NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center

REPORT

Volume XXXIX Number 4 October - December 2024

Defender News

Remembering Larry O'Brien

This issue of the REPORT is the first one in the memory of current staff that was not typeset by Larry O'Brien, who died on December 18th. He put his desktop publishing business at NYSDA's disposal, and when he retired, he kept his computer program going just for us. In addition to the *REPORT*, he set program flyers and materials for our July conferences and many other publications and items. Larry tolerated, with cheerful grumbling, last-minute requests and changes. He embodied the phrase "a joy to work with" and is deeply missed. His obituary acknowledged not only Larry's publishing skills but also his many other interests—photography, family history, the arts, and more—and wonderful personality. The obituary included that Larry was predeceased by "his best friend and brother, Charlie O'Brien." Charlie was NYSDA's Managing Attorney for many years and became Executive Director in 2017, shortly before the illness to which he succumbed in 2020. NYSDA's continuing gratitude to Charlie includes appreciation that he connected us to Larry; we are grateful for the role that each played in our work.

We've Moved!

In January 2025, NYSDA's Albany office moved to a new location:
40 Beaver Street, 4th Floor
Albany, New York 12207

DMV Regs on License Points Increased, New VTL Sections Take Effect

The New York State Department of Motor Vehicles (DMV) amended its regulations regarding the assessment of drivers license points assessed for traffic violations. Both the number of points and the time in which points are considered for penalties changed, as did the rules regarding suspension for multiple alcohol- and drug-related convictions and the assessment of safety factor negative units. Lawyers faced confusion over implementation of the changes, as noted in News Picks from NYSDA Staff on December 10th. The amendments were adopted on Nov. 6, 2024, but "[t]he proposed regulations will not be enforceable until the thirtieth day following publication in the State Register of notice to the public that the Commissioner has determined that the Department's systems are prepared to implement the proposed regulatory changes." NYSDA created a summary of the changes, and is monitoring developments. Plans for a continuing legal education training on the changes were underway as the *REPORT* went to press.

Under a provision of Vehicle and Traffic Law 511(3) that took effect November 1st, third-degree aggravated unlicensed operation of a motor vehicle has been elevated to first-degree aggravated unlicensed operation of a motor vehicle where the individual "has in effect" five or more suspensions or revocations, imposed on at least five separate occasions, pursuant to specified provisions. The change was made in a law signed last year, L 2023, ch 722, also known as Angelica's Law. The legislation also required the DMV commissioner to provide written notice to all persons with

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four such license suspensions or revocations of the consequences of a fifth suspension or revocation.

Another newly-effective law, L 2024, ch 436, makes it a violation of VTL 1212 (reckless driving) to drive a motor vehicle, motorcycle, or other type of vehicle specified in the statute "in a manner which unreasonably interferes with the free and proper use of" any parking lot "or unreasonably endangers users" of any parking lot.

Statutes Intended to Further Penalize "Organized" Retail Theft Go into Effect

A number of amended statutes, passed with the 2024-25 State budget and focused on further penalizing "organized" retail theft, have gone into effect. These laws, referenced in the May 7, 2024, edition and December 10th edition of News Picks, will further criminalize poverty.

The first set of amendments addresses three sections of Penal Law article 155 - grand larceny in the fourth, second, and first degrees. The key modification is extending the time and locations by which the aggregate statutory thresholds may be met. Those thresholds can now be met "by the aggregate value of all such property regardless of whether the goods or merchandise were stolen from the same owner," so long as the alleged thefts are "pursuant to a common scheme or plan." What constitutes such a scheme or plan will need to be litigated.

Two new crimes created by the legislation are a new E felony, "assault on a retail worker" (Penal Law 120.19) and a class A misdemeanor (165.66), "fostering the sale of stolen goods." Defenders encountering the new laws are encouraged to contact the Backup Center for assistance.

Clean Slate Finally in Effect, but Implementation Will Take Years

The Clean Slate Act, relating to the automatic sealing of certain convictions, was signed into law a year ago and went into effect on Nov. 16, 2024. However, as noted on the Office of Court Administration's website, the Act provides OCA "three years from [Nov. 16, 2024] … to set up the required processes to automatically seal eligible conviction records." No later than Nov. 16, 2027, a form will be posted on the OCA website that individuals who think their convictions should have been sealed can use to seek review of those convictions.

NYSDA hosted an Informational Session on the Clean Slate Act, by the NYS Division of Criminal Justice Services (DCJS) and the NYS Office of Court Administration in October. As reiterated in the December 10th edition of News Picks, NYSDA has long supported Clean Slate, which will allow people with specified convictions to re-enter the workforce and will break down barriers that have prevented them from providing for themselves and their families.

Gov. Kathy Hochul signed a complementary bill, the Maintaining Criminal Record Confidentiality Act, on Nov. 22, 2024. It prevents certain entities, including employers and landlords, from requiring individuals to disclose criminal records.

Twists and Turns in Forensic and Technology Issues

Contamination events in the Office of the Chief Medical Examiner (OCME) in New York City, and legal fallout from them, were discussed at length in the December 10th edition of News Picks. The next edition noted a Kings County Supreme Court decision, *People v Morales* (2024 NY Slip Op 24307 [12/4/2024]), ruling on a motion to compel a buccal swab from a client for purposes of comparing his DNA with that found on evidence submitted to the OCME. The court held the motion in abeyance pending confirmation that the evidence in question had not been impacted by the contamination. NYSDA's Discovery and Forensic Support Unit (see below) will continue to monitor developments in this specific forensic evidence saga and provide information to defenders on it and similar problems.

A separate OCME issue, also covered in News Picks on December 31st, is the effect of a national shortage of medical

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examiners and consolidation of medical examiner services in Brooklyn and Manhattan after the Queens OCME stopped conducting autopsies. When medical examiners leave their positions, substitutes have to testify in the criminal cases they left behind. Such "surrogate testimony" is under growing judicial scrutiny. See *Smith v Arizona*, a constitutional Confrontation Clause case covered in the July 31st edition of News Picks.

Defenders also face technical and legal developments in other areas of potential evidence. One example is the exploding use (and news about) artificial intelligence (AI) in many aspects of life and legal practice. In October, a Saratoga County Surrogate's Court confronted the use of AI by an expert tasked with calculating lost profits on a piece of property. As noted in the December 31st edition of News Picks, the expert testified that he used Microsoft Copilot to cross-check his calculations, but could not satisfactorily explain the prompt he used, describe the training data used for Copilot, or "any details about how Copilot works or how it arrives at a given output."

The court eventually tried to replicate the expert's calculations using Copilot, with inconsistent results, and interrogated Copilot about its reliability and accuracy. The court held that "counsel has an affirmative duty to disclose the use of artificial intelligence and the evidence sought to be admitted should properly be subject to a *Frye* hearing prior to its admission, the scope of which should be determined by the Court, either in a pre-trial hearing or at the time the evidence is offered." [Footnote omitted.] The court based this on "the nature of the rapid evolution of artificial intelligence and its inherent reliability issues that prior to evidence being introduced which has been generated by an artificial intelligence product or system …." *Matter of Weber as Trustee of Michael S. Weber Trust*, 2024 NY Slip Op 24258 (10/10/2024).

In a footnote, the court observed, without suggesting unethical actions in the matter before it, that "[a]s an example of how emerging these issues are, on August 7, 2024, the New York City Bar Association issued an ethics opinion (2024-5) on the use of artificial intelligence by attorneys in general…." The opinion appears on their website.

Surveillance and identification technologies continue to present issues to defense lawyers (and society). Included in the October 11th edition of News Picks was information about results of the *Washington Post*'s efforts to obtain information about police use of facial recognition software across states. Of the 100 police departments surveyed, only 30 provided arrest records, with the others saying they were not required to disclose use of the software because while they do use the software to identify potential leads, they do not rely on it as a sole basis of arrest. Use of such software is concerning because at least seven people are known to have been wrongly arrested based on identification based on its use, six of whom were Black. Details noted in the News Picks item included the *Post*'s reporting of an instance in which Clearview AI "search results produced as evidence in one Cuyahoga County, Ohio, assault case included a photo of basketball legend Michael Jordan and a cartoon of a Black man."

In addition to the issues that use of such software raises for individuals pulled into the criminal legal system, facial recognition poses other problems, including invasion of privacy, other fallout from use in locating people in the country without the required documentation, and potential abuse in targeting opponents of a particular policy or political entity. See, e.g. a November 18th post on *Context.news*.

Busy 2024 for NYSDA's Discovery and Forensic Support Unit

The Discovery and Forensic Support Unit at NYSDA's Backup Center had a busy 2024. The unit, created after funding was provided in the state budget for Fiscal Year 2022-2023, supports criminal and family attorneys in various ways. Those who contact NYSDA about complex issues arising under the criminal discovery laws may be directed to training materials and other information and, in some instances, receive other Unit assistance. Attorneys facing forensic and technology issues, ranging from DNA evidence to uses and dangers of artificial intelligence, may receive information such as the names of potential experts, publications, and other materials, as well as individual consultation on some questions.

Forensic-focused continuing legal education included a live training at Albany Law School focusing on litigating cases with digital evidence: "All the Way Up: How to Take Your Digital Evidence Litigation to the Next Level." Webinars included a three-part series on DNA topics and presentations on: latent print pattern matching; digital technology evidence issues such as geofence warrants; cell site location information and call detail records; and algorithms, hidden technology, and the machine witness. A webinar on discovery from the defense rounded out the unit's trainings this year.

NYSDA Provides Free Webinars to Defenders

NYSDA encourages family and criminal defenders to take advantage of our array of free continuing legal education webinars. We offer programs appropriate for both new and experienced attorneys, covering an array of topics relevant to all areas of mandated representation.

Family defense programs from Fall, 2024, included: Policy Reform in the Family Courts; What You Need to Know About

Non-Parent Custody Filings; a primer on Best Interests in Article 6 cases; The A to Z of Article 6 Custody Relocation. Our trainings regularly have attendance in the hundreds and include defenders from all over the state. Positive feedback from attendees included a New York City panel attorney's statement, "I thoroughly enjoy your programs. While I have been in practice for decades, I look forward to workshopping with other experienced counsel that I have not yet had the opportunity to work with. Learn something new each day. Today I got some insight on some of my more difficult and problematic cases." Another defender wrote, "[t]hank you for all of the really interesting and well-done NYSDA trainings you provide."

Recordings of past training programs are available to members on the Training page of NYSDA's website. Information on our low-cost membership is available on the website or by emailing hrapp@nysda.org or calling (518) 465-3524 x13. Please note that, currently, NYSDA does not issue CLE credit for viewing recordings.

Future training programs are listed on our Training Calendar. **Be sure to save the date for the 58th Annual Conference, July 27-29, 2025**, in Saratoga Springs.

Youth Systems and Issues Highlighted

In every legal area that affects public defense clients, attorneys confront the fact that young clients' cases cannot and should not be handled identically to those of adults over 25. Defenders have to know how science, social science, and legal rules and systems developed for young people impact these clients and their legal matters in youth parts, other criminal courts, family courts, probation offices, and detention facilities. Discussed below are resources, law, and policy issues affecting youth and the lawyers who represent them, including in advocacy to improve services geared to youth before, during, and after any involvement in the criminal systems.

Guide: Recognizing Youth are not Adults

Because adolescents are different from adults, defenders are encouraged to take a "developmental approach" to representing young people. Doing so is the driving message of Alan Rosenthal's new practice resource book, *A Defense Attorney's Guide: Representing Adolescents* [JO, AO, YO, Retroactive YO, SORA]. Available on NYSDA's Criminal Defense Resources webpage as well as the ILS website, the *Guide* covers law specifically related to young people denoted adolescent offenders and juvenile offenders, including the many aspects of removal of these cases to family court.

Youthful Offender law is also covered, as are Sex Offender Registration Act (SORA) requirements, with special notice taken of problems in SORA's application to youth. The risk assessment instrument (RAI) used in determining a client's risk level is discussed, with this initial statement: "The RAI is flawed when used for adults, and even more flawed when applied to adolescents."

As noted in the October 11th News Picks item about the Guide, Rosenthal's earlier invaluable practice handbook, *Defending Against the New Scarlet Letter, A Defense Attorney's Guide to SORA Proceedings* (2d Ed), is a potential companion resource, also available on NYSDA's website. (**This is an opportune point to say that NYSDA congratulates Alan Rosenthal on the well-deserved honor of being named by the Onondaga County Bar Association as its 2024 Distinguished Lawyer**.)

While the *Representing Adolescents* guide presents much information on existing legal frameworks for charging young people with behavior that is criminal when committed by adults, it also does more. It offers defenders information on what young people need and what lawyers need to properly represent them (including "a defense team that includes a social worker and/or mitigation specialist"). And it points out that late adolescents/emerging adults—those over 18 but not yet 21 or even 25—are also different from adults in terms of brain development. The Guide stresses the need to educate judges about why they "must prioritize rehabilitation over retribution, promoting successful and productive reentry and reintegration into society over deterrence and incapacitation" when dealing with all youth. A News Picks item four years ago, in the Sept. 30, 2020, edition, included information on "Rethinking Justice for Emerging Adults."

Removing AO's Weapons Charge to Family Court Doesn't Require Prosecution's Consent

A Schenectady County court has held that removal of a charge of criminal possession of a weapon in proximity to a school did not require the prosecution's consent. The defendant was charged as an adolescent offender (AO). The decision in *People v J.R.* (83 Misc 3d 1286[A] [8/29/2024]) examined the language and legislative history of CPL 722.23 (1), and constitutional arguments affecting statutory interpretation, and found the prosecution failed to establish the existence of the required extraordinary circumstances. Therefore, no basis existed for retaining the matter in Youth Part. The court declined to address the prosecution's attempted equal protection argument comparing removal of the 17-year-old under Raise the Age with potential removal of a 15-year-old facing similar charges.

First Dept. Affirms Denial of Expert Testimony on Adolescent Brains

A First Department case from October 3rd, *People v Rivera* (summary on page 23), found a trial court "providently exercised its discretion in precluding" proffered defense expert testimony about adolescent brain development. The application was not made until a month into trial; granting the belated request "would have caused unnecessary delay." More troublingly, the court also said that the defendant's "ability to form that intent as an 18-year-old, was not beyond the ken of the jurors ...." The decision should remind attorneys with clients who are teens to consider ways of incorporating the science of brain development throughout those cases, including in mitigation offered during negotiation with prosecutors and/or for sentencing; in voir dire of jurors; in expert testimony, and in jury instructions. See, for example, the September 2023 edition of the Center for Appellate Litigation's *Issues to Develop at Trial*, which proposed "linking jury charges with the concepts of mens rea and adolescent and young adult brain development."

Vera Institute Offers Information on Youth Issues

The Vera Institute of Justice posted, on Nov. 19, 2024, an article entitled "There are better ways than incarceration to make young people in need feel safe." It tells stories of youth who have been criminalized as a result of "family conflict, abuse, and housing instability." It specifically criticizes systems that push girls and gender expansive youth into the juvenile legal system to "protect" them. It also notes an overreliance in the child welfare system on group homes and institutional settings. The article notes an April 25th report on ending incarceration of these youth in California, as well as programs in other places, like a pilot program in Texas and the organization Rising Ground in New York City.

Calls for Rollback of Raise the Age Appear Ongoing

Through the fall, news media continued to report—and fuel—efforts to roll back the Raise the Age reforms passed in 2017. The *Staten Island Advance* published an article on September 24th noting that a group of elected officials were backing legislation to "see more kids tried in criminal court." The group included State Senator Jessica Scarcella-Spanton, who has introduced legislation to that end. Particular concern was expressed about gun violence. Borough President Vito Fossella said he intended to keep pushing to overturn the reform despite apparent disinterest by those in power. In Albany, the campaign for District Attorney featured some Raise the Age rhetoric; the incumbent who lost had been a "vocal critic" of the reform, as noted in a November 7th *New York Times* recap of election results focusing on crime and law enforcement. It should be noted that the Albany race featured other issues, despite the incumbent's claim that the race would have "statewide consequences" on opposing reforms as was noted in a *Law.com* post on October 16th.

On November 15th, the *Times Union* reported on the sentencing of a 20-year-old for the murder of a barber during a drive-by shooting aimed at someone else. Much of the article was focused on the upright character of the person who was killed and the senselessness of the shooting, which injured others as well; but the headline and final portion of the story pointed to "flaws" in Raise the Age. The young man being sentenced had, at the time of the shooting, been on probation for a family court conviction for possessing a firearm; the involvement of he and a codefendant in the more recent crime illustrated "the apparent lack or effectiveness of any meaningful intervention or support services that followed their prior arrests," the article said.

The failure to provide the effective services envisioned by the reform has been noted in several articles. One in the *New York Times* on October 24th reported on New York City's two juvenile detention centers "struggling to control an exploding population of minors charged with serious crimes," and on problems in implementing programs intended to curb youth violence. "'The fault is not with Raise the Age but with the execution,'" said Sebastian Solomon, interim director for Greater Justice New York at the Vera Institute of Justice. On the same day, *The City* also carried an article on a New York City Department of Investigation report about many problems in the two facilities. Upstate, a story appeared in the *Times Union* about a State Comptroller's audit revealing locally-operated juvenile detention facilities' frequent failures "to conduct timely assessments of many of the adolescent offenders in their custody." This could result in "youth not receiving mandatory individualized 'de-escalation plans' and other health assessments...."

Meanwhile, in central New York, a long article on *Syracuse.com* dated Nov. 25, 2024, decried "Syracuse's stubborn youth crime problem," leading with a story dating back to August 12th. The article claims that Monroe County has "found a solution," cracking down on teens. The article does recognize regional differences, and acknowledges a probation director's observation that "'[t]here's quite a bit of research that detention is not necessarily an effective intervention,'" but rather "'a short-term solution.'" That was backed up by John Jay College professor Jeffrey Butts, who opposes detention except for serious trouble (particularly trouble when guns are involved). Similarly, Julia L. Davis, director of Youth Justice and Child Welfare at the Children's Defense Fund of New York, was

quoted as saying detention "isn't effective at promoting public safety and has deleterious effects on young people' …." She said that "juvenile crime has decreased in both Onondaga and Monroe counties in the past five years, when you look at state data for total arrests [but] Onondaga County's data shows a sharper decrease in overall juvenile crime than Monroe County, even though Monroe County now has had a heavier reliance on detention" with some upward trend in both the past two years.

Thoughtful approaches to the complex issues involved in youth crime are valuable—and rare. The subheading on a *Vital City* article says that the facts about youth crime in New York City "are more complicated than often presented," and sets out observations about use (or misuse) of data in determining what if any actions are needed. The final sentence is: "[w]ithout better data, we risk disproportionately focusing on youth crime and misallocating limited public safety resources on a demographic that accounts for about 9% of major crime arrests." Further details about the article were noted in the December 10th News Picks. This type of information should be useful in combatting efforts to roll back Raise the Age or make other unwarranted, punitive changes

More Reforms Needed to Help Youth, Advocates Say

Advocates seeking reforms in youth criminal laws rallied in the Bronx in October in support of two bills: the Right to Remain Silent Act and the Youth Justice and Opportunities Act. As reported in the *Bronx Times*, supporters included The Legal Aid Society and Youth Represent.

NYSDA has actively supported Right2RemainSilent, which would grant immediate legal counsel to arrested young people, who may otherwise quickly waive their rights without understanding the consequences. Efforts to protect youth will continue in 2025.

Trying to Address Mental Health Issues Among Youth

Finding mental health services for youth is difficult almost everywhere, and certainly in rural communities. Possibly helpful resources include a recorded webinar from Mental Health America on supporting rural youth mental health and, more generally, the Rural Mental Health webpage of the Rural Health Information Hub (RHIhub) and a *Psychology Today* post about rural Telehealth. Another possible resource is the discussion of "Breaking Barriers: Understanding and Combating Mental Health Stigma Among Children, Youth, and Families" posted by the Community Technical Assistance Center (CTAC) and Managed Care Technical Assistant Center (MCTAC), part of New York University's McSilver Institute for Poverty Policy and Research. One legislative effort to address the dearth of services in rural areas of New York was vetoed in November; State Senator Pam Helming issued a statement expressing disappointment at a veto of her bill to create a Rural Suicide Prevention Council. Helming said that "[t]he suicide rate in rural areas of New York is double that of urban areas and is increasing at a significantly greater rate."

Systemic Issues Challenge People with Mental Illness and their Lawyers

Recent developments in the continuing dilemmas that clients with mental illness, and their lawyers, face include appellate decisions discussing harsh sentences and the issuance of the Daniel's Law Task Force's report.

Evaluating the Harshness of Sentences When Mental Illness and Systemic Failure Collide

A candid discussion of the failures of mental health and criminal systems alike to help a 30-year-old man with mental illness precedes the holding in *People v Sparks*, (summary on page 21). The court, noting that "[t]reating incarceration as the default response for individuals like Mr. Sparks has outsized deleterious consequences that, ultimately, make our communities less safe," reduced Sparks' three-to-six-year sentence to the minimum allowed for third-degree robbery, two to four years. Two dissenters found no basis for a sentence reduction.

The discussion in *Sparks* illustrates clearly the ongoing dilemma created by insufficient systemic approaches to mental illness. While the majority said that the dissent failed to refute a forensic psychologist's analysis "or explain how further incarceration would serve the goals of societal protection, deterrence or rehabilitation," the dissent countered that "that is not the determination to be made." Rather, the dissent said, the issue was whether the sentence imposed for behavior on a specific date "was excessive or unduly harsh" and concluded it was not. After describing the defendant's imposing size and persistence in perpetrating a robbery that caused injury, the dissenters said, "the sentence agreed upon and imposed" fairly balanced the defendant's background and "interests of the complainant, the complainant's father, and members of the public at large."

Similarly clashing conclusions appear in *People v Paulino* (summary on page 22), which, like *Sparks*, is a First Department case. The *Paulino* majority rejected "the dissent's principal reliance on [the] defendant's severe mental illness (and his secondary polysubstance addiction)," finding that this "is not an

extraordinary circumstance warranting a sentence reduction," and concluding that "all the mitigating factors defendant cites are outweighed by the seriousness of his offense." The dissent noted research cited by the defense demonstrating "that people with serious psychiatric needs are more likely to be violently victimized and housed in segregation while in prison" and that "the vast majority of people with mental illness in jails and prisons do not receive care, and for those that do, the care is generally inadequate."

Whatever one's opinion is of the *Sparks* and *Paulino* arguments and outcomes, they clearly illustrate the potential impact of detailed mitigation information presented to courts in support of reduced sentencing.

Daniel's Law Task Force Issues Report

As noted in the December 31st edition of News Picks, the NYS Office of Mental Health released the Daniel's Law Task Force's *Behavioral Health Crisis Response Report* in December. The first overarching recommendation is for the State to "establish a defined response protocol for a behavioral health crisis" that includes a set of criteria. A Dec. 23, 2024, article on *SpectrumLocalNews.com* summarized this recommendation as: "when someone calls 911 or 988 about a mental health crisis or substance abuse issue … a team specifically trained in crisis services respond." The second overarching recommendation is to "establish a Behavioral Health Crisis Technical Assistance Center" that includes specified elements.

The Task Force, created in 2023 and "charged with developing recommendations to guide behavioral health crisis response and explore avenues for related diversion services," held listening sessions around the state. See the April 11, 2024, edition of News Picks. The 2020 death of Daniel Prude when Rochester police responded to a call about a man visibly in crisis sparked public protests and ongoing discussions about a variety of issues, including not only responses to 911 calls but also the availability of police body worn camera footage, as discussed in the June-September 2020 *REPORT*.

Racism, institutional or personal, has been identified as a contributing, complicating factor in failures to provide help for people with mental disabilities and other systemic issues around mental health. See, e.g., Advancing An Alternative to Police: Community-Based Services for Black People with Mental Illness (Legal Defense Fund and Bazelon Center July 2022).

"Section 504" Additions Provide Increased Protections for Parents with Disabilities

A final rule adopted earlier this year by the Department of Health and Human Services (HHS) increases the federal protection for people with disabilities. According to an HHS fact sheet, the rule, entitled *Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance*, "updates, clarifies, and strengthens HHS' implementing regulation for Section 504 of the Rehabilitation Act of 1973 (Section 504)." As was pointed out in the December 10th edition of News Picks, the rule, 45 Code of Federal Regulations 84.60, is "[s]ignificant to family defenders representing parents in abuse, neglect, and TPR proceedings."

Category of People Who Can Obtain Orders of Protection Expanded

On Nov. 25, 2024, Governor Hochul signed "Melanie's Law" (Chapter 541 of the Laws of 2024), amending Family Court Act (FCA) 812 and Criminal Procedure Law (CPL) 530.11. The changes expand who can obtain an order of protection by filing a family offense petition, expanding the meaning of "members of the same family or household" to include "persons who are related by consanguinity or affinity to parties who are or have been in an intimate relationship." The law is intended to close an "oversight" in existing law that prevented "close family members of those receiving a protective order from being protected themselves." Defenders with questions related to this or any other area of family court-mandated representation should email our family court staff attorney, Kim Bode at kbode@nysda.org. The new law was noted in News Picks of December 31st.

The State Must Increase Family Defense Funding

NYSDA and its family defense allies continue to fight for increased funding. In 2024, the budget contained 19.5 million dollars for family defense. That's less than the 50 million dollars requested by the Office of Indigent Legal Services (ILS), and far from enough to give floundering offices the resources needed to provide adequate family defense. For defenders who are wondering how ILS is allocating family defense resources to counties, here is a recap. Please note that while a majority of the funding has been to increase the quality of representation in abuse and neglect cases, NYSDA urges future funding to encompass all areas of family court-mandated representation.

Since 2021 ILS has awarded approximately 45 counties "Quality Improvement and Caseload Reduction Grants" to assist them "in implementing initiatives that improve the quality of legal representation provided to parents in child protective matters as defined in Family Court Act Article 10." The fourth such grant was announced in December to the following

counties: Chenango, Franklin, Lewis County, Montgomery, Nassau, Niagara, Oswego, Otsego, Schoharie, St. Lawrence, Tioga, Warren, Wayne, Wyoming, and Yates. The grant is for amounts ranging from $500,000 to $750,000 over three years. For a list of previous awardees click here. Additionally, as noted in the Dec. 31, 2024, edition of News Picks, ILS "announced the availability of funds for a fourth family representation 'model office' in counties outside of NYC to provide comprehensive representation to parents at every stage of a family regulation case." The maximum amount of the grant is $2,610,417 split equally over three years. Monroe and Westchester are currently the only counties to house a "model office." An annoucement of the grant award is expected in March 2025. For more information, click here.

Court of Appeals Deals Bad News to Parents Seeking Expungement of Indicated Reports

In a blow to parents seeking expungement of indicated reports from the State Central Register of Abuse and Maltreatment (SCR), the Court of Appeals in a 4-3 split held that there is no constitutional right to assignment of counsel at the SCR administrative hearings. This puts the onus on the Legislature to ensure that parents at risk of having their lives and livelihoods upended based on unproven all allegations can have representation to seek expungement from the SCR. In *Matter of Jeter v Poole* (summary on page 17), the mother was indicated for excessive corporal punishment against her child. This resulted in a neglect petition being filed and ultimately dismissed with an ACOD.

The majority was also unpersuaded by the appellant's retroactivity argument. "The Appellate Division also properly concluded that the statutory amendments to Social Services Law § 422 (8) (b) (ii) do not apply retroactively to OCFS determinations rendered before the effective date the legislature provided for the amendments, i.e., January 1, 2022." If the Court had applied the SCR modifications retroactively, it would have almost certainly resulted in an expungement for Ms. Jeter, as the current law provides in part that when a neglect case has been dismissed "there shall be an irrebuttable presumption in a fair hearing...that said allegation as to that respondent has not been proven by a fair preponderance of the evidence." The applicable amendments to the SCR can be found at Part R of S. 7506-B/A. 9506-B.

Chief Judge Wilson wrote a stinging dissent, stating in part that "there is a sharp irony in Ms. Jeter's case. Her chosen career is aiding developmentally disabled persons. She first fostered and then adopted her grand-nieces. She later lost her job and profession because of a recanted accusation. When represented by a lawyer, all charges against her were dismissed by a Family Court Judge, but when she was subsequently unrepresented, an ALJ concluded Ms. Jeter did not meet her burden to prove what Family Court already determined."

Family Court Decisions of Interest from the Appellate Division

Adjournment and default, and summary judgment in a termination of parental rights (TPR) findings, were among the family court issues addressed by the Fourth Department in late 2024. See *Matter of Betz v Betz* (summary on page 44) and *Matter of Juliet W.* (summary on page 46). Both were discussed in the December 10th edition of News Picks.

The *Betz* case reminds defenders to make adjournment requests on the record, to preserve for appeal any denial of a request. In *Juliet W.*, the Appellate Division found improper a summary judgment based solely on a dated determination of permanent neglect of other children based on the parent's mental illness and intellectual disability. The circumstances were not such to make collateral estoppel appropriate.

Summary judgment was also at issue in the First Department case *Matter of Cherie D. S.* (summary on page 21). Here, the court denied the father's request for summary judgment, which if granted would have dismissed the petition for termination of his parental rights. The court stated as its reasoning for the denial, "[t]he affidavit and limited documentation submitted by the father raised a defense to the petition which appears valid. Nevertheless, summary judgment dismissing the petition was not warranted, as questions of fact exist as to whether, despite his diligent efforts, the father was unable to communicate with or plan for the child's future." While this was a defeat for the father, it was also an affirmation that a valid defense existed.

A Second Department case in August concerned the often forgotten but important remedy of filing a motion to vacate to relieve a parent from an order entered on default. *Matter of Paez v Bambauer* (summary on page 27), as highlighted in the September 17th edition of News Picks. In October, that Department stressed the right to a meaningful defense in a child support violation case. In *Matter of McCloskey v Unger* (summary on page 31), the court reversed an order of disposition that had found a father in willful violation of a child support order. Counsel had "failed to procure certified copies of the father's medical records or records establishing his entitlement to and receipt of public assistance" and "failed to call any witnesses to testify regarding the father's neuropathy, to subpoena the father's treating physician, or to obtain a medical affidavit from the father's physician." Information on

how to obtain and provide information needed to defend against allegations of failure to meet support obligations can be found on NYSDA's family defense motion practice page; documents there include sample subpoenas and a business records certification for attorneys who need to obtain their client's certified medical records.

Changes in Family Court Act 413, which relates to establishing and modifying child support orders, give family defenders more to work with when assisting clients struggling with child support obligations. As of Sept. 24, 2024, courts attributing or imputing income for child support purposes must consider the parent's specific circumstances, including but not limited to employment and earning history, educational attainment, literacy, health, criminal record, and employment barriers. Upon a default, the parent's circumstances, not the needs of the child, must be considered. And a parent's incarceration shall not be considered voluntary unemployment, without exception. Laws of 2024, ch 357.

Appellate Courts May Sometimes Consider Evidence Outside the Trial Record in Family Court Cases

The November 8th edition of News Picks highlighted a *New York Law Journal* article by appellate attorney Cynthia Feathers on how an appellate court may consider evidence that was not in the trial court record in certain family court cases. This rule is exemplified in *Matter of Muhamede J.D.* (summary on page 26). In this First Department Family Ct Act Art. 6 custody case, the New York County family court granted the mother sole residential custody of the subject child, with permission to relocate out of state. The court reversed and remanded the case to the lower court, based on new information that the Attorney for the Child provided on appeal raising concerns about the mother's commitment to the new custody arrangement. "This Court may take notice of new facts and allegations to the extent they indicate that the record before it is no longer sufficient for determining whether an award of residential custody to the mother and relocation to Vermont is still in the child's best interests [citation omitted].

In light of the changed circumstances brought to this Court's attention, "the record is no longer sufficient to review whether the Family Court's determination regarding custody, parental access, and relocation is in the child's best interests [citation omitted]." *See also Matter of Noah C.*, 225 AD3d 1178 (4th Dept 3/15/2024]) and *Colin M. v Panna B.*, 211 AD3d 732 (2nd Dept 12/7/2022) [citing *Matter of Michael B.*, 80 NY2d 299 (1992), recently noted in *Matter of Joseph J.D.*, 229 AD3d 104 (Surrogate's Ct, Suffolk Co 5/22/2024)] (*Noah C.* and *Joseph J.D.* were summarized in the April-June issue of the *REPORT*). Defenders with questions about this or any other family court topic are encouraged to email our family court staff attorney at kbode@nysda.org.

Can the DVSJA Help Your Client Who is a Survivor of Domestic Violence?

The Domestic Violence Survivors Justice Act (DVSJA) presents opportunities and challenges to defenders and their clients who have experienced intimate partner violence that may have played a role in criminal charges against the client. The December 10th edition of News Picks includes a lengthy item detailing DVSJA developments. The discussion notes, among other decisions, *People v Boyd P.* (summary on page 40) and *People v Hudson* (summary on page 27). See as well *People v Gause* (summary on page 42).

After that News Picks item was posted, the Third Department issued *People v Ava OO.* (2024 NY Slip Op 06245 [12/12/2024]). The appeals court reversed a trial court denial of a DVJSA PL 60.12 guideline sentence and granted the application. As was pointed out in a News Picks item on December 31st, the decision focused on intensive abuse that "encompassed all the hallmarks of sex trafficking," based on evidence of compelled prostitution. Defenders may find several secondary sources considered by the Third Department to be of interest, including a *Report in Support of the Domestic Violence Survivors Justice Act* (NY City Bar Assn. Justice Operations Committee, Domestic Violence Committee and Pro Bono and Legal Services Committee; Suzannah Phillips et al., *Clearing the Slate: Seeking Effective Remedies for Criminalized Trafficking Victims*, City Univ of NY Sch of Law Int'l Women's Human Rights Clinic (2014); and Alaina Richert, *Note, Failed Interventions: Domestic Violence, Human Trafficking, and the Criminalization of Survival*, 120 Mich L Rev 315, 318-319 (2021).

The News Picks items remind attorneys that resources are available on NYSDA's DVSJA Resources webpage. References to the DVSJA in relation to discovery can be found in The Legal Aid Society's updated practice guide to CPL 245, posted on NYSDA's Discovery Reform Implementation webpage. For additional information and consultation on DVSJA issues, attorneys can contact Senior Staff Attorney Stephanie Batcheller, SJBatcheller@nysda.org or (518) 465-3524 x 41.

Offense Alleged While on Bail Must be a Felony to Warrant Remand

When a defendant initially charged with a felony and released on bail is subsequently accused of an additional felony, "the securing order may be modified by means of either CPL 530.60 (1) or (2)," observed the court in *People ex rel Cordes v Shelley* (summary on page 42). But where the bail-setting court did not specify what additional felony the defendant could have been charged with, mentioning only "'jury tampering,'" which is a misdemeanor (see Penal Law 215.23 and 215.25, there was no clear and convincing evidence to support a determination that the defendant "had 'committed a felony while at liberty'" as is required for bail revocation under CPL 530.60(2)(b)(iv). The matter was sent back to the bail-setting court for further proceedings.

A later press account on *msn.com* said that between the reversal and the new proceedings, a new indictment had been filed that included felony charges of witness intimidation. The judge treated the proceedings as a new bail review hearing, and found reasonable evidence that the defendant participated in witness tampering while on bail; the no-bail hold was continued.

Defender Counters a Call for Rollback of Bail Reform

Assigned counsel attorney Fern Adelstein didn't let a legislator's unwarranted attack on bail reform stand unchallenged. As set out in News Picks for December 31st, Adelstein offered a rebuttal that was published on *OleanTimesHerald.com* on November 14th, refuting the claim that changes to the bail laws had endangered public safety by causing a spike in crime and allowing release of someone charged with drug felonies. Rather, she noted after setting out facts refuting the claim of danger, "bail reform has very well served every aspect of the legal system." NYSDA encourages defenders to challenge inaccurate and overblown arguments to overturn justice reforms, and strives to provide information that can be used. The September 17th News Picks included an item on a national report and other information about the effect of bail reform.

Compensation for Public Defense Remains an Issue

Effective a year and a half ago, assigned counsel fees in New York State increased to $158 per hour. However, as the April-June 2023 issue of the *REPORT* noted, the lack of any cost-of-living provision meant that "rates will soon need adjusting again." On Oct. 30, 2024, the *Queens Daily Eagle* reported that lawyers providing family defense as assigned counsel say they "are still a long way from refilling their ranks, cutting back on their caseloads and being fully equipped to provide the best representation possible to those who need it." This problem is not unique to family court or to New York State, as shown below. NYSDA will be monitoring issues including assigned counsel rates and the amount of state funding provided to cover them, and advocating for legislation to ensure quality representation of all clients, in the 2025 legislative session.

Public Defenders Can't Quit a Case without Court Approval When Pay Drops: Idaho Ethics Opinion Noted

Idaho public defense, in the midst of systemic change, is experiencing multiple challenges. At least one development may be of interest to defenders elsewhere. The Idaho State Bar, in Ethics Opinion No. 137, has said that public defenders cannot withdraw from cases without court permission even if new contracts effective in a statewide system changeover mean the defenders will get paid less. An *Idaho Reports* blog post described the situation; as the State of Idaho takes over public defense, most defenders salary will increase from what their county was paying, but "about 15% of employees would see a decrease from their current county pay rate." The ethics opinion addresses three questions, finding that a reduction in a lawyer's compensation can create a financial issue for the attorney that may result in a conflict of interest; a lawyer must seek to withdraw from a pending matter if there is a significant risk that continued representation would be materially limited due to the resulting conflict of interest; and if withdrawal is denied, the lawyer must continue representation.

New York's Rules of Professional Conduct require lawyers to withdraw if the representation will result in a violation of the Rules or law (Rule 1.16(b)(1), but lawyers shall not withdraw without court permission if "permission for withdrawal from employment is required by the rules" of the tribunal (Rule 1.16(d)). As for the conflict, Rule 1.7(a)(2) says a lawyer shall not represent a client where "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected the lawyer's own financial, business, property or other personal interests."

The ABA Journal of November 13th reported about the Idaho ethics opinion. The article quoted the State Public Defender as saying, "'[w]e did not expect 1,100 withdrawals [from cases] on Oct. 1, but that's what happened, and we had to figure things out on the fly' …." A November 20th post on the

Coeur d'Alene/Post Falls *Press* noting the ongoing shortage of public defense lawyers said that the law creating a statewide public defense system came into being "because of a 2015 lawsuit filed by the ACLU of Idaho on behalf of indigent defendants, which alleged that Idaho's public defense system was inadequate," apparently Idaho's version of *Hurrell-Harring*. The lead public defender in one district said, "'I don't know that there's going to be a solution until somebody changes the rules, in terms of what they're willing to pay those contract attorneys....'"

Other issues arising from Idaho's system change include questions as to who must pay for court transcripts needed on appeal, reported in a November 8th article on *IdahoCapitalSun.com*. The law creating the statewide defender system and "relieving counties of their financial obligations for public defense" left this question unanswered. While the State Appellate Public Defender argued that "the legislation was not meant to shift the funding sources of public defense, but rather improve the quality of public defense in Idaho," the court held on December 5th that the new public defender office bears the responsibility for transcript costs. "The ruling adds more financial uncertainty for the SPD's inaugural year," a blog post noted.

Death of Robert Brooks from Beating in Marcy CF Sparks Calls for Reform

The death of Robert Brooks on Dec. 10, 2024, following a beating by corrections officers in Marcy Correctional Facility, became headline news as details emerged. At the end of the month, calls for fundamental change in Department of Corrections and Community Supervision (DOCCS) facilities were growing, and growing louder. The New York Civil Liberties Union pointed out that this event reflected "a culture of violence and a lack of accountability for wrongdoing by corrections officers that puts the lives of incarcerated New Yorkers at risk."

An *Associated Press* (AP) story referred to a Correctional Association of New York (CANY) monitoring visit two years ago, which "documented reports of pervasive brutality and racism inside the Marcy Correctional Facility...." CANY issued a statement urging state officials to go beyond the "good step" of terminating the prison staff involved in killing of Robert Brooks: "take bold and courageous actions to fulfill past commitments and bring about a new era of transparency and accountability in state government" including "[e]mpowering oversight entities to serve as partners...."

Statements about the horror at Marcy included that of The Legal Aid Society in New York City, noted in the AP account; one by the New York Association of Criminal Defense Lawyers; and more.

The need for action to prevent prison brutality in New York and beyond was reinforced by information about the failure of federal courts to provide relief to people who have suffered unlawful uses of force in prisons. A *Business Insider* study, serendipitously posted on *Yahoo.com* in late December, said that "BI found that courts have often sanctioned extreme acts of violence by guards against" people in prison." The article opens with a description of the end and aftermath of the Attica uprising. In the 50 years since, it goes on, "many corrections departments have failed to check staff violence when it tips into excess."

The systemic problem of how governments can be responsible for protecting people in prison from harm by government actors was highlighted in the Brooks matter. Attorney General Letitia James recused her office because the AG represents four of the Marcy correction officers in use-of-force lawsuits stemming from prior actions. As reported in the *Times Union*, Onondaga County District Attorney William J. Fitzpatrick was asked to take the case as a special prosecutor. Marcy is in Oneida County; a *Law.com* article quoted James as pointing out that Fitzpatrick's office "is "well resourced to handle this complex and large investigation...."

In too many articles and statements about the Brooks killing, he and all people in prison are referred to as "inmates," NYSDA urges discontinuation of that term for all purposes. The dehumanization that accompanies use of labels that are inherently or have become pejorative has very real impact. A 2021 study released by FWD.us found that use of labels such as "inmate," "felon," and "offender" in a media context biased readers against the people labeled and reduced support for reform. NYSDA has pointed out before the importance of language, as to "inmate" and other terms. See for example, the *REPORT* of June-Oct. 2022, and Oct.-Dec. 2020, which references the Dec. 23, 2020, edition of News Picks.

The *Times Union* editorial calling for change succinctly described the video footage that revealed this latest instance of brutality:

> Let's be clear about what we're watching: a helpless man being beaten to death by uniformed men being paid for their time by New York taxpayers, while more state employees stand by doing nothing to intervene. The victim is Black; all his tormenters are white.

The blatant racism revealed in that description is not exceptional but rather a visible incarnation of how racism underlies the punitive criminal legal system. The result is an acceptance of brutality that targets Black people and can also be unleashed on anyone.

Racial Disparities, Unconscious Biases, and Related Issues

The last part of 2024 saw information and ongoing questions related to identifying and countering racism, unconscious biases, and related issues in the many systems that impact public defense clients. Examples follow.

Juries and Race:

- A Third Department decision, *People v Alexander* (summary on page 38), found error in a trial court's denial of a defense request for a jury charge on cross-racial identification. That the identifying witness knew the accused did not excuse failure to give the charge, required under *People v Boone* (30 NY3d 521 [2017]).
- The Franklin H. Williams Judicial Commission continued holding hearings on jury service and reform (see News Picks of October 11th), with the first one in 2025 scheduled for January 30th (see News Picks of December 31st). Discussion was to include recommendations "aimed at ensuring our juries more accurately reflect the rich diversity of our state and local communities."
- Upon a defense objection during jury selection in a November murder trial where only one of 121 potential jurors was Black, Judge Andrew C. LoTempio, a Buffalo City Court judge temporarily assigned to County Court, refused to proceed and questioned a jury commissioner about the disparity, as reported in the *Buffalo News*.
- Near the end of 2024, Gov. Hochul vetoed the Jury of Our Peers Act (S206-B/A1432-C), which would have ended New York's lifetime ban on jury service by people who have been convicted of a felony. A statement posted by the New York Civil Liberties Union says that "The veto guarantees racial inequities remain in New York's jury system and keeps New York in the minority of states that permanently take away this basic civic right." NYSDA has supported the bill.
- The racial makeup of juries can matter. Aside from any potential bias against an accused of a different race, racial diversity may improve a jury's decision-making. One study has "found that juries composed of White and Black jurors engaged in higher quality deliberations and made more egalitarian verdict decisions than juries composed of only White members. [footnote omitted]." National Center for State Courts, The Evolving Science on Implicit Bias (2021).

Defenders and Race:

- The report just above can be found in materials from a web training presented by NYSDA and the Long Island Regional Immigration Assistance Center on Dec. 18, 2024, entitled Your Non-Citizen Client and You: Practice Tips When Encountering Bias. The materials also include tips and reminders on addressing bias in the courthouse—*e.g.*, tracing cases by race/immigration status and making sure any data and analysis offered is accurate, including anything generated by artificial intelligence, and also checking one's own bias.
- Defenders can be affected by racism. Perception of race and bias among defenders was surveyed by the Center for Justice Innovation. Release of its report, *Public Defense Attorneys' Perception of Race and Bias*, was noted in the September 17th edition of News Picks. And a law review Note, "A Broken Shield: Ineffective Assistance of Counsel Claims in Cases of Racist Defense Attorneys," was published at 93 Fordham L. Rev. 1035 (2024) in December.
- A different issue as to defenders and racism—Black defenders experiencing racism—led the Black Public Defender Association (BPDA) to create "a free wellness series to help Black defenders sustain their energy, passion and effectiveness in a demanding field." BPDA is a section of the National Legal Aid and Defender Association.

Other Issues Involving Race:

- A *Rolling Stone* magazine investigation reported on Sept. 22, 2024, concluded that "across the country, tens of thousands of mothers ... are coming under scrutiny because of marijuana use." Hearsay or urine tests (often done without maternal consent) indicating marijuana use are triggering notifications to child protective services, leading to family investigations — and separations, the article said. As noted in the October 11th edition of News Picks, *Rolling Stone* said that Black mothers were particularly vulnerable, and that while scientific evidence about any harm to infants from the active ingredient in cannabis is conflicting, the evidence of the long-term adverse health effects on newborns of separating them from their parents is strong.
- The Data Collaborative, along with others, announced in October the anticipated launch of a "Committee on Latine Communities and the New York Criminal Justice System: Data Gaps and Solutions." It is intended "to examine how Latine communities are identified and represented within the system, data collection and reporting gaps and solutions, and ways to mitigate racial disparities and overrepresentation across the criminal justice system."

NYSDA seeks to update defenders and others about ways in which Black clients and other clients of color may be harmed, and also ways in which systems whose design and operation were tainted by racial or other bias harm everyone.

NYSDA Highlights in 2024

57th Annual Conference Awards

The Jonathan E. Gradess Service of Justice Award, named for NYSDA's Founding Director, was presented to Kayla Hardesty (l) of the Cortland County Public Defender's Office for her skill and perseverance in demanding compliance with discovery reform, resulting in the Court of Appeals decision in *People v Bay*. Mollie A. Dapolito (c), Assistant Public Defender, Ontario County Public Defender's Office, and Casey E. Rogers (r), First Assistant Public Defender, Steuben County Public Defender's Office, each received a Kevin M. Andersen Memorial Award, which recognizes attorneys in public defense who have been in practice less than fifteen years and exemplify the sense of justice, determination, and compassion that were the hallmarks of its namesake, a lawyer at the Genesee County Public Defender's Office.

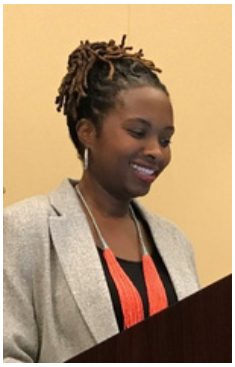
Chief Defender Convening

NYSDA hosted a convening of chief defenders who head up public defender offices, legal aid programs, and assigned counsel programs across the state. Such Convenings provide chiefs with an opportunity to discuss issues that affect all as well as unique problems that arise in a given locale.

Gathering and Networking

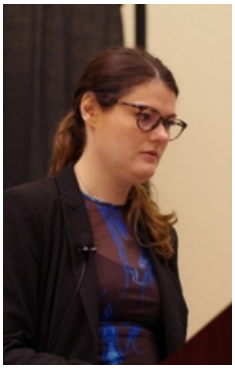
The City Center and the Saratoga Hilton, connected venues in downtown Saratoga Springs, provided spaces for our Annual Conference events including two receptions where colleagues from around the state could network.

57th Annual Conference
Continuing Legal Education- Training for Criminal and Family Defenders



Professor Nicole Smith Futrell, CUNY Law School, presented Ethical Considerations in Client-Centered Law and Systemic Advocacy, with the goal of helping lawyers "understand why client centered lawyering is a valuable approach for criminal and family defenders," internalize techniques, and "recognize ethical and professional concerns that arise."

Chas Budnik and Deborah Frankel, Brooklyn Defender Services, offered insights and information on Termination of Parental Rights Litigation, Strategies & Resources.



Defenders who handle criminal cases received up-to-date information on Challenging Bail Decisions and Maintaining Release Conditions in NY from Jennifer Hose, The Legal Aid Society.

All the Way Up: How to Take Your Digital Evidence Litigation to the Next Level

In September 2024, NYSDA, in collaboration with the Government Law Center at Albany Law School, presented an in-person training on digital evidence. Presenters included John Ellis (Attorney and Digital Forensic Consultant), Sidney Thaxter (NACDL 4th Amendment Center), Julie Fry (Neighborhood Defender Service of Harlem), and members of NYSDA's Discovery and Forensic Support Unit.

Celebrating the 10th Anniversary of the Veterans Defense Program

2024 was the 10th anniversary of NYSDA's Veteran Defense Program (VDP). The milestone was celebrated at a reception in March as part of the VDP's Annual Veterans Treatment Court Convening, in Syracuse. Gary Horton (r), who became VDP Special Counsel after a decade of heading it as Director, talked with Judge Robert Russell (l), founder of Veterans Treatment Courts in New York, at the Convening. The New York State Assembly passed a resolution commemorating the VDP's anniversary.

RESOLVED, That this Legislative Body pause in its deliberations to commemorate the 10th Anniversary of the Veterans Defense Program, recognizing its crucial role in improving and strengthening the lives of justice-involved veterans and their families...

Case Digest

The following are short summaries of recent appellate decisions relevant to the public defense community. These summaries do not necessarily reflect all the issues decided in a case. A careful reading of the full opinion is required to determine a decision's potential value to a particular case or issue. Some summaries were produced at the Backup Center, others are reprinted with permission, with source noted.
For those reading the REPORT online, the name of each case summarized is hyperlinked to the slip opinion. For those reading the REPORT in print form, the website for accessing slip opinions is provided at the beginning of each section (Court of Appeals, First Department, etc.), and the exact date of each case is provided so the case may be easily located at that site or elsewhere.

United States Supreme Court

In the online version of the *REPORT*, the name of each case summarized is hyperlinked to the opinion on the US Supreme Court's website, www.supremecourt.gov/opinions/opinions.aspx. Supreme Court decisions are also available on a variety of websites, including Cornell University Law School's Legal Information Institute's website, www.law.cornell.edu.

Hamm v Smith, 604 US 1 (11/4/2024)

The Eleventh Circuit's decision is unclear as to the analysis of IQ scores for determining whether a person is intellectually disabled and therefore cannot be sentenced to death. On the one hand, that decision suggests a per se rule: "the lower end of the standard-error range for an offender's lowest score is dispositive." But other language approving the District Court's determination suggests "a more holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." The matter is remanded for further consideration in light of this opinion.
Justices Thomas and Gorsuch would grant certiorari.

New York State Court of Appeals

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

People v Sharp, 42 NY3d 369 (10/17/2024)
RIGHT TO BE PRESENT - Sandoval Hearing

LASJRP[1]: The Court of Appeals finds reversible error where the trial court held a conference in defendant's absence on the prosecution's motion to cross examine him on his prior criminal conduct. Although the court later held a hearing in defendant's presence, the court did not hear arguments on the merits, did not confirm defendant's understanding of the underlying facts or the merits of the application, did not ask defendant if he wished to be heard, and did not meaningfully explain to defendant the nature of the proceeding. The court did not articulate the arguments had been made previously or the reasoning for its decisions, referred to defendant's prior convictions by number only, and merely announced its decision. A defendant has a right to hear the arguments and facts relevant to the determination of the Sandoval motion. Defendant's silence, without more, cannot be construed as the knowing and intelligent waiver of defendant's right to participate.

People v Blue, 2024 NY Slip Op 05175 (10/22/2024)
RIGHT TO COUNSEL WAIVER | MAX. SENTENCING EXPOSURE |
CO-D 30.30 TIME | AFFIRMED | DISSENT

ILSAPP[2]**:** Appellant appealed from a First Department order affirming his conviction for five counts of second-degree burglary. The Court of Appeals affirmed and held that the trial court's searching inquiry in assessing whether the accused's waiver of counsel was "knowing, voluntary, and intelligent" was constitutional. The Court declined to impose a bright-line rule requiring the court to recite the maximum sentencing exposure as part of a valid waiver colloquy. The Court also held that CPL 30.30(4)(d) applies to pre-arraignment time when a co-defendant is joined for trial. The dissent disagreed with the majority's conclusion as to waiver of the right to counsel and would have held that the constitution requires trial courts to explore whether the accused is aware of their maximum sentencing exposure before proceeding pro se. Providing the accused with the numerical range of their sentencing exposure is not a significant burden and influences the accused's decisions to plead guilty, testify on their own behalf, and represent themselves.

People v Dixon, 2024 NY Slip Op 05176 (10/22/2024)
RIGHT TO PRESENT A DEFENSE
PRISONERS RIGHTS - Privacy/Monitoring Of Phone Calls

LASJRP: The Court of Appeals holds that pro se defendant was not denied his constitutional right to present a defense by the People's monitoring of the telephone calls that he made to his trial witnesses from jail.
The opportunity for a lawyer to communicate confidentially with potential witnesses is essential to preparation of a defense. Pro se defendants who use jail telephones to prepare their witnesses and discuss trial strategies may not fully appreciate that their conversations may be divulged to the prosecution. Even where that possibility is understood, the limited alterna-

[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 State Court of Appeals *continued*

tive options place many incarcerated pro se defendants in a difficult position: prepare over a recorded phone line or do not prepare at all.

However, in this case, defendant's right to present a defense was not impaired by the monitoring of his jail phone calls. Defendant was out on bail for nearly the entire two years between indictment and his mid-trial remand. His daughter visited him in jail before he called her to testify so that they could continue their trial preparations in person. The court permitted defendant time in the courtroom to speak to his witnesses in private before their testimony. Defendant had been assigned a legal advisor and an investigator, both of whom had the expertise and wherewithal to assist in the preparation of the defense.

Although the People's monitoring of jail phone calls may have a chilling effect on trial preparation that threatens the right to present a defense, defendant became aware that the People were listening to his phone conversations only after he had presented the direct testimony of his daughter and an expert. Aside from himself, the only remaining defense witnesses provided character testimony and little else that could be considered relevant to the case. Thus, any chilling effect here was negligible.

People ex rel. Neville v Toulon, 2024 NY Slip Op 05178 (10/22/2024)
SOMTA | PROCEDURAL DUE PROCESS CHALLENGE REJECTED | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a Second Department order denying his declaratory judgment action against OMH and DOCCS. Appellant had been civilly committed pursuant to SOMTA following a jury trial where he was found to have a "mental abnormality." He was subsequently released and placed on Strict Intensive Supervision and Treatment (SIST). When he was alleged to have violated SIST, a court determined, pursuant to Mental Hygiene Law 10.11(d)(4), that there was probable cause to detain him for a final determination hearing concerning whether he was a dangerous sex offender requiring continued confinement. Appellant filed a state habeas petition alleging that the provisions of the law governing the probable cause hearing violated procedural due process because he was not afforded notice and an opportunity to be heard. The majority held that an adversarial probable cause hearing was not necessary to protect appellant's procedural due process rights. As he possessed only a diminished liberty interest, the level of protection added by an adversarial hearing was slight, in contrast to the State's strong interest in confining dangerous sex offenders. The dissent considered the law to be unconstitutional on its face, finding that all the relevant factors weighed in appellant's favor: he had a liberty interest in determinations heightened the risk of erroneous confinement, remaining in his community, a non-adversarial probable cause and such hearings undermined public safety by disrupting his rehabilitation.

People v Baque, 2024 NY Slip Op 05244 (10/24/2024)
WEIGHT OF THE EVIDENCE | CIRCUMSTANTIAL EVIDENCE | AFFIRMED | CONCURRENCES | DISSENT

ILSAPP: Appellant appealed from a Second Department order affirming his conviction of criminally negligent homicide and EWC following the death of his infant daughter, based entirely upon circumstantial evidence. It was unclear from the record whether the Second Department, in conducting its weight-of-the-evidence (WOTE) review, had applied the same standard charged to the jury. The jury instructions had explained that to convict, the inference of guilt was the only one that could fairly and reasonably be drawn and that circumstantial evidence must exclude beyond a reasonable doubt every reasonable hypothesis but guilt. The Court of Appeals affirmed. The majority found no error in the Second Department's WOTE analysis, observing that the Second Department relied on the proper legal standards and grappled "with the circumstantial evidence presented to the jury." The majority recognized that the same tenets the jury applies to circumstantial evidence cases must also be applied to WOTE review on appeal. But failure to specifically recite the circumstantial evidence standard did not warrant reversal. In dissent, Chief Judge Wilson agreed with the majority that the Appellate Division must apply the same circumstantial evidence rule as the jury in performing WOTE review but concluded that the Second Department's decision and the oral argument below suggested it may have applied the legal sufficiency standard or the "moral certainty standard," and therefore would reverse. Judge Garcia concurred with the result, finding that the Second Department properly applied the WOTE standard, but disagreed with the majority that the Appellate Division's WOTE review power was synonymous with jury instructions on circumstantial evidence, observing that appellate judges do not need such guardrails to focus their attention on the careful reasoning appropriate in circumstantial evidence cases. Judge Singas concurred separately, concluding that without a manifest misapplication of the WOTE standard, the Appellate Division was presumed to have properly exercised its authority.

People v Hayward, 2024 NY Slip Op 05243 (10/24/2024)
IAC | NY SINGLE-ERROR STANDARD | AFFIRMED | CONCURRENCE

ILSAPP: Appellant appealed from a Third Department order affirming his conviction for third-degree CPCS and seventh-degree CPCS. The Court of Appeals affirmed and rejected the ineffective assistance of counsel claim. Trial counsel's failure to move to suppress physical evidence based on a violation of the knock-and-announce rule was a novel issue and not "so clear-

NY Court of Appeals *continued*

cut and dispositive that no reasonable defense attorney would have failed to assert it." Judge Rivera's concurrence, joined by Chief Judge Wilson and Judge Halligan, would have affirmed based on the inadequacy of the record, but expressed concern about the tension between New York's IAC standard and the *Strickland* test in cases involving a single alleged error. "As identified by [federal] jurists, the central problem is that our standard may be misread to deny any constitutional defect where defense counsel makes but one error, even a serious one, in an otherwise-competent representation." The concurring Judges also criticized the majority's suggestion that IAC cannot be based on failure to raise a novel legal issue, stating that "[e]ffective advocacy under the New York Constitution might well require lawyers to advance some less-than-clear-cut claims," particularly where failure to raise the claim has no strategic basis.

People v McGovern, 2024 NY Slip Op 05242 (10/24/2024)
SENTENCE | CONSECUTIVE | NOT A SINGULAR ACT | AFFIRMED

ILSAPP: Appellant appealed from a Fourth Department order affirming his conviction after a jury trial of third-degree grand larceny and second-degree forgery, among other counts, based on a scheme to sell tires by false representation. The Court of Appeals affirmed, holding that sentencing appellant to consecutive sentences on the grand larceny and forgery counts did not violate Penal Law § 70.25(2). Making false statements to induce a driver to relinquish their tires and then signing someone else's name on an invoice were separate acts, not a single act or omission. Nor did either act constitute one of the offenses and a material element of the other.

People v Castillo, 2024 NY Slip Op 05817 (11/21/2024)
JUSTIFICATION DEFENSE - DEADLY FORCE
POSSESSION OF A WEAPON - INTENT TO USE UNLAWFULLY

LASJRP: After a barbershop owner and the victim had a series of confrontations in and around the shop, including a fistfight and threats of violence by the victim against the owner and his family, the victim returned to the shop the same day. The owner called defendant, a friend, and, when defendant arrived, the victim confronted him with a razor blade, and defendant shot and killed him. Defendant was convicted of second-degree murder and second-degree criminal weapon possession. On appeal, he argues that the court erred in failing to instruct the jury on the defense of justification.

The Court of Appeals reverses the convictions. The victim was the initial aggressor, and defendant faced an imminent threat of deadly force when the victim held the blade to his face. Although, at some point, defendant stepped back, and the victim appears to have turned his body, defendant could still have reasonably believed the victim posed a threat to him while he remained standing close to defendant. There also is a reasonable view of the evidence suggesting that defendant could not safely retreat into the back of the barbershop at the time he used deadly physical force.

Although justification is not available as a defense to the possessory offense, the jury, if it had been properly instructed on justification, might have concluded that defendant lacked the requisite intent (to use unlawfully) for the possession charge.

People v Robles, 2024 NY Slip Op 05819 (11/21/2024)
SUPPRESSION | POST-ARREST STATEMENT | NOT HARMLESS | REVERSED & PLEA VACATED

ILSAPP: Appellant appealed from a Fourth Department order affirming his conviction for second-degree CPW following his guilty plea. The Court of Appeals reversed, vacated the plea, and remitted for further proceedings. Although the lower court properly denied appellant's motion to suppress the gun, the court erred in failing to suppress the post-arrest statement. Even though the gun was admissible, there was a reasonable possibility that the court's error in failing to suppress appellant's admission contributed to his decision to plead guilty and thus was not harmless. During the proceedings, appellant sought assurances that he could appeal the suppression determination, and he may have only pleaded guilty "in the face of all the evidence," including his highly incriminating statement. Melissa K. Swartz represented Robles.

People v Williams, 2024 NY Slip Op 05818 (11/21/2024)
CONFRONTATION CLAUSE | BRUTON VIOLATION | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Second Department order affirming his conviction for second-degree murder and second-degree CPW. The Court of Appeals affirmed, holding that any potential Bruton error caused by the introduction of the co-defendant's statement was harmless because the evidence against appellant was overwhelming, and there was no reasonable possibility that the co-defendant's statement affected the verdict.

Matter of Jeter v Poole, 2024 NY Slip Op 05868 (11/25/2024)
ABUSE/NEGLECT - Central Register/Effect Of ACD And Dismissal In Article Ten Proceeding- Right To Counsel

LASJRP: April 2020 amendments to SSL § 422, inter alia, created an irrebuttable presumption in a fair hearing in favor of an Article Ten respondent when the Article Ten petition has been dismissed. This change took effect on January 1, 2022.

Here, the Article Ten proceeding was adjourned in contemplation of dismissal and then dismissed in February of 2020. At an August 2020 fair hearing, OCFS denied relief. In

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petitioner's CPLR Article 78 proceeding, the Appellate Division confirmed OCFS's determination, holding that petitioner had no constitutional right to assigned counsel and that the changes to SSL § 422 did not apply retroactively to fair hearings held before the January 1, 2022 effective date.

The Court of Appeals, in a 4-3 decision, affirms. Although petitioner has a protected interest in her reputation and ability to secure employment in her chosen field, those interests alone do not give rise to a constitutional right to assigned counsel. Inclusion on the State Central Register does not impact rights involving physical liberty, bodily autonomy, or care and custody of one's children that warrant recognition of a constitutional right to assigned counsel in a civil proceeding, such as an Article Ten proceeding.

The Appellate Division properly concluded that the SSL amendments do not apply retroactively to fair hearing determinations rendered before January 1, 2022. In recent cases, this Court has not reflexively applied statutory amendments simply because they were effective by the time the appeal was heard. Here, the legislature delayed the effective date for over eighteen months. The legislature could have made the amendments applicable to pending SCR proceedings but did not. Classifications such as "procedural" or "remedial" do not automatically overcome the strong presumption of prospectivity.

The majority rejects the contention by petitioner and the dissent that application of the amendments to cases pending on direct appeal on the effective date of the amendments would have no retroactive impact. ACS and OCFS were entitled to rely on the law as it existed at the time in order to make their determinations.

The Appellate Division correctly held that OCFS's determination is supported by substantial evidence in the record. An ACD is not a determination that allegations of abuse or neglect were fabricated, unfounded, or unsubstantiated.

People v Peters, 2024 NY Slip Op 05871 (11/25/2024)
CORAM NOBIS | NO REVIEWABLE ISSUES ON APPEAL | AFFIRMED

ILSAPP: Appellant appealed from a Second Department order denying his pro se writ of error coram nobis on the ground of ineffective assistance of appellate counsel. The Court of Appeals affirmed, concluding that because counsel assigned to represent appellant at the Court of Appeals failed to present any of the claims raised below, there were no reviewable issues before for the Court. Appellant was not precluded from filing another coram nobis application raising the ineffectiveness of appellate counsel on his original direct appeal or any other grounds not previously raised.

People v Shader, 2024 NY Slip Op 05873 (11/26/2024)
SORA RISK MODIFICATION | DENIAL AFFIRMED | DISSENT

ILSAPP: Appellant appealed from the denial of his request for a modification of his SORA risk level pursuant to Correction Law 168-o[2]. In a 4-3 decision, the Court of Appeals held that the SORA court did not abuse its discretion in modifying appellant's risk level from a level 3 to a level 2 but denying his request for a reduction to level 1. Appellant in 1977 at the age of 19 had entered a woman's home, bound, and raped her. By that time, appellant had a history of sexual offense. Following his release on parole after serving 21 years in prison, appellant was found to be a level 3 offender at a SORA hearing in 1998. In 2021 he filed for a modification to risk level 1 relying on his treatment history, full-time employment, stable relationship with his wife, role as a stepfather, and age. Appellant had fully complied with his SORA conditions and submitted an expert psychological report outlining his low risk of re-offense. The Board did not oppose the requested modification. The Court of Appeals held that the SORA court properly considered all the relevant information in determining the appropriate modification, including appellant's 2003 misdemeanor convictions for non-sexual offenses. The majority noted that its decision did not preclude appellant from petitioning for a further modification based on updated facts or relief from registration after 30 years on the registry. Chief Judge Wilson, in dissent joined by Judges Rivera and Halligan, found that the SORA court erred in considering non-sexual misdemeanors, as they were legally irrelevant, and it was an abuse of discretion to consider appellant's 1977 offense and history pre-dating the original SORA risk-level determination given its remoteness. Jill Sanders represented Shader.

People v Vaughn, 2024 NY Slip Op 05874 (11/26/2024)
EXPERT TESTIMONY - Eyewitness Identification

LASJRP: The Court of Appeals first concludes that the presence of evidence that corroborates an eyewitness identification is not a determinative factor in deciding an application to admit expert testimony concerning the factors that affect the reliability of eyewitness identifications, nor is it the first part of a rigid two-step process. Cases misinterpreting this Court's holding in People v. LeGrand (8 N.Y.3d 449) as suggesting there is such a two-step process should be disregarded. Whether to admit such expert testimony rests within the discretion of the trial court, which balances the probative value of the proffered testimony against the prospect of trial delay, undue prejudice to the opposing party, confusing the issues or misleading the jury.

Here, although the Appellate Division referenced an incorrect framework, the trial court did not abuse its discretion in granting defendant's oral, midtrial application only in part and limiting the testimony of defendant's expert to the topic of cross-race effect. Although the court was familiar with the law

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concerning cross-race effect, defendant failed to satisfy the prerequisites for the admission of scientific testimony regarding the rest of the factors cited by defendant.

In focusing now on three factors he perceives to be most easily established as the subject of admissible expert testimony - the effect of stress, weapon focus, and the correlation between confidence and accuracy - defendant does what he could and perhaps should have done in the trial court and also fails to obviate the need to conduct a Frye hearing.

The timing of the application and the prospect of delay are not dispositive considerations. The trial court could have delayed the jury trial and held a Frye hearing or granted the application in its entirety if defendant had been able to establish that a Frye hearing was not required. However, there was no abuse of discretion in the court's balancing of the proffered testimony's probative value against the prospect of causing undue prejudice, confusing the issues, misleading the jury, or unduly delaying the proceedings.

People v Garcia, 2024 NY Slip Op 06236 (12/12/2024)
SUPPRESSION | SHOWUP IDENTIFICATION | UNPRESERVED | AFFIRMED

ILSAPP: Appellant appealed from a Second Department order affirming his conviction, following a bench trial, for second-degree assault, fourth-degree CPW, and EWC. The Court of Appeals affirmed. Appellant failed to preserve his argument that the show-up identification procedure was unduly suggestive on a theory of "identification by association"—that he was presented for identification alongside two codefendants, and the strength of the complainant's identification of one codefendant, who was known to the complainant, infected the identification of appellant.enying his pro se writ of error coram nobis on the ground of ineffective assistance of appellate counsel. The Court of Appeals affirmed, concluding that because counsel assigned to represent appellant at the Court of Appeals failed to present any of the claims raised below, there were no reviewable issues before for the Court. Appellant was not precluded from filing another coram nobis application raising the ineffectiveness of appellate counsel on his original direct appeal or any other grounds not previously raised.

People v Lawson, 2024 NY Slip Op 06238 (12/12/2024)
SUPPRESSION | UNLAWFUL STOP | FULL AND FAIR OPPORTUNITY | REVERSED & DISMISSED

ILSAPP: Appellant appealed from an Appellate Term, First Department order affirming his conviction, following a guilty plea, for operating a motor vehicle while intoxicated. The Court of Appeals reversed and dismissed the accusatory instrument. The suppression court initially granted appellant's suppression motion on the basis that the traffic stop was unlawful after the prosecution failed to present any evidence that appellant's U-turns violated VTL § 105. However, the court erred by later granting the prosecution's motion to reargue, under a new legal theory, and by ultimately denying appellant's suppression motion, where the prosecution already had a "full and fair opportunity" to oppose suppression but had been unprepared, running afoul of the underlying policies of finality and judicial efficiency. The Legal Aid Society NYC (Ivan Pantoja, of counsel) represented Lawson.

People v Watkins, 2024 NY Slip Op 06237 (12/12/2024)
SUPPRESSION | DEBOUR | UNPRESERVED | AFFIRMED

ILSAPP: Appellant appealed from a Fourth Department order affirming his conviction for second-degree CPW, following a guilty plea. The Court of Appeals affirmed. Appellant failed to preserve his argument as to whether the initial stop by the police constituted a level four encounter, pursuant to DeBour.

Sabine v State of New York, 2024 NY Slip Op 06288 (12/17/2024)
APPEAL - PRESERVATION

LASJRP: A Court of Appeals majority declines to consider the legal question certified to the Court - regarding accrual of pre-prejudgment interest in a personal injury case arising from a motor vehicle accident - because plaintiff failed to preserve the question in the trial court.

The majority rejects the dissent's suggestion that there should be an exception to this Court's preservation requirement "when controlling precedent blocks the protesting party from obtaining relief."

People v Mero, 2024 NY Slip Op 06385 (12/19/2024)
MOTION TO SEVER SEPARATE OFFENSES | BUSINESS RELATIONSHIP CONFLICT | AFFIRMED | DISSENTS

ILSAPP: Appellant appealed from a Third Department order affirming his conviction for two counts of second-degree murder and two counts of tampering with physical evidence. The Court of Appeals affirmed. The Court held that the trial court did not err in denying appellant's motion to sever two murder charges that occurred about two years apart. Where appellant conceded that initial joinder of the charges was permissible under CPL § 200.20 (2)(c), it was not an abuse of discretion not to sever for good cause where appellant failed to demonstrate "a substantial likelihood" that the jury would be unable to separately consider the proof as to each offense. The Court also held that while the business relationship between defense counsel and a prosecutor, who had been paid by counsel to write briefs for her clients over a four-year period, created a potential conflict of interest, it did not operate on the defense. Chief Judge Wilson, in dissent, would have reversed and remitted for two separate trials and held that good cause to

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sever exists as a matter of law where, applying Molineux jurisprudence, there is no non-propensity purpose for which evidence of one offense could be admitted at the trial of the other and where the risk of prejudice outweighs the probative value of joinder. In a separate dissent, Judge Rivera would have held that trial courts abuse their discretion in denying severance where joinder "carrie[s] significant risks" that the jury will determine guilt based on an accused's perceived criminal disposition, and the evidence of guilt from one offense will "spill over and bolster the evidence of the other."

People v Rufus, 2024 NY Slip Op 06384 (12/19/2024)
VEHICLE STOP | PROBABLE CAUSE | AFFIRMED

ILSAPP: Appellant appealed from a Fourth Department order affirming his DWI conviction following a non-jury trial. The Court of Appeals affirmed. The trial court properly denied appellant's motion to suppress where the vehicular stop was supported by probable cause that appellant had committed a traffic violation. The officers observed appellant's vehicle cross the fog line three times within a tenth of a mile, violating VTL § 1128 (a). The Court also concluded that appellant's legal insufficiency claim was without merit.

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.

People v Perkins, 230 AD3d 977 (1st Dept 9/5/2024)
SCI DEFECTIVE | REVERSED & DISMISSED | DISSENT

ILSAPP: The appellant appealed from a New York County Court judgment convicting him of third-degree robbery. The First Department reversed and dismissed. The Superior Court Information (SCI) was defective because it charged third-degree robbery, a higher-grade offense than any contained in the felony complaint, which alleged fourth-degree grand larceny. To be valid, a joinable offense must be of an equal or lesser grade or degree than the offenses for which the accused was held for grand jury action. The dissent noted that the majority's holding was contrary to prior First Department precedent upholding SCIs including the joinder of higher-grade offenses. The Legal Aid Society of NYC (Harold V. Ferguson, of counsel] represented the appellant. (County Ct, New York Co)

People v Torres, 2024 NY Slip Op 04442
(1st Dept 9/12/2024)
WRONGFUL DENIAL OF SUPPRESSION | REVERSED AND DISMISSED | CONCURRENCE

ILSAPP: Appellant appealed from a New York County Court judgment convicting him of fifth-degree CPCS. The First Department reversed and dismissed based on the suppression court's erroneous ruling upholding the frisk. Appellant's failure to produce his license and registration, along with the officers' observations of the vehicle shaking after being pulled over, PCP odor, poor lighting conditions, and the appellant's nervousness, provided, at most, a level-two founded suspicion that criminality was afoot. The officers too quickly escalated the encounter from a common-law right to inquire to a level-three frisk without the requisite reasonable suspicion, requiring suppression of the drugs, reversal, and dismissal. The concurrence observed that if the officers' testimony about smelling PCP had been credited by the hearing court, their actions would have been justified. The hearing court's refusal to credit this testimony meant the appellate court was precluded from considering it pursuant to People v. LaFontaine, 92 NY2d 470 [1998]. The Office of the Appellate Defender (Rosemary Herbert, of counsel) represented Torres. (Supreme Ct, New York Co)

Matter of Emmanuel C.F., 230 AD3d 997
(1st Dept 9/19/2024)
ABUSE/NEGLECT - FCA § 1028 Hearings

LASJRP: The mother filed an application on January 31, 2024, requesting the return of her children, or alternatively, a hearing pursuant to Family Court Act § 1028. The Family Court commenced a combined § 1028 and fact-finding hearing within three court days, on February 6, 2024. However, after several weeks of piecemeal adjournments and only one hour of testimony from one witness, the mother moved in March 2024 for an order "[s]cheduling the 1028 hearing to proceed expeditiously with at least 5 hours per week of hearing time," or "[s]cheduling the 1028 hearing expeditiously such that it concludes by May 1, 2024." The Family Court denied the application and held that it had complied with § 1028 by commencing the hearings within three court days of the mother's application. The court cited CPLR 4011, which provides general authority to trial judges to "otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue, in a setting of proper decorum."

The First Department, noting that § 1028 provides for an expedited hearing that, except for good cause shown, shall be held within three court days of the parent's application and shall not be adjourned, concludes that conducting the hearing over a period of thirty minutes of hearing time scheduled in March, four hours scheduled in April, three hours in May, and four hours in June, cannot be deemed prompt or expeditious

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judicial review. "In light of the practical constraints on Family Court, including extensive caseloads, often involving urgent matters, we decline to set a specific deadline for completion of the hearing. However, the court is directed to conduct and complete the hearing expeditiously, with no further adjournments except for good cause shown, as required by the statute, and to issue its decision promptly thereafter."
The JRP appeals attorney was Judith Stern, and the trial attorney was Sarah Bodack. (Family Ct, Bronx Co)

People v Sparks, 2024 NY Slip Op 04488 (1st Dept 9/19/2024)
SENTENCE - Mental Health Issues
LASJRP: In a 3-2 decision in this robbery prosecution, the First Department reduces defendant's 3 to 6 year sentence to 2 to 4 years, noting, inter alia, that in order to best protect the public, defendant must get appropriate mental health treatment to rehabilitate him to a healthier mental state; that his history of 12 years of imprisonment has only served to exacerbate his mental difficulties and there is no reason to believe that further incarceration will rehabilitate him; that treating incarceration as the default response for individuals like defendant "has outsized deleterious consequences that, ultimately, make our communities less safe"; and that individuals with mental illness are at greater risk of detention in prison and extended incarceration, prison mental health resources are often inadequate, and individuals living with mental illness face greater risk of harm and abuse while behind bars. (Supreme Ct, New York Co)

People v Tapia, 230 AD3d 1009 (1st Dept 9/19/2024)
SEARCH AND SEIZURE - Probable Cause/Drug Transactions
LASJRP: In a locale known for drug sales, an officer saw defendant "wandering around" and "nervously looking around," which prompted his sergeant to direct the officers to "keep an eye" on defendant. In front of a motel, defendant spoke for a few seconds with a woman the officer knew had been arrested three times for narcotics possession. The two touched hands, and then separated. The woman walked for a block or so, turned around, and returned some minutes later. In her absence, defendant reached between his pants and his body. When the woman returned, defendant "pushed something like a small object in her hand." The officer could not see what was transferred, but saw that defendant placed his hand onto the woman's hand and that she then clenched her fist and walked away. When the police approached, the woman threw to the ground the object she had hidden in her fist.
The First Department, with one judge dissenting, concludes that there was probable cause to arrest defendant. "This peculiar interaction between defendant and the woman, under the circumstances, is not susceptible to innocent interpretation." Probable cause can be found despite an officer's inability to identify the object that changed hands. (Supreme Ct, New York Co)

Matter of Aminata S. v Ndongo D., 230 AD3d 1078 (1st Dept 9/24/2024)
ORDERS ENTERED ON DEFAULT NOT APPEALABLE | DISMISSED
ILSAPP: The father appealed from a Bronx County Family Court granting custody of the subject children to the aunt. The First Department dismissed the appeal. The order was made on the father's default and was thus not appealable, since he never moved to vacate his default. (Family Ct, Bronx Co)

People v Batista, 230 AD3d 1038 (1st Dept 9/24/2024)
SEARCH AND SEIZURE - Auto Search/Inventory
LASJRP: The First Department upholds the denial of defendant's motion to suppress the gun recovered pursuant to an inventory search of defendant's car conducted at the scene of a traffic stop, noting, inter alia, that the search of the trunk, where the gun was recovered, was justified because it was an area that may contain valuables; and that the search was valid even though the police did not create a contemporaneous inventory of items, but rather inventoried the property later at the precinct, where the gun was taken for processing by the evidence collection team and where the search of the car continued. (Supreme Ct, New York Co)

People v Cherie D.S., 2024 NY Slip Op 04524 (1st Dept 9/24/2024)
SURCHARGE AND FEES | YOUTHFUL OFFENDER | STRICKEN
ILSAPP: Appellant appealed from a New York County Court judgment convicting him of third-degree grand larceny and adjudicating her a youthful offender. The First Department struck the mandatory surcharge and crime victim assistance fees. "The statutory provisions authorizing the imposition of mandatory surcharges and crime victim assistance fees upon youthful offenders were repealed effective August 24, 2020." The sentencing court had no authority to impose the fees. The Legal Aid Society of NYC (Megan Taeschler, of counsel) represented D.S. (County Ct, New York Co)

Matter of Police Benevolent Association of the City of New York, Inc. v New York City Civilian Complaint Review Board, 230 AD3d 1041 (1st Dept 9/24/2024)
POLICE MISCONDUCT/CCRB
LASJRP: The First Department upholds an order denying the petition in this hybrid proceeding brought pursuant to CPLR articles 30 and 78 challenging new regulations promulgated by the Civilian Complaint Review Board.
CCRB's expansion of the definition of "Abuse of Authority" to in-

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CCRB's expansion of the definition of "Abuse of Authority" to include "improper use of body worn cameras" is rational and supported by, among other things, CCRB's detailed study which found that officers often turned on their BWCs too late, prematurely turned them off, or failed to use them at all.

The amendment renaming two disposition categories - from "unsubstantiated" to "unable to determine," and from "exonerated" to "within NYPD guidelines" - was not arbitrary and capricious. There is evidence in the record supporting CCRB's claim that the changes would promote understanding by the public, given feedback it received and public hearing testimony. (Supreme Ct, New York Co)

People v Allen, 230 AD3d 1070 (1st Dept 9/26/2024)
IDENTIFICATION - Independent Source

LASJRP: The First Department concludes that the People presented clear and convincing evidence of an independent basis for an in-court identification of defendant by the witness, a store manager who greeted defendant before he took a tote bag from the store.

The witness was standing about 15 feet away from defendant when she greeted him in the entrance of the well-lit store, had an unobstructed view of defendant for two or three seconds, and remembered defendant's green sweater and the strong smell of popcorn he was carrying. The witness identified defendant in a photo array, which, though not admitted at trial, was not unduly suggestive. (Supreme Ct, New York Co)

Matter of Cherie D. R., 230 AD3d 1076 (1st Dept 9/26/2024)
TERMINATION OF PARENTAL RIGHTS - Abandonment/Summary Judgment

LASJRP: The First Department affirms an order denying respondent father's motion for summary judgment dismissing the petition seeking termination of his parental rights.

The father submitted an affidavit with evidence showing that the reason he was not in communication or contact with the child or agency during the six months preceding the filing of the petition was that the child had been wrongfully abducted by her mother from the United Kingdom. As a result, the father asserted, he had been unable to locate the child despite his persistent efforts, including contacting the local police, searching social media, and seeking legal advice.

Although the father raised a defense to the petition which appears valid, summary judgment dismissing the petition was not warranted, as questions of fact exist as to whether, despite his diligent efforts, the father was unable to communicate with the child or plan for the child's future. (Family Ct, New York Co)

People v Kuchma, 230 AD3d 1074 (1st Dept 9/26/2024)
ORDER OF PROTECTION | FAILURE TO TAKE INTO ACCOUNT JAIL TIME | OOP VACATED

ILSAPP: Appellant appealed from a New York County judgment convicting him of first-degree criminal contempt, second-degree stalking, and second-degree aggravated harassment and sentencing him to an aggregate term of 1-to-3 years' imprisonment. The First Department vacated the orders of protection, in the interest of justice, and remanded for a new determination that calculated the jail time credit appellant had earned. Until the time of the recalculation the original protective orders would remain in place. The Legal Aid Society of NYC (Laura Boyd, of counsel) represented Kuchma. (County Ct, New York Co)

People v Maldonado, 230 AD3d 1069 (1st Dept 9/26/2024)
WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | SURCHARGES AND FEES STRICKEN

ILSAPP: Appellant appealed from a Bronx County Court judgment convicting him of fourth-degree CPW and sentencing him to 9 months' imprisonment. The purported waiver of appeal was invalid because the court did not explain that the right to appeal was distinct from trial rights automatically forfeited by a guilty plea, and the First Department had previously recognized the form written waiver as inadequate. The mandatory surcharge and fees were stricken, with the prosecution's consent, but the judgment otherwise affirmed. (County Ct, Bronx Co)

People v Orenstein, 230 AD3d 1068 (1st Dept 9/26/2024)
WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | AFFIRMED

ILSAPP: Appellant appealed from a New York County Court judgment convicting him of two counts of third-degree grand larceny and sentencing him, as a second felony offender, to consecutive terms of 2-to-4 years' imprisonment. The purported waiver of appeal was invalid because neither the oral nor written waiver adequately explained the rights being forfeited. The First Department refused to reduce the sentence. (County Ct, New York Co)

People v Paulino, 2024 NY Slip Op 04625 (1st Dept 9/26/2024)
SENTENCE - Mental Health Issues

LASJRP: Then 29-year-old defendant was charged with, inter alia, attempted murder in the second degree for "savagely pummeling" the 72-year-old victim in the face more than 40 times with his fist at a time when the victim appeared to be unresponsive. This occurred where defendant was then residing, at a supportive Bronx housing development under the auspices of Odyssey House and the New York State Office of Mental Health. Defendant suffers from a severe mental illness and has been diagnosed with schizoaffective disorder, bipolar type and schizophrenia, and defendant's residence had been providing services for his mental illness and polysubstance abuse. Defendant had been seeing a psychiatrist and mental

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therapist at a community-based health care center and was prescribed psychotropic medication. Defendant admitted that he chose not to take his medications for at least five days prior to committing this crime. Defendant accepted a negotiated plea and 8-year sentence.

In a 3-2 decision, the First Department concludes that the sentence is not excessive. While the dissent cites substantial mitigation, including defendant's traumatic upbringing, severe mental illness, history of substance abuse, and lack of prior criminal convictions, the sentencing court considered those factors when it granted a bargained-for sentence that was significantly lower than the 15 years the prosecutor recommended. The dissent questions the utility of defendant completing his 8-year sentence due to the conceded inadequacy of mental health care in prison, but places undue emphasis on rehabilitation. The sentence clearly reflects the need for societal protection which, given defendant's mental health history, trumps defendant's poor prospects for rehabilitation at this time. (Supreme Ct, Bronx Co)

People v Rivera, 2024 NY Slip Op 04832
(1st Dept 10/3/2024)
EXPERT TESTIMONY - Defendant's State Of Mind/Intent
MURDER

LASJRP: The First Department, citing the Court of Appeals' decision in a co-defendant's case - People v Estrella, 41 N.Y.3d 514 - vacates defendants' first-degree murder convictions.

The Court finds no error where the trial court precluded defendant Rivera's proffered expert testimony regarding adolescent brain development. The issue of intent, and defendant's ability to form that intent as an 18-year-old, was not beyond the ken of the jurors. (Supreme Ct, Bronx Co)

[Ed. Note: for a summary of the Estrella case, see page 12 of the Jan.-Mar. 2024 REPORT]

People v Zubidi, 2024 NY Slip Op 04824
(1st Dept 10/3/2024)
SEARCH AND SEIZURE - Auto Stop - Reasonable Suspicion/Order To Exit Vehicle

LASJRP: The First Department, with one judge dissenting, concludes that the police had reasonable suspicion justifying a stop of defendant's van, and probable cause to arrest him.

The police had reasonable suspicion that the driver had committed two prior and separate criminal acts. The results of a license plate search may provide police with reasonable suspicion to stop a driver for a non-traffic-related offense. The stop occurred less than 24 hours after and in close geographic proximity to the second incident, and the officers' knowledge of the van's make, model, and license plate number in connection with both prior incidents did not turn on geographic and temporal proximity considerations.

Although defendant and the dissent note that the officers never observed defendant enter or drive the van on the date of the stop, and thus did not have information connecting the driver of the van on that date to the driver on the other dates, the inference the officers drew - that defendant, the van's registered owner, was the van's driver on the dates in question - was not too general to support reasonable suspicion.

Given the officers' knowledge that defendant had used a gun in one of the prior incidents, they appropriately ordered defendant to step out of the van for their own safety, and forcibly removed defendant when he refused to comply. Defendant's act of reaching for a gun from the van's center console and pointing it at one of the officers independently furnished probable cause for his arrest. (Supreme Ct, New York Co)

People v Gerson, 2024 NY Slip Op 04918
(1st Dept 10/8/2024)
INVALID WAIVER OF APPEAL | AFFIRMED

ILSAPP: Appellant appealed from a New York County judgment convicting him of first-degree burglary and contempt. The First Department found that the purported waiver of the right to appeal was invalid because the court misleadingly suggested that the waiver was an absolute bar to appeal and did not confirm on the record that appellant understood the written waiver. The First Department, upon reviewing the merits of appellant's claims, affirmed. Office of the Appellate Defender (Karen Brill, of counsel) represented Gerson. (Supreme Ct, New York Co)

Matter of Jaiden H., 2024 NY Slip Op 04907
(1st Dept 10/8/2024)
ABUSE/NEGLECT - Severe Abuse
- Fractures/Head Injuries/Burns
- Allowing/Creating Risk
- Derivative Abuse

LASJRP: The First Department upholds findings against the mother of severe abuse, abuse and derivative abuse.

Severe abuse was established through the expert testimony of the child abuse pediatrician, who examined the child and opined that his factures were the result of child abuse, and the expert testimony of the neurosurgeon, who examined the child's medical record and opined regarding the cause of the child's head injuries.

Even if the father alone inflicted the injuries, domestic incident reports establish that the mother had previously accused the father of assaulting and threating to kill her, and the 911 call she made to the police three days before the child sustained his traumatic brain injuries demonstrate that she knew the father was "pushing the baby down." The mother's conduct in continuing to leave the child in the father's care and recklessly

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allowing the abuse to be inflicted evinced a depraved indifference to her son's life.

The Court rejects the mother's contention that eleven rib fractures could have been caused while the two-month-old infant child's family were hugging him. The pediatrician's testimony established that to sustain those rib fractures the child would have to have been "really squeezed tightly" or forcefully, and the mother testified that she was always present when the thirteen-year-old child or other family members held the infant child and cited no incidents suggesting that the fractures occurred when the child was being held by a family member.

Although no pediatrician discovered the rib fractures at routine check-ups or when the child was brought for emergency treatment when he was burned, the child abuse pediatrician testified that the fractures were not "obvious clinically."

Even without expert testimony that the infant child's burns were the result of abuse, evidence of the violence perpetrated on the child and the pain he suffered in multiple incidents of abuse supports the Family Court's finding that the mother created or allowed the creation of a substantial risk of abuse.

The finding of derivative abuse was warranted by the nature and severity of the direct abuse. That the child was thirteen years old and was unaware of the abuse is of no moment given that she was residing in the home when the abuse occurred.

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

Molner v Molner, 2024 NY Slip Op 04912
(1st Dept 10/8/2024)
ATTORNEY-CLIENT PRIVILEGE - Statements By Agent

LASJRP: The First Department holds that the motion court properly denied the wife's assertion of attorney-client privilege with respect to communications involving her parents.

Although the privilege may apply to statements made by one serving as an agent of either the attorney or the client, conclusory statements of nonwaiver, without an indication of how the purported agent facilitated communications, cannot preserve the privilege. Neither the wife nor her parents provided any evidence demonstrating that the parents were deemed necessary to enable attorney-client communication. (Supreme Ct, New York Co)

Matter of Portocarrero v Poole, 2024 NY Slip Op 04929
(1st Dept 10/8/2024)
ABUSE/NEGLECT - Central Register

LASJRP: According to statutory amendments that took effect on January 1, 2022, there is an irrebuttable presumption in a fair hearing that allegations in a report of child abuse or maltreatment have not been proven by a fair preponderance of the evidence where a Family Court Act Article Ten proceeding based on the same allegations terminates in the subject's favor (SSL § 422[8][b][ii]).

The First Department declines to depart from a prior holding that the irrebuttable presumption does not apply where the fair hearing was held after the amendments' effective date but the petitioner commenced an administrative appeal before the effective date. (Supreme Ct, New York Co)

Matter of R.F., 2024 NY Slip Op 04904 (1st Dept 10/8/2024)
TERMINATION OF PARENTAL RIGHTS - Intellectual Disability/Expert Testimony

LASJRP: The First Department upholds the Family Court's finding that the father's intellectual disability left him unable to care for the child properly and adequately, presently and for the foreseeable future.

Although the court-appointed expert did not conduct a parent-child observation, his interviews and testing of the father, and his review of records and evaluations, permitted him to draw his conclusions with a reasonable degree of professional certainty. The court did not rely solely on the father's IQ, as the testimony showed that the father also lacked the adaptive functioning, intellectual functioning, and cognitive functioning sufficient to parent the child.

The father's expert conducted a peer review of the court-appointed expert's evaluation but offered no independent assessment and failed to indicate prior involvement with the father's case.

The JRP appeals attorney was Judith Stern. (Family Ct, Bronx Co)

People v Roper, 2024 NY Slip Op 04919 (1st Dept 10/8/2024)
ASSAULT - Intent/Attempts
MENACING

LASJRP: The First Department finds facially sufficient charges of attempted third-degree assault and third-degree menacing where the accusatory instrument alleged that defendant, "using his knee, struck [complainant] about his groin area," and that "defendant's aforementioned conduct caused [complainant] ... to experience substantial pain about his groin area" and "swelling about the same," and "to experience fear for his physical safety." (Supreme Ct, Bronx Co)

People v Thomas, 2024 NY Slip Op 05036
(1st Dept 10/10/2024)
APPEAL - Preservation

LASJRP: The First Department concludes that defendant failed to preserve his claim that his plea was invalid because he did not consent to the virtual plea proceeding or waive his right to be physically present, and that this claim does not come within the narrow exception to the preservation requirement. (Supreme Ct, New York Co)

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Matter of VB., 2024 NY Slip Op 05043 (1st Dept 10/15/2024)
ABUSE/NEGLECT - Domestic Violence
- Dental Hygiene/Care

LASJRP: The First Department upholds a finding of neglect where the mother engaged in an altercation with the father while the child was present. Both were arrested for domestic violence, the police had to remove the then three-year-old child to the hospital to ensure the child's safety, and the domestic violence occurred near the child, who was awake at the time and crying in the stroller, which permits an inference of impairment or imminent danger of impairment.

The mother also failed to provide adequate dental hygiene and care for the child, who was found with "severe dental caries" after being examined at the hospital.

The JRP appeals attorney was Andrew Ford, and the trial attorneys were Megan McCoy and Rachel Summer. (Family Ct, Bronx Co)

Matter of Pandora S.D., 2024 NY Slip Op 05136
(1st Dept 10/17/2024)
TERMINATION OF PARENTAL RIGHTS -
Petition/Amendment

LASJRP: In this termination of parental rights proceeding, the First Department concludes that although the abandonment cause of action was not pleaded in the petition, the evidence established a cause of action for abandonment and the Family Court had the authority to conform the pleadings to the proof, sua sponte.

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

People v Santana, 2024 NY Slip Op 05144
(1st Dept 10/17/2024)
EXCESSIVE SENTENCE | PROBATIONARY TERM REDUCED

ILSAPP: Appellant appealed from a New York County judgment convicting him of attempted third-degree CSCS and sentencing him to five years' probation. The First Department reduced the sentence to four years' probation in the interest of justice. The Legal Aid Society NYC (Mary-Kathryn Smith, of counsel) represented Santana. (Supreme Ct, New York Co)

People v Ramos, 2024 NY Slip Op 05187
(1st Dept 10/22/2024)
SEARCH AND SEIZURE - Motion Papers

LASJRP: The First Department upholds the summary denial of defendant's motion to suppress where the People provided defendant with detailed information about the undercover sale that formed the basis for his arrest, and defendant's conclusory denial of his participation in the alleged sale did not contradict the felony complaint's factual allegations and was insufficient, given the information available to defendant, to require a hearing. (Supreme Ct, New York Co)

People v Wallace, 2024 NY Slip Op 05189
(1st Dept 10/22/2024)
SORA | ACCEPTANCE OF RESPONSIBILITY | REVERSED

ILSAPP: Appellant appealed from a New York County Court judgment adjudicating him a level three sex offender under SORA. The First Department reversed, finding that the SORA court should not have assessed 10 points for failure to accept responsibility. Appellant's denials of guilt were made when his appeal was still pending, and his admissions could have potentially been used at a retrial, violating his Fifth Amendment right against self-incrimination. Accordingly, appellant should have been assessed points rendering him a presumptive level two offender. The Legal Aid Society, NYC (Robin Richardson, of counsel) represented Wallace. (County Ct, New York Co)

People v Johnson, 2024 NY Slip Op 05313
(1st Dept 10/29/2024)
ADVERSE INFERENCE FOR DESTRUCTION OF EVIDENCE| HARMLESS ERROR| AFFIRMED

ILSAPP: Appellant appealed from a New York County Court judgment convicting him of first-degree sexual abuse and second-degree assault. The First Department found that the trial court erred in refusing to give an adverse inference charge based on the prosecution's failure to disclose a voucher relating to appellant's cell phone. Because the cellphone was sold at auction and the evidence destroyed, the adverse inference charge was mandatory, although the error was harmless. (Supreme Ct, New York Co)

Matter of Denim M., 2024 NY Slip Op 05408
(1st Dept 10/31/2024)
POSSESSION OF A WEAPON - Second Amendment

LASJRP: In this firearm possession prosecution, the First Department concludes that respondent lacks standing to challenge the statute on Second Amendment grounds because he could not have applied for a firearm permit while under age 21. (Family Ct, New York Co)

Matter of Stephanie C. v Ricardo E., 2024 NY Slip Op 05399
(1st Dept 10/31/2024)
CUSTODY | PARENTAL ACCESS SCHEDULE | MODIFIED AND REMITTED

ILSAPP: The father appealed from a Bronx County Family Court order granting the mother sole legal and physical custody and awarding him access on alternating weekends, as well as "shared" holidays and school vacations. The First Department modified in part and remitted for determination of a precise schedule of the father's time with the child, as well as to set an

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electronic contact schedule for each parent when the child is with the other parent, as the parties had requested. Andrew J. Baer represented the father. (Family Ct, Bronx Co)

Matter of Karl R. v Julianne M.R., 2024 NY Slip Op 05501 (1st Dept 11/7/2024)
CUSTODY - Domestic Violence - Appeal/Factual Review Authority

LASJRP: The First Department upholds an award of custody to the father, concluding that the mother failed to establish that the father had committed acts of domestic violence against her and the effect of such domestic violence upon the best interests of the child.

Although where, as here, the Family Court failed to make this determination, the proper procedure is to remand to the Family Court, the Family Court judge that presided over the hearing has retired, and this Court has exercised its power to review the record and make the determination.

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

Matter of Muhamede J.D. v Shanie A.M., 2024 NY Slip Op 05483 (1st Dept 11/7/2024)
NEW FACTS AFTER CUSTODY DECISION | REVERSED AND REMITTED

ILSAPP: The father appealed from a New York County Family Court order granting the parties joint legal custody, the mother residential custody and the father parenting time, and granting the mother's request to relocate with the child to Vermont. The First Department reversed and remitted for further proceedings due to new facts raised on appeal, specifically that the mother has allegedly failed to consistently visit or maintain contact with the child since September 2023. The record was no longer sufficient to review whether the Family Court's determination regarding custody, parental access, and relocation is in the child's best interest. Andrew J. Baer represented the father. (Family Ct, New York Co)

People v Stewart, 2024 NY Slip Op 05546 (1st Dept 11/12/2024)
PERSISTENT VIOLENT FELONY ADJUDICATION IMPROPER | PRIOR PLEA UNKNOWING | VACATED

ILSAPP: Appellant appealed from a New York County Court judgment convicting him of second-degree burglary and sentencing him, as a persistent violent felony offender, to 12 years-to-life in prison. The First Department vacated the persistent violent felony adjudication, finding a prior 2013 burglary conviction unconstitutionally obtained. During the 2013 plea, appellant stated that his intent to steal property arose only after he had entered the dwelling, contrary to the statutory requirement that the intent exist contemporaneously with the unlawful entry. Appellant's statements negated an essential element of the crime, triggering the court's duty to ensure that the plea was entered intelligently. Its failure to do so rendered the 2013 plea unknowing and unconstitutionally obtained. The First Department vacated and remanded for resentencing as a second violent felony offender because the prosecution had established that appellant was previously convicted of a 2005 violent felony. Office of the Appellate Defender (Ronald Zapata, of counsel) represented Stewart. (County Ct, New York Co)

People v Davis, 2024 NY Slip Op 05648 (1st Dept 11/14/2024)
CONSECUTIVE SENTENCES ILLEGAL | FIRST-DEGREE MURDER | VACATED AND REMANDED

ILSAPP: Appellant appealed from a New York County Court order denying his CPL § 440.20 motion to set aside his consecutive 20-year-to-life sentences following his conviction of two counts each of first-degree murder and attempted murder. Relying on People v Rosas, 8 NY3d 493 [2007], the First Department reversed, finding that the imposition of consecutive sentences on the first-degree murder counts was illegal. The Court of Appeals in Rojas held that the first-degree murder statute, PL § 125.27[1][a][viii], establishes that separate acts involved in killing multiple victims constitute a single offense. The sentencing court had attempted to prospectively run the attempted murder count consecutively to the first-degree murder counts in the event consecutive sentences on the completed murder counts were later found improper, but that order was "a nullity in that no statutory authority exists for imposing sentence in that manner." The First Department remanded for plenary resentencing on all counts. The Legal Aid Society of NYC (Lorraine Maddalo, of counsel) represented Davis. (County Ct, New York Co)

Matter of Jahir I. v Sharon E.W., 2024 NY Slip Op 05635 (1st Dept 11/14/2024)
CUSTODY - Law Of The Case

LASJRP: The father moved for vacatur of an order granting custody of the child to the maternal grandmother, alleging that custody was fraudulently obtained without his knowledge by multiple misrepresentations made to the Family Court. The court granted an evidentiary hearing. The same court had previously issued so-ordered subpoenas to, among others, the maternal grandmother. The father moved for an order compelling the maternal grandmother to comply with the so-ordered subpoena.

The matter was transferred to another judge, who denied the father's motion to vacate and declined to hold the hearing. The court also denied the father's motion to compel the maternal

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grandmother to comply with the so-ordered subpoena, on the grounds that the subpoena was overbroad.
The First Department reverses. The decisions directing a hearing and so-ordering the subpoena constituted the law of the case. (Family Ct, New York Co)

Second Department

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

Matter of Brycyn W. (Alexis W.), 230 AD3d 589 (2nd Dept 8/14/2024)
1027 HEARING | APPEAL NOT MOOT | AFFIRMED
ILSAPP: The mother appealed from a Westchester County Family Court order finding the child to be at imminent risk of harm and temporarily removing him from her care after a 1027 hearing. The Second Department found that, although the child had since been returned to the mother, the appeal was not moot because the removal created a permanent and significant stigma. The court otherwise affirmed Family Court's order. Legal Services of the Hudson Valley (Joanne N. Sirotkin, Lauren Norberto, and Proskauer Rose LLP, New York, NY [Michelle K. Moriarty and William C. Silverman], of counsel) represented the mother. (Family Ct, Westchester Co)

Matter of Paez v Bambauer, 230 AD3d 586 (2nd Dept 8/14/2024)
MOTION TO VACATE DEFAULT | REVERSED AND REMITTED
ILSAPP: The mother appealed from a Rockland County Family Court order denying her motion to vacate orders, issued upon her default, granting the father's custody petition and dismissing her family offense petition against him. The Second Department reversed, granted the mother's motion to vacate her default, and remitted for a hearing on the petitions. In doing so, the appellate court noted the policy generally favoring resolution of child custody proceedings on the merits. Ilene K. Graff represented the mother. (Family Ct, Rockland Co)

People v Shaw, 230 AD3d 599 (2nd Dept 8/14/2024)
HARSH AND EXCESSIVE | SENTENCE REDUCED
ILSAPP: The appellant appealed from a Queens County Supreme Court judgment convicting him of 1st degree manslaughter and sentencing him to 20 years of incarceration plus 5 years of PRS. The Second Department reduced the sentence to 10 years and otherwise affirmed. The appellant stabbed the decedent during a bar fight. The decedent was the initial aggressor; he knocked the appellant to the floor, threw a barstool at him, and kicked him. At some point during their altercation, the appellant stabbed the decedent twice, causing an evisceration and puncturing his liver. The decedent—who had taken blood thinners and cocaine—died of blood loss at the hospital. The appellant's challenge to the legal sufficiency of the evidence disproving his justification defense was unpreserved; in any event, the evidence was legally sufficient. Further, the verdict was not against the weight of the evidence—intent to cause a serious physical injury may be inferred from the medical evidence regarding the nature and severity of the stab wounds. However, the 20-year sentence was harsh and excessive. Mischel & Horn, P.C. (Richard E. Mischel, of counsel) represented the appellant. (Supreme Ct, Queens Co)

People v Macaluso, 230 AD3d 1158 (2nd Dept 9/11/2024)
DISCOVERY - Police Disciplinary Records
LASJRP: The Second Department rejects defendant's contention that CPL § 245.20(1)(k) requires automatic disclosure of the entire disciplinary record for every law enforcement officer involved in his case. The People are only required to disclose all items and information that relate to the subject matter of the case. (County Ct, Dutchess Co)

People v Hudson, 2024 NY Slip Op 04571 (2nd Dept 9/25/2024)
SENTENCE - Domestic Violence Survivors Justice Act
PLEAS - Waiver Of Rights
LASJRP: The Domestic Violence Survivors Justice Act, which amended Penal Law § 60.12, permits sentencing courts to impose reduced, alternative sentences in certain cases involving defendants who are victims of domestic violence.
The Second Department holds that a defendant may waive a hearing to determine his or her eligibility for a reduced sentence under the DVSJA as a condition of a negotiated plea agreement. Although, in People v Rudolph (21 N.Y.3d 497), the Court of Appeals held that an eligible offender may not relinquish their right to receive youthful offender treatment pursuant to CPL § 720.20(1) as part of a plea agreement, the DVSJA, in contrast to § 720.20(1), does not include the word "must." Moreover, a youthful offender adjudication on a juvenile impacts the very existence of that offender's criminal conviction. (Supreme Ct, Kings Co)

People v Sargeant, 230 AD3d 1341 (2nd Dept 9/25/2024)
RIGHT TO JURY TRIAL
LASJRP: The Second Department rejects defendant's contention that his conviction by an 11-person jury deprived him of his federal and state constitutional rights to a 12-person

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jury.

In Williams v Florida (399 U.S. 78, 86), the Supreme Court held that the 12-person panel is not a necessary ingredient of trial by jury, and found no constitutional violation where Florida law provided for a 6-member panel, The Federal Rules of Criminal Procedure and federal caselaw also supports the trial court's decision to resume deliberations with an 11-person jury where there was good cause.

Although the State Constitution provides that a defendant is entitled to a 12-person jury absent the defendant's waiver, that language does not foreclose, and is not inconsistent with, a defendant's "forfeiture" of the right, just as in other contexts defendants have forfeited their constitutionally significant rights to confrontation, counsel, and presence in the courtroom. Here, the trial court properly determined that the People established by clear and convincing evidence that defendant engaged in jury tampering. The jury tampering in this instance - defendant confronted a juror at that juror's home and attempted to influence that juror during deliberations - was both devious and egregious.

Were the Court to determine that the trial court had to declare a mistrial in the absence of additional jurors, the Court would be rewarding defendant for his egregious misconduct. In the future defendants may be incentivized and emboldened to engage in similar conduct designed to force a mistrial, or perhaps even successive mistrials, when witnesses may thereafter become unavailable, evidence may be lost or destroyed, memories may fade, or for other purposes of delay. The Court would reach an opposite conclusion under different circumstances, such as if a twelfth juror were to become unavailable because of an unexpected illness or a personal life challenge,

The dissent argues that the determination to proceed with an 11-person jury violated defendant's right to substantive and procedural due process, and that the Court's determination violates the separation of powers doctrine, but these grounds are unpreserved for appellate review. (Supreme Ct, Queens Co)

People v King, 231 AD3d 747 (2nd Dept 10/2/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment sentencing him following a guilty plea. The Second Department found the written appeal waiver invalid. The lower court's oral colloquy erroneously advised appellant that his waiver barred the right to appeal, the right to counsel, and poor person's relief. However, appellant's sentence was not excessive. (Supreme Ct, Queens Co)

Matter of Oscar P., 231 AD3d 731 (2nd Dept 10/2/2024)
ABUSE/NEGLECT - Corroboration Of Out-of-Court Statements

LASJRP: The Second Department upholds findings of sexual abuse and derivative abuse, noting, inter alia, that the child's out-of-court statements about the sexual abuse to a mental health professional, her mother, and an ACS caseworker were consistent and detailed; and that her mother testified about the child's changed demeanor after the abuse occurred.

The JRP appeals attorney was Diane Pazar, and the trial attorney was Naiyma Ferguson. (Family Ct, Queens Co)

People v Trent, 231 AD3d 751 (2nd Dept 10/2/2024)
ANDERS BRIEF | NONFRIVOLOUS APPELLATE ISSUES | MOTION TO WITHDRAW GRANTED

ILSAPP: Appellant's counsel filed an Anders brief. The Second Department granted counsel's motion to withdraw and assigned new counsel to prosecute the appeal. Nonfrivolous issues existed, including whether appellant's right to appeal was valid and whether the sentence was excessive. (County Ct, Suffolk Co)

People v Vanhoven, 231 AD3d 752 (2nd Dept 10/2/2024)
ORDER OF PROTECTION | FAILURE TO TAKE INTO ACCOUNT JAIL TIME | OOP VACATED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of first-degree criminal contempt following a guilty plea. The Second Department affirmed but vacated the order of protection and remitted for a new determination on its duration. Preservation was not required, because appellant had no practical ability to register a timely objection. The duration of the order of protection exceeded the maximum time limit pursuant to CPL § 530.12(5), because appellant was not credited for jail time served. The Legal Aid Society of NYC (Rachel L. Pecker, of counsel) represented Vanhoven. (Supreme Ct, Queens Co)

People v Augustine, 231 AD3d 849 (2nd Dept 10/9/2024)
ANDERS BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

ILSAPP: Appellant's counsel filed an Anders brief. The Second Department granted counsel's motion to withdraw but assigned new counsel to prosecute the appeal. Nonfrivolous issues existed, including whether appellant's waiver of appeal was valid and whether the sentence, which had already been served, was excessive, where there were possible immigration consequences. (Supreme Ct, Queens Co)

Matter of Cornielle v Rosado, 231 AD3d 824 (2nd Dept 10/9/2024)
VISITATION - Adequacy Of Schedule

LASJRP: The Second Department modifies a provision directing that the father shall have parental access on alternate week-

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weekends from Saturday at 10:00 a.m. to Sunday at 7:00 p.m. and such additional parental access as agreed upon by the parties by substituting a provision awarding the father four weeks of consecutive parental access with the child during the summer, relatively equal time during the remainder of the summer, equal access during school holidays during the school year, holidays, and special occasions, and appropriate weekend and non-overnight midweek parental access.

The Family Court appropriately declined to award the father midweek overnight parental access during the school year, as such an award would subject the child to a lengthy and impractical commute between Brooklyn and Pennsylvania, with minimal time left during waking hours for meaningful parent-child contact. However, the award of overnight parental access one night every two weeks is insufficient, and the court failed to provide parental access to the father on holidays, school vacations, and special occasions, such as the child's birthday, without the consent of the mother. Although the father's residence in Pennsylvania may be a hurdle to certain types of parental access during the school year, the Family Court should consider the extent to which non-overnight midweek parental access during the school year in New York is feasible, and should set forth a specific schedule for holidays, school vacations, special occasions, and additional overnight parental access on the weekends. (Family Ct, Kings Co)

People v Guerra, 231 AD3d 852 (2nd Dept 10/9/2024)
RIGHT TO COUNSEL - Effective Assistance

LASJRP: In a 3-2 decision, the Second Department finds reversible error where defense counsel was ineffective in signing, and permitting the jury to consider, a stipulation containing definitions of the crimes charged that eliminated the requisite mens rea element.

With respect to the charges of promoting a sexual performance by a child and possessing a sexual performance by a child, which stemmed from videos and images affiliated with defendant's laptop computer, language in the stipulation suggested that possession, as opposed to knowing possession, is sufficient.

Contrary to the suggestion of the dissent, the defense theory was not limited solely to the notion that defendant did not possess the offending videos and images. Defendant's knowing possession of the videos and images was disputed at trial. (Supreme Ct, Queens Co)

Matter of State v Victor H., 231 AD3d 837 (2nd Dept 10/9/2024)
FRYE HEARING | ADMISSIBILITY OF EXPERT TESTIMONY | HYPERSEXUALITY | AFFIRMED

ILSAPP: Appellant appealed from a Kings County Supreme Court order finding after a bench trial that appellant suffers from a mental abnormality, pursuant to Mental Hygiene Law § 10.03(i), and is a dangerous sex offender requiring civil confinement. The Second Department affirmed, concluding that the lower court, following a pre-trial Frye hearing, properly detdetermined that the condition of hypersexuality has gained general acceptance in the psychiatric and psychological communities, and that expert testimony on the condition was admissible at trial. (Supreme Ct, Kings Co)

People v Muhammad, 231 AD3d 868 (2nd Dept 10/9/2024)
SEARCH AND SEIZURE - Stop And Frisk/ Reasonable Suspicion

LASJRP: The Second Department concludes that the police lacked reasonable suspicion to stop and frisk defendant and search his bag based on the initial anonymous tip about a black male in his 20s with a "colorful bag" containing a gun, without any explanation as to how the tipster knew about the gun or the basis for believing the tipster had inside information about defendant.

However, the police had reasonable suspicion after the tip was corroborated by an identifiable woman at the park, who approached the officer and stated, in reference to an inquiry about defendant, "I think you found him," and identified defendant. Also, before the officers approached defendant, an officer called the tipster, who was no longer at the park; he indicated that the woman the police had spoken with was his wife, and that the bag containing the gun was blue with the word "Champion" on it. The officers observed a bag matching the description "one arm's length reach" away from defendant. (Supreme Ct, Queens Co)

Matter of Alayah K., 231 AD3d 951 (2nd Dept 10/16/2024)
VIOLATION OF ORDER OF PROTECTION ALONE INSUFFICIENT FOR NEGLECT | REVERSED

ILSAPP: The father appealed from a Kings County Family Court order granting custody of the subject child to the maternal grandmother at disposition after a finding of neglect. The Second Department reversed, vacated the finding of neglect, denied the petition, and dismissed the proceeding. The court held that a violation of an order of protection, standing alone, is insufficient to establish neglect. The presentment agency failed to establish, by a preponderance of the evidence, that the child's contact with the nonrespondent mother during an overnight stay at the maternal grandmother's home impaired the child's physical, mental, or emotional condition or that there was imminent danger of impairment. Lisa A. Manfro represented the father. (Family Ct, Kings Co)

People v Eldridge, 231 AD3d 973 (2nd Dept 10/16/2024)
SORA | ADJOURNMENT ERRONEOUSLY DENIED | REVERSED AND REMITTED

Second Department *continued*

ILSAPP: Appellant appealed from an Orange County Court order designating him a level three sex offender. The Second Department reversed and remitted for a new risk level assessment hearing. The lower court improvidently exercised its discretion by denying counsel's request for a brief adjournment of the hearing to review documents his client had just told him about, which could have affected the risk level designation, and to determine whether the documents should have been offered in evidence. The adjournment request was not made for purposes of delay, and the need did not arise from a failure to exercise due diligence. That appellant was scheduled to be released only two days after the hearing was not sufficient reason to deny the adjournment request. Thomas R. Villecco represented Eldridge. (County Ct, Orange Co)

Matter of Jaden M. O., 231 AD3d 958 (2nd Dept 10/16/2024)
TERMINATION OF PARENTAL RIGHTS - Disposition/Child's Wishes

LASJRP: The Second Department upholds an order terminating parental rights in this permanent neglect, concluding that the Family Court did not err in failing to consider the wishes of the then fourteen-year-old child at the time of the dispositional hearing. While a child more than fourteen years old generally must consent to adoption, such a child's desire is only one factor the Family Court may consider.

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

Matter of Logan M., 231 AD3d 955 (2nd Dept 10/16/2024)
ABUSE/NEGLECT - Removal/Imminent Risk

LASJRP: The Second Department finds error in the Family Court's FCA § 1028 determination that returned the child to the custody of the aunt but excluded the mother pursuant to an order of protection.

The mother interfered with the child's medical care by attending a medical appointment with the child unsupervised and by making an appointment for the child's blood work. However, while the mother was residing with the child and the maternal aunt, the child attended all medical appointments and did not have any seizures. (Family Ct, Suffolk Co)

People v Williams, 231 AD3d 972 (2nd Dept 10/16/2024)
30.30 | PRE-INDICTMENT SOR | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree CPW following a guilty plea. The Second Department reversed the judgment and dismissed the indictment, granting appellant's CPL § 30.30 motion because appellant was deprived of his statutory right to a speedy trial. As the prosecution conceded, its statement of readiness was illusory and ineffective to stop the speedy trial clock where it was filed before the indictment was filed. The prosecution further conceded that it failed thereafter to declare readiness until after the six-month period had expired. Murray E. Singer represented Williams. (Supreme Ct, Queens Co)

Matter of Yordani M. V. Y., 231 AD3d 959 (2nd Dept 10/16/2024)
SPECIAL IMMIGRANT JUVENILE STATUS | REVERSED

ILSAPP: The mother appealed from a Queens County Family Court order denying the motion for an order making specific findings enabling the subject child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status. The Second Department reversed, granted the motion, and found that it would not be in the subject child's best interests to be returned to Guatemala based upon an independent factual review of the record. Bruno J. Bembi represented the mother. (Family Ct, Queens Co)

People v Brown, 231 AD3d 1055 (2nd Dept 10/23/2024)
PROSECUTION APPEAL | CPL 30.30 | COVID-19 EXEC. ORDER | INDICTMENT REINSTATED

ILSAPP: The New City District Attorney appealed from an order of the Rockland County Court dismissing the indictment on the ground that respondent was deprived of his right to a speedy trial, pursuant to CPL § 30.30. The Second Department vacated the order, denied the motion, reinstated the indictment, and remitted. The period of time at issue was not chargeable to the prosecution, because Executive Order No. 202.87, issued in response to the COVID-19 pandemic, tolled the speedy trial statute from the date the felony complaint was filed through the date of arraignment on the indictment. (County Ct, Rockland Co)

People v Burris, 231 AD3d 1063 (2nd Dept 10/23/2024)
INVALID WAIVER OF APPEAL | SENTENCES NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from two Queens County Supreme Court judgments sentencing him following guilty pleas. The Second Department found the appeal waivers invalid because the court had erroneously mischaracterized the appellate rights relinquished as encompassing the loss of the right to counsel and poor person's relief, and the court failed to discuss the waivers until after appellant had admitted his guilt as part of the plea agreements. Here, the execution of written waivers did not cure the deficient oral colloquy. However, appellant's sentences were not excessive. Appellate Advocates (Anna Jouravleva, of counsel) represented Burris. (Supreme Ct, Queens Co)

Matter of Caia N., 231 AD3d 1033 (2nd Dept 10/23/2024)
ABUSE/NEGLECT - Mental Illness - Domestic Violence/Threatening Behavior

LASJRP: The Second Department upholds a finding of neglect

Second Department *continued*

based on evidence of the mother's largely untreated mental illness and willingness to engage in and threaten violence in the presence of the child. The mother struck the grandmother in the child's presence and had a history of threatening behavior toward ACS staff.

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

People v Drayton, 231 AD3d 1057 (2nd Dept 10/23/2024)
PROSECUTION APPEAL | CPL 30.30 | COC AND GRAND JURY MINUTES | INDICTMENT REINSTATED

ILSAPP: The Queens County District Attorney appealed from an order of the Queens County Supreme Court invalidating the COC and dismissing the indictment on the ground that respondent was deprived of his right to a speedy trial, pursuant to CPL 30.30. The Second Department vacated the order, denied the motion, reinstated the indictment, and remitted. The COC filed prior to the disclosure of the grand jury minutes was not illusory. The prosecution met their burden of establishing that they had "exercised due diligence and made reasonable inquiries" to obtain the discovery at issue where the COC expressly acknowledged their obligation to provide grand jury minutes once they obtained the completed transcript, and where they then provided the transcript "within a reasonable time after obtaining it from the court reporter." (Supreme Ct, Queens Co)

Matter of Legend C.-F. F., 231 AD3d 1022 (2nd Dept 10/23/2024)
ABUSE/NEGLECT - Hearsay Evidence

LASJRP: The Second Department concludes that the mother's statements in a domestic incident report were admissible under the excited utterance exception to the hearsay rule, and that there was an added assurance of reliability since she was a witness at the hearing.

The JRP appeals attorney was Claire Merkine. (Family Ct, Kings Co)

People v Martinez, 231 AD3d 1061 (2nd Dept 10/23/2024)
DEFICIENT ANDERS BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Suffolk County Court judgment convicting him after a guilty plea of first-degree course of sexual conduct against a child. Appellate counsel filed an Anders brief seeking to be relieved on the ground that there were no nonfrivolous issues to be raised. The Second Department granted counsel's motion to withdraw and assigned new counsel to prosecute the appeal after finding that the Anders brief failed to adequately analyze potential appellate issues or highlight the facts in the record that might arguably support the appeal. Counsel merely recited the underlying facts and stated a bare conclusion that there were no nonfrivolous issues to be raised. (County Ct, Suffolk Co)

Matter of McCloskey v Unger, 231 AD3d 1031 (2nd Dept 10/23/2024)
INEFFECTIVE ASSISTANCE OF COUNSEL | REVERSED AND REMITTED

ILSAPP: The father appealed from a Suffolk County Family Court order finding that he willfully violated a child support order and ordering a period of six months' incarceration. The The Second Department reversed and remitted for a new hearing, holding that the failure of the father's counsel to obtain relevant medical and financial information deprived him of meaningful representation. Counsel failed to procure certified copies of the father's medical records or public assistance records to demonstrate his inability to work and need to rely on public benefits. Moreover, counsel failed to call any witnesses to testify regarding the father's neuropathy, such as the father's treating physician, or even to obtain an affidavit from that physician. Salvatore C. Adamo represented the father. (Family Ct, Suffolk Co)

People v Wildman, 231 AD3d 1066 (2nd Dept 10/23/2024)
SORA | DOWNWARD DEPARTURE | REVERSED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment adjudicating him a level three sex offender under SORA. The Second Department reversed and designated appellant a level one sex offender. Appellant had been at liberty for over 11 years without committing an additional sex offense or violent felony and was already on the cusp of the range applicable to a presumptive risk level two designation. Further, the trial court had not adequately accounted for the mitigating factor that the age difference between appellant and the victim was four years and two months. Appellate Advocates (Zachory Nowosadzki, of counsel) represented Wildman. (Supreme Ct, Kings Co)

People v Blackwood, 231 AD3d 1165 (2nd Dept 10/30/2024)
CONTEMPT - Knowledge Of Order Of Protection

LASJRP: The Second Department reverses an order dismissing a charge of criminal contempt in the first degree, concluding that the grand jury was sufficient where defendant was personally served with the order of protection in court and was advised in court of the issuance and contents of the order; the order contains defendant's signature; and, although the box alongside "Stay away from" was not checked, the protected party's name was typed in the space following that check box and all six subcategories of that section were checked. (Supreme Ct, Westchester Co)

Second Department *continued*

People v Campbell, 231 AD3d 1168 (2nd Dept 10/30/2024)
ORDER OF PROTECTION | OOP VACATED IN INTEREST OF JUSTICE

ILSAPP: Appellant appealed from a Richmond County Supreme Court judgment convicting him of second-degree attempted burglary following a guilty plea. The Second Department affirmed the conviction but vacated the portion of the order of protection naming two protected parties that were neither the victims of, nor witnesses to, the crime to which appellant entered a plea of guilty, as conceded by the prosecution. Appellate Advocates (Alexa Askari, of counsel) represented Campbell. (Supreme Ct, Richmond Co)

People v Mendoza, 231 AD3d 1170 (2nd Dept 10/30/2024)
INVALID WAIVER OF APPEAL | SENTENCE NEITHER EXCESSIVE NOR ILLEGAL | AFFIRMED

ILSAPP: Appellant appealed from a Nassau County Supreme Court judgment sentencing her following a guilty plea to aggravated DWI with a child passenger, aggravated DWI per se, and EWC. The Second Department affirmed but found the appeal waiver invalid because the record did not demonstrate that appellant understood the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty. However, appellant's sentence was not excessive. Nor was the sentence illegal based on the probation condition that she submit to warrantless searches of her person, property, residence, or vehicle. Whether appellant's plea of guilty was made knowingly, voluntarily, and intelligently was not preserved for appellate review because no motion for plea withdrawal was made. Joseph Z. Amsel represented Mendoza. (Supreme Ct, Nassau Co)

Matter of Scotto v Alexander, 231 AD3d 1157
(2nd Dept 10/30/2024)
CUSTODY - Relocation

LASJRP: The Second Department reverses the Family Court's order denying the father permission to relocate with the children to South Carolina.

The father was unable to continue renting his grandmother's house in New York, where he and the children had been residing, and the mother provided only $25 per month in child support for both children. If permitted to relocate, the father would be able to obtain employment in his field of experience with at least the same salary as he earned in New York and his living expenses would be lower in South Carolina than they were in New York. The father would have support from extended family in South Carolina, including the paternal grandmother, who is a certified behavioral analyst and special education administrator who has assisted the father in addressing one of the children's special needs. The father has been the children's primary caregiver since 2017 and the mother was not involved in the children's day-to-day lives, education, or healthcare. (Family Ct, Suffolk Co)

People ex rel. Nieves v Maginley-Liddie,
2024 NY Slip Op 05426 (2nd Dept 11/4/2024)
DISCOVERY/SPEEDY TRIAL

LASJRP: The Second Department denies habeas relief, finding the People's certificate of compliance and statement of readiness valid and not illusory, and noting, inter alia, that belated disclosures were provided to the defense once the People were made aware of the existence of the undisclosed material; and that the voluminous nature of the materials at issue was a dominant factor in the People's ability to identify and obtain missing documents; and they kept defendant and the court apprised of the missing materials and of their diligent efforts to obtain them. (Supreme Ct, Queens Co)

Matter of Davena A., 2024 NY Slip Op 05439
(2nd Dept 11/6/2024)
ABUSE/NEGLECT - Derivative Abuse/Neglect

LASJRP: The Second Department upholds a finding of derivative abuse and neglect, noting, inter alia, that although at the time of the father's abuse one of the subject children was an infant and the other had not yet been born, the evidence demonstrates that the father's parental judgment and impulse control are so defective as to create a substantial risk to any child in his care.

The JRP appeals attorney was Riti Singh, and the trial attorney was Siri Kagan. (Family Ct, Richmond Co)

Matter of Fortune v Jasmin, 2024 NY Slip Op 05443
(2nd Dept 11/6/2024)
CUSTODY - Relocation

LASJRP: The Second Department reverses an order that dismissed, at the close of the mother's case, her petition requesting permission to relocate with the child from Cornwall to Bergen County, New Jersey, outside a previously stipulated twenty-mile radius from the father's residence in Newburgh.

The mother and her spouse testified that they wanted to relocate to Bergen County because they would have family support there and the child liked spending time with family members living in that area. The mother testified that if she were permitted to relocate, she would continue the father's parental access schedule and would agree to additional parental access. The Family Court did not ascertain from the attorney for the child the position of the then eleven-year-old child or conduct an in camera interview. The case is remitted for a continued hearing, including an in camera interview with the child. (Family Ct, Orange Co)

Second Department *continued*

People v Frank, 2024 NY Slip Op 05452
(2nd Dept 11/6/2024)
RESENTENCING | CONCURRENT SENTENCES FOR SINGULAR ACT | NOT SECOND FELONY OFFENDER

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him after a jury trial of second-degree assault, two counts of third-degree CPW, and first-degree public lewdness. The Second Department affirmed the conviction but vacated adjudication as a second felony offender, reversed, and remitted for resentencing. The trial court violated Penal Law § 70.25(2) by sentencing appellant to consecutive sentences because the second-degree assault and CPW counts were not based on separate and distinct acts. Possessing pepper spray formed the basis of the CPW charge, but, as conceded by the prosecution, there was no designation of the alleged dangerous instrument used in the assault. Although unpreserved, the Second Department also exercised its interest-of-justice power to hold that appellant was improperly sentenced as a second felony offender, because his prior burglary conviction in New Jersey did not constitute a felony in New York for purposes of enhanced sentencing. Appellate Advocates (David P. Greenberg, of counsel) represented Frank. (Supreme Ct, Kings Co)

People v Gordon, 2024 NY Slip Op 05456
(2nd Dept 11/6/2024)
DEFICIENT ANDERS BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

I**LSAPP:** Appellant appealed from two Westchester County Supreme Court judgments convicting him after guilty pleas of second-degree attempted CPW and third-degree criminal possession of marihuana. Appellate counsel filed an Anders brief. The Second Department granted counsel's motion to withdraw and assigned new counsel to the appeal where there was no indication appellate counsel had communicated with appellant, and the brief failed to adequately analyze potential legal issues or highlight facts in the record arguably supporting arguments on appeal. Counsel only posited that the appeal waiver was invalid and summarily concluded that the sentence was not harsh or excessive, without analyzing the voluntariness of the pleas or citing to relevant authority. (Supreme Ct, Westchester Co)

Matter of Llanos v Barrezueta, 2024 NY Slip Op 05446
(2nd Dept 11/6/2024)
CUSTODY | CHANGE OF CIRCUMSTANCES | REVERSED

ILSAPP: The mother appealed from a Suffolk County Family Court order denying her modification petition seeking full custody of the child. The Second Department reversed and granted the mother's petition. The Family Court's determination that there had been no change in circumstances lacked a sound and substantial basis in the record. Rather, the parties' relationship had deteriorated to the point that joint custody was inappropriate: they only communicated via text and did not engage in joint decision-making. The mother also had more involvement with tending to the child's daily and emotional needs, and Family Court failed to give sufficient weight to the 12-year-old's strong preference to live with her mother. Salvatore C. Adamo represented the mother. (Family Ct, Suffolk Co)

Matter of Sa'Nai F. B. M. A., 2024 NY Slip Op 05440
(2nd Dept 11/6/2024)
TERMINATION OF PARENTAL RIGHTS - Right To Counsel

LASJRP: During the fact-finding hearing in this termination proceeding, the Family Court granted the mother's assigned counsel's second application to be relieved, and determined that the mother had forfeited her right to be assigned new counsel, where the court had "suspicions" that the mother had been "involved" in a recent security compromise of the assigned counsel's computer, and cited the fact that the mother had a total of three attorneys assigned to represent her or to act as her legal advisor. Subsequently, the court directed, over the mother's objection, that she was required to proceed pro se if she was unable to retain counsel. The mother appeared pro se and was unprepared to call her remaining witnesses, and the court found the mother's direct case to be completed, over the mother's objection.

The Second Department reverses the order terminating parental rights, concluding that the record fails to clearly reflect that the mother engaged in the sort of egregious conduct that would justify a finding that she forfeited her right to assigned counsel. The error requires reversal without regard to the merits of the mother's position in the case. (Family Ct, Kings Co)

People v Stokes, 2024 NY Slip Op 05461
(2nd Dept 11/6/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from a Richmond County Supreme Court judgment sentencing her following a guilty plea. The Second Department found the appeal waiver invalid because it was not made knowingly, voluntarily, or intelligently. The executed written waiver implied that appellant waived her right to prosecute an appeal as a poor person or have an attorney assigned, and the lower court's oral colloquy failed to advise appellant that the waiver did not encompass the loss of such rights. However, appellant's sentence was not excessive. Appellate Advocates (Rebekah J. Pazmiño, of counsel) represented Stokes. (Supreme Ct, Richmond Co)

Second Department *continued*

People v Williams, 2024 NY Slip Op 05595
(2nd Dept 11/6/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment sentencing him following a guilty plea. The Second Department found the appeal waiver invalid because appellant did not learn of the prosecution's demand for an appeal waiver until after he had agreed to enter a guilty plea. However, appellant's sentence was not excessive. Appellate Advocates (Russ Altman-Merino, of counsel) represented Williams. (Supreme Ct, Kings Co)

Matter of Ana D. Z. H. (Jennifer E. Z. H.--Werli P.), 2024 NY Slip Op 05582 (2nd Dept 11/13/2024)
SPECIAL IMMIGRANT JUVENILE STATUS | REVERSED AND REMITTED

ILSAPP: The mother appealed from two Nassau County Family Court orders dismissing the petition to appoint the mother guardian of the child without a hearing and denying the mother's motion to dispense with service on the father. The Second Department reversed, reinstated the petition and motion, and remitted for an expedited hearing. Family Court erred in summarily dismissing the petition—related to findings needed to secure Special Immigrant Juvenile Status for the child—because the child had previously appeared before the court as a person in need of supervision and/or juvenile delinquency proceeding. Resolving the petition and motion required consideration of the child's best interests. Bruno J. Bembi represented the mother. (Family Ct, Nassau 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 Carrie X. (Amber Y.), 230 AD3d 1397
(3rd Dept 9/12/2024)
TERMINATION OF PARENTAL RIGHTS | UNTIMELY NOTICE OF APPEAL | DISMISSED

ILSAPP: The mother appealed from a Broome County Family Court order terminating her parental rights. The court dismissed the appeal as untimely because the Notice of Appeal filed by the mother, not represented by counsel, was filed well after the 35-day statutory time limit had run. The Third Department therefore lacked jurisdiction to hear the appeal. The mother was represented in Family Court, and the court had emailed the termination order to her attorney on the same day it mailed the order to her. (Family Ct, Broome Co)

Matter of C.M. v Z.N., 230 AD3d 1409 (3rd Dept 9/12/2024)
CUSTODY MODIFICATION | REVERSED AND REMITTED

ILSAPP: The mother appealed from a Tioga County Family Court order awarding sole legal custody to the father and granting the mother parenting time "as the parties agree, taking into consideration the child's wishes." The Third Department reversed both parts of the order and remitted to Family Court for a hearing regarding parenting time. There was no indication on the record that the parties were unable to effectively communicate to meet the child's needs, or that joint legal custody was otherwise rendered unfeasible or inappropriate, and therefore, reverted to the prior order of joint legal custody. Family Court also improperly delegated the parenting time determination to the father. The Third Department reminded Family Court that disclosures in a Lincoln hearing must remain confidential. John A. Cirando represented the mother. (Family Ct, Tioga Co)

Matter of Jason VV. v Brittany XX., 230 AD3d 1398
(3rd Dept 9/12/2024)
CUSTODY - Prior Abuse/Neglect By Parent

LASJRP: The Third Department upholds an order that awarded joint legal custody to the parties and primary physical placement to the mother, noting, inter alia, that although there had been two indicated reports of child abuse and/or maltreatment against the mother at some point, the timing and nature of those reports was unclear, and the proof gave no reason to believe that the mother's care for the children was inadequate at the time of the hearing; and that, with respect to incidents that led to the children being placed in the care of DSS, the mother explained that she had been struggling to obtain counseling and other services for the children on an outpatient basis and elected to place them because DSS had secured the evaluation and care for them that they obviously needed, and the record indicates that the mother complied with all treatment recommendations, engaged in mental health treatment and parenting classes, and emerged with improved parenting skills.

The mother was doing her best to address the needs of two obviously troubled children and was making progress in doing so. (Family Ct, Saratoga Co)

Matter of John O., 230 AD3d 1385 (3rd Dept 9/12/2024)
ABUSE/NEGLECT - Educational Neglect
- Domestic Violence

LASJRP: The Third Department finds sufficient evidence of

Third Department *continued*

educational neglect where the mother largely attributed the youngest child's absences to his ADHD diagnosis, and testified that, even when he took his medication, she was unable to maintain his attention for virtual classes on his laptop; and, with respect to the older children, testified that she walked over to the father's residence a few doors down to get them logged onto their computers and monitor them, and contended that she could not sit with all three children and monitor them because they would fight, meaning that she would need to go between her residence with the youngest child and walk to the father's residence.

The Court notes that a caseworker for petitioner testified that the mother had only indicated to her that she would call the older children to make sure they were awake and logged on but did not outline what further steps she would take to ensure their attendance; and that, according to the caseworker, the school had exhausted its options trying to get the children to attend virtual classes with minimal cooperation from the mother.

However, the Court reverses the finding of neglect based on exposing the children to domestic violence. Although there was an altercation between the mother and her boyfriend that resulted in personal injuries to both, including a stab wound to the boyfriend, the incident occurred in a private vehicle and the children were not present. The mother testified that when her disagreements with the boyfriend began to escalate, the children were either sleeping or he would leave the premises. Despite the caseworker's testimony that the children were generally aware of arguments, she failed to testify as to the impact such arguments had on the children or whether such exposure placed the children at imminent risk of impairment. (Family Ct, Otsego Co)

Matter of Marilyn Y. v Carmella Z., 230 AD3d 1402 (3rd Dept 9/12/2024)
VISITATION - Grandparents/Schedule

LASJRP: The Third Department concludes that although the Family Court properly awarded the grandmother visitation, unsupervised visitation and the five-hour duration is inappropriate at this time because the grandmother has become an unfamiliar person to the child.

The grandmother has not met with the child since November 2022 - when the child was two years old. When the grandmother did have an opportunity to meet with the child at a family event, she failed to interact with the child. (Family Ct, Schenectady Co)

People v Baldner, 230 AD3d 1434 (3rd Dept 9/19/2024)
DEPRAVED INDIFFERENCE | PROSECUTION APPEAL| REVERSED | DISSENT

ILSAPP: The prosecution appealed from an Ulster County order that had partially granted a motion to dismiss depraved indifference murder and first-degree reckless endangerment charges based on legally insufficient evidence before the grand jury. The Third Department reversed and reinstated the charges, finding that the evidence was legally sufficient to establish that Baldner—a state trooper—acted with depraved indifference, an essential element of both crimes. The charges arose from two incidents in which the trooper engaged in high-speed chases on the NYS Thruway, one of which resulted in an 11-year-old girl's death in an overturned vehicle. The dissenting justice agreed with County Court that reckless driving alone was insufficient to establish the element of depraved indifference. Larkin Ingrassia LLP (John Ingrassia, of counsel) represented Baldner. (County Ct, Ulster Co)

People v Gentry, 230 AD3d 1428 (3rd Dept 9/19/2024)
INVALID WAIVER OF APPEAL | AFFIRMED | NOT HARSH OR SEVERE

ILSAPP: Appellant appealed from a Schenectady County Court judgment convicting him of second-degree robbery after a plea. The Third Department affirmed but found the waiver of appeal to be invalid. The written waiver contained inaccurate and overbroad language, which was not remedied by the colloquy. However, the sentence of 6.5 years' imprisonment, plus 5 years of PRS, as a second felony offender, was not unduly harsh or severe. Terrence M. Kelly represented Gentry. (County Ct, Schenectady Co)

People v Herbert, 230 AD3d 1433 (3rd Dept 9/19/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

ILSAPP: Appellant appealed from a Schenectady County Court judgment, following a guilty plea, convicting him of second-degree rape, third-degree criminal sexual act, and endangering the welfare of a child. The Third Department affirmed but found the waiver of appeal to be invalid, because the lower court's explanation was overly broad and signified a complete bar to any appellate rights. However, considering the nature and circumstances of the crimes, the sentence was not unduly harsh or severe. Aaron A. Louridas represented Herbert. (County Ct, Schenectady Co)

Matter of Joanna PP. v Ohad PP., 230 AD3d 1445 (3rd Dept 9/19/2024)
CUSTODY - Courtroom Misconduct/Judicial Bias
JUDGES - Bias

LASJRP: The Family Court, citing the father's in-court conduct, credited the mother's testimony as to the father's controlling and harassing behavior and determined that the father was incapable of serving as a joint custodian. The court awarded the mother sole custody of the children.

Third Department *continued*

The Third Department reverses and remits for further proceedings. The father's conduct was at times disruptive, and the Court appreciates the difficulties inherent in addressing his interruptions. However, the Court cannot conclude that the Family Court's assessment of the evidence was not disproportionately influenced by the frustration arising from the father's lack of courtroom decorum. The testimony of the father's witnesses was all but entirely disregarded because those witnesses had not observed the father's in-court behavior. (Family Ct, Chenango Co)

People v Little, 230 AD3d 1432 (3rd Dept 9/19/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

ILSAPP: Appellant appealed from a Cortland County Court judgment convicting him of third-degree rape after a plea. The Third Department affirmed but found the waiver of appeal to be invalid. The court did not engage in any oral colloquy regarding the waiver, nor did it ask about the written waiver, including whether appellant understood its contents or had discussed it with his attorney. However, the sentence of 4 years' imprisonment, plus 15 years' PRS, as a second felony offender, was not unduly harsh or severe. Rural Law Center of New York (Lora J. Tryon, of counsel) represented Little. (County Ct, Cortland Co)

Matter of Moorer v Annucci, 230 Ad3d 1454 (3rd Dept 9/19/2024)
ARTICLE 78 | PRISON DISCIPLINARY VIOLATION | PARTIALLY REVERSED

ILSAPP: The petitioner sought review of a determination that he had violated prison disciplinary rules. The court held—and the respondent DOCCS conceded—that the determination that Moorer was guilty of possessing contraband was not supported by substantial evidence. The court remitted for a redetermination of the penalty to be imposed on additional charges, which were affirmed. Petitioner Devonte Moorer represented himself. (Supreme Ct, Albany Co)

People v Willis, 230 AD3d 1444 (3rd Dept 9/19/2024)
30.30 | ILLUSORY COC | REVERSED AND INDICTMENT DISMISSED

ILSAPP: Appellant appealed from a Columbia County Court judgment convicting her, following a guilty plea, of second- and third-degree CPCS, CPW, and endangering the welfare of a child. The People were not ready for trial within the 30.30 timeframe—as they conceded—rendering their COC illusory. The Third Department therefore reversed and dismissed the indictment. Shane A. Zoni represented Willis. (County Ct, Columbia Co)

People v Niquasia MM., 230 AD3d 1473 (3rd Dept 9/24/2024)
DVSJA| RESENTENCING DENIED

ILSAPP: Appellant appealed a Schenectady County Court judgment denying her DVSJA resentencing motion under CPL § 440.47. The Third Department affirmed. Citing People v Williams, County Court found that there was insufficient evidence to show that, at the time of the offense, appellant was the victim of substantial domestic violence, since appellant's testimony about when she resided with her alleged abusers was "vague and imprecise." The Court also held that that the record did not demonstrate that the abuse she previously experienced at the hands of her mother and the father of her child was a significant contributing factor to her crime. Although appellant testified that, because of the abuse, she frequently became angry and fought with others, the court noted the absence of any expert testimony or other evidence linking her prior abuse to the crime: here, a robbery where cleaning products and other toxic household chemicals were poured on the pregnant victim. The Third Department also held that, even if appellant had met her burden of proof on those two elements, it would not have found it appropriate to reduce her sentence in the interest of justice because of evidence showing the premeditated nature of the crime and appellant's lack of remorse. (County Ct, Schenectady Co)

People v Awny, 230 AD3d 1464 (3rd Dept 9/26/2024)
INVALID WAIVER OF APPEAL | ARGUMENT FORFEITED | AFFIRMED

ILSAPP: Appellant appealed from a Sullivan County Court judgment convicting him of second-degree burglary, second-degree CPW, third-degree CPCS and fourth-degree CPSP after a plea. The Third Department affirmed but found the waiver of appeal to be invalid, as the prosecution conceded. Because appellant entered a plea after his suppression hearing had commenced but before the court rendered a decision, he forfeited any appellate suppression claims and had raised no additional issues. (County Ct, Sullivan Co)

People v Furgeson, 230 AD3d 1488 (3rd Dept 9/26/2024)
SORA | NO NOTICE OF ADDITIONAL UPWARD DEPARTURE FACTORS | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Tompkins County Court order classifying him as a level-three sex offender. The Third Department reversed and remanded for a new hearing. In granting the prosecution's request for an upward departure, County Court sua sponte relied upon additional factors—purported underscoring on factors 4 and7 of the RAI and appellant's psychiatric history—none of which were the basis for the upward departure recommendation from the Board or the prosecution. Lack of fair notice deprived appellant of the

Third Department *continued*

opportunity to consider and respond. Angela Kelley represented Furgeson. (County Ct, Tompkins Co)

People v Graham, 230 AD3d 1476 (3rd Dept 9/26/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

ILSAPP: Appellant appealed from a Schenectady County Court judgment convicting him of third-degree CPCS after a plea. The Third Department found the waiver of appeal to be invalid, but nevertheless affirmed. The sentence of 3.5 years' imprisonment, plus 1.5 years of PRS as a second felony offender, was not unduly harsh or severe. Theresa M. Suozzi represented Graham. (County Ct, Schenectady Co)

People v Johns, 230 AD3d 1478 (3rd Dept 9/26/2024)
SORA MODIFICATION DENIAL | DUE PROCESS VIOLATION | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Cortland County Court order denying his application for reclassification of his level-two sex offender risk level status under CL § 168-o(2). The Third Department reversed and remitted for a new modification hearing. In denying the application, County Court relied heavily on Family Court proceedings, including statements in petitions that were withdrawn. Lack of notice to appellant that this information would be used in the proceeding and a lack of an opportunity to be heard deprived him of due process. The Third Department also reminded the trial court that the purpose of a reclassification hearing is to assess whether circumstances have changed since the initial classification, not to relitigate the initial classification. Rural Law Center of New York (Lora J. Tryon, of counsel) represented Johns. (County Ct, Cortland Co)

People v Rebecca XX., 230 AD3d 1491 (3rd Dept 9/26/2024)
DVSJA | Self-Reporting, Inconsistent Statements | resentencing denied

ILSAPP: Appellant appealed a Madison County Court judgment denying her DVSJA resentencing motion pursuant to CPL § 440.47. The Third Department affirmed. County Court found that there was insufficient evidence to showp that, at the time of the offense, appellant was a victim of substantial domestic violence, or that the abuse was a contributing factor to the crime—in this case, the shooting of her fiancé resulting in a second-degree murder conviction after a plea. The Third Department noted that appellant's testimony regarding physical, sexual, and emotional abuse was not corroborated by evidence such as medical or police records. The court also deferred to County Court's determination that appellant's daughters lacked credibility, because their testimony about the abuse, as well as the nature and extent of appellant's substance abuse, was inconsistent with earlier statements to police and probation. Veronica Reed represented Rebecca XX. (County Ct, Madison Co)

People v Howard, 231 AD3d 1202 (3rd Dept 10/3/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed an Albany County Court (Youth Part) judgment convicting him of second-degree CPW after a plea. The Third Department affirmed the denial of removal to Family Court for adjudication as a Juvenile Offender under Raise the Age, concluding that photographs and text messages submitted by the prosecution established, by a preponderance of the evidence, that appellant had caused significant physical injury to the victim. The Third Department did find the waiver of appeal to be invalid, as the prosecution conceded. The court nevertheless affirmed the trial court's denial of YO status and found the 15-year term of imprisonment, plus 5 years of PRS, not unduly harsh or severe. Nor was counsel ineffective for waiving an Outley hearing and acquiescing to enhanced sentencing based on post-plea arrests, since the record demonstrated counsel had negotiated concurrent sentences on pending charges. Stephan R. Weiss represented Howard. (County Ct, Albany Co)

People v White, 231 AD3d 1217 (3rd Dept 10/3/2024)
CLASS A FELONY | INDICTMENT NOT WAIVABLE | REVERSED AND REMITTED

ILSAPP: Appellant appealed an Albany County Supreme Court order convicting him of first-degree criminal sexual act after a plea, in satisfaction of charges that included predatory sexual act against a child. The Third Department reversed, finding that it was required to reach a jurisdictional issue, even though appellant requested sentence modification rather than plea vacatur. Although appellant agreed to waive indictment and be prosecuted by SCI, this was not an option available to him under CPL 195.10, which excludes Class A felonies punishable by death or life imprisonment. Because predatory sexual act against a child is a class A-II felony with a mandatory maximum sentence of life imprisonment, the waiver of indictment was impermissible. The court therefore vacated the plea, dismissed the SCI, and remitted for further proceedings. Alternate Public Defender, Albany (Steven M. Sharp, of counsel) represented White. (Supreme Ct, Albany Co)

People v Holland, 231 AD3d 1240 (3rd Dept 10/10/2024)
SORA | DECISION NOT APPEALABLE | DISMISSED

ILSAPP: Appellant appealed a Clinton County Court decision adjudicating him a Level Three sex offender under SORA. The Third Department dismissed the appeal. Although County Court issued a written decision, it did not contain "so ordered" language, and no order was ever entered and filed as required

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by Correction Law § 168-n [3]. The appeal was therefore not properly taken and must be dismissed. (County Ct, Clinton Co)

People v Alexander, 231 AD3d 1310 (3rd Dept 10/17/2024)
CROSS-RACIAL ID INSTRUCTION | REVERSED

ILSAPP: Appellant appealed a Broome County Court judgment convicting him of third-degree burglary. The Third Department reversed and remitted for a new trial. The trial included the testimony of a police officer who was familiar with appellant and identified him in surveillance video footage. County Court erroneously denied defense counsel's request for a cross-racial identification jury instruction. Under People v Boone, the defense is entitled to that instruction upon request, and the officer's previous familiarity with appellant did not warrant a different result. Because the evidence of identity was not overwhelming, the error was not harmless. John A. Cirando represented Alexander. (County Ct, Broome Co)

Matter of Baylee F., 231 AD3d 1318 (3rd Dept 10/17/2024)
ABUSE/NEGLECT - Intellectual Limitations - Derivative Neglect

LASJRP: The Third Department upholds a neglect finding based on the parents' intellectual limitations, and a derivative neglect finding, with respect to a child born in 2022, noting, inter alia, that the three-year gap between the most recent adjudication, and the pattern of conduct evidenced in the prior determinations dating back to 2013, are not so attenuated as to foreclose an assessment of whether the impairment in parental judgment continued to exist at the time of the hearing.

The most recent neglect findings from 2019 stemmed from, among other things, the parents' respective intellectual disabilities and adaptive deficits, alongside other related mental health concerns. The parents continuously deny or minimize those conditions and demonstrate no inclination to address them in a meaningful way. Although each parent had engaged in limited mental health counseling to address their other mental health diagnoses and had recently attended parenting classes as recommended by petitioner, the evidence reflects marginal participation in those interventions and their lack of insight into the need to do so. (Family Ct, Clinton Co)

People v Bryan, 231 AD3d 1290 (3rd Dept 10/17/2024)
ANDERS BRIEF | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed a Rensselaer County Supreme Court judgment convicting him after a plea of disseminating indecent material to a minor. Appellate counsel filed an Anders brief seeking to be relieved on the ground that there were no nonfrivolous issues to be raised. The Third Department granted the application to be relieved but assigned new counsel, finding issues of arguable merit, including whether appellant's motion to withdraw his plea was properly denied and whether his appeal waiver was valid. (Supreme Ct, Rensselaer Co)

People v Lipka, 231 AD3d 1283 (3rd Dept 10/17/2024)
INVOCATION OF RIGHT TO COUNSEL | huntley hearing | reversed

ILSAPP: Appellant appealed a Chemung County Court judgment convicting him of first-degree burglary after a plea. The Third Department reversed, finding that County Court erroneously denied the motion to suppress appellant's statements to police. During the interview, appellant's statement "that's what I want a lawyer for," constituted an unequivocal invocation of his right to counsel, and any statements made after that point should have been suppressed. The error was not harmless, because the record did not establish that the decision to plead guilty was entirely independent of the suppression decision. Matthew C. Hug represented Lipka. (County Ct, Chemung Co)

Matter of Mark AA. v Susan BB., 231 AD3d 1347 (3rd Dept 10/17/2024)
CUSTODY/VISITATION - Jurisdiction

LASJRP: Following a conference between the New York Family Court and the Massachusetts Family Court, which had before it the mother's emergency petition seeking to suspend or modify the father's parenting time, the New York court issued an order in which it determined that Massachusetts was a more convenient forum, declined jurisdiction and transferred the issues raised in the pending petitions to the Massachusetts court. The court ruled that Massachusetts was a more appropriate forum because of "the nature and location of the evidence required to resolve the pending litigation," observing that the mother's modification petition related to the child's mental health and would involve records and testimony from providers in Massachusetts.

The Third Department reverses and remits the matter for further consideration, concluding that although the court may have had the statutory factors in mind, the record does not demonstrate what that consideration involved or show how the weighing of the relevant factors led to the court's determination. (Family Ct, Albany Co)

People v Mosher, 231 AD3d 1313 (3rd Dept 10/17/2024)
CONTINUATION OF PROBATION | SCOPE OF COURT'S AUTHORITY | REMITTED FOR RESENTENCING

ILSAPP: Appellant appealed a Tioga County Court judgment revoking his probation and imposing a prison term of 3 ½ years' imprisonment, followed by 1 ½ years of PRS. The Third Department reversed and vacated the sentence. County Court erred in concluding that it could not extend appellant's probation because he had been incarcerated for longer than six months. Because appellant was sentenced to a five-year

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probation term on a second charge, the court was permitted to extend probation if it did not impose an additional term of incarceration. Since the record indicated that the court had wished to continue probation but did not believe it was legally permissible, the Third Department remitted for resentencing. Sandra M. Colastoti represented Mosher. (County Ct, Tioga Co)

People v Rock, 231 AD3d 1315 (3rd Dept 10/17/2024)
WEIGHT OF THE EVIDENCE | KNOWLEDGE OF OOP | REVERSED AND DISMISSED

ILSAPP: Appellant appealed a Clinton County Court judgment convicting him of first-degree falsifying business records and attempted CPW. The Third Department reversed, finding the verdict to be against the weight of the evidence. While the prosecution alleged that appellant attempted to purchase a shotgun in violation of a 1993 New Jersey restraining order prohibiting him from doing so, there was insufficient proof that appellant knew the order was active or that it was issued after a hearing where he had the opportunity to meaningfully participate. LaMarche Safranko Law PLLC (Joshua R. Friedman, of counsel) represented Rock. (Clinton Co, County Ct)

People v Shuler, 231 AD3d 1285 (3rd Dept 10/17/2024)
CPL § 440.10 | IAC | FAILURE TO MAKE MERITORIOUS SPEEDY TRIAL MOTION| REVERSED AND DISMISSED

ILSAPP: Appellant appealed a Schenectady County Court judgment convicting him of second-degree attempted robbery, as well as a second order denying his CPL § 440.10 motion to vacate the conviction. The Third Department reversed, concluding that County Court erred in denying the 440 motion. Defense counsel failed to make a meritorious speedy trial motion, because the prosecution failed to have appellant produced from DOCCS in time for the statutory speedy-trial deadline. Counsel's failure deprived appellant of meaningful representation. The court dismissed the indictment since the time to prosecute under it had expired. Martin J. McGuinness represented Shuler. (County Ct, Schenectady Co)

People v Smith, 231 AD3d 1302 (3rd Dept 10/17/2024)
FAILURE TO INSTRUCT JURY ON INTOXICATION DEFENSE | REVERSED AND REMITTED

ILSAPP: Appellant appealed a Clinton County Court judgment convicting him of second- and third-degree assault, second-degree attempted assault, and third-degree CPW. The Third Department reversed and remitted for a new trial. County Court wrongly refused to instruct the jury on the intoxication defense, despite observations of appellant drinking alcohol, slurring his words, and giggling, as well as his own statement that he "must have blacked out" and could not remember much of the evening in question. Lisa A. Burgess represented Smith. (County Ct, Clinton Co)

People v Anderson, 231 AD3d 1369 (3rd Dept 10/24/2024)
440.20 | RESENTENCING ON ILLEGALLY LENIENT SENTENCE | REDUCED IN INTERESTS OF JUSTICE

ILSAPP: Appellant appealed an Albany County Court judgment denying a CPL § 440.20 motion to vacate his sentence, following convictions for numerous counts of possession and sale of controlled substances. The Third Department upheld the denial of the motion but reduced the sentence in the interests of justice. Appellant's 440.20 motion argued that the sentences on several counts were unlawfully lenient, and that he should therefore be resentenced on all counts. The Third Department agreed with County Court that only resentencing on the illegally low counts was permitted. But because the new sentence resulted in a higher sentence than the original (which the Third Department had reduced from 165 years-to-life to 55 years-to-life in an earlier appeal) the Third Department modified the sentence in the interests of justice to 46 years-to-life. Matthew C. Hug represented Anderson. (County Ct, Albany Co)

People v Dillon, 231 AD3d 1352 (3rd Dept 10/24/2024)
ASSAULT - Serious Physical Injury

LASJRP: The Third Department, upon weight-of-the-evidence review, reduces defendant's conviction from second-degree to third-degree assault.

An oral surgeon diagnosed the victim with a fracture to the left side of his mandible, consistent with facial trauma, and performed a surgical procedure to wire the victim's jaw shut. The victim testified that his jaw was wired shut for several weeks and that he was unable to eat solid food for six weeks, causing him to lose approximately 25 pounds. At the time of trial, approximately 10 months after the incident, the victim continued to experience very occasional pain he described as similar to arthritis.

The evidence about the injury's effect on the victim's daily living does not support a finding that he sustained a protracted impairment of health or of the function of any bodily organ. (County Ct, St. Lawrence Co)

People v Goodman, 231 AD3d 1366 (3rd Dept 10/24/2024)
POSSESSION OF A WEAPON - Acting In Concert

LASJRP: The Third Department overturns, as against the weight of the evidence, a verdict convicting defendant of criminal possession of a weapon in the second degree, noting that the jury could rely on testimony describing defendant's conduct during the incident as evidence that defendant was aware the co-defendant possessed the handgun before the co-defendant displayed, but there was no proof that defendant did or said anything in furtherance of the co-defendant's possession of the handgun. (County Ct, Broome Co)

R.S. v State of New York, 231 AD3d 1376 (3rd Dept 10/24/2024)

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DOCCS FAILURE TO PROTECT | REASONABLY FORESEEABLE| REVERSED

ILSAPP: Appellant appealed a Court of Claims judgment dismissing her suit against DOCCS for failing to protect her from a sexual assault at Clinton Correctional Facility. The Third Department reversed and reinstated the claim, finding in favor of appellant and remitting to the Court of Claims to assess damages. The assault was reasonably foreseeable and thus triggered the State's duty to protect appellant. Appellant, who is transgender, in response to "her general safety fears," had been assigned a sleeping cube in the open-plan dormitory closest to the CO's station, a so-called "PREA cube" reserved by DOCCS for inmates at higher risk of sexual assault. Because the CO assigned to watch the area was asleep at the time of the incident, he "breached his critical duty to protect" appellant's safety, rendering the State liable. Held & Hines, LLP (Philip M. Hines, of counsel) represented R.S. (Court of Claims)

Matter of Chesebro, 231 AD3d 1473 (3rd Dept 10/31/2024)
ATTORNEY DISCIPLINE | ELECTION INTERFERENCE | OUT-OF-STATE CONVICTION

ILSAPP: Chesebro was criminally indicted, along with former President Donald Trump, Rudolph Giuliani, and 16 other defendants in Fulton County, Georgia, for their efforts to overturn the 2020 presidential election. He ultimately pleaded guilty to conspiracy to commit filing false documents, a felony in Georgia. The Attorney Grievance Committee of the Third Department moved to disbar Chesebro in New York based on that conviction. The Third Department denied the motion to disbar but granted it insofar as suspending Chesebro from the practice of law in New York. The court held that automatic disbarment based on a felony conviction is not appropriate, since the Georgia conspiracy conviction is not the equivalent of a felony in New York: it lacks the element of an intent to defraud and is therefore more similar to New York's misdemeanor version of the same crime. However, the Third Department held that Chesebro nevertheless stands convicted of a "serious crime" requiring suspension from the practice of law. The finality of the judgment was unaffected by the conditional nature of the plea agreement providing for vacatur of the conviction upon successful completion of probation, since the definition of "judgment" in New York includes a conviction and sentence, both of which were imposed here. (Supreme Ct, Albany Co)

People v James, 231 AD3d 1435 (3rd Dept 10/31/2024)
WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | AFFIRMED

ILSAPP: Appellant appealed from an Ulster County Court judgment convicting him, after a guilty plea, of second-degree CPW and third-degree CSCS, and sentencing him, as a second felony offender, to an aggregate term of 20 years' imprisonment followed by 5 years of PRS. As the prosecution conceded, the purported waiver of appeal was invalid because neither the oral nor written waiver adequately explained the rights being forfeited. Nevertheless, the court found unpreserved his arguments that his waiver of an Outley hearing was invalid and that the court erred in adjudicating him a second felony offender. The court also found that[t]he sentence was not excessive. Angela Kelley represented James. (County Ct, Ulster Co)

People v Reynolds, 231 AD3d 1433 (3rd Dept 10/31/2024)
WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | SENTENCE NOT EXCESSIVE

ILSAPP: Appellant appealed from an Albany County Supreme Court judgment convicting him of second-degree attempted robbery and sentencing him to 6 years' imprisonment followed by 5 years of PRS. As the prosecution conceded, the purported waiver of appeal was invalid because neither the oral nor written waiver adequately explained the rights being forfeited. The Third Department declined to reduce the sentence, however. Tina K. Sodhi, Alternate Public Defender, Albany (Steven M. Sharp of counsel) represented Reynolds. (Supreme Ct, Albany Co)

People v Boyd P., 2024 NY Slip Op 05608 (3rd Dept 11/7/2024)
DVSJA | RESENTENCING DENIED

ILSAPP: Appellant appealed from a Columbia County Court judgment denying his DVSJA resentencing motion under CPL § 440.47. The Third Department affirmed. Although the evidence demonstrated appellant suffered severe abuse throughout his childhood, the court found that there was insufficient evidence proving it was a significant contributing factor to his crime. Specifically, the court noted the absence of any expert testimony or other similar evidence and cited cases holding that the statute requires a temporal nexus between the abuse suffered by the person seeking resentencing and the offense. The court also opined that "contrary to his claim that he was being subjected to abuse," the evidence showed that appellant had committed acts of domestic violence close in time to the crime. The Third Department also held that the sentence was not unduly harsh due to the nature of the offense: here, the homicide of his four-month-old son. (County Ct, Columbia Co)

People v Gibbs, 2024 NY Slip Op 05507 (3rd Dept 11/7/2024)
WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | SENTENCE NOT EXCESSIVE

ILSAPP: Appellant appealed from a Warren County Court judgment convicting him after a guilty plea of second-degree

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attempted robbery and third-degree attempted escape and sentencing him to 6 years' imprisonment followed by 5 years of PRS. The purported waiver of appeal was invalid because the written waiver implied that it was an absolute bar to appeal, and the oral waiver failed to cure this defect by explaining the appellate rights that would survive the waiver. The Third Department declined to reduce the sentence, however, noting that the sentence was bargained for and citing appellant's "lengthy criminal history and that his actions during the robbery had a significant impact on the store clerk." Rural Law Center of New York (Kristin A. Bluvas, of counsel) represented Gibbs. (County Ct, Warren Co)

People v Hussain, 2024 NY Slip Op 05513
(3rd Dept 11/7/2024)
PLEA WITHDRAWAL ATTEMPT | LIMITED TIME TO CONSULT COUNSEL | AFFIRMED

ILSAPP: Appellant appealed from a Schoharie County Supreme Court judgment convicting him following a jury trial of 20 counts of second-degree manslaughter and sentencing him to concurrent terms of 5-15 years. The Third Department affirmed. Among other things, appellant argued that the court violated his Sixth Amendment rights when it refused to grant him additional time to confer with counsel prior to withdrawing a guilty plea. After the initially-assigned judge retired, a new judge advised appellant that he would not abide by the previous sentencing agreement and intended to sentence him to the maximum prison term. The court then granted appellant just 15 minutes to confer with counsel about withdrawing his plea and denied his request for additional time. While the Third Department noted "this haste was improvident" and that it did not condone the trial court's conduct, it nevertheless affirmed, since "unlike the right to fair trial, a defendant does not have the right to a plea bargain." (Supreme Ct, Schoharie Co)

Matter of NYS Off of Victim Servs v Johnson,
2024 NY Slip Op 05522 (3rd Dept 11/7/2024)
SON OF SAM LAW | WORKERS' COMPENSATION FUNDS| AFFIRMED

ILSAPP: Appellant appealed from an Albany County Supreme Court order, granting a preliminary injunction restraining him from spending or encumbering all but $1,000 of his incarcerated individual account. The Third Department affirmed. Appellant was convicted of second-degree murder and sentenced to a term of 20 years-to-life. While in county jail before his conviction, he settled an earlier workplace injury claim, receiving approximately $41,000, which was deposited in his prisoner account. After he was transferred to DOCCS, the Attorney General's office informed the crime victim of the funds, and the victim indicated an intention to bring an action against him. The Attorney General's Office then requested an injunction to freeze all but $1,000 of the funds under Executive Law § 632-a (the Son of Sam Law). Noting the Legislature's clear intention to provide ready avenues for crime victims to be compensated for their losses, the Third Department rejected appellant's claims that the timing and source of the funds meant that the law was improperly used against him. (Supreme Ct, Albany Co)

People v Nolasco-Gutierrez, 2024 NY Slip Op 05606
(3rd Dept 11/7/2024)
RESTITUTION AS ENHANCED SENTENCE | PLEA WITHDRAWAL | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Tioga County Court judgment convicting him of first-degree burglary and sentencing him to 15 years' imprisonment followed by 5 years of PRS, as well as restitution in the amount of $5,880. The Third Department reversed and remitted. County Court erred by failing to give appellant the opportunity to withdraw his plea after imposing restitution, which was not part of the bargained-for sentence. The case was remitted for County Court to impose the original sentence or give appellant the option to withdraw his plea. Lisa A. Burgess represented Nolasco-Gutierrez. (County Ct, Tioga Co)

People v Ronsani, 2024 NY Slip Op 05511
(3rd Dept 11/7/2024)
RESTITUTION | INSUFFICIENT EVIDENCE | MODIFIED

ILSAPP: Appellant appealed a Columbia County Court judgment convicting him of third-degree attempted criminal possession of stolen property and sentencing him to 3 months in jail, 5 years of PRS, and a restitution payment of $27,050. The Third Department modified by reducing the restitution award to $1,000 and otherwise affirmed. The charges arose when items missing from a storage barn were discovered at an antique shop. At the time of the plea, the prosecution told the court they would not seek restitution since all the property had been recovered. But after the victim impact statement alleged that other property from the storage barn was missing or damaged, the court held a restitution hearing and imposed restitution for those items. Without evidence that defendant's possession of the stolen property at the antique store was part of the same criminal transaction as the theft or damage of items at the storage barn, ordering restitution for those items was error. David E. Woodin represented Ronsani. (County Ct, Columbia Co)

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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 Brightman, 230 AD3d 1527 (4th Dept 9/27/2024)
SORA | FOREIGN DESIGNATION CLAUSE | UNCONSTITUTIONAL AS APPLIED

ILSAPP: Appellant appealed from a Chautauqua County Court order designating him a sexually violent offender. The Fourth Department reversed, holding that SORA's foreign designation clause was unconstitutional as applied to appellant. County Court designated him a sexually violent offender based solely on his prior, out-of-state conviction for the nonviolent sex offense of "importuning" (soliciting via a telecommunications device a complainant between 13 and 16 to engage in sexual conduct when Brightman was 23), which County Court compared to New York's PL § 235.22(2) (first-degree disseminating indecent material to minors). Absent any evidence of violent conduct, mislabeling appellant a sexually violent offender was not rationally related to any legitimate governmental interest. County Court rejected appellant's facial challenge to the foreign designation clause under substantive due process, applying rational basis review. The Chautauqua County Public Defender (Heather Burley, of counsel) represented Brightman. (County Ct, Chautauqua Co)

People ex rel Cordes v Shelley, 230 AD3d 1537 (4th Dept 9/27/2024)
HABEAS CORPUS | BAIL REVOCATION | REVERSED

ILSAPP: Petitioner appealed from a judgment of Onondaga County Supreme Court dismissing his petition for a writ of habeas corpus. Carl Newton was released on bail pending trial, which ended in a mistrial after an individual describing himself as a supporter of Newton allegedly approached trial attorneys and expressed displeasure that certain jurors had been removed from the panel. The trial court held a bail revocation hearing and revoked Newton's bail based on that alleged conduct. The Fourth Department reversed. Although the trial court ostensibly based its decision on the fact that Newton "could have been charged with a felony" based on the incident, it did not specify which felony, and juror tampering is a misdemeanor. Because this offense would have been the only feasible basis to revoke Newton's bail under CPL § 530.60, the Fourth Department held that the bail court's determination was not supported by clear and convincing evidence and that Supreme Court erred in dismissing the petition for a writ of habeas corpus. Craig M. Cordes represented Newton. (Supreme Ct, Onondaga Co)

Matter of Eva'Lyn F., 230 AD3d 1549 (4th Dept 9/27/2024)
ABUSE/NEGLECT/TERMINATION OF PARENTAL RIGHTS - Initial Appearance/Notice Of Rights

LASJRP: In this termination of parental rights proceeding, the Fourth Department rejects respondent parents' contention that they were denied procedural due process because the Family Court failed to advise them, in both this proceeding and the underlying FCA Article Ten derivative neglect proceeding, of their rights pursuant to, inter alia, FCA § 1033-b(1)(b) and (d). The court's failure to strictly comply with these notice requirements does not require reversal since the parents, who were served with the petition in the derivative neglect proceeding and the petition in this proceeding and were represented at all times by appointed counsel, suffered no prejudice as a result of any failure by the court. (Family Ct, Cayuga Co)

People v Figueroa, 230 AD3d 1581 (4th Dept 9/27/2024)
PREDATORY SEXUAL ASSAULT | RESTITUTION | MODIFIED

ILSAPP: Appellant appealed a Genesee County judgment convicting him of predatory sexual assault against a child, first-degree sexual abuse, and EWOC after a plea based on the sexual abuse of his girlfriend's child. The sentence included an award of restitution for the unpaid rent and bills for their shared residence. The Fourth Department modified by vacating the portion of the sentence imposing restitution, and otherwise affirmed. Although the appeal waiver was valid, the restitution award was not encompassed within it because it was not part of the plea. Restitution awards are limited to costs directly caused by the crimes, and the rent and bills did not fit into that category. The Legal Aid Bureau of Buffalo (Allison V. McMahon, of counsel) represented Figueroa. (County Ct, Genesee Co)

People v Gause, 230 AD3d 1573 (4th Dept 9/27/2024)
SENTENCING | FAILURE TO PRONOUNCE ON EACH COUNT | DVSJA | REMITTED

ILSAPP: Appellant appealed a judgment of Steuben County Court convicting her of first-degree robbery, first-degree assault, and fourth-degree conspiracy. The Fourth Department vacated the sentence and remitted to the trial court for resentencing, and otherwise affirmed. The trial court failed to impose a sentence for every count of the verdict as required by CPL 380.20. The Fourth Department affirmed the denial of sentencing pursuant to the DVSJA (PL § 60.12), finding that appellant failed to meet her burden at the DVSJA hearing to establish that her history of abuse was a significant contributing factor to her criminal conduct. Feldman and Feldman (Steven A. Feldman, of counsel) represented Gause. (County Ct, Steuben Co)

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Matter of Gerow v Samuel, 230 AD3d 1580 (4th Dept 9/27/2024)
CUSTODY - Grandparents/Extraordinary Circumstances

LASJRP: The Fourth Department, finding extraordinary circumstances, upholds an order awarding custody to the grandmother, but does note that, in determining that extraordinary circumstances exist, the Family Court erred in relying on the fact that the child had been in the custody of the grandmother for an extended period of time where the child was placed in the grandmother's custody only after an order of protection was issued against the mother regarding the child, and the mother thereafter petitioned to regain custody. (Family Ct, Erie Co)

Matter of Harper W., 230 AD3d 1587 (4th Dept 9/27/2024)
ABUSE/NEGLECT - Leaving Children Unattended In Vehicle - Suspended Judgment/Drug Testing Condition

LASJRP: The Fourth Department upholds a finding of neglect where respondent mother left the children, ages three and five, unattended in an unlocked, running vehicle for at least thirty minutes while she went shopping.

The court properly ordered, as a condition of a suspended judgment, that the mother submit to random drug screens immediately upon request. (Family Ct, Steuben Co)

People v Johnson, 230 AD3d 1573 (4th Dept 9/27/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of first-degree manslaughter and first-degree robbery after a plea. The Fourth Department affirmed but found the waiver of appeal to be invalid, since both the written waiver and oral colloquy used overbroad language mischaracterizing the waiver as a total bar to an appeal. However, the sentence was not unduly harsh or severe. (County Ct, Monroe Co)

Matter of Lillyana M., 230 AD3d 1568 (4th Dept 9/27/2024)
TERMINATION OF PARENTAL RIGHTS - Abandonment

LASJRP: In this abandonment proceeding, the Fourth Department rejects respondent father's contention that petitioner discouraged him from having a relationship with the child by not accommodating his request to visit the child in Onondaga County, where he lived, instead of Oswego County, where the child lived; by not suggesting to him that he send the child letters, cards, or gifts; and by never requesting that he pay child support. (Family Ct, Oswego Co)

People v Lorenzo, 230 AD3d 1564 (4th Dept 9/27/2024)
BRADY MATERIAL - DNA Evidence/Other Perpetrator
MOTION TO VACATE JUDGMENT OF CONVICTION

LASJRP: The Fourth Department upholds an order granting defendants' motion to vacate their convictions for second-degree murder and first-degree burglary where, at the hearing upon defendants' motions to vacate, there was evidence that forensic DNA testing conducted after the conviction excluded defendants as contributors to any DNA found on various items inside the victim's residence, including the knife used to stab the victim, the handcuffs used to bind her, the necktie used to strangle her, her clothing, and her fingernail scrapings; and testimony that the prosecutor did not turn over to the defense his handwritten note stating that the father of the victim's husband was unable to identify a recovered silver dollar as the one he had given to his son.

The trial stipulation that the scrapings found beneath the victim's fingernails contained only her own blood is not the equivalent of evidence conclusively eliminating defendants as contributors to the DNA mixtures. And, although the DNA evidence does not conclusively exclude defendants as participants in the crime since they may have worn gloves, the discovery of unidentified DNA on several items that were tested allows for the possibility that another unidentified person committed the crime. (Supreme Ct, Erie Co)

People v Milord, 230 AD3d 1567 (4th Dept 9/27/2024)
INVALID WAIVER OF APPEAL | SUPPRESSION | AFFIRMED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of second-degree burglary after a plea. The Fourth Department affirmed but found the waiver of appeal to be invalid. Both the written waiver and oral colloquy contained inaccurate language about the scope of the waiver. The Fourth Department held that police observations, in an area known for marijuana sales, of "large puffs of smoke" emanating from a parked vehicle, a strong odor of burnt marijuana, plus Milford's flight from the vehicle after the officer approached, gave rise to reasonable suspicion, justifying the police pursuit. The lower court's denial of the suppression motion was affirmed. (County Ct, Monroe Co)

People v Santos, 230 AD3d 1586 (4th Dept 9/27/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

ILSAPP: Appellant appealed from two Jefferson County Court judgments convicting him, after a plea, of third-degree sexual abuse, forcible touching, first-degree disseminating indecent material to a minor, and promoting a sexual performance by a

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child. The Fourth Department affirmed but found the "global waiver" of appeal to be invalid. The colloquy and written waiver both used overbroad language that mischaracterized the waiver as a complete bar to taking an appeal. However, the sentence was not unduly harsh or severe. (County Ct, Jefferson Co)

People v Taylor, 230 AD3d 1562 (4th Dept 9/27/2024)
SUPPRESSION | DISPOSITIVE EVIDENCE| INDICTMENT DISMISSED

ILSAPP: Appellant previously appealed an Erie County Court judgment convicting him of second-degree CPW2, and the Fourth Department held that the trial court erroneously determined that the police engaged in a level-one intrusion by ordering appellant to step out of his car, held the appeal in abeyance, and remitted for further proceedings. On remittal, the trial court found that the police lacked reasonable suspicion and granted suppression. Because that ruling suppressed all evidence of the charged crime, the Fourth Department dismissed the indictment. The Legal Aid Bureau of Buffalo (Allison V. McMahon, of counsel) represented Taylor. (County Ct, Erie Co)

People v White, 230 AD3d 1533 (4th Dept 9/27/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

ILSAPP: Appellant appealed from a Jefferson County Court judgment convicting her of third-degree CPCS after a plea. The Fourth Department affirmed but found the waiver of appeal to be invalid, because the written waiver used overbroad language not cured by the oral colloquy. However, the sentence was not unduly harsh or severe. (County Ct, Jefferson Co)

People v Foltin, 231 AD3d 1517 (4th Dept 10/4/2024)
WITNESSES - Bolstering

LASJRP: In this child sex crime prosecution, the Fourth Department rejects defendant's contention that the trial court erred in allowing an officer to describe the phases of the forensic interview where the officer spoke only in general terms and did not mention the victim, and thus there was no bolstering.

The court also properly permitted testimony regarding the victim's demeanor during her initial interview with police, which was admissible to explain how the victim eventually disclosed the abuse and how the investigation started. (County Ct, Onondaga Co)

Matter of Kiara F., 231 AD3d 1489 (4th Dept 10/4/2024)
TERMINATION OF PARENTAL RIGHTS - Permanency Goal

LASJRP: In this permanent neglect proceeding, the Fourth Department rejects the father's contention that petitioner was required to change the permanency goal to adoption prior to petitioning to terminate his parental rights in order to avoid concurrent permanency goals that were inherently contradictory. The goal remained return to parent, and an agency is permitted to evaluate and plan for other potential future goals where reunification with a parent is unlikely; simultaneously considering adoption and working with a parent is not necessarily inappropriate. (Family Ct, Cayuga Co)

People v Kratz, 231 AD3d 1529 (4th Dept 10/4/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | DISCREPANCY BETWEEN SENTENCING MINUTES AND CERTIFICATE OF CONVICTION | REMITTED

ILSAPP: Appellant appealed an Onondaga County Court judgment convicting him of second-degree CPW after a plea. The Fourth Department found the waiver of appeal invalid, because the record failed to show that appellant fully understood the rights he was waiving. Although the court found the sentence not unduly harsh or severe, it remitted for resentencing because of a discrepancy in the PRS term noted in the sentencing minutes compared to the certificate of conviction. Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented Kratz. (County Ct, Onondaga Co)

People v Stewart, 231 AD3d 1480 (4th Dept 10/4/2024)
RIGHT TO COUNSEL - Effective Assistance/Jury Voir Dire

LASJRP: A three-judge Fourth Department majority concludes that defendant was deprived of his right to effective assistance of counsel.

Counsel, inter alia, failed to object during voir dire to improper comments from the prosecutor regarding his ability to sleep at night now that he is a prosecutor and no longer a defense attorney; and agreed to have the parties alternate which side went first in declaring whether they wished to exercise a peremptory challenge to a particular prospective juror, which violated CPL § 270.15(2) (People must exercise peremptory challenges first and may not, after defendant has exercised peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box). (County Ct, Oswego Co)

Matter of Betz v Betz, 2024 NY Slip Op 05713 (4th Dept 11/15/2024)
CUSTODY | NO DEFAULT | REVERSED AND REMITTED

ILSAPP: The mother appealed from an Erie County Family Court order granting the father sole custody of the subject child. The Fourth Department reversed and remitted. The Family Court erred in disposing of the matter based on the mother's

Fourth Department *continued*

purported default. The mother, although not present at the start of the proceeding, did appear and participated in a discussion regarding settlement until she was ordered out of the courtroom when she contested the award of sole custody to the father. The order appealed from also does not state that it was made on default; rather, the mother appeared personally and by her attorney. Family Court also abused its discretion in denying the mother's counsel's request for an adjournment, because it was unclear whether a trial was proceeding that day. The notice to the parties stated the appearance was for a "motion" related to the Attorney for the Child's subpoena for documents concerning the child, as well as father's counsel's request for an adjournment, to which both mother's attorney and the AFC had consented. Caitlin M. Connelly represented the mother. (Family Ct, Erie Co)

Brown v Annucci, 2024 NY Slip Op 05675
(4th Dept 11/15/2024)
ARTICLE 78 | CONCURRENT SENTENCES REQUIRED | REVERSED AND PETITION GRANTED

ILSAPP: Appellant appealed from a Wyoming County Supreme Court judgment dismissing his Article 78 petition. Appellant had sought to compel DOCCS to recalculate his aggregate sentence in accordance with the Fourth Department's directive, which effectively obligated DOCCS to run the sentences on all four counts of the indictment concurrently with one another. However, DOCCS had recalculated appellant's sentence to reflect that some counts would run consecutively. The Fourth Department reversed the dismissal and granted the Article 78 petition. The Fourth Department's previous order contained no express language limiting its directive to only a partial modification. Moreover, DOCCS lacks authority to resolve an ambiguity in a judicial order, since sentencing is a judicial function. David J. Pajak represented Brown. (Supreme Ct, Wyoming Co)

People v Cheese, 2024 NY Slip Op 05712
(4th Dept 11/15/2024)
BIASED PROSPECTIVE JUROR | FOR-CAUSE CHALLENGE | REVERSED

ILSAPP: Appellant appealed from an Onondaga County Court judgment convicting him of second-degree murder and two counts of second-degree CPW. The Fourth Department reversed and ordered a new trial. County Court erred in denying appellant's for-cause challenge to a prospective juror. The prospective juror gave "some indication of bias" by stating that he "absolutely" might hold it against the accused for choosing not to testify. The prospective juror's subsequent conduct of nodding affirmatively in response to the court's instruction and question posed to the entire jury panel was not an unequivocal assurance of impartiality. Appellant used a peremptory challenge on this prospective juror and then exhausted his peremptory challenges. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented Cheese. (County Ct, Onondaga Co)

People v Cohen, 2024 NY Slip Op 05658
(4th Dept 11/15/2024)
SORA | UPWARD DEPARTURE NOT WARRANTED | BIPOLAR DISORDER DIAGNOSIS | MODIFIED | DISSENT

ILSAPP: Appellant appealed from an Onondaga County Court order designating him a level three sex offender under SORA. The Fourth Department modified the order and designated appellant a level two. The lower court erred in granting an upward departure where appellant was not more likely to reoffend based on his post-arrest diagnosis of Bipolar Disorder, which had been previously undiagnosed and untreated, and where there was no evidence indicating that appellant was reluctant or unable to comply with treatment and prescribed medications. Additionally, appellant's post-offense statement to one of the victims that it was their word against his did not warrant an upward departure, as failure to accept responsibility is already considered under risk factor 12. Justices Bannister and Keane dissented and would have affirmed. Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented Cohen. (County Ct, Onondaga Co)

Matter of Daniel D., 2024 NY Slip Op 05665
(4th Dept 11/15/2024)
ABUSE/NEGLECT - Presumption Of Abuse - Circumstantial Evidence/Absence Of Post-Removal Injuries

LASJRP: The Fourth Department upholds a finding that the mother abused her four-month-old son, who was found to have nondisplaced fractures in six ribs and both legs.

The presumption in FCA § 1046(a)(ii) extends to all caregivers, especially when they are few and well defined, and the mother failed to rebut the presumption that she and the father, as the sole caregivers, were responsible for the injuries. In this "battle of medical experts," the court did not err in crediting the testimony of petitioner's expert, especially where the child did not sustain any more fractures after he was removed from respondents' home and placed with a relative pending trial, which commenced more than nine months following removal. (Family Ct, Monroe Co)

Fourth Department *continued*

People v Grzegorzewski, 2024 NY Slip Op 05657
(4th Dept 11/15/2024)
SORA | FOREIGN DESIGNATION CLAUSE | REMITTED | CONCURRENCES

ILSAPP: Appellant appealed from a Chautauqua County Court order designating him a sexually violent offender. The Fourth Department reserved decision and remitted. County Court designated appellant a sexually violent offender based solely on a prior out-of-state conviction for a sex offense. Citing People v Malloy, 228 AD3d 1284 [4th Dep't 2024], the appellate court determined that the SORA determination must include a finding of whether the underlying out-of-state offense was violent in nature in order to determine whether the statute, CL § 168-a[3][b], was constitutional as applied and remitted for that determination. Two justices wrote separately in concurrence and would have held the statute unconstitutional. Justice Curran's concurrence opined that appellant had met his burden for an as-applied challenge of showing that there was no rational basis to designate him a sexually violent offender. Justice Ogden's concurrence reiterated her concurrence in Malloy, concluding that the second disjunctive clause in CL § 168-a[3][b] is unconstitutional on its face. The Chautauqua County Public Defender (Heather Burley, of counsel) represented Grzegorzewski. (County Ct, Chautauqua Co)

People v Howard, 2024 NY Slip Op 05733
(4th Dept 11/15/2024)
SEARCH AND SEIZURE - Plain View Doctrine - Fruits/Consent To Search

LASJRP: The Fourth Department concludes that the plain view doctrine did not justify the seizure of checks, a printer, and a computer discovered in defendant's living room.

The officers were lawfully in defendant's house responding to an emergency, and their continued presence while waiting for a police investigator to arrive, after the initial basis for the police entry had been resolved, was not unreasonable. However, the incriminating nature of the seized items was not immediately apparent. The police obtained probable cause only upon manipulating and moving the checks.

Any consent to a search of the home given by defendant or his romantic partner after the police discovered the evidence in question did not attenuate the taint. (Supreme Ct, Monroe Co)

Matter of Juliet W., 2024 NY Slip Op 05690
(4th Dept 11/15/2024)
TPR | SUMMARY JUDGMENT IMPROPER | REVERSED AND REMITTED

ILSAPP: Mother appealed from a Cattaraugus County Family Court order terminating her parental rights, which brought up for review an order granting a summary judgment motion. The Fourth Department reversed, denied the motion, and remitted to Family Court. The summary judgment motion was premised on the ground that the mother was collaterally estopped from relitigating the issue of whether she was "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate for [the subject] child," based solely on a 2018 dispositional order regarding the mother's other children. The petitioning agency failed to submit any additional evidence regarding the mother's purported mental illness or intellectual disability. The prior order, premised on evidence from at least three years prior, was thus insufficient to establish by clear and convincing evidence the mother's present mental condition or intellectual disability. Erickson Webb Scolton & Hajdu, Lakewood (Lyle T. Hajdu, of counsel) represented the mother. (Family Ct, Cattaraugus Co)

People v Morris, 2024 NY Slip Op 05676
(4th Dept 11/15/2024)
CPW | LEGALLY INSUFFICIENT| REVERSED

ILSAPP: Appellant appealed from an Erie County Court judgment convicting him of first-degree assault and second-degree CPW. The Fourth Department reversed in part and vacated the CPW conviction, even though the challenge to legal sufficiency was unpreserved. Appellant demonstrated at trial that he had a license for the firearm at issue, and the prosecution failed to disprove beyond a reasonable doubt that appellant was exempt from prosecution. The People did not oppose vacatur of the conviction. Paul G. Dell represented Morris. (County Ct, Erie Co)

People v Park, 2024 NY Slip Op 05717
(4th Dept 11/15/2024)
ILLEGAL SENTENCE | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Chautauqua County Court judgment convicting him of first-degree rape and first-degree criminal sexual act. The Fourth Department reversed and remitted. Although appellant did not challenge the legality of the sentencing range before the trial court, the Fourth Department remitted because the range was illegally low. County Court must give appellant the opportunity to either withdraw his plea or be resentenced. The Legal Aid Bureau of Buffalo (Braedan M. Gillman, of counsel) represented Park. (County Ct, Chautauqua Co)

Matter of Parker J., 2024 NY Slip Op 05679
(4th Dept 11/15/2024)
TERMINATION OF PARENTAL RIGHTS - Right To Counsel/Waiver

Fourth Department *continued*

LASJRP: In this termination of parental rights proceeding, the Fourth Department concludes that the mother knowingly, intelligently, and voluntarily waived her right to counsel, noting that the Family Court, by asking the mother about her age, education, occupation, previous exposure to legal procedures and other relevant factors, engaged in the requisite searching inquiry to ensure that the mother was aware of the dangers and disadvantages of proceeding without counsel. (Family Ct, Onondaga Co)

Matter of Rodriguez v Young, 2024 NY Slip Op 05705
(4th Dept 11/15/2024)
CUSTODY - Relocation

LASJRP: The Fourth Department upholds an order that, upon a hearing, granted the mother permission to relocate with the child from Erie County to New York City.

The mother initially planned a temporary move to New York City to care for her mother, who was undergoing cancer treatment. While in New York City, the mother, who had lost her job, apartment, and car due to the COVID-19 pandemic, was able to obtain suitable housing and full-time, salaried employment. Although the unilateral removal of the child from the jurisdiction is a factor to consider, an award of custody is based on best interests and not a desire to punish the recalcitrant parent.

The mother has been the primary caregiver of the child and the father's visitation with the child was inconsistent and he has no accustomed close involvement in the child's everyday life. (Family Ct, Erie Co)

People v Walker, 2024 NY Slip Op 05662
(4th Dept 11/15/2024)
PROSECUTION APPEAL | CPL 245.20/30.30 DISMISSAL| REVERSED | CONCURRENCE

ILSAPP: The prosecution appealed from an Erie County Court judgment dismissing the indictment after a CPL 30.30 speedy trial motion. The Fourth Department reversed. The case arose after Walker's alleged assault of his parole officer, and the prosecution failed to produce the parole officer's disciplinary records in discovery. The defense then filed a motion to dismiss, which the trial court granted, because this failure invalidated the CPL § 245.20 certificate of compliance and thereby rendered any statement of trial readiness illusory. The Fourth Department held that the records at issue were possessed by DOCCS and thus outside the purview of discovery the prosecution was required to provide under CPL § 245.20.

Because the prosecution properly complied with their discovery obligation, there was no speedy trial violation. Justice Curran concurred to express the view that the remedy of dismissal under CPL § 30.30 is only available when the prosecution fails to comply with their initial discovery obligations under CPL § 245.20[1], agreeing that the records at issue do not fall within that sub-section's possessory prong. (County Ct, Erie Co)

People v Yates, 2024 NY Slip Op 05738
(4th Dept 11/15/2024)
SENTENCE NOT IMPOSED FOR EACH COUNT | AFFIRMED BUT REMITTED FOR RESENTENCING

ILSAPP: Appellant appealed from an Oneida County Court judgment convicting him of second-degree rape, two counts of third-degree rape, and three counts of EWC after a bench trial. The Fourth Department affirmed but vacated the sentence and remitted for resentencing where County Court failed to impose a sentence for each count of which appellant was convicted by not pronouncing the sentence on the final count of EWC during sentencing. Public Defender, Utica (David A. Cooke, of counsel) represented Yates. (County Ct, Oneida Co)

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