NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center

REPORT

Volume XXXX Number 1 January - April 2025

Defender News

62nd Anniversary of Public Defense: Crises and Progress

March 18th was the 62nd anniversary of the U.S. Supreme Court decision in *Gideon v Wainwright*, the landmark constitutional right to counsel case. For over six decades, federal and state efforts to implement and expand the right have faced continuing challenges. The anniversary, celebrated for years in New York as "Gideon Day," and now known nationally as Public Defense (or Defender) Day, presents opportunities to reflect on criminal and family defense issues.

Lack of funding—low salaries and few resources—has been a root cause of many public defense failings nationwide. This was the case twenty years ago, as noted in a national report, Gideon's Broken Promise, following hearings held during Gideon's 40th year. It is still the case in many places. An April 4th article posted by the Texas Tribune was entitled: "You have the right to an attorney. But in Texas, don't count on it." It noted that the Sixth Amendment Center has found "Texas spends less per resident on indigent defense than all but four other states" and the Texas Indigent Defense Commission estimated that "more than half of rural Texans accused of misdemeanors are left to represent themselves"; a research paper at 8 J Crim Justice & Law 25 has details.

A public defender in Pennsylvania wrote an op-ed the month before Gideon Day; she practices "in a county in a state that provides almost no funding for its public defenders." Public defense representation, she said, should include helping clients gain "a fighting chance for success," not just a good case outcome. She also wrote that if "decision-makers knew my clients as I do, the need for additional resources for indigent defense would be obvious as a cost-effective way to improve lives and the community at large – and would be addressed." NYSDA and defenders around New York State strive to secure such client-centered representation for all who need publicly-funded representation.

Meanwhile, here and across the country, public defense programs face a dearth of available lawyers. Salaries can play a role. A recent post by the Association of Legal Advocates and Attorneys showed that New York City entry-level defender salaries, when adjusted for cost of living, were the lowest among 14 cities. While funding is one aspect of the lack of attorneys seeking defender jobs, the problem can be more complex. Recognizing the need to encourage lawyers to choose this work, NYSDA's Director of Recruitment and Retention, Isabelle Ramos, is working with both chief defenders and law students and graduates to raise awareness of and interest in public defense. One indicator of the situation here is the number of positions from around the state posted on the Jobs (Career Center) page of our website. As to funding in New York, NYSDA advocated throughout the state budget process for the increase in state funding for family defense requested by the Indigent Legal Services Office (ILS), and other needed monies. The Executive Director and Director of the Veterans Defense Program testified in legislative budget hearings as noted in the February 18th edition of News Picks from NYSDA Staff. Looking beyond the current budget and counsel rights that have become traditional in the 62 years since Gideon, the need for counsel in other contexts, such as immigra-

VDP Annual Report Available
See NYSDA's Veterans Defense Program
2024 Annual Report
in the VDP section at www.nysda.org
Includes descriptions of VDP's services, case studies, funding, accolades from defenders, and more!

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tion courts and housing courts, is growing starker. Gothamist.com reported that "Immigrant advocates and lawyers say an increasing number of migrant children are making immigration court appearances without the assistance of attorneys, which they say will lead to more children getting deported." A study announced on April 26th by the National Coalition for a Civil Right to Counsel noted a number of positive developments in jurisdictions that have created a right to counsel in housing courts; these included increased court awareness of the need to enforce tenants' rights, development of caselaw on previously ambiguous areas of landlord-tenant law, and a reduction of bias against tenants. In so many areas, every day should be a day to expand and enforce Gideon.

Information about the final state budget will appear in the next issue of the REPORT.

Review Standard for Sentences: Unduly Harsh or Severe

On January 9th, the Court of Appeals said in *People v Brisman* (summary p. 11) that the proper test for intermediate courts' review of claims that sentences are excessive is whether a sentence is "unduly harsh or severe." A heightened standard, requiring extraordinary circumstances or abuse of discretion, was rejected. Three judges dissented.

The opinions discuss the historical "inherent power" of the intermediate appellate courts in this state to reduce sentences in the statutory provision addressing that power, see CPL 470.15(2)(c) and (6)(b); the state constitution (Art VI, Sec 4(k); and a case from over 30 years ago, *People v Delgado* (80 NY2d 780 [1992]). At least one case is pending Court of Appeals review in light of the *Brisman* decision. See *People v Paulino* in the New Filings list of 4/4/2025; the First Department's decision was summarized and discussed in the Oct.-Dec. 2024 issue of the REPORT.

Judge Troutman's opinion for the *Brisman* majority includes a statement that may be helpful in other contexts such as application of the Domestic Violence Survivors Justice Act (DVSJA). Troutman wrote that use of an erroneous standard that would overly protect challenged sentences would do harm "by potentially insulating excessive sentences from modification, for *society derives no legitimate benefit from imprisoning a person for longer than is warranted*." [Emphasis added.]

3rd Dept: Dismissal Without Prejudice of DVSJA Petition Not Appealable

The Third Department held last November that a County Court order dismissing without prejudice a petition for resentencing under CPL 440.47 was not appealable. The petition did not provide two pieces of evidence corroborating abuse as the Domestic Violence Survivors Justice Act (DVSJA) requires when sentencing relief is sought based on prior abuse. The proper remedy, the court said in *People v Melissa OO.* (summary p. 41), was to refile the petition with the required evidence. To the extent that unavailability of appeal in this situation could insulate some erroneous determinations from review, it is up to the Legislature, not the courts, to provide a remedy, a footnote in the opinion said.

The DVSJA Task Force's guidebook, Intake & Case Assessment for DVSJA Resentencing, available on NYSDA's DVSJA webpage, addresses the statute's requirement that petitions seeking resentencing provide two pieces of evidence—one of which must fall within a narrow list of official documents or be a sworn affidavit by a witness to the abuse—and offers practice tips on this topic.

Other DVSJA Issues on Appeal

In *People v Ava OO.* (summary p. 42), the Albany County Supreme Court's rejection of a DVSJA application for "compassionate sentencing" was overturned. The appellate court stressed that "a reviewing court's assessment of whether the abuse suffered by a defendant was a significant contributing factor to his or her criminal conduct 'should consider the cumulative effect of the abuse together with the events immediately surrounding the crime, paying particular attention to the circumstances under which the defendant was living and adopting a full picture approach in its review ' …." The court noted the defendant's lack of a criminal record prior to meeting the codefendant, who took advantage of the defendant's

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emotional and mental health issues and supported her drug addiction, physically abused her, and committed myriad other abuses, including isolating her from her family, forcing her into prostitution, and threatening to kill her. In the "final prong of the statutory analysis, while not disregarding the impact of defendant's criminal behavior or that the sentence imposed was part of a negotiated plea which encompassed various other pending charges, considering 'the nature and circumstances of the crime and the history, character and condition of' defendant," the court found a reduced sentence pursuant to the DVSJA to be warranted.

Other DVSJA issues are percolating through the appellate courts. For example, leave to appeal was granted by Judge Cannataro in *Matter of Hudson*, which poses the question whether a defendant's right to a Penal Law 60.12 hearing under the DVSJA is waivable as a condition of a plea. (The Second Department decision in *People v Hudson* was summarized in the Oct-Dec. 2024 issue of the REPORT.)

Leave to appeal having been granted last year by a dissenting judge in *People v Angela VV.*, where the issue is whether the defendant established entitlement to resentencing under the DVSJA, oral argument was held in the Court of Appeals on April 9th. The arguments were discussed in an April 11th article posted on *Law.com*. The day before, argument was held in *People v T.P.*; DVSJA relief having been obtained in the Fourth Department, as noted in the May 17th edition of News Picks from NYSDA Staff, the issues before the high court were trial issues relating to effective assistance of counsel, justification instructions, and the prosecutor's summation.

Information on these and many other criminal cases can be found in the Center for Appellate Litigation's Court of Appeals Newsletter. As the *REPORT* went to press, the Court of Appeals issued decisions in both DVSJA cases and summaries will appear in the next issue.

Other DVSJA News

Two recent publications look at aspects of the DVSJA five years after its passage. One is Second Look Myopia: State Sentencing Reform and the Local Prosecutorial Response, appearing at 114 J of Crim Law & Criminology 827. Examining the cases to date suggests, author Alexandra Harrington says, "that consent from prosecutors is correlated with success in securing resentencing" and "that this consent is unevenly distributed throughout the state." In some locations, she adds, prosecutors' offices serve "almost entirely to obstruct the path to relief."

The other new publication is A Second Look at Second Look: Promoting Epistemic Justice in Resentencing, at 100 NYU Law Rev 1. Katharine R. Skolnick compares the DVSJA and the 2004–2009 Drug Law Reform Acts. She concludes that, to bring about decarceration, "resentencing reforms should be categorical or presumptive rather than discretionary."

Offering evidence in support of a reduced sentence under the DVSJA may catch the attention of the news media. An April 30th story in the *Times Union* opened with the following lede. "The defense team for convicted murderer Carrie Weiser argued for a light sentence Tuesday under a 2019 state law that allows for shorter prison stints for defendants who have previously experienced domestic abuse." The article recounted the testimony of a forensic psychologist, including the prosecution's efforts to "poke holes" in it to disparage the claim of abuse.

News coverage of DVSJA can be a positive thing. The News Picks edition of Jan. 16, 2024, noted the release of Nikki Addimando, whose case "was followed closely by many DVSJA supporters" and whose story inspires other survivors who may seek sentencing relief. As this issue of the *REPORT* went to press, Addimando and her sister, Michelle Horton, author of the memoir *Dear Sister*, were to be honored by Hope's Door for their impact on countless lives.

NYSDA Offers Training in Person, On Zoom, and Now On-Demand

In early 2025, NYSDA provided continuing legal education (CLE) training opportunities across a range of issues, venues, and platforms.

While changes to the discovery statute's requirements for prosecutors were being debated, sections relating to defense disclosures were assumed to remain static. In a two-hour NYSDA webinar in February, John Schoeffel of The Legal Aid Society presented Discovery from the Defense: Ethics + Key Questions.

The 39th Metropolitan Trainer in New York City, provided in cooperation with a number of downstate defender programs, offered updates on Court of Appeals decisions and immigrant defense practice, as well as a look at protecting a right to a jury trial in cases at least arguably affected by the U.S. Supreme Court decision in *Erlinger v United States*, 602 US 821 (2024), and a deep dive into DNA laboratory contamination issues. Information about DNA contamination at the New York City Office of the Chief Medical Examiner was included in the Feb. 18th edition of News Picks, which also noted other DNA resources added to the Forensics Resources webpage.

On April 2nd, NYSDA's Discovery and Forensic Support Unit offered Challenging Software- and AI-Generated Evidence. A further look at legal ramifications of artificial intelligence was being prepared as the REPORT went to press: AI Analytics and Fourth Amendment Challenges, on May 21st.

Other spring CLE events include:

- Practical DWI Detection & Standardized Field Sobriety Testing (SFST) Instruction Course. June 26 - June 28, 2025.
- Basic Trial Skills Program (June 8th - June 13th)
- 58th Annual Meeting and Conference (July 27th - 29th).

See information and registration on NYSDA's Training Calendar

Selected CLE Recordings Available on NYSDA's Website

On April 15th, NYSDA announced that recordings of select 2024-2025 training events are available, for members, on www.nysda.org for viewing at no charge for CLE credit. The session on Discovery from the Defense, above, and several family defense programs, are among the offerings now available. Other programs will be added.

To become a member, supporting NYSDA's work and gaining access to these videos, contact Heather Rapp at hrapp@nysda.org.

See the box on p. 16.

Prevention of Removal to Family Court Issues Discussed in Decision, Other RTA Issues Continue

In *People v Guerrero* (summary p. 52), a Fourth Department panel rejected the defense contention that the trial court erred in granting the prosecution's CPL 722.23(1)(b) motion to prevent removal of a case from Youth Part to Family Court. While the majority agreed with the defense that the client's prior adjudications as a juvenile delinquent, or evidence from such proceedings, could not be used in determining the motion to prevent removal, "it is still permissible to raise the illegal or immoral acts underlying such adjudications ...." [Internal quotation marks omitted.] The client's past involvement in the criminal legal system and lack of "appreciable positive response" to "various services and programs" provided during that time was noted.

In dissent, Judge Montour concluded that the trial court abused its discretion because the required "extraordinary circumstances" were not shown. What was shown by the prosecution was not "evidence regarding the nature of the underlying acts that resulted in the adjudications as a juvenile delinquent" but rather "defendant's response to the treatment that he received while participating in Family Court after being adjudicated a juvenile delinquent," which could not properly be considered. Further, as to declining proffered services, the dissent noted that the evidence showed it was the defendant's mother who rejected use of those services. Additionally, Montour wrote, "it cannot be that the violent nature of the crime, standing alone, is an extraordinary circumstance sufficient to warrant denial of removal of the proceeding ...."

The *Guerrero* opinions did not discuss the quality or quantity of services available to youth in Family Court. As noted in the Oct.-Dec. issue of the *REPORT*, questions have been raised about the availability of any meaningful intervention or support services. A recent op-ed on *AmsterdamNews.com* asserted that "most RTA [Raise the Age] funds have not been used as intended. Indeed, rather than being used for community programs that could prevent youth from entering the criminal legal system, RTA funds are being mostly used for detention and probation." It cited a January 16th *Politico.com* report that said the "host of 'wraparound services'" for teens charged with crimes and for at-risk youth meant to be provided with $250 million of RTA funding had not materialized. Among the reasons presented for the failure is that an onerous reimbursement process rather than block grants was put in place.

Attorneys representing clients in Youth Part can find information in Alan Rosenthal's manual on representation of adolescents, posted on NYSDA's Criminal Defense Resources webpage. It includes an entire chapter on Removal of Adolescent Offender and Juvenile Offender Cases to Family Court. The manual also discusses broader issues, noting, for example, that "[t]he notion that incorrigibility is inconsistent with youth is one of the animating purposes of New York's recently enacted Raise the Age legislation. *People v. Doe*, 62 Misc.3d 574 ...." [Internal quotation marks omitted.]

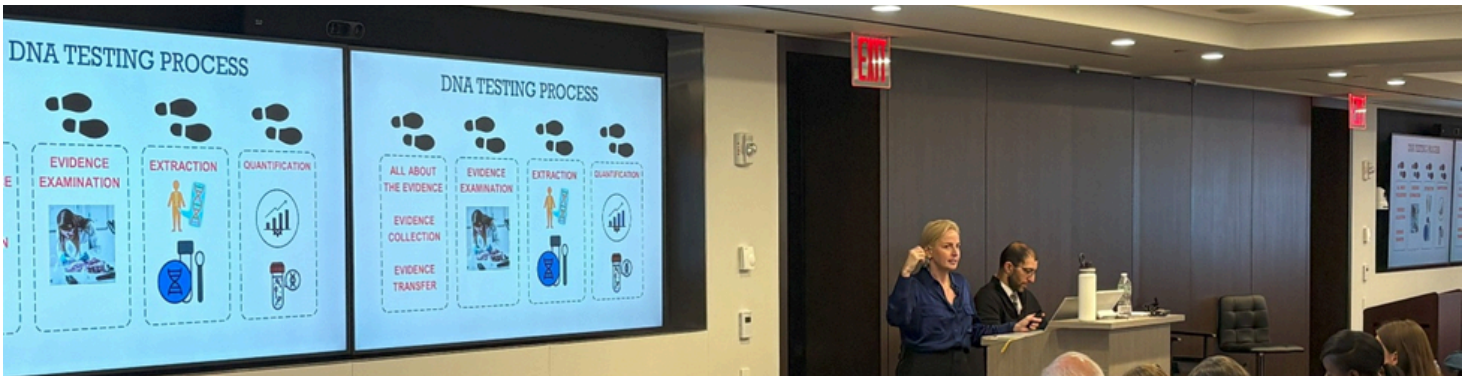
Raise the Age was also mentioned in the recent training on Protecting the Rights of Non-Citizens in Family Court.

FOIL, Law Enforcement Records Addressed

The Court of Appeals issued two decisions regarding law enforcement disciplinary records and the Freedom of Information Law (FOIL) on February 20th, *Matter of New York Civil Liberties Union v City of Rochester* (summary p. 13) and *Matter of NYP Holdings, Inc. v New York City Police Department* (summary p. 13). As mentioned in the March 11th edition of News Picks, the Court held that records of civilian complaints against police officers, even complaints not found to be substantiated, are subject to FOIL, and that the repeal of Civil Rights Law 50-a, which barred release of disciplinary records, applied retroactively to records created when 50-a was in force. The *NYP Holdings* decision was noted in the Rochester *Daily Record*, which included links to the oral argument (video and transcript) on NYcourts.gov.

Law enforcement continues to resist FOIL requests, and courts continue to direct disclosure. The Second Department, in *Matter of New York Civil Liberties Union v Suffolk County* (2025 NY Slip Op 01933 [4/2/2025]), affirmed a Supreme Court

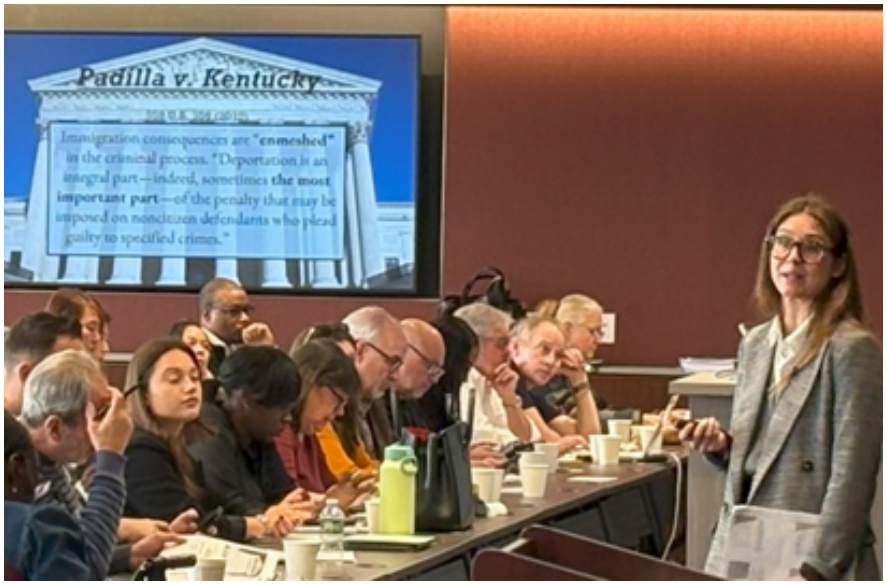
39th Annual Metropolitan Trainer



This year's training in New York City on March 14th was held at a new location – The Legal Aid Society (LAS) Training & Advocacy Center on Water Street.

With ample screens, the approximately 150 people in the room could easily see presenter's slides. NYSDA thanks the LAS and all of the defender organizations that cooperated with us on this training.

Above: Martha Saunders (standing) and Paul Beyder of the LAS DNA Unit presented on Laboratory Contamination: Identifying Issues and Litigation Strategies.



The Padilla Support Center of the Immigrant Defense Project presented Immigrant Defense Practice Update. Above, Staff Attorney Denise Grosman.

"The training was exceptional as always. The subject matters were interesting and necessary, and the presenters were very knowledgeable and engaging." – Attendee

(more photos p. 8)

decision that granted a request for disclosure of certain law enforcement investigatory and disciplinary records, subject to certain redactions or exemptions. *Newsday* reported that the president of the Suffolk Police Benevolent Association had criticized the decision, while an NYCLU assistant legal director praised it.

Another FOIL question was addressed by the First Department on February 6th in *Matter of the Legal Aid Society v Records Access Officer, NYPD* (summary p. 22). The Legal Aid Society (LAS) sought New York Police Department (NYPD) documents relating to procurement of technology and surveillance products and services through special expense purchase contracts, which were confidential agreements created pursuant to a procedure in effect from 2007 to 2020. The program was terminated following the City Council's enactment of the Public Oversight of Surveillance Technology Act (POST). The NYPD denied LAS's FOIL request. The trial court ruled in the resulting litigation that the NYPD failed to meet its burden of showing that the material being sought falls squarely in the statutory exemptions in FOIL. The First Department affirmed, saying the NYPD's evidence of "burdensomeness" was nonspecific and failed to contend with the requirements of the POST Act. The NYPD was directed to comply with the lower court's order directing its "best efforts" to produce responsive records by a date certain and continue to produce such records every three months along with a status update of compliance with the FOIL request.

FOIL remains a valuable investigatory and advocacy tool. On April 8th, MuckRock posted a guide for using the federal Freedom of Information Act (FOIA) to access law enforcement records. The suggestions there may be helpful for those pursuing New York FOIL requests as well as FOIA inquiries.

Agency Must Show Diligent Efforts to Strengthen Parent-Child Relationship

In *Matter of Aaronlin Savanna R.* (summary p. 33), the Second Department considered a case involving a basic tenet of family law. "In a proceeding to terminate parental rights based on permanent neglect, the petitioning agency must, as a threshold matter, prove by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parent-child relationship before the court may consider whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child ... see Social Services Law § 384-b [7] [a] ...." [Citations and internal quotation marks omitted.] Where the petitioner had failed to make an initial showing, by clear and convincing evidence, of such efforts, and the court properly determined that there was no basis to excuse the agency's obligation, dismissal of the petition against the father was upheld.

Such a parental victory is not guaranteed. Family defenders must monitor agency compliance, and take steps to compel it, as noted in the Indigent Legal Service Office standards for parental representation; see Standard H-2. Yet too often defenders see agency efforts they view as minimal being held "diligent." Attorneys are encouraged to contact NYSDA's Family Court Staff Attorney, Kim Bode, about issues concerning an agency's efforts and about counsel's responsibilities regarding the issues.

What Duty of Care do Counties Owe to Children?

County agencies and agents may have duties beyond those discussed above. Parents and children seeking to hold a county accountable for unacceptable foster care conditions may find hope in *Weisbrod-Moore v Cayuga County* (summary p. 13). The Court of Appeals held that by placing children in foster homes, municipalities assume custody of the children and so owe them a duty of care. The case was noted in the March 11th edition of News Picks. Judges Singas and Garcia dissented, concerned about an unfounded, crushing fiscal burden being imposed on counties.

But where a child was placed in the care of a county's Department of Social Services after being designated a person in need of supervision, and the assigned caseworker sexually abused the child, dismissal on summary judgment of a suit against the county for negligent supervision of the caseworker was upheld. The plaintiff, whose suit based on 1993 events was brought under the claim-revival provision of the Child Victims Act, "failed to provide sufficient proof such that a jury could conclude that the County had actual or constructive notice of Mr. Hoch's propensities or that the County would have been on notice but for its allegedly lax supervision and training," the Court of Appeals held. Judge Rivera asserted in dissent that the county "was not entitled to summary judgment on plaintiff's negligent supervision claim because there are triable issues of material fact as to whether it should have known about the dangers to plaintiff presented by its employee." *Nellenback v Madison County* (summary p. 16).

Family defenders who gain information about alleged abuse or negligence affecting clients' children in foster care or under county supervision may want to advise clients to consider consulting a civil attorney about possible suits, preserving evidence, etc.

The Fight Continues for Meaningful Change in the Family Regulatory System

The fight for systemic reform in family court continues. On Feb.

5, 2025, a press release was issued by the NYS Office of Court Administration (OCA), announcing the formation of a panel charged with studying the array of issues negatively impacting youth, children, and families in New York State. In the press release, Chief Administrative Judge Joseph A. Zayas acknowledged, "[o]ur family courts and justice system handle urgent matters involving deep-rooted, systemic issues …." He went on, "[w]e are striving to do better in responding to the essential needs of New York's children and families in crisis."

Additionally, the Family Justice Initiative: Court and Community Collaboration (FJI) released a Preliminary Report and Recommendations. The introduction to the preliminary report states, "[t]he Initiative is solutions-focused, prioritizes areas for improvement, identifies promising programs, and explores new ideas to strengthen families, reduce unnecessary system involvement, and break intergenerational cycles of trauma." The priorities of FJI are self-identified as: 1) increasing access to justice, fairness, and equity in the court process; 2) creating exit ramps for court-involved individuals and families; and 3) preventing or reducing further system involvement by investing in community-based solutions to support families. The preliminary recommendations to meet these goals include, but are not limited to: a proposal to increase funding for parent attorneys, as well as incorporating cost-of-living increases to keep up with inflation; an implementation plan for Rule 205.19 of the Uniform Rules of the Family Court and funding to pay for timely representation in child welfare cases before they ever come to court; increased funding and resources for interpretation services; and development of education and training programs for judges, attorneys, and staff. According to the report, the next phase of the work will include "the development of working groups to pursue longer-term areas for improvement while continuing to identify concrete opportunities for investment along the way." FJI is a collaboration between the Center for Justice Innovation, the Governor's office, and the NYS Unified Court System.

2nd Dept: Non-Respondent Parents Cannot Be Supervised by CPS; 1st Dept Decision Imminent

In a victory for parents challenging the overreach of the "child protective services", the Second Department in *Matter of Sapphire W.* (2025 NY Slip Op 00662) ruled that a family court may not place a non-respondent custodial parent under the supervision of child protective services and the courts when the abuser is living elsewhere and the child has not been removed. The suit was brought by a non-respondent mother who was placed under the supervision of ACS after a neglect proceeding was commenced against the father, with allegations including that he committed acts of domestic violence in front of the child. The appellate division decision reflects that during the pendency of the neglect case the court issued an order of protection against the father on behalf of the mother and child. The child was released to the mother under the supervision of ACS, without any allegation of neglect or abuse against the mother, who was also the alleged victim. In its decision, the court noted that the family court is a court of limited jurisdiction. It stated that, "Contrary to ACS's contention, Family Court Act § 1017 did not provide the Family Court with authority to subject the mother to supervision by ACS and the court, or to require her to 'cooperate' with ACS ….'" [Citation omitted]. The court also "did not have authority pursuant to Family Court Act § 1017 to impose the challenged directives upon the mother, no matter how 'well-intended' the court's 'goals' may have been." [Citation omitted.] This case was also reported in the *New York Times*.

Please note that this decision applies not only to victims of domestic violence but all non-respondent parents. NYSDA congratulates the Family Justice Law Center (FJLC) and the organizations that submitted amicus briefs for this consequential victory. Additionally, FJLC presented oral argument in *Matter of A'Kahri R.* before the Appellate Division, First Department, challenging a family court order that had subjected the non-respondent mother to nine months of ACS surveillance, although she had always had custody of her child and was accused of no wrongdoing." That decision is currently pending.

Neglect Not Established with Negative Inference

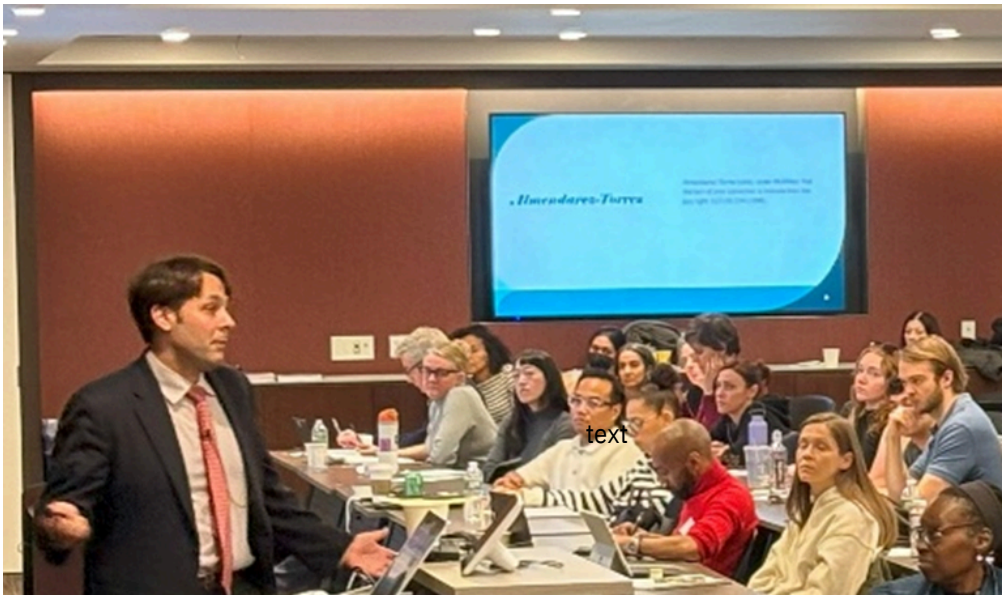
The issue of negative inferences in family court is a topic that comes up quite a bit in abuse and neglect proceedings when the respondent elects not to testify. An example of this is the First Department case *Matter of J.V.* (summary p. 18). The appellate division found error with the family court's neglect finding against the father for providing inadequate shelter based on nothing more than a strong negative inference drawn by the court against the father for his failure to testify. The court stated in its decision, "[t]he strong inference drawn by the court against respondent for failure to testify is insufficient by itself to provide the necessary link between the conditions of the apartment and any imminent harm to the children (*see Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [1st Dept 2010])."

NYSDA recently hosted a free webinar entitled, Should My Client Testify? Negative Inferences and Other Considerations, presented by Piyali Basak, Managing Director at Neighborhood Defender Services of Harlem, and Jeff Blank, Attorney-in-Charge, Integrated Defense Practice at Brooklyn Defender Services. This CLE is available on demand to NYSDA members (see p. 16). Questions about negative inferences or any other family court-related topic? Contact Kim Bode at kbode@nysda.org.

39th Annual Metropolitan Trainer

"Timothy Murphy is a treasure. I have never looked forward to case law updates the way I do when he is presenting them." – Attendee

Timothy Murphy, Assistant Federal Public Defender, Appellate Unit Federal Public Defender's Office for the Western District of New York, presented a Court of Appeals update.



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Matthew Bova, Supervising Attorney & Director, Impact Litigation Project, Co-Director, COA Litigation, Center for Appellate Litigation, presented on Protecting Your Client's Post-*Erlinger* Right to a Jury Trial.

"Very topical, interesting, and not overwhelming. 4 blocks or topics was just right." – Attendee

(more photos p. 5)

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.

Bouarfa v Mayorkas, No. 23-583 (12/10/2024)

Whether a given federal agency decision on an immigration matter is mandatory or discretionary matters. "Congress has limited judicial review of many discretionary determinations." At issue here is the Secretary of Homeland Security's revocation of approval of a visa petition by a U.S. citizen on behalf of a noncitizen spouse. Under 8 USC 1155, the Secretary may revoke approval at any time "'for what he deems to be good and sufficient cause.'" This falls within the purview of 8 USC 1252(a)(2)(B)(ii), which "strips federal courts of jurisdiction to review certain discretionary actions." The U. S. Citizenship and Immigration Services (USCIS), which exercises authority delegated by the Secretary and the Attorney General, initially granted a visa to the noncitizen spouse here but later revoked it on the basis that the non-citizen's prior marriage to a citizen had been for the purpose of evading immigration law. The current citizen spouse's court challenge to the revocation was properly dismissed.

Andrew v White, No. 23-6573 (1/21/2025)
RIGHT TO FAIR TRIAL
EVIDENCE - Undue Prejudice/Due Process

LASJRP[1]: In a capital murder prosecution, the State spent significant time at trial introducing evidence about defendant's sex life and about her failings as a mother and wife, much of which it later conceded was irrelevant. In a federal habeas petition, defendant argued that this evidence had been so prejudicial as to violate the Due Process Clause. The Court of Appeals rejected that claim because, it thought, no Supreme Court holding established a general rule that the erroneous admission of prejudicial evidence could violate due process.

The Supreme Court reverses. This Court had made clear that when evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.

Glossip v Oklahoma, No. 22-7466 (2/25/2025)
PROSECUTORIAL MISCONDUCT - Presentation Of Perjured Testimony
BRADY MATERIAL

LASJRP: Nearly two decades after defendant's murder trial, the State disclosed eight boxes of previously withheld documents. These documents show that Sneed, a testifying co-defendant, suffered from bipolar disorder, which, combined with his known drug use, could have caused impulsive outbursts of violence. They also established that a jail psychiatrist prescribed Sneed lithium to treat that condition, and that the prosecution allowed Sneed falsely to testify at trial that he had never seen a psychiatrist.

Before the Oklahoma Court of Criminal Appeals, the State conceded that the prosecution's failure to correct Sneed's testimony violated the prosecutor's constitutional obligation under Napue v. Illinois (360 U.S. 264) to correct false testimony, and the attorney general asked the court to grant defendant a new trial. The OCCA declined to grant relief because, it held, the State's concession was not "based in law or fact."

Concluding that the prosecution's failure to correct Sneed's trial testimony violated the Due Process Clause and Napue, a Supreme Court majority reverses and remands the case for a new trial. Although the dissent claims that the false testimony must itself have directly affected the trial's outcome to be material under Napue, the prosecutor's failure to correct Sneed's false testimony is the relevant error, and such a correction could have made a material difference.

Although Justice Barrett's partial concurrence/dissent suggests a remand for further proceedings on the ground that the evidence does not remove all doubt that the attorney general's view of the record is correct, the record establishes a violation of Napue. The Court has not required an evidentiary record free of doubt to find a Napue violation in any case, much less when an attorney general confesses that his own office erroneously obtained a capital conviction.

Justice Thomas and Justice Alito dissent.

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

US Supreme Court *continued*

Lackey v Stinnie, No. 23-621 (2/25/2025)
CIVIL RIGHTS ACTIONS - Attorney's Fees

LASJRP: Drivers whose licenses were suspended under a Virginia statute for failure to pay court fines brought a § 1983 action against the Commissioner of the Virginia Department of Motor Vehicles challenging the statute as unconstitutional. The District Court granted a preliminary injunction prohibiting the Commissioner from enforcing the statute. Before trial, the Virginia General Assembly repealed the statute and required reinstatement of licenses suspended under the law, and the parties agreed to dismiss the pending case as moot.

Section 1988(b) allows an award of attorney's fees to "prevailing parties" under § 1983. The District Court declined to award attorney's fees to the drivers on the ground that parties who obtain a preliminary injunction do not qualify as "prevailing part[ies]." The Fourth Circuit reversed en banc, holding that some preliminary injunctions can provide lasting, merits-based relief and qualify plaintiffs as prevailing parties, even if the case becomes moot before final judgment.

The Supreme Court reverses. A party "prevails" when a court conclusively resolves his claim by granting enduring relief on the merits that alters the legal relationship between the parties. Both the change in relationship and its permanence must result from a judicial order. A preliminary injunction, which temporarily preserves the parties' litigating positions based in part on a prediction of the likelihood of success on the merits, does not render a plaintiff a "prevailing party." Nor do external events that moot the action and prevent the court from conclusively adjudicating the claim.

Justice Jackson and Justice Sotomayor dissent.

Delligatti v United States, No. 23-825 (3/21/2025)
SENTENCE - Crime Of Violence

LASJRP: The Supreme Court holds that for sentencing enhancement purposes under 18 U.S.C. § 924(c)(3)(A), which defines a "crime of violence" to include a felony that involves the "use of physical force" against another person, the knowing or intentional causation of bodily injury necessarily involves the use of physical force, and thus the definition does not encompass cases where an offender causes bodily injury by omission rather than action. The ordinary meaning of the term "crime of violence" is one of the most important factors the Court can consider.

Justice Gorsuch and Justice Jackson dissent.

Thompson v United States, No. 23-1095 (3/21/2025)

The statutue, 18 USC 1014, "does not criminalize statements that are misleading but true." The meanings of "false" and "deceitful" overlap, but "some misleading statements are not false," so "the only relevant question according to the text of the statute is whether the statement is 'false.'" The defendant did not violate the statute for saying he had "'borrowed . . . $110,000' from the bank" but omitted that he had borrowed further amounts separately; "under the statute, it is not enough that a statement is misleading. It must be 'false.'"

Concurrence: (Alito, J) The "applicable test on remand is whether, viewing the evidence in the light most favorable to the Government, any rational finder of fact could conclude beyond a reasonable doubt that petitioner's statements were false in context."

Concurrence: (Jackson, J) "I agree … that 18 U. S. C. §1014 criminalizes only false statements." I note "that the pre-verdict instructions the District Court provided to the jury in this case did not say otherwise. … [T]he jury was properly instructed that it could find Thompson guilty only if the prosecution proved beyond a reasonable doubt that Thompson 'made the charged false statement[s].'"

Bondi v Vanderstok, No. 23-852 (3/26/2025)
POSSESSION OF A WEAPON - "Ghost Guns"

LASJRP: The Gun Control Act of 1968 requires those engaged in importing, manufacturing, or dealing in firearms to obtain federal licenses, keep sales records, conduct background checks, and mark their products with serial numbers. The Act defines "firearm" to include "(A) any weapon … which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [and] (B) the frame or receiver of any such weapon."

In 2022, the Bureau of Alcohol, Tobacco, Firearms and Explosives adopted a new rule designed to combat the proliferation of "ghost guns." The rule interprets the Gun Control Act to cover weapon parts kits that are "designed to or may readily be converted to expel a projectile," and "partially complete, disassembled, or nonfunctional" frames or receivers. Gun manufacturers and others filed what they described as a facial challenge under the Administrative Procedure Act, arguing that the GCA cannot be read to reach weapon parts kits or unfinished frames or receivers. The District Court agreed and vacated the rule. The Fifth Circuit affirmed, holding that the Act categorically does not reach weapon parts kits regardless of completeness or ease of assembly, and reaches only finished frames and receivers.

The Supreme Court, in a 7-2 decision, reverses, rejecting the Fifth Circuit's conclusion that no weapon parts kit can ever satisfy the statute's requirements.

Trump v J. G. G., No. 24A931 (4/7/2025)

Detained Venezuelan nationals subject to removal from the country pursuant to a presidential proclamation invoking the Alien Enemies Act (AEA) as to members of Tren de Aragua, designated a foreign terrorist organization, sought injunctive and declaratory relief, dismissing initially-filed habeas claims. The D.C. Circuit issued temporary restraining orders preventing their removal and removal of members of a provisionally certified class of noncitizens in custody subject to the

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proclamation. Those orders are vacated. Challenges under the AEA must be brought in habeas. The Government has agreed that those subject to removal under the proclamation are entitled to due process. The venue for challenges to removal lies in the district of confinement.

Concurrence: [Kavanaugh, J] I agree with the analysis that the claims here must be brought in habeas. "I add only that the use of habeas for transfer claims is not novel."

Dissent: [Sotomayor, J] The Court's legal conclusion is suspect but it intervenes anyway, without mention of the grave harm facing plaintiffs erroneously removed to El Salvador and without "regard for the Government's attempts to subvert the judicial process throughout this litigation." All members of the Court agree that people subject to detention and removal under the AEA are "entitled to judicial review as to questions of interpretation and constitutionality of the Act as well as whether he or she is in fact an alien enemy fourteen years of age or older." [Internal quotation marks omitted.] This Court lacks jurisdiction to review the time-limited, interlocutory order, vacates the order on a novel ground without oral argument or percolation in the lower courts, and exposes the plaintiffs to severe and irreparable harm, which is made more obvious by the Government's claim that once it sends someone to the El Salvador facility "it cannot be made to retrieve them."

Dissent: [Jackson, J] "I join JUSTICE SOTOMAYOR's dissent in full" and "write separately to question the majority's choice to intervene on the eve of the District Court's preliminary-injunction hearing without scheduling argument or receiving merits briefing," a misguided and dangerous fly-by-night approach to the Court's work.

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 Brisman, 2025 NY Slip Op 00123 (1/9/2025)
STANDARD OF REVIEW | EXCESSIVE SENTENCE | REVERSED & REMITTED | DISSENT

ILSAPP[2]: Appellant appealed from a Third Department order affirming the judgment convicting him of first-degree promoting prison contraband and sentencing him to the maximum sentence of 3 1/2 to 7 years' incarceration. In a 4-3 decision, the Court of Appeals reversed the order and remitted for consideration of appellant's excessive sentence claim under the proper standard of whether the sentence is "unduly harsh or severe" (CPL 470.15 [6] [b]). This determination is committed to the intermediate appellate courts, which have "broad, plenary power" to reduce sentences "without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]). The appropriate standard "may be met by a showing of ordinary mitigating circumstances." While in this case the Third Department applied the erroneous "extraordinary circumstances or abuse of discretion" standard, the Court commended the Third Department for soon thereafter correcting course in subsequent cases, as the other Departments have also done. Judge Cannataro, in a dissent joined by Judges Garcia and Singas, found that the Third Department had not misapplied the "unduly harsh or severe" standard and that the majority's holding contradicted the Court's prior decision in Delgado, where the First Department—in a trio of cases affirmed there—used virtually identical language to the Third Department here. Monroe County Public Defender (Clea Weiss, of counsel) represented Brisman.

People v Howard, 2025 NY Slip Op 00184 (1/14/2025)
RIGHT TO COUNSEL - Effective Assistance

LASJRP: In a 5-2 decision, the Court of Appeals rejects defendant's contention that defense counsel was ineffective for among other things failing to object to the admission of certain evidence at trial.

Dissenting, Judge Rivera, joined by Chief Judge Wilson, notes, inter alia, that counsel's boilerplate motion referenced matters not at issue and lacked factual support in several respects, evincing counsel's failure to properly investigate defendant's case; that counsel failed to show defendant video crucial to the prosecution's case until shortly before trial, after defendant complained to the court and the court ordered counsel to provide the video; that counsel's cross-examination of the victim resulted in admission of defendant's criminal history, even though the trial court had denied the prosecution's request to present that same history should defendant testify; and that counsel failed to object to an ambiguous jury instruction that might have resulted in a conviction on the top count. The majority's decision "ignores our precedents and reduces the right to effective counsel to a platitude spoken to appease defendants."

People v Howard, 2025 NY Slip Op 00804 (2/7/2025)
VERDICT - Weight Of The Evidence

LASJRP: When all the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without a basis other than impermissible speculation for a determination of guilt or innocence. People v. Ledwon (153 N.Y. 10) and People v. Jackson (65 N.Y.2d 265). Here, the victim, who was the sole person to testify about the facts, gave a statement to police, through an interpreter, several hours after the alleged robbery that was inconsistent on a material element of the offense with his trial testimony. That statement was introduced through the

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

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officer's testimony at trial, solely for the purpose of impeachment.

The Court of Appeals holds that when an alleged contradictory prior statement is admitted solely for the purpose of impeachment, the Ledwon rule is not implicated. Three concurring judges assert that because the victim stated that he did not recall making the inconsistent statement, the victim's trial testimony was not inherently inconsistent. This case is not akin to those cases invoking the single witness rule.

People v Hernandez, 2025 NY Slip Op 00904 (2/18/2025)
PVFO | EXTENSION OF 10-YEAR LOOKBACK | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a First Department order affirming the conviction and the predicate sentencing designation and sentence. The Court of Appeals affirmed. Appellant was properly sentenced as a persistent violent felony offender where the 10-year lookback period set forth in Penal Law § 70.04 occurs between sentencing on the prior felony and the commission of the present felony, and that period is "extended" by any period of incarceration between commission of the prior felony and commission of the present felony. Thus, appellant's presentence incarceration time on a prior felony conviction did extend the 10-year period, and appellant's predicate sentencing designation was proper. Appellant's *Erlinger* argument that the recidivist sentencing regime is unconstitutional was not preserved. Judge Rivera, in a dissent joined by Chief Judge Wilson, would have reversed, vacated the persistent violent felony offender sentence, and remanded for resentencing. The dissenters criticized the majority for failing to interpret the statute holistically, ignoring that the tolling period should only be applied to the time within the 10-year period—between the date of sentencing on the prior felony and the date of commission of the current felony. The majority's "interpretation of the enhanced sentencing framework is unfair and raises serious constitutional concerns" where people who cannot afford bail may be punished more severely than those who can.

People v Santos, 2025 NY Slip Op 01008 (2/18/2025)
WAIVER OF SHOCK PROGRAM PARTICIPATION | PUBLIC POLICY | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a First Department order affirming his conviction for third-degree CPCS. The Court of Appeals affirmed. Appellant's waiver agreeing not to apply to participate in DOCCS' shock incarceration program was not an illegal component of his sentence, as appellant argued, because it was not a component of the sentence at all. The waiver did not direct DOCCS to impose a specific form of punishment or prohibit DOCCS from calculating his sentence in a particular manner. Chief Judge Wilson, in a dissent joined by Judge Rivera, would have reversed and held that shock program waivers contained in plea agreements are void as against public policy. There is no legitimate reason consistent with public policy to prevent someone otherwise suitable from entering a treatment program years after sentencing when, in DOCCS' determination, that person and society would be better served by inclusion in shock.

People v Williams, 2025 NY Slip Op 00901 (2/18/2025)
LEGAL SUFFICIENCY | INTENT TO COMMIT A CRIME THEREIN | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a First Department order affirming his conviction of third-degree burglary upon a jury verdict and sentencing him to the maximum sentence of 3 1/2 to 7 years' incarceration. The Court of Appeals affirmed, holding that a rational jury could have found that appellant, who was subject to a trespass notice, knowingly and unlawfully entered the CVS with the intent to steal two Red Bulls given his "furtive" behavior caught on store camera footage, his behavior when asked to return the items and leave, and his statements to the police. The availability of innocent explanations for appellant's conduct did not preclude the jury from rationally finding that the prosecution met their burden. Chief Judge Wilson, in a dissent joined by Judge Halligan, would have reversed. Neither the unambiguous store surveillance video nor the witness testimony provided any evidence of intent to commit a crime inside the CVS, and appellant's alleged confession was confused, lacked corroboration, and at most supported a conviction for petty larceny. The majority's decision supported the prosecutorial overcharge of a petty offense growing out of appellant's substance use disorder, mental health issues, and unhoused status that should have been addressed with treatment.

People v Fredericks, 2025 NY Slip Op 01011 (2/20/2025)
RIGHT TO COUNSEL - Effective Assistance

LASJRP: In a 4-3 decision, the Court of Appeals rejects defendant's contention that the trial court erred in denying his request for new counsel without conducting a minimal inquiry.

Defendant's assertions that counsel was not working in his best interest, was prolonging the proceedings, and was advising him to take a plea were too general and conclusory to require a minimal inquiry. The seriousness of defendant's allegation that counsel failed to visit him was undermined by statements in defendant's letter indicating that counsel and his private investigator were communicating with defendant. Defendant also failed to explain how defense counsel allegedly disrespected him and his wife, nor did he provide any context regarding defense counsel allegedly hanging up on him.

In any event, the court conducted a minimal inquiry when it considered the letter and counsel's in-court explanation together, which provided information that enabled the court to understand the nature of the disagreement and conclude that there was not a genuine conflict or that any conflict was reconcilable.

The majority rejects defendant's contention that his counsel took a position adverse to him by opposing defendant's pro se motion for new counsel and "put[ting] on the record" that

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defendant was "shoot[ing] the messenger" because he did not like what defense counsel "ha[d] to tell him." Viewing defense counsel's statements in context, the majority concludes that counsel was only opposing defendant's allegations concerning counsel's allegedly deficient performance and, in response to the court's specific query, declining to adopt the motion. Counsel's remark about "shooting the messenger" did not amount to an assessment of the motion's merits.

Jones v Cattaraugus-Little Valley Central School District, 2025 NY Slip Op 01007 (2/20/2025)
CHILD VICTIMS ACT

LASJRP: In 2019, the legislature passed the Child Victims Act (CPLR 214-g), which, as amended, provided that a previously time-barred tort claim based on a sex offenses against a child "is hereby revived, and action thereon may be commenced not earlier than six months after, and not later than two years and six months after" February 14, 2019 - i.e., "the effective date of this section."

In response to a question certified by the Second Circuit, the Court of Appeals states that the six-month waiting period preceding August 14, 2019 is neither a statute of limitations nor a condition precedent. A statute of limitations generally bars claims asserted too late, whereas defendant's assertion here is that plaintiff's claim was brought too early. The six-month waiting period was intended, at least in part, to give the courts ample time to prepare for the inevitable avalanche of cases and not to provide a benefit to defendants.

In the Matter of New York Civil Liberties Union v City of Rochester et al., 2025 NY Slip Op 01010 (2/20/2025)
FOIL | PUBLIC OFFICERS LAW § 87 | LAW ENFORCEMENT DISCIPLINARY RECORDS | AFFIRMED

ILSAPP: Respondents the City of Rochester and the Rochester Police Department appealed from a Fourth Department order modifying a Supreme Court order determining that respondents were entitled to withhold all police records relating to complaints that were not deemed substantiated, pursuant to the personal privacy exemption contained in Public Officers Law § 87 (2) (b). The Court of Appeals affirmed. The Appellate Division correctly concluded that there is no categorical blanket personal privacy exemption for records relating to complaints against law enforcement officers that are not deemed substantiated. The purpose of the 2020 FOIL amendments, which specifically addressed disclosure of law enforcement disciplinary records, was to bring greater transparency to the law enforcement disciplinary process, including how complaints of officer misconduct are handled. The legislature's definition of "[l]aw enforcement disciplinary records" did not impose any limitation based on the outcome or disposition of the proceeding, and the amendment regarding redaction of sensitive personal information made no mention of allegations or complaints that are unsubstantiated. Similarly, these complaints were not added to the nonexclusive list of examples in Public Officers Law § 89(2)(b) of disclosures that may constitute "[a]n unwarranted invasion of personal privacy." Rather than withhold all such records, Public Officers Law § 87 (2) requires an agency to evaluate each record individually and determine whether "a particularized and specific justification" exists for denying access where disclosing all or part of the record would constitute an unwarranted invasion of privacy. If redactions would prevent such an invasion and can be made without unreasonable difficulty, the agency must disclose the record with those necessary redactions. Robert Hodgson represented the New York Civil Liberties Union.

Matter of NYP Holdings, Inc. v New York City Police Dept., 2025 NY Slip Op 01009 (2/20/2025)
FREEDOM OF INFORMATION LAW - Law Enforcement Disciplinary Records
STATUTES - Retroactivity Of Repeal

LASJRP: Former Civil Rights Law § 50-a contained a Freedom of Information Law exemption: "All personnel records used to evaluate performance toward continued employment or promotion [of certain law enforcement officers] … shall be considered confidential and not subject to inspection or review without the express written consent of [the affected law enforcement officer] except as may be mandated by lawful court order." In June 2020, the Legislature repealed § 50-a and simultaneously amended FOIL to provide for public access to "law enforcement disciplinary records" and added various personal privacy protections for law enforcement officers.

The Court of Appeals holds that the indicia of legislative intent, along with the remedial nature of the repeal legislation, persuade the Court that the repeal was intended to have retroactive application. Thus, law enforcement disciplinary records created while § 50-a was in effect may be disclosed in response to FOIL requests submitted after the statutory exemption was repealed.

Weisbrod-Moore v Cayuga County, 2025 NY Slip Op 00903 (2/20/2025)
FOSTER CARE - Civil Liability For Abuse/Neglect In Foster Care

LASJRP: Plaintiff, formerly a child in foster care, commenced this action pursuant to the Child Victims Act (see CPLR 214-g) alleging that while in the foster home selected by the County, plaintiff allegedly suffered horrific abuse. Plaintiff alleged that her foster parent sexually abused her over the course of approximately seven years, beginning when she was eighteen months old and continuing until she was eight years old. The foster parent allegedly coerced plaintiff's compliance with the

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sexual abuse by inflicting severe physical abuse, resulting in broken bones and a head wound.

Plaintiff alleged that the County had a duty to exercise reasonable care in selecting, retaining, and supervising her foster placement, and that the County breached this duty by placing her in the foster home and failing to adequately supervise her placement to ensure that she was safe under her foster parents' care.

The Supreme Court denied the County's motion to dismiss, concluding that although the County's statutory obligations did not give rise to a private cause of action, plaintiff was asserting only a claim for common-law negligence, not a statutory claim. The Appellate Division reversed, determining that, because the County was acting in a governmental capacity in administering the foster care system, plaintiff was required, and failed, to plead and prove that the County owed her a special duty.

The Court of Appeals reverses, holding that municipalities owe a duty of care to the children the municipalities place in foster homes because the municipalities have assumed custody of those children.

By assuming legal custody, a municipality owes a duty greater than that owed to the public generally, and thus the child need not plead or prove that one of the special duty categories applies. Although a foster child may leave the municipality's physical custody once placed in a foster home, legal custody remains with the municipality, which has a continuing and independent responsibility to safeguard the child from foreseeable harm that may result from the foster placement it selected. This includes exercising a degree of care in selecting and supervising the foster placement. The fact that the County did not exert complete control over plaintiff's day to day life did not relieve the County of its duty to place her in a safe foster home and supervise that home for foreseeable risks. Foster children - minors over whom the government has taken custody and control - are incapable of removing themselves from the environment in which the government has placed them.

People v Willis, 2025 NY Slip Op 01405 (3/13/2025)
MISDEMEANOR COMPLAINTS | FACIAL SUFFICIENCY | AFFIRMED

ILSAPP: Appellants appealed from Appellate Term, First Department, orders affirming their convictions for third-degree aggravated unlicensed driving, following their guilty pleas. The Court of Appeals affirmed. The Appellate Term properly held that the misdemeanor complaints were facially sufficient. According to the sworn factual allegations in each complaint, each appellant was operating a motor vehicle after having had their license suspended at least three times for failing to answer traffic tickets. Where appellants consented to prosecution by misdemeanor complaint, the prosecution was relieved of the prima facie case requirement applicable to an information. Thus, the complaints did not need to specifically allege that appellants personally received the summonses and only needed to set forth facts that establish reasonable cause to believe that the appellants committed the charged offenses. Here, it was reasonable to infer that appellants had knowledge of their license suspensions based on allegations that their licenses had been suspended on at least three occasions for failing to respond to traffic summonses, together with the supporting DMV abstracts, where the traffic summonses allegedly provided notice that failure to answer within 15 days would result in their licenses being automatically suspended. Because Martinez-Fernandez pleaded guilty to the facially sufficient charge of third-degree aggravated unlicensed operation of a vehicle, in satisfaction of the complaint, the Court did not need to reach his facial sufficiency claim regarding the reckless driving charge, or his claim that the traffic infraction should be dismissed.

People v Padilla-Zuniga, 2025 NY Slip Op 01563 (3/18/2025)
INVOLUNTARY PLEA | PRESERVATION NOT REQURIED | MANDATORY FINES |

ILSAPP: Appellant appealed from a Second Department order affirming his Nassau County conviction of first-degree aggravated unlicensed operation of a motor vehicle, aggravated driving while intoxicated, and leaving the scene of an accident without reporting, following his guilty plea. The Court of Appeals reversed, vacated the plea, and remitted. The court's failure to inform appellant at the time of his plea that the sentences for two of the offenses to which he was pleading guilty included mandatory fines rendered the plea involuntary. Preservation was not required where appellant had no practical ability to object prior to the imposition of the fines, which the court did not mention until imposition of sentence. Nor can a valid appeal waiver preclude a challenge to an involuntary plea "where the court fails to advise...of a component of th[e] sentence before it is imposed." Judge Singas took no part in the decision; Justice Webber, from the First Department, sat on the panel by designation. The Legal Aid Society of Nassau County (Argun Ulgen, of counsel) represented Padilla-Zuniga.

People v Scott, 2025 NY Slip Op 01562 (3/18/2025)
INVOLUNTARY PLEA | PRESERVATION NOT REQUIRED | COURT'S SENTENCING ERROR | REVERSED | DISSENT

ILSAPP: Appellant appealed from a Fourth Department order affirming his Erie County conviction of three counts of second-degree burglary, following his guilty plea. The Court of Appeals reversed, with two judges dissenting, and remitted. Preservation of appellant's challenge to his plea was not required, because he had "no practical ability to object to an error . . . which is clear from the face of the record." The court's

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repeated statements to appellant that he faced up to 45 years in prison were legally erroneous on the face of the record, as the aggregate sentence was statutorily capped at 20 years. Appellant could not be expected to correct what the court authoritatively stated, and the prosecution and defense counsel mistakenly believed. The Court has "never held that defense counsel's failure" to "step in to correct" the court's error, "even if it provides a basis for a CPL [§] 440.10 motion, precludes a defendant from separately challenging on direct appeal the voluntariness of their plea due to the court's dereliction of its own constitutional duty." Under the totality of the circumstances, appellant's plea was involuntary: appellant was only 23 years old at that time, had no comparable experience facing serious charges, was under immense pressure to decide whether to accept the plea offer, and the court's egregious error left him with little to no choice. Judge Singas, joined by Judge Garcia, would have affirmed, "because defense counsel plainly had the requisite practical opportunity to raise [the claim] before the trial court." The Legal Aid Bureau of Buffalo, Inc. (Nicholas P. DiFonzo, of counsel) represented Scott.

Wright v State of New York, 2025 NY Slip Op 01564 (3/18/2025)
CHILD VICTIMS ACT

LASJRP: The Court of Appeals holds that the Child Victims Act, which amended the Court of Claims Act rule requiring that a notice of claim against the State be filed within ninety days of its accrual and now allows claims alleging child sexual abuse to be filed within a two-year window, did not alter the substantive pleading requirements set forth in Court of Claims Act § 11(b).

People v Moss, 2025 NY Slip Op 01673 (3/20/2025)
SORA | presumptive override | affirmed

ILSAPP: Appellant appealed from a Fourth Department order affirming the SORA court's decision to apply an automatic override and designate appellant as a level three sexually violent predicate sex offender based on a prior 2006 conviction. The Court of Appeals affirmed and agreed that the automatic override applies. Appellant had successfully challenged the constitutionality of his 2006 plea in an intervening resentencing proceeding, where a court found it could not serve as a predicate because the guilty plea had been unconstitutionally obtained based on the sentencing court's threats to issue the maximum sentence if he proceeded to trial. But appellant never challenged the 2006 conviction on direct appeal (his notice of appeal was deemed untimely and he was denied permission to file a late notice of appeal under CPL § 460.30), and he never sought vacatur pursuant to CPL § 440.10. The Court emphasized the different evidentiary standards involved: a constitutional challenge to a predicate for sentencing enhancement purposes requires substantial evidence, a lower burden of proof than on direct appeal ("totality of the circumstances" review of the plea's involuntariness) or via 440 (preponderance of the evidence). Without vacatur of the 2006 conviction, the override applies. Alternatively, appellant could have sought a downward departure on the basis of the resentencing court's finding regarding the predicate, but he failed to do so.

People v Clark, 2025 NY Slip Op 02102 (4/10/2025)
LEGAL SUFFICIENCY | incredibility as a matter of law | affirmed

ILSAPP: Appellant appealed from a Fourth Department order affirming his conviction of first-degree robbery, upon a jury verdict. The Court of Appeals affirmed. The complainant's identification was legally sufficient, as there was "a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt." The court's denial of appellant's request for jury instructions on photo array procedures did not, under the circumstances, constitute reversible error.

People v Farrell, 2025 NY Slip Op 02100 (4/10/2025)
ANIMAL CRUELTY CRIMES

LASJRP: Agriculture and Markets Laws § 353 - entitled "Overdriving, torturing and injuring animals; failure to provide proper sustenance" - provides, in relevant part, that: "A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to [themselves] or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink ..., or in any way furthers any act tending to produce such cruelty, is guilty of a class A misdemeanor."

The Court of Appeals dismisses as facially insufficient a charge under AML § 353, concluding that the allegations do not establish that defendant deprived the dog of sustenance, and noting, inter alia, that although the accusatory instrument need not include documentation from a veterinarian, especially in those cases where the conditions are visible or palpable, in this case the investigator failed to describe the conditions under which he first observed the dog - splayed in the middle of a traffic lane and barely able to move - which might have allowed for an inference that the dog was mistreated or neglected to the point of being in extremis.

People v Cleveland, 2025 NY Slip Op 02144 (4/15/2025)
SEARCH AND SEIZURE - Reasonable Suspicion/Flight Of Suspect

LASJRP: Defendant suddenly stopped in the middle of the road, exited his vehicle, leaving a car apparently unattended with the door open, and approached a woman with clenched

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fists. Given the woman's violent actions precipitating the encounter, the abrupt way in which defendant stopped his vehicle, and the aggressive manner in which he approached the woman, the Court of Appeals concludes that the record supports the lower courts' determination that it was reasonable for the officers to believe that defendant might menace or assault or commit another crime against the woman.

The Court rejects defendant's contention that when he turned and ran, the officers' initial suspicion did not justify their pursuit because reasonable suspicion evaporated when he stopped approaching the woman in response to the officers' instruction and no longer posed a threat to her. Unlike flight from a level one or level two encounter, which involves an individual's right to be let alone and refuse to respond to police inquiry, a suspect's flight in response to an attempted stop based on reasonable suspicion interferes with officers' legal authority to temporarily detain them.

Nellenback v Madison County, 2025 NY Slip Op 02263 (4/17/2025)
CHILD VICTIMS ACT
FOSTER CARE - Abuse Of Child In Foster Care

LASJRP: Plaintiff was placed as a person in need of supervision in the care of Madison County's Department of Social Services, which assigned a caseworker (Hoch) who, according to plaintiff, repeatedly sexually abused and assaulted him over the next three years. After learning that Hoch had sexually abused several other children to whose cases he was assigned, plaintiff filed suit under the claim-revival provision of the Child Victims Act, alleging that the County was negligent in hiring, supervising, and retaining Hoch.

The Court of Appeals holds that the County is entitled to summary judgment dismissing plaintiff's negligent supervision claim. The evidence was insufficient to prove the County was on notice of the abuse and that it negligently placed Hoch in a position to cause harm.

The Court notes, inter alia, that the County had no actual or constructive knowledge that Hoch had previously committed or had any propensity to commit sexual abuse; that although plaintiff argues that the absence of Hoch's records documenting his interactions and trips with plaintiff was suspicious, records are kept for ten years past the child's eighteenth birthday - which in this case would have been 2010 - and then are routinely destroyed; that although the dissent contends that there are triable issues of fact as to whether the County "created a culture of laxity" that facilitated the abuse, this Court has never held that a party can prove negligent supervision without evidence showing prior conduct, warnings, or signs of risk; and that plaintiff has not shown that the County deviated from the standard of care that was reasonable at the time, and the field of child sexual abuse prevention has evolved significantly in the past three decades.

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 Urena, 232 AD3d 556 (1st Dept 11/27/2024)
MULTIPLICITOUS COUNTS | INTEREST OF JUSTICE | RAPE CONVICTION VACATED

ILSAPP: Appellant appealed from a Bronx County Court judgment convicting him of predatory sexual assault against a child, first-degree rape, and related charges. The First Department vacated the rape conviction in the interest of justice finding this count multiplicitous of the predatory sexual assault count. Even when such a count does not increase the imposed sentence, "the stigma of impermissible convictions must be remedied." Stephen N. Preziosi represented Urena. (County Ct, Bronx Co)

Matter of Michael B. v Patricia S., 233 AD3d 403 (1st Dept 12/3/2024)
VISITATION | IMPERMISSIBLE DELEGATION OF AUTHORITY | REVERSED

ILSAPP: Father appealed from a Bronx County Family Court order granting the mother's motion to modify a prior order of visitation and directing the parents to agree on a parenting time schedule for the child, in writing and in consultation with the subject child. The First Department reversed. Family Court's order impermissibly delegated its authority to set a visitation schedule to the mother and child. It was undisputed that the child did not wish to visit the father, so the effect of the order would be no visitation at all. The First Department remitted the case to Family Court to establish a visitation order to include phone and/or written contact with the father and noted that the court may also order forensic mental health evaluations, therapeutic or other supervised visitation, and counseling as a component of a visitation plan. Thomas R. Villecco represented the father. (Family Ct, Bronx Co)

People v Pan, 233 AD3d 492 (1st Dept 12/10/2024)
RIGHT TO COUNSEL | CONFLICT OF INTEREST | MISADVICE | REVERSED

ILSAPP: Appellant appealed from a New York County judgment convicting him of first-degree assault and EWC. The prosecution conceded that appellant's right to counsel was violated when the plea court prohibited him from retaining an unpaid public defender who worked with him on a related matter and when his assigned attorney made disparaging statements about appellant's accidental stabbing defense, creating a conflict of interest. Counsel also misadvised appellant about the consequences of his guilty plea by explaining that he was likely to be deported when deportation was mandatory. As a result of the ineffective assistance of counsel, appellant's plea was involuntary and needed to be vacated. Center for Appellate Litigation (Lena Jenoda, of counsel) represented Pan. (County Ct, New York Co)

People v Dominguez, 233 AD3d 514 (1st Dept 12/12/2024)
MUG SHOT PHOTOS | ERRONEOUS INTRODUCTION HARMLESS | AFFIRMED

ILSAPP: Appellant appealed from a Bronx County judgment convicting him of second-degree murder. The trial court erred in admitting multiple arrest photos from three prior arrests. While the photos were relevant to showing that appellant had long hair, which he cut prior to arrest, prior mug shots can convey a criminal history thus causing prejudice outweighing their probative value. Nevertheless, the First Department deemed the error harmless due to the photos being redacted, the overwhelming evidence of guilt, and the trial court's curative instructions that the jury should not speculate about the source of the photos. (Supreme Ct, Bronx Co)

People v Thomas, 233 AD3d 568 (1st Dept 12/19/2024)
PROBATION CONDITIONS | NOT REASONABLY RELATED TO REHABILITATION|STRICKEN

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of third-degree assault and sentencing him to 2 years' probation. Appellant's challenge to his conditions of probation survived his valid appeal waiver. The Department of Probation's recommendation that, as a condition of his plea, appellant consent to warrantless searches for drugs and weapons was not reasonably related to rehabilitation. Appellant's conviction did not involve the use of a weapon and was not connected to the sale or use of drugs. Accordingly, the judgment was modified to strike the condition. Center for Appellate Litigation (Abigail Everett, of counsel) represented Thomas. (Supreme Ct, Bronx Co)

Matter of W.P., 233 AD3d 567 (1st Dept 12/19/2024)
JUVENILE DELINQUENCY | NO REASONABLE SUSPICION | REVERSED

ILSAPP: Appellant appealed from a Bronx County Family Court order adjudicating him a juvenile delinquent upon admission that he committed acts that, if committed by an adult, would constitute CPW 2 and placed him on probation for 12 months. The First Department reversed, granted appellant's suppression motion, and dismissed the petition. Police—who were in the area in response to a Shotspotter sensor report of shots fired—did not have reasonable suspicion to stop appellant after observing him riding a bicycle on the sidewalk. Police saw him look in the direction of an unmarked police vehicle, duck, backpedal, and ride in the opposite direction. In response, an

First Department *continued*

officer ordered him to stop, grabbed him by both wrists, and pushed him against a wall. Another officer then observed a bulge in his pocket, which he squeezed and removed. Appellant's detention was unlawful because his "equivocal or innocuous behavior" was "susceptible of an innocent as well as culpable determination." Because the weapon would not have been recovered without the illegal stop, the court dismissed the petition. The Legal Aid Society NYC (John A. Newbery, of counsel) represented W.P. (Family Ct, Bronx Co)

People v Aponte, 233 AD3d 593 (1st Dept 12/24/2024)
SORA | FAILURE TO RULE ON DOWNWARD DEPARTURE | REMANDED

ILSAPP: Appellant appealed from a New York County Supreme Court order adjudicating him a level two sexually violent offender under SORA. The First Department remanded for a hearing on Aponte's request for a downward departure, which the SORA court erroneously declined to address, while otherwise affirming the SORA court's points assessment. The Legal Aid Society of NYC (Ying-Ying Ma, of counsel) represented Aponte. (Supreme Ct, New York Co)

People v Brown, 2024 NY Slip Op 06550 (1st Dept 12/24/2024)
RIGHT TO COUNSEL - Effective Assistance
MOTION TO VACATE JUDGMENT OF CONVICTION

LASJRP: The First Department reverses an order granting defendant's motion to vacate his conviction on two counts of attempted murder in the second degree, rejecting defendant's contention that defense counsel was ineffective for, inter alia, failing to investigate an injury to defendant's leg that defendant claimed made it physically impossible for defendant to have chased down the victims.

It is unclear that counsel was informed of the existence of such a defense and that he ignored it without investigation. Even if counsel was informed, it is objectively reasonable to conclude that counsel considered the risks of putting forth the defense of medical impossibility and decided against it. Advancing such a defense may have required testimony by defendant as to his medical condition on the day of the shooting, including testimony regarding the circumstances under which he sustained the injury, i.e., he was involved in a drug related shooting one year earlier. Defendant's physical condition at the time of the shooting would seem to conflict with his medical records and the potential expert testimony.

Counsel was able to present a defense of misidentification without subjecting the defense to these other issues, and it was highly probable that the testimony of any medical expert would not have been sufficient to defeat the testimony of three eyewitnesses, all of whom knew defendant and had no apparent motivation to falsely identify him or to defeat the evidence of witness intimidation against an independent eyewitness. (Supreme Ct, Bronx Co)

People v Myree, 233 AD3d 595 (1st Dept 12/24/2024)
EXCESSIVE SENTENCE | WEAPON POSSESSION | MODIFIED

ILSAPP: Myree appealed from a Bronx County Supreme Court judgment convicting her of third-degree CPW and sentencing her to 3 1/2 to 7 years' imprisonment. After hearing arguments regarding the violence and degradation Myree has experienced in prison as a transgender woman being housed in a male-designated prison, the First Department reduced the sentence to 3 to 6 years in the interest of justice, making Myree eligible for immediate release. The Legal Aid Society of NYC (Danielle A. Bernstein, of counsel) represented Myree. (Supreme Ct, Bronx Co)

People v Aragon, 234 AD3d 446 (1st Dept 1/7/2025)
SUPPRESSION | IMPROPER SEARCH INCIDENT TO ARREST | REVERSED AND DISMISSED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of fourth- and seventh-degree CPCS. The First Department reversed the denial of suppression, reversed the judgment, and dismissed the indictment. Appellant was entitled to suppression of the cocaine and money recovered upon the search of his person following a traffic stop during which police smelled marijuana. The evidence was not recovered during a search pursuant to an authorized search incident to arrest because the record did not support that the police intended to arrest appellant prior to recovering the cocaine. The Legal Aid Society of NYC (Frank Xiao, of counsel) represented Aragon. (Supreme Ct, New York Co)

People v Cintron, 234 AD3d 454 (1st Dept 1/7/2025)
SORA | IMPROPER UPWARD DEPARTURE | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court order adjudicating him a risk level two under SORA. The First Department modified to a level one, finding that the SORA court improperly granted the prosecution's request for an upward departure. The record did not provide clear and convincing evidence warranting the upward departure based on an aggravating factor not considered by the risk assessment guidelines. Appellant's alleged uncharged criminal conduct—text and social media threats to rape and kill a minor strikingly similar to those that led to the underlying conviction—while theoretically supporting an upward departure, were not established by clear and convincing evidence. Center for Appellate Litigation (Jane Merrill, of counsel) represented Citron. (Supreme Ct, Bronx Co)

Matter of J.V. (Hakim H.), 234 AD3d 464 (1st Dept 1/7/2025)
NEGLECT | INADEQUATE SHELTER | REVERSED

First Department *continued*

ILSAPP: The parent appealed from a Bronx County Family Court order finding that he had neglected the subject children. The First Department vacated the portion of the order finding neglect based on inadequate shelter and otherwise affirmed. The record showed that the condition of the family's apartment improved over time, and ACS never sought to remove the children from the home due to allegedly unsanitary conditions, further demonstrating that the children were not at risk. "The strong inference drawn by the court against [the parent] for failure to testify [was] insufficient by itself to provide the necessary link between the conditions of the apartment and any imminent risk to the children." Steven N. Feinman represented the parent. (Family Ct, Bronx Co)

Matter of Rebecca F. (Danequea J.), 234 AD3d 435 (1st Dept 1/7/2025)
ABUSE/NEGLECT - Leaving Children Unsupervised - Conflict Involving Police

LASJRP: The First Department finds insufficient evidence of neglect where, during the COVID-19 pandemic, the mother, a single parent at home with three children, established a daily schedule that included an afternoon nap; while the mother was napping, her then seven-year-old daughter accidentally caused her younger brother to be burned when she was playing with a candle or stick; the mother then called the daughter's counselor, who called the police; and later, when the mother was outside the building with the police, she became angry and had an argument with one of the officers when she was not allowed back into the apartment briefly to retrieve certain items, including a cell phone charger.

Proof that the brother had a minor injury to his neck after an isolated incident did not establish that the child's mental or emotional condition was impaired or in imminent danger of being impaired, or that the mother failed to exercise a minimum degree of care. The incident did not cause any impairment or imminent danger to the daughter or to the baby, who was asleep in the next room.

A verbal argument with a police officer did not pose any serious or potentially serious harm to the infant child, who was the only child with the mother at that time, and there were no exigent circumstances preventing the mother from returning to the apartment to retrieve necessary items.

The JRP appeals attorney was Judith Stern.

People v Corley, 234 AD3d 500 (1st Dept 1/9/2025)
SORA | PROSECUTION'S APPEAL | FEDERAL CHILD PORNOGRAPHY REGISTERABLE OFFENSE | REVERSED

ILSAPP: The prosecution appealed from a New York County Supreme Court order granting a defense motion to dismiss the SORA proceeding because Corley's federal conviction for child pornography did not qualify as a registerable offense. The First Department reversed and remanded for the court to conduct the SORA hearing, finding that a federal conviction for possession of child pornography qualifies as a registerable offense in New York, despite a 2008 amendment that did not materially re-define the federal crime. (Supreme Ct, New York Co)

Matter of J.M., 234 AD3d 492 (1st Dept 1/9/2025)
ABUSE/NEGLECT - Dismissal/Voluntary Discontinuance

LASJRP: The First Department upholds an order that, prior to a fact-finding hearing, granted ACS's application pursuant to CPLR 3217(b) for a voluntary discontinuance of the proceeding, and dismissed the neglect petition without prejudice.

Unless a court states otherwise a voluntary discontinuance is without prejudice, and the decision was grounded in the court's legitimate concern that the mother might regress, as she had in the past, once the case was no longer active, potentially putting the child at risk. This mother had failed to comply with substance abuse treatment and refused to participate in toxicology screenings following a positive test for marijuana and cocaine. (Family Ct, New York Co)

Matter of Destiny G., 234 AD3d 524 (1st Dept 1/14/2025)
NEGLECT | 1028 HEARING | REVERSED

ILSAPP: A parent appealed from a Bronx County Family Court order denying his application for a return of his children to his care after a Family Court § 1028 hearing. The First Department reversed and granted the application. Any risks to the children could be mitigated with reasonable efforts, and Family Court failed to properly weigh the parent's actions to counteract the agency's concerns, such as finding overnight supervision for the children, improving the condition of the home, and using non-physical methods of punishment. Dora M. Lassinger represented the parent. (Family Ct, Bronx Co)

People v Dupree, 2025 NY Slip Op 00199 (1st Dept 1/14/2025)
GUILTY PLEA | FAILURE TO INQUIRE INTO STATEMENTS TO ENSURE VOLUNTARINESS | REVERSED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of first-degree manslaughter. The First Department vacated the plea due to Supreme Court's failure to inquire into the prosecutor's sentencing statements relating to appellant's suggestions in the PSR that the shooting was justified and he was intoxicated during the crime. "Although there is no statewide consensus on the issue, in the First Department" the plea court's obligation to inquire extends to comments made during the plea colloquy or at sentencing that undermine the plea's voluntariness. The court noted that the Fourth Department reached a different conclusion in People v Brown, 204 AD3d 1519 [4th Dep't 2022]. While the plea court

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does not have an obligation to inquire about out-of-court statements, even those contained in a pre-sentence report, statements made in open court that cast doubt on the plea's voluntariness must be explored. Because at sentencing the prosecutor brought up appellant's statements indicating that [] he may have misunderstood the law, the court should have conducted an inquiry. The Legal Aid Society of NYC (Hilary Dowling, of counsel) represented Dupree. (Supreme Ct, New York Co)

People v Luke, 2025 NY Slip Op 00297 (1st Dept 1/21/2025)
BATSON | FAILURE TO CONDUCT INQUIRY | HELD IN ABEYANCE & REMANDED | DISSENT

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of third-degree burglary and sentencing him to 2 1/2 to 5 years' incarceration. The First Department held the appeal in abeyance and remanded for the lower court to conduct a proper *Batson* inquiry. The trial court "bypassed the protocol entirely by interjecting itself into defendant's *Batson* objection, misapprehending its timeliness, improperly focusing on potential relief, and denying defendant an opportunity to present his full challenge." Counsel's failure to request a particular remedy was not dispositive because the court should have first ruled on the challenge before considering the appropriate remedy. The majority invoked its interest of justice jurisdiction to reach the unpreserved challenge, as it has in other cases, based on the merit of the defense's claim: the prosecution used peremptory strikes at the conclusion of round one of jury selection to dismiss four jurors, three of whom were Black and one of whom "appeared to be ... Hispanic." The majority also emphasized the importance of correcting even unpreserved *Batson* challenges: "[i]f this error is left unchecked, *Batson* and its progeny become a metaphorical dog with no bite." The dissent would have held that appellant's *Batson* challenge was unpreserved, and interest of justice review unwarranted, since defense counsel raised a *Batson* objection but failed to request a remedy. The Legal Aid Society of NYC (Mariel R. Stein, of counsel) represented Luke. (Supreme Ct, New York Co)

Matter of M.G., 234 AD3d 575 (1st Dept 1/21/2025)
ABUSE/NEGLECT - Domestic Violence
- Evidence - Hearsay / Inference From Failure To Testify

LASJRP: The First Department upholds a finding of neglect based on domestic violence, noting, inter alia, that the child was approximately ten feet away in a bedroom during one incident, which permits an inference of impairment or imminent danger of impairment even absent evidence that he was aware of the incident or emotionally affected by it.

The hearsay rule does not apply to the child's statements telling the father to "stop saying that," which were offered to show that the child understood and reacted to the father's demeaning comments to his mother.

The Family Court properly drew the strongest negative inference from the father's failure to testify at the fact-finding hearing and inferred that the father implicitly admitted the truth of his out-of-court admissions against interest. (Family Ct, New York Co)

Matter of Adekunle D.D. v Luxury M.D., 234 AD3d 585 (1st Dept 1/23/2025)
CUSTODY - Relocation
VISITATION - Supervised/Limited Visits

LASJRP: The First Department upholds the Family Court's decision to award sole legal custody to the father, noting, inter alia, that the father's relocation to Texas was motivated by financial and career considerations, rather than animosity toward the mother or a desire to keep the child away from her. He was able to buy a three-bedroom home with a separate bedroom for the child and intended to have the paternal grandmother live with them to help with childcare. The father also secured a suitable school for the child.

The Court rejects the mother's contention that the award of four annual supervised visits amounted to a de facto termination of her parental rights, noting that supervised visitation does not constitute a deprivation of meaningful access to the child.

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

People v Amparo, 234 AD3d 605 (1st Dept 1/23/2025)
IMPROPER PROBATION CONDITION | INVALID APPEAL WAIVER | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of third-degree auto stripping. The First Department struck the probation condition requiring appellant to consent to searches for drugs and weapons. This condition was not reasonably related to rehabilitation because the crime did not involve drugs or weapons. While this claim would survive even a valid waiver of appeal, here the waiver was inadequate. Supreme Court did not explain the nature of the appellate rights being forfeited, that they were separate and distinct from those automatically forfeited by guilty plea, or that limited claims would survive the waiver. The written waiver could not substitute for an on-record explanation of the right to appeal. Center for Appellate Litigation (David Klem, of counsel) represented Amparo. (Supreme Ct, Bronx Co)

People v Jaswane M., 234 AD3d 619 (1st Dept 1/28/2025)
YOUTHFUL OFFENDER | FAILURE TO CONSIDER YO | REMANDED FOR RESENTENCING

First Department *continued*

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of second-degree attempted robbery. The First Department remanded for resentencing. Although Supreme Court adjudicated appellant a youthful offender on another charge under an indictment not part of this appeal, for which appellant was sentenced at the same proceeding, the court failed to state whether it considered youthful offender treatment under this indictment. As the prosecution conceded, this failure required remand for resentencing and a determination of appellant's entitlement to youthful offender treatment. The Legal Aid Society of NYC (Thomas Palumbo, of counsel) represented Jaswane M. (Supreme Ct, Bronx Co)

People v Percy, 234 AD3d 619 (1st Dept 1/28/2025)
IMPROPER PROBATION CONDITION | SURCHARGES AND FEES | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of seventh-degree CPCS and sentencing him to two years' probation. The First Department struck the probation condition requiring appellant to pay $250 in surcharges and fees. This condition would "not assist in ensuring he leads a law-abiding life and [was] not reasonably related to his rehabilitation." Appellant was a first-time felony offender who had not been employed since 2010, relied on public assistance, and struggled with substance abuse. This claim survived the valid appeal waiver. Center for Appellate Litigation (Abigail Everett, of counsel) represented Percy. (Supreme Ct, Bronx Co)

People v Tolliver, 234 AD3d 639 (1st Dept 1/30/2025)
SORA | FAILURE TO STATE FACTUAL FINDINGS AND LEGAL CONCLUSIONS | HELD IN ABEYANCE

ILSAPP: Appellant appealed from a Bronx County Supreme Court order adjudicating him a level 3 sexually violent offender under SORA. The First Department held the appeal in abeyance and remitted for further factual findings and legal conclusions. The SORA court's statements that the prosecution had met its burden of proof for a level 3 adjudication and that "the motion for downward departure is denied" did not satisfy its fact finding and legal analysis obligations under SORA. The Legal Aid Society of NYC (Elizabeth Emmons, of counsel) represented Tolliver. (Supreme Ct, Bronx Co)

People v Hicks, 235 AD3d 417 (1st Dept 2/4/2025)
SPEEDY TRIAL - Witness's Medical Unavailability

LASJRP: The First Department holds that the 39-day period during which a necessary police witness was medically unavailable should have been excluded as an exceptional circumstance under CPL § 30.30(4)(g) where the People established that the officer's broken ankle constituted a sufficiently restricting injury given that the officer suffered from limited mobility, had not been cleared to testify by the police surgeon, and was unable to work in even a limited capacity during the relevant period. The People were not required to show that the witness was completely immobilized or totally incapacitated, or that they had made extraordinary efforts to secure his presence. (Supreme Ct, Bronx Co)

People v Rochester, 235 AD3d 418 (1st Dept 2/4/2025)
APPEAL WAIVER INVALID | EXPLANATION OF RIGHT TO APPEAL INADEQUATE | AFFIRMED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of attempted second-degree burglary (Wiley, J.). The First Department found the appeal waiver inadequate but otherwise affirmed. Supreme Court did not sufficiently distinguish the right to appeal from other rights automatically forfeited by pleading guilty or adequately explain that the waiver was an absolute bar to appellate review. Accordingly, the court reached the defense's *Miranda* claim, but determined that it lacked merit. The Legal Aid Society of NYC (Lorraine Maddalo, of counsel) represented Rochester. (Supreme Ct, New York Co)

People v Serrano, 235 AD3d 415 (1st Dept 2/4/2025)
SPEEDY TRIAL - Constitutional/Motion Practice

LASJRP: The First Department concludes that the court should not have denied defendant's speedy trial motion without a hearing where there was a protracted delay between the date of the robbery in July 2012 and the July 2014 indictment.

The Court notes that although the People contend that federal prosecutors who charged defendant in June 2013 with gun possession following a July 31, 2012 arrest were exploring jurisdiction over the robbery and whether defendant could serve as a cooperator on other investigations, the People did not present any evidence as to whether they contacted federal prosecutors between July 31, 2012 and May 2014, when the People learned federal prosecutors were unable to obtain defendant's cooperation or jurisdiction over the robbery offense; that the People also failed to adequately explain the delay in obtaining a search warrant for defendant's cell phone; and that shortly after the robbery, the People had already gathered extensive evidence against defendant, and defendant did not become aware of that until after the deadline for filing the motion to dismiss expired. (Supreme Ct, New York Co)

Matter of M.V., 235 AD3d 420 (1st Dept 2/4/2025)
TERMINATION OF PARENTAL RIGHTS - Disposition - Appeal/Record On Appeal

LASJRP: The First Department vacates an order terminating the mother's parental rights to the child M.V. and freeing her for adoption and remands the matter to the Family Court for a new

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dispositional hearing where the child's attorney has advised that she no longer resides in the same pre-adoptive foster home, is now fifteen years old, and does not consent to being adopted.

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

People v Hamlett, 235 AD3d 432 (1st Dept 2/6/2025)
EXCESSIVE SENTENCE | SEX OFFENSES | SENTENCES REDUCED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of first-degree criminal sexual act, first-degree robbery, first-degree burglary, first-degree sexual abuse, second-degree robbery, and first-degree criminal impersonation and sentencing him to an aggregate term of 154 years' imprisonment. The First Department reduced the sentence to an aggregate term of 51 1/3 years and otherwise affirmed. The imposed sentence was "unduly harsh and severe." Office of the Appellate Defender (Samuel Steinbock-Pratt, of counsel) represented Hamlett. (Supreme Ct, New York Co)

Matter of the Legal Aid Society v Records Access Officer, NYPD, 2025 NY Slip Op 00723 (1st Dept 2/6/2025)
FREEDOM OF INFORMATION LAW

LASJRP: Between 2007 and 2020, the NYPD procured an array of technology and surveillance products and services, including facial recognition software and cellphone tracking tools, using special expense purchase (SPEX) contracts. SPEX contracts are confidential agreements secured outside standard open-source procurement procedures. The NYPD determined that open-source procurement would undermine the effectiveness of the new surveillance technologies, and that the technologies would be more effective if kept secret from the public. The City Comptroller terminated the SPEX program effective August 27, 2020.

In a FOIL request, The Legal Aid Society sought "[a]ny and all documents relating to" the NYPD's use of confidential SPEX contracts between 2007 and 2020. The NYPD denied the request on the ground that the request "did not reasonably describe a record in a manner that would enable a search to be conducted." However, the universe of responsive SPEX documents was segregated and kept in a single location, which would appear to facilitate a search.

The First Department orders FOIL disclosure, concluding that although the NYPD is seeking to indefinitely foreclose disclosure by invoking the "volume" of Legal Aid's request, the NYPD's conclusory and imprecise evidence failed to demonstrate burdensomeness within the meaning of Public Officers Law § 89(3)(a). (Supreme Ct, New York Co)

People v Rivera, 235 AD3d 436 (1st Dept 2/6/2025)
IMPEACHMENT - Bad Acts/Police Misconduct
BRADY MATERIAL

LASJRP: The First Department finds no error where the court precluded defendant from cross-examining a police witness about the existence of two civil lawsuits naming him as a defendant, as neither had resulted in adverse findings against the officer. The court also did not err by permitting defendant to ask the witness about his alleged participation in an assault and false arrest against the plaintiff in one suit, while precluding inquiry into statements allegedly made by a different officer accused in the complaint.

With respect to defendant's Brady claim regarding an additional lawsuit against this same officer, which was discovered after defendant's conviction, the Court notes that the record does not reflect that the prosecutor had actual or constructive knowledge of this lawsuit before trial and the officer's personal knowledge of the allegations could not be imputed to the prosecutor, who had no duty to inquire about the allegations or to search the dockets in every federal or state court in New York for complaints against police witnesses. (Supreme Ct, New York Co)

Matter of April B. v Relisha H., 235 AD3d 443 (1st Dept 2/11/2025)
VISITATION - Equitable Estoppel - Right To Counsel/AFC

LASJRP: The First Department holds that the Family Court erred in concluding that petitioner established standing based on equitable estoppel where the record contains evidence suggesting that petitioner and the child had an ongoing relationship throughout the child's formative years, but the record does not support the idea that disrupting such a relationship would be harmful to the child's best interests.

Petitioner never lived with the child or assumed any financial responsibilities for her. There was no evidence that petitioner consistently cared for the child or that the child looked upon petitioner as a parental figure. The only other parent the child knew, aside from respondent biological mother, was the mother's companion, whom she regarded as her father and with whom she reported having a close, bonded relationship. Although petitioner might have held out the child as her own, there was no evidence presented that anyone in the family or the community viewed them as having a parent-child relationship. She failed to demonstrate that she engaged in any decision-making with the mother on major issues concerning the child, such as healthcare, welfare, education or religion. Petitioner never took any steps to legally formalize her relationship with the child, such as signing the birth certificate or pursuing second parent adoption.

First Department *continued*

The Court also notes that where the attorney for the child was appointed in April 2022, but it was not until sixteen months later that the AFC first met with and interviewed her client despite the Family Court's efforts and an order requiring that the mother produce the child for the AFC, the delay should not be countenanced given the importance of a child's perspective in these matters. (Family Ct, Bronx Co)

People v Burgos, 235 AD3d 454 (1st Dept 2/11/2025)
EXPERT TESTIMONY - Drug Activity
SEARCH AND SEIZURE - Plain View

LASJRP: The First Department concludes that the detective's viewing of drug paraphernalia in plain view from a lawful vantage point permitted him to remove defendant from the car and recover the paraphernalia. When the officer observed, in plain view, what appeared to be heroin sticking out of a trap on the back of the passenger seat, he was permitted to seize those drugs.

The hearing court did not err in qualifying a police witness as an expert in the operation of traps used to conceal contraband in vehicles and allowing the witness to testify as to whether the trap had been pried open, where he had personally uncovered more than 60 traps and had seen well over 150 traps. (Supreme Ct, New York Co)

People v Correll, 235 AD3d 455 (1st Dept 2/11/2025)
INSUFFICIENT EVIDENCE | VARIANCE BETWEEN INDICTMENT AND PROOF | MODIFIED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of enterprise corruption, fourth-degree grand larceny and first-degree scheme to defraud. The First Department vacated the fourth-degree grand larceny count and certain findings relating to enumerated criminal acts underlying the enterprise corruption count, and otherwise affirmed. The trial evidence, including evidence suggesting that appellant threatened physical damage to construction sites through vandalism, varied from the theory of indictment. The evidence relating to the remaining counts was sufficient. Appellant failed to show that he committed less than three of the criminal acts alleged in the indictment, as required to render the enterprise corruption evidence insufficient. Office of the Appellate Defender (Rosemary Herbert, of counsel) represented Correll. (Supreme Ct, New York Co)

Matter of Baskerville v New York State OCFS, 235 AD3d 465 (1st Dept 2/13/2025)
ABUSE/NEGLECT - Central Register Reports

LASJRP: In this appeal from OCFS's determination denying petitioner's request to amend and seal indicated reports finding maltreatment of his child, the First Department concludes that it lacks jurisdiction because petitioner failed to properly effect service on the Office of the Attorney General as required by CPLR 7804(c). (Supreme Ct, New York Co)

People v Godsent, 235 AD3d 475 (1st Dept 2/13/2025)
FLAWED JURY INSTRUCTION | FAILURE TO CHARGE MOTIVE TO LIE | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of third-degree sexual assault. The First Department affirmed. Although Supreme Court erred in failing to give the CJI charge explaining that the jury should consider whether any witness had a motive to lie, the error was harmless. The court's charge as given provided accurate criteria for the jury to assess witness credibility. (Supreme Ct, New York Co)

People v C.D.C., 235 AD3d 505 (1st Dept 2/18/2025)
YOUTHFUL OFFENDER | RESENTENCING ORDERED | REMANDED

ILSAPP: Appellant appealed from New York County Supreme Court judgments convicting him of second-degree CPW, third-degree CPCS, attempted second-degree murder, and first-degree assault and from an order denying his CPL § 440.20 motion to vacate his sentence as illegal. The First Department reversed the denial of the motion to vacate and remanded for resentencing. While appellant committed crimes that were presumptively ineligible for YO adjudication, the sentencing court had an obligation to make a threshold determination at the time of the plea as to whether to exercise its discretion to deem him an eligible youth. Assuming that the court deemed appellant eligible, the court then had to again exercise its discretion to determine whether to afford appellant YO status. While the court made it clear during the plea proceedings that it did not believe appellant was eligible for YO treatment, it did not make the explicit determination on the record at sentencing. Center for Appellate Litigation (Sarah Siegel, of counsel) represented Cummings. (Supreme Ct, New York Co)

People v White, 235 AD3d 506 (1st Dept 2/18/2025)
GRAND LARCENY - Intent To Permanently Deprive/Taking Of Property

LASJRP: The First Department upholds defendant's conviction for grand larceny in the fourth degree, noting that the jury could have reasonably inferred that at the time that defendant and his co-defendant took a backpack from a sleeping subway passenger, they intended to permanently deprive the owner of the backpack even though they subsequently abandoned it after looking through it; and that the act of removing the victim's backpack from between his knees while he slept was sufficient to establish a taking, which was complete as soon as defendant exercised dominion and control over the backpack by moving it. (Supreme Ct, New York Co)

First Department *continued*

Matter of S.A., 235 AD3d 523 (1st Dept 2/20/2025)
ABUSE/NEGLECT - Hearsay/Corroboration

LASJRP: The First Department upholds a finding of neglect, noting that the child's statements were corroborated by, inter alia, the aunt's statements in the hospital records which were independently admissible because they were relevant to treatment, diagnosis, and discharge.

The JRP appeals attorney was Polixene Petrakopoulos, and the trial attorney was Dara Giannontonio. (Family Ct, Bronx Co)

People v McClaughlin, 2025 NY Slip Op 01066
(1st Dept 2/25/2025)
SUPPRESSION | STATEMENTS | RIGHT TO COUNSEL | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of second-degree assault. The First Department affirmed but found that appellant's statement to the prosecutor should have been suppressed because he unequivocally invoked his right to counsel before making it. But the error was harmless beyond a reasonable doubt as evidence of guilt was overwhelming, including DNA evidence and additional statements. There was no reasonable possibility that the error contributed to appellant's decision to plead guilty. (Supreme Ct, Bronx Co)

Matter of Mercedes E.H. v Dexter R.N.,
2025 NY Slip Op 01065 (1st Dept 2/25/2025)
VISITATION - Violations/Contempt

LASJRP: The First Department concludes that where the mother did fail to produce the child on three occasions, the Family Court did not err in ordering make-up parenting time for the father rather than imposing contempt penalties on the mother. Under the circumstances, the child's best interests were served by providing additional time with the father rather than fining or incarcerating the mother. (Family Ct, Bronx Co)

Matter of E. M., 2025 NY Slip Op 01172 (1st Dept 2/27/2025)
TERMINATION OF PARENTAL RIGHTS - Disposition

LASJRP: The First Department affirms an order which, upon a finding of permanent neglect, terminated the mother's parental rights and transferred custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, noting, inter alia, that despite the children's previous ambivalence about adoption and the possibility that their respective foster mothers may not be willing to adopt, termination of parental rights is in their best interests, particularly given that they have been out of the mother's care since 2017, have thrived in foster care, and expressed their desire not to return to the mother's care. (Family Ct, Bronx Co)

People v Ortiz, 235 AD3d 600 (1st Dept 2/27/2025)
ROBBERY | EXCESSIVE SENTENCE | MODIFIED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of third-degree robbery and sentencing him to 2 1/2 to 5 years in prison. The First Department reduced the sentence to 2 to 4 years in the interest of justice. Center for Appellate Litigation (David Klem, of counsel) represented Ortiz. (Supreme Ct, New York Co)

People v Trulove, 2025 NY Slip Op 01178
(1st Dept 2/27/2025)
SEARCH WARRANT SUFFICIENCY | APPEAL WAIVER INVALID | HELD IN ABEYANCE & REMITTED FOR HEARING

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment (Fabrizio, J.), convicting him of attempted second-degree CPW. The First Department held the appeal in abeyance and remanded for a hearing to determine whether the search warrant was sufficiently particularized and whether there was no reasonable possibility that the wrong premises would be searched. The police officer who applied for the warrant had no personal knowledge of the premises and relied on a confidential informant who described the address as having a single bedroom on the first floor with an unmarked tan door. The defense challenged the particularity of the warrant based on a defense investigator discovering that the building had two apartments on the first floor, both with white, not tan, doors and only one unmarked. The police had searched the bedroom with a door marked "1," where they recovered a gun, magazine, and ammunition. After Supreme Court denied suppression, appellant pleaded guilty. The appeal waiver was invalid. Supreme Court suggested that the right to appeal was automatically forfeited by guilty plea, did not advise of the rights that could not be waived, and did not assure that appellant understood the written waiver. Courts must address plea waivers "carefully and with clarity," not in a "perfunctory manner." A hearing was ordered into whether the warrant was sufficiently particularized or invalid because it contained a misdescription of the premises. Additionally, there was a question of whether there was no possibility that the wrong premises would be searched given that the affirming police officer had no personal knowledge of the premises described in the warrant. The Legal Aid Society of NYC (Katheryne Martone, of counsel) represented Trulove. (Supreme Ct, Bronx Co)

People v Walker, 2025 NY Slip Op 01194 (1st Dept 3/4/2025)
SEARCH AND SEIZURE - Open Container Law
- Reasonable Suspicion -
Pocket Bulge/Flight

LASJRP: Administrative Code of the City of New York § 10-125,

First Department *continued*

the open container law, prohibits alcohol consumption in public places. When accompanied by factors lacking reasonable innocent interpretation, the sight of open containers of alcohol provides reasonable cause to believe that the individuals possessing the bottles intended to consume them.

The First Department orders suppression, concluding that the circumstances here do not support a presumption that defendant intended to consume the alcohol he was carrying, and, instead, point to the conclusion that his actions were innocent and lawful. The bottles defendant was carrying were all closed and capped, and therefore were not open containers, even if they were unsealed. Transporting closed bottles is a legal activity which, without more, does not give rise to a presumption of intent to consume, or a founded suspicion of criminal activity. The fact that it was raining makes it less likely that defendant intended to congregate outside and remain exposed to the elements while consuming alcohol. The officer, at most, had the right to approach defendant to request information.

The heavy-weighted object in defendant's right jacket pocket did not justify the stop and detention, nor did defendant's flight justify pursuit. Flight is insufficient to escalate an encounter when no other circumstances of criminality are present. (Supreme Ct, New York Co)

People v Coke, 2025 NY Slip Op 01297 (1st Dept 3/6/2025)
LEGAL SUFFICIENCY | CIRCUMSTANTIAL DNA EVIDENCE | REVERSED AND INDICTMENT DISMISSED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of second-degree murder and second-degree CPW and from an order denying his 440.10 motion to vacate the judgment. The First Department found evidence of guilt insufficient, reversed, and dismissed the indictment. The prosecution's entirely circumstantial case was legally insufficient to establish appellant's intent or his presence at the crime scene. The presence of appellant's DNA as a contributor to a sample recovered from the gun slide and his presence hours earlier accompanied by those with whom he was accused of acting-in-concert did not establish that appellant intended to aid them in the shooting. The DNA evidence was highly equivocal, as it was impossible to determine when each contributor deposited his DNA on the gun, how appellant's DNA might have been transferred, or whether appellant ever touched the gun. There was no physical, video, or testimonial evidence supporting the conviction. The First Department also noted that the FST method of DNA analysis used to analyze the mixture had been excluded following a *Frye* hearing in another case and that the OCME no longer used this statistical tool. While not dispositive, these circumstances highlighted the weakness of the DNA evidence. Applying the same reasoning, the judgment was found to be against the weight of the evidence. Law Office of Joel V. Rubin, P.C. (Joel V. Rubin, Norman Reimer and Jacob Loup, of counsel) represented Coke. (Supreme Ct, Bronx Co)

People v Davila, 2025 NY Slip Op 01300 (1st Dept 3/6/2025)
MOTION TO VACATE JUDGMENT OF CONVICTION - Claim Of Actual Innocence/Hearing

LASJRP: In this CPL Article 440 proceeding, the First Department holds that the court should have ordered a hearing on defendant's actual innocence claim where defendant presented evidence, supported by the statements of the Assistant United States Attorneys who handled a cooperator, that, after defendant's trial, the cooperator credibly exonerated defendant by admitting to the shooting. Although the cooperator has died, his confession would be admissible as a statement against penal interest. (Supreme Ct, Bronx Co)

People v Huggins, 2025 NY Slip Op 01298 (1st Dept 3/6/2025)
EVIDENCE - Consciousness Of Guilt
RIGHT TO BE PRESENT - Frye Hearing

LASJRP: The First Department concludes that defendant did not have a right to be present at the Frye hearing on the admissibility of DNA evidence, which was not a "core segment" of his trial. Moreover, the hearing was conducted as part of a separate case to which defendant was not a party. Even if defendant had been a party to the Frye hearing, the proceeding did not involve factual matters about which defendant had any knowledge.

The court did not err in admitting evidence of defendant's refusal to participate in a lineup to show a consciousness of guilt. (Supreme Ct, New York Co)

People v Johnson, 2025 NY Slip Op 01326 (1st Dept 3/11/2025)
BURGLARY | EXCESSIVE SENTENCE | MODIFIED

ILSAPP: Appellant appealed from a New York County judgment convicting him, after a jury trial, of first-degree burglary, second-degree burglary, attempted fourth-degree grand larceny, and fourth-degree CPSP, and sentencing him to an aggregate term of 20 years' imprisonment. The case involved two burglaries where appellant gained entry by deception, attacked one victim and stole their phone, and withheld another victim's passport and documents while demanding money from him. Rejecting appellant's weight-of-the-evidence and legal sufficiency claims and characterizing appellant's testimony regarding a justification defense [as] "illogical," the First Department nonetheless reduced the

First Department *continued*

sentence in the interest of justice to an aggregate term of 16 years and otherwise affirmed the conviction. Office of the Appellate Defender (Sean Nuttall, of counsel) represented Johnson. (Supreme Ct, New York Co)

Matter of M.B., 2025 NY Slip Op 01318 (1st Dept 3/11/2025)
ABUSE/NEGLECT - Out-of-Court Statements By Child/Corroboration
- Derivative Abuse

LASJRP: The First Department finds sufficient corroboration of the child's out-of-court statements where a video depicting her interview at a child advocacy center was viewed by the court.

The Court also notes that the rule providing for admissibility of a child's prior out-of-court statements regarding abuse or neglect does not apply only to statements by children who are the subject of the proceeding.

The court properly made a derivative abuse finding as to a child who was sleeping in the same room when the sexual abuse occurred even though the child was not aware of the abuse.

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

People v Wann, 2025 NY Slip Op 01322 (1st Dept 3/11/2025)
INVALID APPEAL WAIVER | SURCHARGE AND FEES VACATED | MODIFIED

ILSAPP: Appellant appealed from a Bronx County judgment convicting him of third-degree robbery and sentencing him to 5 years' probation (Lewis, J.). The First Department vacated the surcharge and fees and otherwise affirmed. Additionally, the First Department found the appeal waiver invalid because the plea court's brief explanation did not adequately explain the nature of the right to appeal and suggested that the right was automatically forfeited by guilty plea. It also failed to advise that the right to appeal was separate and distinct from the trial rights being waived, and there was no written waiver. Center for Appellate Litigation (Emilia Kind-Musza, of counsel) represented Wann. (Supreme Ct, Bronx Co)

Matter of Steven C. v Ayelet C., 2025 NY Slip Op 01311 (1st Dept 3/11/2025)
FAMILY OFFENSE | MOTION TO DISMISS | REVERSED AND PETITION DISMISSED

ILSAPP: Wife appealed from a New York County Family Court order denying her motion to dismiss a family offense petition for failure to state a cause of action. The First Department reversed, granted the motion, and dismissed the petition. Petitioner husband failed to establish either second-degree harassment or fourth-degree stalking in his petition, because he failed to plead the requisite state of mind for either party. Rather, the allegations were solely based on the wife's prior family offense petitions against him and his fear of "yet another bogus petition," as well as her presence at the marital residence on a day she knew she was not supposed to be there. Carol A. Kahn represented the wife. (Family Ct, New York Co)

Second Department

In the online version of the *REPOR*T, 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 Jahmeir T., 233 AD3d 697 (2nd Dept 11/27/2024)
DELINQUENCY | WEIGHT OF THE EVIDENCE | REVERSED

ILSAPP: Appellant appealed from a Nassau County Family Court order finding that he committed acts which, if committed by an adult, would have constituted third-degree assault and third-degree menacing, adjudicated him a juvenile delinquent, and placed him on probation for 6 months. The Second Department reversed and dismissed the petition, determining the finding was against the weight of the evidence. The case turned on the identification of a single witness, the complainant, who was struck from behind and fell face-down to the ground. Although he identified appellant in a show-up procedure, it was from 238 feet away, through the windshield of a police car where appellant was detained in the back seat, and using only one eye, since the other was injured in the incident. Although the complainant claimed he had seen appellant shortly before the incident, his testimony on that point was inconsistent. The Second Department also would have found that the show-up was unduly suggestive, and the police lacked the requisite suspicion to stop appellant and his friends, since they had only a general description of "five black male youths riding bicycles" and appellant only had two companions with him. Frederick K. Brewington (Jonathan I. Edelstein of counsel) represented Jahmeir T. (Family Ct, Nassau Co)

People v Martines, 232 AD3d 911 (2nd Dept 11/27/2024)
DEFICIENT *ANDERS* BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Nassau County Supreme Court judgment convicting him after a guilty plea of first-degree manslaughter and second-degree conspiracy. Appellate counsel filed an *Anders* brief. The Second Department granted counsel's motion to withdraw and assigned new counsel to prosecute the appeal after finding the *Anders* brief deficient. It failed to address the validity of appellant's appeal waiver or whether appellant's sentence was excessive, where it was not the minimum authorized by statute. (Supreme Ct, Nassau Co)

Second Department *continued*

People v Etienne, 233 AD3d 705 (2nd Dept 12/4/2024)
SEARCH AND SEIZURE - Request For Information

LASJRP: Officers on patrol in a residential neighborhood after numerous burglaries had been reported observed defendant at the door of a residence behind a gate where a "no trespassing" sign was posted. The officers observed that defendant had blue latex gloves in his pocket and was holding a FedEx package. The door of the residence was slightly ajar, and defendant was speaking to someone inside. As defendant left the property, the officers approached and asked what he was doing in the area. Defendant gave inconsistent answers and could not explain why he was at that residence. When the officers asked the defendant for identification, he produced what the officers determined to be a fraudulent Pennsylvania driver license. The officers then arrested defendant.

The Second Department upholds the denial of suppression, noting, inter alia, that the officers had an objective credible reason to request information from defendant. (Supreme Ct, Queens Co)

Matter of Euceda v Romero, 233 AD3d 680
(2nd Dept 12/4/2024)
SPECIAL IMMIGRANT JUVENILE STATUS | REVERSED

ILSAPP: The subject child's aunt appealed from a Nassau County Family Court order denying her guardianship petition and 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 guardianship petition and motion, and found that it would not be in the subject child's best interests to be returned to Honduras based upon an independent factual review of the record. The child's active relationship with his father did not compel a different result. Bruno J. Bembi represented the aunt. (Family Ct, Nassau Co)

Matter of O'Connor v Shaw, 233 AD3d 686
(2nd Dept 12/4/2024)
CHILD SUPPORT | OUT OF STATE ORDER | REVERSED

ILSAPP: Appellant appealed from a Westchester County Family Court order granting the mother's petition for an upward modification of child support, arriving at the child support amount by applying Colorado law. The Second Department reversed. Although the parties divorced in Colorado and the mother was awarded child support there, all parties have since relocated to New York. The Uniform Interstate Family Support Act provides that the state issuing the child support order loses jurisdiction where none of the parties or children continue to reside in that state. The Second Department remitted the matter to Family Court for a new child support calculation in accordance with New York law. (Family Ct, Westchester Co)

Matter of Shala C. v Dacia A.D.S., 233 AD3d 679
(2nd Dept 12/4/2024)
ACKNOWLEDGEMENT OF PATERNITY | NEWLY DISCOVERED EVIDENCE | REVERSED

ILSAPP: Appellant appealed from a Queens County Family Court order denying and dismissing his petition to vacate his acknowledgment of paternity. The Second Department reversed and reinstated the petition. The petition was potentially meritorious, because appellant alleged that he had been unaware that the mother had another sexual partner during the relevant time period, and he later received newly discovered evidence: a private DNA test that excluded him as the child's biological father. Green Kaminer Min & Rockmore LLP (Nancy M. Green, of counsel) represented appellant. (Family Ct, Queens Co)

Matter of Teresa S. v Christopher H., 233 AD3d 691
(2nd Dept 12/4/2024)
GRANDPARENT VISITATION | PARENTAL OBJECTION | REVERSED

ILSAPP: The children appealed from a Suffolk County Family Court order granting the grandmother's petition for visitation with the children and setting a schedule for visitation. The Second Department reversed and denied the petition. Family Court's determination that visits with the grandmother would be in the children's best interests lacked a sound or substantial basis in the record. The parents opposed the visits, and the Second Department, noting that courts are generally reluctant to overrule the objections of fit parents regarding grandparent visitation, found their opposition well founded. Ronna L. DeLoe and Steven P. Forbes represented the children. (Family Ct, Suffolk Co)

People v Espinosa, 233 AD3d 796 (2nd Dept 12/11/2024)
DEFICIENT *ANDERS* BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of third-degree attempted burglary, following a guilty plea. Appellant's counsel filed an *Anders* brief. The Second Department granted counsel's motion to withdraw and assigned new counsel. Nonfrivolous issues exist, including but not limited to whether the court had authority to issue an order of protection. (Supreme Ct, Kings Co)

People v Islam, 233 AD3d 798 (2nd Dept 12/11/2024)
OOP | SURCHARGES & FEES | MODIFIED | OOP VACATED & REMITTED AS TO DURATION

ILSAPP: Appellant appealed from two Kings County Supreme Court judgments convicting him of second-degree attempted CPW and second-degree criminal trespass, following his guilty pleas. The Second Department affirmed the convictions but

Second Department *continued*

modified in the interest of justice by vacating the mandatory surcharge and fees in the attempted CPW case; and by vacating the duration portion of the OOP and remitting for a new determination on its duration in the criminal trespass case. Preservation was not required as to the OOP issue because appellant had no practical ability to object where the court did not announce the duration of the OOP at either the plea or sentencing proceedings. The duration of the OOP exceeded the maximum time limit pursuant to CPL § 530.12(5) and failed to consider appellant's jail-time credits. Appellate Advocates (Joshua M. Levine, of counsel) represented Islam. (Supreme Ct, Kings Co)

People v Islam, 233 AD3d 798 (2nd Dept 12/11/2024)
SURCHARGES & FEES | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of fourth-degree CPSP, following his guilty plea. The Second Department modified in the interest of justice by vacating, on consent of the prosecution, the imposition of the mandatory surcharge and fees. Appellate Advocates (Joshua M. Levine, of counsel) represented Islam. (Supreme Ct, Kings Co)

People v Lisbon, 233 AD3d 799 (2nd Dept 12/11/2024)
DEFICIENT *ANDERS* BRIEF | NEW APELLATE COUNSEL ASSIGNED

ILSAPP: Appellant appealed from an Orange County Court judgment convicting him of DWI, following a guilty plea. Appellant's counsel filed an *Anders* brief. The Second Department found the *Anders* brief to be deficient, granted counsel's motion to withdraw, and assigned new counsel. The brief failed to review the court's colloquy related to the rights appellant was waiving or to provide any detail related to appellant's factual admissions. The brief also failed to adequately analyze the voluntariness of the plea, the validity of the appeal waiver, or whether the sentence was excessive. (County Ct, Orange Co)

People v Moore, 233 AD3d 802 (2nd Dept 12/11/2024)
30.30 | PRE-INDICTMENT SOR | REVERSED & DISMISSED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree CPW, following a guilty plea. The Second Department reversed, granted appellant's CPL § 30.30 motion, and dismissed the indictment. As conceded by the prosecution, their pre-indictment statement of readiness was illusory and ineffective to stop the speedy trial clock, and they failed to declare readiness until after the six-month period had expired. Russell Law Group, PLLC (Camille O. Russell, of counsel) represented Moore. (Supreme Ct, Queens Co)

People v Yentes, 233 AD3d 806 (2nd Dept 12/11/2024)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of third-degree robbery, following his guilty plea. The Second Department affirmed but found that the appeal waiver was invalid because the written waiver inaccurately stated that appellant was waiving his rights to poor person relief and postconviction remedies in state and federal courts, and the oral colloquy failed to cure these defects. However, appellant's sentence was not excessive. Appellate Advocates (Sarah B. Cohen, of counsel) represented Yentes. (Supreme Ct, Queens Co)

People v Ford, 233 AD3d 891 (2nd Dept 12/18/2024)
MULTIPLICITOUS COUNTS | COUNTS DISMISSED | MODIFIED

ILSAPP: Appellant appealed from a Richmond County Supreme Court judgment convicting him of 13 counts of third-degree CSCS, after a jury trial. The Second Department modified in the interest of justice by vacating three multiplicitous counts in the indictment where the jury charges on those counts were "essentially identical" to the charges on three other counts, and, as modified, affirmed. While the dismissal of these counts will not affect the duration of the sentence, it is appropriate due to the stigma attached to redundant convictions. Appellate Advocates (Yvonne Shivers, of counsel) represented Ford. (Supreme Ct, Richmond Co)

People v Ford, 233 AD3d 894 (2nd Dept 12/18/2024)
EXCESSIVE SENTENCE | CONSECUTIVE TO CONCURRENT WITH PRIOR CONVICTION | MODIFIED

ILSAPP: Appellant appealed from a Richmond County Supreme Court judgment convicting him of third-degree CPCS, fourth-degree CPCS, and third-degree aggravated unlicensed operation of a motor vehicle, after a non-jury trial. He was sentenced to an aggregate term of 10 years' imprisonment and three years' PRS, running consecutively with the sentence imposed on his prior conviction under a separate indictment. The Second Department affirmed the conviction but found that the sentence—an aggregate term of over 50 years' imprisonment—was excessive and modified in the interest of justice by running the sentence concurrently with the sentence on his prior conviction. Appellate Advocates (Yvonne Shivers, of counsel) represented Ford. (Supreme Ct, Richmond Co)

People v Morel, 233 AD3d 897 (2nd Dept 12/18/2024)
SURCHARGES & FEES | MODIFIED

ILSAPP: Appellant appealed from two Kings County Supreme Court judgments convicting him of first-degree attempted assault and first-degree criminal contempt, following his guilty

Second Department *continued*

pleas. With the prosecution's consent, the Second Department vacated the imposition of mandatory surcharges and fees in the interest of justice. CPL § 420.35 (2-a) permits the waiver of surcharges and fees for individuals under 21 years old at the time of offense. Appellate Advocates (Sarah B. Cohen, of counsel) represented Morel. (Supreme Ct, Kings Co)

Matter of Botros v Botros, 233 AD3d 1029
(2nd Dept 12/24/2024)
VISITATION - Court-Ordered Forensic Evaluation/Refusal To Comply

LASJRP: The Second Department finds no error where the Family Court dismissed the father's petition seeking unsupervised parental access because the father refused to comply with a court order directing an updated forensic evaluation of the parties. (Family Ct, Nassau Co)

Matter of Elina M., 2024 NY Slip Op 06574
(2nd Dept 12/24/2024)
ABUSE/NEGLECT - Excessive Corporal Punishment - Petition/Amendment To Conform To Proof

LASJRP: The Second Department agrees with respondent father that the Family Court erroneously found that ACS established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporate punishment.

Although the Court is not deviating from prior decisional law so as to suggest that a single incident of excessive corporal punishment cannot support a finding of neglect, in this case ACS failed to establish that the father's act of grabbing or holding the child's arm or shoulder rose to the level of neglect or that he intended to hurt the child or exhibited a pattern of excessive corporal punishment.

Also, the Family Court improperly based its finding of neglect, at least in part, upon allegations that were not included in the petition - to wit, that the father had previously engaged in unspecified acts of aggression toward the child and that he misused alcohol in the child's presence. The Family Court afforded ACS an opportunity to conform the pleadings to the proof by a certain date, and after ACS failed to do so, the Family Court made a ruling on the record that its findings would "be based only on the original allegations contained in the petition." Ultimately, the Family Court failed to adhere to its own ruling. (Family Ct, Kings Co)

People v Jenkins, 233 AD3d 1027 (2nd Dept 12/24/2024)
EXCESSIVE SENTENCES | INVALID WAIVER OF APPEAL | MODIFIED

ILSAPP: Appellant appealed from two Orange County Court judgments convicting him of third-degree CSCS and third-degree CPCS, following his guilty pleas, and sentencing him to two determinate terms of 6 years' imprisonment and 2 years' PRS, to be run consecutively. The Second Department affirmed the convictions but modified the sentences. The appeal waiver was invalid because the court mischaracterized the nature of the right to appeal by stating that the convictions and sentences would be final and failed to clarify in the written waiver that appellate review was available for select issues. Appellant's sentences were excessive and modified to two determinate terms of 4 years' imprisonment and 2 years' PRS, to be run consecutively. Richard L. Herzfeld represented Jenkins. (County Ct, Orange Co)

Matter of Morales v Diaz, 233 AD3d 1033
(2nd Dept 12/24/2024)
PARENTAL ACCESS | CHANGE OF CIRCUMSTANCES | MODIFIED

ILSAPP: The mother appealed from an Orange County Family Court order denying her petition to modify prior orders to, among other things, grant her additional parental access to the children. The Second Department modified and directed the father to produce the children for in-person therapeutic or supervised parental access, as well as phone or video contact. The mother's relocation from North Carolina back to New York, where the children lived with their father, constituted a change of circumstances. The father's testimony established that the children did not wish to have contact with the mother while she lived in North Carolina and he felt "there was nothing he could really do," so failing to modify the order would improperly condition her right of parental access on the desires of the children. The Second Department therefore modified the order and remitted for Family Court to set a specific parental access schedule. Alex Smith represented the mother. (Family Ct, Orange Co)

People v Howell, 234 AD3d 713 (2nd Dept 1/8/2025)
SUPPRESSION | IMPROPER SEARCH INCIDENT TO ARREST | MODIFIED & VACATED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree strangulation, fourth-degree CPSP, and false personation, upon a jury verdict. In its December 2022 order, the Second Department remitted the matter for a new suppression hearing and held the appeal in abeyance. Upon its review of the trial court's report determining that the prosecution did not meet its burden of demonstrating that the search of appellant's jacket was justified as a search incident to arrest, the Second Department vacated appellant's fourth-degree CPSP conviction and sentence and remitted the matter. However, appellant's remaining convictions were affirmed. There was no reasonable possibility that the jury's verdict on fourth-degree CPSP influenced its guilty verdict on the remaining counts in any meaningful way, given that the evidence was strong and not "factually related" to the items recovered from appellant's jacket. Appellate Advocates

Second Department *continued*

(Kathleen Whooley, of counsel) represented Howell. (Supreme Ct, Kings Co)

Matter of Karma-Marie W. (Jerry W.), 234 AD3d 705 (2nd Dept 1/8/2025)
GUARDIANSHIP | STANDING | REVERSED

ILSAPP: Appellant appealed from a Kings County Family Court order which, sua sponte, dismissed her guardianship petition with prejudice, on the ground that appellant lacked standing, as they were not biologically related to the subject child. The Second Department reversed. Family Court improperly dismissed appellant's petition without a hearing, as pursuant to SCPA 1703, a guardianship petition may be brought by "any person." The Second Department reinstated the petition and remitted the case to Family Court for a hearing. (Family Ct, Kings Co)

Matter of Koch v Yu-Ting Tsai, 234 AD3d 691 (2nd Dept 1/8/2025)
PARENTAL ACCESS | MODIFIED AND REMITTED

ILSAPP: Mother appealed from an Orange County Family Court order granting father's petition for sole legal custody of the child, with parental access to mother via Skype "or other agreed-upon digital service" and "further access to the child as parties may agree." The Second Department remitted for an in camera interview with the subject child to ascertain their views and to make a new determination as to the mother's parental access, and otherwise affirmed. Family Court's determination to limit the mother's parental access lacked a sound and substantial basis in the record, since the hearing evidence did not demonstrate that it would be detrimental to the child to have in-person visits in New York, and there was no agreement by the parties for additional parental access. Kelli M. O'Brien represented the mother. (Family Ct, Orange Co)

Matter of Kyng T. B., 234 AD3d 682 (2nd Dept 1/8/2025)
ABUSE/NEGLECT - Evidence/Hearsay

LASJRP: The Second Department upholds a neglect finding based on acts of domestic violence where much of the evidence against the father consisted of out-of-court statements made by the mother to a police officer who responded to the mother's 911 call.

The statements were admissible under the excited utterance exception to the hearsay rule. The mother spoke to the officer within minutes after the incident and she was very upset, crying, and in distress. (Family Ct, Queens Co)

People v Picard, 234 AD3d 718 (2nd Dept 1/8/2025)
***ANDERS* BRIEF | NONFRIVOLOUS APPELLATE ISSUE | NEW COUNSEL ASSIGNED**

ILSAPP: Appellant appealed from two Nassau County Supreme Court judgments convicting him of second-degree CPCS and second-degree criminal possession of a forged instrument, following his guilty pleas. Appellant's counsel filed an *Anders* brief. The Second Department granted counsel's motion to withdraw and assigned new counsel. At least one nonfrivolous issue exists regarding whether the court should have ordered an updated PSI report prior to sentencing. (Supreme Ct, Nassau Co)

People v Simon, 234 AD3d 720 (2nd Dept 1/8/2025)
SUPPRESSION | SHOWUP IDENTIFICATION | ALTERNATE JUROR SUBSTITUTION | REVERSED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree robbery, first-degree attempted robbery, second-degree criminal use of a firearm, second-degree CPW, fourth-degree grand larceny, and fourth-degree CPSP, upon a jury verdict. The Second Department reversed; granted appellant's motion to suppress identification evidence; dismissed the counts charging appellant with first-degree robbery, fourth-degree grand larceny, and fourth-degree CPSP; and remitted for a new trial upon the remaining counts. The court should have granted appellant's motion to suppress identification evidence because the prosecution failed to establish that the showup was conducted in close temporal proximity to the crime, and there was no unbroken chain of events or exigent circumstances justifying it. Further, the prosecution failed to establish that the showup was not unduly suggestive where police informed the complainant that they had someone in custody matching the culprit's description, appellant was handcuffed and near law enforcement at the time he was identified, police told the complainant that appellant had committed another crime nearby, and appellant's face was bruised and bleeding while standing in the active crime scene. Further, as conceded by the prosecution, a new trial is required because the court failed to obtain appellant's written and signed consent to replace a regular juror with an alternate juror after deliberations began. Appellate Advocates (Alice R.B. Cullina, of counsel) represented Simon. (Supreme Ct, Kings Co)

People v Yarbrough, 234 AD3d 723 (2nd Dept 1/8/2025)
CODEFENDANT | JOINTLY TRIED AND CONVICTED | REVERSED & REMITTED FOR NEW TRIAL

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree murder and second-degree CPW, upon a jury verdict. The Second Department reversed and remitted for a new trial. Appellant and Deverow were jointly tried and convicted and, as conceded by the prosecution, appellant's judgment warrants reversal and a new trial for the same reasons stated by the Court of Appeals in reversing Deverow's conviction in *People v Deverow*, 38 NY3d 157 [2022]: namely, precluded testimony of a witness could

Second Department *continued*

have contradicted testimony of the sole eyewitness who negated the justification defense, a defense which could have been buttressed by precluded 911 calls. The Legal Aid Society of NYC (Arthur H. Hopkirk, of counsel) represented Yarbrough. (Supreme Ct, Queens Co)

Matter of Blackman v Barge, 234 AD3d 752
(2nd Dept 1/15/2025)
MODIFICATION OF CUSTODY & PARENTAL ACCESS | ERRONEOUS DISMISSAL WITH PREJUDICE | MODIFIED

ILSAPP: Mother appealed from a Westchester County Family Court order dismissing, with prejudice and without a hearing, her petitions to modify her custody order to award her sole legal and physical custody of the parties' child or, in the alternative, for an extension of supervised therapeutic parental access with the child. The Second Department modified the order by deleting the provision dismissing the mother's petition with prejudice, and otherwise affirmed. Although the mother did not make the requisite evidentiary showing of a change in circumstances warranting a hearing on her petitions, the Family Court erred by dismissing said petitions with prejudice, as doing so is confusing and suggests that the mother could not seek relief in the future based upon a change in circumstances. Further, child custody and parental access orders are not entitled to a res judicata effect. Karen M. Jansen represented the mother. (Family Ct, Westchester Co)

People v Duhaney, 234 AD3d 790 (2nd Dept 1/15/2025)
People v Gumbs, 234 AD3d 791 (2nd Dept 1/15/2025)
People v Norberto, 234 AD3d 795 (2nd Dept 1/15/2025)
DEFICIENT *ANDERS* BRIEFS | NEW COUNSEL ASSIGNED

ILSAPP: Appellants' assigned counsel each filed *Anders* briefs to withdraw. In all three cases, the Second Department found counsels' *Anders* briefs deficient, granted their motions to withdraw, and assigned new counsel. In *Duhaney* and *Norberto*, the briefs failed "to analyze potential appellate issues with reference to the facts of the case and relevant legal authority" and offered little more than conclusory statements that there were no nonfrivolous issues to be raised. In *Gumbs*, the brief's statement of facts did not include the proceedings pertaining to appellant's promised alternative sentence, and it did not adequately analyze potential appellate issues. These included whether appellant waived his right to be present at sentencing, whether he violated the terms of interim probation pursuant to the plea agreement, and whether his sentence was excessive. (Supreme Ct, Nassau Co)

Matter of Freyer v Macruari,
234 AD3d 755
(2nd Dept 1/15/2025)
VISITATION - Suspension/Limitation Of Contact - Right To File

LASJRP: The Second Department upholds a determination limiting the father's parental access to contact through OurFamilyWizard and FaceTime where therapeutic parental access was halted because of the father's behavior; the child was angry, upset, and crying after therapy sessions with the father; and the court was entitled to place great weight on the child's wishes due to her age and maturity.

The court erred in prohibiting the father from filing any further modification petitions without the permission of the court where there was no basis in the record demonstrating that the father filed frivolous petitions or filed petitions out of ill will or spite. (Family Ct, Suffolk Co)

Matter of Gliksman v Burekhovich, 234 AD3d 758
(2nd Dept 1/15/2025)
FAMILY OFFENSES - Standing To File o/b/o Child

LASJRP: The Second Department concludes that the paternal grandmother lacks standing to file the family offense petition on behalf of the child, seeking an order of protection against respondent, the child's maternal uncle.

Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his or her property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody. CPLR 1201. Here, petitioner did not have legal custody or legal guardianship of the child. (Family Ct, Kings Co)

People v Kerr, 234 AD3d 794 (2nd Dept 1/15/2025)
TRIAL WITHOUT THE ACCUSED | IMPROPER JURY INSTRUCTIONS | REVERSED & NEW TRIAL ORDERED

ILSAPP: Appellant appealed from an Orange County Court judgment convicting him of second-degree CPW and second-degree criminal possession of a forged instrument, upon a jury verdict. The Second Department reversed and ordered a new trial. The trial court improperly conducted the trial in appellant's absence without making an inquiry or reciting on the record the specific facts and reasons relied upon to determine that appellant's absence from trial was deliberate. Further, although unpreserved for appellate review, the trial court failed to instruct the jury on the home or place of business exception regarding the count of second-degree CPW. Rosenberg Law Firm (Jonathan Rosenberg, of counsel) represented Kerr. (County Ct, Orange Co)

Matter of Lane v County of Nassau, 234 AD3d 761
(2nd Dept 1/15/2025)
ARTICLE 78 | FOIL | POLICE DATABASE | REVERSED & REMITTED

Second Department *continued*

ILSAPP: Petitioner appealed from a judgment of Nassau County Supreme Court denying and dismissing an Article 78 petition to compel disclosure of Nassau County Police Department records pertaining to the creation or maintenance of its current databases and issue an award of attorney's fees and litigation costs. The Second Department reversed, reinstated the relevant branches of the petition, and remitted for further proceedings. Supreme Court erred by determining, as a matter of law, that petitioner failed to "reasonably describe" the records sought, which were not vague or unlimited and were circumscribed as to subject matter and the relevant time period. Further, contrary to FOIL regulations, there is no evidence that the Department made any effort to assist petitioner with more precisely defining the records sought. Cory H. Morris (Victor Yannacone, Jr., of counsel) represented Lane. (Supreme Ct, Nassau Co)

Matter of Nathaniel v Mauvais, 234 AD3d 766
(2nd Dept 1/15/2025)
CUSTODY - Relocation
VISITATION - Suspension/Limitation Of Contact

LASJRP: The Second Department upholds an order limiting the mother's parental access to written letters and packages by regular mail once per week where the mother's mental health had deteriorated over time; she repeatedly made false reports of abuse to authorities; parental access time and telephonic communications with the mother had repeatedly caused the child emotional distress; and the mother only partially participated in a court-ordered forensic evaluation.

The Court also concludes that the Family Court did not err in granting the father permission to relocate with the child to Georgia where the father and the child's stepmother had secured employment in Georgia; and their living expenses in Georgia were significantly lower than in New York, and, as a result, the child had access to a higher standard of living and the ability to participate in more activities than he did in New York. (Family Ct, Kings Co)

Matter of Ramos v West, 234 AD3d 773
(2nd Dept 1/15/2025)
FAMILY OFFENSE | INSUFFICIENT EVIDENCE OF DISORDERLY CONDUCT | MODIFIED

ILSAPP: Father appealed from a Kings County Family Court order of fact-finding and disposition which found that father had committed the family offenses of second-degree aggravated harassment, second-degree harassment, and disorderly conduct, and directed him to comply with the terms of an order of protection. The Second Department modified the order by deleting the provision finding that he committed the family offense of disorderly conduct, and otherwise affirmed. There was insufficient evidence to establish that the father intended to cause, or recklessly posed a risk in causing, public inconvenience, annoyance, or alarm. Elliot Green represented the father. (Family Ct, Kings Co)

People v Beaubrun, 234 AD3d 869 (2nd Dept 1/22/2025)
People v Newman, 234 AD3d 877 (2nd Dept 1/22/2025)
OOP | SURCHARGES & FEES | MODIFIED | OOP VACATED & REMITTED AS TO DURATION

ILSAPP: Appellants appealed from separate Kings County Supreme Court judgments convicting them following their guilty pleas. The Second Department affirmed Beaubrun's conviction for second-degree burglary and Newman's conviction for second-degree attempted assault but vacated the durational portions of appellants' OOPs and remitted for new determinations as to duration. The duration of the OOPs exceeded the statutory maximum and failed to account for appellants' jail-time. Preservation was not required because appellants had no practical ability to timely object where the courts did not announce the durations of the OOPs at the plea or sentencing proceedings. In *Beaubrun*, the Second Department also vacated the mandatory surcharge and fees in the interest of justice and upon the prosecution's consent. Appellate Advocates (Brian Perbix, of counsel) represented Beaubrun; Appellate Advocates (Russ Altman-Merino, of counsel) represented Newman. (Supreme Ct, Kings Co)

Matter of Camiyah B., 234 AD3d 845 (2nd Dept 1/22/2025)
ABUSE/NEGLECT - ICPC

LASJRP: Post-fact-finding, the agency supervising the child's foster care placement requested permission for the foster parent to relocate with the child to Texas. The Family Court granted the application without a hearing.

The Second Department affirms. Pursuant to ICPC Regulation No. 1, subject to certain restrictions, a child who relocates with their "approved placement resource" may be permitted to remain in the receiving state while the ICPC process is pending where the child was already placed with the "approved placement resource" in the sending state and the parties prepare an ICPC application "immediately upon the making of the decision" to relocate. Here, the child had already been placed with the foster parent who was seeking to relocate with the child. The parties timely sought permission and prepared an ICPC application, which the Family Court directed them to submit and which the sending and receiving states were required to timely rule upon.

At oral argument, counsel represented that although Texas has not yet ruled on the application, Texas has been providing ongoing supervision. There is no indication in the record that the ICPC application was denied by Texas.

Addressing the mother's unpreserved claim that the Family Court erred in failing to conduct a full dispositional hearing, the

Third Department *continued*

Court notes that the Family Court had detailed knowledge of the extensive history of the case and clearly articulated the undisputed facts that supported its determination that it was in the child's best interests to relocate.

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

People v Harris, 234 AD3d 872 (2nd Dept 1/22/2025)
PREDICATE SENTENCING | OUT-OF-STATE CONVICTION | VACATED & REMITTED FOR RESENTENCING

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree attempted assault and two counts of attempted aggravated assault upon a police officer and related charges. The Second Department vacated appellant's adjudication as a second felony offender and remitted for resentencing. Appellant was improperly sentenced as a second felony offender, because, as conceded by the prosecution, his prior robbery conviction in Louisiana did not constitute a felony in New York for purposes of enhanced sentencing. Appellate Advocates (Cynthia Colt, of counsel) represented Harris. (Supreme Ct, Kings Co)

People v Martinez, 234 AD3d 879 (2nd Dept 1/22/2025)
DVSJA | TEMPORAL NEXUS | SUMMARY DENIAL AFFIRMED

ILSAPP: Appellant appealed from a Westchester County Supreme Court order summarily denying his resentencing motion pursuant to CPL § 440.47, the retroactive portion of the Domestic Violence Survivors Justice Act. The Second Department modified the order by making the denial without prejudice and otherwise affirmed. The Second Department determined that Supreme Court properly denied the motion without a hearing because appellant failed to present sufficient corroborating evidence that he was a victim of domestic violence at the time he committed the robbery in question. Notably, the Second Department did not address whether it had jurisdiction to hear this appeal from a summary denial of a DVSJA resentencing motion, since the lower court's order had denied the motion. In contrast, in *People v Melissa OO.*, 2024 NY Slip Op 05920 [3d Dep't 2024], the Third Department dismissed a similar appeal where the lower court had styled its denial of a hearing as a dismissal, on the basis that "there is no statutory authority" to appeal from an "order dismissing [an] application for resentencing under the DVSJA without prejudice." *Martinez* and *Melissa OO*. illustrate a growing split in the Appellate Division on the appealability of summary denials/dismissals of DVSJA resentencing motions. (Supreme Ct, Westchester Co)

People v Serrano, 234 AD3d 879 (2nd Dept 1/22/2025)
DISCOVERY/SPEEDY TRIAL

LASJRP: The Second Department, noting that the People failed to address defendant's assertion regarding missing "line of duty" paperwork, concludes that the Certificate of Compliance was improper, the Statement of Readiness should have been stricken as illusory, and defendant's motion to dismiss the indictment on statutory speedy trial grounds should have been granted. (Supreme Ct, Queens Co)

People ex rel. Abate v Warden, Eric M. Taylor Ctr., 234 AD3d 899 (2nd Dept 1/27/2025)
HABEAS CORPUS | REVOCATION OF SECURING ORDER | HEARING REQUIRED | WRIT SUSTAINED

ILSAPP: Petitioner filed a writ of habeas corpus seeking to be released on his own recognizance or to set reasonable bail. The Second Department sustained the writ and restored petitioner to his prior bail status. After posting bail, petitioner appeared late for a court appearance, and the court revoked bail and remanded him, without a hearing. When revoking a securing order, where the record does not demonstrate that the court's determination was based on risk of flight, it will be assumed that the court proceeded pursuant to CPL § 530.60[2][a], which allows for revocation where there is reasonable cause to believe petitioner committed class A or violent felonies or intimidated a victim or witness. Here, the record does not show that the determination was based on risk of flight, and no hearing was held, as required by CPL § 530.60[2][a]. Camille M. Abate represented Latergaus. (Supreme Ct, Kings Co)

Matter of Aaronlin Savanna R., 234 AD3d 972 (2nd Dept 1/29/2025)
AGENCY APPEAL | TPR | NO DILIGENT EFFORTS | AFFIRMED

ILSAPP: The SCO Family of Services ("Agency") appealed from a Queens County Family Court order dismissing their termination of parental rights petition on the ground of permanent neglect, following a fact-finding hearing. The Second Department affirmed. Family Court properly determined that the Agency failed to establish by clear and convincing evidence that it had exercised diligent efforts to strengthen the father's parental relationship with the subject child, and that the Agency's obligation to demonstrate diligent efforts was not excused under the circumstances of the case. Diligent efforts must be made "before the court may consider whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child." Joan Iacono and Diana Kelly represented respondent parents, respectively. (Family Ct, Queens Co)

People v Gallardo, 234 AD3d 986 (2nd Dept 1/29/2025)
WEIGHT OF THE EVIDENCE | PROSECUTORIAL MISCONDUCT AT SUMMATION | TOP COUNTS DISMISSED & NEW TRIAL ORDERED

ILSAPP: Appellant appealed from two judgments of Queens

Second Department *continued*

County Supreme Court convicting her of second-degree attempted murder, first-degree burglary, first-degree attempted assault, fourth-degree criminal mischief, and first-degree criminal contempt, upon a jury verdict. The Second Department reversed the judgments, dismissed the attempted murder and burglary counts, and remitted for a new trial on the remaining counts. The Second Department determined that the convictions were supported by legally sufficient evidence. However, where an acquittal would not have been unreasonable on the attempted murder and burglary counts, the prosecution "failed to establish, beyond a reasonable doubt, that [appellant] intended to cause the death of another person or ... knowingly entered or remained unlawfully in a dwelling with the intent to commit a crime therein," and the Second Department dismissed those counts as against the weight of the evidence. Further, although the argument was partially unpreserved, the Second Department exercised its interest-of-justice power to hold that appellant was deprived of a fair trial due to prosecutorial misconduct at summation. The prosecutor "repeatedly accused [appellant] of lying, improperly vouched for the credibility of the complainant, and misstated the critical evidence to support the charge of attempted murder in the second degree." The Legal Aid Society of NYC (Whitney Elliott, of counsel) represented Gallardo. (Supreme Ct, Queens Co)

Matter of Hanford v Hanford, 234 AD3d 965
(2nd Dept 1/29/2025)
CHILD SUPPORT VIOLATION | WAIVER OF RIGHTS VIA LATER AGREEMENT | MODIFIED

ILSAPP: Appellant appealed from an order of Kings County Family Court finding that he violated the child support provisions of the parties' separation agreement and directed him to pay child support arrears in the sum of $93,612.45. The Second Department modified the order and order of disposition by deleting the provision directing the payment of arrears, remitted the matter to Family Court for a new determination as to the amount of arrears owed, and otherwise affirmed. The parties' subsequent agreement via email to reduce the amount of child support, along with the payee's acceptance of those reduced payments over the course of five years, constituted a valid and enforceable waiver of rights under the prior separation agreement. Mitey Law Firm, P.C. (Vesselin V. Mitey, of counsel) represented Appellant. (Family Ct, Kings Co)

People v Khedr, 234 AD3d 991 (2nd Dept 1/29/2025)
OOP | MODIFIED | OOP VACATED & REMITTED FOR DURATION DETERMINATION

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of third-degree grand larceny following his guilty plea. The Second Department affirmed but vacated the durational portion of two OOPs and remitted for a new determination as to duration. The OOPs' durations exceeded the statutory maximum and failed to account for appellant's jail-time. Preservation was not required because appellant had no practical ability to timely object where the court did not announce the duration of the OOPs at the plea or sentencing proceedings. Appellate Advocates (Rebekah J. Pazmiño, of counsel) represented Khedr. (Supreme Ct, Queens Co)

Matter of Lily, 2025 NY Slip Op 00448 (2nd Dept 1/29/2025)
ADOPTION - Registration Of Foreign Adoption

LASJRP: The Second Department holds that Domestic Relations Law § 111-c permits New York State to register a foreign adoption even though the applicant is no longer in possession of the required immigrant visa, where petitioner provided an affidavit averring that the child had been issued the relevant immigrant visa, and a copy of a replacement Certificate of Citizenship, issued by the United States Citizenship and Immigration Services showing that the child became a United States citizen only nine days after her adoption. The child would not have been able to automatically obtain a Certificate of Citizenship if she had not possessed the appropriate immigrant visa.

The foreign adoption order meets the requirements of Domestic Relations Law § 111-c(1), including the requirement that "the validity of the foreign adoption has been verified by the granting of an IR-3, IH-3, or a successor immigrant visa." (Surrogate Ct, Nassau Co)

People v Mendez-Saldivar, 234 AD3d 995
(2nd Dept 1/29/2025)
DEFICIENT *ANDERS* BRIEF | SORA | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Suffolk County Court order designating him a level two sex offender under SORA. Appellant's assigned counsel filed an *Anders* brief to withdraw. The Second Department found counsel's *Anders* brief deficient, granted the motion to withdraw, and assigned new counsel. The brief failed "to analyze potential legal issues with reference to the facts of the case and relevant legal authority" and offered little more than a conclusory opinion that there were no nonfrivolous issues to be raised. (County Ct, Suffolk Co)

Matter of Mitchell-George v George, 234 AD3d 969
(2nd Dept 1/29/2025)
FAMILY OFFENSE | INSUFFICIENT EVIDENCE OF DISORDERLY CONDUCT | AFFIRMED OOP

ILSAPP: Appellant appealed from a Kings County Family Court order finding that appellant committed the family offenses of disorderly conduct, second-degree harassment, and second-degree menacing, and directed him to comply with the terms of a stay-away order of protection. The Second Department found

Second Department *continued*

insufficient evidence to show that appellant committed disorderly conduct, but otherwise affirmed. Petitioner failed to establish that appellant intended to cause, or recklessly posed a risk in causing, public inconvenience, annoyance, or alarm. Helene Chowes represented Appellant. (Family Ct, Kings Co)

People v Rivera, 234 AD3d 998 (2nd Dept 1/29/2025)
SORA | DOWNWARD DEPARTURE WARRANTED | STATUTORY RAPE | REVERSED

ILSAPP: Appellant appealed from an Orange County Court order designating him a level two sex offender under SORA. The Second Department reversed and designated him a level one. A downward departure was warranted in this case of statutory rape where the complainant's lack of consent was due only to inability to consent by virtue of age. Therefore the scoring of 25 points under risk factor 2 resulted in an over-assessment of appellant's risk to public safety, considering all of the circumstances, including the five-year age difference between appellant and complainant, appellant's overall score near the lower end of the range for a level-two designation, and the lack of any other sex-related crime in appellant's history. Samuel S. Coe represented Rivera. (County Ct, Orange Co)

Matter of Meyer v Nassau County Police Dept., 235 AD3d 641 (2nd Dept 2/5/2025)
ARTICLE 78 | FOIL OF POLICE RECORDS | EXHAUSTION | REVERSED & REMITTED

ILSAPP: Petitioner appealed from a judgment of Nassau County Supreme Court denying and dismissing an Article 78 proceeding against the Nassau County Police Department (NCPD) compelling disclosure of records pursuant to FOIL and for an award of attorney's fees and litigation costs. The Second Department reversed, reinstated the petition, and remitted for a determination on the merits. Supreme Court improperly denied the petition on the basis that petitioner had failed to exhaust his administrative remedies. Where the NCPD's time to respond to petitioner's appeal had expired and its response was a letter via email constituting its final determination, the court should have determined that petitioner exhausted his administrative remedies. Aron Law, PLLC (Joseph H. Aron, of counsel) represented Meyer. (Supreme Ct, Nassau Co)

Matter of Riera v Ayabaca, 235 AD3d 643 (2nd Dept 2/5/2025)
CUSTODY AND FAMILY OFFENSE | DEFAULT CUSTODY ORDER LACKING BASIS IN RECORD | MODIFIED

ILSAPP: The father appealed from a Westchester County Family Court order dismissing his petition to vacate an order awarding sole legal and physical custody of the child to the mother, with a two-year stay away OOP against the father, issued without a hearing in his absence. The Second Department modified the order by granting his motion and remitting for a new determination of the parties' custody petitions, and otherwise affirmed. Whether made upon the default of a party or not, a custody determination must always have a sound and substantial basis in the record. Family Court erred by making a custody determination without a hearing and without making any specific findings of fact regarding the best interests of the child. However, the OOP was upheld. Aron Law, PLLC (Joseph H. Aaron, of counsel) represented the father. (Family Ct, Westchester Co)

Matter of Sapphire W., 2025 NY Slip Op 00662 (2nd Dept 2/5/2025)
ABUSE/NEGLECT - Release Of Child To Non-Respondent Parent/ACS Supervision

LASJRP: In this Article Ten proceeding brought against the child's father alleging that he neglected the child by committing acts of domestic violence against the mother at her home in the presence of the child, ACS advised the court that the father "did not reside in the home" with the mother and the child, although he "would occasionally sort of show up." The Family Court placed the mother under the supervision of ACS and the court and directed the mother to cooperate with ACS in certain respects. Specifically, the court required the mother to "maintain[ ] contact with ACS, permit[ ] [ACS's staff members] to make announced and unannounced visits to the home, and accept[ ] any reasonable referrals for services."

The Second Department reverses. Deciding an issue of first impression in New York, and applying the exception to the mootness doctrine, the Court holds that in a FCA Article Ten proceeding, the Family Court may not place a non-respondent custodial parent under the supervision of the Administration for Children's Services and the court, and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the non-respondent parent's home. The Court cites the well-established interest of a parent in the companionship, care, custody, and management of his or her children (Stanley v Illinois, 405 U.S. 645, 651) and the lack of any statutory authority permitting the challenged directives.

The provisions in FCA § 1017 requiring the non-respondent parent to "submit[ ] to the jurisdiction of the court with respect to the child" and "to cooperate" with "the child protective agency" in various ways (FCA § 1017[3]) are triggered only after the child is removed from the home. Here, the court never determined that the child must be removed from her home.

Moreover, Article Ten serves, in part, to enact procedures preventing unwarranted state intervention in family life, and the relevant provisions of FCA § 1017 serve to help the child maintain family ties while respecting the rights of parents. "The challenged directives constitute precisely the type of state

Second Department *continued*

intervention that the Legislature sought to avoid in circumstances when it is not warranted, particularly considering the impact ACS involvement can have on a child or a parent. It is also unclear how a nonrespondent custodial parent's rights would be respected by placing his or her parenting of a child under ACS supervision. Nor does interpreting Family Court Act § 1017 in a manner that permits ACS supervision of a nonrespondent custodial parent in the circumstances presented help a child to maintain family ties, since the child is necessarily already in the custody of that parent in such circumstances."

Although FCA § 1027(d) provides for release of the child to his or her parent or other person legally responsible for his or her care, pending a final order of disposition, in accord with FCA § 1017(2)(a)(ii), § 1027(d) refers to a subparagraph of § 1017 which applies only to a non-respondent parent after the child is removed from the home, and thus § 1027(d) also applies only in such circumstances.

This Court's determination in Matter of Elizabeth C. (156 A.D.3d 193) does not warrant a different result. In that case, the Court held that, like the removal of a child from the home, the exclusion of a parent from the home requires a showing of imminent risk since they result in similar infringements on the constitutionally protected parent-child relationship. That case involved a different question, and the Court did not state in Elizabeth C. that the circumstances involved an actual "removal" of the child.

The JRP appeals attorney was Zoe Allen, and the trial attorney was Abigail Finkelman. (Family Ct, Kings Co)

Matter of Shepherd v Mirukaj, 235 AD3d 769 (2nd Dept 2/13/2025)
CUSTODY - Interference With Parent-Child Relationship/Alienation
VISITATION - Denial Of Parental Access

LASJRP: The Second Department upholds an award of sole legal and physical custody to the mother with no parental access to the father.

While one parent's alienation of a child from the other parent is an act inconsistent with the best interests of the child, the daughter's bond with the mother and alienation from the father is so strong, with other factors contributing to the deterioration of that relationship, that an award of custody to the father would be harmful to the daughter.

The thirteen-year-old child had a strained relationship with the father and was vehemently opposed to any form of visitation. (Family Ct, Queens Co)

People v Davis, 235 AD3d 892 (2nd Dept 2/19/2025)
PREDICATE SENTENCING | PRIOR FEDERAL CONVICTION | VACATED AND REMITTED FOR RESENTENCING

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree assault, following his guilty plea, and imposing sentence upon his adjudication as a second felony offender. The Second Department vacated appellant's sentence and remitted for resentencing. As conceded by the prosecution, appellant was improperly sentenced as a second felony offender because his prior federal conviction did not require as one of its elements that the firearm be operable, and thus, did not constitute a felony in New York for the purpose of enhanced sentencing. Appellate Advocates (Robert C. Langdon, of counsel) represented Davis. (Supreme Ct, Kings Co)

People v Gonzales, 235 AD3d 897 (2nd Dept 2/19/2025)
People v Jose H., 235 AD3d 897 (2nd Dept 2/19/2025)
SURCHARGES AND FEES | MODIFIED AND VACATED FEES

ILSAPP: Appellants appealed from separate judgments—Gonzales from a Queens County Supreme Court judgment convicting him of third-degree CSCS following his guilty plea and Jose H. from a Kings County Supreme Court judgment adjudicating him a youthful offender upon his guilty plea to third-degree robbery. The Second Department vacated, on consent of the prosecution, the imposition of the mandatory surcharges and fees in the interest of justice, but otherwise affirmed in each case. CPL § 420.35(2-a) permits the waiver of surcharges and fees for individuals under the age of 21 years old at the time of the offense, and the statute applies retroactively to cases that were pending on direct appeal on the effective date of the legislation. Appellate Advocates (Anders Nelson, of counsel) represented Gonzales and Jose H. (Supreme Ct, Queens Co)

Matter of Nunez v Spellen, 235 AD3d 874 (2nd Dept 2/19/2025)
FAMILY OFFENSE | AGGRAVATING CIRCUMSTANCES | MODIFIED FINDINGS OF FACT & OOP

ILSAPP: Both parties appealed from a Queens County Family Court order directing respondent-appellant to comply with a two-year order of protection after finding that he had committed various family offenses against appellant-respondent, but also finding that there were no aggravating circumstances permitting the order of protection to be issued for a period of five years. The Second Department modified the order of fact-finding and disposition to include a finding of aggravating circumstances warranting an order of protection "not in excess of five years" and modified the order of protection to change the latter's duration from two to five years. The Family Court should have found aggravating circumstances existed as the evidence demonstrated that appellant-respondent sustained physical injuries because of the family offenses committed against her, and that several of the offenses were committed in the presence of the parties' children. Schulte Roth & Zabel, LLP (Taleah E. Jennings,

Second Department *continued*

Frances D. Rodriguez, and Priyadarshini Das, of counsel) for appellant-respondent. (Family Ct, Queens Co)

Matter of Panizo v Douglas, 235 AD3d 876 (2nd Dept 2/19/2025)
CUSTODY MODIFICATION | DUE PROCESS RIGHT TO BE HEARD | REVERSED & REMITTED

ILSAPP: Father appealed from an Orange County Family Court order awarding the mother sole legal and physical custody of the parties' child with parental access to the father. The Second Department reversed and remitted for a new hearing on the merits. The Family Court improvidently exercised its discretion by denying the father's adjournment request and proceeding with a custody modification hearing in his absence. Doing so entirely deprived him of his right to testify on his own behalf and to be afforded a full and fair evidentiary hearing involving his fundamental rights. Bonnie C. Brennan represented the father. (Family Ct, Orange Co)

People v Rivera, 235 AD3d 906 (2nd Dept 2/19/2025)
YOUTHFUL OFFENDER | MITIGATING CIRCUMSTANCES | MODIFIED AND REMITTED

ILSAPP: Appellant appealed from a Westchester County Court judgment convicting him of first-degree manslaughter, following his guilty plea. The Second Department modified, vacated his sentence, and remitted for resentencing after a YO determination. Appellant, who was 16 years old at the time of the offense and had no prior criminal convictions, met the threshold eligibility requirements. Where appellant was not convicted of an armed felony, the court erred in determining that appellant was ineligible for YO status pursuant to CPL 720.10(3) based on the perceived absence of mitigating circumstances bearing directly upon the way the crime was committed—a consideration in determining whether a presumptively ineligible youth may qualify for an eligibility exception. Abissi Law PLLC (Heather M. Abissi, of counsel) represented Rivera. (County Ct, Westchester Co)

People v Sobers, 235 AD3d 908 (2nd Dept 2/19/2025)
IMPROPER PROBATION CONDITION | DEPENDENT SUPPORT | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of criminal possession of a firearm, following his guilty plea, and imposing a probationary sentence. The Second Department modified by deleting the probation condition requiring appellant to support dependents and meet other family responsibilities. This condition was improperly imposed because it was not individually tailored to the offense, and thus was not reasonably related to appellant's rehabilitation or necessary to ensure that he would lead a law-abiding life. Appellant's claim did not require preservation, and it survived the valid appeal waiver. Appellate Advocates (Sam Feldman, of counsel) represented Sobers. (Supreme Ct, Kings Co)

People v Telesco, 235 AD3d 910 (2nd Dept 2/19/2025)
DEFICIENT *ANDERS* BRIEF | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from an Orange County Court judgment convicting him of second-degree CPW, following his guilty plea. Assigned counsel filed an *Anders* brief to withdraw. The Second Department found counsel's brief deficient, granted leave to withdraw, and assigned new counsel. Although the brief identified several appealable issues, the analysis lacked supporting legal authority and did not highlight facts in the record that might arguably support the appeal. Further, counsel acted as "a mere advisor to the court, opining on the merits of the appeal." (County Ct, Orange Co)

Matter of Jurenny M.-J. (Kelley M.), 235 AD3d 980 (2nd Dept 2/26/2025)
ABUSE/NEGLECT - Removal/Imminent Risk

LASJRP: The Second Department overturns the Family Court's determination granting the mother's FCA § 1028 application [where] the mother failed to address or acknowledge the circumstances that led to the removal of the children; failed to prevent the father from having contact with the children despite the existence of an order of protection; was emotionally unstable; failed to engage in mental health counseling and other preventative services; and has failed to comply with any order issued in an attempt to mitigate the risk. (Family Ct, Putnam Co)

Matter of Liana A. (Joseph A.), 235 AD3d 969 (2nd Dept 2/26/2025)
DEFICIENT *ANDERS* BRIEF | NEGLECT | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Suffolk County Family Court order finding that appellant had neglected the subject children and releasing them into the nonrespondent parent's custody. Appellant's assigned counsel filed an *Anders* brief seeking to be relieved. The Second Department found counsel's Anders brief deficient, granted the motion to withdraw, and assigned new counsel. The brief failed to "evaluat[e] whether there were any nonfrivolous issues to raise on appeal." Further, counsel "acted as 'a mere advisor to the court,' opining on the merits of the appeals." (Family Ct, Suffolk Co)

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People v McLeod, 2025 NY Slip Op 01108 (2nd Dept 2/26/2025)
SUPPRESSION | TRAFFIC STOP | NO PROBABLE CAUSE TO SEARCH PERSON | REVERSED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree attempted CPW, following his guilty plea. The Second Department reversed, vacated the plea, and granted suppression of the firearm. The prosecution's evidence was insufficient to establish probable cause for the search of appellant's person. The officer testified that during the traffic stop, he ordered appellant out of the car after smelling marihuana emanating from the vehicle. The officer recovered a firearm from appellant's pants. Pursuant to the law as it existed in 2020, the officer must have been "qualified by training and experience to recognize" the "odor of marihuana emanating from a vehicle," and there was no such testimony given at the hearing. Appellate Advocates (Alice R. B. Cullina, of counsel) represented McLeod. (Supreme Ct, Queens Co)

People v Meraluna, 235 AD3d 1001 (2nd Dept 2/26/2025)
SEARCH AND SEIZURE - Auto Stop/Reasonable Suspicion

LASJRP: The Second Department concludes that the officers lacked reasonable suspicion when defendant drove away from the scene of a reported burglary as the police arrived, where the radio transmission described two males entering the rear of the residence and did not describe any vehicle or a third person being involved, and the officer's general knowledge of area burglaries did not justify a different result. (Supreme Ct, Queens Co)

People v Montgomery, 235 AD3d 1004 (2nd Dept 2/26/2025)
IAC | CONFIDENTIAL COMMUNICATIONS | ADVERSE POSITION |REVERSED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of third-degree robbery, third-degree assault, and fifth-degree CPSP, following a nonjury trial. The Second Department reversed and remitted for a new trial. Appellant received ineffective assistance of counsel, and his right to counsel was adversely affected, where his attorneys discussed confidential communications on the record and took an adverse position to him. In support of their CPL article 730 application and to persuade appellant to accept a favorable plea offer, they made detailed statements on the record emphasizing the strength of the evidence against their client and described a "guilty verdict" following a mock trial conducted in their office. While counsels were obligated to advise appellant regarding the plea offer, appellant retained the authority to accept or reject it. Appellate Advocates (Steven C. Kuza, of counsel) represented Montgomery. (Supreme Ct, Queens Co)

People v Persaud, 235 AD3d 1006 (2nd Dept 2/26/2025)
EXCESSIVE SENTENCE | MODIFIED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him after a jury trial of second-degree kidnapping and second-degree strangulation, among other counts, and sentencing him to an aggregate term of 15 years' imprisonment followed by 5 years' PRS. The Second Department modified, in the interest of justice, by reducing the sentence to an aggregate prison term of 10 years' imprisonment followed by 5 years' PRS, and otherwise affirmed. Although appellant's argument that the sentence improperly penalized him for exercising his right to a jury trial was unpreserved, the Second Department reviewed the record and found it failed to support appellant's contention—however, the sentence imposed was excessive. Drummond & Squillace, PLLC (Stephen L. Drummond and JoAnn Squillace, of counsel) represented Persaud. (Supreme Ct, Queens Co)

People v Philpot, 235 AD3d 1010 (2nd Dept 2/26/2025)
DEFICIENT *ANDERS* BRIEF | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from an Orange County Court judgment convicting him of first-degree attempted assault, following his guilty plea. Assigned counsel filed an *Anders* brief to withdraw. The Second Department found counsel's brief deficient, granted leave to withdraw, and assigned new counsel. The brief lacked supporting legal authority and failed to adequately analyze potential appellate issues, including whether the court erred in denying appellant's motion to withdraw his guilty plea, appellant's competency, the validity of the appeal waiver, and whether there was any potential IAC claim. Further, counsel's contention that appellant voluntarily entered his guilty plea was merely conclusory. (County Ct, Orange Co)

People v Rubio, 235 AD3d 1014 (2nd Dept 2/26/2025)
People v Tlatelpo, 235 AD3d 1015 (2nd Dept 2/26/2025)
SURCHARGES AND FEES | MODIFIED AND VACATED FEES

ILSAPP: Appellants appealed from separate Queens County Supreme Court judgments—convicting Rubio of fourth-degree CPW following her guilty plea and convicting Tlatelpo of second-degree attempted robbery following his guilty plea. The Second Department vacated, on consent of the prosecution, the imposition of the mandatory surcharges and fees in the interest of justice, but otherwise affirmed in each case. CPL § 420.35[2-a]

permits the waiver of surcharges and fees for individuals under the age of 21 years old at the time of the offense. The Legal Aid Society of NYC represented Rubio and Tlatelpo (Naila S. Siddiqui and Harold V. Ferguson, Jr., of counsel, respectively). (Supreme Ct, Queens Co)

People v Williams, 235 AD3d 1017 (2nd Dept 2/26/2025)
OOP | INVALID APPEAL WAIVER | AFFIRMED | OOP MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree attempted assault following his guilty plea. The Second Department affirmed the conviction but modified the order of protection by reducing its duration. As conceded by the prosecution, the order of protection exceeded the maximum time limit pursuant to CPL § 530.13[4][A]. Preservation was not required because appellant had no practical ability to register a timely objection given the court's failure to announce the duration of the order of protection at the combined plea and sentencing proceeding. Further, appellant's appeal waiver was invalid because the lower court did not discuss the waiver with appellant until after he had admitted guilt, thereby failing to establish that appellant received a "material benefit" from the appeal waiver. However, the sentence was not excessive. Appellate Advocates (Mark W. Vorkink, of counsel) represented Williams. (Supreme Ct, Kings Co)

People v Cespedes, 2025 NY Slip Op 01229
(2nd Dept 3/5/2025)
OOP DURATION EXCEEDED STATUTORY MAXIMUM | AFFIRMED | OOP MODIFIED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of petit larceny following his guilty plea. The Second Department affirmed but vacated the durational provisions of the orders of protection and remitted for a new determination as to their duration. The orders of protection exceeded the maximum time limit for a class A misdemeanor, pursuant to CPL § 530.13(4)(B). Preservation was not required because appellant had no practical ability to register a timely objection given the court's failure to announce the duration of the orders of protection at either the plea or sentencing proceedings. Appellate Advocates (Rebekah J. Pazmiño, of counsel) represented Cespedes. (Supreme Ct, Queens Co)

People v Creary, 2025 NY Slip Op 01230
(2nd Dept 3/5/2025)
PROSECUTION'S APPEAL | SUPPRESSION | NO GROUNDS TO SUSPECT CRIMINALITY | AFFIRMED

ILSAPP: The prosecution appealed from a Queens County Supreme Court order granting the defense's motion to suppress a gun. The Second Department affirmed. The officer testified that she approached respondent's lawfully parked car, observed the occupant asleep in the driver's seat, and attempted to open the locked driver's side doors. After directing the occupant to unlock the door and exit the car, the officers recovered a gun from the car door's pocket. The officers had an objective, credible reason to approach respondent's lawfully parked car to request information. They did not, however, have a lawful basis for subjecting the occupant to additional restraint by directing him to open the car's door. The occupant was not considered a suspect, and no testimony was elicited that the officers suspected the car contained evidence of a crime. Camille O. Russell represented Creary. (Supreme Ct, Queens Co)

People v Faustin, 2025 NY Slip Op 01231
(2nd Dept 3/5/2025)
BIASED PROSPECTIVE JUROR | FOR-CAUSE CHALLENGE | REVERSED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree burglary, second-degree burglary, and fourth-degree grand larceny after a jury trial. The Second Department dismissed the fourth-degree grand larceny count as legally insufficient, reversed the judgment, and ordered a new trial on the remaining counts. The trial court erred in denying appellant's for-cause challenge to a prospective juror who stated that his mother-in-law had been sexually assaulted and then raised his hand when counsel inquired if any of the potential jurors felt this was not the "right case" for them because it involved sexual assault allegations. The prospective juror's statements and conduct raised a serious doubt regarding his impartiality. As the court failed to elicit an unequivocal assurance on the record from the prospective juror regarding his ability to render a fair and impartial verdict, and appellant had exhausted his peremptory challenges, the denial of his for-cause challenge constituted reversible error. Appellate Advocates (Martin B. Sawyer, of counsel) represented Faustin. (Supreme Ct, Kings Co)

Matter of Rodriguez v Escobar, 2025 NY Slip Op 01224
(2nd Dept 3/5/2025)
UCCJEA | AFFIX AND MAIL SERVICE | REVERSED & REMITTED

ILSAPP: The father appealed from a Queens County Family Court order granting the mother's motion to dismiss the father's habeas corpus petition for lack of personal jurisdiction due to improper service. The Second Department reversed the order dismissing the father's petition, reinstated it, and remitted. Family Court had no authority to dismiss the father's petition for lack of personal jurisdiction. The UCCJEA required that the father serve the mother "in a manner reasonably calculated to

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give actual notice" to her, as she was residing with the child outside of New York. The father served the mother via affix and mail service after an order authorizing it. The mother acknowledged receipt of the affixed copy, and her bare denial that she ever received the mailed copy was insufficient to refute the father's proof of mailing. The Family Court thus erred in directing a hearing to determine the validity of service of process upon the mother and should have found that service was properly effectuated pursuant to the UCCJEA. Nestor Soto represented the father. (Family Ct, Queens Co)

People v Allen, 2025 NY Slip Op 01381 (2nd Dept 3/12/2025)
440.20 | RIGHT TO BE PRESENT AT RESENTENCING | REVERSED

ILSAPP: Appellant appealed from a Kings County Supreme Court resentencing order imposed upon the grant of his CPL § 440.20 motion to set aside his sentence, following his conviction of third-degree rape, upon his guilty plea. The Second Department reversed and remitted for resentencing. As conceded by the prosecution, the lower court violated appellant's right to be present at resentencing. Appellant was not present at resentencing because he was incarcerated in Florida, and he did not waive his right to be present. Appellant's "fundamental right to be personally present" at sentencing "extend[ed] to resentencing or to the amendment of a sentence." The Legal Aid Society of NYC (Nancy E. Little, of counsel) represented Allen. (Supreme Ct, Kings Co)

Matter of Daniel P., 2025 NY Slip Op 01370
(2nd Dept 3/12/2025)
ABUSE/NEGLECT - Release To Respondent Parent With Conditions

LASJRP: The Second Department finds no error where, after the children were removed, the Family Court granted petitioner's application for a release of the younger child to the mother with certain conditions, including requiring the mother to cooperate with petitioner by allowing announced and unannounced visits to her home and by executing HIPAA-compliant releases authorizing disclosure to petitioner of certain medical records concerning the younger child. (Family Ct, Queens Co)

Matter of David J. (Danielle J.), 2025 NY Slip Op 01366
(2nd Dept 3/12/2025)
ABUSE/NEGLECT - Mental Illness - Medical Neglect

LASJRP: The Second Department upholds a finding based on the mother's largely untreated mental illness, noting that the evidence demonstrated, inter alia, that the mother had difficulty interacting with others in person due to her anxiety, which caused her to isolate the children in a shelter room.

ACS did not prove medical neglect. ACS did not allege that the mother's failure to seek preventative care caused actual impairment to the children or present evidence at the fact-finding hearing that the failure to seek such care placed the children in imminent danger of becoming impaired.

The JRP appeals attorney was Judith Stern, and the trial attorney was Joan Ferng. (Family Ct, Queens Co)

People v Johnson, 2025 NY Slip Op 01388
(2nd Dept 3/12/2025)
EXCESSIVE SENTENCE | CONSECUTIVE TO CONCURRENT | MODIFIED

ILSAPP: Appellant appealed from two judgments of Dutchess County Court convicting him, under one indictment, of two counts of third-degree CSCS and two counts of third-degree CPCS, and, under the other indictment, of one count of third-degree CSCS, and sentencing him, as a second felony offender, to an aggregate 20 years' imprisonment followed by 6 years' PRS. The sentences on the third-degree CSCS convictions from the first indictment were to run consecutively with each other, and all other sentences were to run concurrently. The Second Department modified, in the interest of justice, by running the sentences on the third-degree CSCS convictions from the first indictment concurrently with each other, reducing the sentence to an aggregate prison term of 10 years' imprisonment followed by 3 years' PRS, and otherwise affirmed. Kelley M. Enderley represented Johnson. (County Ct, Dutchess Co)

Matter of Marco F., 2025 NY Slip Op 01365
(2nd Dept 3/12/2025)
KIDNAPPING - Abduct/Restrain

LASJRP: The Second Department concludes that the Family Court's second-degree kidnapping finding was against the weight of the evidence, noting that respondent restrained the complainant for a very short time while the two were in the midst of a physical altercation; and that although the complainant testified that respondent pulled her partway into a vehicle, at least one door of the vehicle remained open and the vehicle traveled only a very short distance before stopping again within a matter of mere seconds. (Family Ct, Nassau Co)

People v Ramirez, 2025 NY Slip Op 01392
(2nd Dept 3/12/2025)
DEFICIENT *ANDERS* BRIEF | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of operating a motor vehicle while under the influence of alcohol, following his guilty plea. Appellant's assigned counsel filed an *Anders* brief to withdraw. The Second Department found counsel's brief deficient, granted

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leave to withdraw, and assigned new counsel. The brief failed to adequately "highlight facts in the record that might arguably support the appeal" or "analyze potential appellate issues," including "whether the orders of protection were validly entered." (Supreme Ct, Queens Co)

People v Suckoo, 2025 NY Slip Op 01396
(2nd Dept 3/12/2025)
YOUTHFUL OFFENDER | FAILURE TO CONSIDER YO | REMITTED FOR DETERMINATION & RESENTENCING

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of first-degree manslaughter, following his guilty plea. The Second Department modified, vacated his sentence, and remitted for a youthful offender determination and resentencing. Appellant was an eligible youth, and the record did not demonstrate that the court made a YO determination. On remittal, the court must reconsider the imposition of mandatory surcharges and fees. Appellate Advocates (Maisha Kamal, of counsel) represented Suckoo. (Supreme Ct, Queens Co)

People v Williams, 2025 NY Slip Op 01397
(2nd Dept 3/12/2025)
CHARACTER EVIDENCE

LASJRP: The Second Department finds no error where the trial court permitted the prosecutor to question defendant's character witness about whether she had heard that defendant had produced certain music videos and made gang signs in those music videos, since the witness testified to defendant's reputation for peacefulness in the community. (Supreme Ct, Queens Co)

Third Department

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

People v Cha-Narion D., 232 AD3d 1131
(3rd Dept 11/27/2024)
YOUTHFUL OFFENDER | ABUSE OF DISCRETION | REVERSED

ILSAPP: Appellant appealed from an Albany County Court judgment convicting him of second-degree attempted murder, denying his request to adjudicate him a youthful offender (YO), and sentencing him to 6 years' imprisonment followed by 5 years' PRS. The Third Department reversed, finding that it was an abuse of discretion to deny YO status. Appellant had numerous mental health and cognitive diagnoses, and had suffered traumatic childhood events that exacerbated those issues. There were additional mitigating factors, including a lack of serious injury to the complainant and appellant's limited criminal history. The Third Department substituted its discretion for that of County Court, adjudicated appellant a YO, and modified the sentence to 1 1/3 to 4 years' imprisonment. Tina K. Sodhi, Alternate Public Defender, Albany (Steven M. Sharp of counsel) represented Cha-Narion D. (County Ct, Albany Co)

People v James QQ., 232 AD3d 1137 (3rd Dept 11/27/2024)
DVSJA | DISMISSAL WITHOUT PREJUDICE NOT APPEALABLE | APPEAL DISMISSED

ILSAPP: Appellant appealed from a Greene County Court order dismissing, without prejudice, his DVSJA petition for resentencing under CPL § 440.47. Applying the same reasoning expressed in Melissa OO., the Third Department dismissed the appeal. (County Ct, Greene Co)

People v Melissa OO., 234 AD3d 101 (3rd Dept 11/27/2024)
DVSJA | DISMISSAL WITHOUT PREJUDICE NOT APPEALABLE | APPEAL DISMISSED

ILSAPP: Appellant appealed from a Chenango County Court order dismissing, without prejudice, her DVSJA petition for resentencing under CPL § 440.47 because appellant did not provide two pieces of evidence corroborating her abuse, as required by the statute. The Third Department dismissed the appeal. CPL § 440.47[3] specifically provides for an appeal as of right from a denial of a resentencing petition, but not from a dismissal without prejudice. The court held that the proper remedy was to refile the petition with the required corroborating evidence. The Third Department noted that its prior decisions, as well as decisions from the Second and Fourth Departments, had reached the merits of without-prejudice dismissals in DVSJA resentencing cases, where the issue of appealability was never raised. Acknowledging that the lack of a statutory right to appeal in this situation "could insulate from appellate review certain trial court determinations where a defendant has exhausted his or her potential universe of evidentiary submissions," the court determined that the legislature, not the courts, must provide an appellate remedy. Not addressed was the question of the proper remedy where a trial court commits legal error in dismissing for a purported lack of corroboration. (County Ct, Chenango Co)

Matter of Tiyani AA., 232 AD3d 1147 (3rd Dept 11/27/2024)
TPR | NO DEFAULT | AFFIRMED

ILSAPP: Appellant appealed from a Schenectady County Family Court order finding the subject child to be abandoned and

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terminating appellant's parental rights. The Third Department affirmed, rejecting her argument that by conducting the hearing in her absence but allowing her to observe virtually, the court violated her due process rights. The court first noted that, although the order indicated that it was entered on default, it was not in fact a default, since her counsel had fully participated while appellant observed. Further, appellant's arguments regarding due process were unpreserved because counsel did not object or seek an adjournment for her to appear in person. In any event, the court would not have found a due process violation since counsel capably represented appellant's interests. (Family Ct, Schenectady Co)

People v Mayette, 233 AD3d 1097 (3rd Dept 12/5/2024)
INCLUSORY CONCURRENT COUNTS | SENTENCE REDUCED

ILSAPP: Appellant appealed from a St. Lawrence County Court judgment convicting him of 13 counts related to his alleged sexual abuse of his stepdaughter and sentencing him to an aggregate term of 140 years to life in prison, followed by 10 years of PRS. The Third Department dismissed two counts, reduced the sentence to an aggregate prison term of 20 years to life, with 10 years' PRS, and otherwise affirmed. Two convictions for first-degree sexual abuse were inclusory concurrent counts of a third count: predatory sexual assault against a child, requiring dismissal of those convictions. Another count was a material element of the continuing crime of predatory sexual assault against a child, and the sentence on that count was therefore modified to run concurrently. The court also found the 140-year sentence to be unduly harsh and severe, noting the disparity between it and the 12-to-15 year prison term the prosecution offered twice before trial. Cambareri & Brenneck (Melissa K. Swartz of counsel) represented Mayette. (County Ct, St. Lawrence Co)

People v Ava OO., 233 AD3d 1186 (3rd Dept 12/12/2024)
CPL 60.12 DVSJA SENTENCE | REVERSED

ILSAPP: Appellant appealed from an Albany County Supreme Court judgment convicting her of second-degree robbery after a plea, denying her application to be sentenced under the Domestic Violence Survivors Justice Act (DVSJA), and sentencing her to 5 years' imprisonment, followed by 5 years' PRS. The Third Department reversed, granted appellant's DVSJA application, and resentenced her to a term of 3 1/2 years' imprisonment followed by 6 years' PRS. It was undisputed that appellant experienced substantial abuse perpetrated by her codefendant: during their seven-month relationship. He physically assaulted her, isolated from her family, and forced her to engage in sex work. But while the trial court found that the abuse was not a significant contributing factor to the crime, the Third Department stressed the need to view the act in the context of the abuse, even in the absence of evidence that would negate culpability, such as duress or justification. Here, there was evidence that appellant was codefendant's accomplice in the robbery, but that this occurred in the context of sex trafficking. Finally, the court noted appellant's family support, as well as that the entirety of appellant's criminal history arose after she became romantically involved with the codefendant and began abusing drugs, finding that a traditional sentence would be unduly harsh under the circumstances. Aaron A. Louridas represented Ava OO. (Supreme Ct, Albany Co)

People v Poulos, 233 AD3d 1169 (3rd Dept 12/12/2024)
RIGHT TO SELF-REPRESENTATION | NO PROBABLE CAUSE FOR CELL PHONE SEARCH | REVERSED

ILSAPP: Appellant appealed from a Warren County Court judgment convicting him of numerous charges related to his alleged possession and sale of narcotics and sentencing him to an aggregate term of 32 years' imprisonment, followed by 3 years' PRS. The Third Department reversed, dismissed two counts, and ordered a new trial on the others. County Court erred in summarily denying appellant's request to represent himself at trial and in denying his request to suppress evidence obtained after a search of his cell phone. The initial warrant application did not demonstrate a link between information in the phone and evidence of a crime, and a second warrant application failed to cure the defect because the phone had already been searched. Two of the counts were therefore dismissed since they relied on fruits of that illegal search. Paul J. Connolly represented Poulos. (County Ct, Warren Co)

Matter of Joseph E. v Crystal G., 233 AD3d 1285 (3rd Dept 12/19/2024)
CUSTODY | MODIFICATION NOT SUPPORTED BY RECORD|MODIFIED

ILSAPP: Appellant appealed from an Ulster County Family Court order modifying a prior order of custody and visitation. The Third Department modified and otherwise affirmed. The underlying order included a provision requiring each parent to secure the consent of the other before enrolling the child in extracurricular activities, which the order indicated was on consent. The Third Department found that this consent was not contained anywhere in the record, and Family Court's determination was thus unsupported by a sound and substantial basis. The Third Department also used its authority to search the record and make an independent determination that the modification would not be in the child's best interests, since the parties' animosity toward one another would make mutual consent unlikely. Michelle I. Rosien represented the father. (Family Ct, Ulster Co)

Third Department *continued*

People v Meyers, 233 AD3d 1266 (3rd Dept 12/19/2024)
PROSECUTORIAL MISCONDUCT AT SUMMATION | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed a Chemung County Court order convicting him of second-degree assault and sentencing him, as a second violent felony offender, to six years' imprisonment and five years' PRS. The Third Department found that statements made by the prosecutor suggesting appellant had a propensity for violence—including his admission to instigating the fight and testimony about other similar fighting—were improper. Nevertheless, the court did not find the remarks to have deprived appellant of a fair trial, particularly since the court repeatedly instructed the jurors that summations are not evidence. (County Ct, Chemung Co)

Matter of Ayanna O., 233 AD3d 1418 (3rd Dept 12/26/2024)
ABUSE/NEGLECT - Removal/Imminent Risk
- Reasonable Efforts
- Inference From Failure To Testify At FCA § 1027 Hearing

LASJRP: The Third Department upholds a removal determination upon a FCA § 1027 hearing, noting, inter alia, that during a mental health evaluation, the mother reported various conspiratorial ideations that led her to believe that the children would be trafficked or harmed at school and the mother's affect and delusions led the evaluator to opine that the mother was "unstable psychiatrically" and was likely suffering from delusional disorder, persecutory type; and that after the five children were initially released to the mother, they continued to miss approximately 50% of school days and were all failing their respective classes.

The agency made reasonable efforts. Although the mother agreed to engage with mental health treatment, she declined a caseworker's assistance and had not enrolled on her own. She refused to engage in other recommended services, including substance abuse evaluation and treatment, parenting education and homemaker services, asserting that she had no need for them. The caseworkers also checked on the children's school progress, followed up with the mother and, on at least two occasions, arranged for a school bus to return to pick up the children after the school day had started.

The Court, noting that it reached its decision without any need to draw a negative inference from the mother's failure to testify, "share[s] the mother's concern about the use of a negative inference against a parent who declines to testify at a removal hearing." A removal hearing occurs at the very beginning of the case, and counsel cannot be well prepared and lacks the ability needed to weigh the pros and cons of client testimony. (Family Ct, St. Lawrence Co)

Matter of Christopher Y. v Sheila Z., 233 AD3d 1385 (3rd Dept 12/26/2024)
HABEAS CORPUS | VISITATION | MODIFIED AND REMITTED

ILSAPP: The father appealed from a Tompkins County Family Court order dismissing his petition seeking a writ of habeas corpus for the mother to produce the child. The Third Department modified, converted the matter to a visitation modification proceeding, and remitted to Family Court. The mother, who had sole custody of the child, moved to Florida without court permission, depriving the father of his previously-ordered supervised parenting time. Family Court found the mother to be in willful violation of an enforcement order and held her in contempt but denied the father's application for a writ based on its potential negative impact on the child. But while the mother did fail to produce the child for visitation, it also appeared that the father had not complied with other Family Court directives, including that he obtain a mental health evaluation. Because Family Court had taken no testimony on these issues, the court remitted for an evidentiary hearing to determine a parenting time schedule in the child's best interests. Craig S. Leeds represented the father. (Family Ct, Tompkins Co)

People v Davis, 233 AD3d 1390 (3rd Dept 12/26/2024)
SORA | RELIABLE HEARSAY | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Columbia County Court order classifying him as a level two sex offender. The Third Department reversed and remitted for a new hearing. Although County Court assessed 25 points under risk factor 2 for sexual contact with the victim, that determination was based on a contested statement by the district attorney: that there was a photograph depicting that sexual activity. While the court found that the photographs depicted sexual activity between an adult and a child, it made no finding as to the identity of the adult. The Third Department remitted for the prosecution to provide a foundation supporting the hearsay's reliability. Aaron A. Louridas represented Davis. (County Ct, Columbia Co)

Matter of Jesse HH. v Lindsey II., 233 AD3d 1410 (3rd Dept 12/26/2024)
CUSTODY - Relocation

LASJRP: The Third Department, noting that where a parent's relocation results in an initial custody determination, strict application of the relocation factors set forth in Matter of Tropea v Tropea is not required, upholds a determination awarding custody to the mother, who relocated with the child to Virginia.

The mother has most recently served as the child's primary

Third Department *continued*

residential custodian and has also historically undertaken the primary responsibility for the child's schooling and healthcare. She informed the father about her plan to relocate before doing so in an attempt to "keep him involved." She left her casino-related employment in New York due to childcare constraints and took a job in Virginia, where she resides with her husband in a residence that has a separate bedroom for the child. She expected to double her income and intended to enroll the child in private school, with smaller class sizes, as a result. Her work schedule enabled her to be available for the child on weekdays after school and she had the support of her husband to help with bedtime during her evening shifts. She intended to enroll the child in soccer if awarded primary physical custody, whereas the father had previously pushed back on her requests in this regard.

The father was residing with the paternal grandparents in a residence that required him to share a room with the child. His work schedule required him to rely more heavily on outside resources to assist with childcare. A concern was raised as to whether the father had allowed the child to be in the presence of the paternal uncle, who is a convicted sex offender. Although a majority of the child's extended family lives near the father, including a half sibling with whom the child has a close relationship, the half sibling is in the father's care for only a portion of each month and the father was awarded substantial parenting time with the child during the summer and on holidays, thereby enabling the child to preserve the relationship with the half sibling. (Family Ct, Schenectady Co)

People v Dorvil, 234 AD3d 1106 (3rd Dept 1/16/2025)
CONFESSIONS - Invocation Of Right To Remain Silent

LASJRP: The Third Department concludes that defendant unambiguously invoked his right to remain silent where defendant, after answering numerous inquiries, provided no audible responses to questions for several minutes; an investigator repeated an inquiry as to the next thing defendant remembered, and, after about eight seconds of silence, defendant said "get the f**k out of here b***h, you trying to play me," and repeated that statement after the investigator asked defendant what he said; and the investigator responded that he would leave if defendant wanted him to, but then attempted to persuade defendant to continue the interview, stressing that the investigators needed defendant's side of the story in light of the damaging evidence against him.

The investigators understood defendant's statement as an unequivocal request for them to leave the room and for the interview to end. By continuing the interview without providing further warnings, they violated defendant's right to remain silent, and thus the remainder of the recorded interview must be suppressed. (Supreme Ct, Schenectady Co)

People v Gray, 234 AD3d 1130 (3rd Dept 1/16/2025)
SUPPRESSION | VEHICLE IMPOUNDMENT AND SEARCH | REVERSED

ILSAPP: Appellant appealed from a Schenectady County Court judgment convicting him of attempted second-degree CPW and sentencing him, as a second felony offender, to 4 years' incarceration followed by 5 years' PRS. The Third Department reversed. The impoundment of the car and ensuing search were unconstitutional, and the suppression motion should have been granted. The prosecution failed to establish that the car, which was parked legally, had been towed in accordance with standardized police department policy. That policy directed that a secured and lawfully parked vehicle may be left at a scene. Appellant had also requested that his father, who owned the vehicle, pick up the car later, which would have prevented the car from being towed under the policy. The purported inventory search was a pretext to search for incriminating items—which were the only items listed on the inventory sheet. Justice Egan dissented and would have upheld the validity of the impoundment and search. Hug Law PLLC (Matthew Hug, of counsel) represented Gray. (County Ct, Schenectady Co)

People v Schultz, 234 AD3d 1143 (3rd Dept 1/16/2025)
SORA| FOREIGN REGISTRATION CLAUSE| MODIFIED

ILSAPP: Appellant appealed from a Warren County Court order classifying him as a level two sex offender and a sexually violent offender under SORA. The Third Department modified by vacating his designation as a sexually violent offender, remitted for further proceedings, and otherwise affirmed. That designation was based on a prior Florida conviction through an application of SORA's Foreign Registration Clause. Failure to give appellant notice and the right to be heard regarding that designation violated his procedural due process rights. Although appellant argued on appeal that the designation also violated his rights to substantive due process and equal protection, he was not given the opportunity to develop a record below with respect to those arguments, requiring remittal. Gregory V. Canale, Warren County Public Defender (Erin K. Komon, of counsel) represented Schultz. (County Ct, Warren Co)

People v Loadholt, 234 AD3d 1188 (3rd Dept 1/23/2025)
INVALID WAIVER OF APPEAL | AFFIRMED

ILSAPP: Appellant appealed from a Sullivan County Court judgment convicting him of third-degree CPCS and second-degree perjury based on his guilty plea. He was sentenced to consecutive terms of 7 1/2 years' imprisonment and 3 years' PRS on the drug charge and 1 1/2 to 3 years' imprisonment on the perjury charge. The Third Department affirmed. The appellant's waiver of appeal was invalid. The written waiver was overly broad and purported to completely bar appellate review

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The oral colloquy was insufficient to cure the deficiencies. However, the sentence was not unduly harsh or severe. Jane M. Bloom represented Loadholt. (County Ct, Sullivan Co)

People v Contompasis, 2025 NY Slip Op 00500 (3rd Dept 1/30/2025)

Deferring to the jury's credibility determinations, and viewing the evidence, including the defendant's own admissions that he did not see either of the complainants use a deadly weapon during the encounter at a Jan. 6, 2021, political protest, "the weight of the evidence supports the finding that defendant did not use the knife as a reasonable response to a perceived deadly threat but, rather, did so with criminal intent ...."

Considering the factors in *People v Bay*, including the voluminous nature of the discoverable material, while the prosecution missed a few discoverable items, the disclosures made were reasonable, and due diligence was exercised before filing of the initial certificate of compliance and subsequent filings in good faith. While the CoC was filed and readiness declared one day beyond the CPL 30.30 six-month period, Executive Orders due to the COVID-19 pandemic tolled the clock and the record lacks any allegation that post-readiness delay is chargeable to the prosecution.

The court did not abuse its discretion in denying a for-cause challenge to a potential juror with experience working for the Department of Corrections and Community Supervision who couched some of her responses to questions regarding her ability to be fair and impartial in terms like "think" or "believe."

Many of the alleged deficiencies of trial counsel amount to simple disagreement with strategies, tactics, or scope questions for witnesses; the record reflects meaningful representation.

In imposing a sentence of 12 years for first-degree assault and a consecutive eight-year term for attempted first-degree assault, the court considered the defendant's single misdemeanor record, letters of community support, and the complainants' own role in the melee, balanced against the defendant's lack of remorse, the victim statements, the presentence report, and the evidence at trial. "[W]e discern no basis on which to disturb the sentence ...."

Two lesser included counts should have been dismissed, though the issue was not raised on appeal. It was not enough that the court did not sentence the defendant on those counts (footnote 6). (Supreme Ct, Albany Co)

People v Dawson, 235 AD3d 1034 (3rd Dept 2/6/2025)
INVALID WAIVER OF APPEAL | POST-SENTENCE COLLOQUY INSUFFICIENT TO CURE DEFECT | AFFIRMED

ILSAPP: Appellant appealed from a Rensselaer County Court judgment convicting him of first-degree robbery following a guilty plea. The Third Department found the appeal waiver invalid, because the court's colloquy mischaracterized the rights being waived as an absolute bar to taking a direct appeal and failed to explain that appellate review was available for select issues. The court's post-sentence colloquy explaining that certain issues survived the right to appeal did not retroactively cure the deficiencies in the earlier waiver. However, the sentence was not excessive. Emmalynn S. Blake represented Dawson. (County Ct, Rensselaer Co)

People v Williams, 235 AD3d 1066 (3rd Dept 2/13/2025)
PLEAS - Voluntariness/Knowing And Intelligent
RIGHT TO COUNSEL - Effective Assistance

LASJRP: Noting that, some seven months before the People extended the plea offer, defense counsel acknowledged that he had reviewed discovery materials and would be providing "additional copies" to defendant later that day, the Third Department asserts that, in any event, it has previously held that even the admitted failure to provide a defendant with copies of the People's responses to discovery demands is - standing alone - insufficient to render a guilty plea involuntary or to constitute the ineffective assistance of counsel. (County Ct, Albany Co)

Matter of Andersen v Bosworth, 235 AD3d 1159 (3rd Dept 2/20/2025)
CHILD SUPPORT | FAILURE TO SERVE OBJECTIONS | REVERSED

ILSAPP: Father appealed from a Warren County Family Court order denying his objections to a Support Magistrate's modification of a prior child support order. The Third Department reversed. In an earlier proceeding regarding the support order, the mother filed objections to another order issued by the Support Magistrate. While those objections were granted by the Family Court judge, who found the Support Magistrate had erred, the mother failed to serve those objections upon the father and his counsel before they were granted. The Third Department found that the failure to serve severely prejudiced the father and his counsel, requiring reversal. Cases holding that the failure to serve counsel was deemed a mere "irregularity" involved cases where counsel had nevertheless obtained a copy of the objections and there was no prejudice. Martin J. McGuinness represented the father. (Family Ct, Warren Co)

Matter of Ava OO., 235 AD3d 1135 (3rd Dept 2/20/2025)
ABUSE/NEGLECT - Consent Findings - Disposition/Sex Offenders

LASJRP: Upon the father's appeal challenging the Family Court's determination that his efforts to satisfy the sex offender evaluation provision of the Article Ten fact-finding order were inadequate, the Third Department affirms, concluding that the best interests of the youngest child will be served by leaving

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him in petitioner's care, at least until the father obtains an appropriate sex offender evaluation and engages with recommended treatment.

Although the father made no admissions when he consented to a neglect finding, he was aware that his consent would have the same legal effect as if there had been a hearing and all the necessary facts alleged in the petition were proven, including the allegation that he had sexually abused one of the children. The proof at the dispositional hearing included a sex offender evaluation that scored him as a "below average risk," but the evaluation was not prepared by the evaluator named in the fact-finding order and amounted to a one-page form in which the evaluator failed to complete the section stating whether the result fairly represented the risk posed by the father. The Family Court did not view this to be the "thorough" evaluation contemplated by the fact-finding order. (Supreme Ct, Albany Co)

People v Craddock, 235 AD3d 1105 (3rd Dept 2/20/2025)
PROSECUTION APPEAL | INVENTORY SEARCH | REVERSED | DISSENT

ILSAPP: The prosecution appealed from an Ulster County Court order granting the defense's motion to suppress evidence. The Third Department reversed. Following a traffic stop and towing of the car because none of the occupants had a valid driver's license, police conducted an inventory search. County Court suppressed the evidence found afterward, concluding that police failed to follow proper procedure by not memorializing all items seized from the car or completing the required paperwork until hours or days later. The Third Department disputed County Court's characterization of the facts and found the officer's actions to be "minor deviations from procedure," insufficient to warrant suppression. A two-judge dissent would have upheld suppression and deferred to County Court's findings of fact. (County Ct, Ulster Co)

Matter of Konner N. (Justin O.), 235 AD3d 1112 (3rd Dept 2/20/2025)
TERMINATION OF PARENTAL RIGHTS | DISPOSITIONAL HEARING REQUIRED | REMITTED

ILSAPP: Father appealed from a Chemung County Family Court order finding that he permanently neglected the subject child and terminating his parental rights. The Third Department remitted to Family Court for a dispositional hearing, and otherwise affirmed. Family Court Act § 625(a) provides that the court must hold a dispositional hearing after making a finding of permanent neglect, unless all parties waive that hearing. No hearing took place, but there was no indication in the record that the parties waived it, requiring remittal. Michelle I. Rosien represented the father. (Family Ct, Chemung Co)

Matter of Leandra R. v Steven S., 235 AD3d 1146 (3rd Dept 2/20/2025)
CUSTODY - Appeals

LASJRP: The Third Department dismisses an appeal from an order which, in this FCA Article Six proceeding, transferred the proceeding from Essex County to Steuben County, noting, inter alia, that this is a non-dispositional order from which there is no appeal as of right. (Family Ct, Chemung Co)

People v Swartz, 235 AD3d 1098 (3rd Dept 2/20/2025)
FAIR TRIAL VIOLATIONS | NOT HARMLESS | REVERSED

ILSAPP: Appellant appealed from an Albany County Supreme Court judgment convicting him of two counts of predatory sexual assault against a child and sentencing him to consecutive terms of 20 years-life. The Third Department reversed and ordered a new trial. Appellant was deprived of his right to a fair trial when two witnesses—a psychologist and a police investigator—opined that one of the complainants was telling the truth. Additionally, the trial court precluded the defense from impeaching that complainant using a statement she had given in an unrelated Family Court matter. Because of the central nature of the witness's credibility to the verdict, these errors were not harmless. Albany County Office of the Alternate Public Defender (Steven M. Sharp, of counsel) represented Swartz. (Supreme Ct, Albany Co)

People v Vanderhorst, 235 AD3d 1089 (3rd Dept 2/20/2025)
YOUTHFUL OFFENDER | CORAM NOBIS | MODIFIED AND REMITTED

ILSAPP: Appellant appealed from an Albany County Supreme Court judgment convicting him, after a jury trial, of first-degree manslaughter and sentencing him to 25 years to life. The Third Department modified by vacating the sentence and remitting for the trial court to determine whether appellant, who was 16 years old at the time of the crime, was entitled to youthful offender status. While appellant had not argued in his initial appeal that the trial court had failed to make a youthful offender determination, the Third Department subsequently granted a writ of error coram nobis alleging ineffective assistance of appellate counsel on that basis and vacated the conviction. The prosecution conceded that the trial court failed to make the required youthful offender determination but urged the appellate court to exercise its power to make it in the first instance. The court declined to do so given the absence of any consideration of YO status by the sentencing court. Matthew C. Hug represented Vanderhorst. (Supreme Ct, Albany Co)

Matter of Amber VV. v Colleen WW., 235 AD3d 1197 (3rd Dept 2/27/2025)
CUSTODY - Extraordinary Circumstances

LASJRP: The Third Department concludes that the grandmother

Third Department *continued*

failed to establish extraordinary circumstances in this custody proceeding, noting, inter alia, that a nonparent may not displace a parent solely because he or she may be more attentive to the child's health. (Family Ct, Fulton Co)

People v Ambrosio, 235 AD3d 1181 (3rd Dept 2/27/2025)
RIGHT TO PUBLIC TRIAL
DWI OFFENSES
RIGHT TO COUNSEL - Effective Assistance

LASJRP: The Third Department finds no violation of defendant's right to a public trial where the court closed the courtroom amidst the COVID-19 pandemic. Under COVID-19 protocols requiring reductions in courtroom capacity, the trial was made available for public viewing via Microsoft Teams and the court clerk's office verified that each member of the viewing public, including members of defendant's family, could see and hear the trial proceedings.

The Court, with one judge dissenting, rejects defendant's contention that he was deprived of the effective assistance of counsel because counsel should have requested a jury instruction reflecting a heightened standard of intoxication. In a prior case, this Court limited its holding regarding a heightened standard to the crime of vehicular manslaughter. The new definition of impairment has not been applied to the crimes of driving while intoxicated, driving while ability impaired by alcohol or driving while ability impaired by drugs. Under these circumstances, it cannot be said that any reasonable defense counsel would have requested the intoxication instruction in place of the impairment instruction. (County Ct, Clinton Co)

Matter of Ashley UU. v Ned VV., 235 AD3d 1200 (3rd Dept 2/27/2025)
VISITATION - Violations/Contempt

LASJRP: The Third Department rejects the mother's contention that Family Court erred in finding that she violated a consent order.

The mother admitted depriving the father of his visitation on the day in question because child protective services was at her home responding to a report that she was abusing the child. She suspected that it was the father who had called in the report, and she admitted to being "frustrated" so she "did not allow [the father] to take [the child]."

Even if the mother was unable to transport the child because child protective services was at her home, there was no indication that the mother could not have arranged for transportation for the child to go to the father's and remain compliant with the order. (Family Ct, Schenectady Co)

People v Darby, 235 AD3d 1189 (3rd Dept 2/27/2025)
CPL § 440.20 | PREDICATE STATUS | EQUIVALENCY OF FEDERAL DRUG CONVICTION | REVERSED IN PART & REMITTED

ILSAPP: Appellant appealed from an Albany County Supreme Court order summarily denying his CPL §§ 440.10 and 440.20 motions. The Third Department remitted for a hearing on appellant's 440.20 motion to give the parties the opportunity to litigate whether 21 USC § 841(a)(1) (manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute or dispense a controlled substance) is equivalent to Penal Law § 220.39 (third-degree CSCS). The trial court had sentenced appellant as a predicate felon based on a 2006 federal conviction under 21 USC § 841(a)(1), but the federal statute arguably has a broader knowledge requirement, as held by the First Department in *People v Campanioni*, 99 AD3d 474 (1st Dep't 2021), lv denied 38 NY3d 926 (2022). Accordingly, to determine whether appellant's federal conviction is equivalent to a felony in New York, the trial court must evaluate the facts underlying the federal conviction. Albany County Public Defender (James A. Bartosik Jr., of counsel) represented Darby. (Supreme Ct, Albany Co)

Matter of Dusten T. v Trisha U., 235 AD3d 1215 (3rd Dept 2/27/2025)
PARENTING TIME | MODIFIED

ILSAPP: Appellant parent appealed from a Cortland County Family Court order granting custody to respondent parent and ordering a parenting time schedule that included Wednesday evenings after school. The Third Department modified by eliminating the Wednesday evening time but adding an additional two weeks of parenting time in the summer, which appellant parent requested. Appellant relocated 2 1/2 hours away from respondent parent and child and did not have a vehicle of her own to make the trip. The Appellate Division used its inherent fact-finding power to find the weekday parenting time schedule was thus "not workable" but added additional time to appellant during the child's summer break from school. Lisa K. Miller represented the mother. (Family Ct, Cortland Co)

People v Gray, 2025 NY Slip Op 01259 (3rd Dept 3/6/2025)
RIGHT TO COUNSEL - Waiver/Pro Se Representation With Standby Counsel

LASJRP: Defendant, charged with robbery in the third degree and attempted robbery in the third degree, expressed dissatisfaction with defense counsel and, ultimately, asked to represent himself with standby counsel. Following a colloquy with defendant and after adjourning the matter for defendant to discuss his request with counsel, [] the court granted

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defendant's application to represent himself with standby counsel. Defendant subsequently pleaded guilty to robbery in the third degree. Thereafter, the court denied defendant's motions to withdraw his plea.

The Third Department agrees with defendant that the court erred in granting his request to represent himself. Although the court informed defendant that he did not qualify for standby counsel because he seemed to be familiar with some legal terms, defendant responded that he was requesting standby counsel because he does not know everything in the law. The record does not reflect that defendant was informed of or understood that, despite being permitted to proceed with standby counsel, there were risks inherent in proceeding pro se. (County Ct, Otsego Co)

People v Sturgill, 2025 NY Slip Op 01260
(3rd Dept 3/6/2025)
BURGLARY - Dwelling

LASJRP: The Third Department concludes that for purposes of the burglary charge, there was ample evidence that a shed was converted into a dwelling. There were two beds, dressers, clothing and other personal items. The rape victim and her roommates utilized the shed as their residence and slept there every night, including on the day of the incident. (County Ct, Ulster Co)

Matter of Candy II. v Kandice HH., 2025 NY Slip Op 01411
(3rd Dept 3/13/2025)
VISITATION - Grandparents/Standing
CUSTODY - Grandparents - Extraordinary Circumstances/Best Interests

LASJRP: In the biological grandmother's appeal from an order that awarded sole custody of the children to the mother and denied the grandmother visitation, the Third Department affirms.

The grandmother established extraordinary circumstances, but the Family Court properly determined that it was in the best interests of the children for the mother to have sole custody. After the children left the grandmother's custody, they exhibited educational deficits and the grandmother went prolonged lengths of time without contacting the mother or attempting to spend time with the children. The grandmother disregarded the factual circumstances surrounding the termination of her parental rights to the mother because of sexual abuse, and believed it was appropriate to exercise visitation in the home of the mother's brother, who sexually abused the mother as a child. The grandmother did not complete sex abuse counseling while abuse/neglect proceedings were ongoing involving her sexual abuse of the mother.

The grandmother does not have standing to seek visitation as a grandparent because her parental rights to the mother were terminated and does not otherwise have standing despite the finding of extraordinary circumstances. (Family Ct, Broome Co)

Fourth Department

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

People v Delee, 233 AD3d 1521 (4th Dept 12/20/2024)
PROSECUTION APPEAL | UNDISCHARGED WEAPON AS DANGEROUS INSTRUMENT | REVERSED

ILSAPP: The prosecution appealed from an Onondaga County Court judgment granting Delee's motion to reduce a count of the indictment from first-degree to second-degree burglary. The Fourth Department reversed and reinstated the first-degree burglary count. The trial court erred in ruling that the gun used in the burglary was not a dangerous instrument because it was not fired during the incident, nor was it recovered or tested to see if it could do so. A gun used as a bludgeon, as it was here, met the definition of a dangerous instrument, thus supporting a first-degree burglary charge. (County Ct, Onondaga Co)

People v Dixon, 233 AD3d 1505 (4th Dept 12/20/2024)
PROSECUTION APPEAL | 440.10 VACATUR | LAFONTAINE ISSUE | REVERSED

ILSAPP: The prosecution appealed from an Erie County Court judgment granting Dixon's 440.10 motion to vacate his conviction for CPW 2. The Fourth Department reversed, denied the motion, and reinstated the conviction. Dixon, who had been convicted in 1992 of a number of charges including murder and CPW 2, had filed a 440.10 motion seeking to vacate the CPW 2 conviction based on newly discovered evidence. The trial court had granted an earlier 440.10 motion to vacate the other charges, based on another person's confession that he had done the shooting with a gun provided by Dixon. The prosecution opposed the second 440.10 motion, arguing that the evidence was not newly discovered because appellant knew about the other person's involvement at the time of the crime. The Fourth Department rejected that argument because the shooter refused to testify after the prosecution threatened him with perjury. However, substituting its own discretion for that of the motion court, the Fourth Department found the newly discovered evidence would not have changed the outcome of the trial. Appellant's own evidence established that

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he possessed the gun based on a theory of accessorial liability for the weapon rather than as the principal actor—the theory that was presented at trial. The Fourth Department therefore reversed, concluding that the new evidence would not change the CPW 2 verdict. It could not affirm based on the argument that the change in theory was an impermissible amendment to the indictment, because that issue was not decided adversely to the appellant below (*People v LaFontaine*, 92 NY2d 470, 474 [1998]). (County Ct, Erie Co)

People v Dondorfer, 2024 NY Slip Op 06432 (4th Dept 12/20/2024)
PROSECUTION APPEAL | DRIVING WHILE ABILITY IMPAIRED BY DRUGS | REVERSED

ILSAPP: The prosecution appealed from a Wyoming County Court judgment granting Dondorfer's motion to dismiss for failure to properly instruct the grand jury on the definition of the term "impaired" as relevant to a felony DWI [charge based on 1192(2-a)(b) or (4-a)]. The Fourth Department reversed and reinstated the relevant count of the indictment. The Fourth Department defined impairment by drugs—a definition not specifically set forth in the VTL—as limiting a person's ability to operate a motor vehicle "to any extent." In doing so, the court explicitly rejected the Third Department's reasoning in *People v Caden N.*, which adopted the higher "intoxication" standard for alcohol to define impairment by drugs, rather than the lower "impairment" standard for alcohol in the VTL. (County Ct, Wyoming Co)

People v Swank, 233 AD3d 1459 (4th Dept 12/20/2024)
WARRANTLESS ENTRY | SUPPRESSION | REVERSED

ILSAPP: Appellant appealed from an Oswego County Court judgment convicting him, after a plea, of third-degree CPCS. The Fourth Department reversed, granted appellant's suppression motion, and vacated the plea. The warrantless search of appellant's home was invalid, requiring suppression of the guns seized as a result. Police responded to appellant's home after receiving information that he may have fired a shotgun into the air at another location. After a brief stand-off with police, appellant and his wife and daughter all left the home, and there was no indication that anyone else was inside. Police then performed a protective sweep of the inside of the home, during which they observed the barrels of two long guns in a bedroom. While these warrantless sweeps are permissible under certain circumstances, here there was no reasonable belief that a person was inside who posed a danger to officers, could destroy evidence, or needed assistance. Keem Appeals, PLLC (Brad Keem, of counsel) represented Swank. (County Ct, Oswego Co)

People v Alexander, 234 AD3d 1268 (4th Dept 1/31/2025)
MOLINEUX | REDUCED CHARGE REQUIRES NEW ACCUSATORY INSTRUMENT | REVERSED

ILSAPP: Appellant appealed from a Monroe County Supreme Court judgment convicting him of second-degree and fourth-degree CPW. The Fourth Department reversed, granted a new trial on the second-degree CPW charge, and dismissed the fourth-degree CPW charge. The trial court erred in allowing evidence of appellant's alleged prior abuse of his wife, which did not fall under any of the *Molineux* exceptions allowing evidence of prior bad acts. It did not complete a narrative that would explain a motive for his sudden aggression toward his stepchildren—the sole basis for the charge—and it was unnecessary to prove intent since possession of the gun was presumptive evidence of intent to use it. The evidence was far more prejudicial than probative, and the error was not harmless. The lesser charge must be dismissed, since the prosecution consented to its reduction from third-degree CPW but failed to file an amended accusatory instrument. Lyle T. Hajdu represented Alexander. (Supreme Ct, Monroe Co)

People v Conley, 234 AD3d 1363 (4th Dept 1/31/2025)
INEFFECTIVE ASSISTANCE OF COUNSEL | SUPPRESSION | REVERSED

ILSAPP: Appellant appealed from an Oneida County Court order denying her CPL § 440.10 motion to vacate the judgment of conviction based on ineffective assistance of counsel. The Fourth Department reversed, granted the motion, and dismissed the indictment. Appellant was convicted of first-degree manslaughter after a jury trial. During the investigation, police obtained a warrant authorizing seizure of her cell phone, which police then delivered to a cybersecurity and forensics center, discovering searches for and purchases of the poison that purportedly killed the decedent. The Fourth Department found that defense counsel failed to properly move to suppress the evidence recovered from the cell phone. While that failure was a single error during otherwise competent representation, it was sufficiently significant to compromise her right to a fair trial. Although much of the evidence later became available from another source, that was not the case when the police used the seized evidence to obtain an admission from appellant that led to further incriminating evidence. Moreover, the fact that information was obtained from appellant's cell phone was central to the prosecution's theory of the case. Cambareri & Brenneck, (Melissa K. Swartz, of counsel) represented Conley. (County Ct, Oneida Co)

Fourth Department *continued*

People v Exford, 234 AD3d 1252 (4th Dept 1/31/2025)
ARSON - Circumstantial Evidence
EXPERT TESTIMONY - Arson

LASJRP: The Fourth Department finds no error where the trial court allowed the fire investigator to testify to his opinion that the fire was intentionally set.

However, the court erred in denying defendant's request for a circumstantial evidence instruction. A surveillance video, which is grainy and shot from a distance, depicts a flickering or glow as defendant exits the premises, which promptly grows into a blaze as defendant walks away. There is no way to discern from the video the exact moment that the fire is set or precisely how the fire began. (County Ct, Lewis Co)

People v Hawkey, 234 AD3d 1328 (4th Dept 1/31/2025)
People v Hawkey, 234 AD3d 1335 (4th Dept 1/31/2025)
VOP | PREPONDERANCE OF THE EVIDENCE | HEARSAY | REVERSED AND REMITTED

ILSAPP: Appellant appealed from two Cayuga County Court judgments revoking sentences of probation and imposing sentences of imprisonment. In separate orders, the Fourth Department reversed the judgments, vacated the declarations of delinquency, and remitted to County Court for further proceedings. The evidence presented at the hearing to determine whether appellant committed a criminal offense while on probation consisted entirely of hearsay testimony from a police investigator. "While hearsay is admissible at a probation revocation hearing, hearsay alone does not satisfy the requirement that a finding of a probation violation must be based upon a preponderance of the evidence." Veronica Reed represented Hawkey. (County Ct, Cayuga Co)

People v Hills, 234 AD3d 1311 (4th Dept 1/31/2025)
CPW | DOUBLE JEOPARDY | CONTINUOUS POSSESSION | COUNT DISMISSED | MODIFIED

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 appellant's conviction for second-degree CPW, dismissed that count, and, as modified, affirmed. Prosecuting appellant for gun possession violated his state and federal rights to be protected against double jeopardy. Approximately two weeks after the homicide at issue here, appellant was found in possession of a .44 caliber revolver and because of that possession, was convicted of second-degree CPW. The prosecution alleged in all their filings that the gun he used in the homicide was the same weapon he possessed two weeks later. Appellant's ongoing possession of the weapon was "the product of one continuous impulse" and not "successive and distinguishable impulses." Preservation was not required because a constitutional double jeopardy claim may be raised for the first time on appeal. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented Hills. (County Ct, Onondaga Co)

People v McNeal, 234 AD3d 1247 (4th Dept 1/31/2025)
SORA | RISK FACTOR 4 | NO COURSE OF SEXUAL MISCONDUCT ESTABLISHED | MODIFIED

ILSAPP: Appellant appealed from a Monroe County Court order adjudicating him a level two sex offender, arising from a federal conviction for conspiracy to commit sex trafficking of a minor. The Fourth Department modified by adjudicating him a level one offender and otherwise affirmed. The SORA court improperly assessed 20 points under risk factor 4 for engaging in a continuing course of sexual misconduct. There was no evidence that appellant engaged in sexual contact with the complainant on more than one occasion. Moreover, points were not appropriate under factor 4 on a theory of accessorial liability based on sexual contact between the victim and others. The Fourth Department did not remit to give the prosecution an opportunity to request an upward departure. Rochester Public Defender (Clea Weiss, of counsel) represented McNeal. (County Ct, Monroe Co)

Matter of O'Dell v O'Dell, 234 AD3d 1311 (4th Dept 1/31/2025)
VISITATION - Supervised/Delegation Of Authority

LASJRP: The mother argues on appeal that the Family Court erred in directing that the father's visitation with the child be supervised by a family friend and take place at locations the supervisor deems appropriate.

The Fourth Department upholds the determination appointing the supervisor but modifies the order by directing that the father's access take place either in public or at the supervisor's house. (Family Ct, Cattaraugus Co)

People v Perryman, 234 AD3d 1357 (4th Dept 1/31/2025)
SEARCH AND SEIZURE - Auto Search/Evidence Of Cannabis Possession/Use

LASJRP: The Fourth Department upholds a suppression order where, at the time of the search of the vehicle, the Trooper had reasonable cause to believe only that defendant had consumed cannabis inside the vehicle in violation of Vehicle and Traffic Law § 1227, which is a simple traffic infraction that would not support the search of the vehicle.

Fourth Department *continued*

The Trooper had no basis for believing that defendant was operating a vehicle while impaired by such consumption in violation of Vehicle and Traffic Law § 1192(4) or (4-a), which would have justified the search pursuant to Penal Law § 222.05(4). Thus, Penal Law § 222.05(3) prohibited the Trooper from relying solely on his detection of burning or burnt cannabis. (County Ct, Onondaga Co)

People v Scullin, 234 AD3d 1308 (4th Dept 1/31/2025)
SEARCH AND SEIZURE - Credibility Of Police Testimony

LASJRP: The Fourth Department upholds a suppression order, rejecting the People's contention that the search warrant was properly predicated on a lawful "trash rip" procedure performed by the police at defendant's address, which resulted in the recovery of evidence suggestive of drug possession and sales.

Police witnesses testified that the trash rip procedure yielded multiple leaf clippings that a field test kit determined tested positive for marijuana, and that they connected the trash bags to defendant because they also recovered mail addressed to defendant and his girlfriend from the bags. However, the court declined to credit the witnesses' testimony and found no probable cause, noting that, despite their decades of law enforcement experience, the police who performed the trash rip did not retain any of the inculpatory evidence found in the trash, solely because the recovered items were saturated in old food material. The court further noted that the police did not photograph the contents of the garbage bags or the positive field test result on the recovered plant materials. (County Ct, Oswego Co)

People v Tyson, 234 AD3d 1282 (4th Dept 1/31/2025)
SPEEDY TRIAL - Constitutional Due Process

LASJRP: In a 3-2 decision, the Fourth Department affirms an order dismissing the indictment on constitutional due process grounds due to a preindictment delay of 14 months.

The majority notes, inter alia, that defendant was arrested on December 25, 2021 after an incident in which he threw urine at a correction officer attempting to enter defendant's cell while defendant was an inmate; that defendant was indicted in February 2023; that the case was not complex and did not involve any unique theories of law and the required evidence and witnesses were available to the People at an early date; that this case involved a class E felony - the lowest level of felony offense; that although defendant was serving a sentence on an unrelated charge, defendant was placed in solitary confinement for seven months as a result of this incident, and where, as here, the defendant is imprisoned on another crime, that imprisonment cannot excuse the delay; and that establishment of prejudice is not required, but, in any event, the delay in charging an incarcerated individual with a subsequent crime may prolong incarceration by foreclosing the possibility of a concurrent sentence and may also interfere with rehabilitation, particularly when the individual is already aware of the other potential charge. (County Ct, Erie Co)

Matter of Abdoch v Abdoch, 2025 NY Slip Op 00746 (4th Dept 2/7/2025)
CUSTODY | ATTORNEY FOR THE CHILD APPEAL | DISMISSED

ILSAPP: The Attorney for the Child appealed from a Monroe County Family Court order granting the parties joint custody of the children with designated "zones of influence" for decision-making purposes. The Fourth Department dismissed the appeal. The court declined to depart from its precedent holding that children in a custody matter do not have full party status and may not pursue an appeal when neither "aggrieved yet nonappellant" parent has done so. (Family Ct, Monroe Co)

People v Agee, 2025 NY Slip Op 00742 (4th Dept 2/7/2025)
SPEEDY TRIAL | INITIAL BURDEN | HELD IN ABEYANCE

ILSAPP: Appellant appealed from a Cayuga County Court judgment convicting him of aggravated family offense. The Fourth Department reserved and remitted for a ruling on the merits of appellant's statutory speedy trial motion after consideration of the prosecution's opposition. Appellant met the initial burden for a speedy trial dismissal pursuant to CPL 30.30 by alleging that the prosecution failed to declare readiness within the statutorily prescribed time period. David P. Elkovitch represented Agee. (County Ct, Cayuga Co)

People v Boldorff, 2025 NY Slip Op 00765 (4th Dept 2/7/2025)
SEXUALLY VIOLENT OFFENDER | OUT-OF-STATE CONVICTION | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Chautauqua County Court order designating him a sexually violent offender based on his non-violent, out-of-state felony conviction. The Fourth Department reversed and remitted for further proceedings. For the reasoning set forth in *People v Malloy* (228 AD3d 1284, 1287-1291 [4th Dept 2024]) SORA's foreign registration clause—was unconstitutional as applied. Designating appellant a sexually violent offender based solely on his nonviolent, out-of-state conviction violated substantive due process. It bore no rational relationship to public safety, or any other conceivable state interest. Notably, in *People v Talluto* (39 NY3d 306 [2022]), the Court of Appeals indicated that the foreign jurisdiction clause may contain a legislative drafting error and, if so, unequivocally called upon the Legislature to remedy it. [Chautauqua County] Public Defender (Heather Burley, of counsel) represented Boldorff. (County Ct, Chautauqua Co)

Fourth Department *continued*

People v Brumfield, 2025 NY Slip Op 00764
(4th Dept 2/7/2025)
POSSESSION OF A WEAPON

LASJRP: The Fourth Department reverses defendant's conviction for criminal possession of a weapon in the second degree, concluding that the verdict is against the weight of the evidence where the indictment and the jury charge specifically narrowed the theory of the case to possession of a loaded pistol, but the evidence permitted, at best, mere speculation that the firearm defendant allegedly possessed was a pistol, and not a rifle. Video footage of the shooting shows multiple muzzle flashes indicative of gunfire from the vehicle in which defendant was present but does not directly depict the firearm that is firing the shots. (County Ct, Monroe Co)

People v Guerrero, 2024 NY Slip Op 00766
(4th Dept 2/7/2025)
RAISE THE AGE | REMOVAL TO CRIMINAL COURT | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from an Onondaga County Court order convicting him of first-degree robbery and first-degree burglary committed when he was 17 years old. The Fourth Department affirmed. County Court correctly granted the prosecution's motion to prevent removal of his case to Family Court. Under Raise the Age, an Adolescent Offender's case may remain in adult court rather than Family Court if the prosecution proves that extraordinary circumstances exist, which may include the nature of the crime and the history of the accused. Here, the home invasion robbery involved weapons and injuries to the complainant. While the Fourth Department acknowledged that no prior juvenile delinquency adjudications may be used in support of an extraordinary circumstances determination, it did find that it was permissible to elicit related facts, including compliance with the services and programs provided as a result of any such determination. A dissenting justice would not have found extraordinary circumstances. The facts related to the prior juvenile delinquency adjudication, including the resulting services, were improperly considered by the trial court, and the nature of the crime alone was insufficient to meet the extraordinary circumstances standard. (County Ct, Onondaga Co)

People v Harrell, 2025 NY Slip Op 00774
(4th Dept 2/7/2025)
PREDATORY SEXUAL ASSAULT | LEGAL SUFFICIENCY | COUNT DISMISSED | MODIFIED

ILSAPP: Appellant appealed from a Jefferson County Court judgment convicting him of predatory sexual assault against a child, second-degree rape, third-degree rape, and first-degree sexual abuse. In the interest of justice, the Fourth Department reversed appellant's conviction for predatory sexual assault, dismissed that count, and as modified, affirmed. A person is guilty of predatory sexual assault against a child when, being 18 years old or more, he commits first-degree rape and the victim is less than 13 years old. Here, complainant testified that appellant had sexual intercourse with her on the night before she turned 13 years old. The complainant admitted, however, that there was no clock in the bedroom and she did not know whether the intercourse occurred before midnight. Viewing the evidence in the light most favorable to the prosecution, there is no valid line of reasoning and permissible inferences from which a rational jury could have found that the prosecution proved beyond a reasonable doubt the elements of predatory sexual assault. Ryan James Muldoon represented Harrell. (County Ct, Jefferson Co)

Matter of Pilkenton v Scipione, 235 AD3d 1286
(4th Dept 2/7/2025)
CUSTODY | ATTORNEY FOR THE CHILD APPEAL | AFFIRMED

ILSAPP: The Attorney for the Child (AFC) appealed from a Monroe County Family Court order dismissing the father's custody modification petition. The Fourth Department affirmed. In contrast to Matter of *Abdoch v Abdoch*, the court reached the merits of the appeal, "assuming, arguendo, that the AFC has the authority to pursue an appeal on behalf of the child under the circumstances of this case." The mother, who was a respondent on the appeal, participated pro se, but the father did not appear to have done so. (Family Ct, Monroe Co)

Matter of Sevilla v Torres, 235 AD3d 1303
(4th Dept 2/7/2025)
CUSTODY - Grandparents/Extraordinary Circumstances

LASJRP: The Fourth Department upholds an order awarding sole custody to the grandmother, finding that the grandmother established extraordinary circumstances where the mother was a victim of domestic violence; the child had been present during more than one incident between the mother and her husband; the mother had a pattern of leaving the marital home after an incident and then returning a short time later; the police had been called to the marital residence on multiple occasions; the mother called the child a liar after he disclosed the extent of the abuse to the grandmother; and the child had been negatively impacted by the dynamics of the marital home. (Family Ct, Oneida Co)

Fourth Department *continued*

People v Berry, 2025 NY Slip Op 01523
(4th Dept 3/14/2025)
AGUILAR-SPINELLI | CI'S BASIS OF KNOWLEDGE | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a judgment of Monroe County Supreme Court convicting him, after a jury trial, of various drug and weapon possession charges. A three-justice majority (Lindley, Bannister, and Delconte, JJ.), affirmed the conviction, holding that the confidential informant's (CI) hearsay allegations supporting a search warrant application satisfied the basis-of-knowledge prong of *Aguilar-Spinelli*. The warrant application, which sought a warrant to search two neighboring addresses, included six pages of information from a CI about the second address, but only two sentences about the first address, averring that the CI "was aware of the ongoing presence of narcotics at the subject location because the informant had been present at that location on multiple occasions, including for at least one drug transaction." Justices Ogden and Nowak dissented and would have suppressed the evidence found at the first address and remitted for resentencing on the counts unaffected by suppression. The dissenters noted that the warrant application detailed no specific transactions at the first address, no type of narcotic exchanged, and no time frame for the alleged transaction. Moreover, "the police provided no additional corroborating observations to support issuance of the warrant," such as ongoing surveillance or controlled buy attempts at that address. This "paucity of information" stood in contrast to the extensive detail provided regarding the second address. (Supreme Ct, Monroe Co)

Matter of Bright v Martuscello, 2025 NY Slip Op 01538
(4th Dept 3/14/2025)
PRISON DISCIPLINARY | INSUFFICIENT EVIDENCE | DUE PROCESS DENIED | MODIFIED & REMITTED

ILSAPP: Petitioner appealed from the denial of his Article 78 motion seeking to annul several disciplinary determinations. The Fourth Department ruled, and respondent conceded, that two charges were not supported by substantial evidence and that the determinations upholding those charges should be annulled. With respect to two additional charges, petitioner was denied due process when the hearing officer refused to allow him to view the videotape of the incident underlying one charge and call witnesses relating to the other charge. An incarcerated person has the right to call witnesses and present evidence in his defense when doing so would not be unduly hazardous to institutional safety, and the hearing officer did not mention any such concerns in denying petitioner access to the videotape and the requested witness. The Fourth Department annulled the violation findings on two charges, ordered the findings expunged from petitioner's record, affirmed the findings relating to one charge and remitted for further proceedings including consideration of appropriate penalty. Wyoming County-Attica Legal Aid Bureau, Warsaw (Leah R. Nowotarski, of counsel) represented Bright. (County Ct, Jefferson Co)

People v Clark, 2025 NY Slip Op 01463 (4th Dept 3/14/2025)
30.30 | HEARING REQUIRED | SUA SPONTE DETERMINATION IMPROPER | REMITTED

ILSAPP: Appellant appealed from a Steuben County Court judgment convicting her of third-degree CPCS. The Fourth Department remitted to County Court for further proceedings and reserved decision on the appeal. County Court "erred in failing to hold a hearing [on the 30.30 motion], in conducting its own sua sponte investigation, and in excluding time not advocated for by the People in opposition to defendant's CPL 30.30 motion." Once appellant had established through sworn allegations that there was an unexcused delay exceeding the speedy trial time, the burden shifted to the prosecution to show that time should be excluded. It was improper for County Court to substitute its own investigation, separate from the prosecution's arguments, based on documents not even contained in the appellate record. County Court also failed to address time periods that the prosecution argued were excludable time in their responding papers. The Fourth Department remitted for a hearing on the disputed time periods and directed that the hearing must not include argument about the time periods upon which the court based its sua sponte conclusion. Caitlin M. Connelly represented Clark. (County Ct, Steuben Co)

People v Cousins, 2025 NY Slip Op 01535
(4th Dept 3/14/2025)
IAC | FAILURE TO REVIEW DISCOVERY | REVERSED

ILSAPP: Appellant appealed from a Jefferson County Court judgment convicting him, after a jury trial, of attempted first-degree CPCS and attempted third-degree CPCS. The Fourth Department reversed and granted a new trial. The record showed that defense counsel failed to review critical discovery, including a flash drive containing the entire contents of his client's cell phones. This omission led to subsequent failures to object to inadmissible evidence and failure to request limiting instructions. There was no strategic explanation for these errors, which compromised appellant's right to a fair trial. Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented Cousins. (County Ct, Jefferson Co)

People v Crane, 2025 NY Slip Op 01530
(4th Dept 3/14/2025)
SORA | INSUFFICIENT EVIDENCE OF ALCOHOL ABUSE | MISCONDUCT NOT WHILE IN CUSTODY | MODIFIED

ILSAPP: Appellant appealed from a Steuben County Court order designating him a level three sex offender under SORA. The Fourth Department modified by designating him a level two

Fourth Department *continued*

sex offender and otherwise affirmed. County Court erred in assessing points under risk factor 11, history of drug or alcohol abuse, and risk factor 13, conduct in custody. A statement from the complainant to a caseworker that appellant had been "outside by the fire drinking" on the night of the offense was not clear and convincing evidence that he was abusing alcohol at the time of the offense, particularly where the complainant also denied appellant had been drinking during the second incident and indicated that he "normally doesn't drink." A victim impact statement from appellant's ex-wife that he was "drunk" on the night of the incident was not reliable hearsay under *Mingo* where the source of her information was unclear. No points should have been scored for conduct while in custody under risk factor 13, where the alleged misconduct occurred when appellant was not in fact in custody, or on probation or parole. Maurice J. Verrillo represented Crane. (County Ct, Steuben Co)

People v Fulcott, 2025 NY Slip Op 01467
(4th Dept 3/14/2025)
PSR REFERENCES TO AQUITTED CONDUCT | FAILURE TO RULE ON MOTION TO STRIKE | REMITTED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of first-degree criminal possession of marihuana, following a jury verdict. The Fourth Department ordered the case held, the decision reserved, and the matter remitted. The trial court erred by failing to rule on appellant's motion to strike from the presentence report any references to the conduct underlying the charges of which he was acquitted. A court's failure to rule on a motion cannot be deemed a denial thereof. Steven A. Feldman represented Fulcott. (County Ct, Monroe Co)

People v Hall, 2025 NY Slip Op 01457 (4th Dept 3/14/2025)
WINDOW TINT VIOLATION | TESTIMONY NOT CONCLUSORY | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from two Onondaga County Court judgments convicting him of fifth-degree CPCS and criminal possession of a firearm. The Fourth Department affirmed. The court determined that the officer had reasonable suspicion to believe the windows of appellant's vehicle were excessively tinted in violation of VTL § 375(12-a)(b)(2), and the stop was therefore legal, based on his testimony that he was "unable to see the driver of the vehicle" through the window. Justice Whalen in dissent would have reversed because the prosecution failed to elicit evidence to support the officer's conclusory belief that the tinted windows violated the law. The officer testified that he believed any level of window tint was illegal and that the actual tint on the vehicle's windows was never tested with a tint meter. He also testified that he initially observed the vehicle when it was dark outside and he did not clarify whether it was the window tint, as opposed to the ambient darkness, that prevented him from seeing the driver. Because of that lapse, the officer failed to link his conclusory belief that the windows were excessively tinted with an objective fact in support of that belief. (County Ct, Onondaga Co)

People v Houle, 2025 NY Slip Op 01437 (4th Dept 3/14/2025)
DEFECTIVE GRAND JURY PROCEEDINGS | FAILURE TO RULE ON MOTION TO DISMISS | REMITTED

ILSAPP: Appellant appealed from an Ontario County Court judgment convicting him of second-degree assault, following a jury verdict. The Fourth Department ordered the case held, reserved decision, and remitted. As conceded by the prosecution, the trial court erred by failing to rule on appellant's motion seeking inspection of the grand jury minutes and dismissal of the indictment on the ground that the grand jury proceeding was defective. A court's failure to rule on a motion cannot be deemed a denial thereof. Ontario County Public Defender's Office (Leanne Lapp, of counsel) represented Houle. (County Ct, Ontario Co)

People v Jones, 2024 NY Slip Op 01524
(4th Dept 3/14/2025)
MISTAKEN IDENTITY | PROBABLE CAUSE TO ARREST | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a Monroe County Supreme Court judgment convicting him, upon a guilty plea, of second-degree attempted CPW and sentencing him as a predicate felony offender. A three-justice majority (Lindley, Bannister, and Delconte, JJ.) affirmed the conviction, but vacated the sentence, on consent, and remitted for resentencing, because the prosecution failed to establish that appellant's conviction in a foreign jurisdiction was equivalent to a New York felony. The arrest occurred after a four-member apprehension team from the Department of Corrections and Community Supervision (DOCCS) with an arrest warrant for a parole absconder received information from the absconder's girlfriend that he might be in a one-block area in Rochester. They also knew the absconder's race, height, and weight (6'1" and 180 pounds). Upon arrival, the officers noticed appellant, who was 5'11" and between 185-200 pounds, walking on the street, wearing a ski mask. When two DOCCS officers approached him, appellant fled. The other two officers, who were 20-30 yards away, then pursued appellant, who allegedly discarded a gun during flight. The majority held that the pursuit was justified, because the officers reasonably believed appellant was the parole absconder based on their similar heights and weights, his ski mask, his location in the general location described by the absconder's girlfriend, and his immediate flight. The dissent would have reversed, granted suppression, and dismissed the indictment. There was insufficient evidence that the pursuing officers, who testified, had even a subjectively—let alone objectively—reasonable basis

Fourth Department *continued*

to stop appellant. The approaching officers never testified. It was not unusual for appellant to be wearing a ski mask on a cold December morning, and appellant's race was not discernible given his clothing. Nor was the similarity in height and weight alone sufficient, since both men are of average build relative to the general public. According to the dissent, "the majority's conclusion is tantamount to holding that the parole investigators had a reasonable belief sufficient to stop and arrest any average-sized man, of any race, in the general area where the parolee may have been." (Supreme Ct, Monroe Co)

People v Mitchell, 2025 NY Slip Op 01456
(4th Dept 3/14/2025)
30.30 | TRIAL COURT'S FAILURE TO FOLLOW APPELLATE DIVISION | HELD IN ABEYANCE & REMITTED

ILSAPP: Appellant appealed from an Ontario County judgment convicting him of second-degree unlawful imprisonment, third-degree rape, and related charges. The Fourth Department, in an earlier appeal, had held the matter in abeyance, finding that the prosecution had not exercised due diligence in its failure to discover the complainant's criminal record, rendering its COC illusory. The matter had been remitted for the motion court to determine whether, given the illusory COC, the prosecution had timely declared readiness, given that statutory amendments affecting the defense's reciprocal discovery obligations had been enacted while the case was pending. On remittal, the prosecution argued, for the first time, that appellant had never validly moved to dismiss the indictment on speedy trial grounds. The motion court denied the 30.30 motion on that basis, and the defense appealed. The Fourth Department held that the prosecution's argument, raised for the first time following remittal, was improperly considered, as it was inconsistent with the Fourth Department's earlier findings. A trial court, upon remand or remittitur, has no authority to disregard the mandate of a higher court. The appeal was again held in abeyance and the matter remitted for further proceedings. Easton Thompson Kasperek Shiffrin LLP (Brian Shiffrin, of counsel) represented Mitchell. (County Ct, Ontario Co)

People v Niles, 2025 NY Slip Op 01502 (4th Dept 3/14/2025)
INCLUSORY CONCURRENT COUNTS | MODIFIED

ILSAPP: Appellant appealed from an Oneida County Court judgment convicting him of second- and third-degree assault. The Fourth Department modified by dismissing the third-degree assault count. Third-degree assault is an inclusory, concurrent count of second-degree assault, requiring dismissal of the lower count. Preservation of this issue is not required. Oneida County Public Defender (James P. Godemann, of counsel) represented Niles. (County Ct, Oneida Co)

Matter of Shakema R. v Mesha B., 2025 NY Slip Op 01512
(4th Dept 3/14/2025)
CUSTODY | MENTAL HEALTH TREATMENT AS CONDITION OF VISITATION | MODIFIED

ILSAPP: A parent appealed from Erie County Family Court orders awarding full custody of the children to each of their respective other parents, directing that the appellant parent have supervised visitation with the children, and requiring the appellant parent to participate in mental health treatment before filing modification petitions. The Fourth Department modified by deleting the portion of the order conditioning the filing of modification petitions on mental health treatment and substituting a provision making mental health counseling a component of supervised visitation, and otherwise affirmed. Family Court may not condition any future application for custody or visitation on participation in mental health treatment. Caitlin M. Connelly represented the appellant parent. (Family Ct, Erie Co)

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