Indigent Legal Services

Decisions of Interest

JANUARY 15, 2025

CRIMINAL

COURT OF APPEALS

People v Brisman | January 9, 2025 (Troutman, J.)

STANDARD OF REVIEW | EXCESSIVE SENTENCE | REVERSED & REMITTED | DISSENT

Appellant appealed from a Third Department order affirming the judgment convicting him of first-degree promoting prison contraband and sentencing him to the maximum sentence of 3 ½ to 7 years' incarceration. In a 4-3 decision, the Court of Appeals reversed the order and remitted for consideration of appellant's excessive sentence claim under the proper standard of whether the sentence is "unduly harsh or severe" (CPL 470.15 [6] [b]). This determination is committed to the intermediate appellate courts, which have "broad, plenary power" to reduce sentences "without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]). The appropriate standard "may be met by a showing of ordinary mitigating circumstances." While in this case the Third Department applied the erroneous "extraordinary circumstances or abuse of discretion" standard, the Court commended the Third Department for soon thereafter correcting course in subsequent cases, as the other Departments have also done. Judge Cannataro, in a dissent joined by Judges Garcia and Singas, found that the Third Department had not misapplied the "unduly harsh or severe" standard and that the majority's holding contradicted the Court's prior decision in *Delgado*, where the First Department—in a trio of cases affirmed there—used virtually identical language to the Third Department here. Monroe County Public Defender (Clea Weiss, of counsel) represented Brisman.

People v Brisman (2025 NY Slip Op 00123)

Oral Argument

APPELLATE DIVISION, FIRST DEPARTMENT

People v Aragon | January 7, 2025

SUPPRESSION | IMPROPER SEARCH INCIDENT TO ARREST | REVERSED AND DISMISSED

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

the cocaine. The Legal Aid Society of NYC (Frank Xiao, of counsel) represented Aragon.
People v Aragon (2025 NY Slip Op 00055)
Oral Argument (starts at 00:06:30)

People v Cintron | January 7, 2025

SORA | IMPROPER UPWARD DEPARTURE | MODIFIED

Appellant appealed from a Bronx County Supreme Court order adjudicating him a risk level two under SORA. The First Department modified to a level one, finding that the SORA court improperly granted the prosecution's request for an upward departure. The record did not provide clear and convincing evidence warranting the upward departure based on an aggravating factor not considered by the risk assessment guidelines. Appellant's alleged uncharged criminal conduct—text and social media threats to rape and kill a minor strikingly similar to those that led to the underlying conviction—while theoretically supporting an upward departure, were not established by clear and convincing evidence. Center for Appellate Litigation (Jane Merrill, of counsel) represented Citron.
People v Cintron (2025 NY Slip Op 00064)
Oral Argument (starts at 00:09:20)

People v Corley |January 9, 2025

SORA | PROSECUTION'S APPEAL | FEDERAL CHILD PORNOGRAPHY REGISTERABLE OFFENSE | REVERSED

The prosecution appealed from a New York County Supreme Court order granting a defense motion to dismiss the SORA proceeding because Corley's federal conviction for child pornography did not qualify as a registerable offense. The First Department reversed and remanded for the court to conduct the SORA hearing, finding that a federal conviction for possession of child pornography qualifies as a registerable offense in New York, despite a 2008 amendment that did not materially re-define the federal crime.
People v Corley (2025 NY Slip Op 00170)
Oral Argument (starts at 02:25:40)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Howell | January 8, 2025

SUPPRESSION | IMPROPER SEARCH INCIDENT TO ARREST | MODIFIED & VACATED

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

People v Howell (2025 NY Slip Op 00112)
Oral Argument (starts at 00:24:05)

People v Simon | January 8, 2025

SUPPRESSION | SHOWUP IDENTIFICATION | ALTERNATE JUROR SUBSTITUTION | REVERSED

Appellant appealed from a Kings County Supreme Court judgment convicting him of first-degree robbery, first-degree attempted robbery, second-degree criminal use of a firearm, second-degree CPW, fourth-degree grand larceny, and fourth-degree CPSP, upon a jury verdict. The Second Department reversed; granted appellant's motion to suppress identification evidence; dismissed the counts charging appellant with first-degree robbery, fourth-degree grand larceny, and fourth-degree CPSP; and remitted for a new trial upon the remaining counts. The court should have granted appellant's motion to suppress identification evidence because the prosecution failed to establish that the showup was conducted in close temporal proximity to the crime, and there was no unbroken chain of events or exigent circumstances justifying it. Further, the prosecution failed to establish that the showup was not unduly suggestive where police informed the complainant that they had someone in custody matching the culprit's description, appellant was handcuffed and near law enforcement at the time he was identified, police told the complainant that appellant had committed another crime nearby, and appellant's face was bruised and bleeding while standing in the active crime scene. Further, as conceded by the prosecution, a new trial is required because the court failed to obtain appellant's written and signed consent to replace a regular juror with an alternate juror after deliberations began. Appellate Advocates (Alice R.B. Cullina, of counsel) represented Simon.
People v Simon (2025 NY Slip Op 00117)
Oral Argument (starts at 00:38:15)

People v Yarbrough | January 8, 2025

CODEFENDANT | JOINTLY TRIED AND CONVICTED | REVERSED & REMITTED FOR NEW TRIAL

Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree murder and second-degree CPW, upon a jury verdict. The Second Department reversed and remitted for a new trial. Appellant and Deverow were jointly tried and convicted and, as conceded by the prosecution, appellant's judgment warrants reversal and a new trial for the same reasons stated by the Court of Appeals in reversing Deverow's conviction in *People v Deverow*, 38 NY3d 157 [2022]: namely, precluded testimony of a witness could have contradicted testimony of the sole eyewitness who negated the justification defense, a defense which could have been buttressed by precluded 911 calls. The Legal Aid Society of NYC (Arthur H. Hopkirk, of counsel) represented Yarbrough.
People v Yarbrough (2025 NY Slip Op 00118)

People v Picard | January 8, 2025

ANDERS BRIEF | NONFRIVOLOUS APPELLATE ISSUE | NEW COUNSEL ASSIGNED

Appellant appealed from two Nassau County Supreme Court judgments convicting him of second-degree CPCS and second-degree criminal possession of a forged instrument, following his guilty pleas. Appellant's counsel filed an *Anders* brief. The Second Department granted counsel's motion to withdraw and assigned new counsel. At least

one nonfrivolous issue exists regarding whether the court should have ordered an updated PSI report prior to sentencing.
People v Picard (2025 NY Slip Op 00116)

TRIAL COURTS

People v Lithgow | 2024 WL 5316283
SPEEDY TRIAL | FAILURE TO DISCLOSE POLICE MISCONDUCT RECORDS | DISMISSED
Lithgow was charged in New York County Criminal Court with operating a motor vehicle while intoxicated and impaired. He moved to dismiss the accusatory instrument on speedy trial grounds, arguing that the prosecution's COC was invalid because it failed to disclose Internal Affairs records of testifying police witnesses. The prosecution argued that it had complied with its discovery obligations because the requested records were not related to the subject matter of Lithgow's case and were not discoverable. While recognizing some disagreement among intermediate appellate courts, County Court rejected this argument as "adoption of the constricted statutory construction would disregard the legislature's intent." The prosecution is required to disclose underlying disciplinary records for substantiated and unsubstantiated allegations of misconduct against testifying law enforcement witnesses. The COC was invalid and the speedy trial motion granted. New York County Defender Services (Melissa Sopher, of counsel) represented Lithgow.
People v Lithgow (2025 NY Slip Op 24330)

FAMILY

APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Rebecca F. (Danequea J.) | January 7, 2025
NEGLECT | ISOLATED ACCIDENTAL INJURY | REVERSED
The parent appealed from a Bronx County Family Court order finding that she had neglected the subject children. The First Department reversed and dismissed the petition. While home during the pandemic, the parent, caring for three young children alone, established a daily routine that included a family naptime. During that nap one day, the seven-year-old child accidentally caused a burn to her brother's neck. The parent then called the daughter's counselor, who called the police. Later, when she was outside the building with the police, the parent argued with one of the officers when she was not allowed back into the apartment briefly to retrieve certain items. Neither of these incidents were neglect. While a single accidental injury may result in a neglect finding, here the parent exercised a minimum degree of care. There was also no showing that her argument with the police placed the children at risk of harm. Marion C. Perry represented the parent.
Matter of Rebecca F. (Danequea J.) (2025 NY Slip Op 00042)

Matter of J.V. (Hakim H.) | January 7, 2025

NEGLECT | INADEQUATE SHELTER | REVERSED

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

Matter of J.V. (Hakim H.) (2025 NY Slip Op 00072)

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Koch v Yu-Ting Tsai | January 8, 2025

PARENTAL ACCESS | MODIFIED AND REMITTED

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

Matter of Koch v Yu-Ting Tsai (2025 NY Slip Op 00097)

People v Karma-Marie W. (Jerry W.) | January 8, 2025

GUARDIANSHIP | STANDING | REVERSED

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

Matter of Karma-Marie W. (Jerry W.) (2025 NY Slip Op 00104)

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