Indigent Legal Services

Decisions of Interest

FEBRUARY 5, 2025

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v Jaswane M. | January 28, 2025

YOUTHFUL OFFENDER | FAILURE TO CONSIDER YO | REMANDED FOR RESENTENCING

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

People v Jaswane M. (2025 NY Slip Op 00405)

People v Percy | January 28, 2025

IMPROPER PROBATION CONDITION | SURCHARGES AND FEES | MODIFIED

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

People v Percy (2025 NY Slip Op 00406)

People v Tolliver | January 30, 2025

SORA | FAILURE TO STATE FACTUAL FINDINGS AND LEGAL CONCLUSIONS | HELD IN ABEYANCE

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

People v Tolliver (2025 NY Slip Op 00489)

APPELLATE DIVISION, SECOND DEPARTMENT

People ex rel. Abate v Warden | January 27, 2025

HABEAS CORPUS | REVOCATION OF SECURING ORDER | HEARING REQUIRED | WRIT SUSTAINED

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

People ex rel. Abate v Warden, Eric M. Taylor Ctr. (2025 NY Slip Op 00392)
Oral Argument (starts at 00:06:18)

People v Gallardo | January 29, 2025

WEIGHT OF THE EVIDENCE | PROSECUTORIAL MISCONDUCT AT SUMMATION | TOP COUNTS DISMISSED & NEW TRIAL ORDERED

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

People v Gallardo (2025 NY Slip Op 00460)
Oral Argument (starts at 00:08:34)

People v Rivera | January 29, 2025

SORA | DOWNWARD DEPARTURE WARRANTED | STATUTORY RAPE | REVERSED

Appellant appealed from an Orange County Court order designating him a level two sex offender under SORA. The Second Department reversed and designated him a level one. A downward departure was warranted in this case of statutory rape where the complainant's lack of consent was due only to inability to consent by virtue of age. Therefore the scoring of 25 points under risk factor 2 resulted in an over-assessment of appellant's risk to public safety, considering all of the circumstances, including the five-year age difference between appellant and complainant, appellant's overall score near the lower end of the range for a level-two designation, and the lack of any other sex-related crime in appellant's history. Samuel S. Coe represented Rivera.
People v Rivera (2025 NY Slip Op 00467)

People v Khedr | January 29, 2025

OOP | MODIFIED | OOP VACATED & REMITTED FOR DURATION DETERMINATION

Appellant appealed from a Queens County Supreme Court judgment convicting him of third-degree grand larceny following his guilty plea. The Second Department affirmed but vacated the durational portion of two OOPs and remitted for a new determination as to duration. The OOPs' durations exceeded the statutory maximum and failed to account for appellant's jail-time. Preservation was not required because appellant had no practical ability to timely object where the court did not announce the duration of the OOPs at the plea or sentencing proceedings. Appellate Advocates (Rebekah J. Pazmiño, of counsel) represented Khedr.
People v Khedr (2025 NY Slip Op 00461)

People v Stephens | January 29, 2025

INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

Appellant appealed from a Nassau County Supreme Court judgment (Harrington, J.) convicting him of third-degree grand larceny and third-degree attempted grand larceny following a guilty plea. The Second Department found the appeal waiver invalid because, while attempting to clarify a portion of the model colloquy after appellant indicated he did not understand, the court mischaracterized the nature of the right to appeal such that appellant's understanding of the appeal waiver was not evident from the record. However, appellant's sentence was not excessive. Judah Maltz represented Stephens.
People v Stephens (2025 NY Slip Op 00462)
Oral Argument (starts at 00:10:43)

People v Mendez-Saldivar | January 29, 2025

DEFICIENT *ANDERS* BRIEF | SORA | NEW COUNSEL ASSIGNED

Appellant appealed from a Suffolk County Court order designating him a level two sex offender under SORA. Appellant's assigned counsel filed an *Anders* brief to withdraw. The Second Department found counsel's *Anders* brief deficient, granted the motion to withdraw, and assigned new counsel. The brief failed "to analyze potential legal issues with reference to the facts of the case and relevant legal authority" and offered little more than a conclusory opinion that there were no nonfrivolous issues to be raised.
People v Mendez-Saldivar (2025 NY Slip Op 00465)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Contompasis | January 30, 2025

LESSER INCLUDED COUNTS | MODIFIED

Appellant appealed from an Albany County Supreme Court judgment convicting him of first-degree assault, first-degree attempted assault, second-degree assault, and third-degree CPW and sentencing him to 20 years' imprisonment and 5 years' PRS. The Third Department dismissed two counts of the indictment and otherwise affirmed. Although this argument was not raised on appeal, those two counts were lesser included counts of two others, and the trial court should have dismissed those convictions by operation of law under CPL § 300.40[3][b].

People v Contompasis (2025 NY Slip Op 00500)

Oral Argument

APPELLATE DIVISION, FOURTH DEPARTMENT

People v Tyson | January 31, 2025

PROSECUTION'S APPEAL | UNREASONABLE DELAY IN PROSECUTION | AFFIRMED

The prosecution appealed from an Erie County Court order granting a motion to dismiss the indictment based on a violation of due process rights resulting from preindictment delay. The Fourth Department affirmed. Tyson was arrested after an allegation that he threw urine at a correction officer attempting to enter his cell. He was not indicted until 14 months later, at which time he was charged with aggravated harassment of an employee by an incarcerated individual. The court analyzed the delay using the five factors relevant under *People v Taranovich*: the extent of the delay; the reason for the delay; the nature of the underlying charge; whether there has been an extended period of pretrial incarceration; and whether there was prejudice to the defense as a result. Under the circumstances here, the delay was unreasonable. Two dissenting judges would have reversed and reinstated the indictment, determining that none of the five factors weighed in Tyson's favor. The Legal Aid Bureau of Buffalo (Abigail D. Whipple, of counsel) represented Tyson.

People v Tyson (2024 NY Slip Op 00545)

Oral Argument

People v Alexander | January 31, 2025

MOLINEUX | REDUCED CHARGE REQUIRES NEW ACCUSATORY INSTRUMENT | REVERSED

Appellant appealed from a Monroe County Supreme Court judgment convicting him of second-degree and fourth-degree CPW. The Fourth Department reversed, granted a new trial on the second-degree CPW charge, and dismissed the fourth-degree CPW charge. The trial court erred in allowing evidence of appellant's alleged prior abuse of his wife, which did not fall under any of the *Molineux* exceptions allowing evidence of prior bad acts. It did not complete a narrative that would explain a motive for his sudden aggression toward his stepchildren—the sole basis for the charge—and it was unnecessary to prove intent since possession of the gun was presumptive evidence of intent to use it. The evidence was far more prejudicial than probative, and the error was not harmless. The

lesser charge must be dismissed, since the prosecution consented to its reduction from third-degree CPW but failed to file an amended accusatory instrument. Lyle T. Hajdu represented Alexander.
People v Alexander (2025 NY Slip Op 00539)
Oral Argument

People v Conley | January 31, 2025

INEFFECTIVE ASSISTANCE OF COUNSEL | SUPPRESSION | REVERSED

Appellant appealed from an Oneida County Court order denying her CPL § 440.10 motion to vacate the judgment of conviction based on ineffective assistance of counsel. The Fourth Department reversed, granted the motion, and dismissed the indictment. Appellant was convicted of first-degree manslaughter after a jury trial. During the investigation, police obtained a warrant authorizing seizure of her cell phone, which police then delivered to a cybersecurity and forensics center, discovering searches for and purchases of the poison that purportedly killed the decedent. The Fourth Department found that defense counsel failed to properly move to suppress the evidence recovered from the cell phone. While that failure was a single error during otherwise competent representation, it was sufficiently significant to compromise her right to a fair trial. Although much of the evidence later became available from another source, that was not the case when the police used the seized evidence to obtain an admission from appellant that led to further incriminating evidence. Moreover, the fact that information was obtained from appellant's cell phone was central to the prosecution's theory of the case. Cambareri & Brenneck, (Melissa K. Swartz, of counsel) represented Conley.
People v Conley (2025 NY Slip Op 00597)
Oral Argument

People v Perryman | January 31, 2025

PROSECUTION APPEAL | SUPPRESSION| AFFIRMED

The prosecution appealed from an Onondaga County Court order granting a defense motion to suppress statements and physical evidence. The Fourth Department affirmed and dismissed the indictment. During a traffic stop, police observed a plume of smoke and the odor of burnt cannabis after the driver rolled down his window. Police then ordered the driver and passenger out of the car, administered field sobriety tests, and searched the vehicle, finding narcotics. Under Penal Law § 222.05[3], the odor of burnt cannabis is insufficient, standing alone, to find reasonable cause to search a vehicle. While suspicion of impaired driving may justify a search, here there was no basis for the police to believe that the driver was impaired. At most, there was reasonable cause to believe that the driver had consumed cannabis inside the vehicle, a simple traffic infraction that would not support a search. Frank H. Hiscock Legal Aid Society (Casey S. Duffy, of counsel) represented Perryman.
People v Perryman (2025 NY Slip Op 00593)
Oral Argument

People v Scullin | January 31, 2025

PROSECUTION APPEAL | SUPPRESSION | AFFIRMED

The prosecution appealed from an Oswego County Court order granting a defense motion to suppress physical evidence seized under a search warrant. The Fourth Department affirmed and dismissed the indictment. County Court properly concluded that the search warrant was not supported by probable cause. Police witnesses testified that they retrieved marijuana leaf clippings from garbage bags that they opened outside of Scullin's home. While this type of "trash rip procedure" may be proper because of the reduced expectation of privacy in garbage left for collection outside and may support probable cause for a search warrant under some circumstances, the trial court appropriately failed to credit the police witnesses' testimony here. Police failed to take basic measures to document or retain the purported marijuana recovered from the trash, such as photographing it or the field test kit results. Piotr Banasiak represented Scullin.
People v Scullin (2025 NY Slip Op 00559)
Oral Argument

People v Hawkey | January 31, 2025

VOP | PREPONDERANCE OF THE EVIDENCE | HEARSAY | REVERSED AND REMITTED

Appellant appealed from two Cayuga County Court judgments revoking sentences of probation and imposing sentences of imprisonment. In separate orders, the Fourth Department reversed the judgments, vacated the declarations of delinquency, and remitted to County Court for further proceedings. The evidence presented at the hearing to determine whether appellant committed a criminal offense while on probation consisted entirely of hearsay testimony from a police investigator. "While hearsay is admissible at a probation revocation hearing, hearsay alone does not satisfy the requirement that a finding of a probation violation must be based upon a preponderance of the evidence." Veronica Reed represented Hawkey.
People v Hawkey (2025 NY Slip Op 00569)
People v Hawkey (2025 NY Slip Op 00573)

People v McNeal | January 31, 2025

SORA | RISK FACTOR 4 | NO COURSE OF SEXUAL MISCONDUCT ESTABLISHED | MODIFIED

Appellant appealed from a Monroe County Court order adjudicating him a level two sex offender, arising from a federal conviction for conspiracy to commit sex trafficking of a minor. The Fourth Department modified by adjudicating him a level one offender and otherwise affirmed. The SORA court improperly assessed 20 points under risk factor 4 for engaging in a continuing course of sexual misconduct. There was no evidence that appellant engaged in sexual contact with the complainant on more than one occasion. Moreover, points were not appropriate under factor 4 on a theory of accessorial liability based on sexual contact between the victim and others. The Fourth Department did not remit to give the prosecution an opportunity to request an upward departure. Rochester Public Defender (Clea Weiss, of counsel) represented McNeal.
People v McNeal (2025 NY Slip Op 00521)

People v Exford | January 31, 2025

JURY INSTRUCTIONS | CIRCUMSTANTIAL EVIDENCE | REVERSED & NEW TRIAL ORDERED

Appellant appealed from a Lewis County Court judgment convicting him of two counts of first-degree arson, four counts of second-degree murder, one count of second-degree

arson, and six counts of first-degree reckless endangerment. The Fourth Department reversed and ordered a new trial because of the court's improper refusal to grant a circumstantial evidence instruction. The strongest evidence linking appellant to the crime was a grainy video surveillance recording that depicted a flickering or glow as appellant exited the premises. There was no way to discern from the video, however, when the fire was set or precisely how it began. A court must grant a defense request for a circumstantial evidence charge when the proof of guilt rests solely on circumstantial evidence, as was the case here. Failure to give the charge was not harmless error; although "'overwhelming proof of guilt' cannot be defined with mathematical precision, it necessarily requires more evidence of guilt than proof beyond a reasonable doubt." Piotr Banasiak represented Exford.
People v Exford (2025 NY Slip Op 00536)
Oral Argument (starts at 00:50:10)

People v Hills | January 31, 2025
CPW | DOUBLE JEOPARDY | CONTINUOUS POSSESSION | COUNT DISMISSED | MODIFIED
Appellant appealed from an Onondaga County Court judgment convicting him of second-degree murder and two counts of second-degree CPW. The Fourth Department reversed appellant's conviction for second-degree CPW, dismissed that count, and, as modified, affirmed. Prosecuting appellant for gun possession violated his state and federal rights to be protected against double jeopardy. Approximately two weeks after the homicide at issue here, appellant was found in possession of a .44 caliber revolver and because of that possession, was convicted of second-degree CPW. The prosecution alleged in all their filings that the gun he used in the homicide was the same weapon he possessed two weeks later. Appellant's ongoing possession of the weapon was "the product of one continuous impulse" and not "successive and distinguishable impulses." Preservation was not required because a constitutional double jeopardy claim may be raised for the first time on appeal. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented Hills.
People v Hills (2025 NY Slip Op 00560)
Oral Argument (starts at 00:56:30)

TRIAL COURTS

People v Almonte | 2025 WL 287677
DWI | DISCOVERY | SINGLE PHOTOGRAPH | SANCTIONS CONSIDERED
Almonte was charged in Bronx County Criminal Court with DWI and related charges. Criminal Court denied the defense motion to dismiss on speedy trial grounds because the prosecution's failure to disclose a single photograph used to identify Almonte did not render the COC illusory. But the court did recognize that sanctions for the discovery violation might be appropriate and recommended that the trial court consider them. It was of no import that the prosecution did not intend to introduce the picture at trial or litigate its admissibility. Bronx Defenders (Bailey Jackson, of counsel) represented Almonte.
People v Almonte (2025 NY Slip Op 50063(U))

People v Galicia | 2025 WL 301824

SPEEDY TRIAL | COC ILLUSORY FOR FAILURE TO DISCLOSE BWC | DISMISSED

Galicia was charged in Kings County Criminal Court with second-degree assault. Criminal Court granted the defense speedy trial motion based on the prosecution's failure to disclose BWC footage. The prosecution did not exercise due diligence. BWC footage is common in domestic violence incidents and its existence would have been obvious to a reasonably diligent prosecutor. Considering the simple nature of the case, that the discovery was not voluminous, and the material remained outstanding months later, the court rejected the prosecution's claim that they had acted diligently. Criminal Court also rejected the prosecution's claim that the defense motion to contest the COC was untimely where the prosecution was alerted to its noncompliance within a month of its original disclosure. As the prosecution was not ready in the time allotted under the speedy trial statute, dismissal was required. Brooklyn Defender Services (Jenna Codignnotto, of counsel) represented Galicia.

People v Galicia (2025 NY Slip Op 50068(U))

People v Antoine | 2025 WL 311004

SPEEDY TRIAL | PROSECUTION'S DELAY INEXCUSABLE | DISMISSED

Queens County Criminal Court granted the defense motion to dismiss on speedy trial grounds. The prosecution's delay tactics were inexcusable. They disregarded the discovery deadlines without explanation and stated they were ready for trial after business hours at the speedy trial deadline, rendering a timely trial impossible. Their COC was also illusory and false as they knew they had not disclosed police records and BWC footage. The SOR was illusory and the prosecution unreasonably delayed proceedings on the speedy trial motion. Queens Defenders (Dan Friedman, of counsel) represented Antoine.

People v Antoine (2025 NY Slip Op 50080(U))

People v Sneed | 2024 WL 5361783

SPEEDY TRIAL | COC AND SOR ILLUSORY FOR FAILURE TO DISCLOSE 911 CALLS | DISMISSED

Sneed was charged in Kings County Criminal Court with third-degree assault. Criminal Court granted the defense speedy trial motion and dismissed the charges. The prosecution's COC and SOR were illusory where they failed to disclose 911 calls. In a criminal case, 911 calls are "quotidian, something for which a reasonably diligent prosecutor would be on the lookout." The defense was able to discern that the calls existed from reviewing other discovery. Criminal Court was struck by the volume of calls—five in total—that were overlooked. Such calls are of exceptionally high evidentiary value, containing statements made by the complainant, close in time to the incident. The Legal Aid Society of NYC (Nicole Pagan, of counsel) represented Sneed.

People v Sneed (2025 NY Slip Op 51836(U))

People v Gavilanes | 2025 WL 323024

ACCUSATORY INSTRUMENT | FACIAL INSUFFICIENCY | SPEEDY TRIAL | DISMISSED

Gavilanes moved to dismiss the charges against him due to the prosecution's failure to file a valid information within the 90-day speedy trial period. The information failed to provide fair notice of the location relevant to the accusations. One year after filing the initial information, the prosecution informed the defense that they would be alleging the incident occurred ten blocks away from the location originally specified. The prosecution

failed to provide adequate notice to allow the defense to prepare for trial. There was no reasonable explanation provided and the information was facially insufficient under constitutional notice provisions. The change in location could not be fairly characterized as a typographical error. As the prosecution failed to file a facially sufficient accusatory instrument within 90 days of commencing the case, dismissal was required. The Legal Aid Society of NYC (Raina Salvatore, of counsel), represented Gavilanes.
People v Gavilanes (2025 NY Slip Op 50084(U))

FAMILY

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Aaronlin Savanna R. (Anonymous) | January 29, 2025

AGENCY APPEAL | TPR | NO DILIGENT EFFORTS | AFFIRMED

The SCO Family of Services ("Agency") appealed from a Queens County Family Court order dismissing their termination of parental rights petition on the ground of permanent neglect, following a fact-finding hearing. The Second Department affirmed. Family Court properly determined that the Agency failed to establish by clear and convincing evidence that it had exercised diligent efforts to strengthen the father's parental relationship with the subject child, and that the Agency's obligation to demonstrate diligent efforts was not excused under the circumstances of the case. Diligent efforts must be made "before the court may consider whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child." Joan Iacono and Diana Kelly represented respondent parents, respectively.
Matter of Aaronlin Savanna R. (2025 NY Slip Op 00451)
Oral Argument (starts at 00:30:13)

Matter of Hanford v Hanford | January 29, 2025

CHILD SUPPORT VIOLATION | WAIVER OF RIGHTS VIA LATER AGREEMENT | MODIFIED

Appellant appealed from an order of Kings County Family Court finding that he violated the child support provisions of the parties' separation agreement and directed him to pay child support arrears in the sum of $93,612.45. The Second Department modified the order and order of disposition by deleting the provision directing the payment of arrears, remitted the matter to Family Court for a new determination as to the amount of arrears owed, and otherwise affirmed. The parties' subsequent agreement via email to reduce the amount of child support, along with the payee's acceptance of those reduced payments over the course of five years, constituted a valid and enforceable waiver of rights under the prior separation agreement. Mitey Law Firm, P.C. (Vesselin V. Mitey, of counsel) represented Appellant.
Matter of Hanford v Hanford (2025 NY Slip Op 00446)

Matter of Mitchell-George v George | January 29, 2025

FAMILY OFFENSE | INSUFFICIENT EVIDENCE OF DISORDERLY CONDUCT | AFFIRMED OOP

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

of protection. The Second Department found insufficient evidence to show that appellant committed disorderly conduct, but otherwise affirmed. Petitioner failed to establish that appellant intended to cause, or recklessly posed a risk in causing, public inconvenience, annoyance, or alarm. Helene Chowes represented Appellant.
Matter of Mitchell-George v George (2025 NY Slip Op 00449)

APPELLATE DIVISION, FOURTH DEPARTMENT

Matter of O'Dell v O'Dell | January 31, 2025
SUPERVISED VISITATION | LOCATION ISSUE | MODIFIED
Mother appealed from a Cattaraugus County Family Court order that, among other things, directed that the father's visitation would be supervised by a family friend and take place at locations determined by that individual. The Fourth Department modified by limiting the visitation locations to either in public or at the supervisor's house. Lyle T. Hajdu represented the mother.
Matter of O'Dell v O'Dell (2025 NY Slip Op 00551)
Oral Argument (starting at 02:19:06)

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