NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center

REPORT

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Defender News

58th Annual Conference: Changes Made, Tradition of Quality Continued

NYSDA's 58th Annual Meeting and Conference, held July 27-29, 2025, at the Saratoga Hilton and City Center in Saratoga Springs, attracted the most attendees in NYSDA's history. Changes in scheduling helped ensure that more people could attend the award presentations and the membership meeting, both held during lunch on Monday. The CLE training program again offered separate tracks for criminal and family defenders, along with plenary sessions for all on immigration and mental health. Members who were unable to come to Saratoga will be able to view recordings of the CLE sessions—for MCLE credit—once those have been posted on the website. For photos and more information about this year's successful conference, see pp. 13 , 14, and 71.

2025 Legislative Session: Late Budget, a Few Wins, Discovery Changes

For public defense lawyers and many others, the state legislative session that ended in June brought much disappointment and frustration amid a few important victories. That the budget was finalized 38 days after the March 31st deadline meant advocates and legislators had less time to address remaining bills. Good bills competed with one another for attention. Some harmful, or at best unproductive, bills supplanted meaningful proposals. Rollback of prior reforms in the criminal legal area dominated headlines and discussions during and after budget season. What emerged was a jumble of bills that NYSDA continues to evaluate. Some have already become law; others await the Governor's signature.

Budget

NYSDA received funding equal to that of last year. This will allow us to continue our training, direct defender services, publications, and other services. We reiterate here our heartfelt thanks to the defense community, veterans groups, and others whose support was invaluable, including the Chief Defenders Association of New York, New York State Association of Criminal Defense Lawyers, and the New York State Office of Indigent Legal Services (ILS).

The ILS Fund (ILSF) budget (Aid to Localities) increased by $5.5 million to be used for family defense—a welcome but insufficient addition. For the third year in a row, a "sweep" of up to $234 million from the ILSF to the general fund is authorized. In March 2025, the State moved $80.1 million from the ILSF to the general fund, and in March 2024, the State transferred $37.8 million to the general fund from the ILSF. These amounts are correlated to the amounts the State paid out to cover the State's share of the increase in the hourly rate for assigned counsel attorneys and attorneys for the child, which was passed in 2023. Whether the State will use its full sweep authority in the 2025-2026 SFY is an open question, particularly in light of the uncertainty about the federal budget and how spending cuts may impact New York.

Find details about defense funding, and many legislative changes of interest to the defense and client communities, in NYSDA's enacted budget memo, published in the May 14th edition of News Picks. Uncertainty about fiscal implications of federal actions and inactions looms over all efforts at analysis.

Discovery Amendments

The final budget did include changes to Criminal Procedure Law article 245 and section 30.30. L 2025, ch 56, Part LL (pp. 125-131). The changes took effect on August 7, 2025.

NYSDA, a proud member of the Alliance to Protect Kalief's Law, worked hard to prevent gutting of the 2020 discovery reforms. On a positive note, the worst elements of the Governor's proposed changes to discovery in criminal

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cases were removed.

Prosecution claims that the onerous burden of complying with discovery requirements was beyond their capacity bore fruit. In the budget, defense discovery was allotted $45 million, while prosecutors and law enforcement are to receive $90 million.

Lawyers attending NYSDA's Annual Conference at the end of July heard detailed discussion of discovery law changes. Presenters covered the parts of the statute that were affected:

- 245.20(1): modest changes to list of discoverable material
- 245.20(2): rewording of proviso on material DAs need a subpoena to obtain
- 245.20(6): minor addition to permitted redactions
- 245.50(1) + 30.30(5): changes to rules regarding COC standards
- 245.50(4): 35-day deadline for COC challenges (w/ exceptions)
- 245.70(8): DA's motions "pre-trial" motions for 30.30 purposes
- 245.10(1)(c): minor amendments
- 245.90: new section added

Lawyers who were unable to attend the conference sessions are encouraged to contact the Backup Center for assistance.

Other sources of information are also available. A detailed discussion about the discovery changes appeared in the August 15th edition of News Picks. The Data Collaborative for Justice has summarized New York's discovery provisions, including the latest amendments.

Electronic Court Appearances

Changes were made in the law regarding electronic court appearances, as noted in News Picks on May 14th. A new court rule regulating electronic appearances during criminal proceedings was proposed in June, and was provisionally effective on July 8th—the date the law took effect. NYSDA submitted comments on the proposed rule. As discussed in News Picks for September 4, 2025, NYSDA pointed out ways in which the proposed rule could harm defendants, such as being read to improperly allow courts to engage directly with represented defendants without ensuring they first received counsel's advice about consenting to virtual appearance and/or to improperly inquire as to reasons for refusals to consent to appear remotely.

A major criticism of the legislation is that it was included in the budget "without consultation with the NYS Office of Indigent Legal Services or criminal defense providers." NYSDA stressed that hybrid or virtual proceedings should not be the norm, and referred to the Statement on Virtual/Remote Court Appearances (Nov. 23, 2020) along with the National Association for Public Defense Statement on the Issues with the Use of Virtual Court Technology (June 18, 2020).

Bills Relating to Mental Health

Laws relating to involuntary commitment and some other issues concerning mental illness were included in the state budget.

Involuntary Commitment

Legislation to loosen the legal standard for involuntary commitment of people with mental illness was included in the budget and became effective August 8th. Language was added to the definition of when someone is "in need of involuntary care and treatment" to include when there is "a substantial risk of physical harm to the person due to an inability or refusal, as a result of their mental illness, to provide for their own essential needs such as food, clothing, necessary medical care, personal safety, or shelter." CPL 9.01(c)(3). As described in *Politico* on May 1st, the new approach "remains contentious" as detractors note that [w]ithout "significant investment in post-discharge resources such as housing and outpatient care ... the expansion of involuntary commitment will have little success ...."

A paper from the Drug Policy Alliance in March—"From Crisis to Care"—asserted that involuntary treatment, and similar responses to behavior based in mental illness, "undermines health and safety and can lead to deadly outcomes...." What is needed, the paper says, is to instead "prioritize resourcing community-based, scientifically-backed treatment programs ...."

Materials at NYSDA's recent Annual Conference included An Overview of Mental Hygiene Law Article 9, with information on involuntary commitment and much more. Lawyers who did not attend are encouraged to contact the Backup Center. Defenders may also want to seek information or assistance from Mental

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Hygiene Legal Service (MHLS). MHLS is "responsible for representing, advocating and litigating on behalf of individuals receiving services for a mental disability," and has offices in each of the Departments of the Appellate Division.

New York City Public Advocate Jumaane Williams posted a long statement on April 18th calling for use of mental health incident review panels, which have never been convened, rather than detaining the vulnerable population of people with mental illness.

Meanwhile, at the federal level, an Executive Order issued on July 24th was described and decried by the American Bar Association Commission on Human Rights. It said the order "declares a federal policy of 'encouraging civil commitment of individuals with mental illness who pose risks to themselves or the public or are living on the streets and cannot care for themselves in appropriate facilities for appropriate periods of time.'" Because this action is "a major step backward in civil rights," the Commission urged the disability community, advocates, policymakers, and the public to reject this approach and defend the hard-won rights of people with disabilities. The Commission observed that "civil commitment traditionally falls within the domain of state law." NYSDA and others will be monitoring the change to New York's law and the allocation of funding between institutional and community-based care.

Review of Incidents Involving People with Serious Mental Illness

The Legislature has amended Mental Hygiene Law 31.37, changing requirements for review of incidents involving people with serious mental illness and use of deadly physical force resulting in serious physical injury to another. The Legislature has now mandated, rather than merely authorizing, the Commissioner of Mental Health to create at least one mental health incident review panel per quarter to review the circumstances and events related to such incidents. The Commissioner, in selecting incidents to be reviewed, shall review requests from local governmental units or nonprofits involved with providing mental health care or representing the interests of people with mental illness. The Commissioner may also establish panels to review a serious incident involving a person with mental illness in which a person with serious mental illness suffers physical injury or causes such injury to another, suffers a preventable medical complication, or is involved in a violent incident. The purpose of review is to identify "problems or gaps in mental health delivery systems and to make recommendations for corrective action …."

The influence of law enforcement on the bill appears in some details. The panels now must include a representative from the Division of Criminal Justice Services, and final reports, which must be provided to entities about which the report makes recommendations for corrective actions, shall now be confidential. Cumulative reports, previously to be done annually, must be done every two years and made available to the public on the Office of Mental Health website.

Other Legislative Activity Relating to Mental Illness

Separate budget legislation affects youth who lack stable housing. Mental Hygiene Law 22.11 regarding treatment of minors was amended to omit from the definition of "minor" homeless youth and youth receiving services at "an approved runaway and homeless youth crisis services program or a transitional independent living support program" under Executive Law 532-a. With a change to Public Health Law 2504(1), adding behavioral health services, this allows affected youth to effectively consent to behavioral health services.

Legislation regarding legal issues for people with mental illness that that did not pass include the Forensic Rehabilitation Act. A.8603/S.8310. This bill would amend CPL 330.20, New York's law regarding what happens to people after a verdict or plea of "not responsible by reason of" mental illness. One of the most important changes would be removing district attorneys from proceedings to determine whether a person held pursuant to a commitment order should be released. The period during which someone could be held before their retention order was revisited would be reduced.

Mental Health Issues Arise in Many Legal Arenas

Mental health issues affecting clients and their cases can arise—or continue—in a variety of situations that lawyers must try to address.

As reported on *TheCity.nyc* on August 12th, The Legal Aid Society and the NYU School of Law's Civil Rights in the Criminal Legal System Clinic have filed a federal lawsuit saying that hundreds of people incarcerated at Rikers Island are routinely being denied the treatment needed to restore their competency to stand trial. Legal Aid highlighted the suit in a press release. Earlier, the May 14th edition of News Picks said: "*Gothamist.org* reported on April 7th … that as '[j]udges are finding a growing number of criminal defendants in New York City's state courts mentally unfit to stand trial, … hospitals where the defendants are supposed to go for treatment can't keep up with the increasing demand' and the people found to lack competency remain in jail." Lawyers' strategies to deal with the issue have included "filing special 'forthwith' orders with the court, which asks judges to demand that the state immediately admit their client and start treating them," according to *Gothamist.org* on April 16th.

In another area, one lawyer successfully sought to dismiss an indictment in the furtherance of justice for a client perceived to have "mental disease or defect," but the Second Department reversed the dismissal. *People v Jackson* (summary p. 51). The appellate court said that "a pretrial motion pursuant to CPL 210.40 'is not the proper vehicle for the dismissal of an indictment'" on those grounds, relying on Second Department precedent.

A panel in the Third Department did dismiss a juvenile delinquency case in the interest of justice. The appellate court observed that the petition had been brought, after the child slapped a DSS worker while being held in an emergency room under a MHL 9.41 temporary hold, "to obtain a suitable placement for a hard-to-place child who is mentally ill or otherwise disabled" and had been "psychiatrically cleared." The petition was a "means to an end as it appeared to be the only vehicle to suitably place respondent," resulting in the child being detained in the hospital, mostly in the emergency room, for six months. The court emphasized that "it is not proper to leverage a juvenile delinquency proceeding in order to obtain suitable placement … and this proceeding served its dubious purpose and respondent has paid the price several times over." [Footnote omitted.] The case, the court said, "should serve as a beacon to those empowered to find legitimate and safe psychiatric placements for those in need, such as respondent, so this scenario is not repeated." *Matter of A. WW.* (summary p. 56). Lawyers are using the case to help young clients beyond the Third Department when agencies seek "to leverage a juvenile delinquency proceeding" to obtain a placement; see this Onondaga County case: *Matter of N.S.* (86 Misc3d 1236[A] [6/18/2025]).

For clients with mental health issues who are facing sentencing, lawyers should ensure that accurate, mitigating information is included in the presentence report. The First Department recently found that a presentence report lacking information on the defendant's history of trauma, mental health, and substance abuse was inadequate. *People v Camacho* (summary p. 24). In another case, it found a presentence report "seriously deficient," where there had been no presentence interview and "[t]he report was devoid of information regarding defendant's education, employment history, health status, and mental health, each a statutorily prescribed category (see CPL 390.30 [1]-[2])." *People v Pizzaro* (summary p. 28).

Individual and community experiences and differences may impact mental health and how best to address issues surrounding mental illness. Mental health issues may provide particular challenges in communities of color, requiring tailored resources. For example, NAMI (National Alliance on Mental Illness) California has a webpage devoted to Mental Health in Black Communities: Challenges, Resources, Community Voices. The Mental Health Association designates July as BIPOC Mental Health Month: "Culture, ethnicity, and race all play a role in the way that each person experiences the world. These factors, among others, have profound effects on mental health, especially for Black, Indigenous, and people of color (BIPOC)."

Incarceration, and the rampant racism that is bred into the carceral system, deepens mental health crises. See "'I just couldn't stop crying': How prison affects Black men's mental health long after they've been released," published by *The Conversation* on July 18th.

Family defenders may encounter issues regarding the mental health of clients or others in clients' families. A major example is that termination of parental rights (TPR) may occur as result of a parent's mental illness (Social Services Law 384-b). There are safeguards and strategies counsel may employ to avoid or overturn that result. In *Matter of Justina C.M.J.* (summary p. 34), termination was reversed based on a showing that the mother was deprived of her right to due process rights, including the right to be present for the proceedings. In *Matter of Ahmad S. M.* (summary p. 40), dismissal of a TPR petition was upheld because the agency failed to establish by clear and convincing evidence that it had fulfilled its statutory duty to make diligent efforts to strengthen the relationship between the mother and her children; here, that would include proper efforts to get an evaluation to assist in treating the mother's mental illness as well as other efforts to help her provide proper parental care for her children.

Drug Use Allegations in Family Court: It's Complicated

Late last year, a reporter named Shoshana Walter had an article posted by The Marshall Project (highlighted in the Sept. 17, 2024 News Picks), which highlighted the pervasive problem of false positive drug tests causing parents and newborns to be separated from each other, sometimes forever. The article also shed light on the targeting of pregnant and birthing people for random drug testing without their consent. "The harms of drug testing fall disproportionately on low-income, Black, Hispanic, and Native American women, who studies have found are more likely to be tested when they give birth, more likely to be investigated, and less likely to reunite with their children after they've been removed," said Walter. Some of the big takeaways from Walter's investigation included:

1) When birthing individuals arrive at hospitals, medical professionals drug test many without informed consent and then report positive and unconfirmed results to the local Child Protective Services agency (CPS).

2) In some cases, individuals were reported to CPS based on positive tests caused by drugs that a doctor prescribed either immediately before or during labor and delivery.

3) Some hospitals test every birthing individual, while others flag people because of reasons including bad teeth, a mother's tattoo, or a stressed demeanor.

Recently, Denise-Marie Ordway from The Journalist's Resource spoke to Walter about the piece and its impact. As the resulting article recounts, Walter told Ordway that after witnessing a newborn being taken away from their mother based on a positive drug test, she decided to investigate. "She wanted to know: How often do hospital maternity wards test pregnant patients for illicit drugs and harmful substances? How common are false positive results?" Walter recalled that she contacted a toxicologist to find out if blood pressure medicine could cause a false positive. She was told, "It's not only very possible, it's very common …."

According to Ordway, the impact of Walter's investigation is far-reaching. Some brave parents have come out of the shadows to report their stories of false positives.

Some members of Congress have said they would pursue change by launching investigations and introducing legislation. And the issue is being noted by others; an April 25th *New Yorker* article by Jessica Winter on reproductive technology observed that "[s]ome states routinely charge women with child neglect or endangerment for drug use during pregnancy (and even prescription medications have raised alarms)."

NYSDA continues to support the Maternal Health, Dignity and Consent Act or the Informed Consent Act. Under such law, providers would be required to obtain informed consent before testing a birthing parent and newborn baby. The bill has been pending in the Senate and Assembly for the past several years, but has failed to be passed by both houses and make it to the governor's desk. More information can be found about the Maternal Health, Dignity, and Consent Act here.

NYSDA reminds family defenders to be vigilant when representing clients charged with drug-related neglect. The law in NY is very clear that it takes more than a positive drug test or an allegation that a parent has used or possessed drugs to establish neglect. We encourage family defenders to read *Matter of Jefferson C.-A.* (227 AD3d 894 [2d Dept 2024]) for a thorough discussion of the law related to drug use neglect. Additionally, defenders are urged to be diligent and not to take positive drug tests at face value. NYSDA's Discovery and Forensic Support Unit and our Family Court Staff Attorney, Kim Bode, are available for consultation at info@nysda.org and kbode@nysda.org. On December 10th, NYSDA will be offering a free webinar on defending against allegations of neglect based on substance use. Watch the NYSDA Training Calendar for details.

Proposed OCA Rule Change Could Offer Some Relief for Those Accused of Support Violations

Late last spring, OCA proposed an amendment to Rule 205.43 of the Uniform Rules of the Family Court to allow for flexibility in calendaring and adjudicating child support violation cases (see the July 14th edition of News Picks). As the rules stand now, the finder of fact (usually a support magistrate) must commence a hearing within 30 days and conclude it within 60 days of the date on the summons. There is no doubt that the rule change is meant to convenience the courts, allowing them more flexibility to control their calendar, but that there are also benefits to respondents and their attorneys cannot be denied. In the memo recommending the changes, Hon. Richard Rivera and Hon. Alison Hamanjian, co-chairs of the Family Court Advisory Committee, note that "due to the widespread shortage of assigned counsel … it often takes many weeks and multiple court dates for the Court to find an available attorney to assign under Family Court Act §262. Moreover, the attorney … cannot be expected to be adequately prepared to proceed to a fact-finding hearing within days or at most a few weeks of meeting their client, a critically important hearing at which their client is facing the possibility of incarceration." The memo continues, "[f]lexible good cause exceptions are critical, as the problems that cause non-payment of support often cannot be adequately addressed within 30 days, or even 90 days. For example, where obligors have lost their employment, the Family Court has programs available to assist them, often leading to job placements and enabling them to once again support their families."

Willfulness Finding in Support Violation Cases Reversed

The road to keeping someone out of jail for non-payment of child support can be daunting, but with the right amount of time and preparation, and some appellate practice, it is possible to prevail. In *Matter of Arcuri v Rubin* (summary p. 64), the Fourth Department reversed an order confirming the determination of the Family Court that the respondent willfully violated his order of support by failing to make payments. The appellate division found that the father did rebut the prima facie showing of willfulness by presenting "competent medical evidence consisting of hospital records and records from a cardiology practice to support his contention that his medical condition prevented him from maintaining employment."

In a similar case with a similar outcome, "the Second Department found reversible error with the Family Court finding

a mother in willful violation of her order of support when she presented sufficient evidence to substantiate her claim that she was temporarily unable to work due to a medical condition." May 14th News Picks summarizing *Matter of Dukofksy v Dukofsky* (2025 NY Slip Op 02064).

NYSDA reminds defenders that taking the time to conduct a thorough client interview well in advance of a hearing is the best way to determine if the client has any defenses to a non-payment proceeding. See, for example, Office of Indigent Legal Services, Standards for Parental Representation in State Intervention Matters, Standard M-2: "Updated client interview. Interview the client well before each court appearance, in time to use client information for investigation." This is not only best practice, but it could also avoid an ineffective assistance of counsel claim down the road, similar to the one in *Matter of McCloskey v Unger* (2024 NY Slip Op 05210 [10/23/2024]). Counsel may need to obtain medical records or other relevant information to aid in their client's defense. Sample subpoenas are available in NYSDA's family defense sample motion bank.

A Second Appeals Court Finds It Illegal for the Family Court and Child Welfare Agencies to Supervise Nonrespondent Parents

The rights of nonrespondent parents in the family regulatory system have again been found to be protected against government intrusion. In a July 24th decision, *Matter of R.A.* (2025 NY Slip Op 04295), the First Department found it statutorily impermissible for the courts or CPS to enter an order of supervision, or order of protection, against a parent who has not been accused of abuse or neglect, but rather is the victim of domestic violence. In its lengthy decision, the court writes in part, "[w]e find that ACS's [Administration of Children's Services] stated policy of monitoring the nonrespondent parent in such cases is not permitted …including and especially where the reason ACS seeks supervision is that the nonrespondent parent is a domestic violence survivor." The issue of the constitutionality of the practice was not addressed, as the case was decided on statutory grounds.

Readers may recall that earlier in the year, the Second Department came to an almost identical conclusion in *Matter of Sapphire W.* (237 AD3d 41). The panel in *Matter of R.A.* quoted several sections from *Sapphire W.*: "[w]e agree with the sound reasoning in *Matter of Sapphire W.* and hold that Family Court Act §§ 1017 and 1027(d) do not permit supervision of a nonrespondent parent who has been caring for the child, in the absence of a court-ordered removal of the child. We further concur with the Second Department that, '[c]onsidering the intrusive and potentially traumatic impact of ACS involvement in a family's life, the disproportionate involvement of Black and Hispanic children in the child welfare system cannot be ignored.'" (Citation and footnote omitted.) A press release from the Family Justice Law Center (FJLC), the organization that litigated both cases on appeal and represented the mother during oral arguments, stated that this "monumental decision is a powerful statement that families in New York should no longer experience such unjust and unnecessary surveillance." Oral arguments for *Matter of Sapphire W.*, conducted by the founder of FJLC, David Shalleck-Klein, are available on the Unified Court System website (starts at 00:13:30). Shalleck-Klein presented a webinar on the decision for NYSDA on March 27th. A recording will be available on our website, in the coming weeks.

Other Positive News for Parents from the Appellate Division

Over the past several months, the Second Department issued some favorable decisions for parents in family regulatory cases. Defenders are strongly encouraged to read these cases in their entirety, as they offer useful information on the state of the law in FCA article 10 and 10-A cases. NYSDA has hosted several CLE programs on these topics. Recordings are available in our video-on-demand library to our members. Those with questions are encouraged to contact our Family Court Staff Attorney, Kim Bode, at kbode@nysda.org.

Intellectual Disability Alone is Not Sufficient to Establish a Neglect

In *Matter of Tiffany N.* (summary p. 44) (see June 2nd News Picks), the court affirmed the dismissal of a neglect petition against a parent based on an alleged intellectual disability. The court said: "ACS failed to establish a causal connection between the mother's intellectual disability and actual or imminent harm to the child."

Termination of Parental Rights Reversed

In *Matter of Makari A.H.* (summary p. 47) (see July 14th News Picks) the court reversed a decision from the Family Court finding that the mother permanently neglected her child. The appellate division found that the agency failed to meet its statutory burden of first proving that the mother failed to maintain contact with the child or plan for his future, which are required by Social Services Law 384-b. The petition against the mother was denied, and the case was dismissed.

Abuse Case Dismissed with Assistance from An Expert

In Matter of Landon K. (summary p. 45), the court reversed a finding of abuse against the parents of a baby that suffered

a subdural and retinal hemorrhage while in their care. This result was only achieved after the family defender hired an expert to testify at the fact-finding hearing. The appellate division agreed that the county made a prima facie case of abuse but found that "the appellants presented sufficient evidence to rebut the petitioner's prima facie case of abuse, through the testimony of their expert witnesses." For more information about obtaining funds for expert witnesses in family or criminal defense cases and to connect to experts, see our Expert Funding Graphic Guide and contact NYSDA's Discovery and Forensic Support Unit at forensics@nysda.org.

Abuse Allegations Dismissed Due to Lack of Corroboration

In *Matter of Clamar G. (Dana G.)* (summary p. 41), the court affirmed a lower court dismissal of a neglect petition based on excessive corporal punishment, agreeing with the Family Court's determination that the allegations were not proven by a preponderance of the evidence. The court opined that "the petitioner failed to present any relevant evidence to reliably corroborate the out-of-court disclosures." (Citation omitted.) In doing so the court seemed to call into question the credibility of the children, noting that they denied the allegations in the petition on numerous occasions. Therefore, "the Family Court properly found that the out-of-court statements of the child … as to the alleged excessive corporal punishment were not sufficiently corroborated by other nonhearsay evidence."

Supporting America's Children and Families Act Takes Effect in October

In other potentially positive news, the Supporting America's Children and Families Act (SACFA), a federal law that was signed earlier this year, is scheduled to go into effect on October 1, 2025. The law reauthorizes and amends Title IV-B programs. Some of the changes are listed below. The information memorandum from the U.S Department of Health and Human Services can be found on the Administration for Children and Families website. According to the memo, the law includes, but are not limited to, provisions on:

"***Legal Representation:*** Requires agencies to describe the steps they will take to ensure that information about available independent legal representation in specified child welfare proceedings are provided to the child, as appropriate, and the child's parent, legal guardian or individual who has legal custody (sec. 422(b)(4)(C) of the Act)."

"***The Indian Child Welfare Act of 1978 (ICWA)***: Expands the current state plan requirement directing agencies to consult with Tribes and describe specific measures taken to comply with ICWA to now also describe how the state will ensure timely notice to Tribes of state custody proceedings and placements involving Indian children and case recordkeeping related to transfers of jurisdiction, termination of parental rights, and active efforts (sec. 422(b)(9) of the Act)."

"***Policies Relating to Poverty and Neglect:*** Requires agencies to provide a description of policies, including training for employees, to address child welfare reports and investigations of neglect concerning living arrangements and subsistence needs to prevent the separation of a child from a parent solely due to poverty, to ensure access to support services for immediate needs (sec. 432(a)(11) of the Act)."

"***Involving Youth and Families with Lived Experience:*** Requires agencies to consult with youth and families with lived experience in child welfare systems, in addition to the nonprofit and community-based organizations currently required, and to make a report publicly available on how the agency has implemented the youth's suggestions (sec. 432(b)(1) of the Act)."

High-Tech Surveillance Grows

Defenders may have encountered video surveillance products from Flock Safety (Flock) in cases, or in their own children's schools or neighborhoods. Flock's automatic license plate reader (ALPR) is installed in over 5,000 U.S. communities. As noted in the June 2nd edition of News Picks, Flock has now introduced Flock Nova; the company describes it as "an all-in-one data intelligence platform built to accelerate investigations." Read more about Flock and other platforms in the July 14th edition of News Picks.

A July 30th blog post on FlockSafety.com offered information on How to Build a Real-Time Crime Center the Right Way. On December 31st, News Picks offered information on surveillance technology, including Dutchess County's plan to launch a Real Time Crime Center (RTCC). RTCCs across the state and country "merge data from live video, cameras, license plate readers, body cameras worn by law enforcement, audio detection and other tools into a single cloud-based operational view."

On August 11th, *NYFocus.com* made public information that New York City "is quietly using a flagship free internet program for public housing residents for another purpose: expanding NYPD [New York City Police Department] surveillance." A program of the NYC Housing Authority (NYCHA), Big Apple Connect, provides free internet service to public housing residents; apparently, there was no notice to those residents or

the public that the NYPD was going to use the network connections to link cameras at NYCHA developments directly to the police central digital surveillance system.

NYSDA's Discovery and Forensic Support Unit presented a webinar, AI Analytics and Fourth Amendment Challenges, on May 21st. The Unit continues to monitor police and other surveillance practices and keep defenders informed. Lawyers with surveillance issues in their cases—or who have information about troubling local developments involving use of this technology—are encouraged to contact the Unit.

The Unit also tracks and assists defenders with other forms of technology relevant to their cases. The August 15th News Picks included an update on software used to draft police reports using artificial intelligence; Axon, the company that sells Draft One, acknowledged that drafts produced by the software are not saved, as "'the last thing we want to do is create more disclosure headaches for our customers and our attorney's offices.'" The News Picks item contained a list of questions posed by the Electronic Frontier Foundation about the use of Draft One.

Continuing to Address Specific and Systemic Racial Issues

Each year since Juneteenth became a federal holiday, including 2025, NYSDA has closed its offices to allow staff the opportunity to celebrate freedom and the history, achievements, and perseverance of Black people, and to reflect on continuing systemic racism and societal injustice. That practice continued this year. It is just one of many ways that, throughout each year, NYSDA points out evidence of racism and urges continued efforts to combat it.

This April, for example, we submitted a memorandum in support of the Fair & Timely Parole Act, S159/A127, seeking to create more meaningful parole reviews by changing the standard of parole release decisions to center on a person's rehabilitation current risk of violating the law, not on the original crime. We noted a comprehensive 2020 Albany *Times Union* analysis of parole hearing data that found the Board of Parole significantly less likely to release Black and Latinx people relative to their white counterparts. On May 28, 2025, as the Legislature remained in session, *Gothamist* published an article on a new report showing that "[r]acial disparities in parole decisions continue to worsen across New York state, with new data showing a widening gap from a year ago." The study, by the Center on Race, Inequality, and the Law at New York University, was also noted on *WSKG.org*. But as noted above, much-needed parole reforms remain unpassed, and NYSDA continues to support those reforms.

On another systemic note, the July 14th edition of News Picks reported on a discussion about the effort in California to address racism in its criminal system by use of a Racial Justice Act, and possible use of such legislation in other states.

Race in Family Matters

As for racial injustice in family law matters, NYSDA's memo in support of the Preserving Family Bonds Act (A4940/S5240) stated that "[f]amily separation is a racial justice issue." Racial disparity is stark in the family regulatory ("child welfare") system, with Black children making up about 50% of the youth in the foster care system, though they are nowhere near 50% of all children. See, e.g., Examining the New York Child Welfare System and Its Impact on Black Children and Families (2024). Allowing continued visitation and/or contact between children and their families of origin after termination of parental rights (when such contact is in the children's best interests) would, among other things, provide children access to their racial, ethnic, religious, and cultural histories, which is critical to developing a sense of self. See, e.g., Shanta Trivedi, "The Harm of Child Removal" N.Y.U. REVIEW OF LAW & SOCIAL CHANGE Vol. 43:523 (2019).

An April 3rd article on *Law.com* on "Dangerous Scripts," discussed bias in custody evaluations. Biases can stem not just from race, but from a variety of affiliations that can influence custody evaluators, such as "professional communities with shared training, methodologies, and belief systems" or from "an instinctive rapport with a parent who shares their communication style, educational background, or life experiences." The authors suggest that parents' attorneys "have a crucial role in mitigating the impact of a custody evaluator's potential biases," by educating clients about such potential biases and preparing them for evaluations by "helping them to provide concrete examples of positive parenting rather than general claims." This can help counter any "cognitive miser tendency" on the part of the evaluator, which is "the tendency to conserve mental energy by relying on mental shortcuts" when faced with a complex task like custody evaluation. Attorneys may also try to request "evaluators with backgrounds or training that might balance potential biases in a particular case"; "ensure evaluators receive comprehensive documentation from various sources – teachers, healthcare providers, extended family – to challenge potential biases"; and "carefully review reports for language suggesting bias, such as different standards applied to each parent or dismissal of important cultural contexts."

Race as a Factor in Identification

The June 2nd edition of News Picks included information

on a study of the "other-race-effect" that can affect cross-racial identification. Researchers used artificial intelligence and electroencephalography to gain what they asserted are new insights into the phenomenon. One researcher opined that such tools might "be used to improve facial recognition software, gather more accurate eyewitness testimony, or even as a diagnostic tool for mental health disorders ...." The item also discussed legal responses to existing knowledge about cross-racial identification, such as the model instruction on the Criminal Jury Instructions (CJI2d) webpage and caselaw finding error in denial of such instructions.

An article published in the *Washington Journal of Social & Environmental Justice* in June also addressed race as a factor in misidentification. "Any Black Man Will Do: A Transparency Framework for Eyewitness Identification in the Facial Recognition Technology Era" discusses how the advent of facial recognition technology has compounded the risks of cross-racial identification.

NYSDA will continue to provide information helping to identify racism and other biases, and invites defenders to contact the Backup Center with information or questions.

Appellate Work: Getting it Right

Attorneys who prepare appeals for public defense clients face challenges different from but no less difficult than those faced by trial lawyers. One recently published resource for defenders doing family law appeals is a two-part series in the *New York Law Journal*: Family Court Appeals and Ineffective Assistance Claims: Part One (6/16/2025) and Part Two (6/23/2025). Authors Cynthia Feathers and Carolyn Walther note that IAC arguments in appeals from family court cases are often analogous to those in criminal matters, but diverge at certain points. In Part One they set forth "an overview of the applicable legal standards when analyzing IAC claims in Family Court cases and discusses preservation of such claims." In Part Two they address "selected cases in which IAC arguments were rejected or accepted upon appeal."

Part One refers to the Revised Appellate Standards and Best Practices of the NYS Office of Indigent Legal Services (ILS) (2023). It points to Standard 5, which says that attorneys who offer appellate representation "must possess the expertise, time, and resources needed to provide quality representation."

Another standard regarding appellate representation that merits attention is Standard 23, which deals with *Anders* briefs, *i.e.*, briefs in which appellate counsel seeks to withdraw on the grounds that no nonfrivolous issues exist to support an appeal. The Standard says that such briefs should be filed rarely—only in cases involving a guilty plea, where there were no substantive hearings or denials thereof, the minimum possible sentence was imposed, and there are no grounds for vacating the plea. The commentary discusses *Matter of Giovanni S.*, 89 AD3d 252, a Second Department decision from 2011 later described as "a significant and analytical opinion ... that clarified the law, expectations, requirements, and procedures for Anders relief." *People v Murray*, 169 AD3d 227, 230 (2019). A new publication, Practice Advisory: Anders Briefs, was recently issued by ILS; there has been an increase in appellate court rejections of asserted no-issue appeals. A number of such decisions are summarized in this issue.

Trial attorneys may benefit from resources dealing with appeals and/or post-conviction matters. Information helpful to trial defenders include pointers on the importance of preserving legal issues information, interlocutory appeals in family law cases, and more.

Trauma Informs New Decision—And Many Aspects of Defenders' Work

The effects of trauma make their way into the lives of many public defense clients—and defenders. Trauma may help provide explanations for behavior, decision-making, interactions with others (including counsel), etc. These observations underlie much current thinking and training about public defense work, and are finding their way into caselaw.

In *People v Hannah T.* (2025 NY Slip Op 04330 [7/25/2025]), a Fourth Department panel chose, over strong dissent, to independently review in the interest of justice a sentence imposed following a plea and valid waiver of the right to appeal. The court said that "[u]nder the unique circumstances of this case, including the heinous childhood abuse of defendant and the trauma she suffered as a result, the plea for leniency from the victim's mother, and defendant's lack of personal involvement in the violent act, we conclude that a prison sentence of 25 years is unjust and oppressive in relation to this crime and this defendant, and it must be corrected." The sentence was reduced "to a determinate term of five years, to be followed by the five-year period of postrelease supervision previously imposed," but the court declined to adjudicate the defendant a youthful offender.

The dissenters wrote that "the majority advances an expansive theory of the Appellate Division's authority that is incompatible with both Court of Appeals case law elucidating the scope of that authority and this Court's long-held understanding of its power." An article about *Hannah T.* appeared on *Law.com*. A summary of the decision will appear in the next issue of the *REPORT*.

DVSJA Provides a Way to Acknowledge Trauma

The Domestic Violence Survivors Justice Act (DVSJA) is

discussed in *Hannah T*. That legislation provides a mechanism for consideration of the trauma experienced by survivors of domestic violence when the abuse suffered is found to be a "significant contributing factor" to the criminal behavior. Decisions under the DVSJA, which became law in 2019, are now appearing in appellate courts as well as trial courts. See discussions in the News Picks for August 15th (*People v Brenda WW.* and *People v Angela VV.* (summaries p. 20), as well as *People v E.G.* [Supreme Ct, Kings Co (10/22/2024)]) and December 10th, 2024 (*People v Niquasia MM.* [230 AD3d 1473] and *People v Rebecca XX*. [230 AD3d 149], as well as *People v A.L.* [2024 NY Slip Op 24281 (Supreme Ct, New York Co)]).

Two publications looking at aspects of the DVSJA five years after its passage are "A Second Look at Second Look: Promoting Epistemic Justice in Resentencing" (100 NYU Law Rev 1) and "Second Look Myopia: State Sentencing Reform and the Local Prosecutorial Response" (114 J of Crim Law & Criminology 827). They were described in the June 2nd edition of News Picks. Attorneys with questions about DVSJA are encouraged to contact Senior Staff Attorney Stephanie Batcheller at SJBatcheller@nysda.org or (518) 465-3524 x 41.

DOCCS Procedures for Legal Mail

This year brought new mail procedures for lawyers who need to communicate with clients or others in the custody of the Department of Corrections and Community Supervision (DOCCS). In February, NYSDA learned that DOCCS was calling attorneys, requiring them to verify that they had sent mail received at a facility; resulting delays in delivery of legal mail to clients were noted by some. An emergency and proposed rulemaking notice published in the May 21st edition of the State Register announced a rule that broadened considerably DOCCS' powers in screening privileged mail. The procedures were implemented immediately, while comments were to be accepted through July 20th, as noted in News Picks for June 2nd. The emergency rule was published in the August 20th State Register; it is to expire on September 28th unless it is extended, or is adopted as proposed.

Comments from three New York City organizations—Center for Appellate Litigation, Office of the Appellate Defender, and Parole Prep—decried DOCCS' plan to withhold or destroy privileged mail flagged as potential contraband. Those comments were posted by *www.News10.com* with an August 7th article on the proposal. The article noted that "[c]ritics argue that the scanners, made by RaySecur, are only supposed to mark items for further inspection, not to determine what's contraband, and that the system would give 'unchecked power to machines never designed to have the final say over privileged legal mail.'"

NYSDA would appreciate hearing from any attorneys who have had recent problems as to delivery or confidentiality of legal mail, or erroneous flagging of mail as contraband, whether in DOCCS facilities or local jails.

Defender's Arrest Due to Flawed Initial Flagging of "Contraband"; Charges Dropped

Overreliance on initial flagging of alleged contraband not in mail but written materials being carried in person led to the arrest of a public defender in Queens for allegedly bringing tetrahydrocannabinol (THC) to an incarcerated client. Confirmatory lab testing revealed that the field test was wrong (as was a drug dog that alerted), and the charges were dropped, as NYSDA reported in News Picks on August 15th.

Defenders whose clients' arrests were based on any type of field test or alert are urged to consult with NYSDA's Discovery and Forensic Support Unit about possible issues and experts.

Crises Continue in State and Local Incarceration Facilities

Whether advising clients exposed to state prison sentences or local jail time about what to expect, representing people charged with offenses while incarcerated, or handling appeals or post-conviction matters for incarcerated clients, defenders need to know about conditions inside. Unfortunately, those conditions are not good. The Correctional Association of New York (CANY), mandated to monitor state prison conditions, released information on August 5th headlined "Suicides in Prison More than Doubled from 2023 to 2024." CANY's post described its "new dashboard containing data obtained by Freedom of Information Law request from the New York State Office of Mental Health," which "provides visibility into yet another crisis in New York's prisons."

Client-Centered Representation Standards
(NYSDA Client Advisory Board 2005)
Clients Want a Lawyer Who--
20. Accurately informs the client who may be incarcerated about the incarceration process, including jail and prison programs, and works with the client to plan the future in terms of treatment while incarcerated, transitional issues, and reentry.

As a July 24th Albany *Times Union* headline read, "Prison crisis persists amid fight to restore programs." DOCCS continues to report staffing shortages, with National Guard troops remaining on duty in prisons months after they were deployed during an illegal strike by many corrections

employees. This is cited as the reason for maintaining the suspension of programming provisions of the Humane Alternatives for Long-Term Solitary Confinement Act (HALT), but HALT has been a target of prison employees since its passage.

The suspension is being challenged in a class action lawsuit handled by the Prisoners' Rights Project of The Legal Aid Society as reported on *NYSFocus.com* on April 18th.

Since the murder of Robert Brooks in DOCCS custody near the end of 2024 and the calls for reform that followed it (see the Oct.-Dec. 2024 issue of the *REPORT*), at least one corrections officer has been sentenced for participating in that horrific death. Christopher Walrath, one of six people charged with second-degree murder in the case, pled guilty to first-degree manslaughter and received a 15-year sentence as noted on August 4th by *www.The City.nyc*. In the March beating death of Messiah Nantwi, which occurred in DOCCS during the strike, one officer has pled guilty to offering a false instrument for filing and faces a one and one-third to four years prison sentence. Daniel Burger's plea was reported on August 14th by *CNYCentral.com*.

The two high-profile killings are far from the only instances of officer brutality in state prisons. As announced on the website of the U.S. Attorney for the Northern District of New York on August 21st, sentence has been imposed on the first of three officers who pled guilty to federal charges for beating and choking a Black person incarcerated at Mid-State Correctional Facility in 2023. According to a *LawAndCrime.com* post on January 8th about a civil lawsuit filed in the matter, the officers said, "Let's give him the George Floyd challenge!" George Floyd is of course the Black man murdered by a police officer in Minnesota on May 25, 2020, sparking nationwide protests.

Demands for improvements in prison conditions and changes to reduce the number of people held there continue. At the end of August, over 130 justice advocacy groups, including NYSDA, signed on to a letter calling on state leaders to take actions that would reduce the state's prison population amid concerns about the safety of the people incarcerated. The letter calls for both executive and legislative action, including "expansive use of executive clemency, compassionate release, home confinement, and work release, and—critically important—enacting the Fair & Timely Parole Act, the Earned Time Act, the Elder Parole Act, the Second Look Act, and the Challenging Wrongful Convictions Act." (The Legislature's failure to pass such reform bills was among the disappointments of the last session.)

The letter also calls for full compliance with HALT.

Meanwhile, local jails across the state, including Rikers Island in New York City, are seeing delays in the transfer to DOCCS of people who have been sentenced to state prison. This poses fiscal, logistical, and other problems for jails and dangers to the people being held. NYSDA has heard from Chief Defenders about the crisis and has been working with defenders to identify ways the State can solve it. The delays are also preventing people who are eligible for parole hearings from receiving hearings on a timely basis.

The Elmira *Star-Gazette* reported about the issue on June 5th. The NYS Sheriffs' Association reported that the daily average of 200 people who were "state-ready" before the DOCCS strike is now closer to 2,400. The delay interferes with programming and medical treatment and frustrates the people who are awaiting transfer, according to one Sheriff.

Immigration Turmoil Affects Clients and Defenders—Even Citizens

Amid headlines and videos about federal Immigration and Customs Enforcement (ICE) actions involving people who are citizens of other countries, stories also surface about U.S. citizens becoming enmeshed in detention proceedings. An *Intelligencer* article on June 2nd said that multiple citizens of the U.S. have been ensnared in the ongoing ICE efforts to deport people from other countries; it notes that such mistakes occurred in other administrations, but what has changed "is the government's willingness to admit, and correct, its errors." While the chances may be low that a public defender's client is a U.S. citizen mistakenly tagged as deportable, it can happen. And many difficulties can arise in representing someone with state charges who has been detained by ICE, legitimately or otherwise.

Possible immigration issues exist for clients who are naturalized U.S. citizens. As noted in the August issue of the monthly newsletter of the Western New York Regional Immigration Assistance Center (WNY RIAC), the Department of Justice "will prioritize the denaturalization of those who have obtained their citizenship by fraud … [including] those who committed felonies they did not disclose when they naturalized …." (Other topics covered in that newsletter are domestic violence convictions that make defendants deportable; individuals from certain countries being most at risk for third-country deportation, i.e. being sent to a country other than that where they hold citizenship; and denial of relief from deportation to an individual merely arrested for DUI with a child passenger.)

Beyond naturalization, another issue relating to how citizenship is conferred looms. Court challenges to a federal administration effort to end birthright citizenship—conferred by constitutional law on most children born in the U.S. to noncitizen parents—continue. New York's Attorney General issued a statement on June 27th regarding the U.S. Supreme

Court's partial stay of a lower court's preliminary injunction against the executive order purporting to end birthright citizenship. The high court addressed only the issue of broad (nationwide) injunctions, not the merits of the executive order, as a New York Immigration Coalition post noted on the same day. On August 7th, *Newsweek* reported that the Administration has indicated in a litigation status report that it "intends to file a petition 'expeditiously' for certiorari," which would put the issue before the Supreme Court during the term that begins in October. A description of birthright citizenship can be found in an "explainer" posted by the Brennan Center for Justice on July 29th.

As birthright citizenship issues play out, defenders whose Native American clients ask about the issue can point to the following information posted on the Native American Rights Fund website. "Since 1924, Congress has guaranteed birthright citizenship to all Native Americans born in the United States," so that the current effort to "strip citizenship from children born in the United States to parents who are not citizens or lawful permanent residents" does not implicate them. While Snopes found that reports early in the year that ICE was targeting Native Americans could not be verified, clients may have concerns.

As to other immigration issues, some of the intricacies of immigration law that reach the Supreme Court are reflected in *Riley v Bondi* (summary p. 16), which addresses filing deadlines and other immigration issues. Public defense lawyers need not understand most immigration law details but must recognize that time can be of the essence in obtaining knowledgeable legal help on immigration matters.

Defense lawyers may face not only questions about how to advise and properly represent family or criminal court clients with immigration issues but questions about the boundaries of advising and advocating for those clients without being exposed to risks themselves. One WNY RIAC monthly newsletter included information on when an attorney's efforts to prevent a client's arrest in court or elsewhere might lead to federal "harboring" charges against the lawyer. See the May 14th edition of News Picks from NYSDA Staff. While a state law that seeks to prevent ICE arrests in or near state courthouses (Protect our Courts Act [POCA]) should minimize the times that defenders are directly confronted with detention of clients, the federal administration has challenged POCA in federal court. Several defender and immigration organizations have called for dismissal of that case, as reported in an August 13th post on *QueensEagle.com*.

As NYSDA and others continue to stress, any criminal or family defender with a client who was born outside the U.S. should talk to a RIAC attorney (or, in larger offices, an in-house immigration lawyer) about the client's situation. See the May 14th News Picks for information on RIACs, funded through the Office of Indigent Legal Services, and other immigration resources. A list of RIACs can be found on a webpage of the NYSDA website at and on the Indigent Legal Services Office RIAC webpage.

The NYSDA Annual Conference in July included a plenary session on Immigration: Padilla, Best Practices, Preventing Harm at the Intersection of Criminal, Family & Immigration Systems. Lawyers who were unable to attend can contact the Backup Center.

Alert: Recent Presidential Executive Orders Target Bail Reform, Flag Desecration

As the *REPORT* went to press, the President of the United States issued Executive Orders (EOs) with subject matter potentially relevant to the defense of people accused of some behaviors. These two EOs appeared on August 25th. They are hedged with disclaimers about limiting the actions called for to those "permitted by law," so that their ultimate effect, and possible actions to counter them, cannot be immediately determined. NYSDA will be evaluating and monitoring these and other federal actions that might affect public defense clients in New York.

One EO is entitled Taking Steps to End Cashless Bail to Protect Americans. It announces an Administration policy that "[f]ederal policies and resources should not be used to support jurisdictions with cashless bail policies, to the maximum extent permitted by law" and calls for creation of a list of such "States and local jurisdictions that have, in the Attorney General's opinion, substantially eliminated cash bail as a potential condition of pretrial release from custody for crimes that pose a clear threat to public safety and order, including offenses involving violent, sexual, or indecent acts, or burglary, looting, or vandalism." Federal agencies are to identify federal funds provided to such jurisdictions "that may be suspended or terminated, as appropriate and consistent with applicable law." (A separate EO targeting the nation's capital was issued the same day entitled Measures To End Cashless Bail And Enforce The Law In The District Of Columbia.)

The other August 25th EO of possible interest to New York defenders is entitled Prosecuting Burning of The American Flag. It calls on the Attorney General to "prioritize the enforcement to the fullest extent possible of our Nation's criminal and civil laws against acts of American Flag desecration that violate applicable, content-neutral laws, while causing harm unrelated to expression, consistent with the First Amendment." It also says the when a federal entity "determines that an instance of American Flag desecration may violate an applicable State or local law, such as open burning restrictions, disorderly conduct laws, or destruction of property laws, the agency shall refer the matter to the appropriate State or local authority for potential action."

NYSDA's 58th Annual Meeting and Conference

This year's conference in Saratoga Springs included a celebration of individuals who work to improve and protect due process.

The three awardees were Assembly Member Latrice M. Walker, retired Attorney in Chief of the Legal Aid Society of Nassau County and current Director of Training at the Legal Aid Society of Suffolk County Kent V. Moston, and Schuyler County Public Defender Josette D. Colon. As noted in the August 15th edition of News Picks, they "were recognized for their stellar support of due process, public defense, and zealous advocacy."

Congratulations to each of them!

Josette Colon accepting the Kevin M. Andersen Award on July 28th

Kent Moston (c), after receiving the Wilfred R. O'Connor Award, poses with Laurette Mulry (l), head of Suffolk County Legal Aid and Scott Banks, head of Nassau County Legal Aid

Latrice Walker (r) receiving the Jonathan E. Gradess Service of Justice Award, presented by Susan Bryant (l)

Conference Offered CLE for Both Criminal and Family Defenders

Topical training sessions at the conference included plenary presentations for all defenders, whether they represent clients in criminal or family matters, as well as sessions focused on family and criminal law issues respectively (see p. 1).

2025 Annual conference CLE presenters included (l to r): Brian Cummings, Piyali Basak, Kendea Johnson, Ruth Hamilton, Kalle Condliffe, Amelia Goldberg and David Shalleck-Klein

In addition, this EO calls for the denial, revocation, etc. of immigration benefits "whenever there has been an appropriate determination that foreign nationals have engaged in American Flag-desecration activity under circumstances that permit the exercise of such remedies pursuant to Federal law." As with the "cashless bail" EO, the constitutionality of the EO and its disclaimers require parsing before the possible effects of it on individuals and federal funding received by states and localities can be evaluated.

Staff Changes at NYSDA

NYSDA announced several exciting staff changes these past months.

PDCMS Personnel Moves

In April, Darlene Dollard retired from NYSDA after decades of stellar work on the Public Defense Case Management System (PDCMS) now used by public defense offices across the state. Darlene earned a "Best of New York" Leadership Award in 2006 for excellence in IT Operations, Support, and Service, and helped create the culture of innovation, dedication, and care that the PDCMS maintains. Thank you and best wishes in your well-earned retirement, Darlene!

Dandre Wheeler, promoted to Interim Director in December 2024 in preparation for Darlene's departure, was appointed Director of PDCMS this year. Dandre has been a member of the PDCMS team for close to 10 years; he takes on this leadership role as we are developing a new cloud-based version of PDCMS. Congratulations, Dandre!

Other members of the PDCMS Team also moved up. Asaph Ko has been promoted to Senior Information Systems Specialist, and Oneil McDonald has moved into the newly created position of PDCMS Software Testing and Training Specialist. Kudos to both! NYSDA expects to add staff to this great team soon.

PDCMS staff tabled at the Annual Conference in July. Pictured , from left: Oneil McDonald, Asaph Ko, and Dandre Wheeler.

VDP Now Has a Mitigation Specialist

NYSDA's Veterans Defense Program (VDP) helps public defenders fulfill their constitutional obligation to investigate clients' military service and any related mental health issues that may have contributed to their offense, and to seek mitigation. In April, Yairelis Burgos, Ph.D., joined VDP as a Mitigation Specialist. She brings impressive credentials as well as dedication to this role. A veteran herself, she brings deep expertise in military culture and trauma-informed assistance. She has served as a Forensic Social Worker, Paralegal Specialist, and Veteran Mitigation Specialist, and has earned B.S. in Justice Studies, an M.S.W., and a Ph.D. in Criminal Justice. Welcome, Yairelis!

Albany Office Welcomes Moe Whitcomb

In July, Moe Whitcomb began working as an Executive Assistant in NYSDA's Albany office. Most recently, Moe was the Assistant to the Executive Offices at the New York State Bar Association. A welcome addition to the Backup Center, Moe is passionate about prisoner rights, advocacy, and trauma-informed care for people who are impacted by the criminal legal system. Previously, they were a PREA (Prison Rape Elimination Act) counselor and caseworker working with survivors of sexual violence in NYS prisons. They have also held positions at Prisoners' Legal Services of New York, The Legal Project, Osborne Association, and a local family law firm. Moe, glad you are here!

NYSDA is Hiring!

Applications Sought for Staff Attorneys to work in our Public Defense Backup Center.

The position provides an exciting opportunity for an experienced lawyer who is passionate about elevating public defense and supporting defenders statewide.
A Backup Center Staff Attorney's job is to act as a resource attorney, providing support and guidance to defenders and other members of defense teams by conducting:

- case consultations,
- legal research,
- training,
- development of resource guides and other publications,
- expert witness referrals, and
- a variety of short- and long-term projects.

For a full list of duties and responsibilities and of required qualifications and experience, see the NYSDA Jobs and Internships webpage. NYSDA is an equal opportunity employer. NYSDA values diversity, equity, and inclusion and strongly encourages candidates of all identities, orientations, experiences, and communities to apply.

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.

Barnes v Felix, No. 23-1239 (5/15/2025)
EXCESSIVE POLICE FORCE | "MOMENT-OF-THREAT" DOCTRINE REJECTED | VACATED & REMANDED

ILSAPP[1]: Appellant appealed from a Fifth Circuit Court of Appeals decision affirming the grant of summary judgment to the respondent police officer in a § 1983 lawsuit brought by the estate of a deceased driver. The Supreme Court of the United States vacated the judgment and remanded. The Fifth Circuit's "moment-of-threat" rule, which evaluates the reasonableness of an officer's conduct only in the immediate window when their safety is threatened, improperly constricts the inquiry into the "totality of the circumstances." Respondent, a police officer patrolling a Texas highway, stopped a car based on a radio alert that it had outstanding toll violations. The driver, Barnes, told the officer that he did not have his license with him and that the car was a rental in his girlfriend's name. While observing appellant rummage through papers in the car, the officer smelled marijuana, asked Barnes if there was anything in the car he should know about, and ordered Barnes out of the car. Barnes opened the car door but also turned on the ignition and started driving, prompting the officer to jump onto the doorsill. With no visibility into the car, respondent fired two shots inside, killing Barnes. After his estate brought a § 1983 lawsuit alleging excessive force, summary judgment was granted to respondent and the Fifth Circuit affirmed. The Supreme Court held that an "inquiry into the reasonableness of police force requires analyzing the 'totality of the circumstances,'" which involves "careful attention to the facts and circumstances" of the incident. This inquiry "has no time limit" and cannot be restricted by "chronological blinders." The Court rejected the Fifth Circuit's "moment-of-threat" doctrine, also followed in the Second, Fourth, and Eighth Circuits, which improperly narrowed the analysis here to the two seconds between the officer jumping onto the doorsill and the shots fired. This approach circumvented the "fact-dependent and context-sensitive approach" the Supreme Court has prescribed. Justice Kavanaugh, in a concurrence joined by Justices Thomas, Alito, and Barrett agreed with the majority, but wrote separately to address the dangers of traffic stops for police officers, particularly when the driver pulls away during the stop, and the officer must make a split-second choice in a situation presenting no easy or risk-free options. Milbank LLP (Nathaniel Zelinsky, of counsel) represented Barnes.

Snope v Brown, No. 24–203 (6/2/2025)
POSSESSION OF A WEAPON - Second Amendment

LASJRP[2]: A divided Supreme Court denies the petition for a writ of certiorari in a case in which the Fourth Circuit upheld Maryland's ban on ownership of AR–15s.

Justice Alito, Justice Gorsuch and Justice Thomas dissented, with Justice Thomas expressly attacking the Fourth Circuit's decision, and Justice Kavanaugh called the Fourth Circuit's decision "questionable" and expressed support for consideration of the issue in the near future.

A.J.T. v Osseo Area Schools, No. 24–249 (6/12/2025)
EDUCATION LAW - ADA/Rehabilitation Act

LASJRP: Petitioner is a teenage girl who suffers from a rare form of epilepsy that severely limits her physical and cognitive functioning. When school administrators denied her certain educational accommodations, her parents sued the school district, alleging discrimination on the basis of disability. The courts below held that petitioner's claims could not go forward because she had not shown that school officials acted with "bad faith or gross misjudgment."

The Supreme Court reverses, holding that ADA and Rehabilitation Act claims based on educational services should be subject to the same standards that apply in other disability discrimination contexts.

Rivers v Guerrero, No. 23-1345 (6/12/2025)

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) erects strict procedural hurdles that incarcerated individuals seeking relief through a second or successive habeas corpus filing must clear. Where a district court has

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

entered a judgment as to a first habeas petition, and that judgment is under review by an appellate court, the circuits have been split as to whether a second-in-time habeas application qualifies as a "second or successive" one subject to the requirements of AEDPA (28 USC 2244). The Second Circuit's position has been that the AEDPA provisions in question do not apply where appellate proceedings are pending regarding the initial petition. Held, "[a] second-in-time §2254 petition generally qualifies as a second or successive application, triggering the requirements of §2244(b), when an earlier filed petition has been decided on the merits and a judgment exists. Because the Fifth Circuit correctly applied this straightforward rule, we affirm."

United States v Skrmetti, No. 23–477 (6/18/2025)
EQUAL PROTECTION - Transgender Minors

LASJRP: A Supreme Court majority holds that a Tennessee law banning certain medical care for transgender minors does not violate the Equal Protection Clause of the Fourteenth Amendment.

The law does not classify on any bases that warrant heightened review under the Equal Protection Clause since the law prohibits healthcare providers from administering puberty blockers and hormones to minors for certain medical uses, regardless of a minor's sex, and the Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. The law's prohibitions on the use of puberty blockers and hormones do not exclude individuals based on transgender status.

The law survives rational basis review. Tennessee determined that administering puberty blockers or hormones to a minor to treat gender dysphoria, gender identity disorder, or gender incongruence "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences." It further found that it was "likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term medical studies." Tennessee determined that "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors." At the same time, Tennessee noted evidence that discordance between sex and gender "can be resolved by less invasive approaches that are likely to result in better outcomes for the minor." ["]The law's age- and diagnosis-based classifications are rationally related to these findings and the State's objective of protecting minors' health and welfare.

In concurring opinions, certain Justices assert that transgender status does not constitute a suspect class.

Perttu v Richards, No. 23–1324 (6/18/2025)
PRISONERS RIGHTS - Prison Litigation Reform Act/Exhaustion Requirement

LASJRP: The Prison Litigation Reform Act of 1995 requires prisoners with complaints about prison conditions to exhaust available grievance procedures before suing in federal court. In some cases the exhaustion issue is intertwined with the merits of the prisoner's lawsuit.

Richards is a prisoner in Michigan who alleges that he was sexually abused by Perttu, a prison employee. He also alleges that when he tried to file grievance forms about the abuse, Perttu destroyed them and threatened to kill him if he filed more. The parties agree that the exhaustion and First Amendment issues are intertwined, because both depend on whether Perttu did in fact destroy Richards's grievances and retaliate against him.

A Supreme Court majority holds that a party has a right to a jury trial on PLRA exhaustion when that dispute is intertwined with the merits of the underlying suit.

Esteras v United States, No. 23–7483 (6/20/2025)
SENTENCE - Violation Of Supervised Release

LASJRP: A criminal sentence may include both time in prison and a term of supervised release, with conditions. If the defendant violates one of the conditions, the district court may revoke the term of supervised release and require re-imprisonment but may do so only "after considering" an enumerated list of sentencing factors. Conspicuously missing from this list is a statute which directs a district court to consider "the need for the sentence imposed" "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The Sixth Circuit held that a district court may consider that factor.

The Supreme Court reverses. Congress's decision to omit the factor at issue raises a strong inference that courts may not consider that factor when deciding whether to revoke a term of supervised release. Congress's decision to exclude retribution from the calculus comports with the role of supervised release, which fulfills rehabilitative ends and provides post-confinement assistance. "[W]hen a defendant violates the conditions of his supervised release, it makes sense that a court must consider the forward-looking ends of sentencing (deterrence, incapacitation, and rehabilitation), but may not consider the backward-looking purpose of retribution.["]

Riley v Bondi, No. 23-1270 (6/26/2025)

A Board of Immigration Appeals (BIA) decision "in a 'withholding-

US Supreme Court *continued*

only' proceeding (*i.e.*, one in which removal from the United States is not at issue)" cannot be considered "a 'final order of removal ….'" The 30-day filing deadline "for judicial review of a 'final order of removal,'" 8 USC 1252(b)(1), therefore cannot be met by filing a petition for review within 30 days of a "withholding-only" decision issued after an order commanding the removal of a noncitizen. Review of a removal order and of denial of withholding of removal (here, based on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT]) must occur in one proceeding. But that does not mean the CAT decision is the final order of removal or that a previously-issued removal order is "non-final" when CAT relief is sought.

The 30-day deadline is a claims-processing rule, not a jurisdictional requirement. Congress did not strongly signal that it is. Because the Government does not want to pursue the missed deadline as ground for dismissal, this case is not precluded from proceeding on remand.

Concurrence: (Thomas, J) "[O]n remand, the Fourth Circuit should consider whether it has jurisdiction to review a CAT order when the court is not conducting that review 'as part of the review of a final order of removal.'"

Dissent in Part: (Sotomayor, J) The majority acknowledges that the only way to review the decision that the petitioner is deportable is after the denial of his request for relief from removal. Yet the Court concludes that appeal from the former was due before an order was issued as to the latter. "Congress did not write so incoherent a judicial-review provision …."

Gutierrez v Saenz, No. 23–7809 (6/26/2025)
DISCOVERY - Post-Conviction DNA Testing/
Civil Rights Action

LASJRP: Petitioner sought DNA testing of evidence that, he says, will help him prove he was never at the scene of the murder he was convicted of committing. When the prosecutor refused to test the evidence, petitioner filed a § 1983 suit arguing that Texas's procedures for obtaining DNA testing violated his rights under the Due Process Clause. The district court agreed and granted a declaratory judgment to that effect. The Fifth Circuit reversed, concluding that petitioner lacked standing to bring his § 1983 suit, reasoning that, even if a federal court declared Texas's procedures unconstitutional, the prosecutor would be unlikely to turn over the physical evidence for DNA testing.

The Supreme Court reverses. The declaratory judgment petitioner seeks would redress the injury by ordering a change in the legal status of the parties and eliminating the state prosecutor's allegedly unlawful justification for denying DNA testing. The Fifth Circuit erred in transforming the redressability inquiry into a guess as to whether a favorable court decision will in fact ultimately cause the prosecutor to turn over the evidence. That a prosecutor might eventually find another reason to deny a prisoner's request for DNA testing does not vitiate his standing to argue that the cited reasons violated his rights under the Due Process Clause.

Mahmoud v Taylor, No. 24–297 (6/27/2025)
FIRST AMENDMENT

LASJRP: The Board of Education of Montgomery County, Maryland has introduced a variety of "LGBTQ+- inclusive" storybooks into the elementary school curriculum. The books and associated educational instructions provided to teachers are designed to "disrupt" children's thinking about sexuality and gender. The Board has told parents that it will not give them notice when the books are going to be used and that their children's attendance during those periods is mandatory.

A group of parents sued to enjoin those policies, asserting that this curriculum, combined with the Board's decision to deny opt outs, impermissibly burdens their religious exercise.

The Supreme Court, in a 6-3 decision, holds that the parents are likely to succeed in their challenge to the Board's policies and thus are entitled to a preliminary injunction. A government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses a very real threat of undermining the religious beliefs and practices that the parents wish to instill. And a government cannot condition the benefit of free public education on parents' acceptance of such instruction.

Goldey v Fields, No. 24-809 (6/27/2025)

The "implied cause of action for damages against federal officers for certain alleged violations of the Fourth Amendment" found in *Bivens v Six Unknown Fed. Narcotics Agents*, 403 US 388 (1971) does not permit the plaintiff "to maintain an Eighth Amendment excessive-force Bivens claim for damages against federal prison officials."

Finding a Bivens cause of action "is 'a disfavored judicial activity'" and "'special factors' counsel against recognizing an implied Bivens cause of action" here. "Congress has actively legislated in the area of prisoner litigation but has not enacted a statutory cause of action for money damages." Further, "extending Bivens to allow an Eighth Amendment claim for excessive force could have negative systemic consequences for prison officials and the 'inordinately difficult undertaking' of running a prison." And "'an alternative remedial structure' already exists for aggrieved federal prisoners.

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.

NY Court of Appeals *continued*

People v Hemingway, 2025 NY Slip Op 02965 (5/15/2025)
AMENDED INDICTMENT | TYPOGRAPHICAL ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Third Department order affirming a County Court order permitting the prosecution to amend count 1 of the indictment. The Court of Appeals affirmed. County Court did not err in allowing the prosecution to amend the indictment under CPL § 200.70(1) for the purpose of correcting a typographical error where the indictment erroneously cited to subdivision (2) of VTL § 1192 pertaining to "alcoholic intoxication" instead of subdivision (4) pertaining to "drug impairment." "Amendments to correct demonstrable typographical errors that align with the evidence adduced in the grand jury, do not change the People's theory of the case or otherwise prejudice the defendant fall within the ambit of CPL [§] 200.70(1)."

People v Sherlock, 2025 NY Slip Op 02966 (5/15/2025)
SORA | SEXUALLY VIOLENT OFFENDER | FOREIGN REGISTRATION CLAUSE | MODIFIED

ILSAPP: Appellant appealed from a Second Department order affirming his designation as a level two sex offender and a sexually violent offender (SVO) under SORA, stemming from his federal child pornography conviction. The Court of Appeals modified by vacating appellant's SVO designation and otherwise affirmed. The SORA court improperly designated appellant a SVO under the "foreign registration clause" of Correction Law § 168-a(3)(b), which "defines a sexually violent offense as one based on a conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." The federal government does not maintain a sex offender registry comparable to a mandated state registry, and there is "no requirement that federally convicted sex offenders register with the federal government." Further, appellant was convicted under a federal statute that was explicitly included under New York's statutory definition of "sex offense" but not "sexually violent offense." However, the Court affirmed the level two designation, as there was record support for the Second Department's denial of appellant's request for a downward departure. Lisa Marcoccia represented Sherlock.

Matter of Joshua J. (Tameka J.), 2025 NY Slip Op 03010 (5/20/2025)
PERMANENCY HEARINGS - Appeals/Mootness

LASJRP: In a 4-3 decision, the Court of Appeals finds no error where the Appellate Division declined to invoke the mootness exception to review respondent mother's appeals from two permanency hearing orders; and declines to recognize a new exception to the mootness doctrine which would allow for appellate review of all mooted permanency hearing orders. Both permanency hearing orders were superseded by subsequent permanency hearing orders which continued the child's placement in foster care.

The impact any error might have in subsequent hearings is speculative, and the potential resolution of that error long after its occurrence is not an immediate consequence of the order that would directly affect rights of the parties that are controlled by the superseding order.

The Appellate Division did not err in determining that the issues raised below were not sufficiently substantial or novel to warrant an exercise of its discretion to retain the appeal despite mootness. To the extent the mother contends that the referee erred by claiming to lack the power to return the children to the mother's care prior to a dispositional hearing, the record does not demonstrate that the issue is likely to recur.

Even assuming the Court could properly create a blanket exception, the mother's proposed rule is not workable or prudent since it would unnecessarily flood appellate courts with appeals that, in many cases, present only moot issues whose resolution would have no real impact on the rights of the parties or the law of this State. The six-month schedule governing hearings reflects an understanding that the circumstances of a child or parent may change rapidly, requiring a change in permanency goal. Appellate review of the merits of a permanency hearing order, decided upon circumstances that may have changed, risks undermining the purpose of FCA Article Ten-A by injecting unnecessary uncertainty into the life of the child. There is no evidence that appellate courts reflexively dismiss appeals from permanency hearing orders for mootness.

Changes to the appellate process are more appropriately addressed through administrative or legislative means.

People v Lewis, 2025 NY Slip Op 03011 (5/20/2025)
RIGHT TO COUNSEL - Waiver/Pro Se Representation

LASJRP: Defendant, who had moved to withdraw his guilty plea, stated that he was "taking his plea back" and did not need counsel, whom he believed was ineffective, to represent him at trial. He asserted that he would take his chances with a new attorney, and when the court asked how long defendant needed to hire one, defendant responded that he "would represent" himself. When the court appeared not to understand, defendant repeated that he "would like to represent" himself. The court then asked, "You're going to represent yourself?" Defendant responded, simply, "yes."

The Court of Appeals, in a 4-3 decision, finds reversible error where the court failed to conduct a searching inquiry into defendant's unequivocal and timely request to proceed pro se and, instead, immediately denied defendant's request without

NY Court of Appeals *continued*

inquiry and expressly refused to consider any further request until the day of trial. The court had no authority to impose a requirement for repeated invocations of the right to self-representation, nor may a court, as the prosecution argues, skip the inquiry entirely based on assumptions about a defendant's motive for making an unequivocal request. Defendant did not ask to proceed pro se as an alternative to receiving new counsel, nor did he leverage his right of self-representation in an attempt to compel the court to appoint another lawyer.

People v Hu Sin, 2025 NY Slip Op 03100 (5/22/2025)
UNCHARGED CRIMES EVIDENCE

LASJRP: The Court of Appeals finds no error where, at defendant's trial on charges that he raped his sister-in-law, the court admitted evidence that defendant had sexually assaulted two of his other sisters-in-law.

Defendant raised a defense of consent at trial. That defendant had sexually assaulted the victim's sisters under "hauntingly" similar circumstances tends to make the innocent explanation improbable. The evidence also is relevant as background information pertaining to the nature of defendant's relationship with the victim and the dynamics of the family at large. For instance, during the charged rape, defendant stated: "I am waiting for all your sister. I want to do like this. So I am waiting for this time." The evidence provides clarity and context for the jury.

Given the similarity of the prior acts, and the fact that the court repeatedly instructed the jury that the evidence could not be considered for propensity purposes, the court did not abuse its discretion in determining that the potential prejudice did not outweigh the probative value of the evidence.

Tuckett v State of New York, 2025 NY Slip Op 03099 (5/22/2025)
COURT OF CLAIMS ACT § 8-B | NEWLY DISCOVERED EVIDENCE | AFFIRMED | DISSENT

ILSAPP: Claimant appealed from a Fourth Department order affirming a decision of the Court of Claims dismissing his claim seeking damages for unjust conviction and imprisonment pursuant to Court of Claims Act § 8-b because he did not prove his innocence by clear and convincing evidence. The Court of Appeals affirmed. Claimant's action was based on his now-vacated 2011 conviction for sexual abuse of his minor cousin, for which he was sentenced to 18 years' imprisonment. In 2013, the complainant told his mother that he had lied about the sexual abuse. This information was shared with the prosecution, and the prosecutor sent a letter to claimant disclosing that the cousin had recanted the allegation of sexual abuse. Relying on this newly discovered evidence, claimant moved to vacate his conviction pursuant to CPL § 440.10(1)(g) and County Court granted the motion. Claimant then filed this claim against the State, raising three arguments on appeal, each of which the Court of Appeals considered. First, even if the Court of Claims relied on inadmissible hearsay, any reliance on those statements did not prejudice Claimant because the court identified substantial additional evidence supporting its conclusion that claimant's proof was not clear and convincing. Second, the Court of Claims did not rely on evidence outside the record; each of the statements claimant challenged had record support. Third, the Court of Claims' decision did not reflect a misunderstanding of People v Shilitano, 218 NY 161 [1916], which the majority concluded did not establish a rebuttable presumption that recantation testimony is unreliable, but rather required courts to consider the motives behind conflicting statements, among other factors, in considering recantation evidence. Here, the Court of Claims set forth specific reasons, based on its factual findings and "careful attention to the demeanor of the witnesses," to support its conclusion that the recantation evidence was not credible. Judge Rivera in dissent would have granted Claimant a new trial because the court relied on matters outside the record as "corroboration" for the initial abuse allegations, relied on an outdated categorical presumption against recantation testimony, and overemphasized the witness' perceived "flat affect" during a virtual proceeding.

People v Baldner, 2025 NY Slip Op 03602 (6/12/2025)
Grand Jury | legal sufficiency | affirmed

ILSAPP: Appellant appealed from a Third Department order reversing an Ulster County Court order that partially granted a motion to dismiss depraved indifference murder and first-degree reckless endangerment charges based on legally insufficient evidence before the grand jury. The Court of Appeals affirmed. Appellant's "arguments [were] essentially challenges to the weight of the evidence, and thus not properly considered on appellate review of a challenge to the legal sufficiency of an indictment."

People v Salas, 2025 NY Slip Op 03603 (6/12/2025)
APPEAL - Record On Appeal
MOTION TO VACATE JUDGMENT OF CONVICTION - Hearing

LASJRP: The Court of Appeals rejects defendant's contention that a missing transcript of jury deliberation proceedings constitutes a mode of proceedings error, entitling him to vacatur of his conviction. The proper remedy is a reconstruction hearing, provided that the defendant's conduct evidences a good faith purpose to obtain prompt and effective reconstruction.

However, the court below erred in denying without a hearing defendant's motion to vacate his conviction on the ground that defense counsel was ineffective. Defense counsel's affirmation, together with the trial record, suggest that counsel

NY Court of Appeals *continued*

may have lacked a strategic or other legitimate basis for one or more of his actions relating to eyewitness identification testimony at the heart of the People's proof.

People v Angela VV., 2025 NY Slip Op 03644 (6/17/2025)
DVSJA | STANDARD OF REVIEW | AD FINDINGS SUPPORTED BY THE RECORD | AFFIRMED

ILSAPP: Appellant appealed from a Third Department order affirming a Franklin County Court order that denied her application for resentencing under the DVSJA (CPL § 440.47). The Court of Appeals affirmed. Citing *People v Brenda WW.*, decided the same day, the Court held that factual findings made by the Appellate Division, when supported by the record, are beyond the scope of its review. Here, the Third Department had conducted an independent review of the record and agreed with County Court that appellant failed to meet her burden under all three of the DVSJA prongs. The Third Department found that appellant's testimony was incredible and self-serving. The Appellate Division also agreed with County Court that the defense expert's report was unreliable, because it was based "solely upon [appellant's] self-reporting"; the expert's conclusion that appellant did not clearly remember the details of the homicide was belied by her detailed post-arrest statements; and the report omitted an opinion on how appellant's trauma impacted her commission of the offense. The Court of Appeals determined that these findings were supported by the record.

People v Brenda WW., 2025 NY Slip Op 03643 (6/17/2025)
DVSJA | STANDARD OF REVIEW | PRS REQUIRED UNDER THE DVSJA | MODIFIED & REMITTED | DISSENT

ILSAPP: The prosecution appealed from a Third Department order that reversed an order of Madison County Court denying respondent Brenda WW.'s application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (CPL § 440.47; PL § 60.12); granted the motion; and reduced her sentence, as a second felony offender, from 20 years' imprisonment plus 5 years' PRS, to 8 years' imprisonment plus 5 years' PRS. The Court of Appeals affirmed the grant of DVJSA resentencing but remitted the case to the Appellate Division for further proceedings concerning the PRS term. The Court held that the Appellate Division's plenary factual review power allows intermediate appellate courts to review DVSJA decisions de novo and to reverse DVSJA denials without finding that the trial court abused its discretion. Because the Third Department's findings were supported by the record, the Court of Appeals had no basis to disturb them. The majority (Wilson, C.J.) also held that the DVSJA requires resentenced survivors to serve a term of PRS, citing PL § 70.45(2)(f) and PL § 60.12(8). Therefore, the Appellate Division erred in holding that the 7 years Brenda had served in excess of the new 8-year term should be credited towards her 5-year PRS term. The Court remitted the case to the Appellate Division for further proceedings, surmising that in imposing the maximum PRS term, the Third Department may have been influenced by the erroneous belief that Brenda would not in fact serve any time on PRS. In dissent, Judge Singas, joined by Judge Troutman, agreed with the majority's standard-of-review holding but disagreed on the PRS issue. As an initial matter, the dissent found the PRS challenge unpreserved, as it was raised for the first time in the Court of Appeals. Further, in the dissent's view, the "majority elide[d] the distinction between a court's duty to impose a period of [PRS] under the DVSJA and the execution of that portion of the sentence" (emphasis added). The latter is a question of sentencing calculation traditionally left to DOCCS and subject to challenge via a CPLR article 78 petition where, unlike here, DOCCS would be a party. Despite assurances that the Court's PRS holding is limited to DVSJA resentencings, the dissent warned that it could be applied to identical language in other PRS provisions, making it "likely [to] impact the calculation of sentences in other resentencing circumstances." The dissent also found that requiring successful DVSJA applicants to serve PRS contravenes the DVSJA's remedial purpose to redress excessive punishment for survivors of domestic violence, since community supervision "mimic[s] the abusive relationships that domestic violence survivors experienced…prior to incarceration." Finally, the dissent criticized the remedy of remittal, which would give an opportunity for the defense to seek a lower term of PRS, thereby affording relief to a non-appealing party. Veronica Reed represented Brenda WW.

People ex rel. Ellis v Imperati, 2025 NY Slip Op 03646 (6/17/2025)
PROSECUTION HABEAS APPEAL | TERRORISTIC THREATS | BAIL ELIGIBILITY | REVERSED | DISSENT

ILSAPP: The prosecution appealed from a Second Department order granting a habeas petition on the grounds that PL § 490.20, making a terroristic threat, is not a bail-eligible offense. The Court of Appeals reversed and held that making a terroristic threat is a bail-eligible offense under CPL § 510.10(4)(a), which incorporates all but two violent felonies "enumerated in section 70.02 of the penal law." Despite the plain language of CPL § 510.10(4)(g), which specifically excludes the offense of making a terroristic threat from the list of terrorism-related bail-eligible offenses, the Court reasoned that the "text and disjunctive structure of CPL § 510.10(4)" indicate that paragraph (g) was not intended to narrow the "independent authorization" for setting bail under paragraph (a). The Court determined that the

NY Court of Appeals *continued*

list set forth in CPL § 510.10(4) is disjunctive, as the paragraphs are separated by semi-colons, and the final two paragraphs are separated by the word "or." Elements in a disjunctive list are not intended to modify each other and are separate and distinct categories. Where each paragraph of CPL § 510.10(4) "confers distinct authority to set monetary bail for the qualifying crimes identified in that particular paragraph," paragraph (g)'s exclusion of the offense of making a terroristic threat "simply means that authority to impose bail under that paragraph because an offense is a crime of terrorism does not extend to the crime of making a terroristic threat." In dissent, Chief Judge Wilson, joined in part by Judge Troutman and by Judge Rivera, would have affirmed the judgment under the "longstanding rule of statutory construction" that when general and specific provisions conflict, the specific provision controls. The dissent also argued that the majority's interpretation renders paragraph (g)'s exclusion superfluous, because bail-eligibility is a binary question where "an offense either qualifies or it does not."

People v T.P., 2025 NY Slip Op 03642 (6/17/2025)
RIGHT TO COUNSEL - Effective Assistance

LASJRP: The Court of Appeals reverses defendant's first-degree manslaughter conviction, concluding that her right to effective assistance of counsel was violated when defense counsel failed to object to remarks that the prosecutor made during summation which misrepresented critical evidence and repeatedly denigrated defendant. The mischaracterization of defendant's testimony about her fear of the victim went to the heart of her justification defense, and the accusations of repeated lies further undermined her credibility in the jury's eyes.

Judge Rivera, concurring in the result, would reverse because the trial court's Criminal Jury Instructions-based charge on justification in the use of deadly physical force was erroneous. Judge Rivera proposes new instructions for cases involving intimate partners, which would allow the jury to consider evidence that the victim previously violently attacked the defendant or that the defendant had knowledge that the victim threatened violence against him/her. Judge Garcia, also concurring in the result, notes that courts must recognize that deviating from the standard charge entails risks and that "[f]or a court to do so based on the view of a single judge of this Court on an open issue that has not been tested in the adversarial process or considered by the Committee in the normal course … would be ill-advised."

People ex rel. Welch v Maginley-Liddie, 2025 NY Slip Op 03645 (6/17/2025)
HABEAS | BAIL | HARM+HARM | RELEASE CONDITIONS | DECLARATORY JUDGMENT GRANTED | CONCURRENCE

ILSAPP: Appellant appealed from a Second Department order dismissing a habeas petition and holding that an individual who posts bail is "released under conditions" under CPL § 510.10(4)(t) ("Harm+Harm"). That provision "provides a judge with discretion to set bail on certain otherwise non-qualifying offenses committed after [an individual] has been 'released under conditions' on a prior charge." The Court of Appeals endorsed the Second Department's position but reversed denial of the writ and converted the proceeding to a declaratory judgment action, since habeas relief is no longer available. The Court held that an individual "who is arrested on new charges after having been released on bail on a prior charge is 'released under conditions' within the meaning of CPL § 510.10(4)(t)." The Court rejected defense counsel's argument that the "released under conditions" language in CPL § 510.10(4)(t) only applies to non-monetary conditions, finding that bail is a condition of release. The applicability of CPL § 510.10(4)(t) is not limited to individuals with "'open non-qualifying cases' who have been released on non-monetary conditions." Rather, it applies to individuals "released under any condition, including bail." Judge Rivera, joined by Chief Judge Wilson, concurred in the result, agreeing that the phrase "released under conditions" in CPL § 510.10(4)(t) applies to individuals who posted bail in their underlying case. The concurrence, however, did not adopt the majority's "sweeping conclusion that bail is, generally, a 'condition of release,'" because this "risks forcing a particular interpretation of the word 'condition' on other provisions of the bail statute, contrary to the legislature's intention, with potentially unintended consequences."

People v Bacon, 2025 NY Slip Op 03692 (6/18/2025)
PRESERVATION | CONFRONTATION CLAUSE | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a First Department order affirming his New York County Supreme Court judgment convicting him of third-degree assault and third-degree robbery. The Court of Appeals affirmed in a 4-to-3 decision. The majority held that appellant failed to preserve his claim that his constitutional right to confront the witnesses against him was violated. Appellant's only contemporaneous objection to the police testimony about the complainant's statements was sustained on hearsay grounds. The defense motion for a trial order of dismissal at the close of the prosecution's proof challenging the sufficiency of the evidence because the complainant had not testified did not serve to preserve the confrontation objection. The dissent (Rivera, J.) believed that defense counsel's objection that "[t]here was no ability to cross-examine" was "more than adequate to preserve his challenge to the admission of the [complainant's] statements as a violation of the Sixth Amendment Confrontation Clause." Samir Deger-Sen represented appellant.

NY Court of Appeals *continued*

Matter of Parents for Educational and Religious Liberty in Schools v Young, 2025 NY Slip Op 03689 (6/18/2025)
EDUCATION LAW - Compulsory Education

LASJRP: To comply with the state requirement that children receive a free education and attend "full time instruction," New York provides access to schools funded by the public that offer an approved curriculum of instruction. When a parent or custodian enrolls a child at a nonpublic school, they are legally required to ensure that the child receives an education substantially equivalent to that offered at the local public schools. Regulations that implement the substantial equivalency requirement, inter alia, provide that a nonpublic school that fails to establish substantial equivalency "shall no longer be deemed a school which provides compulsory education fulfilling the requirements of" the Education Law.

The regulations establish a mechanism by which the statutory mandate is enforced and flow from the statutory language itself. Contrary to petitioners' claims, nothing in the regulations requires that parents "unenroll" their children from a nonpublic school deemed not to provide substantially equivalent instruction, nor do the regulations authorize school closures. The parent or custodian must determine how to ensure their compliance with the Education Law.

First Department

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People v Gonzalez, 236 AD3d 529 (1st Dept 3/18/2025)
ORDER OF PROTECTION | FAILURE TO CREDIT JAIL TIME | INTEREST OF JUSTICE | REMANDED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of first-degree criminal contempt. The First Department remanded for recalculation of the order of protection, reaching the unpreserved claim in the interest of justice. The prosecution conceded that the expiration date of the OOP was incorrect because it failed to account for the jail time credit to which appellant was entitled. The Legal Aid Society of NYC (Ji Hyun Rhim, of counsel) represented Gonzalez. (Supreme Ct, New York Co)

People v Hernandez, 236 AD3d 530 (1st Dept 3/18/2025)
JUROR MISCONDUCT | 330.30 HEARING ORDERED | HELD IN ABEYANCE & REMANDED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him, after a jury trial, of first-degree burglary and third-degree criminal mischief and sentencing him to concurrent prison terms of 6 years and 1 to 3 years, respectively. The First Department held the appeal in abeyance and remanded for a CPL § 330.30 hearing. Summary denial of a 330.30 motion is only appropriate when the motion lacks a legal basis or contains no sworn factual allegations essential to support it (CPL § 330.30[2][d][iii]). Here, two jurors attested that another juror—an attorney—stated during deliberations that "the proof did not have to be beyond a reasonable doubt." Appellant was entitled to an evidentiary hearing based on these sworn allegations, even where appellant was acquitted of the top charges. The First Department also affirmed summary denial of a DVSJA hearing pursuant to PL § 60.12, holding that appellant had failed to put forth evidence of a temporal nexus between the alleged abuse and offense. The court cited *People v Williams*, 198 AD3d 466 (1st Dept 2021), a case involving a resentencing claim under CPL § 440.47, which does have an evidentiary pleading requirement, where the absence of a temporal nexus was determined only after an evidentiary hearing. The First Department cited no statutory support for requiring a pre-hearing evidentiary proffer under PL § 60.12. Edelstein & Grossman (Jonathan I. Edelstein, of counsel) represented Hernandez. (Supreme Ct, Bronx Co)

Matter of La. J. (L.J.), 236 AD3d 517 (1st Dept 3/18/2025)
ABUSE/NEGLECT - Alcohol Misuse
- Educational Neglect

LASJRP: The First Department finds insufficient evidence of neglect where there was no evidence that the mother lost self-control during repeated bouts of excessive drinking, which is necessary to trigger the presumption of neglect under Family Court Act § 1046(a)(iii).

The finding that the child was educationally neglected is upheld. During the 2022-2023 school year, the child was absent from school 73 times and late 30 times. While the mother argued that some of those were medically excused absences, the mother presented no doctors' notes or other documentary support provided to the school. Evidence of excessive unexcused absences from school supports a finding that the child was in imminent danger of becoming impaired.

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

People v A.H., 236 AD3d 549 (1st Dept 3/20/2025)
YOUTHFUL OFFENDER | DETERMINATION NEEDED | MITIGATING FACTORS | REMANDED

ILSAPP: Appellant appealed from two New York County Supreme Court judgments convicting him of attempted first-degree assault, attempted second-degree murder, and second-degree CPW. The First Department remanded for resentencing in both cases. The prosecution conceded that appellant was entitled to resentencing resentencing on the armed felonies of

First Department *continued*

attempted assault and CPW. While not presumptively eligible for youthful offender treatment, appellant was entitled to a determination as to the applicability of mitigating factors. As to the second-degree murder conviction, appellant was YO-eligible without any presumption of ineligibility and was entitled to an express determination of the propriety of youthful offender status on that charge. The Legal Aid Society of NYC (David Billingsley, of counsel) represented Harris. (Supreme Ct, New York Co)

People v D.B., 236 AD3d 552 (1st Dept 3/20/2025)
YOUTHFUL OFFENDER | DETERMINATION NEEDED | REMANDED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of fourth-degree promoting prostitution and obstruction of breath or blood circulation. The First Department remanded for resentencing for the court to determine on the record appellant's entitlement to youthful offender treatment. Office of the Appellate Defender (Alexandra Ricks, of counsel) represented Bonilla. (Supreme Ct, Bronx Co)

Matter of D.C. v J.J.G., 236 AD3d 539 (1st Dept 3/20/2025)
FAMILY OFFENSE | DISORDERLY CONDUCT | NOT MOOT DESPITE EXPIRED OOP | MODIFIED

ILSAPP: Appellant appealed from a New York County Family Court order finding that he committed the family offenses of second-degree harassment and disorderly conduct and issuing a two-year order of protection. The First Department modified by vacating the disorderly conduct finding and otherwise affirmed. The appeal was not moot, although the order of protection had expired, because the family offense finding carries enduring consequences. Evidence that appellant sent private messages to the other party via Facebook messenger did not support a finding that he acted with "the intent to cause, or recklessness in causing, public harm," a requirement for a finding of disorderly conduct. Marion C. Perry represented appellant. (Family Ct, New York Co)

People v Rochester, 236 AD3d 550 (1st Dept 3/20/2025)
APPEAL WAIVER INVALID | INSUFFICIENT EXPLANATION OF APPELLATE RIGHTS | AFFIRMED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him, upon a guilty plea, of third-degree CPCS and criminal possession of a firearm (Greenberg, J.). The First Department struck down the appeal waiver but otherwise affirmed. The plea court conducted no review of the appellate rights being waived to establish that appellant had a full appreciation of the waiver's consequences, even considering the written waiver, which was itself faulty. The plea court did not explain that the right to appeal was separate and distinct from the trial rights forfeited by pleading guilty or that waiver was not an absolute bar to appeal, as some claims were unwaivable. The Legal Aid Society of NYC (Lorraine Maddalo, of counsel) represented Rochester. (Supreme Ct, Bronx Co)

People v Joseph, 236 AD3d 575 (1st Dept 3/25/2025)
JUSTIFICATION DEFENSE - Application To Felony Murder

LASJRP: The First Department finds no error where the court properly declined to charge the jury on justification, which has no application to felony murder.

The Court rejects defendant's suggestion that the defense would lie if, for example, a defendant entered a store, pushed the owner away from the cash register and started removing cash, only to realize that the owner has drawn a gun, pointed it at him and cocked the trigger. Defendant's apparent argument that, in such circumstances, the intruder may draw his own gun, shoot the owner dead, and have engaged in no unlawful conduct finds no support in law or logic. (Supreme Ct, Bronx Co)

People v Fofana, 236 AD3d 607 (1st Dept 3/27/2025)
CERTIFICATE OF RELIEF FROM DISABILITIES | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of criminal possession of a firearm. The First Department, despite upholding the appeal waiver, modified the judgment by granting appellant's application for a certificate of relief from disabilities. Center for Appellate Litigation (Abigail Everett, of counsel) represented Fofana. (Supreme Ct, Bronx Co)

Matter of Paul C.T. v Renee G.-T., 236 AD3d 611 (1st Dept 3/27/2025)
VISITATION - Grandparents

LASJRP: The First Department upholds an order denying the paternal grandfather in-person and virtual visits with the child, noting, inter alia, that the mother's objection was not solely based on existing acrimony; that the grandfather and the entire paternal family were highly critical and dismissive of the mother's parenting; that after certain visits, North Carolina Child Protective Services received a report alleging that the child was educationally neglected; that there were tumultuous visitation exchanges, which culminated in the paternal grandparents sending their attorney to confront the mother in the child's presence; and that neither grandparent's testimony demonstrated any empathy or sensitivity to the fact that a child, who had recently lost a parent and was removed from her mother due to the grandparents' involvement, might be reluctant to see them.

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

Matter of R.C. (D.C.—R.R.), 2025 NY Slip Op 01859 (1st Dept 3/27/2025)
NEGLECT | REMOVAL FROM NONRESPONDENT PARENT | DUE PROCESS VIOLATION | REVERSED

First Department *continued*

ILSAPP: Parent appealed from a New York County Family Court order continuing placement in foster care until the next permanency hearing and dismissing her petition for a writ of habeas corpus seeking a return of the child. The First Department reversed, remanded the case to Family Court, and stayed its order for 5 days for the parties to arrange an orderly transition back to the parent's care. Family Court had dismissed a neglect petition that had resulted in the removal of the child from the parent's care, but nevertheless continued the child's placement in foster care for over 3 1/2 years based on continuing neglect proceedings against the other parent. Family Court lacked subject matter jurisdiction to keep the child in foster care after the neglect proceeding was dismissed, and the other parent's case did not provide that jurisdiction because the child had not been removed from his care. The protracted removal of the child—based in part on consideration of post-dismissal evidence against the non-respondent parent—violated respondent parent's due process rights. The appeal was not moot despite a subsequent permanency hearing order, because the determination not to return the child was based on findings that the child would be at risk of harm if returned, which could affect the parent's status in future proceedings. Andrew J. Baer represented the appellant parent. (Family Ct, New York Co)

Matter of R.T. v L.T., 236 AD3d 612 (1st Dept 3/27/2025)
FAMILY OFFENSE | MOTION TO DISMISS BASED ON RES JUDICATA | REVERSED AND PETITION RESTORED

ILSAPP: Appellant appealed a Bronx County Family Court order dismissing her family offense petition based on res judicata and failure to state a cause of action. The First Department reversed and restored the petition seeking an order of protection in her favor. A prior neglect proceeding alleging domestic violence against the father ultimately resolved with dismissal of the finding against him after a suspended judgment. Approximately two weeks later, the mother filed a family offense petition against him based on the same allegations. The First Department found that res judicata did not bar the new petition, because the mother was not a party to the prior neglect proceeding. She was also able to seek additional relief under the family offense petition, including an order of protection on her behalf. Daniel X. Robinson represented appellant. (Family Ct, Bronx Co)

Matter of Tomomi N. v Michael G., 237 AD3d 436 (1st Dept 4/3/2025)
VISITATION - Violations

LASJRP: The First Department upholds an order which granted the father's application to dismiss the mother's petition alleging the violation of an order of custody and an order of visitation, noting that the petition is subject to the requirement in CPLR 3013 that pleading allegations must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

The petition describes only one instance when the mother was unable to visit the children, but the father was not present on that occasion. As to that incident, the court properly dismissed the petition with prejudice. Also, the order the father allegedly violated was not annexed to the mother's petition. (Family Ct, New York Co)

Matter of C.J., 237 AD3d 465 (1st Dept 4/8/2025)
ABUSE/NEGLECT - Respondent/Person Legally Responsible - Creating Risk Of Harm

LASJRP: The First Department upholds a finding of neglect, concluding that respondent is a person legally responsible for the child where at all relevant times, he and the nonrespondent mother were involved in a romantic relationship; respondent testified that he was present at the hospital when the child was born; respondent and the child share the same last name and respondent referred to the child as his son when he initially spoke to the ACS caseworker; respondent testified that when he spent time with the mother, the child was present 80% of the time; and on the night of the incident the child and his mother were staying overnight at respondent's apartment.

In addition to committing acts of domestic violence against the child's mother while the child was in the home, respondent further neglected the child by locking himself in his apartment with the child while repeatedly denying police officers' requests to enter, necessitating the assistance of emergency services to access the apartment and return the nine-month-old child to his mother. (Family Ct, New York Co)

People v Pan, 237 AD3d 482 (1st Dept 4/8/2025)
ACCUSATORY INSTRUMENTS - Amendment/Time Of Offense

LASJRP: The First Department concludes that the court properly granted the People's motion to amend the indictment to expand the timeframe for the continuing crime of predatory sexual assault against a child based on the victim's statements indicating that the charged abuse continued for several months beyond the end date originally stated in the indictment. Moreover, this did not constructively amend the indictment by eliciting allegations of criminal conduct different from that presented in the grand jury since the indictment tracked the language of the statute, which does not require proof of a particular crime or type of sexual conduct. (Supreme Ct, New York Co)

People v Camacho, 237 AD3d 504 (1st Dept 4/10/2025)
SENTENCING | INADEQUATE PSI | VACATED & REMANDED

ILSAPP: Appellant appealed from a New York County Supreme

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Court judgment convicting him of persistent sexual abuse and sentencing him to 3 years' imprisonment plus 7 years' PRS. The First Department vacated the sentence, remanded for resentencing, and otherwise affirmed. The presentencing report was inadequate, as it omitted crucial information regarding appellant's history of trauma, mental health, and substance abuse and failed to include a victim impact statement. Appellant had not been interviewed prior to the report's issuance and Probation had requested an adjournment so that a newly assigned case officer could conduct the investigation. (Supreme Ct, New York Co)

Matter of D.P., 237 AD3d 500 (1st Dept 4/10/2025)
JUVENILE DELINQUENCY | LESSER INCLUDED OFFENSE | MODIFIED

ILSAPP: Appellant appealed from a New York County Family Court order adjudicating him a juvenile delinquent and finding he had committed acts which, if committed by an adult, would have constituted the crimes of third-, fourth-, and fifth-degree criminal possession of stolen property and third-degree unauthorized use of a vehicle. The First Department modified by vacating the findings of fourth- and fifth-degree criminal possession of stolen property and otherwise affirmed. Those offenses were based on the same conduct and were lesser included offenses of third-degree criminal possession of stolen property, and thus should have been vacated, as the presentment agency conceded. Larry Bachner represented D.P. (Family Ct, New York Co)

Matter of Y.M.R.P. v B.P., 237 AD3d 502 (1st Dept 4/10/2025)
FAMILY OFFENSE | STAY-AWAY ORDER OF PROTECTION WARRANTED | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Family Court order finding, upon respondent's admission, that he committed the family offense of second-degree harassment and issuing a two-year limited order of protection. The First Department modified the order of protection to a two-year stay-away order requiring respondent to vacate the residence. Based upon the allegations in the petition and testimony at the dispositional hearing, respondent's conduct—including biting appellant and threatening her with a knife, after which she fled the shared apartment for her safety—warranted the issuance of a stay-away order with an order of exclusion. Douglas H. Reiniger represented Y.M.R.P. (Family Ct, Bronx Co)

People v Guillen, 237 AD3d 542 (1st Dept 4/15/2025)
JUSTIFICATION | REFUSAL TO CHARGE | REVERSED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of first-degree manslaughter. The First Department reversed and ordered a new trial based on *People v Castillo*, 42 NY3d 628 [2024], where the Court of Appeals reversed due to the trial court's denial of a justification charge to Guillen's co-defendant at their joint trial. The prosecution conceded reversal was required. Office of the Appellate Defender (Catherine Taylor Poor, of counsel) represented Guillen. (Supreme Ct, Bronx Co)

Matter of Jamila-Kai M.R. v Lonnie L.M., 237 AD3d 553 (1st Dept 4/15/2025)
SUPPORT - Appeals/Record On Appeal

LASJRP: In this support proceeding, the First Department, noting that an appellant is obligated to assemble a proper record which includes prior orders, petitions for downward modification and for child support, or documentary evidence to which the orders refer, concludes that the father's failure to provide transcripts, orders, or other documentation renders the record on appeal inadequate. (Family Ct, New York Co)

People v Webb, 237 AD3d 546 (1st Dept 4/15/2025)
UNCHARGED CRIMES EVIDENCE - Probative As To Identity Issue

LASJRP: In this murder prosecution, the First Department finds no error where the trial court permitted the People to elicit testimony by a witness who was robbed by the co-defendants and a third man matching the description of defendant, shortly before the robbery and shooting involved in this case.

The resemblance testimony was relevant to the issue of identity and included detailed testimony about the third perpetrator of the prior robbery, whose description closely matched defendant, as well as other evidence of the location and various surrounding circumstances linking him to that robbery. (Supreme Ct, Bronx Co)

People v Guzman, 237 AD3d 570 (1st Dept 4/17/2025)
POSSESSION OF A WEAPON - Second Amendment

LASJPR: The First Department rejects defendant's unpreserved Second Amendment claim that New York's "good moral character" licensing requirement is arbitrary and not founded in objective requirements. (Supreme Ct, Bronx Co)

People v Lee, 237 AD3d 569 (1st Dept 4/17/2025)
PLEA TERMS NOT HONORED | RIGHT TO BE PRESENT | SENTENCE VACATED | MODIFIED & REMANDED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of third-degree CPW. The First Department modified the judgment and remanded for resentencing. As the prosecution conceded, the sentencing court impermissibly changed the terms of the plea and sentence after appellant was sentenced, and then resentenced him in his absence. Appellant had not formally moved to with-

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draw his plea, requiring that the case be remanded to afford him the opportunity to do so at a new sentencing proceeding. The Legal Aid Society, NYC (Mimi Lei, of counsel) represented Lee. (Supreme Ct, New York Co)

Matter of Jahzara J.S., 237 AD3d 578 (1st Dept 4/22/2025)
ABUSE/NEGLECT - Corroboration

LASJRP: The First Department upholds a finding of neglect, concluding that the child's out-of-court statements were sufficiently corroborated where the child disclosed the alleged misconduct multiple times to different people, including staff at the child's daycare and ACS's child protective specialist, and the daycare workers also testified to observing noticeable changes in the child's demeanor after an alleged incident and the child exhibiting age-inappropriate behavior.

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

People v Khan, 237 AD3d 585 (1st Dept 4/22/2025)
WITNESSES - Mid-Testimony Sequestration
HEARSAY - Defendant's Constitutional Right To Present

LASJRP: The First Department finds no error where the court declined to conduct an inquiry or give an adverse inference charge when it learned that during two breaks the sex crime victim took to compose herself during cross-examination, she was in the jury room with her sister, who subsequently testified. The court took notice of the fact that the sisters had been in the jury room together, and allowed defendant to argue in summation, based on that fact, that the witnesses were not credible. The victim's sister testified on cross-examination that she had not discussed with the victim "any of what happened in court yesterday or the day before," and neither sister had knowledge of most of the facts pertinent to the other sister's testimony.

Defendant had no constitutional right to introduce his own self-serving statement made to the police - "She's an escort [referring to the victim]. The escort service is fetish friendly" - which lacked sufficient indicia of reliability. (Supreme Ct, New York Co)

People v Smith, 237 AD3d 590 (1st Dept 4/22/2025)
PLEAS - Plea Bargains/Voluntariness

LASJRP: The First Department finds no error where the court determined that there would be no further plea negotiations after commencement of the pretrial hearing. The court's refusal to grant defendant a one-day adjournment to consider a plea to the minimum sentence for a violent felony, which had been available to defendant for approximately a month, did not constitute coercion. (Supreme Ct, Bronx Co)

Matter of Isaiah D.S., 237 AD3d 627 (1st Dept 4/24/2025)
ABUSE/NEGLECT - Excessive Corporal Punishment

LASJRP: Where there was visible bruising on the child's neck, arms, and legs several days after the incident, the First Department concludes that while the father was understandably concerned about the child's increasingly problematic behavior and might have had valid reasons for disciplining the child, his response, which included placing his hands around the child's neck and causing bruising that was present days later, was disproportionate and exceeded the physical force reasonable for discipline.

The JRP appeals attorney was Polixene Petrakopoulos. (Family Ct, New York Co)

People v Brown, 237 AD3d 620 (1st Dept 4/29/2025)
BURGLARY - Dwelling
EXPERT TESTIMONY - Gang Activity/Basis Of Opinion
IDENTIFICATION - Surveillance Footage

LASJRP: In connection with an assault by defendant and six other men who broke into another man's jail cell, the First Department holds, inter alia, that the evidence of burglary was sufficient since the victim's jail cell qualified as a dwelling, and although the victim lacked full control over access to his cell, he had some ability to restrict entry by other inmates, and the rulebook distributed to all inmates informed them that they were prohibited from entering each other's cells.

The Court finds no error in the introduction of a DOC witness's testimony about defendant's nickname and gang membership, noting that even if the checklist used by DOC to assess defendant as a gang member was inadmissible hearsay, the People's expert would have been permitted to rely on the material as long as it was accepted in his profession as reliable in forming a professional opinion and there was evidence establishing the reliability of the out-of-court material.

The trial court did not err in admitting non-eyewitness testimony identifying him in jail surveillance footage where the testifying DOC gangs investigator had sufficient contact with defendant over an extended period of time to achieve a level of familiarity that rendered the lay opinion helpful in identifying defendant in chaotic video footage of an assault involving numerous people. (Supreme Ct, New York Co)

People v Diomande, 237 AD3d 646 (1st Dept 4/29/2025)
SEARCH AND SEIZURE - Reasonable Suspicion

LASJRP: After noting that the testifying officer had reasonable suspicion where defendant closely matched the detailed description of the robber broadcast over the radio and was observed in geographic and temporal proximity to the robbery which occurred in the early morning hours, the First Department rejects defendant's contention that the testifying officer had to have learned of an additional factor before instructing defendant to stop moments after other officers had ended their

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encounter with him. The record does not establish that the testifying officer had the same justification for stopping defendant as the other officers, that he was aware of the extent of their investigation or the suspicion supporting it, or that the duration or scope of the stops were individually or collectively unreasonable. (Supreme Ct, New York Co)

People v Ross, 237 AD3d 649 (1st Dept 4/29/2025)
UNCHARGED CRIMES EVIDENCE

LASJRP: In this attempted murder prosecution, the First Department concludes that the trial court erred in admitting evidence that defendant had a history of dealing drugs and associating with other drug dealers. Although such evidence is relevant when the potential motive arises directly from the defendant's involvement in the drug trade, no evidence indicated that the victim was a rival drug dealer or that any specific drug transactions were relevant to the offense. (Supreme Ct, New York Co)

People v Wall, 237 AD3d 648 (1st Dept 4/29/2025)
SEARCH AND SEIZURE - Reasonable Suspicion/ Possession Of A Gun

LASJRP: The First Department concludes that the police officers' observation that defendant had a heavy, L-shaped object "in the shape of a firearm" in the right pocket of his otherwise form-fitting sweatpants while standing at a drug-prone corner provided them with reasonable suspicion that defendant possessed a gun.

Even if the police had assumed that defendant possessed a permit for the gun that could be seen in his pocket, defendant still would have been in violation of Penal Law § 400.00(15) for openly carrying a firearm. (Supreme Ct, New York Co)

People v J.T., 238 AD3d 422 (1st Dept 5/1/2025)
SURCHARGES & FEES | YOUTHFUL OFFENDER | DNA SURCHARGES UNAUTHORIZED | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of first-degree robbery and attempted second-degree murder and adjudicating him a youthful offender. The First Department modified, striking the surcharges, crime victims' assistance, and DNA databank fees. The statutory provisions authorizing imposition of these fees on youthful offenders were repealed on August 24, 2020, prior to appellant's sentence. Even prior to their repeal, those provisions barred imposition of DNA databank fees on youthful offenders. DNA fees remain unauthorized on youthful offenders because they have not been convicted of a crime. The sentencing court had no authority to impose any of these fees. Center for Appellate Litigation (David J. Klem, of counsel) represented J.T. (Supreme Ct, Bronx Co)

People v Cruciani, 2025 NY Slip Op 02735 (1st Dept 5/6/2025)
JUDGMENT OF CONVICTION - Death Of Defendant

LASJRP: In each of these consolidated cases, the court vacated the conviction and dismissed the indictment pursuant to the common-law abatement ab initio doctrine.

The First Department affirms. The doctrine seeks to protect constitutional due process rights afforded by appellate review of a conviction. Under this doctrine, the death of a defendant whose conviction has not become final through the appellate process results in the abatement of not only any pending appeal but also all proceedings from the case's inception.

The answer to the question of where to draw the line in striking the proper balance between the rights of defendants and the rights of victims must come not from this Court, but from the legislature or the Court of Appeals. The Court is obligated to affirm based on Court of Appeals precedent. (Supreme Ct, New York Co)

Matter of Mohammad M. v Sara R., 238 AD3d 496 (1st Dept 5/8/2025)
CUSTODY - Right To Counsel

LASJRP: The First Department upholds an order awarding the father primary legal and physical custody, noting, inter alia, that the Family Court did not deprive the mother of her right to counsel where the court assigned her two different attorneys and, after the attorneys withdrew due to a breakdown in communication, assigned her a legal advisor. That the court declined to assign a third attorney does not mean that the mother's decision to proceed pro se was coerced. (Family Ct, New York Co)

People v Gonzalez, 238 AD3d 519 (1st Dept 5/13/2025)
SUPPRESSION | CONSENT TO SEARCH | PROSECUTION PRESERVATION | REVERSED & DISMISSED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of second-degree CPW. The First Department reversed, granted suppression, and dismissed the indictment. Appellant's stepmother did not possess common authority over his backpack and could not consent to the police search of its contents. The prosecution's argument that appellant abandoned the backpack was not raised below and could not provide an alternative ground for affirmance. Because the suppression court did not rule on the abandonment issue adversely to appellant, the First Department lacked jurisdiction to consider the claim. Center for Appellate Litigation (Elizabeth Lagerfeld, of counsel) represented Gonzalez. (Supreme Ct, New York Co)

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People v N.H., 238 AD3d 520 (1st Dept 5/13/2025)
YOUTHFUL OFFENDER | FAILURE TO CONSIDER | SENTENCE VACATED & REMANDED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of first-degree manslaughter. The First Department vacated the sentence and remanded for resentencing. As the prosecution conceded, appellant was entitled to resentencing so that the court could make a youthful offender determination. The Legal Aid Society of NYC (Mariel Stein, of counsel) represented N.H. (Supreme Ct, Bronx Co)

People v Fishbein, 238 AD3d 543 (1st Dept 5/15/2025)
IMPEACHMENT - Bad Acts/Police Misconduct
DISCOVERY - Police Disciplinary Records/In Camera Review

LASJRP: The First Department reverses defendant's conviction for assault in the second degree, theft of services, obstructing governmental administration in the second degree, and criminal trespass in the third degree, concluding that the trial court erred when it failed to permit cross-examination regarding the underlying facts of a civil suit in which a testifying police officer was a defendant alleged to have shot the plaintiff in the leg after he was subdued by police officers. The existence of the suit provided a good faith basis for inquiring and the allegations of excessive force were relevant to the credibility of the witness.

The court also should have granted defendant's motion pursuant to People v. Gissendanner (48 N.Y.2d 543) to the extent of conducting an in camera review of the officer's disciplinary record where defendant alleged that the officer inflicted pain on him by twisting his wrist when he was already subdued, and the defense learned of two lawsuits in which the officer was alleged to have engaged in similar conduct. (Supreme Ct, New York Co)

People v Sampson, 238 AD3d 546 (1st Dept 5/15/2025)
FAILURE TO PROVIDE STATEMENT NOTICE | ERRONEOUS ADMISSION HARMLESS | AFFIRMED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of first-degree robbery, second-degree CPW, and fourth-degree grand larceny. The First Department affirmed. While the court erred in failing to preclude an unnoticed statement—appellant's declaring "That's me" when shown a still photograph from the crime surveillance footage—the error was harmless. There was no significant probability the jury would have acquitted but for the error. (Supreme Ct, New York Co)

People v L.G., 238 AD3d 568 (1st Dept 5/20/2025)
CONTEMPT

LASJRP: Upon the court's conclusion that defendant was not fit to proceed, the court entered an order of commitment adjudicating her an incapacitated person and committing her to OMH custody for care and treatment. The order directed that defendant be transferred "forthwith" to the appropriate psychiatric institution designated by OMH, but OMH failed to transfer defendant to an appropriate psychiatric facility for nearly six months.

The First Department affirms an order that granted defendant's motion to hold OMH in civil contempt. Although the use of the term "forthwith" permits limited flexibility, it does not provide a party discretion to obey when it deems it prudent or appropriate to do so. The court properly concluded that OMH did not prove that it was impossible to comply with the order. OMH was well aware of the ongoing, escalating issues causing incapacitated defendants to endure extended wait times of weeks and months on Rikers Island, while waiting to be admitted to designated secure psychiatric facilities. (Supreme Ct, New York Co)

People v Pizzaro, 238 AD3d 571 (1st Dept 5/20/2025)
SENTENCING | INADEQUATE PRE-SENTENCING REPORT | SENTENCE VACATED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of second-degree CPCS and second-degree CPW and sentencing him to concurrent 6-year prison terms and 5 years' PRS. The First Department vacated the sentence and remanded for resentencing. The presentencing report was seriously deficient due to its failure to include an interview with appellant following "technical difficulties" with the video link. The report was devoid of information regarding appellant's education, employment history, health status, and mental health. These deficiencies were not cured by the court affording appellant an opportunity to make a statement at sentencing. Appellant did not waive this claim by failing to object. Center for Appellate Litigation (Rashad Moore, of counsel) represented Pizzaro. (Supreme Ct, New York Co)

People v Sneed, 238 AD3d 573 (1st Dept 5/20/2025)
ADJOURNMENTS

LASJRP: Previously, the First Department remanded the matter for a state action hearing on the factual issue of whether or not the store security guard involved in defendant's detention was licensed to exercise police powers or acting as an agent of the police.

On the eve of the hearing, the People announced that they planned to call one witness, who was the lead prevention investigator at Bergdorf Goodman's store at the time of defendant's detention for the alleged theft. Defense counsel sought an adjournment because she had only learned the identity of the purported witness that morning, and wanted to

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subpoena materials from Bergdorf, such as store polices and employment records, relevant to the issue of whether the testifying witness was a state actor.

The First Department holds that the court erred in denying defense counsel a short adjournment. Without information about the identity of the officers involved in defendant's arrest, counsel was not in a position to meaningfully subpoena records from Bergdorf, and thus defense counsel did not fail to exercise due diligence. Defendant's right to adequately prepare for the hearing should not have been denied merely because of possible inconvenience to the court or others.

The matter is remanded for a new hearing, which should be conducted after defense counsel is given an opportunity to subpoena the pertinent Bergdorf records. (Supreme Ct, New York Co)

People v Howard, 238 AD3d 679 (1st Dept 5/29/2025)
ROBBERY - Intent To Permanently Deprive Owner/Dispose Of Property

LASJRP: The First Department concludes that although it can be inferred that defendant stole the victim's bicycle at gunpoint to effectuate a speedy flight from the area where he had just engaged in a shoot-out with three men, the evidence supported the conclusion that defendant either intended to deprive the victim of the bicycle permanently or intended to dispose of the property in such manner or under such circumstances as to render it unlikely that the victim would recover it. (Supreme Ct, New York Co)

People v Avila, 2025 NY Slip Op 03286 (1st Dept 6/3/2025)
PROBATION CONDITION: WARRANTLESS SEARCHES | IMPROPERLY IMPOSED | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of third-degree unauthorized use of a motor vehicle and sentencing him to 3 years' probation. The First Department modified by striking the probation condition requiring appellant to consent to warrantless searches. Appellant was not under the influence or armed with a weapon at the time of the incident and had no history of substance abuse or weapons use. The condition was not reasonably related to rehabilitation or necessary to ensure that appellant would lead a law-abiding life. The challenge survived a valid appeal waiver and did not require preservation. Center for Appellate Litigation (Benjamin Weiner, of counsel) represented Avila. (Supreme Ct, Bronx Co)

Matter of M. H., 2025 NY Slip Op 03280 (1st Dept 6/3/2025)
ABUSE/NEGLECT - Excessive Corporal Punishment - Violence In Children's Presence - Missing Witness Inference

LASJRP: The First Department upholds a finding of neglect where two of the children stated that the mother struck them with a belt, and two of the children stated that she "whooped" the four-year-old child with a spatula, which constitutes excessive corporal punishment.

Respondent Ricardo also neglected the children. When the mother picked the children up for a visit, she brought them to Ricardo's car, where the children saw he had a gun and called their father. When the father arrived, Ricardo punched him, leading to a fight and scaring the children.

The family court properly declined to grant a missing witness charge or draw a negative inference as to a caseworker who was unavailable due to an ongoing confidential medical emergency and whose testimony otherwise would have been cumulative. The court properly reached the same conclusion as to the father, whose testimony concerning the fight with Ricardo likely would have been cumulative of the children's statements.

The JRP appeals attorney was Claire Merkine, and the trial attorney was Ryan Koleda. (Family Ct, Bronx Co)

People v Perez, 2025 NY Slip Op 03285 (1st Dept 6/3/2025)
JUSTIFICATION DEFENSE

LASJRP: Defendant, a police officer responding to a report of an "emotionally disturbed person," encountered a man standing in the middle of the street who appeared to be inebriated and was holding a large liquor bottle above his head as he spoke in an aggressive manner to other people. Defendant got the man to sit down on a chair and calm down but soon they became engaged in a physical altercation. They eventually landed on the ground, with defendant landing on top, and the man reached around the back of defendant's neck with his left arm in an attempt to pull defendant toward him. Defendant's partner removed the man's left arm from around defendant's neck in a matter of seconds and held onto it. At this point, defendant punched the man in the face six times in rapid succession, breaking his nose and causing other injuries.

The First Department upholds the trial court's determination that the six blows were not justified because the man did not pose a threat to defendant, noting that defendant's punches constituted more force than he reasonably believed necessary to defend himself. (Supreme Ct, New York Co)

People v Vega, 2025 NY Slip Op 03289 (1st Dept 6/3/2025)
DISCOVERY - Post-Conviction DNA Testing

LASJRP: The First Department affirms an order which denied defendant's motion pursuant to CPL § 440.30(1-a), noting, inter alia, that the statute does not provide for retesting DNA material, and thus, even though touch-type DNA testing did not exist when the items were tested before trial in 2001, the court properly denied the request to retest the items. (Supreme Ct, Bronx Co)

First Department *continued*

People v Wilson, 2025 NY Slip Op 03288 (1st Dept 6/3/2025)
SORA | MARIJUANA USE NOT HISTORY OF DRUG OR ALCOHOL ABUSE | AFFIRMED

ILSAPP: Appellant appealed from a Bronx County Supreme Court SORA order adjudicating him a level 2 offender. The First Department affirmed but found that the SORA court failed to adequately set forth its findings of fact and conclusions of law and erroneously assessed points under the risk factor for history of drug and alcohol abuse. Appellant's admission of marijuana use since age 15 did not support a finding of a history of substance abuse that would increase the risk of reoffending. But the error did not impact appellant's risk level, since the First Department affirmed denial of a downward departure. The Legal Aid Society of NYC (Sarah Chaudry, of counsel) represented Wilson. (Supreme Ct, Bronx Co)

Matter of B.F. v Administration for Children's Servs., 2025 NY Slip Op 03393 (1st Dept 6/5/2025)
ARTICLE 10 | PERSON LEGALLY RESPONSIBLE | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a Bronx County Family Court order finding that he had abused B.F., a child for whom he was legally responsible. The First Department affirmed, with two justices dissenting. Family Court properly found that appellant, the live-in boyfriend of the child's mother, was a person legally responsible for the child using the four-factor test set forth in *Matter of Yolanda D.* Appellant lived in the home for five months and contributed $100 per week to family expenses, the child testified that they were close, the abuse took place during the family activity of watching television in the evening, and he threatened the child by saying that he had "friends" who lived on the block, showing that he had control over her. The child protective purpose of the statute requires a broad interpretation of the "person legally responsible" concept. The dissent (Rodriguez and Rosado, JJ.) would not have found that appellant was a person legally responsible, since he was not in a role that was the functional equivalent of a parent. The child described her relationship with him as "like a good friendship" and said he was like a brother to her. Appellant never took any supervisory responsibility for the child, nor assumed any other parental or household duties. (Family Ct, Bronx Co)

Matter of Olga R. v Olga I.M., 2025 NY Slip Op 03392 (1st Dept 6/5/2025)
VISITATION - Appeal/Mootness

LASJRP: The First Department dismisses as moot an appeal from an order which dismissed the petition, brought on behalf of petitioner's grandson, seeking an order granting sibling visitation with the subject child F.M., who was adopted during the pendency of the appeal. The adoptive parent was not named as a party.

Because the biological parents no longer have care, custody, or control of F.M., a reversal of the order would have no immediate or practical effect.

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

People v Rackover, 2025 NY Slip Op 03389 (1st Dept 6/5/2025)
DNA | WRONGFUL DENIAL OF FRYE HEARING | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting him of second-degree murder, first-degree hindering prosecution, and concealment of a human corpse. The First Department affirmed but found that the trial court erred in refusing to conduct a Frye hearing on the forensic statistic tool (FST) used to perform DNA analysis on seven samples. The error was harmless because the FST evidence was a very small portion of the DNA evidence submitted, where over 100 samples were tested, and the FST portion pertained only to evidence that was minimally important compared to the other DNA evidence. Center for Appellate Litigation (Marika Meis, of counsel) represented Rackover. (Supreme Ct, New York Co)

Matter of N.C.M., 2025 NY Slip Op 03527 (1st Dept 6/10/2025)
ABUSE/NEGLECT - Domestic Violence/Derivative Neglect

LASJRP: The First Department upholds a finding of neglect where respondent broke the lock to the mother's apartment and assaulted her while two of the children were in an adjacent room. The fact that the domestic violence occurred in close proximity to the two younger children permits an inference of impairment or imminent danger of impairment, even in the absence of evidence that the children were aware of it or emotionally affected by it.

Respondent derivatively neglected the oldest child, who was not at home at the time of the incident.

The JRP appeals attorney was Andrew Ford, and the trial attorney was Dodd Terry. (Family Ct, New York Co)

People v O'Toole, 2025 NY Slip Op 03537 (1st Dept 6/10/2025)
SEARCH AND SEIZURE - Common Law Right To Inquire/Reasonable Suspicion

LASJRP: Officers responding to a radio run regarding a shooting on the ninth floor of an apartment building found defendant standing alone in the hallway, and smelled gunpowder. The First Department notes that these circumstances provided at least a founded suspicion justifying a common-law inquiry.

After the arresting officer asked whether defendant lived in the building, defendant began exhibiting unusually nervous behavior, such as trembling, sweating, and repeatedly pressing

First Department *continued*

the elevator button to leave the ninth floor. After the officer saw a bulge near defendant's waist area, there was reasonable suspicion that defendant was armed or dangerous, and the officer lawfully grabbed the bulge. When defendant slapped the officer's hands away and fled, the police were authorized to pursue him. (Supreme Ct, New York Co)

People v Wood, 2025 NY Slip Op 03535 (1st Dept 6/10/2025)
PROBATION CONDITION: PAYMENT OF SURCHARGE AND FEES | IMPROPERLY IMPOSED | MODIFIED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment convicting her of attempted CPW2 and sentencing her to 5 years' probation. The First Department modified by striking the probation condition requiring her to pay the mandatory surcharge and fees. This condition was not reasonably related to rehabilitation or necessary to ensure that appellant would lead a law-abiding life. Center for Appellate Litigation (Abigail Everett, of counsel) represented Wood. (Supreme Ct, New York Co)

People v Hernandez, 2025 NY Slip Op 03636 (1st Dept 6/12/2025)
YOUTHFUL OFFENDER | ARMED FELONY | NO RECORD FINDINGS | VACATED AND REMITTED

ILSAPP: Appellant appealed from a New York County Supreme Court judgment denying his motion to set aside his sentence pursuant to CPL § 440.20. As the prosecution conceded, appellant's claim under *People v Middlebrooks*, 25 NY3d 516 [2015] and *People v Rudolf*, 21 NY3d 497 [2013] was cognizable in a CPL § 440.20 motion. Appellant was entitled to resentencing under *Middlebrooks*, as he was a youth convicted of at least one armed felony offense and the sentencing court failed to make the requisite on-the-record finding of appellant's entitlement to YO with reference to the factors enumerated in CPL § 720.20(3). Although it was apparent that the sentencing court did not believe a YO adjudication was warranted, appellant was entitled to a specific on-the-record determination. Center for Appellate Litigation (Allison Haupt, of counsel) represented Hernandez. (Supreme Ct, New York Co)

Matter of D.M. v B.L.J., 2025 NY Slip Op 03648 (1st Dept 6/17/2025)
FAMILY OFFENSE | FAMILY COURT HAS JURISDICTION OVER APPELLATE COUNSEL FEES | AFFIRMED

ILSAPP: Appellant appealed from a New York County Family Court order finding that Family Court had jurisdiction over petitioner-mother's application for counsel fees and referring the matter for a full evidentiary hearing. The First Department affirmed. Although the order of protection at issue in the case had expired, Family Court properly retained jurisdiction for ancillary matters, one of which was the reasonableness of counsel fees—including appellate counsel fees— under Family Court Act § 842(f). (Family Ct, New York Co)

People v Rivera, 2025 NY Slip Op 03654 (1st Dept 6/17/2025)
PROBATION CONDITION: WARRANTLESS SEARCH FOR DRUGS | IMPROPERLY IMPOSED | MODIFIED

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of third-degree assault and sentencing him to 2 years' probation. The First Department modified by striking the probation condition requiring appellant to consent to warrantless searches for drugs and drug paraphernalia. The valid appeal waiver did not foreclose review of this claim, which does not require preservation. While the condition requiring appellant to consent to searches of weapons was proper given that appellant was armed with a sharp instrument during this incident, the condition authorizing warrantless searches for drugs and drug paraphernalia was not reasonably related to rehabilitation or necessary to ensure that appellant would lead a law-abiding life. Appellant's crime did not appear connected to the sale or use of drugs, and he had no history of offenses involving substance abuse. Center for Appellate Litigation (Abigail Everett, of counsel) represented Rivera. (Supreme Ct, Bronx Co)

Matter of J.M., 2025 NY Slip Op 03764 (1st Dept 6/24/2025)
ABUSE/NEGLECT - Hearsay/Statements Relevant To Diagnosis And Treatment

LASJRP: The First Department upholds findings of abuse and neglect and derivative abuse and neglect against the mother, noting, inter alia, that one child's statements were independently admissible and did not require corroboration where the statements were made to her treating therapist during a therapy appointment and thus fit within an exception to the rule against hearsay.

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

People v Maldonado, 2025 NY Slip Op 03770 (1st Dept 6/24/2025)
***ANDERS* BRIEF | SPANISH INTERPRETATION NECESSARY | DENIED WITHOUT PREJUDICE**

ILSAPP: Appellant appealed from a Bronx County Supreme Court judgment convicting him of attempted second-degree robbery. The First Department held the appeal in abeyance, denied assigned counsel's motion to be relieved, without prejudice, and directed counsel to communicate with appellant in Spanish concerning the application. Although counsel's letter explained the substance and expected consequences of filing a no-merit *Saunders* brief and advised him of his right to file a pro se supplemental brief, the letter was inadequate. It was [] written

First Department *continued*

in English while the record reflected that appellant was aided by a Spanish interpreter during the proceedings. (Supreme Ct, Bronx Co)

People v Tarazona, 2025 NY Slip Op 03768
(1st Dept 6/24/2025)
POSSESSION OF A WEAPON - Second Amendment

LASJRP: The First Department, noting that defendant had standing to assert a Second Amendment challenge to the state's gun licensing scheme, even though he did not apply for a license, where an application would have been futile because he did not meet the minimum age requirement, rejects defendant's challenge. (Supreme Ct, Bronx Co)

People v Thomas, 2025 NY Slip Op 03767
(1st Dept 6/24/2025)
SEARCH AND SEIZURE

LASJRP: The First Department upholds the denial of suppression, concluding that at the point when [the defendant] abandoned the gun by throwing the bag with it inside over the fence behind him, the plainclothes officers who were approaching had done nothing more than greet him with "hello, police" and walk toward him without drawing their guns as he stood on the sidewalk. (Supreme Ct, Bronx Co)

People v Joudeh, 2025 NY Slip Op 03867
(1st Dept 6/26/2025)
RIGHT OF CONFRONTATION - Scope Of Cross-Examination IMPEACHMENT

LASJRP: The First Department concludes that defendant was not deprived of his right to present a defense or to confront the prosecution's witnesses where the court denied defendant's request to cross-examine three police officers who fired shots at defendant regarding the disciplinary consequences of wrongfully discharging their weapons and to introduce evidence that the officers fired 18 shots at him, collectively.

The police disciplinary rules were of little probative value here because all the officers were found to have acted appropriately in firing their weapons. (Supreme Ct, New York Co)

Matter of J'Quan M. v Zhonvel B., 2025 NY Slip Op 03865
(1st Dept 6/26/2025)
CUSTODY MODIFICATION | IAC | HEARING REQUIRED | REVERSED AND REMITTED

ILSAPP: Appellant father appealed from a Bronx County Family Court order denying his petition to modify an existing custody order. The First Department reversed and remitted for further proceedings before a different judge and with new counsel assigned to represent him. The father's inadequate representation by counsel resulted in actual prejudice where his lawyer failed to elicit any testimony relevant to his custody petition. This error was due in part to Family Court's apparent confusion about the purpose of several court appearances on the case. Further, neither counsel nor the court addressed a concerning ACS report about the mother after a court-ordered investigation. After finding a substantial change of circumstances, the court should have conducted a full evidentiary hearing to determine the best interests of the child. Dora M. Lassinger represented J'Quan M. (Family Ct, Bronx Co)

People v Lowndes, 2025 NY Slip Op 03868
(1st Dept 6/26/2025)
SENTENCE - Probation/Conditions

LASJRP: The First Department rejects defendant's challenge to a probation condition requiring him to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and [] not consort with disreputable people."

The court deemed this condition reasonably necessary to insure that defendant will lead a law-abiding life or to assist him to do so, given that defendant was found in possession of a loaded pistol and small amount of cocaine, and Probation's recommendation that defendant participate in drug counseling services based on his daily use of marijuana. (Supreme Ct, Bronx Co)

People v Rockeem M., 2025 NY Slip Op 03870
(1st Dept 6/26/2025)
YO | FINES & FEES IMPROPERLY IMPOSED | MODIFIED

ILSAPP: Appellant appealed from two Bronx County Supreme Court judgments convicting him of attempted first-degree assault and attempted second-degree CPW. The First Department modified by striking the mandatory surcharges and crime victim assistance fees. The statutory provision authorizing the imposition of mandatory surcharges and crime victim assistance fees upon youthful offenders was repealed on August 24, 2020, before appellant's sentence. Accordingly, the court had no authority to impose the surcharge and fee as to appellant's YO conviction. The First Department, in the interest of justice, also vacated the mandatory surcharge and fees imposed on appellant's first felony conviction. The sentence and commitment sheet also needed to be corrected to reflect the proper term of PRS. Center for Appellate Litigation (David J. Klem, of counsel)

Second Department

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

Second Department *continued*

People v Brown, 236 AD3d 919 (2nd Dept 3/19/2025)
DEFICIENT *ANDERS* BRIEF | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Suffolk County Court judgment convicting her of second-degree attempted robbery, following her 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, counsel's conclusion that such issues are meritless converted his constitutionally mandated role to act as an "active advocate" on his client's behalf into "merely an advisor to the court on the merits of the appeal." (Supreme Ct, Suffolk Co)

People v Vassell, 236 AD3d 933 (2nd Dept 3/19/2025)
EXCESSIVE SENTENCE | SEX OFFENSES | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree criminal sexual act (6 counts), first-degree sexual abuse (16 counts), first-degree incest (6 counts), among other counts, upon a jury verdict, and sentencing him, as a second felony offender, on each count to a determinate term of 15 years' imprisonment followed by 20 years' PRS. Five separate groups of counts were run consecutively to one other. The Second Department modified, in the interest of justice, by reducing the sentence on the consecutive count to a determinate term of 8 years' imprisonment followed by 20 years' PRS, and otherwise affirmed. Appellate Advocates (Erica Horwitz, of counsel) represented Vassell. (Supreme Ct, Kings Co)

People v Vega, 236 AD3d 934 (2nd Dept 3/19/2025)
EXCESSIVE SENTENCE |
FIRST-DEGREE ASSAULT AFTER TRIAL | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree assault, upon a jury verdict, and sentencing him as a second violent felony offender to a determinate term of 18 years' imprisonment followed by 5 years' PRS. The Second Department modified, in the interest of justice, by reducing the sentence to a determinate term of 14 years' imprisonment followed by 5 years' PRS, and otherwise affirmed. The underlying trial involved acquittal on a charge of second-degree attempted murder on grounds other than justification, as stated by the jury foreperson, and a denied request for a justification charge on the assault count of which appellant was convicted. Appellate Advocates (Anna Jouravleva, of counsel) represented Vega. (Supreme Ct, Kings Co)

People v Bostic, 236 AD3d 1051 (2nd Dept 3/26/2025)
LEGAL SUFFICIENCY | MULTIPLICITOUS COUNTS |
ADMISSIBILITY OF DNA REPORT | VACATED IN PART

LSAPP: Appellant appealed from a Queens County Supreme Court judgment, following a jury verdict, convicting him of second-degree attempted murder, two counts of first-degree assault, two counts of first-degree robbery, and two counts of second-degree CPW, arising from a robbery and shooting. The Second Department vacated the convictions of one count of first-degree assault and one count of second-degree CPW and, as modified, affirmed. As conceded by the prosecution, one count of first-degree assault was multiplicitous of one count of first-degree robbery. Further, there was insufficient evidence to convict appellant of the count of second-degree CPW pertaining to the Intratec firearm where the prosecution only presented evidence that it was loaded when police collected it the following day, but not at the time that it was in appellant's possession. Further, the admission of a nontestifying analyst's DNA report violated appellant's Confrontation Clause rights, but the error was harmless because the report was cumulative to the supervising criminalist's testimony, as she reached the same conclusions after analyzing the raw data. The Legal Aid Society of NYC (Arthur H. Hopkirk, of counsel) represented Bostic. (Supreme Ct, Queens Co)

People v Isaacs, 2025 NY Slip Op 01818
(2nd Dept 3/26/2025)
UNSEALING CRIMINAL RECORDS | CCRB | REVERSED

ILSAPP: Appellant appealed from a Kings County Supreme Court order granting the motion of nonparty New York City Civilian Complaint Review Board (CCRB) to unseal his criminal records related to an underlying criminal case from two years earlier where appellant, an NYPD officer, was acquitted of second-degree murder and first-degree manslaughter. The Second Department reversed. The court violated CPL § 160.50, which states "in unequivocal mandatory language, a general proscription against releasing sealed records and materials, subject only to a few narrow exceptions," none of which applied to CCRB. CCRB failed to establish that the list of parties permitted to seek the unsealing of records under CPL § 160.50(1)(d) should be expanded due to "extraordinary circumstances." Further, appellant never waived any privacy interest he had in his sealed records because he did not "affirmatively place the underlying conduct at issue," where he described some of the evidence presented at his criminal trial in his CPLR article 78 proceeding. Worth, London & Martinez, LLP (Stuart Gold, of counsel) represented Isaacs. (Supreme Ct, Kings Co)

People v Jean-Jacques, 236 AD3d 1055
(2nd Dept 3/26/2025)
SURCHARGES AND FEES | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree manslaughter and second-degree CPW, upon a jury verdict. The Second

Second Department *continued*

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 (Yaniv Kot and Alexa Askari, of counsel) represented Jean-Jacques. (Supreme Ct, Kings Co)

People v Jones, 236 AD3d 1058 (2nd Dept 3/26/2025)
SPEEDY TRIAL - Constitutional

LASJRP: The Second Department upholds the dismissal of murder charges on constitutional speedy trial grounds where the 31-month delay between the death of the victim and the indictment was excessive; the People's explanation that the delay was attributable to a heavy workload and a staffing shortage in the District Attorney's Office as a result of the COVID-19 pandemic is not exactly a factor in the People's favor; the charges are serious but the preparation for the prosecution was not complex and the People have not asserted that any delay was caused by the intricacies of prosecution; and there was a lengthy period of pretrial incarceration of eight years on related charges and presumptive prejudice to defendant resulting from the lengthy delay and pretrial incarceration. (Supreme Ct, Kings Co)

People v Steward, 236 AD3d 1066 (2nd Dept 3/26/2025)
BURDEN OF PROOF | NONJURY TRIAL | REVERSED & NEW TRIAL ORDERED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of fourth-degree CPCS and unlawful possession of marihuana after a nonjury trial. The Second Department reversed and remitted for a new trial as to the CPCS conviction and dismissed the unlawful possession of marihuana conviction as academic following the repeal of PL § 221.05. The court impermissibly shifted the burden of proof to the defense by ruling that it was unpersuaded beyond a reasonable doubt that appellant "was in fact framed" by police. The court's finding "reverses the constitutionally required principles that the defense bears no burden and that it is the prosecution that must introduce evidence sufficient to persuade the fact finder, beyond a reasonable doubt, of the defendant's guilt." Appellate Advocates (Steven C. Kuza, of counsel) represented Steward. (Supreme Ct, Queens Co)

Matter of Justina C.M.J. (Chantilly J.), 236 AD3d 1026 (2nd Dept 3/27/2025)
TPR | DUE PROCESS RIGHT OF PRO SE LITIGANT TO BE PRESENT AT PROCEEDING | REVERSED & REMITTED

ILSAPP: Parent appealed from two separate Westchester County Family Court orders terminating her parental rights after finding that she was unable, by reason of mental illness, to provide proper and adequate care for her children. The Second Department reversed, remitted for a new hearing, and ordered that appellant be assigned counsel or be permitted an opportunity to retain counsel. Family Court deprived the parent of her due process rights by proceeding with the TPR hearing in her absence, despite her being pro se and requesting an adjournment following her medical provider's directives to quarantine. Further, Family Court "improvidently exercised its discretion in denying [appellant's] requests . . . for a copy of her own court-ordered psychiatric evaluation" and "additional time to obtain a court transcript and consult with her legal advisor," and by "excluding [her] from the courtroom for the remainder of the hearing, without the issuance of a warning and with knowledge of [the] diagnoses contained in [her] psychiatric evaluation." Steven P. Forbes represented appellant parent. (Family Ct, Westchester Co)

People v Petty, 236 AD3d 1065 (2nd Dept 3/27/2025)
COMPETENCY TO STAND TRIAL

LASJRP: The Second Department finds error where two examiners who conducted court-ordered competency examinations determined that defendant was competent while one examiner determined that the defendant was not competent, but the court failed to conduct the required competency hearing. Instead, the court ordered "an updated 730 report" and two updated reports determined that defendant was competent at that time.

The Court holds the appeal in abeyance and remits the matter for a reconstruction hearing to determine defendant's competence to stand trial based on the evidence available before the court ordered the updated report. (Supreme Ct, Queens Co)

People v Alleyne, 237 AD3d 734 (2nd Dept 4/2/2025)
SEARCH AND SEIZURE - Common Law Right To Inquire - Stop And Frisk/Reasonable Suspicion

LASJRP: The Second Department concludes that where the officers had a founded suspicion that criminal activity was afoot, supporting a level two inquiry, the officers' repeated requests to defendant to show his hands and to step down from the elevated surface on which he was standing were reasonable.

Defendant's failure to comply with these requests, combined with his action in positioning his body to hide his right hand and right side from the officers' view, provided reasonable suspicion and permitted brief detention and a frisk, which led to the recovery of a gun. (County Ct, Orange Co)

Second Department *continued*

People v Austin, 237 AD3d 736 (2nd Dept 4/2/2025)
IMPEACHMENT - Prior Inconsistent Statement

LASJRP: The Second Department concludes that the prosecution witness's inability to recall his prior testimony was insufficient to lay a foundation for impeachment because it did not tend to prove facts that differed from the earlier more definite testimony. When a witness testifies under oath that he or she cannot recollect a particular fact, his or her prior statement as to that fact is inadmissible as a prior inconsistent statement. (Supreme Ct, Kings Co)

People v Black, 237 AD3d 738 (2nd Dept 4/2/2025)
SUPPRESSION | POLICE TESTIMONY NOT CREDIBLE | VACATED & DISMISSED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree attempted CPW, following his guilty plea. The Second Department vacated the plea, granted the suppression motion, and dismissed the indictment. Suppression should have been granted where the prosecution failed to establish the legality of the police conduct in the first instance. The officer's testimony "was incredible as a matter of law and patently tailored to meet constitutional objections." The testimony that when appellant pulled up his pants the officer was able to see an "L-shape" outline in appellant's waistband while another individual stood directly between them "defie[d] common sense and strain[ed] credulity," and it was inconsistent with the officer's notes, arrest reports, grand jury testimony, and body-worn camera footage. Appellate Advocates (Elijah Giuliano and Anders Nelson, of counsel) represented Black. (Supreme Ct, Kings Co)

People v Carey, 237 AD3d 741 (2nd Dept 4/2/2025)
SEARCH AND SEIZURE - Emergency Exception/ Protective Sweep

LASJRP: The complainant, an employee of defendant's dental practice which was attached to defendant's home, heard defendant screaming her name from within his home. She searched for defendant and, upon approaching the bottom portion of a staircase, heard what she believed to be the cocking of a handgun, and looked up to see defendant "on the top steps holding what appeared to be a handgun." Defendant, chuckling, stated that he had nearly shot her. The complainant, scared, left the home and called the 911 emergency number, resulting in a large police response. Defendant exited the home and was arrested, and the police made a warrantless entry into the home and found a number of firearms.

The Second Department upholds a suppression order. The police had no reasonable basis for believing that there was an emergency at hand and an immediate need for police assistance for the protection of life or property inside the home. By the time the police arrived, the complainant and defendant had left the premises. The "protective sweep" exception also did not apply given the absence of a factual predicate from which the police could reasonably infer that the home contained another person who may have been injured, or might destroy evidence, or pose a threat to the officers or the public. (Supreme Ct, Nassau Co)

People v Coley, 2025 NY Slip Op 01945 (2nd Dept 4/2/2025)
30.30 | PROSECUTION'S APPEAL | COC & SOR IMPROPER | FAILURE TO PROVIDE POLICE MISCONDUCT RECORDS | AFFIRMED

ILSAPP: The prosecution appealed from a Queens County Supreme Court order granting the defense CPL § 30.30 motion to dismiss the indictment. The Second Department affirmed. The prosecution failed to disclose underlying records from a prior case where one of its police witnesses was found to be incredible. Supreme Court properly determined, based on this failure, that the COC was improper, the SOR illusory, and granted the motion to dismiss. The underlying records in the prior case, including transcripts of the discredited police officer's testimony, related to the subject matter of the present case for impeachment purposes and were subject to automatic discovery under CPL § 245.20(1)(k)(iv). The records went to the witness's credibility and could be used for impeachment. The prosecution was required to provide these records, not just a letter stating that the witness had previously been found incredible. "All evidence and material that tends to impeach the prosecution witnesses must be disclosed. This, of course, comports with the presumption of openness built into CPL article 245." The Second Department distinguished the Court of Appeals decision in *People v Garrett*, 23 NY3d 878 (2014), relied on by the prosecution, which concerned a narrower question regarding *Brady* disclosures and pre-dated discovery reform. Randall Unger represented Coley, et al. (Supreme Ct, Queens Co)

Haddad v Sassoon, 237 AD3d 673 (2nd Dept 4/2/2025)
CUSTODY & PARENTAL ACCESS | RECORD NO LONGER SUFFICIENT TO DETERMINE BEST INTERESTS | MODIFIED & REMITTED

ILSAPP: Appellant appealed from a Westchester County Supreme Court order granting a modification petition and awarding respondent mother sole legal and physical custody of the parties' youngest child. The Second Department modified by vacating the order, remitting to the trial court for a new hearing, and directing joint custody in the interim. New developments since the June 2021 order appealed from rendered the record insufficient to determine the child's best interests, requiring a reopened hearing (see *Matter of Michael B.*, 80 NY2d 299 [1992]). Joan Iacono represented Haddad. (Family Ct, Westchester Co)

Second Department *continued*

People v McMahon, 237 AD3d 746 (2nd Dept 4/2/2025)
DISCOVERY - Due Diligence

LASJRP: The Second Department concludes that the People exercised due diligence and made reasonable efforts to satisfy their obligations under CPL Article 245 at the time they filed the Certificate of Compliance.

The Suffolk County District Attorney's Office implemented policies and procedures to ensure discovery compliance and hired 30 discovery expediters to serve as liaisons with law enforcement agencies and to obtain discovery. In this case, the initial discovery supplied by the People was voluminous, totaling more than 400 pages. It would not have been particularly obvious to the People at the time of the COC that some of the discoverable materials were missing, especially given that entire categories of discovery were not missing, and there is no claim that the absence of the items was readily noticed by the defense. The prosecutor relied on the representation of a member of the Biological, Environmental, and Animal Safety Team Unit that the entire case file had been uploaded and it appears that, due to mere error and oversight, the missing pages were not initially disclosed. The People immediately disclosed the missing materials once they learned that they had not been turned over in the initial release. The failure to compare the pages of the uploaded file to the hard copies did not demonstrate a lack of due diligence. (County Ct, Suffolk Co)

Matter of Messiah S. E., 237 AD3d 698 (2nd Dept 4/2/2025)
ABUSE/NEGLECT - Initial Appearance/Notice Of Allegations

LASJRP: Family Court Act § 1033-b(1)(b) requires that the court, at an initial appearance, advise the respondent of the allegations in the petition.

The Second Department finds no error where the mother was not read the allegations in the petitions at her initial court appearance, but there is no indication that the mother, who was aided by counsel, was not fully aware of the contents of the petitions at that time. The mother testified at the fact-finding hearing that she understood that the proceedings were initiated because the oldest child sustained burns, and that she knew what was required of her to regain custody of her children and the consequences of her failure to comply with her service plan.

The JRP appeals attorney was Andrew Ford, and the trial attorney was Carolyn Silvers. (Family Ct, Queens Co)

Matter of Miller v Norton, 237 AD3d 711 (2nd Dept 4/2/2025)
CUSTODY - Child's Wishes

LASJRP: The Second Department finds error in the Family Court's determination awarding the father sole legal and physical custody of the child. Although the express wishes of older and more mature children can support the finding of a change in circumstances, that factor should not have been given significant weight in this case, where the child was less than eleven years old when the hearing was conducted and she was never interviewed in camera by the court, which is the preferred method for ascertaining a child's wishes. The court improperly relied upon the testimony of the child's therapist, who was not qualified as an expert and offered largely unfiltered hearsay.

However, temporary physical custody should remain with the father. The child is now approaching fifteen years of age and has been, in effect, in the father's sole physical custody for more than five years. The matter is remitted for the appointment of a forensic evaluator and a new hearing, including an in camera interview with the child, to establish an appropriate and liberal parental access schedule for the mother. (Family Ct, Putnam Co)

Matter of New York Civ. Liberties Union v Suffolk County, 237 AD3d 717 (2nd Dept 4/2/2025)
FOIL | PUBLIC OFFICERS LAW § 87 | LAW ENFORCEMENT DISCIPLINARY RECORDS | AFFIRMED

ILSAPP: Appellant-respondents Suffolk County and Suffolk County Police Department (SCPD) appealed from an order and judgment of Suffolk County Supreme Court granting petitioner-respondent NYCLU's Article 78 petition to compel the production of withheld and redacted law enforcement investigatory and disciplinary records. The Second Department affirmed. The privacy exemption under Public Officers Law § 87(2)(b) must be "narrowly construed" and supported by "specific, persuasive evidence" that the materials fall within the exemption. The SCPD relied on the privacy exemption to withhold the requested records containing unsubstantiated, unfounded, or exonerated allegations of police officer misconduct but did not "articulate any particularized and specific justification" for doing so. "There is no categorical exemption from disclosure for unsubstantiated allegations or complaints of police officer misconduct." Kirkland & Ellis LLP (Aaron H. Marks, Aulden Burcher-DuPont, Yaffa A. Meeran, Hannah C. Simson, and NYCLU Foundation [Robert Hodgson and Lisa Laplace], of counsel) represented the NYCLU. (Supreme Ct, Suffolk Co)

Matter of Pollack v Slasten, 237 AD3d 720 (2nd Dept 4/2/2025)
CUSTODY | PARENTAL ACCESS SCHEDULE | COUNSEL FEES | MODIFIED AND REMITTED

ILSAPP: The mother appealed from a Suffolk County Family Court order granting the father sole legal and physical custody of the parties' children, awarding him counsel fees, and awarding her supervised parental access with no set schedule. The Second Department modified in part by denying the father's

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application for counsel fees and remitted for a determination of a precise schedule of the mother's supervised parenting time with the child, but otherwise affirmed. Beth Rosenthal represented Slasten.

Roswell v County of Suffolk, 237 AD3d 767
(2nd Dept 4/2/2025)
CIVIL DISCOVERY | CCRB RECORDS NOT PRIVILEGED | AFFIRMED

ILSAPP: Plaintiff commenced an action for damages against the Suffolk County and a police officer, alleging unlawful arrest and assault. Suffolk County Supreme Court granted the plaintiff's discovery request for the officer's CCRB records and motion to compel their production, directing in camera review. The Second Department granted leave to appeal and affirmed. Supreme Court properly granted the plaintiff's motion to produce the CCRB records, including those that were created prior to the repeal of Civil Rights Law § 50-a. The request was made after the repeal of that section, and there is no categorical exemption for unsubstantiated complaints of police misconduct. The defendants' assertions of privilege did not outweigh the plaintiff's interest in disclosure of material relevant to the current action. Tierney & Tierney (Thomas E. Scott, of counsel) represented Roswell. (Supreme Ct, Suffolk Co)

People v Ryan, 237 AD3d 754 (2nd Dept 4/2/2025)
30.30 | INADEQUATE RECORD FOR APPELLATE REVIEW | HELD IN ABEYANCE & REMITTED

ILSAPP: Appellant appealed from a Suffolk County Court judgment convicting him of three counts of second-degree CPW and four counts of third-degree CPW, upon a jury verdict. The Second Department held the appeal in abeyance and remitted for a new determination on the CPL § 30.30 motion. County Court improperly denied the motion without affording the prosecution an opportunity to submit opposition papers to satisfy its burden of "establishing excusable delay for any elapsed period of time beyond the statutorily prescribed time." As conceded by the prosecution, the record before the Second Department was inadequate to enable appellate review of the denial of appellant's motion. Suffolk County LAS (Felice B. Milani, of counsel) represented Ryan. (County Ct, Suffolk Co)

Matter of Stephen B.J.B. v Marcia N.S.C., 237 AD3d 689
(2nd Dept 4/2/2025)
PATERNITY| COLLATERAL ESTOPPEL NOT APPLICABLE | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Rockland County Family Court order dismissing his petition to terminate a child support obligation. The Second Department reversed, reinstated the petition, and remitted to Family Court. Appellant signed an acknowledgment of paternity, which he later tried to vacate by filing a paternity petition. Family Court dismissed that petition for failure to state a cause of action upon which relief can be granted, but noted that he would have been equitably estopped from vacating the acknowledgment in any event, because the child viewed him as her father. When he later filed a new petition to terminate his child support obligation, Family Court dismissed it, finding that he had been collaterally estopped by the earlier dismissal. The Second Department held that collateral estoppel was inapplicable, because the earlier dismissal did not take place after a hearing with a full opportunity to litigate the issue. Family Court should have held a hearing on whether appellant had valid grounds to challenge the acknowledgment of paternity: fraud, duress, or material mistake of fact. Ilene Kim Graff represented Stephen B.J.B. (Family Ct, Rockland Co)

Matter of Dukofsky v Dukofsky, 237 AD3d 812
(2nd Dept 4/9/2025)
CHILD SUPPORT VIOLATION | WILLFULLNESS | REVERSED & VACATED

ILSAPP: A parent appealed from a Nassau County Family Court order finding, after a hearing, that she had willfully violated a prior order of child support and committing her to a correctional facility for a period of no more than 30 days. The Second Department dismissed the order of commitment as academic, vacated the order of disposition finding willfulness, vacated the order denying objections to the same, and denied the child support violation petition. Family Court should not have found that appellant-parent's failure to pay child support was willful. Appellant had presented competent, credible evidence to substantiate her assertion that she was unable to make the child support payments because she had been out of work for several months following surgery, had no additional savings or assets, and had relied on her mother for support. William A. Sheeckutz represented appellant-parent. (Family Ct, Nassau Co)

People v Edmondson, 237 AD3d 846 (2nd Dept 4/9/2025)
PROSECUTION'S APPEAL | CPL § 440.10 NEW EVIDENCE | DET. SCARCELLA | MODIFIED

ILSAPP: The prosecution appealed from a Kings County Supreme Court order granting Edmonson's CPL § 440.10 motion to vacate the judgment of two counts of second-degree murder, second-degree attempted murder, enterprise corruption, and three counts of second-degree CPW, and for a new trial. The Second Department modified by reinstating the convictions and sentences related to two shootings and enterprise corruption, but affirmed the grant of the 440 motion as to the convictions related to the shooting death of the complainant, Rankin. The court properly vacated the convictions related to Rankin's homicide based upon newly discovered evidence that the trial witness who had testified

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that he saw Edmonson shoot Rankin subsequently recanted and testified at the 440 hearing that his trial testimony was fabricated and had been developed during meetings with Detective Louis Scarcella. However, the hearing court should have denied respondent's motion to vacate the convictions related to the other crimes, because there was no evidence that Scarcella engaged in improper conduct with respect to any other witness, and the witness at issue only provided testimony with respect to the Rankin shooting. Further, the enterprise corruption conviction was independently supported by "substantial testimonial and physical" direct evidence. (Supreme Ct, Kings Co)

Matter of Moses M., 237 AD3d 825 (2nd Dept 4/9/2025)
ABUSE/NEGLECT - Right To Counsel/Waiver Of Right

LASJRP: The Second Department finds no right to counsel violation where the court failed to conduct a searching inquiry to ensure that the mother's waiver of her right to counsel was made knowingly, voluntarily, and intelligently and failed to sufficiently warn the mother of the risks of proceedings pro se or apprise her of the importance of a lawyer in the adversarial system, but the mother was later appointed new counsel, who represented her when she consented to a finding of neglect and at the dispositional hearing.

The court's failure to ensure that the mother validly waived her right to counsel could not have affected the ultimate outcome of the proceeding. (Family Ct, Suffolk Co)

Matter of Moshae L., 237 AD3d 821 (2nd Dept 4/9/2025)
ABUSE/NEGLECT - Medical Neglect

LASJRP: The Second Department upholds a finding of neglect, noting, inter alia, that the mother, who was advised that one child may have attention deficit disorder and expressed concerns that he may also have autism, failed to have him evaluated by a medical professional. (Family Ct, Westchester Co)

Matter of Hoovler v Vazquez-Doles, 237 AD3d 936 (2nd Dept 4/16/2025)
CONFIDENTIALITY - Grand Jury Minutes

LASJRP: The Second Department grants CPLR article 78 relief, concluding that the Supreme Court exceeded its authority by directing the release of certain grand jury minutes to counsel in a civil action.

In Orange County, only terms of the County Court have been charged with the empaneling of grand juries at the times relevant to this proceeding, and thus the County Court in charge of the grand jury in the criminal action was the only court authorized to release the grand jury minutes. (Supreme Ct, Orange Co)

Matter of Jaslene P., 237 AD3d 942 (2nd Dept 4/16/2025)
ABUSE/NEGLECT - Corroboration

LASJRP: The Second Department concludes that the child's out-of-court statements alleging abuse were corroborated by, inter alia, the testimony of her adult sister alleging "similar incidents" of sexual abuse committed by the father against her that were alleged in a prior, unrelated proceeding. (Family Ct, Kings Co)

People v Sidbury, 237 AD3d 975 (2nd Dept 4/16/2025)
SENTENCING | RIGHT TO BE PRESENT | REMITTED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree manslaughter and two counts of second-degree CPW, after a jury trial. The Second Department affirmed the conviction, vacated the sentence, and remitted for resentencing. Appellant had a fundamental right to be personally present at sentencing, and he neither expressly waived nor "forfeited that right by willfully absenting himself from court or engaging in disruptive conduct on the date of sentencing." Appellate Advocates (Sam Feldman, of counsel) represented Sidbury. (Supreme Ct, Kings Co)

People v Walker, 237 AD3d 978 (2nd Dept 4/16/2025)
INCLUSORY CONCURRENT COUNTS | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree attempted murder, first-degree assault, first-degree attempted assault, criminal possession of a firearm, first-degree criminal use of a firearm, second-degree criminal use of a firearm, and two counts of second-degree CPW, following a jury trial. The Second Department vacated the conviction for criminal possession of a firearm, dismissed that count of the indictment, and otherwise affirmed. The charges of second-degree CPW and criminal possession of a firearm are inclusory concurrent counts, and, as conceded by the prosecution, CPL § 300.40(3)(b) requires dismissal of the lesser count of criminal possession of a firearm. Rosenberg Law Firm (Jonathan Rosenberg, of counsel) represented Walker. (Supreme Ct, Kings Co)

Matter of Lopez v Neira, 237 AD3d 1097 (2nd Dept 4/23/2025)
VISITATION - Delegation Of Court's Authority - Counseling Requirement

LASJRP: The Second Department concludes that the Family Court properly directed the father to complete a four-month course of individual counseling as a component of his parental access.

However, the court erred by delegating to the children's therapist the authority to determine the father's access to family therapy with the children following his course of counseling, and delegating to the mother the authority to determine the father's parental access when it directed that,

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upon commencing family therapy, the father "shall be permitted to request of the mother … that the visits be expanded to allow for therapeutically supervised and/or resource supervised visits." (Family Ct, Queens Co)

Matter of Clifton C. v Tory P. R., 237 AD3d 1193 (2nd Dept 4/30/2025)
GRANDPARENT CUSTODY | BEST INTEREST HEARING REQUIRED | REVERSED

ILSAPP: Maternal grandfather and the child separately appealed from a Suffolk County Family Court order dismissing the grandfather's custody petition after a hearing. The Second Department reversed and remitted for a new hearing to determine custody based upon the best interests of the child. Under the totality of the circumstances, the grandfather had met his burden of proving extraordinary circumstances. The grandfather took care of the child for most of her life, including after the mother's death, while the father permitted it, "assumed the role of a noncustodial parent," and the child expressed a desire to continue residing with her grandfather. Finding no extraordinary circumstances, the court did not conduct a best interests hearing—which is now required. Salvatore C. Adamo represented Clifton C. and Mark A. Peterson represented the child. (Family Ct, Suffolk Co)

Matter of De Phillips v Perez, 237 AD3d 1198 (2nd Dept 4/30/2025)
FAMILY OFFENSE & VIOLATION | INTIMATE RELATIONSHIP | HEARING REQUIRED | REVERSED & REMITTED

ILSAPP: Parent appealed from a Kings County Family Court order dismissing her family offense petition and violation petition filed on behalf of the child against respondent, without a hearing, for lack of subject matter jurisdiction under Family Court Act § 812(1)(e). The Second Department reversed, reinstated the petitions, and remitted for a hearing to determine whether there was an "intimate relationship" between the subject child and the respondent, a paramour of petitioner's former spouse. Considering the parties' conflicting allegations as to the nature of the relationship at issue, the Family Court erred by summarily dismissing the petitions. Diana Kelly represented De Phillips. (Family Ct, Kings Co)

People v Dowling, 237 AD3d 1220 (2nd Dept 4/30/2025)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment sentencing him following his guilty plea (Gubbay, J., at plea; D'Emic, J., at sentencing). The Second Department found that appellant's appeal waiver was invalid but affirmed the sentence. The court failed to elicit a response from appellant that he voluntarily waived his right to appeal and "did not ensure that he understood the distinction between the right to appeal and the rights automatically forfeited upon entering a plea of guilty." Further, the court's oral colloquy mischaracterized the loss of appellate rights as forfeiting the right to counsel and waiving costs, fees, and expenses. The written waiver did not cure the deficient oral colloquy. However, the sentence was not excessive. Appellate Advocates (Sam Feldman, of counsel) represented Dowling. (Supreme Ct, Kings Co)

People v Garcia, 237 AD3d 1223 (2nd Dept 4/30/2025)
CORAM NOBIS | IAC | FAILURE TO FILE NOTICE OF APPEAL | GRANTED

ILSAPP: Appellant filed a writ of error coram nobis alleging ineffective assistance of counsel pursuant to *People v Syville*, 15 NY3d 391 (2010), seeking leave to file a late notice of appeal from a judgment of Queens County Supreme Court rendered in 2022. The Second Department granted appellant's application and deemed the notice of appeal timely filed. Appellate Advocates (Sarah O'Leary, of counsel) represented Garcia. (Supreme Ct, Queens Co)

People v Gilyard, 237 AD3d 1223 (2nd Dept 4/30/2025)
ORDER OF PROTECTION | VACATED IN INTEREST OF JUSTICE

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of fourth-degree CPW following his guilty plea. The Second Department affirmed the conviction but vacated the OOP as a matter of discretion in the interest of justice, since the challenge was unpreserved. The court had no authority to grant an OOP in favor of an individual who was neither the victim of, nor a witness to, the crime to which appellant pleaded guilty. The Legal Aid Society of NYC (Mary-Kathryn Smith, of counsel) represented Gilyard. (Supreme Ct, Queens Co)

Joseph P.A. v Martha A., 237 AD3d 1146 (2nd Dept 4/30/2025)
DIVORCE | CUSTODY | APPEAL BY NON-PARTY CHILDREN | REVERSED

ILSAPP: Nonparty children appealed from a Suffolk County Supreme Court order awarding sole legal and residential custody of the children to the plaintiff-father in a nonjury divorce trial. The Second Department sua sponte granted the children leave to appeal, reversed to award defendant-mother sole legal and residential custody, and remitted to the trial court to establish an appropriate parenting time schedule for the plaintiff-father. Supreme Court's order lacked a sound and substantial basis in the record. Plaintiff-father was living in Florida and represented to the court that he was not seeking residential custody. Although a strict application of the *Tropea*

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factors is not required in an initial custody determination, the court erred by awarding plaintiff-father residential custody without fully considering the impact of moving the children away from the defendant-mother, the only home they had known, to live with plaintiff-father in Florida. Further, "the court failed to give sufficient weight to the expressed preference of the children." Warren S. Hecht represented the children. (Supreme Ct, Suffolk Co)

People v Lowe, 237 AD3d 1225 (2nd Dept 4/30/2025)
MOSLEY NON-EYEWITNESS TESTIMONY | SURVEILLANCE VIDEO ID | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Nassau County Court judgment convicting him of two counts of first-degree robbery, third-degree robbery, three counts of first-degree assault, fourth-degree grand larceny, third-degree CPW, and resisting arrest, upon a jury verdict. The court erred in permitting a detective to identify appellant at trial from a surveillance video where the detective lacked sufficient contact with appellant "to achieve a level of familiarity that rendered the detective's opinion helpful" (*see People v Mosley*, 41 NY3d 640 [2024]). However, the error was harmless because there was overwhelming evidence of appellant's guilt and no significant probability that the error contributed to the conviction. (County Ct, Nassau Co)

People v Nesbitt, 237 AD3d 1228 (2nd Dept 4/30/2025)
PLEAS - Motion To Withdraw

LASJRP: At a court appearance prior to sentencing, defendant asked the court to "take [his] plea back." The court immediately answered "No." Upon further inquiry by defendant, the court explained that defendant needed a legal basis to withdraw his plea. Defendant asserted that he had been misled by his attorney. Without any further inquiry into the substance of this assertion, defendant was removed from the courtroom and was thereafter sentenced on his convictions.

The Second Department remits the case for further proceedings, concluding that defendant was not afforded a reasonable opportunity to present his contentions. (County Ct, Nassau Co)

Matter of Snow v Snow, 237 AD3d 1204 (2nd Dept 4/30/2025)
ORDER OF PROTECTION | NO VIOLATION | AFFIRMED

ILSAPP: Petitioner appealed from a Suffolk County Family Court order dismissing, after a hearing, his violation petition alleging that respondent willfully violated a temporary OOP by "remotely accessing investment accounts through an investor portal without his authority or consent and providing the financial information contained therein to her attorney for use in the California divorce action." The Second Department affirmed. The Family Court properly denied the petition and dismissed the proceeding, as petitioner failed to demonstrate, by clear and convincing evidence, that the respondent violated a clear and unequivocal mandate contained in the order of protection. The order of protection required the respondent to refrain from remotely controlling or monitoring petitioner's electronic devices, and the conduct at issue did not fit those parameters. Garr Silpe, P.C. (Steven M. Silpe and Lindsay Miller, of counsel) represented the respondent. (Family Ct, Suffolk Co)

Matter of Adonis J. W., 238 AD3d 775 (2nd Dept 5/7/2025)
SPEEDY TRIAL - Constitutional Due Process

LASJRP: The Second Department concludes that respondent was deprived of his constitutional right to due process by the eight-and-a-half-month delay between his arrest and the filing of the petition.

The assault charges (the petition included a charge of attempted first-degree assault) were serious and respondent did not demonstrate any actual prejudice to his defense attributable to the delay, but the presentment agency failed to establish a legitimate reason for the delay. The ultimate goal of promptly treating and rehabilitating respondent was not furthered by permitting a fact-finding hearing following the unjustified delay.

The JRP appeals attorney was Hannah Kaplan, and the trial attorney was Thomas Burrows. (Family Ct, Queens Co)

Matter of Ahmad S. M. (Samera M.), 238 AD3d 764 (2nd Dept 5/7/2025)
AGENCY APPEAL | TPR | NO DILIGENT EFFORTS | AFFIRMED

ILSAPP: The agency appealed from a Queens County Family Court order dismissing their termination of parental rights petition on allegations 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 mother's parental relationship with the subject children. The agency failed to show that it had "made affirmative, repeated, and meaningful efforts to obtain a psychological evaluation to assist treatment of the mother's mental illness, to prepare the mother to provide care for the children's medical needs, or to provide a referral for services that would assist the mother in managing and engaging with the children." Center for Family Representation (Emily S. Wall, of counsel), represented Samera M. (Family Ct, Queens Co)

Matter of Badalyan v Antaplian, 238 AD3d 738 (2nd Dept 5/7/2025)
VISITATION | IMPROPER CONDITIONS ON FUTURE PARENTAL ACCESS | MODIFIED

ILSAPP: Father appealed from a Queens County Family Court

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order (1) limiting his visitation with the parties' children to supervised therapeutic parental access under certain conditions, and (2) conditioning his future expansion of parenting time upon his participation in therapy, his understanding of the reasons for neglect findings against him, and progress in his therapeutic parental access with the children. The Second Department modified the order by deleting the provisions placing conditions on future expansion of his parenting time, and otherwise affirmed. A court may not direct a parent to undergo counseling or treatment, or to successfully complete treatment or therapy, as a condition of future parental access or application for parental access rights. Cheryl Charles-Duval represented Antaplian. (Family Ct, Queens Co)

Matter of Clamar G. (Dana G.), 238 AD3d 749 (2nd Dept 5/7/2025)
AGENCY APPEAL | NEGLECT | CORPORAL PUNISHMENT | INSUFFICIENT CORROBORATION OF CHILD'S HEARSAY | AFFIRMED

ILSAPP: ACS and subject children appealed from a Kings County Family Court order dismissing the neglect petitions, after a fact-finding hearing, for failing to establish that the parties neglected the subject children by inflicting excessive corporal punishment. The Second Department affirmed. The record supported Family Court's determination that the father gave credible testimony, and that the agency failed to provide reliable corroboration to the children's hearsay statements. The oldest child's hearsay statements "did not constitute reliable corroboration" of the youngest child's hearsay statements alleging excessive corporal punishment by her father and stepmother, because both children "specifically denied the allegations in the petition on multiple occasions." Although accepted as a common reaction by children, a child's recantation of abuse or neglect allegations creates a credibility issue for determination by the court. Leighton M. Jackson represented stepmother Dana G. and Brooklyn Defender Services (Sarah Han and Jessica Marcus, of counsel) represented father Clark G. (Family Ct, Kings Co)

People v Palm, 238 AD3d 787 (2nd Dept 5/7/2025)
SEARCH AND SEIZURE - Stop And Frisk/ Reasonable Suspicion

LASJRP: The Second Department concludes that where defendant matched the general description of the perpetrator, who had brandished a firearm, that was broadcast over the police radio, and defendant was found in temporal and spatial proximity to the scene of the incident, and the officers observed that defendant put his hands in his waistband, the police had reasonable suspicion to stop and frisk defendant. (County Ct, Orange Co)

People v White, 238 AD3d 789 (2nd Dept 5/7/2025)
ERRONEOUS UNIFORM SENTENCE & COMMITMENT FORM | CONCURRENT SENTENCE REQUIRED

ILSAPP: Appellant appealed from a Westchester County Supreme Court judgment convicting him of two-counts of second-degree murder and one count each of second-degree attempted murder, first-degree burglary, and first-degree assault, following a jury verdict. The Second Department remitted for vacatur of appellant's amended uniform sentence and commitment sheet (USC), and reinstatement of the original USC, and otherwise affirmed the conviction. As conceded by the prosecution, the amended USC erroneously imposed consecutive sentences on the murder, attempted murder, and assault counts. Appellant's "sentences on the attempted murder and assault counts run concurrently with each other and consecutively to the sentence on the intentional murder count." Aidala, Bertuna & Kamins, P.C. (Lino J. De Masi, of counsel) represented White. (Supreme Ct, Westchester Co)

People v Carrington, 238 AD3d 893 (2nd Dept 5/14/2025)
OOP | MODIFIED | OOP DURATION VACATED & REMITTED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree assault following his guilty plea. The Second Department vacated the duration portion of the OOP and remitted for a new determination on its duration, but otherwise affirmed. Preservation was not required 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 prosecution conceded that the duration of the OOP exceeded the maximum time limit pursuant to CPL § 530.13(4)(A). Appellate Advocates (Russ Altman-Merino, of counsel) represented Carrington. (Supreme Ct, Queens Co)

People v Cherry, 238 AD3d 894 (2nd Dept 5/14/2025)
JUSTIFICATION | FAILURE TO WITHDRAW IMPROPER CHARGE | REVERSED

ILSAPP: Appellant appealed from a Nassau County Supreme Court judgment convicting her of two counts of first-degree burglary, two counts of second-degree assault, and one count each of first-degree assault, third-degree burglary, fourth-degree CPW, and second-degree aggravated harassment, upon a jury verdict. The Second Department reversed and remitted for a new trial on all but the harassment count. The court erred by "giving a justified use of deadly physical force charge to the deliberating jury without expressly withdrawing the prior ordinary physical force justification charge." Because the court left the jury with "competing charges on a material issue," it was "not possible to conclude that the jury rendered its verdict with a complete and accurate understanding of the applicable law." Charles E. Holster, III represented Cherry. (Supreme Ct, Nassau Co)

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Matter of Fernandez v Rasberry, 238 AD3d 870 (2nd Dept 5/14/2025)
PARENTAL ACCESS SCHEDULE | NO CHANGE OF CIRCUMSTANCES | REVERSED & REMITTED

ILSAPP: Father appealed from a Suffolk County Family Court order granting the mother's petition to decrease his parenting time with the child. The Second Department reversed and remitted for the court to set forth a new parental access schedule. The parents originally stipulated that the father would have parenting time capped at 140 hours over a 2-week period, although no schedule was specified. After a hearing, Family Court granted the mother's application to modify the arrangement by reducing the father's parenting time and set forth a new schedule. The Second Department reversed. The mother failed to demonstrate the required change of circumstances to warrant the modification. The Second Department thus remitted for Family Court to direct a parenting time schedule consistent with the original stipulation. Lynn Poster-Zimmerman, P.C. represented Fernandez. (Family Ct, Suffolk Co)

People v Luy, 238 AD3d 916 (2nd Dept 5/14/2025)
SORA | RISK FACTOR 15 | UNCERTAIN POST-RELEASE LIVING SITUATION | AFFIRMED

ILSAPP: Appellant appealed from a Nassau County Supreme Court order designating him a level two sex offender under SORA. The Second Department affirmed. The SORA court improperly assessed appellant 10 points under risk factor 15 because the prosecution failed to prove that appellant's living situation was inappropriate. At most, the evidence presented showed that appellant's "living situation was uncertain." However, the Second Department assessed 10 additional points under risk factor 12 based on appellant's failure to accept responsibility for his conduct, keeping the point total the same. "Where the record is sufficient, [the appellate court] may assess more points than assessed by the SORA court, so long as the People proved sufficient facts to support those points." Richard M. Langone represented Luy. (Supreme Ct, Nassau Co)

Matter of Sanna v Delong, 238 AD3d 880 (2nd Dept 5/14/2025)
CUSTODY MODIFICATION | CHANGE OF CIRCUMSTANCES | HEARING REQUIRED | REVERSED & REMITTED

ILSAPP: Father appealed from two Dutchess County Family Court orders dismissing his petition to modify an existing custody order and his separate petition alleging a violation of the order. The Second Department reversed, reinstated the petitions, and remitted to Family Court for a hearing. The father demonstrated the required change of circumstances to warrant a hearing on the modification, including that he had achieved seven years of sobriety since the custody order was issued. He also alleged that the mother made a statement intending to estrange him from the child, which may have been a violation of the custody order and also should have been resolved at a hearing. Thomas T. Keating represented Sanna. (Family Ct, Dutchess Co)

People v Taylor, 238 AD3d 902 (2nd Dept 5/14/2025)
SUPPRESSION | DEBOUR | NO REASONABLE SUSPICION TO FRISK | REVERSED & DISMISSED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree CPW, following a non-jury trial. The Second Department reversed, granted suppression of the firearm, and dismissed the indictment. The court should have granted appellant's motion to suppress the firearm. The detective testified that he saw appellant hold an unidentified "black object" while standing next to an illegally parked car, put the object into his pocket after making eye contact with the detective, put his hands up at the detective's command, and then reach back towards his pocket. Because the detective's testimony did not provide support that appellant "was armed or posed a threat to the officers' safety," the detective did not have reasonable suspicion to grab appellant's pocket and frisk him. Even assuming this was a "high crime area" does not provide sufficient justification for informational requests, let alone the search at issue. The Legal Aid Society of NYC (Iván Pantoja, of counsel) represented Taylor. (Supreme Ct, Queens Co)

People v Thomison, 238 AD3d 905 (2nd Dept 5/14/2025)
SUPPRESSION | NO BASIS FOR INFORMANT'S KNOWLEDGE | REVERSED & DISMISSED
SEARCH AND SEIZURE - Auto Stop/Reasonable Suspicion

LASJRP: The Second Department orders suppression, finding no reasonable suspicion justifying a stop of defendant - a black male driving a white Hyundai Santa Fe who, when he exited the vehicle, was wearing a dark brown leather jacket, blue jeans, and a black hooded sweatshirt - where the officer described the 911 call as a "possible menacing" by a black male with a leather jacket who left the scene in a white Jeep and another officer testified that they knew they were looking for a "man with a gun," but neither officer testified as to how the informant knew that defendant had a gun. While the informant did identify defendant from across the street, the identification occurred well after defendant had been stopped.

Although the People argue that defendant's failure to use his turn signal when he was pulling away from the curb where his vehicle was parked was sufficient cause to stop him, a stop based on a traffic infraction did not, without reasonable suspicion of criminal activity, allow the police to forcibly detain defendant, in handcuffs, behind his vehicle and look within the

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vehicle for the weapon that was recovered. (County Ct, Dutchess Co)

People v Wilson, 238 AD3d 909 (2nd Dept 5/14/2025)
LEGAL SUFFICIENCY | WEIGHT OF THE EVIDENCE | FOR-CAUSE JUROR CHALLENGE | REVERSED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of 19 counts of first-degree falsifying business records, 19 counts of third-degree falsely reporting an incident, and one count each of computer trespass, third-degree computer tampering, first-degree criminal contempt, fourth-degree stalking, and second-degree coercion, upon a jury verdict. The Second Department reversed and dismissed the indictment as to 19 counts of first-degree falsifying business records and remitted for a new trial on the remaining counts. The evidence was legally insufficient, and the verdict was against the weight of the evidence as to the 19 counts of first-degree falsifying business records. The prosecution presented evidence that, over the course of two years, appellant's "conscious objective was to harass, intimidate, and embarrass the complainant" by sharing sexually explicit videos and photos of complainant and repeatedly making calls to emergency service providers to come to complainant's home, but did not establish that appellant acted with the intent to defraud. Additionally, the court erred in denying appellant's for-cause challenge to a prospective juror where the juror raised serious doubts about his ability to be impartial when he stated that "he could not give his complete assurance that he would" set aside his prior experience as a defendant in a "frivolous" lawsuit. The court should have either conducted a follow-up inquiry to elicit unequivocal assurances or excused the prospective juror. Denial of appellant's for-cause challenge was reversible error warranting a new trial on the remaining counts. Appellate Advocates (Alice R. B. Cullina, of counsel) represented Wilson. (Supreme Ct, Queens Co)

Matter of Ayan I., 238 AD3d 1040 (2nd Dept 5/21/2025)
ABUSE/NEGLECT - Removal/Imminent Risk

LASJRP: The petition alleged that respondent father neglected the subject child by, inter alia, committing acts of domestic violence against the non-respondent mother while the child was home, violating an order of protection, and absconding with the child.

The Second Department upholds the denial of the father's FCA § 1028 application for return of the child.

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

People v Carl, 238 AD3d 1066 (2nd Dept 5/21/2025)
WEIGHT OF THE EVIDENCE | RECKLESS ENDANGERMENT | COUNT DISMISSED

ILSAPP: Appellant appealed from a Westchester County Court judgment convicting him of attempted aggravated assault upon a police officer, two counts of first-degree reckless endangerment, and one count each of seventh-degree CPCS, second-degree criminal mischief, and third-degree criminal mischief, following a jury verdict. The Second Department vacated and dismissed one count of first-degree reckless endangerment, but otherwise affirmed. The verdict as to that count was against the weight of the evidence. The allegations arose from two separate car chases, and the prosecution failed to establish beyond a reasonable doubt that appellant's conduct during the first car chase "evinced a depraved indifference to human life." An acquittal on that count "would not have been unreasonable." Richard L. Herzfeld represented Carl. (County Ct, Westchester Co)

People v Emmanuel D., 238 AD3d 1068 (2nd Dept 5/21/2025)
POSSESSION OF A WEAPON - Second Amendment

LASJRP: The Second Department rejects defendant's contention that Penal Law weapon possession statutes are unconstitutional on their face, concluding that defendant has failed to demonstrate that there is no set of circumstances under which the statutes would be valid under the Second Amendment.

New York may constitutionally require a license in order to possess a firearm and impose at least some requirements to obtain that license. (Supreme Ct, Kings Co)

People v Fleming, 238 AD3d 1078 (2nd Dept 5/21/2025)
SORA | NO DOWNWARD DEPARTURE DESPITE EXCEPTIONAL RESPONSE TO TREATMENT | AFFIRMED

ILSAPP: Appellant appealed from a Suffolk County Court order designating him a level two sex offender under SORA. The Second Department affirmed. Although appellant demonstrated "an exceptional response to sex offender treatment through, inter alia, multiple assessments from his treatment providers indicating that he had exceeded program expectations and was assisting other offenders to succeed with their treatment," under the totality of the circumstances, that mitigating factor was not enough to result in a downward departure from the presumptive risk level. Included in the analysis was "the danger to the community should [appellant] reoffend," where the sex offense involved a child and was preserved on video. (County Ct, Suffolk Co)

Matter of Horoshko v Pasieshvili, 238 AD3d 1038 (2nd Dept 5/21/2025)
CUSTODY & VISITATION | PARENTAL ACCESS SUSPENDED | HEARING REQUIRED | REVERSED & REMITTED

ILSAPP: Father appealed from a Kings County Supreme Court (IDV Part) order granting the mother's petition for sole legal and

Second Department *continued*

physical custody of the child and suspending the father's parental access. The Second Department reversed. Family Court erred when it granted the mother's petition without a hearing. Nor did the court make any specific findings of fact regarding the best interests of the child. The Second Department therefore remitted for a hearing and a new determination by Family Court. Warren S. Hecht represented Pasieshvili. (Supreme Ct, Kings Co)

Matter of Shamir M., 238 AD3d 1041 (2nd Dept 5/21/2025)
JUVENILE DELINQUENCY | SUBSTITUTION OF PINS PETITION | MODIFIED

ILSAPP: Appellant appealed from a Nassau County Family Court order finding that he had committed an act that, if committed by an adult, would have constituted the crime of first-degree attempted sexual assault and conditionally discharging him for 12 months. The Second Department modified by substituting a PINS adjudication for the delinquency adjudication in the interest of justice and otherwise affirmed. While the argument that Family Court should have substituted a PINS petition for the delinquency under Family Court Act § 311.4 was unpreserved for appellate review, the court nevertheless exercised its discretion to do so "under the particular circumstances of this case." Amy L. Colvin represented Shamir. (Family Ct, Nassau Co)

Matter of Tiffany N. (Trena G.), 238 AD3d 1044 (2nd Dept 5/21/2025)
NEGLECT | AGENCY APPEAL | INTELLECTUAL DISABILITY ALONE NOT NEGLECT | AFFIRMED

ILSAPP: ACS appealed from a Kings County Family Court order dismissing a neglect petition against a parent. The Second Department affirmed the dismissal. At fact-finding, ACS failed to establish that either the parent's mild intellectual disability or her emotional outbursts directed at foster care agency staff had caused actual or potential harm to the child. The evidence also demonstrated that the parent was engaged in supportive services, and there was no evidence that those services were inadequate. The court also rejected ACS's argument that Family Court erred in excluding portions of the parent's psychiatric consultation, where the notes were written after hospital discharge and therefore did not relate to diagnosis and treatment, rendering them inadmissible hearsay. Brooklyn Defender Services (Jessica Marcus, of counsel) represented Trena G. (Family Ct, Kings Co)

People v Williams, 238 AD3d 1076 (2nd Dept 5/21/2025)
FOR-CAUSE JUROR CHALLENGE | MOSLEY NON-EYEWITNESS TESTIMONY | REVERSED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of two counts of second-degree CPW and one count of first-degree reckless endangerment, following a jury verdict. The Second Department reversed and ordered a new trial. The trial court erred in denying appellant's for-cause challenge to a prospective juror where the juror "repeatedly indicated" that he would be affected by appellant's "failure to testify" and could not "provide unequivocal assurances" that he would be able to render a verdict "based solely upon the evidence adduced at trial." These responses clearly raised doubts about the juror's ability to be impartial, and denial of appellant's for-cause challenge was reversible error because he had "exhausted all of his peremptory challenges." Additionally, the court erred in permitting a detective to identify appellant at trial in a surveillance video. The detective spent a total of "10 to 15 minutes" with appellant, which was not enough time to establish "sufficient contact with [appellant] to achieve a level of familiarity that renders the lay opinion helpful" (see *People v Mosley*, 41 NY3d 640 [2024]). Appellate Advocates (Yvonne Shivers and Joshua M. Levine, of counsel) represented Williams. (Supreme Ct, Kings Co)

People v Gillespie, 238 AD3d 1172 (2nd Dept 5/28/2025)
SENTENCE - Vindictiveness

LASJRP: The Second Department concludes that the presumption of vindictiveness that applies where a defendant successfully appeals, and is retried, convicted, and given a greater sentence than that imposed after the initial conviction, was overcome where the initial convictions resulted from defendant's guilty plea, and the leniency defendant received previously was relinquished when the victim and her son were forced to testify at trial. Moreover, the judge who imposed the second sentence was not the same judge who imposed the first sentence, and the second judge alluded to defendant's lack of genuine remorse. (Supreme Ct, Queens Co)

Matter of Ilan Z., 238 AD3d 1164 (2nd Dept 5/28/2025)
ABUSE/NEGLECT - Motion To Vacate

LASJRP: The petitions alleging abuse and derivative abuse were based on an incident in which the six-month-old child was treated at a hospital for a traumatic head injury. The mother consented to entry of a finding of neglect without admission pursuant to FCA § 1051(a). The children were subsequently released to the mother.

The mother later moved pursuant to FCA § 1061 for a modification of the order of fact-finding and disposition that would grant her a suspended judgment and vacate the finding of neglect. Following a hearing, the Family Court denied the mother's motion.

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The Second Department affirms, noting that although the mother has complied with services, including parenting skills courses and therapy, and wishes to seek employment as a pediatric nurse, the record demonstrates that she continues to lack insight into the seriousness of the injury.

The JRP appeals attorney was Polixene Petrakopoulos and the trial attorney was Sabrina Lall. (Family Ct, Queens Co)

Matter of Landon K. (Stephanie K.), 238 AD3d 1145
(2nd Dept 5/28/2025)
ABUSE/NEGLECT - Presumption Of Abuse/
Shaken Baby Injuries
- Expert Testimony

LASJRP: The Second Department reverses findings of abuse and derivative neglect made against the parents upon a fact-finding hearing, concluding that although petitioner established a prima facie case by presenting evidence that one of the children sustained injuries including subdural hemorrhages and retinal hemorrhages, respondents presented evidence sufficient to rebut petitioner's prima facie case through the testimony of their expert witnesses.

Those experts opined that the injuries were not intentionally inflicted, as there were no external injuries, the child's "bridging veins" were not torn or bleeding, which would have occurred if she had been shaken, and the patterns and amount of bleeding in the brain, along with the location of the subdural hemorrhages, were inconsistent with "shaken baby syndrome." The experts put forth a reasonable explanation for the injuries by opining that she suffered a stroke, which could have been caused by subdural bleeding sustained during birth, and that her subsequent COVID-19 infection could have prevented this injury from healing and could have contributed to clotting and rebleeding in her brain.

Moreover, the record demonstrates that respondents are concerned parents who promptly sought medical assistance for the injured child and were cooperative and forthcoming with information throughout these proceedings. (Family Ct, Nassau Co)

People v Mills, 238 AD3d 1175 (2nd Dept 5/28/2025)
CORAM NOBIS | LATE NOTICE OF APPEAL | GRANTED

ILSAPP: Appellant filed a writ of error coram nobis seeking leave to file a late notice of appeal from two judgments of Kings County Supreme Court rendered in 2021. The Second Department granted appellant's application, as he was entitled to relief pursuant to *People v Syville*, 15 NY3d 391 (2010). Appellate Advocates (Maya McDonnell, of counsel) represented Mills. (Supreme Ct, Kings Co)

Santman v Satterthwaite, 238 AD3d 1156
(2nd Dept 5/28/2025)
CHILD SUPPORT | ARTICLE 78 |
WRIT OF MANDAMUS NOT AVAILABLE | AFFIRMED

ILSAPP: Appellant appealed from a Nassau County Supreme Court order dismissing her petition for a writ of mandamus to compel Family Court to reschedule a hearing. The Second Department affirmed. Appellant sought a writ of mandamus to compel Family Court to schedule a child support hearing in compliance with the deadlines in 22 NYCRR 205.43(b) and (e). The Second Department applied the exception to the mootness doctrine to reach the merits of the claim, but nevertheless found that a writ of mandamus was not the appropriate remedy. Scheduling hearings involves an exercise of Family Court's discretion, rather than the type of purely ministerial act that a writ of mandamus was intended to address. (Supreme Ct, Nassau Co)

Matter of Wynter S.A. (Skylien A.), 238 AD3d 1140
(2nd Dept 5/28/2025)
ARTICLE 10 | GOOD CAUSE SHOWN UNDER FCA § 1061 |
REVERSED

ILSAPP: Parents separately appealed from a Queens County Family Court order finding, upon consent but without admission, that they neglected and derivatively neglected their children, and denying their applications for a suspended judgment after a dispositional hearing. The Second Department reversed the order, granted the applications for suspended judgment, and vacated the findings of neglect and derivative neglect. Pursuant to FCA § 1061, Family Court should have vacated the findings of neglect and derivative neglect for good cause shown, because the parents had "demonstrated their insight into how their actions affected the children, their commitment to ameliorating the issues that led to the findings of neglect and derivative neglect, including their compliance with undergoing parenting and anger management programs, and their lack of a prior child protective history." Lewis S. Calderon represented appellant Skylien A., and Christian P. Myrill represented appellant Bernard B. (Family Ct, Queens Co)

People v Ceballos, 2025 NY Slip Op 03339
(2nd Dept 6/4/2025)
SUPPRESSION | RELEVANCE | COMMUNICATIONS WITH
DETECTIVE | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree attempted assault, criminal obstruction of breathing or blood circulation, third-degree assault, EWC, third-degree attempted assault, and second-degree harassment, following a jury verdict. The

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Second Department affirmed. The court erred in admitting appellant's phone and text communications with a detective concerning the child appellant shared with the complainant, as these were irrelevant to the charged offenses. But the error was harmless beyond a reasonable doubt as evidence of guilt was overwhelming, and "no significant probability exists that the errors contributed to the convictions." (Supreme Ct, Queens Co)

People v Foster-Bey, 2025 NY Slip Op 03342
(2nd Dept 6/4/2025)
CORAM NOBIS | YOUTHFUL OFFENDER | MODIFIED & REMITTED

ILSAPP: Appellant filed a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a Second Department order affirming a Kings County Supreme Court judgment. The Second Department granted appellant's application, vacated its 2018 decision, modified by vacating the sentence imposed, and remitted for resentencing and for a determination as to whether appellant should be afforded YO adjudication. Appellant was denied effective assistance where appellate counsel did not argue that the trial court "failed to determine whether [appellant] should be afforded youthful offender status." CPL § 720.20(1) mandates a YO determination in every case where the accused is eligible, even when not requested. Where the convictions are for armed felonies (here, first-degree assault and second-degree CPW), the court must first make determination on the record regarding eligibility, applying the factors under CPL § 720.20(3); then, if eligible, the court must determine whether to grant YO status. As conceded by the prosecution, the record was devoid of these requisite determinations. The Second Department expressed no opinion as to whether the court should grant YO. Brooklyn Defender Services (Lisa Schreibersdorf and Aminie Woolworth, of counsel) represented Foster-Bey. (Supreme Ct, Kings Co)

People v Goodluck, 2025 NY Slip Op 03343
(2nd Dept 6/4/2025)
440.10 | IAC | SUPPRESSION | SCOPE OF WARRANT | REVERSED & REMITTED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of two counts of second-degree criminal possession of a forged instrument, following a jury verdict, and an order of the same court denying his CPL § 440.10 motion without a hearing. The Second Department reversed the order, granted the 440 motion, vacated the judgment, and remitted for a new trial. Appellant was deprived of the effective assistance of counsel. While trial counsel sought suppression on a theory that the search warrant was not based on probable cause, he failed to argue that appellant's seized credit cards were outside the scope of the search warrant for firearms and related items. Nor did he contend that the plain-view exception to the warrant requirement did not apply to the seized credit cards, which was refuted by the hearing testimony. Counsel in his affirmation averred that he failed to consider that the seized credit cards were not described in the search warrant, neglected to research the applicable exceptions to the warrant requirement, and that his failure to move for their suppression was not a result of a strategic decision. Because counsel did not fully investigate the law, facts, and relevant issues necessary to inform the best course of action, appellant did not receive effective assistance. Appellate Advocates (Cynthia Colt, of counsel) represented Goodluck. (Supreme Ct, Kings Co)

Matter of Kevin C. v Trisha J., 2025 NY Slip Op 03324
(2nd Dept 6/4/2025)
CUSTODY | PATERNITY ESTABLISHED AFTER FILING CUSTODY PETITION | REVERSED & REMITTED

ILSAPP: Father appealed from a Kings County Family Court order dismissing his custody petition for lack of standing. The Second Department reversed, denied the mother's motion to dismiss, reinstated the father's petition, and remitted for further proceedings. A biological parent has standing to seek custody of their child, and the timing of their adjudication of paternity does not negate standing. The Family Court erred in determining that the petitioner did not have standing to file the custody petition because he had not been adjudicated the biological father of the child before filing the petition. Paternity was sufficiently alleged in the custody petition, was not denied by the mother, and was ultimately confirmed by a subsequent DNA test and an order of filiation entered on consent. Aronson Mayefsky & Sloan, LLP (Caitlin Connolly and Reid A. Aronson, of counsel) represented Kevin C. (Family Ct, Kings Co)

People v Van Leer, 2025 NY Slip Op 03595
(2nd Dept 6/4/2025)
SORA | IMPROPER DENIAL OF RISK LEVEL MODIFICATION | REVERSED

ILSAPP: Appellant appealed from a Suffolk County Court order denying his petition to modify his risk level classification under SORA under CL § 160[o][2]. The Second Department reversed, granted the petition, and designated appellant a level one sex offender. The trial court should have granted appellant's petition and modified his risk level classification from level

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three to one. Since his 1999 conviction of two counts of first-degree sexual abuse, appellant has resided in MA without any further sex offenses or serious felonies, has consistently registered as a sex offender, had his risk level reduced from three to one in MA, and was married from 2003 to 2018. Further, the NY Board of Examiners of Sex Offenders "recommended that it 'would not be opposed to'" modifying appellant's classification to a level one. Laurette D. Mulry (Mark J. Ermmarino, of counsel) represented Van Leer. (County Ct, Suffolk Co)

Matter of Aboagye v Aboagye, 2025 NY Slip Op 03550
(2nd Dept 6/11/2025)
CUSTODY MODIFICATION | RELOCATION PETITION DENIED WITHOUT A HEARING | REVERSED

ILSAPP: Mother appealed from a Suffolk County Supreme Court order summarily denying her motion to modify the parties' divorce judgment to permit her to relocate with the children from Suffolk County to Rockland County. The Second Department reversed and remitted for a hearing to determine whether the mother had established a sufficient change in circumstances and whether her motion should be granted. Factual allegations in the mother's petition entitling her to a hearing included: her recent engagement; her intent to reside with her fiancé in Rockland County; difficult living arrangements; and increasing hostility between the parents. Since there were material facts in dispute and "[n]o agreement of the parties can bind the court to a disposition other than that which a weighing of all . . . the factors involved shows to be in the child's best interest," Supreme Court was obligated to hold a full hearing to decide whether there was a sufficient change in circumstances justifying a modification of the existing custody arrangement. Tabat, Cohen, Blum, Yovino & Diesa, P.C. (Elizabeth Diesa and Angela A. Ruffini, of counsel) represented appellant. (Supreme Ct, Suffolk Co)

People v Babatunde, 2025 NY Slip Op 03583
(2nd Dept 6/11/2025)
SURCHARGES AND FEES | MODIFIED AND VACATED FEES

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree attempted murder, 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. 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 (Alice R. B. Cullina, of counsel, and Maritza Medina Olazarán, on the brief) represented Babatunde. (Supreme Ct, Kings Co)

People v Battle, 2025 NY Slip Op 03584
(2nd Dept 6/11/2025)
POSSESSION OF A WEAPON - Dagger

LASJRP: The Second Department rejects defendant's contention that Penal Law §§ 265.02(1) and 265.01(2) are unconstitutionally vague on their face and as applied to him due to the absence of a statutory definition of the term "dagger." (Supreme Ct, Queens Co)

People v Emanuel, 2025 NY Slip Op 03585
(2nd Dept 6/11/2025)
OOP | NO DEFINITE EXPIRATION DATE | VACATED & REMITTED AS TO DURATION

ILSAPP: Appellant appealed from a Westchester County Supreme Court judgment convicting him of first-degree burglary, second-degree burglary, second-degree robbery, and tampering with physical evidence, upon a jury verdict. The Second Department affirmed the convictions but modified in the interest of justice by vacating the duration portions of the OOPs and remitting for new determinations on duration. The prosecution conceded that the trial court erred by not fixing definite expiration dates on the OOPs. Specifically, the trial court set the OOPs to expire on "March 3, 2041, less [appellant's] jail time credit, which is to be computed by the applicable department of correction," thereby "effectively fail[ing] to set a definite expiration date, and thus, duration, for the orders of protection." Scott M. Bishop represented Emanuel. (Supreme Ct, Westchester Co)

Matter of Makari A.H. (Letoya A.J.-H.),
2025 NY Slip Op 03569 (2nd Dept 6/11/2025)
TPR | NO PERMANENT NEGLECT | REVERSED

ILSAPP: Mother appealed from a Queens County Family Court order finding that she permanently neglected the child and terminating her parental rights. The Second Department reversed. While the agency demonstrated that it made diligent efforts to encourage and strengthen the parent-child relationship, it failed to prove by clear and convincing evidence that the mother failed to maintain contact with the child or plan for his future. The agency acknowledged the "close bond" between parent and child and that the mother consistently visited, even though the child was placed in a foster home in another borough, a subway and ferry trip ride away. While the mother was at times inconsistent with services, she completed a special needs parenting class and psychiatric evaluation, as well as maintained contact with the agency. The agency's

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reliance on an incident where the mother provided the child with candy, as well as housekeeping issues in the mother's apartment, was misplaced considering her other efforts. Richard L. Herzfeld represented Letoya A.J.-H. (Family Ct, Queens Co)

People v Martines, 2025 NY Slip Op 03588
(2nd Dept 6/11/2025)
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellant appealed from a Nassau County Supreme Court judgment convicting him of first-degree manslaughter and second-degree conspiracy, following his guilty plea. The Second Department affirmed the judgment but found the appeal waiver invalid. The court failed to ascertain whether appellant understood the nature of the appellate rights being waived or the consequences of waiving those rights and did not elicit an acknowledgement that appellant voluntarily waived his right to appeal. The oral colloquy mischaracterized the waiver as precluding appellate review of the voluntariness of the plea. Further, "there was no written waiver to supplement the deficient oral colloquy." However, the sentence was not excessive. Joseph F. DeFelice represented Martines. (Supreme Ct, Nassau Co)

Matter of Roman v Deceus, 2025 NY Slip Op 03575
(2nd Dept 6/11/2025)
FAMILY OFFENSE | FAILURE TO PRESERVE JUDICIAL BIAS ARGUMENT | AFFIRMED

ILSAPP: Appellant appealed from a Queens County Family Court order finding that she had committed the family offense of second-degree harassment and issuing a two-year order of protection. The Second Department affirmed. The mother failed to preserve her contention that Family Court was biased against her. A party wishing to do so must preserve an objection and move for recusal. (Family Ct, Queens Co)

Matter of Royal v Royal, 2025 NY Slip Op 03576
(2nd Dept 6/11/2025)
CHILD SUPPORT | IMPUTED INCOME BASED ON PAST TAX RETURN | REVERSED & REMITTED

ILSAPP: Father appealed from a Kings County Family Court order denying his objections to a Support Magistrate's order of retroactive child and spousal support. The Second Department reversed and remitted for a new determination of his support obligation. After a hearing, the Support Magistrate used the father's 2018 tax return to calculate his child and spousal support obligations from November 2018-December 2019, resulting in a total retroactive support obligation of $48,200.22. While Family Court may properly use past income to impute income to a party in a child support matter, its determination here was not supported by the record. The father was injured in a work-related incident and two car accidents during the period at issue and was unable to return to work. His only reported income during that time was approximately $10,000 in unemployment benefits. The Support Magistrate's calculation thus did not accurately reflect his income for the relevant period, making remittal for recalculation necessary. Stephen David Fink represented the father. (Family Ct, Kings Co)

Matter of Cruz v Williams, 2025 NY Slip Op 03714
(2nd Dept 6/18/2025)
CUSTODY | IMPROPER CONDITIONS ON COMMENCEMENT OF PARENTAL ACCESS | MODIFIED

ILSAPP: Father appealed from a Queens County Family Court order limiting his parental access to the parties' child to supervised therapeutic parental access and conditioning the commencement of his parental access on completion of any courses required by the therapeutic program. The Second Department modified by deleting the provision of the order conditioning father's parenting time on completion of courses required by the therapeutic program and otherwise affirmed. Although a court may "direct a party to submit to counseling or treatment as a component of a parental access or custody order," the Family Court erred by conditioning the commencement of the father's parental access on his completion of any courses required by the therapeutic program. Leighton M. Jackson represented Williams. (Family Ct, Queens Co)

People v Hires, 2025 NY Slip Op 03734
(2nd Dept 6/18/2025)
HEARSAY EXCEPTION | MEDICAL RECORDS | INADEQUATE FOUNDATION | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Suffolk Court judgment convicting him of first-degree course of sexual conduct against a child and EWC, upon a jury verdict. The Second Department affirmed the convictions but held that the complainant's medical report was improperly admitted into evidence. The medical director's testimony did not provide an adequate foundation to admit the complainant's medical report under the business records exception to hearsay. The medical director did not prepare the report, was not employed with the business at the time of complainant's examination, and "did not provide sufficient testimony concerning the period of time

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when the report was made and whether it was made in the regular course of...business at that time." Nevertheless, the error was harmless because there was overwhelming evidence of appellant's guilt, and there was "no significant probability that the error contributed to his convictions." (County Ct, Suffolk Co)

People v Mallette, 2025 NY Slip Op 03737
(2nd Dept 6/18/2025)
SURCHARGE AND FEES | MODIFIED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of petit larceny, following his guilty plea. The Second Department vacated, on consent of the prosecution, the imposition of the mandatory surcharge and fees in the interest of justice, but otherwise affirmed. CPL § 420.35(2-a) permits the waiver of surcharges and fees for individuals under 21 at the time of offense. Appellate Advocates (Alexa Askari, of counsel) represented Mallette. (Supreme Ct, Kings Co)

Matter of Martinez v Toole, 2025 NY Slip Op 03721
(2nd Dept 6/18/2025)
FAMILY OFFENSE | SINGLE VERBAL DISPUTE NOT HARASSMENT | REVERSED

ILSAPP: Appellant appealed from Orange County Family Court orders finding that she had committed the family offense of second-degree harassment and issuing a two-year order of protection, as well as granting full custody to the father and permitting him to relocate to North Carolina. The Second Department reversed the family offense orders and affirmed the custody orders. The father failed to demonstrate harassment where the only proof consisted of a single verbal dispute that he had with the mother and her husband. That argument occurred on the driveway of the father's home when the mother and her husband dropped off the child at the father's home instead of at a police station, which the father claimed was the agreed-upon exchange location. Samuel S. Coe represented Toole. (Family Ct, Orange Co)

People v Mimms, 2025 NY Slip Op 03740
(2nd Dept 6/18/2025)
DVSJA | ELIGIBILITY | AGGREGATE SENTENCE OVER 8 YEARS | SUMMARY DENIAL AFFIRMED

ILSAPP: Appellant appealed from an Orange County Court order summarily denying his resentencing motion pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (CPL § 440.47). The Second Department affirmed. Appellant was sentenced to consecutive determinate terms of imprisonment of 5 years for second-degree assault and 5 years for third-degree CPCS. To be eligible for retroactive resentencing, a DVSJA applicant must be "serving a sentence with a minimum or determinate term of eight years or more for an offense...." (CPL § 440.47[1][a]). The Second Department rejected appellant's contention that he met the eligibility requirement based on his aggregate sentence of 10 years. Citing the Fourth Department's decision in *People v Shawn G.G.*, the Second Department held that by using "sentence" and "offense" in the singular, the statute did not contemplate the 8-year minimum threshold applying to aggregate sentences. Appellant was therefore ineligible for resentencing. (County Ct, Orange Co)

Matter of Rahim v Braden, 2025 NY Slip Op 03725
(2nd Dept 6/18/2025)
CHILD SUPPORT | IMPUTED INCOME AND STATUTORY CAP | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Kings County Family Court order denying her objections to a Support Magistrate's order for an upward support modification and retroactive child support. The Second Department reversed and remitted. The Support Magistrate erred in two respects: first, by imputing over $47,000 in income to the mother that was unsupported by the record; and second, by erroneously calculating further child support over the statutory cap on combined parental income. While additional child support based on income over the statutory cap is appropriate in some circumstances—including where the child has educational or other special needs warranting an additional amount—here those circumstances were not present. The Second Department thus remitted to Family Court for a new support calculation. Braden represented herself. (Family Ct, Kings Co)

Matter of Smisek v DeSantis, 2025 NY Slip Op 03727
(2nd Dept 6/18/2025)
CUSTODY - Child's Wishes

LASJRP: The Second Department concludes that the Family Court should have modified the custody orders so as to award the mother sole legal and residential custody of the children, noting, inter alia, that the Family Court failed to give sufficient weight to the expressed preference of the children, who were 12 and 9 years old at the time the hearing concluded. (Family Ct, Nassau Co)

Matter of Stein v Stein, 2025 NY Slip Op 03752
(2nd Dept 6/18/2025)
CUSTODY MODIFICATION | RELOCATION PETITION DENIED WITHOUT A HEARING | REVERSED

ILSAPP: Mother appealed from a Suffolk County Supreme

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Court order summarily denying her motion to modify the parties' divorce judgment to permit her to relocate with the children to Connecticut, and to establish a new parental access schedule. The Second Department reversed and remitted for appointment of an AFC and for a hearing to determine whether the mother's motion should be granted. It was error to summarily deny the mother's relocation request, since the parties' submissions revealed numerous factual disputes regarding the proposed relocation, and, as the divorce judgment incorporated the parties' stipulation of settlement agreement, there was never a full hearing as to the best interests of the children. Further, "the particular circumstances of the case, including the children's ages and the nature of some of the allegations" necessitated the appointment of an attorney for the children. Barrows Levy PLLC (Matthew Grosso, of counsel) represented appellant. (Supreme Ct, Suffolk Co)

People v Wheeler, 2025 NY Slip Op 03747
(2nd Dept 6/18/2025)
SUPPRESSION | UNDULY SUGGESTIVE ID PROCEDURE | INDEPENDENT SOURCE HEARING | MODIFIED & REMITTED FOR NEW TRIAL

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree burglary and second-degree assault, upon a jury verdict. Upon remittitur from the Court of Appeals that reversed an earlier Appellate Division decision dismissing the second-degree assault charge for insufficient evidence, the Second Department modified by vacating the second-degree burglary conviction and sentence, granting appellant's motion to suppress identification evidence, and remitting for a new trial on the second-degree burglary charge, to be preceded by a hearing to determine whether an independent source existed for the complainant's identification of appellant. While the complainant's identification of appellant from a Facebook photo was not the product of a police-arranged identification procedure, the complainant's identifications of appellant "from a single arrest photograph were the result of unduly suggestive identification procedures, and those identifications should have been suppressed." The Legal Aid Society of NYC (Tomoeh Murakami Tse, of counsel) represented Wheeler. (Supreme Ct, Kings Co)

People v Cannon, 2025 NY Slip Op 03814
(2nd Dept 6/25/2025)
MOSLEY NON-EYEWITNESS TESTIMONY | CO-CONSPIRATOR HEARSAY EXCEPTION | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Nassau County Supreme Court judgment convicting him of second-degree murder, first-degree assault, and two counts of second-degree CPW, upon a jury verdict. The Second Department affirmed the convictions but held that *Mosley* identification testimony and statements made by his co-conspirator were improperly admitted. The court improvidently exercised its discretion in admitting the lay non-eyewitness testimony of two police officers identifying appellant from a surveillance video, because they lacked sufficient contact with appellant "to achieve a level of familiarity that rendered [their] opinion helpful" to the jury (see *People v Mosley*, 41 NY3d 640 [2024]). Further, it was error to admit the co-defendant's statements under the co-conspirator exception to hearsay. Nevertheless, the errors were harmless because there was overwhelming evidence of appellant's guilt, and there was "no significant probability that the error(s) contributed to [his] convictions." (Supreme Ct, Nassau Co)

People v Collins, 2025 NY Slip Op 03815
(2nd Dept 6/25/2025)
***ANDERS* | DEFICIENT BRIEF | NEW COUNSEL ASSIGNED**

ILSAPP: Appellant appealed from a Westchester County Court judgment convicting him of aggravated DWI, 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 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 the guilty plea and appeal waiver were valid and that there were no nonfrivolous issues to be raised. (County Ct, Westchester Co)

People v Cooper, 2025 NY Slip Op 03816
(2nd Dept 6/25/2025)
DELAYED DISCLOSURE OF WITNESS RECANTATION | *SANDOVAL* | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree murder (three counts) and second-degree CPW, upon a jury verdict. The Second Department affirmed. However, the court held that the prosecution had improperly delayed disclosure of a grand jury witness's recantation, which occurred months after the witness testified. Additionally, the court's *Sandoval* ruling improperly weighed whether appellant "intended to impeach the credibility of the [prosecution's] witnesses based upon those witnesses' criminal histories," which is not a "relevant factor[] to consider in making a Sandoval ruling." Nevertheless, the errors were deemed harmless where there was overwhelming evidence of appellant's guilt, and there was "no significant

Second Department *continued*

probability that the jury would have acquitted" had the errors not occurred. (Supreme Ct, Kings Co)

People v Jackson, 2025 NY Slip Op 03820
(2nd Dept 6/25/2025)
PROSECUTION APPEAL | MOTION TO DISMISS IN FURTHERANCE OF JUSTICE | REVERSED

ILSAPP: The prosecution appealed from a Westchester County Court order granting respondent's motion pursuant to CPL § 210.40(1) to "dismiss the indictment in the furtherance of justice." The Second Department reversed the order, reinstated the indictment, and remitted for further proceedings. Dismissal of an indictment in furtherance of justice "is to be exercised sparingly, in those cases where there is some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution...would constitute or result in injustice." The court "improvidently exercised its discretion in substituting its own judgment" for that of the jury by improperly weighing the strength of the prosecution's case. Further, CPL § 210.40 "is not the proper vehicle for the dismissal of an indictment" based on the court's belief that respondent "was not responsible for his conduct by reason of mental disease or defect." (County Ct, Westchester Co)

Matter of Kamani K.L., 2025 NY Slip Op 03810
(2nd Dept 6/25/2025)
ABUSE/NEGLECT - Evidence/Surveillance Video

LASJRP: The Second Department finds sufficient evidence of neglect, noting, inter alia, that the shelter director's testimony as to what an unpreserved surveillance video showed did not violate the best evidence rule, and did not implicate the hearsay rule.

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

People v Pinnock, 2025 NY Slip Op 03825
(2nd Dept 6/25/2025)
YO | APPEAL WAIVER INVALID | FAILURE TO MAKE YO DETERMINATION | SURCHARGES & FEES | MODIFIED & REMITTED

ILSAPP: Appellant appealed from a Kings County Supreme Court judgment convicting him of second-degree attempted CPW, following his guilty plea. The Second Department modified by vacating the sentence imposed and the mandatory surcharge and fees, remitted the matter for a determination as to whether appellant should be afforded youthful offender treatment, but otherwise affirmed. Appellant's purported waiver of appeal was invalid due to a truncated oral colloquy that did not ensure he understood the nature of his right to appeal. As the prosecution conceded, the court failed to make a YO determination pursuant to CPL 720.20(1), despite it being required "in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain." The Second Department expressed no opinion as to whether appellant should be afforded YO treatment. Additionally, in the interest of justice and with the prosecution's consent, the court waived appellant's mandatory surcharge and fees. Appellate Advocates (Russ Altman-Merino, of counsel) represented Pinnock. (Supreme Ct, Kings Co)

Sandiaes v Sandiaes, 2025 NY Slip Op 03833
(2nd Dept 6/25/2025)
DIVORCE | APPOINTMENT OF AFC | FORENSIC EVALUATION | REVERSED AND REMITTED

ILSAPP: Appellant appealed from a Westchester County Supreme Court order denying a pre-trial motion to appoint a new AFC for the parties' two eldest children and for a neutral or independent forensic evaluation in the parties' divorce. The Second Department reversed and remitted. Supreme Court should have granted both requests, as the children's appointed AFC failed to thoroughly ascertain the eldest child's position and circumstances prior to taking a position on physical custody, especially given the child's autism, nonverbal status, and seizure disorder. The AFC also failed to inquire about a potential conflict of interest in representing both children while advocating for 50/50 physical custody. Additionally, the court improvidently exercised its discretion by not ordering a neutral forensic evaluation given the parties' conflicting contentions and the eldest child's special needs. Dow Divorce Law, PLLC (Adelola Sheralynn Dow, of counsel) represented appellant. (Supreme Ct, Westchester Co)

People v Saravia, 2025 NY Slip Op 03827
(2nd Dept 6/25/2025)
APPEAL - Preservation/Statement Suppression Issues

LASJRP: The Second Department finds unpreserved defendant's contention that his statements should have been suppressed on the ground that the police failed to provide him with a qualified translator to aid in the administration of Miranda warnings. Defendant failed to raise the issue in his motion to suppress or otherwise raise the issue before the court. (County Ct, Suffolk Co)

People v Velasquez, 2025 NY Slip Op 03829
(2nd Dept 6/25/2025)
ORDERS OF PROTECTION | JAIL TIME CREDIT | OOPS VACATED & REMITTED AS TO DURATION

Second Department *continued*

ILSAPP: Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree attempted criminal mischief, following a guilty plea. The Second Department affirmed the conviction but exercised its interest of justice jurisdiction by vacating the OOP that had been granted in favor of a person who was neither the victim of, nor witness to, the crime to which appellant pleaded guilty, vacating the durational portions of the remaining OOPs, and remitting for new determinations as to duration. These remaining OOPs exceeded the maximum time limit pursuant to CPL § 530.12(5) and failed to consider appellant's jail-time credits. Preservation is not required because appellant had no practical ability to object where the court did not announce the duration of the OOPs at either the plea or sentencing proceedings. Appellate Advocates (Alexa Askari, of counsel) represented Velasquez. (Supreme Ct, Queens Co)

People v Walker, 2025 NY Slip Op 03830
(2nd Dept 6/25/2025)
DEFENSES - Temporary And Lawful Possession
POSSESSION OF A WEAPON

LASJRP: The Second Department concludes that the court erred by declining to instruct the jury on the defense of temporary and lawful possession of a weapon.

The Court notes, inter alia, that since the jury acquitted defendant of the charges of attempted murder, assault and attempted assault in the first degree based upon a justification defense, there was a reasonable view that defendant took possession of the gun with a valid legal excuse; that defendant's firing of a gun on a public street does not negate the entitlement to a temporary lawful possession instruction where the shooting was justified and the possession was otherwise lawful; that defendant's intent to turn the weapon over to lawful authorities is not a necessary element of the defense; and that there is no evidence that defendant retained the gun after fleeing the location of the shooting. (Supreme Ct, Kings Co)

Third Department

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

People v Bender, 236 AD3d 1184 (3rd Dept 3/20/2025)
RECKLESS ENDANGERMENT - Depraved Indifference
DISCOVERY - Notice Of Intent To Present Psychiatric Evidence/Preclusion Of Evidence

LASJRP: In a 3-2 decision, the Third Department finds legally sufficient evidence of reckless endangerment in the first degree - i.e. that defendant acted with depraved indifference to human life - where defendant, fully awake and bearing an expression of rage, drove indiscriminately along a heavily trafficked road and essentially played an extreme game of bumper cars with his fellow motorists; defendant put countless lives at risk and left serious crashes in his wake; and defendant never stopped or pulled over after any of his collisions and continued on each time, stopping only when his vehicle finally crashed into a house.

The Court finds no error in the preclusion of psychiatric evidence where, approximately a year and a half after defendant was arraigned, and five weeks before trial, defense counsel learned of a supposed connection between defendant's bipolar disorder and his sleep disorder, but no application for permission to file a late notice was made at that time and it was not until less than a week before trial, and then only in response to a motion by the People to preclude psychiatric evidence, that defendant finally cross-moved to file a late notice.

Although defense counsel asserted that he had telephoned the prosecutor upon learning the new information, any oral discussions that may have occurred did not relieve defendant of his obligation to make a formal written motion for leave to file a late notice and thus do not constitute good cause for the delay. Moreover, defendant never disclosed the nature of the anticipated testimony beyond a vague and conclusory assertion that a bipolar diagnosis played a role in defendant's sleep disorder, and defendant's proposed notice shed no light on the testimony to be offered. (County Ct, Albany Co)

[*Ed. Note:* *Leave to appeal was granted on 4/30/2025 (43 NY3d 967 [3rd Dept]).*]

People v Phelps, 236 AD3d 1194 (3rd Dept 3/20/2025)
CPL §§ 440.10 & 440.20 | DISCRETIONARY BAR INAPPLICABLE | REMITTED FOR HEARING

ILSAPP: Appellant appealed from a Montgomery County Court order denying his second CPL § 440.10 and 440.20 motion, without a hearing. The Third Department reversed the order in the interest of justice and remitted the matter to County Court for a hearing. In his first 440 motion, which was summarily denied, appellant argued that his guilty plea was not knowing, voluntary, and intelligent because counsel misadvised him about when he would become eligible for parole if he accepted the plea offer. Appellant raised the issue again in his second 440 motion, which was again summarily denied on the theory that his successive claim was procedurally barred. The Third Department held that, while CPL § 440 does not obligate a

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court to evaluate a prior ruling on the merits before summarily denying a subsequent motion advancing the same issue, that bar is discretionary rather than mandatory. This case presents one of the rare times when it is appropriate to reconsider issues previously decided on the merits. Critically, the second motion included witness affidavits affirming that counsel assured appellant that he would be eligible for parole halfway through his minimum 15-year term of imprisonment, as well as correspondence between counsel and appellant wherein counsel ignored questions on the topic. Given appellant's submissions, plus his relatively young age and inexperience with the criminal legal system, summary denial of his motion was an improvident exercise of discretion. Adam W. Toraya represented Phelps. (County Ct, Montgomery Co)

People v Powell, 236 AD3d 1239 (3rd Dept 3/27/2025)
INCLUSORY CONCURRENT COUNTS | RESTITUTION | PRESUMPTION OF VINDICTIVENESS | MODIFIED & ORDER REVERSED

ILSAPP: Appellant appealed from a Broome County Court judgment convicting him of first-degree murder and two counts of second-degree murder and from a restitution order by that same court. The Third Department modified the judgment by reversing both of appellant's convictions for second-degree murder, reversed the restitution order and, as modified, affirmed. The second-degree murder counts were inclusory concurrent counts of the first-degree murder conviction and therefore must be dismissed. The restitution order was imposed after appellant's initial appeal retrial, when the only change in circumstances was that appellant had acquired funds after incurring a personal injury while incarcerated—a change in circumstances not attributable to appellant. The trial court did not overcome the presumption of vindictiveness where it failed to place on the record the reasons for the enhanced sentence, other than finding that it was not vindictive, to order appellant "to make financially whole the representatives of his victims," facts that indisputably existed at the time of the initial sentencing. Moreover, the prosecution did not request restitution as part of appellant's initial sentence, "reinforc[ing] the perception that [appellant was], in fact, being punished for prosecuting a successful appeal of his first conviction." Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented Powell. (County Ct, Broome Co)

Matter of Casey Q. v Jeffrey O., 237 AD3d 1270 (3rd Dept 4/3/2025)
CUSTODY | FULL AND FAIR OPPORTUNITY TO BE HEARD | REVERSED & REMITTED

ILSAPP: Both parents cross-appealed from a Cortland County Family Court order dismissing the mother's custody petition. The Third Department reversed and remitted. After a 12-day contested hearing, Family Court issued a sua sponte order precluding all further testimony and directing the parties to submit written closing arguments. Family Court ultimately awarded the father sole legal custody and set forth a schedule giving the mother two days of parenting time per week. The Third Department agreed with both parents and the attorney for the child that the court improperly ended the hearing before its completion, and the parties were deprived of a full and fair opportunity to be heard. It thus remitted to Family Court for a new fact-finding hearing. Rebecca L. Konst represented Jeffrey O.; Pamela B. Bleiwas represented Casey Q. (Family Ct, Cortland Co)

Matter of Christopher MM. v Mackenzie NN., 237 AD3d 1271 (3rd Dept 4/3/2025)
CUSTODY - Relocation

LASJRP: The Third Department upholds an order that denied the mother's request for permission to relocate to Florida with the child; and directed that if the mother remains in Chemung County, the parties were to have joint legal custody with a shared parenting schedule, but, if the mother moved from Chemung County, the father was to have primary physical custody.

The mother, who had been the child's primary caretaker, was prone to hasty decision-making, and the child's presence in New York would allow the father to provide the child with a more stable environment. Although the mother sought to relocate to benefit from a strong support system in Florida, she chose to leave that behind with little to no planning soon after the child was born. Also, the supports available to the child in Florida substantially mirrored those available in New York, as the paternal grandmother who resided in the father's home was available as a reliable source of childcare, and the father's proximity to the child allowed him to intervene and offset the mother's shortcomings. The record contradicted the mother's assertion that she was willing and able to maintain contact and work to foster a positive relationship between the father and the child if she could relocate to Florida. (Family Ct, Chemung Co)

People v Franklin, 237 AD3d 1246 (3rd Dept 4/3/2025)
IAC | SINGLE ERROR | FAILURE TO OBJECT TO SANDOVAL VIOLATION | REVERSED & NEW TRIAL ORDERED

ILSAPP: Appellant appealed from a Clinton County Court judgment convicting him of second-degree robbery, second-degree criminal use of a firearm, and petit larceny. The Third Department reversed and remitted for a new trial. Defense counsel did not object when appellant's parole officer circumvented the court's Sandoval ruling precluding the introduction of appellant's past rape conviction by testifying

Third Department *continued*

that she supervised "primarily sex offenders" and confirmed that appellant was assigned to her because he was a sex offender. Defense counsel was ineffective for failing to object to this testimony or to request a limiting instruction. An appropriate objection would have been successful considering the court's Sandoval ruling and the prosecution's on-the-record affirmation that they would not solicit testimony regarding the basis for appellant's parole status. While this single error was sufficient to deprive appellant a fair trial, counsel was also ineffective for failing to object to law enforcement testimony describing interviews with individuals who refuted appellant's alibi. This testimony presented arguably inadmissible hearsay evidence. Noreen McCarthy represented Franklin. (County Ct, Clinton Co)

People v Henry, 237 AD3d 1258 (3rd Dept 4/3/2025)
RIGHT TO COUNSEL - Invocation By Defendant

LASJRP: The Third Department concludes that defendant did not invoke his right to counsel where, approximately 45 minutes into an interview, after the investigator had left the room and a different officer entered, defendant said to him, "do I need to have my lawyer come up here?" and, approximately 10 minutes later, asked, "can I get my attorney up here." (County Ct, Tompkins Co)

People v Monk, 237 AD3d 1250 (3rd Dept 4/3/2025)
IAC | CUMULATIVE EFFECT |
REVERSED & NEW TRIAL ORDERED

ILSAPP: Appellant appealed from a Tompkins County Court judgment convicting him of first-degree rape, first-degree criminal sexual act, and first-degree sexual abuse and from an order summarily denying his CPL § 440.10 motion. The Third Department reversed the judgment and order, granted appellant's motion, and remitted for a new trial. The cumulative effect of defense counsel's actions deprived appellant of meaningful representation and a fair trial. This case hinged on credibility, yet defense counsel's opening and closing statements vouched for sexual assault survivors generally and this complainant in particular. Additionally, while cross-examining a witness, counsel elicited testimony about appellant's criminal history and drug use, opening the door to those lines of questioning during appellant's cross-examination, topics otherwise precluded by the court's Sandoval ruling. Counsel also failed to object to repeated instances of prosecutorial misconduct during summation, including vouching for complainant's credibility and an attempt to "sidetrack[ ] the jury from its ultimate responsibility — determining facts relevant to guilt or innocence." Marlene O. Tuczinski represented Monk. (County Ct, Tompkins Co)

People v Richardson, 237 AD3d 1266 (3rd Dept 4/3/2025)
CPL § 440.10 | SORA REGISTRATION | THIRD-DEGREE BURGLARLY | MODIFIED

ILSAPP: Appellant appealed from an Albany County Court order denying his CPL § 440.10 motion to vacate his conviction insofar as it required him to register as a sex offender. The Third Department, in the interest of justice, granted appellant's motion, vacated the judgment, and thereafter reinstated the judgment without the provisions certifying appellant as a sex offender. Appellant had pled guilty to third-degree burglary and was apprised of his obligation to register as a sex offender upon his release from prison. Appellant did not appeal his conviction, but 10 years later he filed the instant CPL § 440.10 motion arguing that plea counsel was ineffective for failing to argue that third-degree burglary as a sexually motivated felony is not a registerable offense within the meaning of Correction Law § 168-a (2). The Third Department agreed with the 440 court that counsel was not ineffective: at the time of appellant's plea "there was no clear appellate authority supporting the argument . . . appellant claims that counsel should have made." Nonethless, citing *People v Brown*, 41 NY3d 279 (2023), the Third Department recognized appellant's "liberty interest in not being misclassified as a sex offender and required to register under SORA." In this unique circumstance, CPL § 440.10(4) provided the appropriate mechanism to vacate a judgment of conviction, make the necessary modification, and reinstate the judgment as modified. Albany Alternate Public Defender (Steven M. Sharp, of counsel) represented Richardson. (Supreme Ct, Albany Co)

People v Warr, 237 AD3d 1262 (3rd Dept 4/3/2025)
PETIT LARCENY | LESSER INCLUDED OFFENSE | MODIFIED

ILSAPP: Appellant appealed from a Chemung County Court judgment convicting him of first-degree burglary, first-degree robbery, and three counts of petit larceny. The Third Department modified the judgment by reversing one of appellant's petit larceny convictions and, as modified, affirmed. The robbery conviction was related to the forcible stealing of two rings belonging to complainant A. The petit larceny charge in count 3, which also related to the two rings stolen from complainant A, is a lesser included offense of first-degree robbery. As the prosecution conceded, the petit larceny conviction on count 3 was deemed dismissed upon appellant's conviction of the greater offense. Sandra M. Colatosti represented Warr. (County Ct, Chemung Co)

Third Department *continued*

Matter of Lawyers for Children v New York State OCFS, 2025 NY Slip Op 02115 (3rd Dept 4/10/2025)
ARTICLE 78 | HOST FAMILY HOME PROGRAM | AFFIRMED | DISSENT

ILSAPP: Appellant Lawyers for Children, Inc. appealed from a Rensselaer County Supreme Court judgment dismissing their Article 78 petition seeking review of certain regulations promulgated by respondent, the New York State Office of Children and Family Services (OCFS). The Third Department affirmed, with two justices dissenting. The new regulations created a Host Family Home Program, which allows parents to sign a "person in parental relation" designation under the General Obligations Law in lieu of formal intervention by the foster care and Family Court systems. Lawyers for Children, Inc., a nonprofit organization providing representation of children in Family Court proceedings, argued that the Host Family Home program is a "shadow voluntary foster care system" without the procedural safeguards prescribed by the Legislature for voluntary foster care placements. Appellant therefore argued that OCFS acted without legislative authority in creating the program and that the regulations conflicted with the existing statutory scheme. The Third Department held that OCFS acted properly under the four-part test set forth in *Boreali v Axelrod*, 71 NY2d 1 (1987). Two justices dissented and would have held that OCFS exceeded its authority by crossing the line from regulation into legislation. The dissenters also noted widespread opposition to the regulations and that, while other states have passed legislation permitting similar systems, New York is the only state to have done so via a regulatory scheme. (Supreme Ct, Rensselaer Co)

People v Parker, 2025 NY Slip Op 02108 (3rd Dept 4/10/2025)
ASSAULT - Terrorism

LASJRP: After the murder of George Floyd in Minneapolis, defendant was present at a protest and participated in a riot. Defendant was arrested and charged with, and was later convicted of, inter alia, attempted aggravated assault upon a police officer as a crime of terrorism.

The Third Department reverses the terrorism conviction, finding legally insufficient evidence. Defendant crossed a clear line from peaceful protest to unlawful rioting and violence, which warranted his convictions stemming from such conduct. Defendant's statements on social media and during his interview referencing the need for "change" with respect to police brutality against Black Americans is insufficient to establish that defendant intended to influence a policy rather than express his anger over his perception of pervasive racism in law enforcement across the nation. (County Ct, Albany Co)

Matter of Gearing, 237 AD3d 1403 (3rd Dept 4/17/2025)
NEGLECTED CRIMINAL APPEAL | ATTORNEY FAILED TO RESPOND TO COMMITTEE | DISBARRED

ILSAPP: The Attorney Grievance Committee for the Third Judicial Department (AGC) moved for Gearing's disbarment after Gearing failed to respond to or appear for further investigatory or disciplinary proceedings within six months from the date of his suspension. The Third Department granted AGC's motion and disbarred Gearing. Gearing was suspended following AGC's investigation of a client's complaint alleging that he had neglected a criminal appeal resulting in dismissal of that appeal. Although Gearing initially responded to the complaint, he thereafter failed to respond to subsequent requests for information and did not appear for an examination under oath. (Alison M. Coan, of counsel) represented AGC.

People v Hoyt, 237 AD3d 1360 (3rd Dept 4/17/2025)
ANTOMMARCHI | REVERSAL NOT REQUIRED WHERE NO PREJUDICE | AFFIRMED

ILSAPP: Appellant appealed from a Broome County Court judgment convicting him of first- and third-degree rape. The Third Department affirmed. Appellant was improperly excluded from bench conferences during jury selection prior to executing an Antommarchi waiver. After questioning the first jury panel, including three sidebar conferences, but prior to the lodging of challenges by either party, the court advised appellant that he had the right to come up to the bench during each and every sidebar conference throughout the trial. While appellant's exclusion from the three sidebars violated appellant's Antommarchi rights, reversal was not required because the sidebars occurred during questioning of prospective jurors who were excused by the court for cause, and thus appellant's presence "could not have afforded him or her any meaningful opportunity to affect the outcome." (County Ct, Broome Co)

People v Nesbitt, 237 AD3d 1366 (3rd Dept 4/17/2025)
DEFICIENT ANDERS BRIEF | NEW COUNSEL ASSIGNED

ILSAPP: Appellant appealed from a Schenectady County Court judgment convicting him of first-degree criminal contempt, second-degree attempted assault, and second-degree menacing. Assigned appellate counsel filed an Anders brief to withdraw. The Third Department found counsel's brief deficient, granted leave to withdraw, and assigned new counsel. The appeal is not "wholly frivolous" because there are issues of arguable merit, such as the validity of appellant's waiver of the right to appeal and whether appellant's sentence is harsh and severe. (County Ct, Schenectady Co)

Third Department *continued*

People v Williams, 237 AD3d 1377 (3rd Dept 4/17/2025)
AMENDED UNIFORM SENTENCE & COMMITMENT FORM NEEDED| AFFIRMED & REMITTED

ILSAPP: Appellant appealed from a Schenectady County Court judgment convicting him of third-degree CPCS and criminally negligent homicide. The Third Department affirmed the judgment and remitted for entry of an amended uniform sentence and commitment form. Although County Court referred to appellant as a second felony offender at sentencing, he was actually sentenced as a second felony drug offender. Accordingly, an amended uniform sentence and commitment form must be prepared accurately reflecting appellant's predicate status. (County Ct, Schenectady Co)

Matter of A. WW., 237 AD3d 1420 (3rd Dept 4/24/2025)
DISMISSAL IN FURTHERANCE OF JUSTICE

LASJRP: A three-judge Third Department majority dismisses the juvenile delinquency petition in furtherance of justice.

Attempted assault in the third degree, a class B misdemeanor, is not serious and the DSS caseworker was not seriously injured.

Respondent's character and condition is, in large part, a function of a DSS placement system that failed her in many ways on multiple occasions. Respondent was in DSS custody because her mother was deceased and her grandmother, who had adopted respondent, ultimately surrendered her rights. Respondent has a reportedly low IQ and a history of mental illness which was so severe that the Family Court ordered a capacity evaluation. Respondent had been brought to the hospital emergency room on a temporary Mental Hygiene Law § 9.41 hold, and was detained, mostly in the emergency room, under "dubious circumstances" for an "outrageous" period of six months.

Respondent already had numerous strikes against her, including her lack of a parent/guardian, her serious mental health challenges, and a previous juvenile delinquency adjudication, and this additional juvenile delinquency finding is a red flag that will undoubtedly hinder opportunities and could cause difficulty for respondent should she seek mental health assistance in the future. This petition was prosecuted because of the difficulty of placing her in a suitable setting.

As stated by the County Attorney - this is the strongest factor favoring dismissal - DSS did not "want [respondent] to be a [juvenile delinquent], but the system itself is failing. We have no other option than to make her a [juvenile delinquent] and put her with OCFS and cross our fingers that she gets the treatment she needs. [Respondent] has been in [the emergency room at the hospital] for a long time and, honest to god, I just feel like she's been failed at every turn." Despite the difficulty in placing respondent, it is not proper to leverage a juvenile delinquency proceeding to obtain a suitable placement for a hard-to-place child who is mentally ill or otherwise disabled. This case "should serve as a beacon to those empowered to find legitimate and safe psychiatric placements for those in need, such as respondent, so this scenario is not repeated."

Respondent has completed her OCFS placement and is no longer in DSS custody, and allowing the juvenile delinquency adjudication to remain serves no useful purpose.

A concurring judge would dismiss based on ineffective assistance of counsel. "Put plainly, counsel should have done what the majority does now — move to dismiss the petition in furtherance of justice...." (Family Ct, Delaware Co)

People v Santiago, 237 AD3d 1441 (3rd Dept 4/24/2025)
SORA | RIGHT TO BE PRESENT AT HEARING, 237 AD3d 1441 | INVALID WAIVER OF PRESENCE | REVERSED & REMITTED

ILSAPP: Appellant appealed from an Ulster County Court order classifying him as a level three sex offender. The Third Department reversed and remitted to County Court for a new risk level assessment hearing. Appellant's due process rights were violated because the record did not establish that he voluntarily waived his right to be present at the virtual SORA hearing. The court's statement that appellant had been "served" and did not want to be present was not supported by documentation or a statement by defense counsel that appellant was aware of his rights and the consequences of failing to appear, or that appellant had "expressed a desire to forego his presence at the hearing." Likewise, an email from DOCCS indicating that appellant waived his right to be present in court was also insufficient to establish that appellant was advised of the hearing date, his right to participate remotely, or the consequences of failing to appear or participate. Trevor W. Hannigan represented Santiago. (County Ct, Ulster Co)

People v Hooper, 238 AD3d 1207 (3rd Dept 5/1/2025)
ASSAULT - Intent

LASJRP: The Third Department reverses defendant's conviction for assault in the second degree, concluding that the trial court should have charged the lesser included offense of assault in the third degree.

Defendant began by attempting to discipline the victim but things soon escalated to the point where he was trying to injure her, including by picking her up by her throat and holding her against a wall for a few minutes, allowing her to fall to the floor

Third Department *continued*

and then slapping her. However, it was unclear whether defendant anticipated that the conscious victim would fall when he released her, and there was conflicting testimony as to whether he threw her to the floor with enough force to break her tooth or she simply took a bad fall after he let her drop. The victim's treating dentist conceded in his testimony that a tooth could accidentally break and that he had seen such injuries result from incidents as minor as "biting down on forks wrong." (County Ct, St. Lawrence Co)

Matter of Jaime T. v Ryan U., 238 AD3d 1257
(3rd Dept 5/1/2025)
VISITATION | HEARING REQUIRED | REVERSED AND REMITTED

ILSAPP: Appellant father appealed from an Albany County Family Court order partially granting the mother's motion for summary judgment, which suspended all contact between the father and the subject child. The Third Department reversed and remitted for a hearing on what contact would be in the child's best interests. While the mother demonstrated that there was no triable issue of material fact as to whether the father committed a family offense against her based on his criminal conviction for domestic violence, there remained an open question about what parenting time, if any, would be in the child's best interests. The court also reminded the parties that at the hearing, it would be the mother's burden to show that suspending all contact would be in the child's best interests, not the father's burden to show why he should have visitation. (Family Ct, Albany Co)

People v Sabb, 238 AD3d 1212 (3rd Dept 5/1/2025)
CONSECUTIVE SENTENCES IMPROPER | GUILTY PLEA | MODIFIED TO CONCURRENT | DISSENT

ILSAPP: Appellant appealed from an Albany County Supreme Court judgment convicting him of first-degree manslaughter and first-degree attempted assault and sentencing him to consecutive prison terms of 25 years and 10 years, respectively, plus 5 years' PRS. The Third Department modified by directing that the sentences run concurrently and otherwise affirmed. The charges arose from a drive-by shooting in which appellant fired into a crowd, wounding one victim and killing another. "[T]he imposition of consecutive sentences was illegal because there is no evidence in the record to suggest that the victims were wounded by separate and distinct acts"—here, pulling the trigger. The majority declined to give the prosecution the opportunity to withdraw consent to the plea because they had not argued for vacatur, but only opposed modification. Presiding Justice Egan, joined by Justice Mackey, dissented and would have affirmed the consecutive sentences because they were part of the plea agreement, appellant never objected their imposition, and he never argued that both complainants were shot with one bullet. Moreover, the presentence report, which appellant did not challenge, provided "a sufficient factual basis...to conclude that the [complainants] were wounded by different bullets...." The dissent further opined that even if the imposition of consecutive sentences was illegal, the proper remedy would be remittal "for resentencing with the opportunity for [either party] to withdraw from the plea agreement," since the prosecution did not get the benefit of the bargain. Albany Conflict Defender (Steven M. Sharp, of counsel) represented Sabb. (Supreme Ct, Albany Co)

Matter of Melissa H. v Jordan G., 238 AD3d 1296
(3rd Dept 5/8/2025)
CUSTODY AND VISITATION | SUSPENSION OF PARENTING TIME | MODIFIED & REMITTED

ILSAPP: Appellant father appealed from a Chemung County Family Court order suspending his parenting time and ordering parenting time "solely in a therapeutic/counseling setting," without a specific schedule. The Third Department modified and remitted. The drastic remedy of suspending parenting time lacked a sound and substantial basis in the record. After the child jumped out of a car on the way to the father's home and refused to visit with him, the mother filed a petition to modify custody and visitation. The child's therapist could not opine on what specifically may have triggered the child's behavior, and while a forensic exam and Lincoln hearing were discussed on the record, neither occurred. The court also repeatedly misstated testimony in its decision and relied on those misstatements to suspend visits. The Third Department reversed and remitted to Family Court for a new hearing. Lisa K. Miller represented Jordan G. (Family Ct, Chemung Co)

People v Ubrich, 238 AD3d 1273 (3rd Dept 5/8/2025)
IAC | ADVERSE POSITION | NO MINIMAL INQUIRY BY COURT | MODIFIED AND REMITTED

ILSAPP: Appellant appealed from a Schenectady County Court judgment convicting him of third-degree CPW after a guilty plea. The Third Department vacated appellant's sentence and remitted for assignment of new counsel on appellant's plea withdrawal motion and for County Court to determine whether to relieve the Public Defender (PD) and appoint substitute counsel for sentencing. After appellant expressed distrust in the PD, requested substitute counsel, and sought plea withdrawal, alleging numerous deficiencies in the PD's perfor-

Third Department *continued*

mance, including failure to account for appellant's learning disability in ensuring he understood the terms of the plea agreement, County Court appointed the Conflict Defender (CD) for the limited purpose of investigating whether IAC rendered the plea involuntary. A conflict then arose when the CD took an adverse position to appellant, stating that the plea withdrawal motion lacked merit. This stance "affirmatively undermined arguments her client wished the court to review, thereby depriving [appellant] of effective assistance of counsel." The court should have relieved the CD and assigned new counsel to represent appellant on the motion. Moreover, appellant's allegations of IAC in letters to the court set forth a plausible claim that the trust and communication between him and the PD had broken down irretrievably. This allegation triggered County Court's duty to make at least a minimal inquiry into the nature of the disagreement and its potential for resolution—a core judicial function not delegable to the CD. No such inquiry was made, requiring vacatur of the sentence and remittal for consideration of substitute counsel. In dissent, Justice Clark opined that the CD's statements did not undermine or contradict appellant's argument, but indicated a shift in his position. And because appellant did not make a proper plea withdrawal motion, his challenge to the voluntariness of his plea and the ineffective assistance of counsel claim were unpreserved. Angela Kelley represented Ubrich. (County Ct, Schenectady Co)

People v Murphy, 238 AD3d 1349 (3rd Dept 5/15/2025)
DISCOVERY - Protective Orders

LASJRP: The Third Department holds that the court erred in issuing a protective order pursuant to CPL § 245.70(3) without holding the required hearing on the People's application.

Although CPL § 245.70(1) permits a court to conduct ex parte proceedings and accept in camera submissions, this Court has advised that the better practice, in most cases, would be for the People to provide the defendant with advanced written notice, by way of motion brought on by order to show cause, that certain information has not been disclosed and a protective order is being sought. Proceeding in this manner allows defense counsel to see the portions of the People's written application that contained legal argument or other matter that would not reveal information that may be covered by the protective order. Defense counsel should be excluded from the process only to the extent necessary to preserve the confidentiality of sensitive information pending a determination by the court. And, a party seeking expedited appellate review under CPL § 245.70(6) should be given a copy of the order; thus, in drafting a protective order, the court should not discuss the protected materials or include confidential information. (County Ct, Broome Co)

People v Quarterman, 238 AD3d 1385 (3rd Dept 5/22/2025)
People v Rhodes, 238 AD3d 1383 (3rd Dept 5/22/2025)
People v Terry, 238 AD3d 1387 (3rd Dept 5/22/2025)
INVALID WAIVERS OF APPEAL | SENTENCES NOT EXCESSIVE | AFFIRMED

ILSAPP: Appellants appealed from separate Supreme and County Court judgments sentencing them following their guilty pleas. The Third Department found their appeal waivers invalid. In *Rhodes* (Fulton County Court [Hoye, J.]) and *Terry* (Saratoga County Court [Murphy III, J.]), the written waivers contained overbroad and inaccurate language and were identical to waivers the Third Department had previously found invalid. Neither waiver was remedied by County Court's brief oral colloquy. In *Quarterman* (Albany County Court [McDonough, J.]), both the oral colloquy and the written waiver used overly broad and inaccurate language regarding the appellate rights being waived. However, none of appellants' sentences were unduly harsh or severe, and their remaining arguments were found to be without merit.

People v Branton, 238 AD3d 1429 (3rd Dept 5/29/2025)
DISCOVERY - DOCCS Disciplinary Records

LASJRP: The Third Department holds that disciplinary records for the DOCCS investigator listed as a witness at trial fall outside the scope of disclosure required by CPL § 245.20(1)(k)(iv) since DOCCS is not a police or law enforcement agency for discovery purposes and thus the records are beyond the constructive possession of the People. (Supreme Ct, Albany Co)

People v Rhodenhouse, 238 AD3d 1435 (3rd Dept 5/29/2025)
SENTENCE - Probation Conditions

LASJRP: The Third Department concludes that the specialized sexual offender probation conditions imposed on defendant are unlawful because they are not reasonably related to her rehabilitation.

In the 25 years since defendant completed sex offender treatment prior to being successfully discharged from probation in Florida in September 2000, defendant has not been charged with any additional sex offenses. The criminal trespass conviction in this case did not stem from defendant entering a school, no children were present at the time of the offense (or otherwise involved or implicated in its commission), and the underlying crime was not even tangentially related to either a sex or child welfare offense. (County Ct, Chemung Co)

Third Department *continued*

Matter of Crystal NN. v Joshua OO., 2025 NY Slip Op 03368 (3rd Dept 6/5/2025)
CHILD SUPPORT | PARENTAL ALIENATION | REVERSED

ILSAPP: Appellant mother appealed from an Albany County Family Court order granting the father's motion to dismiss her petition. The Third Department reversed and remitted. The mother had filed a petition against the father, who had custody of the two children, seeking to terminate her child support obligation or for a downward modification of support based on parental alienation of the parties' younger child. At the hearing solely on the issue of parental alienation, both the mother and the older child testified about the father denigrating the mother and dissuading the children from having contact with her. In granting the father's motion to dismiss, Family Court's comments regarding witness credibility suggested that it applied the incorrect legal standard. It also erred by dismissing the case with prejudice, since the court had continuing jurisdiction over the order of child support, and by dismissing the remaining relief sought by the mother without a hearing. Amanda FiggsGanter represented Crystal NN. (Family Ct, Albany Co)

Matter of Heather F. v Matthew G., 2025 NY Slip Op 03376 (3rd Dept 6/5/2025)
CUSTODY & VISITATION MODIFICATION | MOTION TO DISMISS| REVERSED & REMITTED

ILSAPP: Appellant mother appealed from a Schenectady County Family Court order granting the father's motion to dismiss her custody modification petition. The Third Department reversed and remitted for further proceedings. Family Court erred in dismissing the modification petition, where the petition set forth sufficient allegations that, if proven at a hearing, could have supported a modification of the existing order. The father, who lived in California, had parenting time with the child on the east coast, which he had chosen to exercise in New Hampshire—160 miles from the child's home. The mother's petition asked that the east coast parenting time occur within 40 miles of the child's home, so that the mother could have agreed-to mealtime visits with the child to alleviate concerns about her separation anxiety. The mother should have been given the benefit of a favorable inference allowing her petition to be heard. Sandra M. Colatosti represented Heather F. (Family Ct, Schenectady Co)

People v Partak, 2025 NY Slip Op 03360 (3rd Dept 6/5/2025)
***ANDERS* BRIEF | REJECTED | NONFRIVOLOUS APPELLATE ISSUE | NEW COUNSEL ASSIGNED**

ILSAPP: Appellant appealed from a Saratoga County Court judgment convicting him of fourth-degree grand larceny. Assigned counsel filed an *Anders* brief to withdraw. The Third Department granted counsel's motion to withdraw but rejected the *Anders* brief and assigned new appellate counsel. At least one nonfrivolous issue exists regarding whether the execution of the waiver of indictment complied with the requirements of CPL § 195.20. (County Ct, Saratoga Co)

People v Rivera, 2025 NY Slip Op 03362 (3rd Dept 6/5/2025)
MIRANDA | INVOCATION OF RIGHT TO REMAIN SILENT | HARMLESS ERROR | AFFIRMED

ILSAPP: Appellant appealed from an Albany County Supreme Court judgment convicting him of second-degree burglary. The Third Department affirmed. Police violated appellant's right to remain silent when they continued to interrogate him after he unequivocally invoked his right to remain silent. An audiovisual recording of appellant's interview with police established that a detective read appellant his rights and appellant replied that he understood them and was willing to proceed. Thereafter, appellant actively engaged in discussions with the detective and answered his questions. Later in the interview, however, appellant did unequivocally invoke his right to remain silent, and at that point the police were required to stop. The error was harmless because there was overwhelming proof of appellant's guilt, and appellant's statements after invocation "were, for the most part, exculpatory." Therefore, there was no reasonable possibility that the error contributed to his conviction. (Supreme Ct, Albany Co)

People v Shaw, 2025 NY Slip Op 03358 (3rd Dept 6/5/2025)
INVOLUNTARY PLEA | COURT'S SENTENCING ERROR | PRESERVATION NOT REQUIRED | REVERSED

ILSAPP: Appellant appealed from a Warren County Court judgment convicting him of third-degree CSCS (three counts), third-degree CPCS (four counts), second-degree criminally using drug paraphernalia (two counts), and EWC, and from an order of said court, which denied appellant's CPL §§ 440.10 and 440.20 motions, without a hearing. Finding the plea involuntary, the Third Department reversed appellant's conviction, remitted the matter to County Court, and dismissed the appeal from the order denying appellant's 440.10 and 440.20 motions as academic. The court's repeated statements to appellant that he faced up to 36 years in prison were legally erroneous, because the aggregate sentence would be statutorily capped at 30 years. Appellant's plea was involuntary given his record statements demonstrating that his sentencing exposure played a decisive role in his decision to plead guilty." Preservation was not required because, as the COA recently

Third Department *continued*

held in *People v Scott* (2025 NY Slip Op 01562), where "the court provides [appellant] with erroneous information concerning their maximum sentencing exposure that is contrary to the undisputed text of the Penal Law, fails to correct its error on the record, and [appellant] has no apparent reason to question the accuracy of that information, [appellant] need not preserve a challenge to the voluntariness of the guilty plea on that ground." The Third Department declined to endorse appellant's additional argument that County Court also misadvised him with regard to the potential of a life sentence as a persistent felony offender. The court noted that neither the Third Department nor the Court of Appeals has explicitly adopted the Fourth Department's holding in *People v Boykins*, 161 AD3d 183 (4th Dept 2018), lv denied, 31 NY3d 1145 (2018), that the Drug Law Reform Act precludes courts from sentencing as PFO's people convicted of qualifying drug felonies. Rural Law Center of New York, Inc., (Keith F. Schockmel, of counsel) represented Shaw. (County Ct, Warren Co)

People v Suprunchik, 2025 NY Slip Op 03364
(3rd Dept 6/5/2025)
SEARCH AND SEIZURE - Plain View

LASJRP: The Third Department orders suppression, concluding that the plain view exception to the search warrant requirement does not apply where only the back end of defendant's vehicle was visible from the street, and it was necessary for the deputy to walk up the driveway in order to see the incriminating evidence on the front of the vehicle; by that point he had entered onto and conducted a search in an area where defendant had a reasonable expectation of privacy due to posted "No Trespassing" and "Private Property" signs. (County Ct, Cortland Co)

Matter of Tyler T. v Brianna W., 2025 NY Slip Op 03369
(3rd Dept 6/5/2025)
CUSTODY | CONSENT ORDER | NO FINDING OF EXTRAORDINARY CIRCUMSTANCES | REVERSED & REMITTED

ILSAPP: Father appealed from a Delaware County Family Court order dismissing his initial custody petition and petition to modify a prior consent order of custody between the subject child's mother, the mother's husband, and the maternal grandmother. The Third Department reversed and remitted "for an expedited hearing on the father's initial custody petition to address the issue of whether the maternal grandmother has established extraordinary circumstances and, if so, what custody arrangement is in the best interests of the child." A nonparent petitioning for custody has the burden of demonstrating extraordinary circumstances before a court may consider what custody arrangement is in the best interest of the child, and a prior consent order to which a parent was not a party cannot bypass this requirement. Family Court erred by making no determination that the maternal grandmother had demonstrated extraordinary circumstances that warranted: (1) granting her emergency temporary custody of the child after the mother left her in her care, despite the father's pending establishment of paternity proceeding; (2) dismissing the father's initial custody petition that he filed along with DNA test results confirming his paternity, because the maternal grandmother, mother, and husband all entered into an order of custody on consent without naming the father as a party; and (3) dismissing the father's modification of custody petition because he was not a party to the consent order.

Given the limited record before the court, the Third Department declined to determine whether extraordinary circumstances existed and remitted for a hearing. Lisa K. Miller represented Tyler T. (Family Ct, Delaware Co)

People v Olsen, 2025 NY Slip Op 03604
(3rd Dept 6/12/2025)
SENTENCE - Crimes Of Acquittal

LASJRP: After trial in this attempted murder prosecution, defendant was found guilty of third-degree criminal possession of a weapon. The sentencing court stated that this was not a simple criminal possession of a weapon case in that defendant testified that he purchased the weapon in Pennsylvania with a large-capacity ammunition device and later discharged it at a vehicle. The court concluded, from defendant's own testimony, that this was "the definition of reckless behavior" as defendant admitted that he knew there were people in the vehicle. The court stated that the fact that defendant was upset, went out of state to make the purchase and then discharged it is "what makes it bad." The court clarified that it was "not going to consider any of the issues that the jury acquitted [defendant] on" and that "[h]e's presumed innocent, but he sat there and told me what he did with that gun that he'd bought 12 hours earlier."

The Third Department concludes that the court did not improperly consider evidence relevant to the crimes of which defendant was acquitted. Instead, the court referenced the facts surrounding the crime of conviction. (County Ct, Sullivan Co)

Matter of Peterkin v New York State Dept. of Corr. & Community Supervision, 2025 NY Slip Op 03617
(3rd Dept 6/12/2025)
ARTICLE 78 | HALT ACT VIOLATION | DETERMINATION CONFIRMED

Third Department *continued*

ILSAPP: Petitioner commenced this Article 78 proceeding seeking review of a determination of respondent Commissioner of Corrections and Community Supervision finding petitioner guilty of violating certain prison disciplinary rules and imposing a penalty of 730 days (two years) in the Special Housing Unit (SHU). The Third Department confirmed that the disciplinary violation was based on sufficient evidence, but found that the penalty of 730 days in SHU violated the Humane Alternatives to Long-Term Solitary Confinement (HALT) Act. Correction Law § 137(6)(i)(i) provides, with certain exceptions, that "[n]o person may be placed in segregated confinement for longer than necessary and no more than [15] consecutive days. Nor shall any person be placed in segregated confinement for more than [20] total days within any [60-] day period." As conceded by the Attorney General (AG), petitioner's 730-day SHU penalty violated the HALT Act. Although petitioner's challenge was moot, since—after serving approximately one year in solitary confinement—petitioner had been released from the SHU, the Third Department invoked the exception to the mootness doctrine. The matter was "likely to be repeated" and would "typically evade review" given DOCCS' position that hearing officers can impose "maximum recommendations" beyond the limitations set forth in the HALT Act. The court rejected this stance: "Hearing officers have no authority to disregard the HALT Act's statutory limitations and requirements by substituting their own judgment and imposing penalties beyond those which the law allows—for whatever reason.... To the extent this unlawful practice is continuing, it must cease." Roger V. Archibald represented Peterkin.

People v Gouge, 2025 NY Slip Op 03664
(3rd Dept 6/18/2025)
APPEAL WAIVER INVALID | INSUFFICIENT EXPLANATION OF APPELLATE RIGHTS | AFFIRMED

ILSAPP: Appellant appealed from a Warren County Court judgment (Hall, J.) convicting him of aggravated family offense (five counts), fourth-degree criminal mischief, second-degree harassment, third-degree assault, aggravated criminal contempt, and second-degree criminal contempt (three counts). The Third Department found the appeal waiver invalid, but otherwise affirmed. The written waiver of appeal was overbroad, and County Court's "terse oral colloquy" was insufficient to ensure that appellant understood that some appellate issues survived the waiver. Rural Law Center of New York, Inc. (Kristin A. Bluvas, of counsel) represented Gouge. (County Ct, Warren Co)

People v Harrigan, 2025 NY Slip Op 03669
(3rd Dept 6/18/2025)
ILLEGAL SENTENCE | NO OPPORTUNITY TO WITHDRAW PLEA | VACATED & REMITTED

ILSAPP: Appellant appealed from a Clinton County Court judgment convicting her of second-degree conspiracy. The Third Department modified by vacating the sentence and remitting the matter to County Court to afford appellant the opportunity to move to withdraw her guilty plea or for the court to fashion a remedy honoring the sentencing promise. Here, appellant pled guilty and was promised a sentence of 10 years' imprisonment plus 5 years' PRS, which the court imposed. DOCCS later advised the court that an indeterminate sentence was required, with a maximum of between 9 and 25 years and, as appellant was a second felony offender, a minimum to be one-half the maximum, i.e., 4 1/2 to 12 1/2 years. Subsequently, the court resentenced appellant to 8 to 16 years' imprisonment, without expressly affording her an opportunity to withdraw her guilty plea. The court should have either afforded appellant an opportunity to withdraw her guilty plea, which, if she declined, would permit imposition of a lawful sentence, or "reduce[d] the sentence or the crime charged so that the sentence upon which the plea bargain was based can be legally imposed," thereby honoring the sentencing promise. Erin C. Morigerato represented Harrigan. (County Ct, Clinton Co)

Matter of Juan Z., 2025 NY Slip Op 03674
(3rd Dept 6/18/2025)
DISPOSITION - Restitution

LASJRP: The Third Department concludes that the Family Court erred in ordering restitution where respondent pleaded to a charge that did not include allegations of property damage and did not admit to any allegations related to property damage during his allocution and there was no recorded agreement to accept an admission in exchange for restitution on all charges.

The record merely reflects the possibility of a future hearing to determine if "any" restitution would be ordered if the parties could not agree. (Family Ct, Tompkins Co)

People v Martin, 2025 NY Slip Op 03842
(3rd Dept 6/26/2025)
STATUTES - Retroactivity
SEARCH AND SEIZURE - Probable Cause/Cannabis

LASJRP: Penal Law § 222.05(3)(a) - enacted as part of the Marihuana Regulation and Taxation Act - provides that no finding or determination of reasonable cause to believe a crime has been committed shall be based solely on evidence of the odor of cannabis."

In a 3-2 decision, the Third Department, addressing a

Third Department *continued*

question left open in People v. Pastrana (41 N.Y.3d 23), holds that this provision applies to a post-enactment suppression hearing concerning a pre-enactment search. The provision is directed at the present evidentiary findings of a court, and no real question of retroactive effect on past conduct or events is presented. (County Ct, Washington Co)

Fourth Department

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

Matter of Jonathan M. v Jessica N., 236 AD3d 1360 (4th Dept 3/14/2025)
PATERNITY - Equitable Estoppel

LASJRP: In this paternity proceeding, the Fourth Department rejects petitioner's contention that the Family Court erred in applying equitable estoppel where petitioner was aware of the possibility that he could be the child's father because of his sexual relations with the mother but nonetheless waited nearly four years after the child's birth before commencing this proceeding, during which time a strong, positive father-daughter relationship between the child and respondent developed, of which petitioner was also aware.

The mother's deception with respect to the child's paternity does not bar application of the doctrine of equitable estoppel. The determination whether equitable estoppel should be applied depends entirely on the best interests of the child and not the equities between the adults. (Family Ct, Monroe Co)

Matter of Lachenauer v Lachenauer, 236 AD3d 1309 (4th Dept 3/14/2025)
CUSTODY - Extraordinary Circumstances
VISITATION - Delegation Of Authority

LASJRP: The Fourth Department upholds an order awarding the step-grandmother primary physical custody and awarding the mother supervised visitation with the child as the parties mutually agree.

The finding of extraordinary circumstances is supported by evidence that the mother, inter alia, put the child at risk when she drove while intoxicated with the child in her car, struck the child with a lacrosse stick and bit him, verbally abused the child, repeatedly sent the child to live with the step-grandmother for prolonged periods of time, and failed to get appropriate substance abuse and mental health treatment.

Although a court cannot delegate its authority to determine visitation to either a parent or a child, it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances. (Family Ct, Jefferson Co)

People v Iqbal, 236 AD3d 1476 (4th Dept 3/21/2025)
STRANGULATION

LASJRP: The Fourth Department reverses defendant's conviction for assault in the third degree and strangulation in the second degree where the trial court admitted testimony from a police officer who responded to the scene that, in prior, unspecified cases, he had taken photographs "once or twice" of complainants who had "alleged strangulations," and that he could not recall having observed bruises on those other complainants. This irrelevant testimony was used by the People to explain that the lack of marks on the neck of the victim in the present case did not mean that defendant did not strangle her. (County Ct, Monroe Co)

Matter of Jose M.F., 236 AD3d 1465 (4th Dept 3/21/2025)
MAKING A TERRORISTIC THREAT

LASJRP: The Fourth Department finds legally insufficient evidence of making a terroristic threat where respondent sent private messages to another student in a different school district stating that respondent was planning to commit a mass shooting to end bullying in his school. There was no evidence that those threats were made to anyone other than the student or that respondent requested that the student relay the threats to others. This evidence failed to establish the element of intent to intimidate a civilian population. (Family Ct, Seneca Co)

People v Linda R.M., 236 AD3d 1488 (4th Dept 3/21/2025)
DVSJA | FAILURE TO REQUEST 60.12 HEARING NOT IAC | AFFIRMED

ILSAPP: Appellant appealed from a Wayne County Court judgment convicting her of first-degree manslaughter after a plea. The Fourth Department affirmed. Defense counsel's failure to request a hearing to determine eligibility for an alternative sentence at initial sentencing under the DVSJA, was not ineffective assistance. The record reflected that, as part of the plea agreement, the parties agreed to a sentence commensurate to what appellant could have received under the DVSJA. The court noted that, to the extent appellant alleged IAC regarding the plea negotiation, that claim must be raised via CPL § 440 motion. (County Ct, Wayne Co)

People v Meyers, 236 AD3d 1499 (4th Dept 3/21/2025)
RECONSTRUCTION HEARING | AFFIRMED | DISSENT

ILSAPP: Appellant appealed from a Steuben County Court

Fourth Department *continued*

judgment convicting him of first-degree arson and first-degree murder. The Fourth Department affirmed, with the Presiding Justice dissenting. Upon an earlier appeal from the conviction, the Fourth Department remitted for a reconstruction hearing, since large portions of the record were missing, including: "three days of jury selection, opening statements, summations, final jury instructions, County Court's handling of a jury note, and the verdict," as well as portions of witnesses' testimony replaced with irregularities like "omitted," "untranscribable," and "blah blah." Following a reconstruction hearing and second appeal, the Fourth Department affirmed the conviction. Presiding Justice Whalen would have reversed and granted a new trial based on the inadequate procedures at the reconstruction hearing. County Court did not specifically list the transcripts to be reconstructed, nor did it determine whether the evidence submitted was sufficient to construct a record that would protect the right to appeal. The prosecution also refused to provide defense counsel with copies of or access to the original trial exhibits, and County Court's denial of the defense's motion for those items deprived appellant of the right to a fair hearing. (County Ct, Steuben Co)

People v Nateonna R., 236 AD3d 1491 (4th Dept 3/21/2025)
DVSJA | INSUFFICIENT EVIDENCE THAT ABUSE WAS A CONTRIBUTING FACTOR | AFFIRMED

ILSAPP: Appellant appealed from an Erie County Supreme Court judgment convicting her of first-degree manslaughter after a plea and denying her relief under the DVSJA at initial sentencing under PL § 60.12. The Fourth Department affirmed. Assuming that the appeal waiver did not encompass denial of DVSJA sentencing, the court reached the merits of the DVSJA claim, holding that the defense failed to establish that the abuse was a significant contributing factor to the criminal conduct. (Supreme Ct, Erie Co)

Matter of Nedia M. v Ashley M., 236 AD3d 1460
(4th Dept 3/21/2025)
PERMANENCY HEARINGS - Permanency Goal
- Age-Appropriate Consultation With Child
KINSHIP GUARDIANSHIP

LASJRP: The Fourth Department upholds an order appointing the paternal aunt as a kinship guardian, rejecting respondent mother's contention that the Family Court lacked subject matter jurisdiction because the guardianship petitions were filed at a time when the permanency goal in each child's FCA Article Ten-A proceeding was return to parent rather than referral for legal guardianship.

The court held a joint permanency and guardianship hearing and determined that referral for guardianship was an appropriate permanency goal and that there were compelling reasons why return to parent was not an appropriate goal. The evidence established that the children would be at risk of neglect if returned to the mother because of her ongoing relationship with respondent father despite the danger he posed to the children, and because of her refusal to substantiate that she was no longer using drugs.

The court satisfied the requirement that it hold an age-appropriate consultation with the children by eliciting the children's wishes from the attorney for the children. (Family Ct, Onondaga Co)

Matter of Passero v Patcyk, 236 AD3d 1487
(4th Dept 3/21/2025)
VISITATION | PROHIBITION ON VISITS IN FATHER'S HOME | REVERSED

ILSAPP: Father appealed from an Erie County Family Court order prohibiting him from exercising visitation with the children at his residence. The Fourth Department reversed. The order lacked a sound and substantial basis in the record. Although two of the three children were allergic to horses, which the father had on his property, there was insufficient evidence that the children could not safely visit if precautions were taken. The mother's medical expert's opinion—that the children must strictly avoid horse allergens—was based on inaccurate information that the children were taken to urgent care as the result of an allergic reaction to horses. Caitlin M. Connelly represented the father. (Family Ct, Erie Co)

Matter of Seeley-Sick v Allison, 236 AD3d 1478
(4th Dept 3/21/2025)
VISITATION - Conditions

LASJRP: The Fourth Department agrees with the mother that the court erred in ordering, as a condition of visitation, that she either participate in domestic violence counseling or cease to reside with her husband. The matter is remitted for the court to fashion a specific and definitive schedule for visitation, if any, between the mother and the children. (Family Ct, Livingston Co)

Matter of Thayer v Darling, 236 AD3d 1485
(4th Dept 3/21/2025)
CUSTODY - Relocation Issues

LASJRP: The Fourth Department affirms an order granting primary physical residence of the children to the mother on the condition that she relocate from North Carolina back to Wayne County or any contiguous county in New York State, noting, inter alia, that where an order following an initial custody hearing includes a requirement conditioning physical residence on a parent's return to the geographic area where the parties resided, it should be upheld where, as here, it has a sound and substantial basis in the record. (Family Ct, Wayne Co)

Fourth Department *continued*

Matter of Maliah B. 236 AD3d 1352 (4th Dept 4/14/2025)
ABUSE/NEGLECT - Leaving Children Alone

LASJRP: The Fourth Department finds sufficient evidence of neglect where the mother left the four children, then eight, seven, four and three years old, unattended at home for at least one hour, only partially clothed and in a dirty and disheveled state, in a dirty house. (Family Ct, Erie Co)

Matter of Arcuri v Rubin, 237 AD3d 1575
(4th Dept 4/25/2025)
CHILD SUPPORT VIOLATION | WILLFULNESS | REVERSED & VACATED

ILSAPP: A parent appealed from an Oneida County Family Court order finding him in willful violation of his child support obligation and sentencing him to 20 days in jail. The Fourth Department reversed, denied the petition, and vacated the order of commitment. Family Court "erred in focusing only on [appellant's] failure to pay, particularly in the past, instead of whether he was presently able to work and make the required payments" and should not have found that appellant's failure to pay child support was willful. Appellant presented competent, credible evidence that he was unable to meet his child support obligation because he had been hospitalized for various medical conditions, and his physical disabilities prevented him from maintaining employment. Further, appellant received public assistance and had met the medical criteria to receive disability payments from the Social Security Administration. Todd G. Monahan represented Rubin. (Family Ct, Oneida Co)

People v Burns, 237 AD3d 1559 (4th Dept 4/25/2025)
ILLEGAL CONVICTION | REVERSED AND DISMISSED

ILSAPP: Appellant appealed from two Onondaga County Court judgments convicting him of two counts of second-degree CPW under two separate indictments. The Fourth Department reversed his conviction under the first appeal and dismissed that indictment. Appellant did not plead guilty to any count of that indictment and that matter did not proceed to trial. Accordingly, his conviction was illegal. Hiscock Legal Aid Society (Sara A. Goldfarb, of counsel) represented Burns. (County Ct, Onondaga Co)

People v Burrows, 237 AD3d 1481 (4th Dept 4/25/2025)
30.30 | VALID COC | AFFIRMED | CONCURRENCE

ILSAPP: Appellant appealed from a Monroe County Supreme Court judgment convicting him of second-degree CPW and second-degree menacing. The Fourth Department affirmed. The court determined that the prosecution's COC was valid, because the prosecution exercised due diligence and made reasonable efforts to ascertain the existence of discovery materials. Justice Whalen concurred in the result but disagreed with the majority's conclusion that the prosecution had no obligation to make reasonable inquiries to ascertain the names and contact information of several witnesses who were depicted on surveillance footage inside the convenience store when appellant was arrested. While the prosecution need not "ascertain the existence of witnesses" not known to law enforcement (CPL 245.20[1][c]), where the existence of witnesses is known, the prosecution has an obligation to ascertain their names and contact information. Here, the prosecution knew that several of the witnesses depicted on the surveillance footage had "evidence or information relevant to any offense charged" (CPL 245.20[1][c]): specifically, the prosecution had statements from the store owner and the complainant, as well as the arresting officer's police report, "each of which reflect[ed] that just prior to [appellant's] arrest, the depicted store employees tackled [appellant] to the ground, locked the door, and waited for police to arrive." Since there was "no plausible argument that the store employees…did not have 'evidence or information relevant to any offense charged," the prosecution was obligated to "make a diligent, good faith effort to ascertain" the "names and adequate contact information for [those] persons." (Supreme Ct, Monroe Co)

Matter of Catherine M.C. v Matthew P.C., 237 AD3d 1552
(4th Dept 4/25/2025)
CUSTODY MODIFICATION | CHANGE IN CIRCUMSTANCES | REVERSED & REMITTED

ILSAPP: Mother appealed from a Wayne County Family Court order dismissing her custody modification petition. The Fourth Department reversed, reinstated the petition, and remitted. The mother established changed circumstances warranting an evidentiary hearing as to the children's best interests. Since the entry of the parties' custody order, the father had not exercised his supervised parenting time in over two years, and the parties' older child disclosed to the mother that he had been sexually abused by the father. Further, the child's allegations were corroborated by a court-ordered psychological evaluation. Tyson Blue represented Catherine M.C. (Family Ct, Wayne Co)

Matter of Dennimnicole H.-C., 237 AD3d 1577
(4th Dept 4/25/2025)
ABUSE/NEGLECT - Leaving Child With Acquaintance

LASJRP: The Fourth Department upholds a finding of neglect where an acquaintance - a relative stranger whose address the mother did not know - drove the mother and her then two-year-old child to a grocery store in a car without a car seat, and the mother left the child in the car with the acquaintance while she attempted to shoplift approximately $700 worth of groceries.

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The mother had outstanding warrants but was released by the police on an appearance ticket as the officers were unable to run a warrant check. (Family Ct, Erie Co)

People v Fox, 237 AD3d 1523 (4th Dept 4/25/2025)
330.30 | JUROR MISCONDUCT |
HELD & REMITTED FOR HEARING

ILSAPP: Appellant appealed from an Ontario County Court judgment convicting her of third-degree burglary. The Fourth Department held the appeal and remitted for a hearing on appellant's CPL § 330.30 motion to set aside the verdict on the grounds of juror misconduct. Sworn allegations from one juror established that two other jurors "improperly inserted specialized knowledge and experience" in an effort to influence the verdict. Although some of the juror's statements were belied by the record, her statements regarding what transpired in the jury room were not "impossible of belief" and thus, the trial court erred in denying the motion on that ground, the only reason offered by the court for denying the motion. The Fourth Department remitted the matter for the court "to rule upon any other issues raised by the [prosecution] in opposition to the motion." Bradley E. Keem represented Fox. (County Ct, Ontario Co)

Matter of Jayden M., 237 AD3d 1560 (4th Dept 4/25/2025)
TERMINATION OF PARENTAL RIGHTS - Appeal

LASJRP: In this termination of parental rights proceeding, the Fourth Department agrees with the father that the appeal should not be dismissed as untimely where the father may have been served with the order by the Family Court via email only, which is not a method of service provided for in Family Court Act § 1113. (Family Ct, Erie Co)

Matter of Jemma M., 237 AD3d 1569 (4th Dept 4/25/2025)
TERMINATION OF PARENTAL RIGHTS
- Petition/Amendment To Conform To Proof

LASJRP: In this termination of parental rights proceeding, the Fourth Department rejects the mother's contention that the court erred in sua sponte conforming the pleading to the proof by amending the one-year period stated in the petition by six days. The mother was neither surprised nor prejudiced by the amendment. (Family Ct, Onondaga Co)

People v Kellam, 237 AD3d 1520 (4th Dept 4/25/2025)
CPL § 440.10 | IAC CLAIM NOT PROCEDURALLY BARRED |
REVERSED & REMITTED FOR HEARING

ILSAPP: Appellant appealed from an Onondaga County Court order summarily denying his CPL § 440.10 motion alleging ineffective assistance of counsel. The Fourth Department reversed and remitted for a hearing on appellant's IAC claim. The motion was not procedurally barred and should not have been summarily denied on that ground. Where, as here, an IAC claim involves "mixed claims" relating to both record-based and non-record-based issues, the claim may be brought in a collateral proceeding, whether or not the appellant could have raised the claim on direct appeal. Appellant's 440 motion established that there were sufficient disputed factual questions, such as whether defense counsel had reasonable strategic reasons for, inter alia, failing to call the only witness who identified appellant as the perpetrator, despite her equivocal identification testimony at Kellam's first trial, which ended in a hung jury. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented Kellam. (County Ct, Onondaga Co)

Matter of Kim A.F. v Alexis M.B.-R., 237 AD3d 1484
(4th Dept 4/25/2025)
PATERNITY - Genetic Marker Testing/Best Interests

LASJRP: The Fourth Department rejects respondent's contention that the Family Court erred in ordering genetic marker testing, noting, inter alia, that the court properly limited her testimony regarding petitioner's alleged drug use and abusive behavior. The best interests determination with respect to genetic testing in a paternity proceeding addresses what is in the best interests of the child and not the equities between the adults and is distinct from a best interests analysis used in custody proceedings. (Family Ct, Oswego Co)

O'Brien v County of Monroe, 237 AD3d 1608
(4th Dept 4/25/2025)
CHILD VICTIMS ACT | DUTY TO PROTECT CHILDREN IN
FOSTER CARE | REVERSED

ILSAPP: Appellant appealed from a Monroe County Supreme Court decision dismissing his Child Victims Act lawsuit against Monroe County for abuse he suffered as a child in foster care.
Citing the recent Court of Appeals decision in *Weisbrod-Moore v Cayuga County* (— NY3d at —, 2025 NY Slip Op 00903 [2025]), the Fourth Department reversed and reinstated appellant's claim. Municipalities owe a duty of reasonable care to the children in their foster homes, because the municipalities have "assumed legal custody to guard" those children from "foreseeable risks of harm" stemming from their foster placement. The special duty doctrine does not apply to foster children, as the municipality's "authority to control where and with whom" foster children reside also assumes a duty of care "beyond what is owed to the public generally." Soloff & Zervanos (Brian M. Doyle, of counsel) and Thomas Legal Counselors at Law, LLC represented O'Brien. (Supreme Ct, Monroe Co)

Fourth Department *continued*

People v Reed, 237 AD3d 1490 (4th Dept 4/25/2025)
EXCESSIVE SENTENCE | SENTENCE GREATER THAN CODEFENDANT | MODIFIED | DISSENT

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of second-degree manslaughter, leaving the scene of an incident resulting in death without reporting, tampering with physical evidence, and third-degree aggravated unlicensed operation of a motor vehicle. The Fourth Department reduced the sentence in the interest of justice by imposing a sentence of 3 to 9 years' imprisonment for second-degree manslaughter; vacating the surcharge, DNA databank fee, and crime victim assistance fee; and, as modified, affirmed. Appellant, who was 18 years old, and his cousin were racing in separate vehicles, exceeding the speed limit, when appellant fatally collided with a bicyclist. Both appellant and his cousin fled the scene and appellant tried to cover up his crimes by selling the damaged vehicle to a salvage company. Nevertheless, the Fourth Department reduced appellant's sentence to the sentence received by his older cousin who, in the court's view, was no less culpable than appellant for the fatal accident and subsequent attempts to avoid apprehension. Justice Montour dissented, and would have affirmed the judgment, concluding that the mere fact that another participant in the conduct that resulted in the bicyclist's death may have received a shorter sentence does not in and of itself render appellant's sentence unduly harsh. Monroe County Public Defender (James A. Hobbs, of counsel) represented Reed. (County Ct, Monroe Co)

People v Rodriguez, 237 AD3d 1513 (4th Dept 4/25/2025)
JURY INSTRUCTIONS | CIRCUMSTANTIAL EVIDENCE | MODIFIED & REMITTED FOR NEW TRIAL

ILSAPP: Appellant appealed from an Onondaga County Court judgment convicting him of second-degree murder, second-degree attempted murder, two counts of second-degree CPW, two counts of second-degree criminal facilitation, and two counts of first-degree hindering prosecution. The Fourth Department modified by reversing appellant's convictions for second-degree murder and second-degree attempted murder, granting a new trial on those counts, and, as modified, affirmed. The trial court erred in denying appellant's request for a circumstantial evidence instruction with respect to the homicide counts, since the prosecution's case relied solely on circumstantial evidence. Appellant's statements were not direct admissions of guilt because they "merely include[ed] inculpatory acts from which a jury may or may not infer guilt." Failure to give the charge was not harmless error because the evidence of appellant's guilt was not overwhelming: for the jury to find appellant guilty of the murder counts "it had to make a number of logical leaps connecting [appellant] to those crimes]." Thus, there was a "significant probability that the jury would have acquitted . . . if the circumstantial evidence charge had been given." Jonathan Rosenberg represented Rodriguez. (County Ct, Onondaga Co)

People v Smith, 237 AD3d 1531 (4th Dept 4/25/2025)
RESENTENCE | ERROR IN CERTIFICATE OF CONVICTION MUST BE CORRECTED | AFFIRMED

ILSAPP: Appellant appealed from an order of the Erie County Supreme Court resentencing him upon his conviction of third-degree attempted rape. The Fourth Department affirmed the resentencing order but held that the certificate of conviction erroneously stated that appellant's sentence of probation was revoked because of a violation, a claim that survives even a valid appeal waiver. It must be amended to correctly state that the sentence of probation was vacated. The Legal Aid Bureau of Buffalo (Axelle Lecomte Mathewson, of counsel) represented Smith. (Supreme Ct, Erie Co)

People v Taylor, 237 AD3d 1543 (4th Dept 4/25/2025)
REQUEST TO PROCEED PRO SE | SEARCHING INQUIRY REQUIRED | REVERSED & NEW TRIAL ORDERED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of second-degree CPW and seventh-degree CPCS. The Fourth Department reversed and granted a new trial because the trial court erred in summarily denying appellant's request to proceed pro se without conducting the requisite inquiry. Before the start of trial, appellant requested to represent himself by stating "I would like to go pro se, and I would like to bring something to the [c]ourt's attention if I may, your Honor." The court initially ignored the request, but after defense counsel raised the issue twice more, the court told appellant "'[w]e are not going to address the issue of pro se. You are here with [defense counsel]' whom the court described as 'one of the most experienced defense attorneys in town.'" Because the court recognized that appellant unequivocally requested to proceed pro se, it was required to conduct a "searching inquiry" into appellant's waiver of the right to counsel. Monroe County Conflict Defender's Office (Stephanie M. Stare, of counsel) represented Taylor. (County Ct, Monroe Co)

People v Baker, 238 AD3d 1507 (4th Dept 5/2/2025)
30.30 | COC INVALID | REMITTED

ILSAPP: Appellant previously appealed from a Wayne County Court judgment convicting him of first-degree sexual abuse. The Fourth Department held the appeal in abeyance and remitted the matter to County Court to determine whether the prosecution was ready for trial within the requisite time period,

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given that the July 2022 COC was deemed invalid. On remittal, County Court found additional excludable time, concluding that the prosecution was not required to be ready by September 1, 2022, thus rendering the issue of the COC's validity academic. The Fourth Department held the instant appeal and reserved decision, remitting the matter again to County Court for a determination consistent with its prior decision, specifically addressing whether the prosecution was ready for trial within the required time frame, considering the July 2022 COC was invalid. Wayne County Public Defender (Brian Shiffrin, of counsel) represented Baker. (County Ct, Wayne Co)

People v Barnes, 238 AD3d 1509 (4th Dept 5/2/2025)
ILLEGAL SENTENCE | SECOND VIOLENT FELONY OFFENDER | VACATED & REMITTED FOR RESENTENCING

ILSAPP: Appellant appealed from a Niagara County Court judgment convicting him of attempted aggravated assault upon a police officer or a peace officer and sentencing him, as a second violent felony offender, to 16 years' imprisonment. The Fourth Department modified by vacating the sentence, otherwise affirmed, and remitted the matter to County Court for resentencing. As a second violent felony offender convicted of a class C violent felony, appellant faced a determinate sentence of between 7 and 15 years' incarceration. Thus, the 16-year sentence was illegal because it exceeded the maximum sentence permitted. Rosenberg Law Firm (Morgan Namian, of counsel) represented Barnes. (County Ct, Niagara Co)

Matter of Benjamin H., 238 AD3d 1513 (4th Dept 5/2/25)
ABUSE/NEGLECT - Allowing Neglect

LASJRP: The Fourth Department upholds a determination that the father neglected the children where he, inter alia, knew that the mother was intoxicated but failed to stop her from driving her vehicle with one of the children inside. (Family Ct, Erie Co)

People v Lipton, 238 AD3d 1504 (4th Dept 5/2/2025)
CONFESSIONS - Invocation Of Right To Remain Silent

LASJRP: The Fourth Department concludes that the hearing court erred in refusing to suppress statements defendant made during a videotaped interrogation after she told the investigators six separate times that she had nothing more to say and was done talking. Defendant's unequivocal invocations of the right to remain silent were not scrupulously honored by the investigators, who continued the interrogation as if they did not hear what defendant had said. (County Ct, Monroe Co)

People v Nathan, 238 AD3d 1516 (4th Dept 5/2/2025)
IAC | FAILED TO ADVOCATE FOR YO STATUS | HELD AND REMITTED

ILSAPP: Appellant previously appealed from a Monroe County Supreme Court judgment convicting him of first-degree manslaughter. The Fourth Department held the appeal in abeyance and remitted the matter for the court "to make and state for the record a determination whether [appellant] should be afforded youthful offender status." On this appeal, the Fourth Department again held the case, reserved decision, and remitted the matter for the court to make and state on the record a new determination of whether appellant should be afforded YO status. Appellant was denied the effective assistance of counsel on remittal because defense counsel failed to meaningfully advocate for him to be afforded YO status. Defense counsel submitted a memorandum riddled with spelling, grammatical, and syntax errors in which he requested that appellant be resentenced as an adult to a reduced term of imprisonment and an unspecified period of PRS. Counsel did not address the factors related to whether appellant should be afforded YO status and merely mentioned YO status in passing. Counsel had no strategic or legitimate basis for raising sentencing contentions that exceeded the scope of remittal and that, if accepted, would have required the court to disobey the mandate of the appellate court on remittal. Monroe County Conflict Defender (Kathleen P. Reardon, of counsel) represented Nathan. (Supreme Ct, Monroe Co)

People v Patterson, 238 AD3d 1471 (4th Dept 5/2/2025)
LEGAL SUFFICIENCY | FAILURE TO RULE ON MOTION | REMITTED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of second-degree burglary and four counts of third-degree burglary. The Fourth Department reserved decision, held the appeal in abeyance, and remitted for further proceedings. Because the trial court failed to rule on appellant's motion for a trial order of dismissal following the close of the prosecution's proof, the Fourth Department could not address appellant's legal sufficiency claim regarding his second-degree burglary conviction. The court's failure to rule on a motion cannot be deemed a denial thereof. Monroe County Public Defender (Paul Skip Laisure, of counsel) represented Patterson. (County Ct, Monroe Co)

People v Santana, 238 AD3d 1520 (4th Dept 5/2/2025)
EXCESSIVE SENTENCE | ROBBERY | YOUTH | TRAUMA HISTORY | DISPARITY WITH PLEA OFFER | MODIFIED

ILSAPP: Appellant appealed from a Monroe County Supreme Court judgment convicting him of two counts of first-degree and three counts of second-degree robbery, upon a jury verdict. Substituting its own discretion for that of the sentencing court, the Fourth Department found the imposed sentence—not

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mentioned in the opinion— unduly harsh and modified by reducing each of the first-degree robbery sentences to 10 years. Appellant suffered a traumatic upbringing, was only 20 years old at the time, and struggled with depression. In addition, the prosecution had offered a plea bargain to an aggregate sentence of 4 years' imprisonment. Monroe County Conflict Defender (Fabienne A. Santacroce, of counsel) represented Santana. (Supreme Ct, Monroe Co)

People v Taft, 238 AD3d 1494 (4th Dept 5/2/2025)
MODE OF PROCEEDINGS ERROR | ABSENCE DURING TRIAL | REVERSED

ILSAPP: Appellant appealed from a Wayne County Court judgment convicting him of second-degree burglary, second-degree assault, and third-degree intimidating a victim or witness.[] The Fourth Department reversed and granted a new trial. Where appellant appeared during jury selection but failed to reappear later that day, the court "was required to determine that his absence was deliberate in order to find that he had forfeited his right to be present." Despite the prior issuance of *Parker* warnings, the court made a mode of proceedings error by "proceed[ing] in [appellant's] absence without making a finding on the record that [his] absence was deliberate, without stating facts and reasons that would support a finding of deliberateness, and without granting an adjournment or taking other steps to locate [him]." Because appellant was absent during a material part of his trial, the error was not harmless. Banasiak Law Office, PLLC (Piotr Banasiak, of counsel) represented Taft. (County Ct, Wayne Co)

People v Vanderbilt, 238 AD3d 1483 (4th Dept 5/2/2025)
FINES | DISPARITY BETWEEN SENTENCING MINUTES AND COURT ORDER | REMITTED FOR RESENTENCING

ILSAPP: Appellant appealed from a Wayne County Court judgment convicting him of second-degree assault, resisting arrest, and reckless driving. A discrepancy between the sentencing minutes and the court's fine, fees, and surcharges order, and the certificate of disposition, required vacatur of the reckless driving sentence. The sentencing minutes reflected that the court was imposing "no fine," but the order signed by the court reflected a $100 fine. The Fourth Department vacated the reckless driving sentence and remitted to County Court for a determination of whether the sentence included a fine. (County Ct, Wayne Co)

People v Akbar, 2025 NY Slip Op 03455 (4th Dept 6/6/2025)
PROSECUTION APPEAL | APPEAL MOOT DUE TO PLEA TO REMAINING COUNTS | DISMISSED

ILSAPP: The prosecution appealed from an Erie County Court order dismissing the first three counts of an indictment. The Fourth Department dismissed the appeal as moot. Akbar pleaded guilty to the remaining counts of the indictment during the pendency of the appeal, and the parties did not contend any exception to the mootness doctrine applied. The Legal Aid Society of Buffalo (Kristin E. Markarian, of counsel) represented Akbar. (County Ct, Erie Co)

People v Harris, 2025 NY Slip Op 03419 (4th Dept 6/6/2025)
PROSECUTION APPEAL | STATUTORY DOUBLE JEOPARDY | REVERSED | DISSENT

ILSAPP: The prosecution appealed from an Erie County Court order dismissing a second-degree murder indictment on CPL § 40.40 statutory double jeopardy grounds. The Fourth Department reversed the order, denied the motion, and reinstated the indictment. County Court erred in finding that the murder prosecution was barred because it was part of the same criminal transaction as the conduct underlying Harris' previous plea to CPW charges. In that case, Harris's grandmother was found shot in the chest in her home, and Harris pled guilty to two counts of CPW after she admitted that she had been playing with guns that accidentally discharged. She was indicted and pleaded guilty to two counts of CPW. Several months later, the prosecution presented evidence to another grand jury relating to the murder charge, offering similar evidence, and additional statements made by Harris. The majority found that the conduct underlying the firearm possession counts was not part of the same transaction as the conduct underlying the murder charge, citing *People v Brown*, 21 NY3d 739 (2013) (consecutive sentences appropriate for CPW simple possession conviction and crime committed with same weapon). The dissent (Lindley, J.P.) would hold that CPL § 40.40(2) barred the murder prosecution because the charge was joinable under CPL § 200.20(2) with the firearm offenses previously charged, and the prosecution possessed legally sufficient evidence to support a murder conviction when Harris pleaded guilty to the firearm offenses; the statute prohibits the prosecution from dealing out indictments one at a time. (County Ct, Erie Co)

Matter of Jacobs v Randall, 2025 NY Slip Op 03472 (4th Dept 6/6/2025)
CUSTODY - Consent Order/Change In Circumstances

LASJRP: The Fourth Department finds no error in the Family Court's dismissal of the father's petition seeking modification of a consent order that granted the parties joint custody with "primary residential custody" to the mother.

The father failed to establish a sufficient change in circumstances. He alleged that the child, who wore a diaper, was found to have a rash in his genital area at school on a day

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that he came from the mother's house, and that the child had been slapped by the mother's daughter, causing red marks on his cheeks. Even assuming, arguendo, that the father established those allegations at the hearing, the alleged changes in circumstances were not significant enough to warrant an inquiry into the child's best interests. And, although the father testified that the child occasionally had dirty hands, fingernails and feet while in the mother's care, the alleged hygiene problems existed before the father agreed to give the mother primary physical custody.

The child has thrived under the existing custodial arrangement notwithstanding the parties' hostility toward each other, and there is no indication in the record that the relationship is worse than it was before the prior order was entered. (Family Ct, Herkimer Co)

Matter of Ja'Moure D.S., 2025 NY Slip Op 03485
(4th Dept 6/6/2025)
ABUSE/NEGLECT - Respondent/Person Legally Responsible

LASJRP: The Fourth Department concludes that, as the child's biological father, respondent is a proper respondent without regard to whether he was also a person legally responsible for the child's care at the pertinent time.

Moreover, petitioner introduced evidence that respondent received mail at the apartment where the mother and child resided, that he kept clothing at the apartment, that he watched the child while the mother left the apartment to go shopping, and that one of the child's siblings stated that respondent lived with them. (Family Court, Onondaga Co)

People v Lopez-Nunez, 2025 NY Slip Op 03451
(4th Dept 6/6/2025)
APPEAL WAIVER | OVERBROAD |
***ERLINGER* CLAIMS UNPRESERVED | AFFIRMED**

ILSAPP: Appellant appealed from a Monroe County Supreme Court judgment convicting him of attempted second-degree CPW. The Fourth Department affirmed but struck down the appeal waiver (Schiano, J.) as overly broad. The oral and written waivers mischaracterized the nature of the rights being forfeited, portraying the waiver as an absolute bar to taking an appeal and as extinguishing not only the attendant rights to counsel and poor person relief, but also to all postconviction relief. Appellant's *Erlinger* claims were not preserved where he admitted his prior convictions and did not dispute the periods of incarceration at sentencing. Appellant also failed to preserve his challenge under CPL 400.15 § (2) to the prosecution's predicate felony statement which did not list the names of the correctional facilities where he was imprisoned. Monroe County Public Defender (Guy A. Talia, of counsel) represented Lopez-Nunez. (Supreme Ct, Monroe Co)

Matter of Sky F.-M.J., 2025 NY Slip Op 03462
(4th Dept 6/6/2025)
TERMINATION OF PARENTAL RIGHTS - Discovery
- Adjournments

LASJRP: In this termination of parental rights proceeding, the Fourth Department rejects the contention of the mother and the attorney for the child that the court abused its discretion when it denied the AFC's request for an adjournment to review discovery.

The AFC did not demonstrate that the request was not based on a lack of due diligence since the ongoing obligation created by a prior Family Court Act § 1038(b) demand had long expired and the AFC failed to make a new demand. (Family Ct, Monroe Co)

People v Smith, 2025 NY Slip Op 03454 (4th Dept 6/6/2025)
WEIGHT OF THE EVIDENCE | BENCH TRIAL |
CONSTRUCTIVE POSSESSION | REVERSED & DISMISSED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him, following a nonjury trial, of seventh-degree CPCS and second-degree criminal use of drug paraphernalia. The Fourth Department reversed and dismissed the indictment, finding that the verdict was against the weight of the evidence. Drugs and paraphernalia were recovered from appellant's girlfriend's apartment, where appellant stayed on occasion, and for which he had a key. But appellant was not on the lease, the search of the apartment did not specifically connect him to the areas where the contraband was found, and none of the contraband was in plain view. Thus, no statutory presumption of knowing possession applied. Monroe County Public Defender (Sabine A. Breme, of counsel) represented Smith. (County Ct, Monroe Co)

People v Sullivan, 2025 NY Slip Op 03494
(4th Dept 6/6/2025)
***MIRANDA* | UNEQUIVOCAL INVOCATION OF RIGHT TO**
REMAIN SILENT | REVERSED | DISSENT IN PART

ILSAPP: Appellant appealed from an Onondaga County Court judgment convicting him, after a guilty plea, of second-degree unlawful imprisonment and first-degree CPCS. The Fourth Department reversed, vacated the plea, and granted the motion to suppress all statements after appellant invoked his right to remain silent. After speaking with police for several minutes and then receiving *Miranda* warnings, appellant answered "no, sir" when asked whether he would be willing to answer a detective's questions. He then said he would be willing to listen to the questions. He also wrote "no sir" on a written form asking whether he would be willing to answer questions. The interview then proceeded for another 15 minutes, during which appellant

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made several incriminating statements. After police then executed a search warrant at his home, police spoke to him again in a holding cell—ostensibly to obtain "pedigree information"—where he made additional incriminating statements. Appellant unequivocally communicated a desire to cease all questioning with his "no sir" responses, and any statements afterwards should have been suppressed. A dissenting justice (Ogden, J.) would also have suppressed the pre-*Miranda* statements, although the issue was unpreserved, because the detective's questions at that juncture were not limited to pedigree information or appellant's physical needs and were reasonably likely to elicit an incriminating response. Easton Thompson Kasperek Shiffrin LLP (Brian Shiffrin, of counsel) represented Sullivan. (County Ct, Onondaga Co)

Matter of Thomas v Osinski, 2025 NY Slip Op 03452
(4th Dept 6/6/2025)
CUSTODY | PARENTING TIME | AFFIRMED | DISSENT

ILSAPP: Mother appealed from a Cayuga County Family Court order granting the father sole legal and physical custody of the parties' child and awarding the mother visitation on alternate weekends and "any other times as can be agreed between the parties." The Fourth Department affirmed. Agreeing that the mother's parenting time—which did not specify additional visitation on holidays and school breaks and instead left it to the parties to agree upon such visitation—was "not untenable under the circumstances"—the majority further reasoned that the mother could also file a modification or enforcement petition in Family Court if she "is unable to obtain such other visitation as the parties may agree."[ ] In dissent, Justice Ogden would have modified the order by eliminating the provision providing additional visitation as can be agreed between the parties and would have remitted for Family Court to set forth specific, additional visitation for the mother. The dissent opined that the additional parenting time provision was untenable under the circumstances given the acrimonious nature of the parties' relationship. Law Office of Veronica Reed (Veronica Reed, of counsel) represented Thomas. (Family Ct, Cayuga Co)

People v Alcaraz-Ubiles, 2025 NY Slip Op 03929
(4th Dept 6/27/2025)
IDENTIFICATION - Confirmatory Identification By Witness

LASJRP: The Fourth Department agrees with defendant that the court erred in concluding that a witness's identification was merely confirmatory where the witness had either interacted with defendant twice or approximately four or five times including a couple of times at the barber shop; the witness knew defendant "not much but a little bit," knew defendant only by his nickname and not his given name; and the witness never provided a physical description or testimony supporting a conclusion that he had intensely focused on the facial or other distinctive features of the perpetrator as they rode in a vehicle together in close proximity to and from the scene of the crime. (Supreme Ct, Monroe Co)

People v Barron, 2025 NY Slip Op 03911
(4th Dept 6/27/2025)
EXCESSIVE SENTENCE | MANSLAUGHTER |
YO DENIAL AFFIRMED | SENTENCE REDUCED

ILSAPP: Appellant appealed from a Monroe County Court judgment convicting him of first-degree manslaughter, following his guilty plea. The Fourth Department modified by reducing the sentence to 12 years' imprisonment and 5 years' PRS. This was the third time the Fourth Department considered the case on appeal: the court had previously remitted to County Court for consideration of whether appellant should be afforded youthful offender (YO) status (*see People v Barron*, 206 AD3d 1687 [2022]). When YO was subsequently denied, appellant again appealed, alleging ineffective assistance of counsel at the YO sentencing proceeding, and the Fourth Department agreed, reversed, and remitted for a new YO determination (*see People v Barron*, 215 AD3d 1256 [2023]). YO was again denied. Here, the Fourth Department held that the most recent YO denial was not an abuse of discretion but found that the sentence was unduly harsh. The Monroe County Public Defender's Office (David R. Juergens, of counsel) represented Barron. (County Ct, Monroe Co)

People v Cunningham, 2025 NY Slip Op 03890
(4th Dept 6/27/2025)
SEARCH AND SEIZURE - Auto Search/Inventory

LASJRP: The Fourth Department orders suppression, concluding that the purported inventory search was a pretext to search for contraband.

The police essentially conducted two searches of defendant's vehicle following the traffic stop and detention. The first search resulted in the discovery of weapons, whereas the second search was conducted to inventory the contents and damage to the vehicle. The officers' purpose in conducting the first search was to find specific weapons in a specific vehicle possessed by a specific person - i.e., defendant. (County Ct, Erie Co)

People v Dean, 2025 NY Slip Op 03878 (4th Dept 6/27/2025)
INCLUSORY CONCURRENT COUNTS | JURY INSTRUCTED ON WRONG STANDARD | MODIFIED

ILSAPP: Appellant appealed from a Wayne County Court judgment convicting him of first-degree murder, two counts of second-degree murder, two counts of second-degree CPW, and second-degree conspiracy. The Fourth Department modified by

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reversing both of appellant's convictions for second-degree murder and one of his convictions for second-degree CPW and dismissing those counts. As the prosecution conceded, the second-degree murder counts must be dismissed because they were inclusory concurrent counts of first-degree murder. The Fourth Department also dismissed the second-degree CPW conviction under PL § 265.03(3) in the interest of justice, because the trial court mistakenly read the elements required for second-degree CPW under PL § 265.03(1)(b), thereby failing to convey to the jury the correct standard to be applied when considering that count. Wayne County Public Defender (Paul Skip Laisure, of counsel) represented Dean. (County Ct, Wayne Co)

People v Edwards, 2025 NY Slip Op 03926
(4th Dept 6/27/2025)
APPEAL WAIVER | CHALLENGE TO ENHANCED SENTENCE NOT WAIVED | AFFIRMED

ILSAPP: Appellant appealed from a Wayne County Court judgment (Williams, J.) convicting him of first-degree criminal contempt, following his guilty plea, and imposing an enhanced sentence. The Fourth Department held that the waiver of appeal did not encompass appellant's challenge to the enhanced sentence, since County Court did not advise him at the time of the plea of his sentencing exposure under a potential enhanced sentence. Nevertheless, appellant's argument that County Court abused its discretion in imposing an enhanced sentence was unpreserved, as he had neither fil[ed] a motion to withdraw the plea or a motion to vacate the judgment, and the Fourth Department declined to reduce the sentence in the interest of justice. (County Ct, Wayne Co)

People v Glover, 2025 NY Slip Op 03913
(4th Dept 6/27/2025)
EXCESSIVE SENTENCE | ASSAULT & CPW | YO DENIAL AFFIRMED | SENTENCE REDUCED

ILSAPP: Appellant appealed from a Monroe County Supreme Court judgment convicting him of first-degree assault and second-degree CPW (four counts), following his guilty plea, and sentencing him to an aggregate term of 16 years' imprisonment, plus PRS. The Fourth Department affirmed the denial of youthful offender status but modified by reducing the sentences imposed on each count to a determinate term of 13 years' imprisonment. Due to the offense date, when appellant had just turned 16 years old, this was one of the last cases in New York ineligible for removal to Family Court under Raise the Age. Monroe County Public Defender's Office (Clea Weiss, of counsel) represented Glover. (Supreme Ct, Monroe Co)

People v Lincoln, 2025 NY Slip Op 03930
(4th Dept 6/27/2025)
SORA | UPWARD DEPARTURE IMPROPER WHEN BASED ON FACTOR NOT PREVIOUSLY RAISED | REVERSED

ILSAPP: Appellant appealed from a Monroe County Court order designating him a level two under SORA. The Fourth Department reversed the order and remitted the matter to County Court for further proceedings. As the prosecution conceded, County Court violated appellant's due process rights by granting an upward departure based on a factor that was not raised in the risk assessment instrument (RAI) or by the prosecution at the hearing, i.e., appellant's employment as a youth swim coach. Monroe County Public Defender (Clea Weiss, of counsel) represented Lincoln. (County Ct, Monroe Co)

People v Loper, 2025 NY Slip Op 03921 (4th Dept 6/27/2025)
GUILTY PLEA WITHDRAWAL MOTION | OPPORTUNITY TO BE HEARD | HELD IN ABEYANCE

ILSAPP: Appellant appealed from a Steuben County Court judgment convicting him of fourth-degree grand larceny, following his guilty plea. The Fourth Department held the appeal in abeyance, reserved decision, and remitted the matter to County Court. Prior to sentencing, defense counsel told the court that appellant wished to withdraw his plea and asked the court to appoint new counsel to examine her client's application, which would require "some analysis" of defense counsel's "handling of his case." The court denied the motion without addressing counsel's concerns or permitting appellant the opportunity to speak. On remittal, the court should afford appellant "a reasonable opportunity to state the contentions in support of his motion to withdraw his guilty plea and, if appropriate, hold a hearing before deciding the motion." Alan P. Reed represented Loper. (County Ct, Steuben Co)

Over 400 people attended NYSDA's 58th Annual Meeting and Conference, many seen in this wide-angle photo of a training session. For more photos and information about the conference, see pp. 1, 13, and 14.

New York State Defenders Association
40 Beaver St., 4th Floor, Albany, NY 12207

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