2/10/20 DOI)

Mode of proceedings errors required reversal. The defendant was not present when deliberating juror expressed concerns about pressure on jury. As to ensuing jury note, court failed to comply with CPL 310.30.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00878.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00878.htm)

### **330.30 motion**

*People v Newman*  
2020 NY Slip Op 02449  
(4<sup>th</sup> Dept) (4/27/20 DOI)

County Court erred in summarily denying a CPL 330.30 motion to set aside the conviction for menacing peace officers. Alleged jury misconduct involved a reenactment, thus requiring the court to inquire into whether the jury's conduct was a conscious experiment directly material to a critical issue that may have colored the jurors' views and prejudiced the defendant. A defense affidavit explained that counsel learned that, by using the bathroom door in the deliberation room to reenact the scene, the jurors had attempted to determine whether the defendant was aware that the persons knocking at his door were sheriff's deputies.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_02449.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02449.htm)

## **SENTENCING/YO**

### **Absence**

*People v Dais*  
2020 NY Slip Op 00828  
(1<sup>st</sup> Dept) (2/10/20 DOI)

Because the defendant was absent when court imposed post-release supervision, he had to be resentenced.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_00828.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00828.htm)

### **Misapprehension**

*People v Work*  
2020 NY Slip Op 00962  
(4<sup>th</sup> Dept) (2/10/20 DOI)

Court and counsel misapprehended the sentencing options in believing the defendant was eligible for CPL 410.91 parole supervision. The narrow exception to the preservation applied. Plea vacated.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_00962.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00962.htm)

### **Enhanced**

*People v Blanford*  
2020 NY Slip Op 00646  
(3<sup>rd</sup> Dept) (2/3/20 DOI)

Where court did not warn the defendant that positive drug sentence could result in enhanced sentence, its imposition was error. Remittal for original sentence or chance to withdraw guilty plea.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_00646.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00646.htm)

### **Consecutive/concurrent**

*People v Banks*  
2020 NY Slip Op 01525  
3<sup>rd</sup> Dept (3/9/20 DOI)

The imposition of consecutive terms for the assault convictions was error. Eyewitnesses heard five shots. Four bullets were recovered from the victims and one from the bar where the incident occurred. No proof

showed that any victim was struck by a bullet that did not first pass through another victim. Given the absence of evidence that any of the assault convictions arose from a separate and distinct pull of the trigger by the defendant, concurrent sentences were required.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01525.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01525.htm)

### **Reduction explained**

#### *People v Rankin*

2020 NY Slip Op 01976

4<sup>th</sup> Dept (3/23/20 DOI)

The defendant was convicted of 2<sup>nd</sup> degree murder in the death of a rival gang member and was sentenced to 23 years to life. The reviewing court reduced the sentence to a term of 18 years to life, noting that the defendant was only 18 years old at the time of the incident.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01976.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01976.htm)

#### *People v Fenton*

2020 NY Slip Op 02428

(4<sup>th</sup> Dept) (4/27/20 DOI)

The Fourth Department reduced sentence from 7½ to 2½ years, followed by post-release supervision. At the time of the sale of \$50 worth of cocaine, the defendant was 56 and had a minimal criminal record. His son, who arranged the sale, pleaded guilty and got probation.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02428.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02428.htm)

### **IAC**

#### *People v Jones*

2020 NY Slip Op01640

2<sup>nd</sup> Dept (3/16/20 DOI)

The defendant was deprived of effective assistance of counsel at sentencing, since counsel made no substantive arguments on his behalf and displayed no meaningful knowledge of the case or his background.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01640.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01640.htm)

#### *People v Huntress*

2020 NY Slip Op 01778

4<sup>th</sup> Dept (3/16/20 DOI)

The defendant was improperly sentenced as a second felony offender. The predicate conviction, the Pennsylvania crime of receiving stolen property, was not the equivalent of NY's 4<sup>th</sup> degree CPW, since operability of the firearm was not an element of the former offense.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01778.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01778.htm)

### **Shock incarceration**

#### *Matter of Matzell v Annucci*

2020 NY Slip Op 01425

(3<sup>rd</sup> Dept) (2/28/20 DOI)

DOCCS could not consider an inmate's disciplinary record to deny shock incarceration. DLRA amendment gave sentencing court authority to order shock incarceration if the defendant was eligible. DOCCS no longer makes ultimate determination.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01425.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01425.htm)

## **Sealing**

*People v Anonymous*  
2020 NY Slip Op 01113  
COA (2/24/20 DOI)

A trial court is without authority to consider, for sentencing purposes, erroneously unsealed official records of a prior criminal proceeding terminated in favor of the defendant. The exception at CPL 160.50 (1) (d) (ii) (access permitted where law enforcement agency shows that justice so requires) did not apply. The improper use of the D's trial testimony was the sole basis for the enhanced sentence.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_01113.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_01113.htm)

*People v Shrayef*  
2020 NY Slip Op 02073  
2<sup>nd</sup> Dept (3/27/20 DOI)

The defendant's CPL 160.59 motion to seal his conviction of 2<sup>nd</sup> degree money laundering was denied. The Second Department affirmed. Weighing in favor of sealing were the time since the defendant's conviction and his lack of contacts, before or since, with the criminal justice system. However, weighing against relief were the circumstances and seriousness of the offense, including his central role.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02073.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02073.htm)

## **YO not considered**

*People v Blanton*  
2020 NY Slip Op 00156  
(2<sup>nd</sup> Dept) (1/13/20 DOI)

Defendant pleaded guilty. Supreme Court failed to consider YO status though the D was eligible. CPL 720.20 (1) mandated violation. *See People v Rudolph*, 21 NY3d 497. Sentence vacated, remittal.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00156.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00156.htm)

*People v Allen*  
2020 NY Slip Op 00423  
(2<sup>nd</sup> Dept) (1/24/20 DOI)

Court failed to consider whether youth charged with armed felony was eligible for YO treatment and, if so, whether such status should be granted.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00423.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00423.htm)

*People v Giron*  
2020 NY Slip Op 01637  
2<sup>nd</sup> Dept (3/16/20 DOI)

The sentencing court must determine whether an eligible youth is a YO. The defendant was an eligible youth, yet the mandated determination was not made. Sentence vacated.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01637.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01637.htm)

*People v Ochoa*  
2020 NY Slip Op 02156  
1<sup>st</sup> Dept (4/3/20 DOI)

The defendant was convicted of 2<sup>nd</sup> degree CPW, upon his plea of guilty. The First Department vacated the sentence and remanded for a further youthful offender determination. The lower court erred in finding the defendant presumptively ineligible for YO, based on his commission of an armed felony. Under CPL 720.10, an armed felony required possession of a deadly weapon. Since a loaded firearm was not always a deadly weapon, the defendant's conviction for possessing a loaded firearm was not an armed felony.



[http://nycourts.gov/reporter/3dseries/2020/2020\\_02156.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02156.htm)

*People v Jones*

2020 NY Slip Op 02202

3<sup>rd</sup> Dept (4/10/20 DOI)

It was unclear whether the lower court recognized that he had pleaded guilty to an armed felony and that a judicial finding regarding YO-eligibility, based on the CPL 720.10 (3) factors, was required. There was no reference at the plea or sentencing to an armed felony. The sentence was vacated.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02202.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02202.htm)

### **YO granted**

*People v Carlos M.-A.*

2020 NY Slip Op 01083

2<sup>nd</sup> Dept (2/24/20 DOI)

The defendant was convicted of an armed felony but was eligible for a YO adjudication. Mitigating circumstances supporting YO treatment included that: (1) the D was only 16 at the time of the crime; (2) he had no prior criminal record; (3) he had strong family support; (4) the presentence report recommended a YO adjudication; and (5) the D expressed remorse.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01083.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01083.htm)

*People v Nicholas G.*

2020 NY Slip Op 01828

4<sup>th</sup> Dept (3/16/20 DOI)

YO ordered where: (1) the defendant was 17 at the time of the crimes and had no criminal record or history of violence or sex offending; (2) he had cognitive limitations, learning disabilities, and mental health issues; (3) the D accepted responsibility and expressed genuine remorse; and (4) the Probation Department and reviewing psychologist recommended YO treatment.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01828.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01828.htm)

*People v Marcel G.*

2020 WL 2169721

2<sup>nd</sup> Dept (5/8/20 DOI)

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2<sup>nd</sup> degree robbery. The Second Department adjudicated the defendant to be a youthful offender. Denial of YO status was an improvident exercise of discretion. The defendant, who was 17 at the time of the offenses, admitted his guilt and took responsibility for his actions. As part of his plea conditions, he successfully completed a treatment program, passing every drug test administered. The PSI report recommended YO status.

<http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D62758.pdf>

## SORA

### **Reversed**

#### *People v Pittman*

2020 NY Slip Op 00443

(2<sup>nd</sup> Dept) (1/24/20 DOI)

Reduction from level three to two. Upward departure was error. Criminal history was covered by Guidelines, not an aggravating factor. Prior criminal conduct for which the defendant was not convicted did not meet clear and convincing evidence standard.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00443.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00443.htm)

#### *People v Maund*

2020 NY Slip Op 02011

4<sup>th</sup> Dept (3/23/20 DOI)

SORA risk level reduced from three to two, because the People failed to prove that the defendant committed a continuing course of sexual misconduct—risk factor 4. The sole evidence presented was the case summary prepared by the Board of Examiners of Sex Offenders. At the hearing, the D denied that he engaged in a continuing course of sexual misconduct. Where the D contested the factual allegations, the case summary alone was insufficient to satisfy the People’s burden.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02011.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02011.htm)

#### *People v Wilke*

2020 NY Slip Op 02002

4<sup>th</sup> Dept (3/23/20 DOI)

The defendant was found to be a level-two risk pursuant to SORA. The Fourth Department reversed and remitted. County Court violated his right to due process by sua sponte assessing points on a theory not raised by the Board of Examiners or the People.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02002.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02002.htm)

### **Affirmed**

#### *People v Thomas*

2020 NY Slip Op 00084

(1<sup>st</sup> Dept) (1/13/20 DOI).

Error to assess 15 points under risk factor for accepting responsibility, but defendant was still level three.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00084.htmquantum](http://nycourts.gov/reporter/3dseries/2020/2020_00084.htmquantum)

#### *People v Diaz*

2020 NY Slip Op 01114

COA (2/24/20 DOI)

A statement in the PSI report (“on one or more occasions, he used physical force to coerce the victim into cooperation”) was “reliable hearsay,” justifying an assessment of 10 points for use of force. standard. Judges and Wilson dissented. The unattributed conclusory hearsay sentence was not reliable and did not constitute clear and convincing evidence of forcible compulsion.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_01114.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_01114.htm)

#### *People v Perez*

2020 NY Slip Op 02096

(COA) (3/27/20 DOI)

The SORA hearing court did not err in assessing 30 points for risk factor 9. It was proper to rely on the underlying conduct of the foreign conviction. Judge Wilson dissented, joined by Judge Rivera.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02096.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02096.htm)

## **CPL 330.20**

### *People v Guillen*

2020 NY Slip Op 00387

(1<sup>st</sup> Dept) (1/24/20 DOI)

Hearing needed on motion where, based on note she sent, it appeared that jury foreperson wanted to date a prosecution assistant, and another juror failed to reveal a close relationship with a witness.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00387.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00387.htm)

### *People v David T.*

2020 NY Slip Op

(4<sup>th</sup> Dept) (2/10/20 DOI)

Reversal in CPL 330.20 proceeding, where court failed to conduct initial hearing required by statute.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00964.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00964.htm)

### *People v Juan R.*

2020 NY Slip Op 01190

2<sup>nd</sup> Dept (2/24/20 DOI)

The defendant was committed to a secure facility for six months, pursuant to CPL 330.20 (6), upon a finding that he had a dangerous mental disorder. Reversed. No valid strategy could have warranted defense counsel's concession that the D suffered from a dangerous mental disorder; and the hearing was mandatory.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01190.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01190.htm)

## **POST-DISPOSITION**

### **Retrial barred**

#### *Matter of Bannister v Wiley*

2020 NY Slip Op 00522

(1<sup>st</sup> Dept) (2/3/20 DOI)

CPLR Art. 78 petition in nature of prohibition granted. Trial court erred in declaring a mistrial to accommodate juror's travel plans. Retrial barred by double jeopardy clauses of U.S. and NYS Constitutions. Indictment dismissed.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00522.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00522.htm)

### **CPL 440.10 motions**

#### ***Hearing ordered***

#### *People v Martin*

2020 NY Slip Op 00067

(1<sup>st</sup> Dept) (1/13/20 DOI)

A material factual dispute warranted a hearing, where motion counsel reported that defense counsel said that he did not realize he could have called an expert about the defendant not possessing the requisite mental state for murder, but the prosecution stated the opposite.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00067.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00067.htm)

*People v Martinez*

2020 NY Slip Op 00252

(1<sup>st</sup> Dept) (1/20/20 DOI)

Reversal of summary denial of 440 motion. Counsel said deportation was possible, but it was mandatory. In finding no prejudice, Supreme Court erred in focusing on events in 2017, not at the time of the 2007 plea. Extensive proof of the D's primary purpose of remaining in the U.S. Remand for a hearing before a different justice.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00252.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00252.htm)

*People v Scott*

2020 NY Slip Op 01807

4<sup>th</sup> Dept (3/16/20 DOI)

Hearing on 440.10 motion needed. Counsel was purportedly ineffective in failing to call an alibi witness who would have testified that he was with the defendant in North Carolina at the time of the murder.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01807.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01807.htm)

*People v Fox*

2020 NY Slip Op 01809

4<sup>th</sup> Dept (3/16/20 DOI)

Hearing on 440.10 motion needed. An affiant said the defendant borrowed his jacket and did not know drugs were in the pockets, yet counsel did not call such witness.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01809.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01809.htm)

***Denial affirmed***

*People v Maffei*

2020 NY Slip Op 02680

COA (5/8/20 DOI)

The defendant contended that he was denied effective assistance based on counsel's failure to challenge a prospective juror. Finding that a CPL 440.10 motion was needed to present such argument, the Court of Appeals upheld a conviction for 2<sup>nd</sup> degree murder. Counsel's decisions during jury selection may be based on many factors, including matters dehors the record. Judge Rivera dissented. A single error may qualify as IAC if sufficiently egregious and prejudicial. Jury selection was a strategic decision solely within the province of defense counsel. The majority had, in effect, adopted a per se rule that IAC claims must be considered via a 440 motion.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_02680.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_02680.htm)

**CPL 440.20 motions**

*People v Francis*

2020 NY Slip Op 00996

COA (2/24/20 DOI)

The jurisdictional restrictions of CPL 470.15 (1) did not apply to appeals of CPL 440.20 orders. By its plain terms, the statute limited review to errors that hurt the appellant in the instant proceedings.

[http://www.nycourts.gov/reporter/3dseries/2020/2020\\_00996.htm](http://www.nycourts.gov/reporter/3dseries/2020/2020_00996.htm)

## **SARA**

*People ex rel. Rosario v Superintendent*

2020 NY Slip Op 01178

2<sup>nd</sup> Dept (2/24/20 DOI)

As a result of inartful language, Executive Law § 259-c (14) had been interpreted in opposing fashion by the Third and Fourth Departments. The legislative history supported an interpretation that imposed the SARA-residency requirement based on either an offender's conviction of a specifically enumerated offense against an underage victim *or* the offender's status as a level-three sex offender.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01178.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01178.htm)

*M/O Green v LaClair*

2020 NY Slip Op 02338

(3<sup>rd</sup> Dept) (4/24/20 DOI)

Based on burglary and robbery convictions and his previous designation as risk-level three designation, the petitioner was found subject to SARA. That was error. The crimes for which the petitioner was serving a sentence were not enumerated offenses. The Exec. Law § 259-c (14) school-grounds restriction applies to offender serving sentence for enumerated Penal Law offense, where in addition, either victim was under age 18 at time of offense or defendant was designated risk-level three sex offender.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02338.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02338.htm)

## **MHL Art. 10**

*M/O State of NY v Richard F.*

2020 NY Slip Op 00943

(4<sup>th</sup> Dept) (2/10/20 DOI).

MHL Article 10 order finding that the defendant was a dangerous sex offender requiring confinement was error, where it defied unanimous expert proof.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00943.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00943.htm)

# FAMILY

1/1-5/8/20

## **Article 4 – Child support**

*M/O Elizabeth L. v Kevin O.*

2020 NY Slip Op 00037

(1<sup>st</sup> Dept) (1/3/20 DOI)

Appeal from willful violation finding dismissed, since it was made upon default, and no appeal lies from order upon default.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00037.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00037.htm)

*M/O Lopez v Wessin*

2020 NY Slip Op 00137

(2<sup>nd</sup> Dept) (1/13/20 DOI)

Probation vacated based on unpreserved illegal sentence. Statute allowed ordering jail or probation, but not both.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00137.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00137.htm)

*M/O Miller v DiPalma*

2020 NY Slip Op 00140

(2<sup>nd</sup> Dept) (1/13/20 DOI)

IAC as to willful violation, where counsel failed to produce any records to support father's defense that he could not work as mail carrier due to injury and had sought other work.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00140.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00140.htm)

*M/O Anthony S. v Monique T.B.*

2020 NY Slip Op 00382

(1<sup>st</sup> Dept) (1/24/20 DOI)

Okay for non-custodial father to seek child support on behalf of apparent custodial paternal grandmother, to be paid by non-custodial mother.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00382.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00382.htm)

## **Article 5 – Paternity**

*M/O Denise R.-D. v Julio R.P.*

2020 NY Slip Op 00145

(2<sup>nd</sup> Dept) (1/13/20 DOI)

Error to dismiss paternity petition based on equitable estoppel. Child had long relationship with husband, not with putative father, but he had known about the latter for years.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00145.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00145.htm)

## **Article 6 – Custody and visitation**

### ***Reversals***

*M/O Campbell v Blair*

2020 NY Slip Op 00270

(2<sup>nd</sup> Dept) (1/20/20 DOI)

Error to dismiss mother's custody petition at close of her case. She showed a change, i.e. her move from the country of Jamaica to Staten Island and stepmother's alleged corporal punishment of child. Petition reinstated.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00270.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00270.htm)

*M/O Starasia E. v Leonora E.*

2020 NY Slip Op 00334

(3<sup>rd</sup> Dept) (1/20/20 DOI)

Error to deny father's request to participate by phone call from prison in proceeding in which child's relative was awarded custody.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00334.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00334.htm)

*M/O Farouz v Williams*

2020 NY Slip Op 00592

(2<sup>nd</sup> Dept) (2/3/20 DOI)

Dismissal of custody petition, at close of petitioner-mother's case reversed. She made prima facie showing of change of circumstances, warranting a full inquiry.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00592.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00592.htm)

*M/O Williams v Davis*

2020 NY Slip Op 00777

(4<sup>th</sup> Dept) (2/3/20 DOI)

Father stormed off in frustrating at court appearance, and without notice, court held hearing without him and granted custody to mother. That was error. New hearing ordered.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00777.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00777.htm)

*M/O Massiello v Milano*

2020 NY Slip Op

(2<sup>nd</sup> Dept) (2/10/20 DOI)

Error to deny mother's mod petition seeking permission to relocate with children to South Carolina. Mother had been the primary caregiver; children wanted to move with her; she had been diagnosed with multiple sclerosis; and had family support in South Carolina.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00863.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00863.htm)

*M/O Erica X. v Lisa X.*

2020 NY Slip Op 01224

2<sup>rd</sup> Dept (2/24/20 DOI)

No appeal lies from an order entered upon the consent of the appellant. But during court proceedings, the trial judge and the AFC questioned the ability of the disabled mother to consent to anything. Thus, the record did not establish that her consent was valid.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01224.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01224.htm)

*M/O Tara DD. v Seth CC.*

2020 NY Slip Op 01227

3<sup>rd</sup> Dept (2/24/20 DOI)

The father untimely filed an answer and provided certain discovery. As a result, the lower court granted a motion to preclude him from offering any proof. That was error, where there was no showing of willfulness, and preclusion barred proof relevant to best interests.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01227.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01227.htm)

*M/O Shaun C.S. v Kim N.M.*

2020 NY Slip Op 02099

(1<sup>st</sup> Dept) (3/27/20 DOI)

Custody order reversed for further proceedings before a Family Court judge. Here, the referee exceeded her authority by determining the issues. A judicial determination was needed as to whether any further hearings were necessary and to give the parties an opportunity to seek confirmation or rejection of the referee's findings and conclusions.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02099.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02099.htm)

*Matter of Siegell v Iqbal*

2020 NY Slip Op 02084

(2<sup>nd</sup> Dept) (3/27/20 DOI)

Reversal of a custody order and remittal for a new hearing before a different judge. Family Court was biased against the mother, depriving her of a fair and impartial hearing. The appellate court reached the unpreserved issue in the interest of justice. The trial court predetermined the outcome during the hearing and took an adversarial stance against the mother by interjecting itself into the proceedings and cross-examining the mother on irrelevant matters.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02084.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02084.htm)

*M/O Georgiou-Ely v Ely*

2020 NY Slip Op 02049

(2<sup>nd</sup> Dept) (3/27/20 DOI)

Reversal of a custody order and remittal. Family Court erred in finding no change in circumstances, where the children's relationship with the father has deteriorated, he threatened to strike them with a belt, and he denigrated the mother in their presence. Further, the children, age 11 and 13, wanted to live with the mother.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02049.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02049.htm)

*M/O Jennifer VV. v Lawrence WW.*

2020 NY Slip Op 02136

(3<sup>rd</sup> Dept) (4/3/20)

The AFC failed to fulfill his obligations to express the clients' wishes. The 10-year-old was old enough to express her wishes, and the six-year-old's level of maturity and verbal abilities had to be assessed. He did not meet with the children during the appeal, thus failing to counsel them and elicit their current wishes. Because the AFC rendered ineffective assistance, he was relieved.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02136.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02136.htm)

*M/O Jessica D. v Michael E.*

2020 NY Slip Op 02133

(3<sup>rd</sup> Dept) (4/3/20)

Reversal of order dismissing custody mod petition. Family Court properly found change of circumstances but improperly denied any parental access based on deeply flawed forensic report, that failed to see the value in building a mother-child relationship and acquiesced in father's desire to thwart such a relationship. Upon remittal, Family Court should consider therapeutic visitation and solicit the recommendation of a different forensic evaluator.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02133.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02133.htm)



*M/O Alwardt v Connolly*  
2020 NY Slip Op 02574  
(4<sup>th</sup> Dept) (5/4/20 DOI)

Reversal of order granting custody to mother. Family Court failed to address relevant “best interests” factors. The only factor favoring the mother was the duration of the existing arrangement. Child did poorly in school, was depressed, received little support from mother. The father could provide a more stable home, and the 14-year-old child wanted to live with him.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02574.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02574.htm)

*M/O Jeanine N. v Mamadou O.*  
2020 NY Slip Op 02730  
1<sup>st</sup> Dept (5/8/20 DOI)

The determination that the mother would be limited to two hours’ on Saturdays, supervised by the father at a location agreed upon by the parties, was not sound. Supervision is only appropriate where the child’s physical safety or emotional well-being would otherwise be at risk. There was no evidence that the mother acted improperly during visits. Even if supervision were necessary, the father should not oversee the mother’s parenting time, since the parties did not communicate with each other. Given the passage of time, further proceedings were needed to set a parental access schedule.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02730.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02730.htm)

### ***Right to counsel***

*M/O Goodine v Evans*  
2020 NY Slip Op 02668  
2<sup>nd</sup> Dept (5/8/20 DOI)

The father appealed from a Nassau County Family Court order, which confirmed an order finding a willful violation of a prior child support order and committed him to jail for 30 days, unless he paid a certain purge amount. The Second Department vacated the willful violation order and remitted for a new hearing. The period of incarceration had expired, but in light of the enduring consequences, the appeal was not academic. The father had a constitutional right to counsel; incarceration was a possible disposition. When the father first appeared, the Support Magistrate informed him that, if he was employed, he was ineligible for assigned counsel and could represent himself or request an adjournment to retain counsel. The father stated that, although employed, he could not afford retained counsel, and he requested assigned counsel. The Magistrate denied counsel, when it should have delved into the father’s financial circumstances.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02668.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02668.htm)

### ***Decision reserved***

*M/O Steeno v Szydowski*  
2020 NY Slip Op 01808  
4<sup>th</sup> Dept (3/16/20 DOI)

Challenged order granted parental access to the mother as the parties agreed upon or, absent an agreement, as Family Court determined after a hearing. Notice of appeal deemed an application for permission to appeal, and leave granted. Family Court failed to set forth findings as to whether the grandmother established extraordinary circumstances. Remittal ordered.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01808.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01808.htm)

## ***Modified***

*M/O Acosta v Melendez*  
2020 NY Slip Op 00409  
(2<sup>nd</sup> Dept) (1/24/20)

Family Court erred in giving mother control over whether and when father had parental access. Remittal.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_00409.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00409.htm)

*M/O Adam V. v Ashli W.*  
2020 NY Slip Op 01231  
3<sup>rd</sup> Dept (2/24/20 DOI)

No appeal lies from an order entered upon the consent of the appellant. However, when the instant agreement was placed on the record, the mother made specific objections, so the order was appealable. The stipulation terms were not accurately reflected in the order.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_01231.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01231.htm)

*M/O Kane FF. v Jillian EE.*  
2020 NY Slip Op 02691  
3<sup>rd</sup> Dept (5/8/20 DOI)

Family Court erred in granting the father unsupervised parenting time. The court had ordered him to complete domestic violence counseling and provide a report to the court. The counseling was never undertaken, and no reason appeared on the record for the failure. Further, the court made no finding that the father had demonstrated a change in circumstances sufficient to warrant reconsideration of the child's best interests and did not explain the lifting of the supervision requirement or dispensing with the DV counseling requirement. The matter was remitted to determine a parenting schedule.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_02691.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02691.htm)

## ***Affirmed***

*Mathiew v Michels*  
2020 NY Slip Op (1<sup>st</sup> Dept)  
(2/10/20 DOI)

Initial custody order allowing mother and children to move to London upheld. Mother had job, apartment, and family there and would foster father's parental access.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_00815.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00815.htm)

*Matter of LeVar P. v Sherry Q.*  
2020 NY Slip Op 01533  
3<sup>rd</sup> Dept (3/9/20 DOI)

Family Court should not have disclosed information provided by the child during the *Lincoln* hearing. Protecting the child's right to confidentiality is a paramount judicial obligation. However, the improper disclosure did not adversely affect the determination.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_01533.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01533.htm)

*M/O Grabowski v Smith*  
2020 NY Slip Op 02400  
(4<sup>th</sup> Dept) (4/27/20 DOI)

Custody to the mother served the child's interests. The AFC's endorsement of a result contrary to the child's wishes did not constitute effective assistance of counsel. The 10-year-old wanted no contact with the mother, but abiding by such wishes would sever the mother-child relationship, to the child's detriment.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_02400.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02400.htm)

## ***UCCJEA***

*M/O Defrank v Wolf*  
2020 NY Slip Op 00126  
(2<sup>nd</sup> Dept) (1/13/20 DOI)

Neither NY nor PA was home state, but NY had subject matter jurisdiction to make initial custody determination.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00126.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00126.htm)

*M/O Sadie HH. v Darrin II.*  
2020 NY Slip Op 01219  
3<sup>rd</sup> Dept (2/24/20 DOI)

Family Court erred in finding that NY was an inconvenient forum for several reasons. Most testimony would come from the mother and other NY witnesses; and the father could testify by phone. Further, prior proceedings had occurred here; the mother could not afford to fly to Arizona or retain counsel; and she might not be assigned counsel there.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01219.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01219.htm)

## **Article 8 – Family offenses**

*M/O Maxine B. v Richard C.*  
2020 NY Slip Op 00482  
(1<sup>st</sup> Dept) (1/24/20 DOI)

Son menaced mother, and order of protection was proper. Mother's statement in court that order was not needed was obviously due to son's presence, in light of other proof of her need for protection.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00482.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00482.htm)

## **Article 10 – Abuse and neglect**

### ***No neglect/reversals***

*M/O Alexandra R.-M. (Sonia R.)*  
2020 NY Slip Op 00280  
(2<sup>nd</sup> Dept) (1/20/20 DOI)

Mother's insults and name-calling of misbehaving daughter were poor form, but not neglect.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00280.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00280.htm)

*M/O K.S.*  
2020 NY Slip Op 00979  
1<sup>st</sup> Dept (2/24/20 DOI)

The child was in the home when the incident occurred, but was sleeping in another room, as proven by credible testimony of the parents and the responding police officer. Neglect finding reversed.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00979.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00979.htm)

*M/O Zaire S.*  
2020 NY Slip Op 01027  
1<sup>st</sup> Dept (2/24/20 DOI)

The agency presented insufficient evidence that the grandmother knew, or should have known, that the boyfriend had a serious substance abuse problem. While she was aware that he used alcohol a lot, and he once overdosed on drugs, the record did not show frequency or duration of prior drug use.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01027.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01027.htm)

*M/O Lila JJ.*  
2020 NY Slip Op 01216  
3<sup>rd</sup> Dept (2/24/20 DOI)

The grandmother appealed from an order of Cortland County Family Court, which denied her motion to vacate an order finding neglect. The Third Department reversed. The controlling provision was Family Ct Act § 1042. The mother was only notified that a conference, not a fact-finding hearing, could occur.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01216.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01216.htm)

*M/O Elliot P. N. G.*  
2020 NY Slip Op 02091  
(2<sup>nd</sup> Dept) (3/27/20 DOI)

Error to deny Article 10 respondent's motion for the production of certain records by non-parties, pursuant to CPLR 3125 and Mental Hygiene Law § 33.13. It was error to deny disclosure of certain records from two different sources. CPLR article 31 applies to abuse and neglect proceedings and mandates full disclosure of all matter material and necessary in the defense of an action. The records sought were material to the defense and did not pose a risk of harm to the children.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02091.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02091.htm)

*M/O Abel XX.*  
2020 NY Slip Op 02129  
(3<sup>rd</sup> Dept) (4/3/20 DOI)

It was proper for Family Court to decline to dismiss the Article 10 petitions when the agency sought to withdraw them and allow the AFC to proceed on the petitions, but evidence of educational and medical neglect was insufficient. Family Court erred in relying on inadmissible evidence. Reversal.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02129.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02129.htm)

*M/O Katie P. H.*  
2020 NY Slip Op 02265  
(2<sup>nd</sup> Dept) (4/10/20 DOI)

On the fifth day of the hearing, the mother did not timely arrive in court, because her bus from Georgia was delayed. Counsel notified the court, said the mother wanted to testify, and sought an adjournment. The court erroneously denied the adjournment, as well as a request to reopen the hearing when the mother arrived after summations.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02265.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02265.htm)

*M/O Simone C.P.*  
2020 NY Slip Op 02270  
2<sup>nd</sup> Dept (4/10/20 DOI)

The neglect petition was dismissed: evidence did not show that the father's alleged domestic violence against the mother and use of marijuana harmed the child.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02270.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02270.htm)

*M/O F. W.*  
2020 NY Slip Op 02385  
(1<sup>st</sup> Dept) (4/24/20 DOI)

Family Court erred in denying the father's motion for an expedited hearing to determine whether the subject children, removed through a failed trial discharge, should be returned to him. The mootness exception applied. The government had an interest in ensuring a correct adjudication. Also to be weighed was the significant emotional harm to the children due to separation from their parents. In the post-dispositional phase, the father was entitled to the same due process safeguards as those afforded in neglect proceeding.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02385.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02385.htm)

### ***Neglect found***

*M/O Janiya P. (Scott G.)*  
2020 NY Slip Op 00679  
(1<sup>st</sup> Dept) (2/3/20 DOI)

Error to dismiss neglect petition where the respondent grabbed mother by hair and dragged her in presence of kids.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00679.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00679.htm)

*M/O Rebecca V.*  
2020 NY Slip Op 00825  
(1<sup>st</sup> Dept) (2/10/20 DOI)

Neglect finding supported by the mother's statements that the father stabbed her and took the child from the home in a car. Such statements were admissible under the present sense impression and excited utterance exceptions.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00825.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00825.htm)

### ***Due process***

*M/O Katherine U.*  
2020 NY Slip Op 00066  
(1<sup>st</sup> Dept) (1/13/20 DOI)

Testimony of child abuse victim via closed-circuit TV balanced father's due process rights and child's emotional well-being. Further, father found guilty in criminal trial in midst of Family Court fact-finding hearing, was collaterally estopped from challenging Family Ct Act Art. 10 sex abuse allegations.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00066.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00066.htm)

### ***Default***

*M/O Daniel P.*  
2020 NY Slip Op 00077  
(1<sup>st</sup> Dept) (1/13/20 DOI)

Order finding neglect was on default and thus not appealable where counsel was not authorized to participate until mother arrived, and she did not do so until after key records were admitted.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00077.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00077.htm)

### **KinGAP**

*M/O Jaquan L.*  
2020 NY Slip Op 00213  
(1<sup>st</sup> Dept) (1/13/20 DOI)

KinGAP expansion as to assistance payments applied retroactively to grandmother who executed petitions before children turned 16.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00213.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00213.htm)

## **TPR**

*M/O Tai-Gi K.*

2020 NY Slip Op 00679

(2<sup>nd</sup> Dept) (2/3/20 DOI)

Permanent neglect and TPR reversed. Agency did not help arrange for school transfer so child would live nearer mother or provide other appropriate services, and mother made get strides in her life.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00679.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00679.htm)

*M/O Rahsaan I. v Schenectady Co DSS*

2020 NY Slip Op 01212

3<sup>rd</sup> Dept (2/24/20 DOI)

The mother appealed from an order of Schenectady County Family Court, terminating her parental rights based on mental illness. That was error, due to the absence of the statutorily mandated contemporaneous psychological exam.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01212.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01212.htm)

*M/O Amira W. H.*

2020 NY Slip Op 02263

2<sup>nd</sup> Dept (4/10/20 DOI)

When the mother did not appear on a hearing date, counsel stated that she would participate on the mother's behalf. Thus, the mother was not in default as to the fact-finding hearing. The trial court's refusal to permit counsel to introduce into evidence certain documents, based on the mother's failure to appear, violated her due process rights. A parent has a right to be heard on matters concerning her child.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02264.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02264.htm)

## **Divorce**

*M/O Makris v Makris*

2020 NY Slip Op 00139

(2<sup>nd</sup> Dept) (1/13/20 DOI)

Error to enforce maintenance provision of divorce judgment in Family Court, where mother waived payments in oral agreement 16 years earlier and did not seek enforcement until instant application.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_00139.htm](http://nycourts.gov/reporter/3dseries/2020/2020_00139.htm)

*M/O Katie P. H.*

2020 NY Slip Op 02265

(2<sup>nd</sup> Dept) (4/10/20 DOI)

On the fifth day of the hearing, the mother did not timely arrive in court, because her bus from Georgia was delayed. Counsel notified the court, said the mother wanted to testify, and sought an adjournment. The court erroneously denied the adjournment, as well as a request to reopen the hearing when the mother arrived after summations.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02265.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02265.htm)

*M/O Simone C.P.*

2020 NY Slip Op 02270

2<sup>nd</sup> Dept (4/10/20 DOI)

The neglect petition was dismissed: evidence did not show that the father's alleged domestic violence against the mother and use of marijuana harmed the child.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02270.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02270.htm)