

# Decisions of Interest

NOVEMBER 13, 2024

## CRIMINAL

### APPELLATE DIVISION, SECOND DEPARTMENT

#### ***People v Frank*** | November 6, 2024

RESENTENCING | CONCURRENT SENTENCES FOR SINGULAR ACT | NOT SECOND FELONY OFFENDER

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

[People v Frank \(2024 NY Slip Op 05452\)](#)

[Oral Argument \(starts at 00:09:20\)](#)

#### ***People v Gordon*** | November 6, 2024

DEFICIENT *ANDERS* BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

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

[People v Gordon \(2024 NY Slip Op 05456\)](#)

### ***People v Stokes*** | November 6, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

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

[People v Stokes \(2024 NY Slip Op 05461\)](#)

## APPELLATE DIVISION, THIRD DEPARTMENT

### ***People v Ronsani*** | November 7, 2024

RESTITUTION | INSUFFICIENT EVIDENCE | MODIFIED

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

[People v Ronsani \(NY Slip Op 05511\)](#)

[Oral Argument](#)

### ***People v Gibbs*** | November 7, 2024

WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | SENTENCE NOT EXCESSIVE

Appellant appealed from a Warren County Court judgment convicting him after a guilty plea of second-degree attempted robbery and third-degree attempted escape and sentencing him to 6 years' imprisonment followed by 5 years of PRS. The purported waiver of appeal was invalid because the written waiver implied that it was an absolute bar to appeal, and the oral waiver failed to cure this defect by explaining the appellate rights that would survive the waiver. The Third Department declined to reduce the sentence, however, noting that the sentence was bargained for and citing appellant's "lengthy criminal history and that his actions during the robbery had a significant impact

on the store clerk.” Rural Law Center of New York (Kristin A. Bluvas, of counsel) represented Gibbs.

[People v Gibbs \(2024 NY Slip Op 05507\)](#)

***People v Hussain*** | November 7, 2024

PLEA WITHDRAWAL ATTEMPT | LIMITED TIME TO CONSULT COUNSEL | AFFIRMED

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

[People v Hussain \(2024 NY Slip Op 05513\)](#)

[Oral Argument](#)

***Matter of NYS Office of Victim Services v Johnson*** | November 7, 2024

SON OF SAM LAW | WORKERS’ COMPENSATION FUNDS | AFFIRMED

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

[Matter of NYS Off of Victim Servs v Johnson \(2024 NY Slip Op 05522\)](#)

[Oral Argument](#)

## FAMILY

### APPELLATE DIVISION, FIRST DEPARTMENT

***Matter of Muhamede J.D. v Shanie A.M.*** | November 7, 2024

NEW FACTS AFTER CUSTODY DECISION | REVERSED AND REMITTED

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

[Matter of Muhamede J.D. v Shanie A.M. \(2024 NY Slip Op 05483\)](#)

***Matter of Karl R. v Julianne M. R.*** | November 7, 2024

SPECIFIC PARENTAL ACCESS SCHEDULE | FACT-FINDING POWER OF APPELLATE DIVISION | REMITTED

The mother appealed from a New York County Family Court order granting the father custody and ordering continuation of visitation "as is." The First Department modified in part and remitted for further proceedings. Although Family Court did not make a finding regarding the mother's allegations of domestic violence, the Appellate Division used its fact-finding power to find that the mother had failed to prove those allegations by a preponderance of the evidence. The Family Court order lacked adequate specificity, however, since it did not address vacation times, access to medical and educational information, and any costs associated with the parental access, requiring remittal. Richard L. Herzfeld represented the mother.

[Matter of Karl R. v Julianne M. R. \(2024 NY Slip Op 05501\)](#)

### APPELLATE DIVISION, SECOND DEPARTMENT

***Matter of Sa'Nai F. B. M. A. (Chaniece T.)*** | November 6, 2024

TPR | DEPRIVATION OF RIGHT TO COUNSEL | REVERSED

The mother appealed from a Kings County Family Court order of fact-finding and disposition terminating her parental rights and transferring guardianship and custody of the subject child to the Commissioner of Social Services for the purpose of adoption. The Second Department reversed and remitted for a new hearing. Family Court granted an application by the mother's assigned counsel to be relieved and determined that the mother had forfeited her right to assigned counsel—her third assigned attorney—after Family Court expressed "suspicions" that the mother had been involved in a security breach of the attorney's computer. The Second Department held that the mother was

deprived of her right to counsel when she was forced to represent herself at the TPR proceedings. The record failed to show that the mother engaged in egregious conduct that, as a matter of “extreme, last resort,” would forfeit her fundamental right to counsel. Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY (Audra Soloway, Jeremy Benjamin, Michael Bass, of counsel) and NYU School of Law Family Defense Clinic Washington Sq. Legal Services (Christine Gottlieb, of counsel) represented the mother. [Matter of Sa'Nai F. B. M. A. \(Chaniece T.\) \(2024 NY Slip Op 05440\)](#)

***Matter of Llanos v Barrezueta*** | November 6, 2024

CUSTODY | CHANGE OF CIRCUMSTANCES | REVERSED

The mother appealed from a Suffolk County Family Court order denying her modification petition seeking full custody of the child. The Second Department reversed and granted the mother’s petition. The Family Court’s determination that there had been no change in circumstances lacked a sound and substantial basis in the record. Rather, the parties’ relationship had deteriorated to the point that joint custody was inappropriate: they only communicated via text and did not engage in joint decision-making. The mother also had more involvement with tending to the child’s daily and emotional needs, and Family Court failed to give sufficient weight to the 12-year-old’s strong preference to live with her mother. Salvatore C. Adamo represented the mother. [Matter of Llanos v Barrezueta \(2024 NY Slip Op 05446\)](#)

***Matter of Fortune v Jasmin*** | November 6, 2024

RELOCATION | CHILD’S POSITION NOT CONSIDERED | REVERSED AND REMITTED

Appellant appealed from an Orange County Family Court order dismissing her modification petition seeking to relocate with the child to Bergen County, New Jersey. The Second Department reversed and remitted to Family Court. Appellant presented sufficient evidence to establish a prima facie case that relocating with the child to Bergen County would be in the child’s best interests, and Family Court erred in failing to ascertain from the attorney for the child the position of the 11-year-old child or to conduct an *in camera* interview with the child. Steven N. Feinman represented appellant. [Matter of Fortune v Jasmin \(2024 NY Slip Op 05443\)](#)

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