

# Decisions of Interest

OCTOBER 4, 2021

## CRIMINAL

### FOURTH DEPARTMENT

#### ***People v Faison*** | October 1, 2021

MURDER | THEORY

The defendant appealed from a Monroe County Court judgment, convicting him of 2<sup>nd</sup> degree murder (depraved indifference, person less than 11) and other crimes. The Fourth Department reversed the murder conviction and ordered a new trial on that count. A jury instruction created the chance that the conviction was based on a theory different from the one set forth in the indictment, as amplified by the bill of particulars. The depraved indifference theory was limited to the defendant's infliction of head injuries by shaking/hitting the child. The instruction allowed the jury to also consider his inaction after the assault. The defendant did not object to testimony regarding that topic, and he testified about it himself. However, he preserved the instant issue by an objection at the charge conference. A dissenting justice would have dismissed the murder count, based on legally insufficient evidence. Danielle Wild represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05184.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05184.htm)

#### ***People v Johnson*** | October 1, 2021

DUE PROCESS | DEAL

The defendant appealed from a Supreme Court judgment, convicting him of 1<sup>st</sup> degree robbery and other crimes, upon a jury verdict. The Fourth Department reversed and ordered a new trial before a different justice. The trial court committed reversible error when it induced a plea agreement that required the codefendant to testify against the defendant for a more favorable sentence. By deviating from the role of neutral arbiter, the trial court denied the defendant his due process right to a fair trial in a fair tribunal. The Monroe County Public Defender's Office (Benjamin Nelson) represented the appellant.

#### ***People v Melendez*** | October 1, 2021

CPW | PROOF

The defendant appealed from an Onondaga County Supreme Court judgment, convicting him upon a jury verdict of seven counts of 2<sup>nd</sup> degree CPW and five counts of 3<sup>rd</sup> degree CPW. The Fourth Department modified. The verdict was against the weight of the evidence as to CPW 2, since the People presented no evidence that the firearms were

loaded when in the defendant's possession. Those counts were dismissed. Hiscock Legal Aid Society (William Pixley, of counsel) represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05196.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05196.htm)

***People v Morana*** | October 1, 2021

SORA | MITIGATION

The defendant appealed from a County Court order determining that he was a level-two SORA risk. The Fourth Department modified. Upon a plea of guilty, the defendant had been convicted of possessing a sexual performance by a child under age 16. The Board of Examiners found him a presumptive level-two risk. The guidelines did not adequately account for mitigating facts. The defendant had a congenital disease that caused disfigurement and medical issues, requiring many surgeries. As a child, he was bullied and was isolated. He had only one prior misdemeanor. He used child pornography generally when under the influence of drugs taken to quell depression. For his conviction, the defendant had been sentenced to probation. A downward departure to risk level one was ordered. Monroe County Public Defender (Timothy Davis) represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05188.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05188.htm)

***People v Minwalkulet*** | October 1, 2021

SPEEDY TRIAL | 14 YRS

The defendant appealed from an Ontario County Court judgment, convicting him of 3<sup>rd</sup> degree CPCS and endangering the welfare of a child. The Fourth Department affirmed. In 2002, when released on his own recognizance, the defendant absconded. In 2016, State Police found him when he was arrested in Pennsylvania. County Court properly denied a motion to dismiss on statutory speedy trial grounds. State Police diligently in attempting to locate the defendant. They routinely checked law enforcement databases and social media; investigated addresses associated with defendant; sought information about his whereabouts from the FBI; and interviewed his wife and mother-in-law.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05195.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05195.htm)

## FOURTH DEPARTMENT

***Marshall v Marshall*** | October 1, 2021

COUNSEL | FRIVOLOUS

The wife appealed from an order of Ontario County Supreme Court, denying her post-divorce motions to (1) “correct” the judgment by increasing maintenance, and (2) vacate the judgment under CPLR 5015 (a) (1), as to the denial of attorney’s fees. The Fourth Department affirmed, with costs. The corrective relief was not available via CPLR 2001 or 5019, which dealt with clerical/ministerial errors, not improper reasoning/conclusions. The counsel fees decision was not entered on default. The appellate court granted the husband’s request for costs and ordered the plaintiff’s attorney to pay reasonable expenses plus reasonable attorney’s fees resulting from counsel’s frivolous conduct. The appellate brief was filled with arguments devoid of merit and insupportable by any reasonable argument for a change in current law.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05194.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05194.htm)