CRIMINAL DECISIONS
(Jan. 1 to Dec. 31, 2022)

PRETRIAL

Accusatory instrument

People v Acosta
201 AD3d 596
(1st Dept) (1/27/22 DOI)
The indictment charged the defendant under Penal Law § 220.16 (1), but he pleaded guilty under subdivision (12). Since the latter offense was the same grade as the former, it was not a lesser included offense and the plea was jurisdictionally defective.
People v Acosta (2022 NY Slip Op 00509) (nycourts.gov)

People v Crumedy
203 AD3d 1240
(2nd Dept) (3/4/22 DOI)
Second degree course of sexual conduct against a child was charged. Six-year interval charged in the indictment was too long to provide sufficient notice to the defendant.
People v Crumedy (2022 NY Slip Op 01351) (nycourts.gov)

People v Solomon
203 AD3d 1468
(3rd Dept) (4/1/22 DOI)
SCI charging EWC was jurisdictionally defective. It stated that the victim was age 17 at the time of the offense, but the offense required that the victim be *less than* 17.
People v Solomon (2022 NY Slip Op 02158) (nycourts.gov)

People v Bloome
205 AD3d 1045
(2nd Dept) (5/24/22 DOI)
Burglary count was jurisdictionally defective in alleging that the defendant was "armed with a dangerous weapon, to wit: a knife." Only specified knives qualified as a deadly weapon. The People's motion to amend that count in indictment was not authorized.
People v Bloome (2022 NY Slip Op 03398)

People v Godfrey
75 Misc 3d 130 (A)
(App Term, 2nd Dept) (6/6/22 DOI)
The Information was duplicitous, since it charged one count of aggravated harassment but alleged that two offenses occurred on two distinct dates, separated by nearly one month.
People v Godfrey (2022 NY Slip Op 50432(U)

People v Flores
75 Misc 3d 130 (A)
(App Term, 2nd Dept) (6/6/22 DOI)
Guilty plea did not forfeit the issue of facial insufficiency—a jurisdictional defect. Regarding intent to use the weapon unlawfully against another, the complainant sheriff saw an imitation pistol on defendant's side.
People v Flores (2022 NY Slip Op 50431(U)

People v Hill
38 NY3d 460
(COA) (6/17/22 DOI)
The misdemeanor complaint charging 7th degree CPCS failed to allege a sufficient factual basis to conclude that the synthetic cannabinoid substance the defendant possessed was illegal. Dismissal.
People v Hill (2022 NY Slip Op 03930)

People v Michalski
206 AD3d 1443
(3rd Dept) (7/1/22 DOI)
Conviction of criminal contempt reversed, count dismissed. The waiver of indictment was invalid since the defendant had already been indicted.
People v Michalski (2022 NY Slip Op 04190)

People v Baek
207 AD3d 1086
(4th Dept) (7/1/22 DOI Pt 2)
Reversal, indictment dismissed. The sole count of the indictment charged only one offense. On its face, the indictment was not duplicitous. However, as amplified by the bill of particulars, it was. The jury heard proof about two distinct acts, with no instructions as to which act to consider when rendering a verdict.
People v Baek (2022 NY Slip Op 04263)

People v Ortega
75 Misc 3d 139 (A)
(App Term, 2nd Dept) (7/8/22 DOI)
Reversal. The accusatory instrument alleged that the arresting officer observed the defendant "seated behind the driver's seat with the engine running." Without additional factual allegations—pertaining, for example, to the position, condition, and location of the vehicle—the element of operation was not sufficiently alleged.
People v Ortega (2022 NY Slip Op 50587 U

People v Ferretti
209 AD3d 1173
(3rd Dept) (10/31/22 DOI)
Reversal. Even if generalized language in the SCI, coupled with a statutory reference, otherwise would be sufficient to allege material elements of the crime, such reference was negated by inclusion of conduct—establishing a Facebook account—that did not constitute the crime charged. The defendant had no duty to report to DCJS the mere fact that he had set up such an account.
People v Ferretti (2022 NY Slip Op 06030)

People v Mendoza
2022 NY Slip Op 06499
(2nd Dept) (11/21/22 DOI)
SCI dismissed. The defendant was charged by felony complaint with 1st degree course of sexual conduct against a child and endangering the welfare of a child. The sole charge in the SCI—2nd degree course of sexual conduct against a child—was not an offense for which he had been held for the action of a grand jury, nor was it a lesser included offense of a crime charged in the felony complaint.
People v Mendoza (2022 NY Slip Op 06499)

People v Odu
2022 NY Slip Op 07266

(3rd Dept) (12/27/22 DOI)
Reversal. The SCI charging the defendant with 3rd degree rape was jurisdictionally defective because it did not charge him with a crime for which he had been held for the action of the Grand Jury or a lesser included offense of such a crime.
People v Odu (2022 NY Slip Op 07266)

Amended indictment

People v Winston
205 AD3d 32
(1st Dept) (3/25/22 DOI)
Trial court improperly amended the indictment by replacing the defective 2nd degree offenses with the lesser included offenses of 3rd degree assault and attempted 3rd degree assault, both as hate crimes.
People v Winston (2022 NY Slip Op 02080) (nycourts.gov)

Bail

People ex rel. Rankin v Brann
201 AD3d 675
(2nd Dept) (1/14/22 DOI)
Evidentiary hearing was required under CPL 530.60 (2) (c) (before revoking order of recognizance, release under non-monetary conditions or bail, court must hold hearing and admit relevant, admissible evidence).
https://nycourts.gov/reporter/3dseries/2022/2022_00153.htm

People ex rel. Steinagle v Howard
204 AD3d 1491
(4th Dept) (5/2/22 DOI)
Habeas relief granted. The bail-fixing court failed to explain its decision on the record or in writing.
People ex rel. Steinagle v Howard (2022 NY Slip Op 02901) (nycourts.gov)

Grand jury

People v Palma
208 AD3d 801
(2nd Dept) (8/20/22 DOI)
Proper to grant defendant's motion to dismiss the indictment. The grand jury proceeding was defective because it failed to conform to the requirements of CPL Article 190 to such a degree that the integrity of the proceeding was impaired and the defendant may have been prejudiced. The People failed to provide complete information regarding the navigational laws and rules that potentially bore upon the defendant's culpability.
People v Palma (2022 NY Slip Op 05044)

People v Cain
209 AD3d 124
(3rd Dept) (9/26/22 DOI)
Based on the shackling of his hands in the presence of the grand jury, the defendant moved unsuccessfully to dismiss the indictment. The People asserted that the shackles were hidden by the table where the defendant sat. But concealing one's hands may be interpreted as having something to hide. Further, no cautionary instructions were given.
People v Cain (2022 NY Slip Op 05239)

People v Jimenez
2022 NY Slip Op 06541
(COA) (11/21/22 DOI)
The COA rejected the defendant's argument that the grand jury proceeding was seriously impaired because the prosecutor did not give a charge on justification under Penal Law § 35.05 (2). Only in rare circumstances would that "choice of evils" defense to apply. The evidence did not support the defendant's claim that he had struck a dog with a stick to avoid a potentially fatal dog-bite infection.
People v Jimenez (2022 NY Slip Op 06541)

Lineup

People v Bennett
2022 NY Slip Op 07007
(1st Dept) (12/9/22 DOI)
The defendant was deprived of his right to have counsel present at a post-indictment lineup conducted when he already had representation. The error was not harmless. Thus, the defendant was entitled to suppression of the lineup ID and a new trial, preceded by an independent source hearing regarding the witness who identified him at that lineup.
People v Bennett (2022 NY Slip Op 07007)

Motion to dismiss

People v Sovey
2022 WL 16704589
(Sup Ct) (11/21/22 DOI)
The defendant contended that the CPW2 statute was unconstitutionally applied to him, given *Bruen*. He did not lack standing just because he had not applied for a license. In a reopened hearing, he would have the ultimate burden to demonstrate that he was an "ordinary, law-abiding, adult citizen" like the plaintiffs in *Bruen*, and that he could have obtained a license but for the unconstitutional aspect of the statute.
People v Sovey (2022 NY Slip Op 22340)

Prohibition

McNair v McNamara
206 AD3d 1689
(4th Dept) (6/13/22 DOI)
DA prohibited from retrying the defendant on weapons charges. A jury trial had commenced, the jury was selected and sworn, and three witnesses testified. Then the trial judge felt sick and thought he might have Covid. Before being tested, he declared a mistrial. Jeopardy had attached. There was no manifest necessity. The judge should have considered alternatives.
McNair v McNamara (2022 NY Slip Op 03825)

Makhani v Kiesel
2022 NY Slip Op 06556
(1st Dept) (11/21/22 DOI)
Addressing an issue of first impression, the appellate court held that the AG may not criminally prosecute an individual based on an Executive Law § 63 (3) referral from the Chief Administrative Judge. Such a referral could only come from an agency within the executive branch. Prohibition was granted.
Makhani v Kiesel (2022 NY Slip Op 06556)

SUPPRESSION

Arrest warrant

People v Jones
204 AD3d 476
(1st Dept) (4/14/22 DOI)
Error to deny motion for suppression hearing regarding an arrest warrant allegedly executed in violation of CPL 120.80. The motion papers were sufficient to warrant a hearing, where the defendant's assertions were specific, and the People responded with conclusory denials. Remittal.
People v Jones (2022 NY Slip Op 02369) (nycourts.gov)

Automobile exception

People v Marcial
2022 NY Slip Op 06142
(2nd Dept) (11/4/22 DOI)
Reversal. The suppression court properly considered legal justifications supported by the evidence, even if not raised explicitly by the People. But the auto. exception did not apply. The mere fact that the defendant was driving the same vehicle identified in the I-card and in the wanted poster as having been used to flee the burglaries did not provide probable cause to conclude that the vehicle contained evidence of the burglaries.
People v Marcial (2022 NY Slip Op 06142)

Custodial interrogation

People v Corey
209 AD3d 1306
(4th Dept) (10/11/22 DOI)
The lower court erred in refusing to suppress certain statements the defendant made while in police custody without having been *Mirandized.* At the hospital, he called an officer to his bed and said, "I'm beat up." That spontaneous statement was not subject to suppression. But then the officer asked the defendant, "What happened," thereby eliciting the defendant's explanation about how he came to illegally possess a weapon.
https://nycourts.gov/reporter/3dseries/2022/2022_05646.htm

Credibility

People v Austin
203 AD3d 732
(2nd Dept) (3/4/22 DOI)
Reversal of denial of suppression. Indictment dismissed. Supreme Court did not even try to reconcile contradictory accounts of officers as to where the defendant was sitting in a minivan and what he was doing when the officers arrived. While one officer claimed that the defendant was trying to conceal a gun in a bag, ample evidence strongly suggested otherwise.
People v Austin (2022 NY Slip Op 01306) (nycourts.gov)

Emergency

People v Hunter

174 Misc 3d 131 (A)
(App Term, 2nd Dept) (3/4/22 DOI)
Emergency exception to warrant requirement applied to animals, but hearing evidence did not show that the officer had reasonable grounds to believe an emergency existed. He knew only that a 911 caller said the dogs were not being taken care of—not that there was a substantial threat of imminent danger to them.
People v Hunter (2022 NY Slip Op 50148(U)) (nycourts.gov)

Hearing

People v Fleming
201 AD3d 552
(1st Dept) (1/20/22 DOI)
Appeal held in abeyance. Remand for a *Mapp/Dunaway* hearing. In this buy-and-bust case, the factual allegations in the suppression motion were sufficient to entitle the defendant to a hearing regarding whether the arresting officer had probable cause to arrest him.
People v Fleming (2022 NY Slip Op 00360) (nycourts.gov)

People v Esperanza
203 AD3d 124
(1st Dept) (1/27/22 DOI)
The defendant made sufficient allegations—that she did not give the police consent to enter and/or search her residence and that the search violated her constitutional rights—to warrant a hearing. When the defendant made her motion, details as to the drug sale and arrest were not available to her. In addition, she could not know what information counsel needed, given that she was nearly blind, did not speak English, and had never been convicted of a crime.
People v Esperanza (2022 NY Slip Op 00383) (nycourts.gov)

Miranda

People v Abdullah
206 AD3d 1340
(3rd Dept) (6/24/22 DOI)
New trial. Error to deny suppression. The interaction between the defendant and police at a store was captured by body cameras. Four officers were present. Defendant was required to place all his personal property on the counter. One officer stood between the defendant and the store exit. Police delved into firearms the defendant may have possessed. A reasonable person would not have felt free to leave.
People v Abdullah (2022 NY Slip Op 04045)

Parolee

People v Smith
202 AD3d 1492
(4th Dept) (2/7/22 DOI)
Reversal. Searches that may be reasonable when performed by a parole officer may be unconstitutional if done by a police officer. The discovery of contraband in the defendant's vehicle was the result of a police investigator's unlawful search. When parole officers arrived, they were not pursuing parole objectives.
People v Smith (2022 NY Slip Op 00790) (nycourts.gov)

Probable cause

People v Jones

202 AD3d 821
(2nd Dept) (2/11/22 DOI)
Reversal, suppression. At the hearing, a detective testified that the defendant was arrested based on loitering, but there was no testimony that he remained in any place with others. Further, the detective did not see any physical property or cash exchanged. Observations of several brief, nondescript interactions involving the defendant at an address known for prior drug activity did not provide probable cause.
People v Jones (2022 NY Slip Op 00878) (nycourts.gov)

People v Rodriguez
2022 NY Slip Op 07080
(2nd Dept) (12/19/22 DOI)
Dismissal of 7th degree CPCS count. Supreme Court should have suppressed a Ziploc bag of pills. The People did not claim that the pills were found during the search of the car, pursuant to the automobile exception to the warrant requirement. The People did not explain how police came to seize the pills.
People v Rodriguez (2022 NY Slip Op 07080)

People v Reedy
2022 NY Slip Op 07397
(4th Dept) (12/27/22 DOI)
Error to deny suppression. The stop of the defendant's vehicle was unlawful; there was no probable cause to believe that the defendant committed a traffic violation. The officer stopped the vehicle after visually estimating the speed at 82 mph in a 65 mph zone. There was no testimony about the officer's training and qualifications to support the estimate.
People v Reedy (2022 NY Slip Op 07397)

People v Tubbins
2022 NY Slip Op 07317
(4th Dept) (12/27/22 DOI)
Error to deny suppression. Police officers did not have probable cause to arrest the defendant for obstructing governmental administration on the ground that, when he jumped up from a table and began to run away, he interfered with their ability to issue citations for violations.
People v Tubbins (2022 NY Slip Op 07317)

People v Singletary
2022 NY Slip Op 07392
(4th Dept) (12/27/22 DOI)
No reasonable suspicion to justify the initial seizure of the defendant's vehicle, effected by stopping their patrol car directly behind his vehicle parked at a gas station. The officers were responding to multiple gunshots at or near the gas station—a high-crime area. But they did not see any shots emanating from the area where the defendant's vehicle was parked.
People v Singletary (2022 NY Slip Op 07392)

Reasonable suspicion

People v Jennings
202 AD3d 1439
(4th Dept) (2/7/22 DOI)
Police lacked reasonable suspicion to seize the defendant's vehicle by parking their car to prevent him from driving away. Their illicit action was based on the defendant's mere presence in a vehicle parked in a high-crime area and purported furtive movements within the vehicle.
People v Jennings (2022 NY Slip Op 00755) (nycourts.gov)

People v Ponce
203 AD3d 1628
(4th Dept) (3/14/22 DOI)
Based on an anonymous tip that the defendant was in a specific vehicle at a specific location, police were dispatched but did not find the defendant or vehicle. Hours later, they saw the vehicle with two persons inside. The stop was unlawful, since police lacked a reasonable suspicion that defendant was in the vehicle.
People v Ponce (2022 NY Slip Op 01706) (nycourts.gov)

People v Singleton
203 AD3d 1646
(4th Dept) (3/22/22 DOI)
Error to deny suppression. A taxi in which the defendant rode was stopped based on a belief that he was a suspect in a recent shooting. But the detective who ordered the stop had never seen an image of the suspect, and the defendant's presence near the crime site did not support a suspicion that he was the shooter.
People v Singleton (2022 NY Slip Op 01893) (nycourts.gov)

People v Salley
205 AD3d 651
(1st Dept) (6/6/22 DOI)
During a lawful stop for a traffic infraction, the police noticed the odor of marijuana. Under the law at the time, that mere aroma justified the search. The MRTA, Penal Law § 222.05 (3) (eff. 3/31/31), regarding whether a finding of probable cause may be based on proof of the odor of cannabis, should not be applied retroactively.
People v Salley (2022 NY Slip Op 03481)

People v King
206 AD3d 1656
(4th Dept) (6/6/22 DOI)
Police saw the defendant's vehicle in the parking lot of an apartment complex known for drug activity, and they knew of his prior drug convictions. When they stopped their vehicle in front of his parked car so he could not drive away—thereby seizing him—they lacked a reasonable suspicion.
People v King (2022 NY Slip Op 03595)

People v Thorne
207 AD3d 73
(1st Dept) (6/10/22 DOI)
Reversal, dismissal. The defendant fit a vague description of a robbery suspect only in that he was a Black male in the vicinity of the crime. Key parts of the description did not match him, and he had distinctive features not included. Further, his behavior in walking quickly and hiding his face was susceptible of an innocent interpretation. Thus, police had no reasonable suspicion, yet they conducted a level-three stop.
People v Thorne (2022 NY Slip Op 03696)

People v Hodge
206 AD3d 1682
(4th Dept) (6/13/22 DOI)
Police lawfully stopped the petitioner and did not inordinately prolong his detention. However, after ordering him to exit the truck, they unlawfully tried to pat frisk him without a reasonable suspicion that he posed a threat to their safety.
People v Hodge (2022 NY Slip Op 03821)

People v Leonard
207 AD3d 1162
(4th Dept) (7/11/22 DOI)
Two dissenters would have suppressed and reversed. An informant merely told police that his parole officer said the defendant was dangerous and known to carry weapons. The officers' attempt to stop the vehicle was not supported by reasonable suspicion. The car did not stop, and the defendant fled on foot. The ensuing chase was not lawful, since the record was ambiguous as to whether the officer saw the defendant grab his waistband before or after the pursuit.
People v Leonard (2022 NY Slip Op 04468)

People v Lewis
208 AD3d 595
(2nd Dept) (8/12/22 DOI)
Since the defendant was found in the distinctive vehicle in which the robbery perpetrator had fled, the officers reasonably suspected that he had committed that crime. But there was no justification for searching his pocket and removing his wallet after he was caught and a protective pat-down yielded no weapon. The officers committed an additional constitutional violation in opening the wallet, searching its contents, and determining that it belonged to the victim. The suppression error was not harmless as to the robbery-related counts. Thus, a new trial was ordered on those counts.
People v Lewis (2022 NY Slip Op 04920)

Right to counsel

People v Dawson
38 NY3d 1055
(COA) (4/29/22 DOI)
Defendant did not unequivocally invoke his right to counsel while in custody. Dissent. Defendant did so invoke right when he said, "I just wish that I'd memorized my lawyer's number. He's in my phone. Is it possible for me to like call him or something?"
People v Dawson (2022 NY Slip Op 02772) (nycourts.gov)

Show up

People v Garcia
2022 NY Slip Op 06496
(2nd Dept) (11/21/22 DOI)
Supreme Court properly denied the defendant's motion to suppress identification evidence from a show-up identification. The show-up here was conducted near the time and place of the crime. Even though the defendant and his co-defendants were flanked by police officers during the ID, the procedure was deemed not unduly suggestive.
People v Garcia (2022 NY Slip Op 06496)

Suggestive IDs

People v Wheeler
201 AD3d 960
(2nd Dept) (1/27/22 DOI)
A new trial on the burglary charge was needed because the identifications from a single arrest photograph were the result of unduly suggestive procedures and should have been suppressed. The trial was to be preceded by a hearing to determine whether an independent source existed for the identifications.
People v Wheeler (2022 NY Slip Op 00442) (nycourts.gov)

People v Sulayman
206 AD3d 574
(1st Dept) (7/1/22 DOI)
Reversal, new trial. Photo array was unduly suggestive because the defendant was the only person wearing distinctive clothing that fit the description of the suspect.
Perople v Sulayman (2022 NY Slip Op 04132)

Search warrant

People v Ozkaynak
203 AD3d 1616
(4th Dept) (3/14/22 DOI)
Decision withheld. The defendant had standing to challenge a search warrant issued for cell-site location information. The case was controlled by Carpenter v U.S., decided after the conviction.
People v Ozkaynak (2022 NY Slip Op 01700)

People v Abad
208 AD3d 892
(2nd Dept) (9/19/22 DOI)
The contention that the search warrant was not supported by probable cause was preserved for appellate review. Although the defendant did not raise such argument in his motion, Supreme Court expressly decided the issue. *See* CPL 470.15 (2). But that argument had no merit.
People v Abad (2022 NY Slip Op 05094)

People v Bonilla
2022 NY Slip Op 07304
(1st Dept) (12/27/22 DOI)
Supreme Court erred in denying the motion to controvert the search warrant based on the defendant's lack of standing to challenge the warrant—a ground not raised by the People. Further, *People v LaFontaine* (92 NY2d 470), precluded consideration of alternative prosecution arguments raised upon appeal.
People v Bonilla (2022 NY Slip Op 07304)

Victim v suspect

People v Gough
203 AD3d 747
(2nd Dept) (3/4/22 DOI)
The trial court erred in not suppressing DNA evidence obtained from the defendant's clothing taken from the hospital the night of the shooting. The defendant had a legitimate expectation of privacy in his clothing. That police considered him a victim, not a suspect, did not strip him of Fourth Amendment protections. But the error was harmless.
People v Gough (2022 NY Slip Op 01317) (nycourts.gov)

GUILTY PLEAS

Appeal waiver

People v Mitchell
201 AD3d 818

(2nd Dept) (1/20/22 DOI)
Purported waiver of appeal was invalid. Supreme Court erroneously stated that the waiver constituted an absolute bar to taking a direct appeal. Written waiver inaccurately stated that the defendant was forfeiting the right to the assignment of appellate counsel and the opportunity to collaterally attack the judgment.
People v Mitchell (2022 NY Slip Op 00317) (nycourts.gov)

People v Moore
201 AD3d 1209
(3rd Dept) (1/20/22 DOI)
Waiver of appeal was invalid. Court did not explain the scope of the waiver. The written waiver erroneously said that the defendant was waiving his rights to all state, federal, and collateral review; and that he was not under the influence of any drugs or medications. In fact, he was taking various drugs and medications.
People v Moore (2022 NY Slip Op 00338) (nycourts.gov)

People v Johnson
37 NY3d 1166
(COA) (2/11/22 DOI)
Reversal. Waiver of appeal invalid. The plea court conflated the right to appeal with rights automatically forfeited by a guilty plea, so consideration of the suppression claim was not foreclosed. Remittal.
People v Johnson (2022 NY Slip Op 00909) (nycourts.gov)

People v Streater
207 AD3d 952
(3rd Dept) (7/25/22 DOI)
The waiver of the right to appeal was invalid. Neither the oral discussion nor the written waiver explained that some appellate issues would survive. Instead, the waiver suggested that an absolute bar to a direct appeal covered even nonwaivable issues.
People v Streater (2022 NY Slip Op 04668)

People v Hall
2022 NY Slip Op 06327
(1st Dept) (11/21/22 DOI)
The defendant made a valid waiver of his right to appeal, which foreclosed review of his statutory speedy trial claim. Further, by pleading guilty, he had forfeited review of such issue. The defendant was convicted before the effective date of the current version of CPL 30.30 (6), which was not applied retroactively.
People v Hall (2022 NY Slip Op 06327)

People v McNeil
2022 NY Slip Op 06294
(3rd Dept) (11/21/22 DOI)
Yet another permutation on ubiquitous misleading and ineffectual waivers of appeal. County Court used overbroad language in its oral colloquy, erroneously stating that, once the defendant waived his right to appeal, it was "gone forever." Further, the written waiver inaccurately claimed to be "a complete and final disposition of this case."
People v McNeil (2022 NY Slip Op 06294)

Breach of agreement

People v Owensford
209 AD3d 766
(2nd Dept) (10/17/22 DOI)

The trial court should have held a hearing to resolve the sharply contested dispute as to whether the defendant violated a plea/cooperation agreement. Reversal.
People v Owensford (2022 NY Slip Op 05716)

Broken promise

People v Mothersell
204 AD3d 1403
(4th Dept) (4/25/22 DOI)
Reversal. The plea was not knowing, voluntary, and intelligent. The plea court told the defendant pro se that he would retain the right to appeal from all its orders and failed to advise him that, by pleading guilty, he forfeited review of his argument that two counts of the indictment were duplicitous.
People v Mothersell (2022 NY Slip Op 02661) (nycourts.gov)

Coercion

People v Stephenson
205 AD3d 1217
(3rd Dept) (5/20/22 DOI)
No mode-of-proceedings error occurred. While the doctrine was sometimes applied to plea bargaining it did not apply to the instant facts. The record did not support the assertion that the plea was inherently coercive where certain suppression hearings were waived in exchange for continuing negotiations.
https://nycourts.gov/reporter/3dseries/2022/2022_03281.htm

Discovery

People v Hewitt
201 AD3d 1041
(3rd Dept) (1/10/21)
Where the defendant made a plea withdrawal motion premised on the People's noncompliance with its discovery duties, the trial court had to consider the impact of any violation on his plea decision. But defendant had waived discovery issues; the People substantially complied with disclosure requirements; and nondisclosure of grand jury minutes did not affect plea decision.
People v Hewitt (2022 NY Slip Op 00079) (nycourts.gov)

People v Dollison
76 Misc 3d 132 (A)
(App Term, 2nd Dept) (10/3/22 DOI)
Speedy trial dismissal. An unequivocal order required the People to provide a Certificate of Readiness to stop the clock but they failed to comply. Neither the court's unawareness of that lapse, nor the defendant's later participation in setting an adjourn date, absolved the People of their obligation.
People v Dollison (2022 NY Slip Op 50911(U))

Ineffective assistance

People v Roots
2022 NY Slip Op 06617
(4th Dept) (11/21/22 DOI)
Reversal. There was no legitimate strategy for defense counsel's failure to file a suppression motion contending that the police lacked reasonable suspicion to seize the defendant. The contention survived the

defendant's guilty plea, because suppression of the challenged evidence would have resulted in dismissal of at least some of the indictment, and therefore the error infected the plea bargaining process.
https://nycourts.gov/reporter/3dseries/2022/2022_06617.htm

People v Williams
2022 NY Slip Op 07265
(3rd Dept) (12/27/22 DOI)
Second counsel failed to support the CPL 220.60 (3) motion to withdraw the guilty plea with affidavits from the defendant or first counsel and to incorporate allegations the defendant made in the PSI. Instead, second counsel relied on his own "information and belief" and submitted a general pro forma motion. Such representation was not meaningful.
People v Williams (2022 NY Slip Op 07265)

Lost benefit

People v Ringrose
201 AD3d 1329
(4th Dept) (1/31/22 DOI)
When the defendant pleaded guilty in Monroe County, the court informed him that the aggregate 16-year term would run concurrently with a 14-to-24-year term already imposed in Ontario County, However, upon appeal, the Ontario County sentence was reduced to four years. Thus, the defendant lost the benefit of the Monroe County deal. Plea vacated.
People v Ringrose (2022 NY Slip Op 00569) (nycourts.gov)

Marijuana

People v Ramos
202 AD3d 410
(1st Dept) (2/3/22 DOI)
Conviction of 2nd degree possession of marijuana not vacated. Penal Law Art. 222 did not apply to defendants sentenced before its enactment.
People v Ramos (2022 NY Slip Op 00631) (nycourts.gov)

Motion to withdraw plea

People v Hemingway
2022 NY Slip Op 06356
(4th Dept) (11/21/22 DOI)
Decision reserved. County Court erred when it failed to assign new counsel after defense counsel took a position adverse to the defendant's motion to withdraw his guilty plea.
https://nycourts.gov/reporter/3dseries/2022/2022_06356.htm

Non-existent offense

People v Adams
201 AD3d 1311
(4th Dept) (1/31/22 DOI)
The defendant was convicted of refusal to submit to a breath test (VTL § 1194 [1] [b]). That was a non-existent offense. Such an error was nonwaivable, required no preservation, was not forfeited by a guilty plea, and could be corrected sua sponte. The plea was vacated and the count was dismissed.
People v Adams (2022 NY Slip Op 00562) (nycourts.gov)

People v Alim
204 AD3d 1418
(4th Dept) (4/25/22 DOI)
The defendant's refusal to submit to a breath test did not establish a cognizable offense, so that count of the indictment was dismissed.
People v Alim (2022 NY Slip Op 02671) (nycourts.gov)

Padilla

People v Acosta
202 AD3d 447
(1st Dept) (2/3/22 DOI)
Appeal held in abeyance. IAC. Counsel failed to advise the defendant that his guilty plea to a drug-related felony would result in mandatory deportation and merely stated, "This may and probably will affect his immigration status." Remand so the defendant could seek to show that a reasonable probability that he would not have pleaded guilty if cautioned about the deportation consequences of his plea.
People v Acosta (2022 NY Slip Op 00737) (nycourts.gov)

Peque

People v Contreras
201 AD3d 573
(1st Dept) (1/27/22 DOI)
Denial of motion to be relieved and appeal held in abeyance. Counsel had not established that the defendant was alerted to potential *Peque* issues; that the client made an informed decision not to raise such matters; and that he knew about his right to file a pro se brief.
People v Contreras (2022 NY Slip Op 00379) (nycourts.gov)

People v Amantecatl
74 Misc 3d 88
(App Term, 2nd Dept) (3/4/22 DOI)
Appeal held in abeyance. The defendant pleaded guilty. The trial court did not mention possible deportation. Since the defendant's plea and sentencing occurred in the same proceeding, he had no ability to object, and the claim was reviewable absent a motion. *People v Peque* said nothing about violations. However, merits were considered. Matter remitted so the defendant could move to vacate the plea.
People v Amantecatl (2022 NY Slip Op 22055) (nycourts.gov)

People v Moore
203 AD3d 953
(2nd Dept) (3/21/22 DOI)
Supreme Court failed to warn the defendant of possible deportation consequences of plea. The matter was remitted to give the defendant an opportunity to move to vacate his plea.
People v Moore (2022 NY Slip Op 01809) (nycourts.gov)

People v Taylor
75 Misc 3d 132(A)
(App Term, 2nd Dept) (6/6/22 DOI)

Justice Court failed to tell the defendant that he might be deported based on a guilty plea. In seeking to vacate the plea, the defendant established a reasonable probability that, if properly warned, he would have rejected the plea offer. He had moved from Jamaica to Brooklyn at age 11, and he wished to remain here.
People v Taylor (2022 NY Slip Op 50449(U)

Persistent violent felony offender

People v Kaval
2022 NY Slip Op 07022
(COA) (12/19/22 DOI)
As to a persistent VFO adjudication, although the People provided insufficient proof of tolling at the initial sentencing, new evidence presented upon remittal was sufficient and should have been considered. The court had inherent authority to correct illegal sentences.
People v Kaval (2022 NY Slip Op 07022)

Post-release supervision

People v Wolfe
207 AD3d 757
(2nd Dept) (8/1/22 DOI)
Reversal of judgment upon guilty plea. The defendant was not informed of the specific period of post-release supervision to be imposed or the maximum potential duration.
People v Wolfe (2022 NY Slip Op 04745)

PRS
People v Blauvelt
2022 NY Slip Op 06959
(3rd Dept) (12/9/22 DOI)
The defendant pleaded guilty to a class C violent felony sex offense, so the maximum period that could be imposed was 15 years. Given that County Court indicated its intent to impose the maximum duration of PRS, the appellate court reduced the period from 20 to 15 years.
People v Blauvelt (2022 NY Slip Op 06959)

Preservation

People v Bush
38 NY3d 66
(COA) (3/25/22 DOI)
Three-judge dissent. The defendant had pleaded guilty to a reduced charge in exchange for 20 days' community service. In error, the lower court imposed additional year-long conditions that had not been mentioned. The defendant had no opportunity to preserve his claim by objecting prior to sentencing. Since he had served his sentence, the indictment should be dismissed.
People v Bush (2022 NY Slip Op 01956) (nycourts.gov)

People v Brown
204 AD3d 1519
(4th Dept) (5/2/22 DOI)
Affirmance. Regarding preservation exception, Third Department decisions misread *People v Pastor*, 28 NY3d 1089, which did not expand *People v Lopez*, 71 NY2d 662 (where defendant's factual recitation during plea proceedings negated essential element of crime, court must make further inquiry to ensure defendant understood nature of charge and was intelligently entering guilty plea). *See People v Reese*, *infra*.

People v Brown (2022 NY Slip Op 02917) (nycourts.gov)

People v Marone
206 AD3d 1039
(3rd Dept) (6/6/22 DOI)
Defendant's statements during the plea colloquy negated an essential element of 3rd degree perjury. Given his limited explanation about an emailed affidavit, County Court was obliged to further inquire. The record demonstrated only that the defendant filed an unsworn document.
People v Marone (2022 NY Slip Op 03543)

People v Bovio
206 AD3d 1658
(4th Dept) (6/6/22 DOI)
Murder case. Defendant pushed his toddler stepson, causing him to strike his head on the floor and die days later. During the plea colloquy, when stating through counsel that he did care for the victim, the defendant negated the mens rea element of depraved indifference. Before accepting the plea, County Court had a duty to inquire further.
People v Bovio (2022 NY Slip Op 03591)

People v Reese
206 AD3d 1461
(3rd Dept) (7/1/22 DOI)
Conviction of 2nd degree CPW reversed, matter remitted. The defendant negated an element of the crime —at sentencing. The narrow exception to the preservation requirement was implicated. County Court failed to conduct a further inquiry.
People v Reese (2022 NY Slip Op 04194)

Second violent felony offender

People v Lynch
2022 NY Slip Op 06141
(2nd Dept) (11/4/22 DOI)
Vacatur of adjudication as a second violent felony offender. Such sentence was illegal, where the defendant committed the instant offense before he was sentenced on the prior violent felony conviction. The issue was not subject to the preservation rule.
People v Lynch (2022 NY Slip Op 06141)

Sentence unclear

People v Lumpkin
201 AD3d 1257
(3rd Dept) (1/27/22 DOI)
In the interest of justice, the court reviewed the defendant's unpreserved argument that the plea was defective. County Court made inconsistent statements about whether a prison term of two or three years would be imposed. The plea was vacated.
People v Lumpkin (2022 NY Slip Op 00477) (nycourts.gov)

Statutory speedy trial

People v Forbes

203 AD3d 949
(2nd Dept) (3/21/22 DOI)
The defendant forfeited his right to claim that he was deprived of his statutory speedy trial rights. CPL 30.30 (6) did not go into effect until after the judgment of conviction and did not apply retroactively.
People v Forbes (2022 NY Slip Op 01805) (nycourts.gov)

People v Dennis
206 AD3d 1369
(3rd Dept) (6/24/22 DOI)
The defendant's claim that he was denied his statutory right to a speedy trial was forfeited by his guilty plea. CPL 30.30 (6) (statutory speedy trial claim shall be reviewable upon appeal from ensuing judgment that was entered upon plea of guilty) did not apply retroactively.
People v Dennis (2022 NY Slip Op 04054)

People v Merchant
209 AD3d 453
(1st Dept) (10/11/22 DOI)
The defendant forfeited review of his speedy trial claim by pleading guilty. He was convicted before the effective date of amended CPL 30.30 (6), which *prospectively* permitted defendants who pleaded guilty to raise statutory speedy-trial claims on appeal.
https://nycourts.gov/reporter/3dseries/2022/2022_05619.htm

People v Hall
2022 NY Slip Op 06327
(1st Dept) (11/21/22 DOI)
The defendant made a valid waiver of his right to appeal, which foreclosed review of his statutory speedy trial claim. Further, by pleading guilty, he had forfeited review of such issue. The defendant was convicted before the effective date of the current version of CPL 30.30 (6), which was not applied retroactively.
People v Hall (2022 NY Slip Op 06327)

TRIALS

Adjournment

People v Reeves
208 AD3d 687
(2nd Dept) (8/22/22 DOI)
Reversal. The lower court should have granted a one-day continuance for the defendant's daughter to travel from out of state to New York. Further, Supreme Court should have denied the People's request for a missing witness charge as to the daughter, who was knowledgeable about her father's alibi. It was illogical to allow a jury to draw an adverse inference based on the failure of the defendant to call this witness.
People v Reeves (2022 NY Slip Op 04979)

Alternate jurors

People v Murray
39 NY3d 10
(COA) (10/24/22 DOI)
Prior to the start of deliberations, the court discharged the alternate jurors. A trial juror was later removed for alleged misconduct, and the court seated a discharged alternate. That was error. Once discharged, an

alternate juror was no longer "available for service" as a replacement for a trial juror. The trial court's sole remedy was to declare a mistrial. New trial ordered.
People v Murray (2022 NY Slip Op 05916)

People v Sanford
2022 NY Slip Op 06446
(1st Dept) (11/21/22 DOI)
New trial The alternate jurors were excused after summations, but before deliberations began. Subsequently, one deliberating juror was discharged, and the defendant requested a mistrial. Supreme Court denied the request and seated a previously excused alternate. An alternate juror was no longer "available for service" after being discharged.
People v Sanford (2022 NY Slip Op 06446)

Batson

People v Douglas
203 AD3d 1682
(4th Dept) (3/22/22 DOI)
New trial. Supreme Court erred in denying a *Batson* challenge with respect to the prosecutor's exercise of a peremptory strike on a prospective juror. Statements the prosecutor attributed to the prospective juror at issue were made by a different prospective juror.
People v Douglas (2022 NY Slip Op 01919) (nycourts.gov)

Amended theory

People v Notice
2022 NY Slip Op 51263
(2nd Dept) (12/19/22 DOI)
Conviction for violating Ag & Markets Law § 353 reversed. At trial, the People changed the theory of the case, but they were bound by the theory set forth in an accusatory instrument.
People v Notice (2022 NY Slip Op 51263(U))

Brady

People v Ramunni
203 AD3d 1076
(2nd Dept) (3/25/22 DOI)
Brady violation. A 911 caller who witnessed the subject brawl described an individual who did not match the defendant. The People failed to disclose the caller's identity and contact information.
https://nycourts.gov/reporter/3dseries/2022/2022_02022.htm

People v Sherwood
204 AD3d 1162
(3rd Dept) (4/14/22 DOI)
Dissent. Four days before trial, the defendant received records from the victim's forensic evaluation regarding child sexual abuse evaluation. The withheld material was material, and the defendant was prejudiced by the *Brady* violation. He was denied an opportunity to investigate and interview other potential defense witnesses well in advance of trial.
People v Sherwood (2022 NY Slip Op 02455) (nycourts.gov)

Challenge for cause

People v Bowman
203 AD3d 670
(1st Dept) (4/1/22 DOI)
New trial. When prospective juror conveyed that she might have difficulty focusing and might have leaned toward reaching a verdict quickly, trial court should have inquired to determine her ability to serve.
People v Bowman (2022 NY Slip Op 02208) (nycourts.gov)

People v Ledezma
204 AD3d 420
(1st Dept) (4/8/22 DOI)
New trial. Error to deny for-cause challenges against prospective jurors who indicated that they were inclined to believe the alleged victims because they had proceeded to trial. The court should have made further inquiries to elicit unequivocal assurances from the panelists' impartiality.
https://nycourts.gov/reporter/3dseries/2022/2022_02236.htm

People v Cortes
204 AD3d 439
(2nd Dept) (4/22/22 DOI)
Reversal. Supreme Court erred in denying the defense for-cause challenge to a prospective juror who was working as an ADA at the Queens County DA's Office—the very agency prosecuting the defendant.
People v Cortes (2022 NY Slip Op 02561) (nycourts.gov)

People v Tate
208 AD3d 1111
(1st Dept) ((10/3/22 DOI)
New trial. The defendant's challenge for cause to a prospective juror should have been granted. The panelist stated "I'm definitely bias[ed] toward law enforcement, toward police officers. I know a lot of cops." The trial court did not elicit an unequivocal assurance that the panelist would set aside any bias.
People v Tate (2022 NY Slip Op 05286)

Confrontation Clause

Hemphill v New York
595 US ___
(USSC) (1/20/22 DOI)
Over defense objection, to rebut the defense theory of third-party culpability, the trial court allowed the State to introduce parts of the transcript of the third party's plea allocution. The court reasoned that the defendant had opened the door because the testimonial, out-of-court statements were reasonably necessary to correct the misleading impression his defense created. The admission of the allocution violated the defendant's Sixth Amendment right to confront witnesses against him. The defendant did not forfeit such right by rendering allocution arguably relevant to his defense theory.
20-637 Hemphill v. New York (01/20/2022) (supremecourt.gov)

People v Ellerbee
203 AD3d 1068
(2nd Dept) (3/25/22 DOI)
Defendant's right to confrontation was violated. He was not given a chance to cross-examine a DMV employee who was directly involved in sending out the suspension notices or who had personal familiarity with the mailing practices or his driving record.
People v Ellerbee (2022 NY Slip Op 02016) (nycourts.gov)

People v Franklin
207 AD3d 476
(2nd Dept) (7/8/22 DOI)
Reversal. Trial court erroneously admitted a Criminal Justice Agency form through a CJA employee who did not create the form where it was not shown that the creator of the form was unavailable. The form listed the defendant's address as the basement of the home where police recovered the silver gun. The admission of the testimony and document to establish an essential element of the charges of 2nd and 3rd degree CPW violated the defendant's constitutional right of confrontation.
People v Franklin (2022 NY Slip Op 04308)

People v Hemphill
2022 NY Slip Op 04663
(COA) (7/25/22 DOI)
The admission of the plea allocution of third-party Morris, in violation of the defendant's Confrontation Clause rights, was harmless. The plea allocution neither exculpated Morris nor inculpated defendant as the shooter, and the prosecutor's reliance on the allocution was minimal.
People v Hemphill (2022 NY Slip Op 04663)

Constitutional speedy trial

People v McDonald
203 AD3d 636
(1st Dept) (4/1/22 DOI)
Violation of the defendant's constitutional right to a speedy trial. The nearly six-year pretrial delay was unreasonably long, and the defendant was incarcerated throughout that time. He was presumptively prejudiced. The charges were serious, but the case was relatively simple. The People did not show good cause for letting the prosecution languish.
People v McDonald (2022 NY Slip Op 02099) (nycourts.gov)

People v Johnson
2022 NY Slip Op 06537
(COA) (11/21/22 DOI)
Reversal. The Fourth Department misapplied *People v Taranovich*. The length of delay (eight years pre-indictment) favored the defendant. The Appellate Division held that the preindictment delay could not have impaired his ability to defend himself on the charge of which he was convicted. That was error. When an indictment had multiple counts, if the defendant's ability to defend one count was impacted by the delay, it might weaken his plea bargaining position.
People v Johnson (2022 NY Slip Op 06537)

Defendant's testimony – Pleading the Fifth

People v Smith
207 AD3d 1211
(4th Dept) (7/11/22 DOI)
The trial court ruled that, if the defendant took the stand, the prosecution could cross-examine him about who he was with during the underlying incident. The defendant contended that such cross-examination would have violated his Fifth Amendment rights because that information was the subject of a pending federal indictment. While the prosecution could not question the defendant about pending *unrelated* criminal charges for credibility purposes, the facts here were *related* to the charges at issue.
People v Smith (2022 NY Slip Op 04494)

Deliberating jurors

People v Rivera
206 AD3d 1356
(3rd Dept) (6/24/22 DOI)
Dissent. No "probing and tactful inquiry" into whether a juror was grossly unqualified. During deliberations in this rape case, the juror revealed that she was a victim of rape. The foreperson reported that, in the jury room, the juror verbally attacked another juror, revealed the rape, was very upset, and was in tears. The juror had not disclosed the rape during voir dire or on the jury questionnaire.
People v Rivera (2022 NY Slip Op 04050)

Discovery

People v Gough
209 AD3d 667
(2nd Dept) (10/11/22 DOI)
CPL 245.80 (1) (b), which mandated the imposition of a remedy or sanction when discoverable material was lost or destroyed, was not to be applied retroactively to a trial ruling which preceded the effective date.
https://nycourts.gov/reporter/3dseries/2022/2022_05542.htm

Duplicitous counts

People v Woodley
201 AD3d 749
(2nd Dept) (1/14/22 DOI)
Seven counts charged the defendant with 2nd degree criminal contempt, arising from his alleged violation of two orders of protection during two incidents on the same day. Neither the verdict sheet nor the jury charge explained how the proof applied to the counts. Thus, the counts were dismissed.
https://nycourts.gov/reporter/3dseries/2022/2022_00201.htm

Evidentiary errors

Cross examination

People v Kilgore
203 AD3d 1634
(4th Dept) (3/14/22 DOI)
Error to curtail cross of a police detective who took a statement from the victim. The defendant laid a proper foundation by eliciting from the victim testimony that was inconsistent with the detective's report. The error was not harmless.
People v Kilgore (2022 NY Slip Op 01709) (nycourts.gov)

Defendant's testimony

People v Newhall
206 AD3d 1144
(3rd Dept) (6/10/22 DOI)
County Court erred in sustaining objections to the defendant's testimony asserting that he was on trial for a false accusation of sexual assault. The testimony was proper and was not meant to usurp the jury's function. But the error was harmless.

People v Newhall (2022 NY Slip Op 03765)

Defense witness

People v Andrews
2022 NY Slip Op 06366
(4th Dept) (11/21/22 DOI)
New trial. County Court erred when it precluded a defense witness from testifying that the complainant offered to falsely accuse the witness's boyfriend of sexual abuse, around the same time that the first incident the defendant was accused of allegedly occurred. The nature of the false allegation was sufficiently similar to the charged allegations to cast doubt on the validity of the charges.
https://nycourts.gov/reporter/3dseries/2022/2022_06366.htm

Expert

People v Slaughter
207 AD3d 1185
(4th Dept) (7/11/22 DOI)
Affirmance County Court properly allowed expert testimony concerning child sexual abuse accommodation syndrome (CSAAS) to explain behavior that might be puzzling to the jury. Although the expert testified briefly regarding the general behavior of perpetrators, the court sustained a defense objection and delivered a limiting instruction. The defendant asserted that CSAAS was no longer generally accepted in the scientific community, but the record did not support that contention.
People v Slaughter (2022 NY Slip Op 04478)

Frye

People v Patterson
204 AD3d 548
(1st Dept) (4/22/22 DOI)
Appeal held in abeyance. The motion court should have granted the defense request for a *Frye* hearing on the Forensic Statistical Tool for DNA evidence. The factors cited by the People were insufficient to show consensus in the scientific community as to the methodology's reliability. The error was not harmless.
People v Patterson (2022 NY Slip Op 02637) (nycourts.gov)

People v Easley
38 NY3d 1010
(COA) (4/29/22 DOI)
Abuse of discretion to admit the results of DNA analysis conducted using the FST without holding a *Frye* hearing. But error was harmless. Dissent. Error not harmless. No eyewitness saw the defendant in possession of the gun; no video showed him holding the weapon during the incident; and no fingerprints were recovered from the gun.
People v Easley (2022 NY Slip Op 02770) (nycourts.gov)

People v Wakefield
2022 NY Slip Op 02771
(COA) (4/29/22 DOI)
Affirmance. *Frye* hearing evidence established that the relevant scientific community generally accepted TrueAllele's DNA interpretation process. Concurrence in result. Admitting proof was harmless error. TrueAllele's algorithm was not generally accepted because its source code had not been assessed as reliable by independent third parties. The software developer's involvement in most validation studies constituted

a conflict of interest. The DNA proof was testimonial; and the defendant was denied access to the source code needed for effective cross-examination of the declarant software developer.
People v Wakefield (2022 NY Slip Op 02771) (nycourts.gov)

Molineux

People v Nelson
201 AD3d 413
(1st Dept) (1/10/21)
Okay to admit proof— that the defendant threatened to kill one victim hours before thrusting a knife through a bedroom door, injuring the second victim and that both victims heard the defendant slap his companion right before the attack—to complete the narrative, explain victims' behavior, and show intent.
People v Nelson (2022 NY Slip Op 00015) (nycourts.gov)

People v Velett
205 AD3d 1143
(3rd Dept) (5/13/22 DOI)
Molineux error. County Court properly found inadmissible the defendant's 1999 sexual abuse conviction. But a detective testified about such conviction. The improper disclosure was highly prejudicial, because it could have led the jury to believe that the defendant had a propensity for committing the instant crime. But the error was harmless.
People v Velett (2022 NY Slip Op 03148) (nycourts.gov)

People v DeJesus
206 AD3d 1554
(4th Dept) (6/6/22 DOI)
Error to permit *Molineux* evidence of the defendant's alleged involvement in a burglary of the victim's home days prior to the instant offenses to show intent. Intent could be inferred from the victim's testimony.
People v DeJesus (2022 NY Slip Op 03584)

People v Mountzouros
206 AD3d 1706
(4th Dept) (6/13/22 DOI)
New trial. Defendant charged with sexually abusing son. The trial court erred in allowing testimony about the defendant's sexual abuse of another son, under the *Molineux* MO exception. The similarities between the uncharged acts and charged crimes were not sufficiently unique.
People v Mountzouros (2022 NY Slip Op 03840)

Past recollection recorded

People v Gardner
204 AD3d 1509
(4th Dept) (5/2/22 DOI)
New trial. County Court erred in admitting as a past recollection recorded the written statement of a prosecution witness. The statement was not accurate, according to the witness, and was made many months after the alleged events recorded.
People v Gardner (2022 NY Slip Op 02911) (nycourts.gov)

Photo/text foundation

People v Mayo

202 AD3d 833
(2nd Dept) (2/11/22 DOI)
People did not offer proof that Facebook photo used against the defendant was an accurate representation; that the defendant controlled the web page; and that the photo was created or posted on a specified date. The error was not harmless.
People v Mayo (2022 NY Slip Op 00881) (nycourts.gov)

People v Rodriguez
38 NY3d 151
(COA) (5/20/22 DOI)
There was no abuse of discretion as a matter of law in the determination that screenshots—purporting to depict selected portions of text messages with sexual content between the defendant coach and a 15-year-old athlete—were sufficiently authenticated. Testimony of the victim sufficed to authenticate the screenshots taken by her boyfriend. Even if the best evidence rule applied in this context, the trial court properly admitted the screenshots.
https://www.nycourts.gov/reporter/3dseries/2022/2022_03307.htm

Presenting a defense

People v Deverow
38 NY3d 157
(COA) (5/24/22 DOI)
Murder conviction reversed. Trial court precluded evidence offered to support a justification defense, thereby depriving the defendant of his constitutional right to present a defense. The proffered testimony was not collateral; it was probative of the ability of the sole prosecution witness to observe and recall details of the shooting.
People v Deverow (2022 NY Slip Op 03362)

Present sense impression

People v Deverow
38 NY3d 157
(COA) (5/24/22 DOI)
Murder conviction reversed. The trial court erred in excluding 911 calls made from the scene at the time of the crime. They qualified as present sense impressions and were corroborated by independent evidence.
People v Deverow (2022 NY Slip Op 03362)

Presumption of innocence

People v Roberts
203 AD3d 1465
(3rd Dept) (4/1/22 DOI)
Defendant was deprived of a fair trial based on the admission of a jail phone call wherein he stated that he might as well "cop out to…the five years or whatever." Such statement would have made it difficult for the jury to accept the presumption of innocence and to evaluate the evidence fairly.
People v Roberts (2022 NY Slip Op 02157) (nycourts.gov)

Prompt outcries and excited utterances

People v Gideon
203 AD3d 519

(1st Dept) (3/21/22 DOI)
Supreme Court admitted, as excited utterances and prompt outcries, four hearsay statements made by the alleged victim after the incident. That was error. None of the statements was an excited utterance. Two were prompt outcries, so only the fact of a complaint, not its accompanying details, was admissible. Yet the trial court considered all four utterances for their substance. The error was not harmless.
People v Gideon (2022 NY Slip Op 01746)

People v Samuel
208 AD3d 1261
(2nd Dept) (9/26/22 DOI)
The trial court erred in admitting a 911 call made by a neighbor after the shooting. The statement of a nonparticipant may not be admitted as an excited utterance unless it can be inferred that the declarant had an opportunity to personally observe the event. But the error was harmless.
People v Samuel (2022 NY Slip Op 05224)

People v Ismael
2022 NY Slip Op 06614
(4th Dept) (11/21/22 DOI)
The trial court erred in admitting her statement as an excited utterance. For argument's sake, if she experienced the requisite startling event, the statement did not reflect a fact or circumstance personally observed by her, but rather her inferential conclusion regarding the author of the messages. But the error was harmless.
People v Ismael (2022 NY Slip Op 06614)

Rape Shield Law

People v Green
208 AD3d 1539
(3rd Dept) (10/3/22 DOI)
Under Rape Shield Law exception, trial court properly limited cross-examination to the complainant's sexual conduct in the 48 hours leading up to the incident—thereby striking a balance between protecting the victim's privacy and preserving the defendant's ability to mount an effective defense.
People v Green (2022 NY Slip Op 05353)

Reputation witness

People v Lisene
201 AD3d 738
(2nd Dept) (1/14/22 DOI)
Evidence precluded. New trial. Party had right to call a witness to testify that a key opposing witness had a bad reputation in the community for truth and veracity. Proper foundation was laid. The mother whose reputation was at issue was a key fact witness whose credibility was sharply contested.
https://nycourts.gov/reporter/3dseries/2022/2022_00194.htm

Sandoval

People v Bloome
205 AD3d 1045
(2nd Dept) (5/24/22 DOI)

After a *Sandoval* hearing, the trial court improperly ruled that, if the defendant testified, the prosecutor could cross-examine him as to facts underlying a 2004 assault conviction and 2012 robbery conviction. But the error was harmless.
People v Bloome (2022 NY Slip Op 03398)

People v Henderson
2022 NY Slip Op 07009
(1st Dept) (12/9/22 DOI)
Reversal, new trial, interest of justice. Supreme Court erred when it modified its pretrial *Sandoval* ruling based on the defendant's testimony, which was not so misleading as to allow the revised ruling. The error was not harmless.
People v Henderson (2022 NY Slip Op 07009)

Gravity knife

People v Lester
208 AD3d 684
(2nd Dept) (8/22/22 DOI)
Conviction of 4th degree CPW was predicated on possession of a gravity knife. Even though the statute decriminalizing such act did not take effect until 2019, that count was dismissed in the interest of justice.
People v Lester (2022 NY Slip Op 04977)

Ineffective assistance

People v Sposito
37 NY3d 1149
(COA) (1/10/21 DOI)
Defendant failed to prove IAC claim in 440 hearing. Reasonably, counsel had tried to disprove the element of consent and had waived a *Huntley* hearing. As to counsel's failure to use or call an expert, the COA majority discerned a reasonable strategic choice. Judge Wilson dissented.
People v Sposito (2022 NY Slip Op 00040) (nycourts.gov)

People v Burgos
38 NY3d 56
(COA) (3/21/22 DOI)
The defendant was not deprived of effective assistance when his attorney failed to disclose that he was suspended in the Second Circuit for neglecting criminal cases.
People v Burgos (2022 NY Slip Op 01868) (nycourts.gov)

Judge as advocate

People v Aponte
204 AD3d 1031
(2nd Dept) (4/29/22 DOI)
New trial. Judge seemed like advocate; impeded defense of third-party culpability; and undermined defense closing argument. In interest of justice, appellate court held that the cumulative effect of the errors deprived the defendant of a fair trial.
People v Aponte (2022 NY Slip Op 02813) (nycourts.gov)

Jury charges

People v Seignious
202 AD3d 511
(1st Dept) (2/11/22 DOI)
The indictment charged the defendant with the burglary as a sexually motivated crime. The People consistently pursued such theory. Yet at the charge conference in the middle of the People's case, the prosecution requested that ordinary 2nd degree burglary be charged as a lesser included offense. Grant of such request was error. The defendant had no notice of such alternative theory.
People v Seignious (2022 NY Slip Op 00948) (nycourts.gov)

People v Heiserman
204 AD3d 1249
(3rd Dept) (4/22/22 DOI)
Reversal. Error to deny request for a jury charge on the defense of justification. While being processed, the defendant was ordered to take off his shoes. He refused, was pepper-sprayed in the face, and struck a police sergeant. There was a reasonable view of the evidence that police used excessive force and the defendant's acts were justified.
People v Heiserman (2022 NY Slip Op 02588) (nycourts.gov)

People v Gardner
204 AD3d 1509
(4th Dept) (5/2/22 DOI)
New trial. Error to instruct the jury on accomplice liability, referring to a person who "potentially"—rather than "intentionally"—aided another.
People v Gardner (2022 NY Slip Op 02911) (nycourts.gov)

People v Williams
205 AD3d 935
(2nd Dept) (5/20/22 DOI)
The trial court erred in refusing to charge 2nd degree manslaughter as a lesser included offense of 2nd degree murder, since a reasonable view of the evidence would support the conclusion that the defendant acted recklessly rather than intentionally when he shot a man who pulled a machete on him
People v Williams (2022 NY Slip Op 03257) (nycourts.gov)

People v Harris
206 AD3d 1063
(3rd Dept) (6/6/22 DOI)
Manslaughter conviction reversed. The defendant claimed self-defense, but the trial court failed to deliver an instruction that, if the jury found him not guilty of 2nd degree murder, any lesser counts must not be considered.
People v Harris (2022 NY Slip Op 03548)

People v Dowling
207 AD3d 799
(3rd Dept) (7/8/22 DOI)
The trial court did not err in refusing to give a missing witness charge concerning the victim. The defendant showed that the witness had material knowledge and was expected to give non-cumulative testimony. Further, the People acknowledged that they knew the victim was housed in the local jail. However, he was not under prosecution control, in that he was wholly uncooperative.
People v Dowling (2022 NY Slip Op 04324)

People v Noel

207 AD3d 661
(2nd Dept) (7/25/22 DOI)
Murder reversed. The People's evidence consisted primarily of testimony of the defendant's paramour, codefendant Lovell. As part of a cooperation agreement, Lovell testified that the defendant solicited his help to kill her husband and that they hired another codefendant to do the deed. Supreme Court failed to instruct the jury that Lovell was an accomplice as a matter of law and thus subject to the statutory corroboration requirement.
People v Noel (2022 NY Slip Op 04647)

People v Delisme
208 AD3d 1063
(1st Dept) (9/19/22 DOI)
Reversal and new trial. The defendant and the complainant lived in a housing complex where each had a separate room providing entry to a shared bathroom to which no one else had access. The court should have granted the defense request for a jury instruction stating that the defendant, who asserted a defense of justification, had no duty to retreat from the bathroom. As a matter of law, the shared bathroom was part of the defendant's dwelling—notwithstanding that he shared it with the complainant.
People v Delisme (2022 NY Slip Op 05130)

People v Adrian
209 AD3d 1116
(3rd Dept) (10/24/22 DOI)
Error to deny intoxication charge. Video footage showing a marked difference in the defendant's behavior earlier the same day and right before a bar fight, and there was testimony about his alcohol consumption.
People v Adrian (2022 NY Slip Op 05896)

People v Soto
2022 NY Slip Op 06589
(4th Dept) (11/21/22 DOI)
The Fourth Department reversed in part and ordered a new trial on two of four counts. Supreme Court erred when it failed to give the jury an instruction on circumstantial evidence. The proof of the defendant's possession of one of the guns at issue was entirely circumstantial, and the evidence against him was not overwhelming.
https://nycourts.gov/reporter/3dseries/2022/2022_06589.htm

People v Heiserman
2022 NY Slip Op 07024
(COA) (12/19/22 DOI)
Regarding a requested justification instruction, no reasonable view of the evidence supported a finding that it was excessive for an officer to pepper spray the defendant to make him remove his shoes while being processed for arrest. Since the officer's force was not excessive, the defendant's assault on him was not justified.
People v Heiserman (2022 NY Slip Op 07024)

People v Ruiz
2022 NY Slip Op 07092
(COA) (12/19/22 DOI)
Proper to deny request for instruction on temporary and lawful possession of a weapon, based on the defendant's belief, at the time of the crime, that her life and her children's lives were under threat. She used the weapon in a reckless and dangerous manner when she fired blindly through a closed, windowless door.
People v Ruiz (2022 NY Slip Op 07092)

Jury selection

People v Ramirez
208 AD3d 897
(2nd Dept) (9/19/22 DOI)
County Court's Covid-19 procedures did not deprive the defendant of meaningful participation in jury selection. Face coverings of potential jurors and social distancing did not interfere with the defendant's ability to observe the jurors and assess their demeanor.
People v Ramirez (2022 NY Slip Op 05098)

Jury trial rights

People v Garcia
2022 NY Slip Op 03359
(COA) (5/24/22 DOI)
When the defendant demanded a jury trial, he asserted that any of the charged B misdemeanors would result in deportability and cited a relevant federal statute and two immigration decisions. That was insufficient to invoke his right to a jury trial. Dissent. The burden on noncitizen defendants to invoke the right to a jury trial should be realistic and feasible. There was no basis to deviate from *People v Suazo*, 32 NY3d 491.
People v Garcia (2022 NY Slip Op 03359)

Mistrial

McNair v McNamara
206 AD3d 1689
(4th Dept) (6/13/22 DOI)
Oneida County DA prohibited from retrying the defendant on weapons charges. A jury trial had commenced, the jury was selected and sworn, and three witnesses testified. Then the trial judge felt sick and thought he might have Covid. Before being tested, he declared a mistrial. Jeopardy had attached. There was no manifest necessity. The judge should have considered alternatives.
McNair v McNamara (2022 NY Slip Op 03825)

Mode of proceedings

Jury notes

People v Manzano
202 AD3d 994
(2nd Dept) (2/18/22 DOI)
County Court failed to meaningfully respond to a jury note. Simply rereading the original instructions may sometimes constitute a meaningful response, but here it was error to do so in response to the jury's last question about the elements of one charge.
https://nycourts.gov/reporter/3dseries/2022/2022_01040.htm

People v Zenon
208 AD3d 1634
(4th Dept) (10/3/22 DOI)
New trial. The trial court committed a *People v O'Rama* error. A jury note stated, "Please go over manslaughter ***vs*** murder 2 elements of the charges from your instructions [emphasis added]." The court did

not read the note verbatim nor show it to the parties but instead paraphrased it and thus failed to provide meaningful notice of the contents.
People v Zenon (2022 NY Slip Op 05446)

People v Heyworth
209 AD3d 615
(1st Dept) (10/31/22 DOI)
New trial. The trial court's failure to read to the parties the entirety of a note submitted just before the jury reached a verdict deprived counsel of meaningful notice. The fact that the jury announced that it had reached a verdict before the note was read did not cure the mode-of-proceedings error.
People v Heyworth (2022 NY Slip Op 06072)

Other

People v Jones
202 AD3d 1285
(3rd Dept) (2/18/22 DOI)
The defendant was deprived of a fair trial when the trial court directed the People's investigator to enter the jury room to show the jurors how to operate a digital recorder. The violation of CPL 310.10 (1) constituted a mode-of-proceedings error that did not require preservation.
https://nycourts.gov/reporter/3dseries/2022/2022_01069.htm

MRTA

People v Bennett
2022 NY Slip Op 06357
(4th Dept) (11/21/22 DOI)
Instead of arguing on appeal that Penal Law Article 222 should apply retroactively to the marijuana-related conviction, the defendant should have petitioned Supreme Court to vacate the conviction pursuant to CPL 440.46-a.
https://nycourts.gov/reporter/3dseries/2022/2022_06357.htm

Notice of alibi

People v Thomas
209 AD3d 615
(4th Dept) (10/3/22 DOI)
New trial. Supreme Court erred in denying the defense motion to file a late notice of alibi. In a motion filed the day before jury selection, counsel explained that, through his own negligence, despite his awareness of an alibi witness, he failed to notify the court and prosecutor. His failure to comply with CPL 250.20 was not willful or motivated by a desire to obtain a tactical advantage. The defendant's constitutional right to offer the testimony of the alibi witness outweighed any prejudice to the People.
People v Thomas (2022 NY Slip Op 05430)

Polling jury

People v Ramunni
203 AD3d 1076
(2nd Dept) (3/25/22 DOI)

Reversible error in accepting the verdict after polling the jury. When asked if the verdict was hers, juror #9 said, "Um, I'm not sure, with some, but most of them, yes." The court's follow-up "yes or no" question was posed in the presence of remaining jurors, despite evidence that #9 may have succumbed to pressure.
https://nycourts.gov/reporter/3dseries/2022/2022_02022.htm

Quantum of proof

Assault 3rd (vehicle)

People v Palombi
204 AD3d 1401
(4th Dept) (5/2/22 DOI)
Conviction of 3rd degree assault reversed. Driving with only a learner's permit, the defendant lost control and crashed into a pole while rounding a curve. The verdict, that a passenger was seriously injured due to the defendant's criminal negligence, was against the weight of evidence. Expert proof about a speed of 92 mph was speculative, and that the defendant crossed the double line did not show moral blameworthiness.
People v Palombi (2022 NY Slip Op 02896) (nycourts.gov)

Assault / physical injury / serious physical injury

People v Wheeler
201 AD3d 960
(2nd Dept) (1/27/22 DOI)
As to assault, the element of "physical injury" was not proven. A detective testified that the defendant hit him in the mouth with a fist, his lip bled, and he felt severe pain. No proof corroborated the description of pain or addressed its duration.
https://nycourts.gov/reporter/3dseries/2022/2022_00442.htm

People v Abughanem
203 AD3d 1710
(4th Dept) (3/22/22 DOI)
The evidence was legally insufficient to support 3rd degree assault. The People failed to present evidence establishing that the victim sustained a physical injury when the defendant jumped on her back. Although she reported back pain, there were no photographs of injuries or any evidence of substantial back pain.
People v Abughanem (2022 NY Slip Op 01938) (nycourts.gov)

People v Bunton
206 AD3d 1724
(4th Dept) (6/13/22 DOI)
The defendant appealed from a County Court judgment, convicting him of 2nd degree assault (two counts) and other crimes. The Fourth Department dismissed one assault count, finding the proof legally insufficient as to the element physical injury. There was only a vague description of the injury and no testimony about any pain medications. Further, the prosecution produced no medical records, and officer did not miss work.
People v Bunton (2022 NY Slip Op 03856)

People v Lopez-Sarmiento
207 AD3d 1210
(4th Dept) (7/11/22 DOI)
The proof as to assault showed that the defendant attempted to stab the victim; they struggled over the knife; and she suffered minor cuts to her hands. He was guilty only of attempted 2nd degree assault.
People v Lopez-Sarmiento (2022 NY Slip Op 04493)

People v Mayancela
207 AD3d 752
(2nd Dept) (8/1/22 DOI)
Evidence was legally insufficient as to serious physical injury element of gang assault, assault, and robbery. The complainant sustained multiple lacerations to his neck, head, chest, and abdomen. There was no proof of the victim's serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ. The convictions were reduced to attempted crimes.
People v Mayancela (2022 NY Slip Op 04741)

People v McBride
2022 NY Slip Op 07023
(1st Dept) (12/19/22 DOI)
The evidence of serious physical injury was legally insufficient. However, in slashing the complainant in the face with a sharp object, the defendant had showed an intent to cause serious physical injury and permanent disfigurement.
People v McBride (2022 NY Slip Op 07034)

Attempted murder

People v Hill
206 AD3d 1616
(4th Dept) (6/6/22 DOI)
Attempted 2nd degree murder dismissed. A video of an encounter between the defendant and a victim revealed that the gun may have accidentally discharged.
People v Hill (2022 NY Slip Op 03619)

Attempted robbery

People v Headley
204 AD3d 417
(1st Dept) (4/8/22 DOI)
Police stop of conspirators' vehicles heading to a robbery location several miles away—which had yet to be identified to the conspirators by the sting operators—was insufficient to prove attempted 1st degree robbery. The defendant and the others were not dangerously near to committing robbery.
https://nycourts.gov/reporter/3dseries/2022/2022_02234.htm

Burglary

People v Brown
203 AD3d 666
(1st Dept) (4/1/22 DOI)
Alleged burglary at medical center building. Insufficient proof of the "dwelling" element. Patients did not stay overnight in this building, and no "unit" within the building was a dwelling. The building did not provide the defendant with ready access to other buildings where hospital patients stayed overnight.
People v Brown (2022 NY Slip Op 02205) (nycourts.gov)

People v Burney
204 AD3d 1473
(4th Dept) (4/25/22 DOI)

Burglary conviction arose from violation of a stay-away order when defendant's girlfriend allowed him to enter her place to take a nap. His intent to commit a separate crime in the apartment was not proven.
People v Burney (2022 NY Slip Op 02737) (nycourts.gov)

People v Ferguson
204 AD3d 614
(1st Dept) (4/29/22 DOI)
Conviction of 1st degree burglary reversed as against the weight of the evidence. The People failed to prove that the entry into the victim's apartment was unlawful. Their theory was that the victim's estranged wife allowed the defendant to enter the premises to kill the victim. Given that the victim's wife co-owned the building and had a key to the apartment, the People failed to prove entry without consent.
People v Ferguson (2022 NY Slip Op 02878) (nycourts.gov)

People v Jones
206 AD3d 1566
(4th Dept) (6/6/22 DOI)
Fingerprint examiner opined that the print was made by the defendant's index finger—even though the print matched only 22% of the characteristics of his inked print. No other proof linked him to the burglary.
People v Jones (2022 NY Slip Op 03590)

Criminally negligent homicide

People v Faucett
206 AD3d 1463
(3rd Dept) (7/1/22 DOI)
Conviction of criminally negligent homicide reversed and count dismissed. The defendant did not see the vehicle he struck. His unexplained failure to see it did not support the conviction.
People v Faucett (2022 NY Slip Op 04195)

People v Cardona
207 AD3d 737
(2nd Dept) (8/1/22 DOI)
Conviction of criminally negligent homicide and reckless driving reversed. The conviction arose from a single-car collision. The defendant was driving at 74 mph when he lost control, went down an embankment, and crashed into a tree. His passenger died. While the defendant's conduct reflected poor judgment, the proof failed to establish that he engaged in an affirmative act beyond driving faster than the speed limit.
People v Cardona (2022 NY Slip Op 04733)

Criminal possession of drugs

People v Mighty
203 AD3d 1687
(4th Dept) (3/22/22 DOI)
Evidence of drug possession insufficient. There was no proof that the defendant possessed the controlled substance, and his mere presence where contraband was found was insufficient for constructive possession.
People v Mighty (2022 NY Slip Op 01923) (nycourts.gov)
CPW

People v King
206 AD3d 1593
(4th Dept) (6/6/22 DOI)

CPW 2 dismissed. Defendant's mere presence in the house where the weapon was found did not establish constructive possession.
People v King (2022 NY Slip Op 03606)

People v Holloway
2022 NY Slip Op 06716
(2nd Dept) (11/28/22 DOI)
The People appealed. The App Div affirmed. Proof that the defendant possessed a loaded handgun found in an unoccupied car parked behind his house was legally insufficient. The prosecution failed to present evidence that the defendant owned, rented, or exercised control over the car in which the gun was found.
People v Holloway (2022 NY Slip Op 06716)

Criminal sale of drugs

People v Adams
201 AD3d 1031
(3rd Dept) (1/10/21)
Criminal sale and conspiracy convictions against the weight of the evidence. No codefendants testified as to the defendant's involvement in purchases; no cocaine was recovered; and weight element not proven.
People v Adams (2022 NY Slip Op 00076) (nycourts.gov)

Dangerous contraband

People v Turner
202 AD3d 1375
(3rd Dept) (2/25/22 DOI)
While possession of a noncriminal, small amount of marihuana by an incarcerated person did not constitute possession of dangerous contraband (*People v Finley*, 10 NY3d 647), it was for the Legislature to determine whether synthetic marihuana was dangerous.
People v Turner (2022 NY Slip Op 01207) (nycourts.gov)

Depraved indifference murder

People v Williams
206 AD3d 1282
(3rd Dept) (6/17/22 DOI)
Conviction of 2nd degree murder (depraved indifference) to 2nd degree manslaughter. One justice dissented in part, opining that the defendant drove in an extremely reckless manner that showed an utter disregard for the value of human life. As the officer began to approach, the defendant fled the traffic stop, driving at 128 mph while approaching a yellow light. While he was highly intoxicated, such escape showed that he was conscious of his actions.
People v Williams (2022 NY Slip Op 03945)

Grand larceny

People v Golding
206 AD3d 1759
(2nd Dept) (6/10/22 DOI)
Grand larceny and criminal possession of stolen property counts dismissed. The defendant took keys to a U–Haul van, sat in the vehicle for two minutes, and then exited without ever moving it. The evidence did not show intent to cause permanent loss to the vehicle owner.

People v Golding (2022 NY Slip Op 03741)

Harassment 2nd

People v Lagano
2022 NY Slip Op 07021
(COA) (12/19/22 DOI)
Regarding conviction of 2nd degree harassment conviction based on legally insufficient evidence, a rational factfinder could have concluded that the defendant's statements—that he would kill the complainant's family, firebomb her home, and shoot her children in the head—were serious threats.
People v Lagano (2022 NY Slip Op 07021)

Manslaughter 2nd

People v Harris
203 AD3d 1320
(3rd Dept) (3/11/22 DOI)
Manslaughter 2nd upheld. Defendant drank and took drugs with victim and did not seek medical care when she was clearly in distress, but instead left her to "sleep it off." His conduct set in motion the events that foreseeably resulted in the victim's death.
People v Harris (2022 NY Slip Op 01484) (nycourts.gov)

Murder

People v Agan
207 AD3d 861
(3rd Dept) (7/15/22 DOI)
1st degree (witness elimination) reduced to 2nd degree murder. The evidence did not establish that the deceased victim (the defendant's wife) witnessed the defendant's sex offenses with the minor victim. At most, she may have been a coincidental witness. Further, there was no evidence that the defendant feared that his prosecution was imminent or that his wife might be called to testify against him.
People v Agan (2022 NY Slip Op 04581)

People v Jenkins
2022 NY Slip Op 06652
(2nd Dept) (11/28/22 DOI)
Proof of murder was legally insufficient. The heory of accessorial liability was that the defendant's display of a gun during a bar fight prolonged the attack and delayed others from transporting the victim to the hospital. However, the proof did not establish that the defendant shared his companion's homicidal intent.
People v Jenkins (2022 NY Slip Op 06652)

Predatory sexual assault

People v Adolph
206 AD3d 753
(2nd Dept) (6/10/22 DOI)
Predatory sexual assault against a child count dismissed. The crime required that the course of conduct occurred over a period of at least three months. No trial proof was adduced as to the period of alleged abuse.
People v Adolph (2022 NY Slip Op 03735)

Robbery

People v Smith
206 AD3d 1058
(3rd Dept) (6/6/22 DOI)
First and 2nd degree robbery counts dismissed. There was legally insufficient evidence to prove intent for accessorial liability. Indeed, considerable evidence suggested that the defendant was not one of the masked individuals who robbed the victim.
People v Smith (2022 NY Slip Op 03547)

Speeding

People v Ambrosini
74 Misc 3d 83
(App Term, 2nd Dept) (3/4/22 DOI)
Reversal of conviction of driving at an unreasonable and imprudent speed. The police officer provided no testimony as to any condition or hazards at the relevant time, so the court could not determine whether 78 mph was too fast.
People v Ambrosini (2022 NY Slip Op 22054) (nycourts.gov)

Terroristic threat

People v Santiago
206 AD3d 1466
(3rd Dept) (7/1/22 DOI)
Conviction of making a terroristic threat reversed, charge dismissed. The defendant did not cause a reasonable fear of the imminent commission of an offense. No warnings were issued about his threat.
People v Santiago (2022 NY Slip Op 04196)

Repugnant verdict

People v Rodriguez
203 AD3d 1053
(2nd Dept) (5/24/22 DOI)
Verdict of guilty as to 2nd degree robbery and 4th degree grand larceny was repugnant to acquittal of 3rd degree unauthorized use of a vehicle.
People v Rodriguez (2022 NY Slip Op 03403)

Right to counsel

People v English
201 AD3d 733
(2nd Dept) (1/14/22 DOI)
Reversal. The defendant's right to counsel was not adequately protected. His request for a new attorney, made through assigned counsel, contained serious complaints about counsel and allegations as to the breakdown of communications. Supreme Court denied the request without speaking with the defendant.
https://nycourts.gov/reporter/3dseries/2022/2022_00189.htm

People v Resheroop
209 AD3d 444
(1st Dept) (10/11/22 DOI)

New trial. Lower court denied the defendant's request for new counsel without making any inquiry and without giving him an opportunity to explain the basis for his request.
https://nycourts.gov/reporter/3dseries/2022/2022_05606.htm

Self-representation

People v Goodwin
201 AD3d 529
(1st Dept) (1/20/22 DOI)
New trial. The calendar court's denial of the defendant's repeated requests deprived him of his right to represent himself. His disruptiveness was not a sound rationale for rejecting his applications; his only outbursts flowed from frustration at not receiving a ruling.
People v Goodwin (2022 NY Slip Op 00281) (nycourts.gov)

People v Duarte
37 NY3d 1218
(COA) (2/18/22 DOI)
The defendant's statements did not trigger the trial court's duty to conduct a searching inquiry. Two judges dissented. The defendant's constitutional right to represent himself was denied. During a suppression hearing, the defendant asserted that counsel was ineffective, and he did not want counsel to represent him. After the court denied the application to relieve counsel, the defendant said, "I would love to go pro se."
People v Duarte (2022 NY Slip Op 00960) (nycourts.gov)

People v Baines
39 NY3d 1
(COA) (10/24/22 DOI)
Searching inquiry standard regarding pro se representation not met by the court telling the defendant that it was "not a great idea" to represent himself; that he was putting himself "in a very bad position;" and that a lawyer would have knowledge of criminal procedure that he did not. The appropriate remedy was remittal for a repeat of pretrial proceedings during which the defendant was deprived of counsel for an opportunity to make whatever pretrial motions were, or could have been, made.
People v Baines (2022 NY Slip Op 05919)

Sidebars

People v Girard
2022 NY Slip Op 06645
(1st Dept) (11/28/22 DOI)
New trial. There was a violation of the defendant's right to be present at sidebar conferences. The conference concerned the defendant's testimony, and he had specific knowledge that would have helped advance his position regarding his justification defense.
People v Girard (2022 NY Slip Op 06645)

***Sirois* hearing**

People v Phillips
203 AD3d 1636
(4th Dept) (3/14/22 DOI)
New trial. County Court precluded the defendant from being present at a material witness hearing, at which the witness testified. At ensuing *Sirois* hearing, material witness did not testify and the defendant was present. County Court found that the witness was rendered unavailable to testify at trial by threats

attributable to the defendant. While a defendant generally had no right to be present at a material witness hearing, his absence from a *Sirois* hearing could impair his ability to defend. The trial court erred in using unchallenged testimony and its own observations from the material witness hearing in the *Sirois* decision.
People v Phillips (2022 NY Slip Op 01710) (nycourts.gov)

Summation

People v Drago
207 AD3d 559
(2nd Dept) (7/15/22 DOI)
Reversal. Prosecutor's improper comments during summation deprived the defendant of a fair trial—an issue that was partially unpreserved. The prosecutor mischaracterized the evidence relating to the charge of criminally negligent homicide and suggested that the defendant's conduct was intentional or reckless. In addition, closing remarks denigrated defense theories as "excuses" and "garbage" and evoked sympathy for the defendant in strong emotional terms.
People v Drago (2022 NY Slip Op 04561)

People v Adorno
2022 NY Slip Op 05856
(2nd Dept) (10/24/22 DOI)
The majority and dissent engaged in extended discussions about their competing visions of the requirements to preserve an issue for appellate review in a case involving purported prosecutorial misconduct in summation.
People v Adorno (2022 NY Slip Op 05856)

Statutory speedy trial

People v Galindo
38 NY3d 199
(COA) (6/17/22 DOI)
CPL 30.30 (1) (e), made effective while the defendant's direct appeal was pending, did not apply here. The amendment required the application of maximum times for prosecutorial readiness to accusatory instruments charging traffic infractions jointly with a felony, misdemeanor, or violation. The amendment did not call for retroactive operation.
People v Galindo (2022 NY Slip Op 03928)

Trial penalty

People v Ellerbee
203 AD3d 1068
(2nd Dept) (3/25/22 DOI)
The defendant was penalized for exercising his right to a jury trial. Prior to trial, the Supreme Court offered 1½ years plus 2 years' post-release supervision, stating "You should understand the way I operate…before trial with me, you get mercy; after trial, you get justice." Prison term reduced.
People v Ellerbee (2022 NY Slip Op 02016) (nycourts.gov)

Unsworn child witness

People v Reed
2022 NY Slip Op 06657
(3rd Dept) (11/28/22 DOI)

New trial. County Court erred in allowing the three-year-old complainant to testify without first inquiring as to whether she had the requisite intelligence and capacity to give unsworn testimony. The error was not harmless. Issue reached in interest of justice.
People v Reed (2022 NY Slip Op 06657)

330.30 motion

People v Hubbard
201 AD3d 414
(1st Dept) (1/10/21)
CPL 330.30 motion granted based on juror misconduct. Juror used cardboard to simulate a knife and made a stabbing motion to mimic the crime. The demonstration applied common sense and experience and did not involve expert opinion.
People v Hubbard (2022 NY Slip Op 00017) (nycourts.gov)

People v Kenney
209 AD3d 1301
(4th Dept) (10/11/22 DOI)
County Court did not err in summarily denying the defendant's motion to set aside the verdict, pursuant to CPL 330.30 (2). The alleged juror misconduct was addressed by the court and counsel on the record at the time of trial.
https://nycourts.gov/reporter/3dseries/2022/2022_05645.htm

People v Allen
209 AD3d 1307
(4th Dept) (10/11/22 DOI)
The People appealed from an Oswego County Court order granting the defendant's motion to set aside the verdict, pursuant to CPL 330.30 (1). Reversed. The motion was premised on matters outside the existing trial record.
https://nycourts.gov/reporter/3dseries/2022/2022_05647.htm

SENTENCING

Appellate Division authority

People v Manson
205 AD3d 1150
(3rd Dept) (5/13/22 DOI)
The People urged that the appeal should be dismissed pursuant to CPL 450.10 (1). That statute did purport to disallow an appeal as of right where the sole issue was excessiveness of the agreed-upon sentence imposed upon a guilty plea. However, such provision was found to contravene the State Constitution.
People v Manson (2022 NY Slip Op 03151) (nycourts.gov)

Concurrent/consecutive

People v Martinez
201 AD3d 658
(2nd Dept) (1/10/21)
Consecutive CPW/murder terms were in error. The People did not establish that the defendant knowingly and unlawfully possessed a loaded firearm before forming the intent to cause a crime with that weapon.
People v Martinez (2022 NY Slip Op 00037) (nycourts.gov)

People v Parker
203 AD3d 1431
(3rd Dept) (3/11/22 DOI)
Error to impose consecutive sentences for two counts of 4th degree CPW. Sentences for two offenses could not run consecutively where single act constituted two offenses. Defendant's convictions were based on his act of constructively possessing two rifles in a locked safe on a certain date.
People v Parker (2022 NY Slip Op 01487) (nycourts.gov)

People v Reid
203 AD3d 474
(1st Dept) (3/11/22 DOI)
The sentence for possession of firearm with intent to use it unlawfully against another had to run concurrently with the term for murder, because there was no evidence that the defendant possessed the weapon with an unlawful intent distinct from his intent to kill the victim.
People v Reid (2022 NY Slip Op 01425) (nycourts.gov)

People v Brown
204 AD3d 1390
(4th Dept) (4/25/22 DOI)
Terms for 1st degree assault and 1st degree robbery must run concurrently, where the robbery was the predicate felony for the assault.
People v Brown (2022 NY Slip Op 02655) (nycourts.gov)

People v Lopez
204 AD3d 1529
(4th Dept) (5/2/22 DOI)
Supreme Court improperly sentenced the defendant as a second felony offender. The issue was unpreserved, but the illegality of the sentence was readily discernible from the record. A federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony.
People v Lopez (2022 NY Slip Op 02925) (nycourts.gov)

People v Burgess
204 AD3d 1036
(2nd Dept) (4/29/22 DOI)
Sentence imposed on the conviction of 2nd degree CPW should not run consecutively to the concurrent sentences for 1st degree manslaughter and attempted 2nd degree murder. The evidence did not establish that the defendant's possession of a gun was separate and distinct from his shooting at the two victims.
People v Burgess (2022 NY Slip Op 02814) (nycourts.gov)

People v Franklin
207 AD3d 963
(3rd Dept) (7/25/22 DOI)
County Court should not have imposed consecutive terms for arson and tampering. Given that the fire was set to conceal evidence, those convictions arose from a single act, and the sentences had to run concurrently with one another.
People v Franklin (2022 NY Slip Op 04677)

People v Gutierrez
209 AD3d 669

(2nd Dept) (10/11/22 DOI)
Modification. Sentences for 1st degree burglary would run concurrently with those imposed for 1st and 2nd degree assault. The former crimes did not involve disparate or separate acts from the assault crimes so as to support consecutive sentences.
https://nycourts.gov/reporter/3dseries/2022/2022_05543.htm

DVSJA

People v Crispell
203 AD3d 1393
(3rd Dept) (3/21/22 DOI)
Although at sentencing the defendant alluded to her domestic violence history, she failed to indicate how such history impacted her participation in the instant offense. To the extent that she sought a reduced sentence as a victim of domestic violence, she needed to make a CPL 440.47 application for resentencing.
People v Crispell (2022 NY Slip Op 01843) (nycourts.gov)

Enhanced

People v Martinez
202 AD3d 828
(2nd Dept) (2/11/22 DOI)
Supreme Court erred in imposing an enhanced sentence based on the defendant's violation of a condition of the plea. The court had not warned the defendant that he would be subject to open-ended treatment or that a single positive drug test would constitute a violation. Only failure to comply with explicit conditions constituted a violation.
People v Martinez (2022 NY Slip Op 00880) (nycourts.gov)

Fees, Fines, Surcharges

People v Bradshaw
2022 NY Slip Op 05216
(2nd Dept) (9/26/22 DOI)
The imposition of a supplemental sex offender victim fee for crimes committed before the effective date of Penal Law § 60.35(1)(b) did not violate the Ex Post Facto Clause. The fee was designed for fiscal purposes.
People v Bradshaw (2022 NY Slip Op 05216)

People v Wilson
201 AD3d 1354
(4th Dept) (1/31/22 DOI)
The plea court improperly enhanced the defendant's sentence by imposing a fine that was not part of the negotiated agreement. The remedy was to vacate the fine to conform the sentence to the promise.
People v Wilson (2022 NY Slip Op 00593)

People v Coleman
209 AD3d 501
(1st Dept) (10/17/22 DOI)
Surcharges and fees imposed upon sentencing for 2019 judgments vacated in the interest of justice, pursuant to CPL 420.35 (2-a) (L. 2020, c. 155, § 1, eff. 8/24/20).
People v Coleman (2022 NY Slip Op 05762)

People v Ruiz

209 AD3d 1042
(2nd Dept) (10/31/22 DOI)
Fine of $2,000 fine vacated since it was not part of the negotiated plea agreement. Under the circumstances of the case, imposition of the fine was an improper enhancement of the agreed-upon sentence.
People v Ruiz (2022 NY Slip Op 06016)

Ignition interlock device

People v Dancy
206 AD3d 823
(2nd Dept) (6/17/22 DOI)
Trial court violated the VTL by directing that the defendant must install and maintain an ignition interlock device for a three-year period, without imposing a sentence of probation or a conditional discharge.
People v Dancy (2022 NY Slip Op 03904)

Illegal

People v Thurston
208 AD3d 1629
(4th Dept) (10/3/22 DOI)
Vacatur of conditional discharge component of sentence. Although the issue was not raised, the reviewing court could not allow an illegal sentence to stand.
People v Thurston (2022 NY Slip Op 05443)

Orders of protection

People v Grant-Byas
201 AD3d 479
(1st Dept) (1/14/22 DOI)
Expiration date of orders of protection did not consider jail-time credit. Remand to set proper duration.
People v Grant-Byas (2022 NY Slip Op 00137) (nycourts.gov)

People v Farrell
201 AD3d 1367
(4th Dept) (1/31/22 DOI)
OP contained stay-away and no-contact directives as to the defendant's son. In a criminal action, such an order may be issued only in favor of a victim or witness. The son was neither.
People v Farrell (2022 NY Slip Op 00608) (nycourts.gov)

People v Rodriguez
203 AD3d 849
(2nd Dept) (3/11/22 DOI)
Vacatur of the durational provision of OP and remittal, since jail-time credits were not considered and the period imposed otherwise exceeded the maximum duration.
People v Rodriguez (2022 NY Slip Op 01466) (nycourts.gov)

People v Tumolo
203 AD3d 961
(2nd Dept) (3/21/22 DOI)
The duration of the orders of protection exceeded the maximum set forth in CPL 530.13 (4). Time served was not credited. Thus, the durational provisions were vacated.

People v Tumolo (2022 NY Slip Op 01817) (nycourts.gov)

People v Gonzalez
207 AD3d 656
(2nd Dept) (7/25/22 DOI)
Vacatur of durational provisions of orders of protection that exceeded the statutory maximum.
People v Gonzalez (2022 NY Slip Op 04644)

Predicate and timing issues

People v Hayes
2022 NY Slip Op 06965
(3rd Dept) (12/9/22 DOI)
County Court erred in sentencing the defendant as a second felony offender based upon a predicate offense for which she was sentenced on the same day as the instant offense. The sentence upon a predicate conviction must have been imposed before the commission of the present felony.
People v Hayes (2022 NY Slip Op 06965)

People v Faulkner
2022 NY Slip Op 06957
(3rd Dept) (12/9/22 DOI)
Sentence as a second violent felony offender may have been illegal. Neither the predicate statement nor the presentence report established his periods of incarceration between the two violent felonies so as to toll the 10-year look-back period.
People v Faulkner (2022 NY Slip Op 06957)

Predicate not equivalent

People v Griffith
201 AD3d 485
(1st Dept) (1/14/22 DOI)
Vacatur of second violent felony offender adjudication. NJ robbery conviction did not qualify as the equivalent of NY felony. *See People v Gilchrist*, 223 AD2d 382 (NJ statute punished knowing use of force in immediate flight from theft, while NY law punished only force with intent to compel person to give up property or prevent resistance).
People v Griffith (2022 NY Slip Op 00146) (nycourts.gov)

People v Merisier
202 AD3d 835
(2nd Dept) (2/11/22 DOI)
Adjudication as a second felony offender was improper. Predicate, federal drug conspiracy conviction did not require proof that conspirator committed overt act in furtherance of conspiracy, as NY did.
People v Merisier (2022 NY Slip Op 00883) (nycourts.gov)

People v Arline
203 AD3d 843
(2nd Dept) (3/11/22 DOI)
Vacatur of adjudication as a second violent felony offender. The defendant's prior Florida burglary conviction did not constitute a predicate violent felony conviction.
People v Arline (2022 NY Slip Op 01462) (nycourts.gov)

People v Robinson
205 AD3d 737
(2nd Dept) (5/6/22 DOI)
The predicate felony was a Connecticut larceny conviction under a statute that defined the crime differently in several subdivisions, some of which were not felonies under NY law. The CT accusatory instrument was not in the record so it was not clear which subdivision applied. Remittal.
People v Robinson (2022 NY Slip Op 03010) (nycourts.gov)

People v Bilfulco
207 AD3d 646
(2nd Dept) (7/25/22 DOI)
The defendant should not have been adjudicated a second felony offender based on a prior federal conviction for possession of a firearm by a felon. The federal crime did not require that the firearm be operable and thus did not constitute a New York felony for the purpose of enhanced sentencing.
People v Bilfulco (2022 NY Slip Op 04637)

People v Reedy
2022 NY Slip Op 07397
(4th Dept) (12/27/22 DOI)
Error to deny suppression. The stop of the defendant's vehicle was unlawful; there was no probable cause to believe that the defendant committed a traffic violation. The officer stopped the vehicle after visually estimating the speed at 82 mph in a 65 mph zone. There was no testimony about the officer's training and qualifications to support the estimate.
People v Reedy (2022 NY Slip Op 07397)

People v Tubbins
2022 NY Slip Op 07317
(4th Dept) (12/27/22 DOI)
Error to deny suppression. Police officers did not have probable cause to arrest the defendant for obstructing governmental administration on the ground that, when he jumped up from a table and began to run away, he interfered with their ability to issue citations for violations.
People v Tubbins (2022 NY Slip Op 07317)

People v Singletary
2022 NY Slip Op 07392
(4th Dept) (12/27/22 DOI)
No reasonable suspicion to justify the initial seizure of the defendant's vehicle, effected by stopping their patrol car directly behind his vehicle parked at a gas station. The officers were responding to multiple gunshots at or near the gas station—a high-crime area. But they did not see any shots emanating from the area where the defendant's vehicle was parked.
People v Singletary (2022 NY Slip Op 07392)

Presence required

People v Umar
203 AD3d 964
(2nd Dept) (3/21/22 DOI)
This defendant was not produced at sentencing on two convictions; and the record did not reveal that he expressly waived his right to be present. The matter was remitted for resentencing.
People v Umar (2022 NY Slip Op 01818) (nycourts.gov)

People v Berry
206 AD3d 755
(2nd Dept) (6/10/22 DOI)
A defendant had a fundamental right to be personally present when sentence was pronounced. This defendant was not produced at his resentencing proceeding, and the record did not establish that he expressly waived his right to be present. Reversed and remitted.
People v Berry (2022 NY Slip Op 03737)

Prior conviction unconstitutional

People v Hoyt
209 AD3d 1112
(3rd Dept) (10/24/22 DOI)
At the PVFO hearing, the defendant challenged the constitutionality of a 2006 felony conviction that the People sought to use as a predicate conviction. Supreme Court determined that, because the defendant had not appealed from the earlier conviction, he could only challenge the conviction via a CPL 440.10 motion. The appellate court held that the defendant had an independent statutory right to challenge the use of the prior conviction as a predicate felony.
People v Hoyt (2022 NY Slip Op 05894)

Probation condition

People v Dranchuk
203 AD3d 741
(2nd Dept) (3/4/22 DOI)
Appellate court deleted probation condition requiring the defendant to consent to a search of his person, vehicle, and home and to the seizure of drugs or weapons found. Conditions were not reasonably related to rehabilitation.
People v Dranchuk (2022 NY Slip Op 01312) (nycourts.gov)

People v Selby
2022 NY Slip Op 06722
(2nd Dept) (11/28/22 DOI)
The challenged a condition of probation requiring the defendant to refrain from contact with other sex offenders made it clear that he was expected to not engage in purposeful acts that could result in the prohibited contact. The condition did not subject him to strict liability; it was construed to prohibit *knowing* contact with any sex offender.
People v Selby (2022 NY Slip Op 06722)

People v Arias
2022 NY Slip Op 06760
(1st Dept) (12/2/22 DOI)
App Div struck the probation condition requiring the defendant to consent to a search by a probation officer of his person, vehicle, or home for "illegal drugs, drug paraphernalia, gun/firearm, or other weapon or contraband." The condition was improper because the defendant's offense did not involve substance abuse or a weapon; he had no history involving substance abuse or weapons; and the condition was not necessary to his rehabilitation.
https://nycourts.gov/reporter/3dseries/2022/2022_06760.htm

Pronouncement of sentence

People v Belcher-Cumba
202 AD3d 1149
(3rd Dept) (2/3/22 DOI)
CPL 380.20 required that courts pronounce sentence in every case where a conviction was entered. County Court did not pronounce the length of the term of imprisonment in open court. Thus, the sentence was vacated and the matter remitted.
People v Belcher-Cumba (2022 NY Slip Op 00691) (nycourts.gov)

People v Adams
203 AD3d 1684
(4th Dept) (3/22/22 DOI)
During sentencing, the lower court failed to orally pronounce the definite term component of the defendant's sentence, in violation of CPL 380.20. The appellate court vacated the sentence and remitted for resentencing.
People v Adams (2022 NY Slip Op 01921) (nycourts.gov)

Reduction explained

People v Youngblood
202 AD3d 1435
(4th Dept) (2/7/22 DOI)
Sentences for attempted aggravated murder (three counts) would run concurrently. Although the defendant's conduct in firing at police while inside his girlfriend's home were serious, no one was injured. The de facto life sentence without parole was not warranted.
People v Youngblood (2022 NY Slip Op 00751) (nycourts.gov)

People v Brown
203 AD3d 1319
(3rd Dept) (3/11/22 DOI)
Conviction of 1st degree criminal possession of marihuana, upon plea of guilty. In the interest of justice, term reduced to time served (three years), given defendant's age, physical condition, and criminal history.
People v Brown (2022 NY Slip Op 01483) (nycourts.gov)

People v Socciarelli
203 AD3d 1642
(4th Dept) (3/14/22 DOI)
Aggregate 32 years for sex offenses imprisonment was unduly severe, where the defendant had no prior sex offenses and the People offered 10 years pre-indictment and 15 years post. All terms to run concurrently.
People v Socciarelli (2022 NY Slip Op 01713) (nycourts.gov)

People v Lewis-Bush
204 AD3d 1424
(4th Dept) (4/25/22 DOI)
Sentence unduly severe, given the disparity between the plea offer and the sentence imposed. All sentences would run concurrently.
People v Lewis-Bush (2022 NY Slip Op 02675) (nycourts.gov)

People v Young
204 AD3d 1511
(4th Dept) (5/2/22 DOI)

In plea case, sentence for predatory sexual assault against a child reduced from 14 to 10 years to life, given the defendant's lack of a criminal history, abusive upbringing, resulting mental health issues, and remorse.
People v Young (2022 NY Slip Op 02912) (nycourts.gov)

People v Franklin
206 AD3d 1610
(4th Dept) (6/6/22 DOI)
Four counts of predatory sexual assault against a child. Aggregate term reduced from 80 years to life to 30 years to life. Although the defendant's conduct was heinous and despicable, he had no prior criminal record, and the reduced sentence would provide an opportunity for him to demonstrate rehabilitation in the future.
People v Franklin (2022 NY Slip Op 03616)

People v Kerrick
206 AD3d 1268
(3rd Dept) (6/17/22 DOI)
Although the defendant was being sentenced as a second violent felony offender, considering the disparity in his term and those of cohorts, the term for burglary reduced from 20 years to 12 years, plus PRS.
People v Kerrick (2022 NY Slip Op 03941)

People v Acosta
208 AD3d 1579
(4th Dept) (10/3/22 DOI)
Sentence reduced, based on the defendant's largely remote criminal history; the nonviolent nature of these offenses, and the disparity between the pretrial sentencing promise and the term imposed after trial. The appellate court emphasized that a defendant need not show extraordinary circumstances or an abuse of discretion for the midlevel appellate court to reduce a sentenced.
People v Acosta (2022 NY Slip Op 05390)

People v Colon
2022 NY Slip Op 07381
(4th Dept) (12/27/22 DOI)
The aggregate sentence was unduly harsh and severe, considering the disparity between the plea offer and the sentence imposed following trial. In the interest of justice, the appellate court directed that the sentences on the first and second counts would run consecutively to each other and concurrently with the sentences imposed on the remaining counts.
People v Colon (2022 NY Slip Op 07381)

Restitution

People v Witherow
203 AD3d 1595
(4th Dept) (3/14/22 DOI)
Restitution and reparation order. Error to impose more than the statutory cap for the second victim's past lost earnings—a form of loss not within the exception to the cap.
People v Witherow (2022 NY Slip Op 01691) (nycourts.gov)

People v Webber
203 AD3d 1660
(4th Dept) (3/22/22 DOI)

County Court erred in imposing the maximum restitution surcharge of 10%. The record contained no filing of an affidavit of an official or organization, designated in CPL 420.10 (8), showing that actual cost of the collection and administration of restitution exceeded 5% of restitution amount or amount collected.
People v Webber (2022 NY Slip Op 01904) (nycourts.gov)

People v Jensen
205 AD3d 926
(2nd Dept) (5/20/22 DOI)
Restitution order vacated. The defendant objected, and the record was insufficient to determine the proper amount, so he was entitled to a hearing.
People v Jensen (2022 NY Slip Op 03250) (nycourts.gov)

People v Piasta
207 AD3d 646
(4th Dept) (7/1/ 22 DOI)
Restitution order vacated, remittal. An undetailed, vague letter from an insurer was insufficient to support the $6,000 ordered.
People v Piasta (2022 NY Slip Op 04243)

People v Long
209 AD3d 673
(2nd Dept) (10/11/22 DOI)
The amounts of restitution awarded were not pronounced at sentencing. Such errors could be addressed on appeal, despite the valid waiver of appeal and failure to preserve the issue. Further, surcharges and fees were inconsistent with restitution.
https://nycourts.gov/reporter/3dseries/2022/2022_05545.htm

People v Jeffriesel
209 AD3d 1034
(2nd Dept) (10/31/22 DOI)
The sentencing court improperly speculated that the defendant had committed additional, similar crimes for which she had not been charged. Sentence vacated.
People v Jeffriesel (2022 NY Slip Op 06012)

People v Pawaroo
2022 NY Slip Op 06176
(1st Dept) (11/4/22 DOI)
The defendant failed to preserve her challenge to restitution. In any event, the award was proper. The defendant had stolen $587,000 from her former employer by depositing insurance checks in her own bank accounts. In imposing restitution, the court considered the defendant's ability to pay. When probation was revoked, the court reissued the order in the amount of $382,000 to reflect the payments already made.
People v Pawaroo (2022 NY Slip Op 06176)

YOUTHFUL OFFENDER

People v Lundi
201 AD3d 817
(2nd Dept) (1/20/22 DOI)
Supreme Court was required to determine if the defendant, whose convictions were armed felonies, was an eligible youth under CPL 720.10 and, if so, whether he should receive YO status.

People v Lundi (2022 NY Slip Op 00316) (nycourts.gov)

People v Graham
202 AD3d 1482
(4th Dept) (2/7/22 DOI)
Error to find the defendant ineligible for youthful offender status. First degree manslaughter was not an armed felony under the YO statute. The matter was remitted.
People v Graham (2022 NY Slip Op 00784) (nycourts.gov)

People v Shelton
202 AD3d 1001
(2nd Dept) (2/18/22 DOI)
The instant convictions constituted armed felonies for which the Supreme Court was required to consider statutory factors to determine whether the defendant was an eligible youth and, if so, whether he should be afforded YO. The lower court did not do so.
https://nycourts.gov/reporter/3dseries/2022/2022_01050.htm

People v Thompson
203 AD3d 961
(2nd Dept) (3/21/22 DOI)
The record did not show that Supreme Court made a YO determination, despite the defendant's eligibility.
People v Thompson (2022 NY Slip Op 01816) (nycourts.gov)

People v Irizarry
203 AD3d 1471
(3rd Dept) (4/1/22 DOI)
County Court erred in finding that, while the defendant was an eligible youth, YO treatment was "not an option" because the People had said during plea negotiations that, if such relief was granted, they would withdraw consent to the plea deal. Off-the-record promises made in plea bargaining will not be recognized where contradicted by the record.
People v Irizarry (2022 NY Slip Op 02159) (nycourts.gov)

People v Kahrone H.
204 AD3d 693
(2nd Dept) (4/8/22 DOI)
Fees vacated. DNA databank fees may not be imposed upon a YO. New York repealed statutes authorizing imposition of a mandatory surcharge and crime victim assistance fee upon a YO. The 2020 amendments applied retroactively to cases pending on direct appeal.
People v Kahrone H. (2022 NY Slip Op 02281) (nycourts.gov)

People v Simon
205 AD3d 1209
(3rd Dept) (5/20/22 DOI)
Charges stemmed from the defendant engaging in criminal conduct when at age 17 and 18. *People v Rudolph*, 21 NY3d 497, was decided after the defendant was sentenced but before the appellate process was complete. County Court was required to decide whether the defendant should be adjudicated a YO.
https://nycourts.gov/reporter/3dseries/2022/2022_03277.htm

People v Freeman
206 AD3d 1694
(4th Dept) (6/13/22 DOI)

The court erred in failing to determine if the defendant should be afforded youthful offender status. Because he was convicted of an armed felony offense, the court had to first determine if he was an eligible youth.
People v Freeman (2022 NY Slip Op 03829) (nycourts.gov)

People v Powell
208 AD3d 1366
(2nd Dept) (10/3/22 DOI)
Despite the defendant's eligibility, the record did not demonstrate that the lower court made a YO finding. The sentence was vacated, and the matter remitted.
People v Powell (2022 NY Slip Op 05335)

SORA

Affirmed

People v Tingling
201 AD3d 555
(1st Dept) (1/20/22 DOI)
The SORA court erred in assessing 25 points under the risk factor for sexual contact, based on a theory of accessorial liability for promoting the prostitution of a 15-year-old girl. The People did not prove that the defendant assisted customers in obtaining the services of the victim or shared the necessary intent with his victim's customers. However, the defendant remained at level two.
People v Tingling (2022 NY Slip Op 00363) (nycourts.gov)

People v Lane
201 AD3d 1266
(3rd Dept) (1/27/22 DOI)
In SORA appeal, CPL 460.30 motion was improper since such proceedings are civil in nature. The App Div treated the premature 2019 NOA as if the appeal had been taken from the 2021 order. *See* CPLR 5520 (c) (in interest of justice, appellate court may deem premature NOA to be valid).
People v Lane (2022 NY Slip Op 00482) (nycourts.gov)

People v Talluto
201 AD3d 1333
(4th Dept) (1/31/22 DOI)
Designation of the defendant as "sexually violent offender" affirmed. Dissent. Under Correction Law § 168-a (7) (b), a "sexually violent offense" encompassed a conviction of a felony in another jurisdiction for which the offender was required to register in that jurisdiction. The law should be interpreted so that the designation as a sexually violent offender was reserved for those who fit the valid part of the definition.
People v Talluto (2022 NY Slip Op 00575) (nycourts.gov)

People v J.F.
206 AD3d 496
(1st Dept) (6/17/22 DOI)
Correction Law § 168-a (2) (3) authorized the trial court to determine that a conviction of 2nd degree unlawful surveillance—the crime at issue here—did not require sex offender registration. However, that provision did not apply to modifications.
People v J.F. (2022 NY Slip Op 03973)

People v Corr

208 AD3d 136
(2nd Dept) (7/1/22 DOI)
"Initial date of registration" in SORA referred to registration with DCJS. SORA did not mention registration under any other state's laws.
People v Corr (2022 NY Slip Op 04183)

People v Matos
209 AD3d 19
(2nd Dept) (8/22/22 DOI)
SORA adjudication affirmed. A SORA certification could be challenged upon an appeal from the judgment of conviction—but not upon an appeal from the order designating the risk level. Since the defendant failed to appeal from the judgment of conviction, the appellate court could not review his contention that his certification was unlawful because the underlying crime was not a sex offense for SORA purposes.
People v Matos (2022 NY Slip Op 04984)

People v Vidro
209 AD3d 449
(1st Dept) (10/11/22 DOI)
There was no basis to find that the criteria for a "sex offense" for purposes of a disciplinary determination were equivalent to those for "sexual misconduct" within the meaning of the SORA risk factor.
https://nycourts.gov/reporter/3dseries/2022/2022_05616.htm

People v Suttle
209 AD3d 451
(1st Dept) (10/11/22 DOI)
The defendant was required to register as a sex offender in New York based on a Louisiana conviction that was not equivalent to any NY felony. The defendant had not shown that his sex offender adjudication based on the conviction at issue was contrary to the Public Health Law.
https://nycourts.gov/reporter/3dseries/2022/2022_05618.htm

People v Talluto
2022 NY Slip Op 07025
(COA) (12/19/22 DOI)
The statutory definition of a "a sexually violent offense" encompassed a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender" in that jurisdiction. The defendant was convicted of a non-violent felony sex offense in Michigan, where he would have to register as a sex offender.
People v Talluto (2022 NY Slip Op 07025)

Dismissed

People v Marxuach
2022 NY Slip Op 06277
(2nd Dept) (11/21/22 DOI)
Claim that defendant was not convicted of a sex offense as defined by Correction Law § 168-a was not reviewable upon appeal from an order designating his SORA risk level. The issue had to be raised on direct appeal from the judgment.
https://nycourts.gov/reporter/3dseries/2022/2022_06277.htm

Reversed/modified

People v Wassilie
201 AD3d 1117
(3rd Dept) (1/10/21)
County Court erred in assessing points in two SORA categories. As to risk factor 4, the record did not reflect that 2nd degree unlawful surveillance involved sexual contact. For risk factor 10, the record lacked proof that the defendant committed a "prior felony or sex crime" within three years of the instant offenses.
People v Wassilie (2022 NY Slip Op 00103) (nycourts.gov)

People v Morancis
201 AD3d 751
(2nd Dept) (1/14/22 DOI)
SORA reversal. Ineffective assistance. Counsel made two arguments, both lacking in merit and revealing no understanding of facts and law. Even if the arguments had any viability, they would not have altered the presumptive risk level. There was no strategic rationale to attack the assessment of points, while not seeking downward departure.
https://nycourts.gov/reporter/3dseries/2022/2022_00202.htm

People v Simmons
203 AD3d 106
(1st Dept) (1/20/22 DOI)
The defendant was improperly required to register as a sex offender based on his conviction of 1st degree assault as a sexually motivated felony. In a matter of first impression, the reviewing court held that only sexually motivated felony offenses listed in Correction Law § 168-a (2) (a) (i), (ii) were included in the definition of "sex offense."
People v Simmons (2022 NY Slip Op 00284) (nycourts.gov)

People v Addison
201 AD3d 974
(2nd Dept) (1/27/22 DOI)
SORA risk level reduced from two to one. Lengthy periods without offending, which were not considered in the risk assessment instrument, were a basis for a downward departure. After a 2004 sex offense, the defendant was in the community for 12 years without recidivism.
People v Addison (2022 NY Slip Op 00445) (nycourts.gov)

People v Stevens
201 AD3d 1344
(4th Dept) (1/31/22 DOI)
SORA adjudication stemmed from 1996 Virginia conviction for the statutory rape of a 14-year-old when the defendant was age 18—an isolated incident. He completed sex offender and substance abuse treatment and was not convicted of another sex crime. Dangerousness and risk of recidivism overestimated.
People v Stevens (2022 NY Slip Op 00581) (nycourts.gov)

People v VonRapacki
204 AD3d 41
(3rd Dept) (2/18/22 DOI)
Reversal of order classifying the defendant as a level-two sex offender. SORA court did not set forth findings of fact/conclusions of law, so remittal was required. At the new hearing, the defendant would be entitled to different assigned counsel, given the ineffective assistance he had received. SORA defendants had a due process right to effective assistance. Counsel had no contact with the defendant and made no arguments.
https://nycourts.gov/reporter/3dseries/2022/2022_01071.htm

People v Paterno
203 AD3d 853
(3rd Dept) (3/11/22 DOI)
SORA court erred in granting an upward departure. The People failed to prove, by clear and convincing evidence, the proffered aggravating factor, including that the defendant engaged in unprotected sexual conduct with the victim.
People v Paterno (2022 NY Slip Op 01470) (nycourts.gov)

People v Ritchie
203 AD3d 1562
(4th Dept) (3/14/22 DOI)
New SORA hearing. The defendant was deprived of a meaningful opportunity to respond to a sua sponte assessment of additional points and to argue against an alternative finding regarding an override.
People v Ritchie (2022 NY Slip Op 01635) (nycourts.gov)

People v Gomez
204 AD3d 493
(2nd Dept) (4/14/22 DOI)
Error to designate defendant a level-three predicate sex offender. Reversal, reduction to level-two offender. Supreme Court erred in assessing 30 points under risk factor 5 where victim was age 14. Further, the SORA court should not have imposed 30 points under risk factor 9 concerning prior convictions. The instant offense occurred in 2004, and the defendant did not plead guilty to the other crimes until 2011.
People v Gomez (2022 NY Slip Op 02440) (nycourts.gov)

People v Ellis
204 AD3d 1388
(4th Dept) (4/25/22 DOI)
The defendant was a level-two, not level-three, risk. The SORA court erred in assessing 20 points under risk factor 4 (continuous course of sexual misconduct). The People presented proof that the defendant engaged in acts of sexual contact with the victim on more than one occasion, but they failed to demonstrate that such instances were separated in time by at least 24 hours.
People v Ellis (2022 NY Slip Op 02654) (nycourts.gov)

People v Buyund
205 AD3d 729
(2nd Dept) (5/6/22 DOI)
Conviction of 1st degree burglary as a sexually motivated offense. Vacatur of the defendant's certification as a sex offender, since the instant crime was not a registerable offense under SORA.
People v Buyund (2022 NY Slip Op 03004) (nycourts.gov)

People v Cisneros
205 AD3d 624
(1st Dept) (5/24/22 DOI)
Adjudication as level-two sexually violent offender reversed. The Bronx County proceeding should have been dismissed on the defendant's motion. New York County Supreme Court had entered a SORA adjudication based on the defendant's criminal conduct in both counties.
People v Cisneros (2022 NY Slip Op 03454)

People v Faris
Unpublished

(App Term, 2nd Dept) (7/1/22 DOI)
The defendant pleaded guilty to forcible touching, but for his SORA adjudication, he should not have been assessed points for using forcible compulsion. The People failed to introduce clear and convincing evidence that the defendant overcame the victim's physical resistance with his superior size and strength or that she feared what he would do if she did not submit.

People v Echols
207 AD3d 478
(2nd Dept) (7/8/22 DOI)
Reversed. The defendant had pleaded guilty to attempted 1st degree criminal sexual act. Counsel rendered ineffective assistance by: (1) waiving a viable argument regarding risk factor 4; (2) not knowing applicable law; and (3) failing to articulate any argument supporting the downward departure sought.
People v Echols (2022 NY Slip Op 04310)

People v Krull
208 AD3d 163
(1st Dept) (8/8/22 DOI)
SORA adjudication reduced from level two to one. Supreme Court erred in assessing 10 points under risk factor 12 for the defendant's refusal to accept responsibility for his criminal conduct, thus raising his risk level. That assessment constituted an adverse consequence of such severity that the defendant was, in effect, compelled to provide incriminating testimony in violation of his Fifth Amendment rights. He could not admit to the underlying conduct without facing a potential perjury prosecution, given his trial testimony and his pending direct appeal.
People v Krull (2022 NY Slip Op 04783)

People v Morissette
75 Misc 3d 1230 (A)
(County Court) (8/8/22 DOI)
The defendant contended that Justice Court erred in denying his CPL 30.30 motion to dismiss, based on the People's failure to timely provide *Giglio* information, thus invalidating the COC and SOR. The trial court decided the motion on submissions without giving the defendant a reasonable opportunity to be heard, and it failed to explain the denial of the motion. Upon remand, those errors were to be rectified.
https://nycourts.gov/reporter/3dseries/2022/2022_50701.htm

People v Moore
208 AD3d 1514
(3rd Dept) (9/26/22 DOI)
Ineffective assistance of SORA counsel, who did not must consult with and counsel the client. Further, counsel failed to present a defense or raise any objections.
People v Moore (2022 NY Slip Op 05242)

People v Castrovinci
209 AD3d 681
(2nd Dept) (10/11/22 DOI)
Risk level reduced from two to one in the interest of justice. The SORA court improperly assessed points under such factors since there was never any sexual contact between the defendant and the victim, and thus her conduct did not satisfy the definition of a continuing course of sexual conduct.
https://nycourts.gov/reporter/3dseries/2022/2022_05550.htm

People v Howland
2022 NY Slip Op 06967

(3rd Dept) (12/9/22 DOI)
At the SORA hearing, the defendant requested a downward departure, but County Court failed to address the request or make a record of any findings. The Third Department affirmed the assessment of points that resulted in a presumptive level-three classification but reversed and remitted for a determination as to whether a downward departure was warranted.
People v Howland (2022 NY Slip Op 06967)

POST-CONVICTION

440.10 motions

Denial reversed

People v Green
201 AD3d 814
(2nd Dept) (1/20/22 DOI)
Hearing ordered on 440 motion based on actual innocence. The defendant submitted four supporting affidavits from alleged witnesses who described another individual as the shooter. The sole witness who testified against the defendant at trial stated that she was not present during the shooting—which was consistent with what she initially told police.
People v Green (2022 NY Slip Op 00315) (nycourts.gov)

People v Jackson
202 AD3d 1483
(4th Dept) (2/7/22 DOI)
CPL 440.10 denied after hearing. Reversal. Pursuing an EED defense was the best trial strategy, and there was no strategic explanation for counsel's lapses in not presenting available proof regarding PTSD and offering expert testimony.
People v Jackson (2022 NY Slip Op 00785) (nycourts.gov)

People v Tindley
202 AD3d 838
(2nd Dept) (2/11/22 DOI)
CPL 440.10 motion. Reversal. Hearing needed on whether counsel was ineffective in failing to: (1) investigate to determine whether pretrial motions as to search warrants should be made; and (2) advise the client of such potential challenges before he pleaded guilty to counts based on evidence recovered.
People v Tindley (2022 NY Slip Op 00886) (nycourts.gov)

People v Kagan
204 AD3d 695
(2nd Dept) (4/8/22 DOI)
440 denial reversed, new murder trial granted. The defendant, who is white, was charged with shooting a Black man. Judge who presided over the nonjury trial reviewed the trial transcript and realized that his experiences as a civil rights activist had improperly influenced his analysis and decision-making. Given such hearing proof, the defendant's right to a fair trial before an unbiased factfinder was violated.
People v Kagan (2022 NY Slip Op 02283) (nycourts.gov)

People v Samaroo
205 AD3d 822
(2nd Dept) (5/13/22 DOI)

Error to deny 440.10 motion. Hearing needed regarding whether the defendant was deprived of effective assistance by counsel's misadvice regarding immigration consequences. As to prejudice, the defendant had lived in this country since age 10, was married, had two children, was employed, and was the family's sole financial support.
People v Samaroo (2022 NY Slip Op 03128) (nycourts.gov)

People v Roshia
206 AD3d 1057
(3rd Dept) (6/6/22 DOI)
440 summary denial reversed. County Court judge should have recused himself, given that: (1) his law clerk was the former DA who prosecuted the defendant; (2) the defendant's motion made allegations about the DA's conduct while prosecuting him; and (3) there was a need to maintain an appearance of impartiality.
People v Roshia (2022 NY Slip Op 03546)

People v Williams
206 AD3d 1625
(4th Dept) (6/6/22 DOI)
440 denial after hearing reversed. Trial counsel had failed to interview a witness who was present during the shootings and could provide potentially exculpatory evidence. The defense investigator and trial counsel said they did not pursue the matter because the witness' version of events was inconsistent with other accounts. But without delving into the information, counsel could not make an informed decision.
People v Williams (2022 NY Slip Op 03625)

People v Buckley
206 AD3d 1470
(3rd Dept) (7/1/22 DOI)
Hearing needed on 440 motion. A special prosecutor advised the trial court that he was withdrawing an agreement based on the defendant's failure to fully cooperate in the prosecution of another perpetrator. Defense counsel may have been ineffective in failing to demand a hearing.
People v Buckley (2022 NY Slip Op 04197)

People v Go
207 AD3d 1081
(4th Dept) (7/1/22 DOI – Pt 2)
Denial of CPL 440.10 motion reversed. Counsel did not inform the defendant that the subject crime was an aggravated felony and erroneously that the risk of deportation diminished because the crime occurred more than five years before he obtained a green card. Remittal on prejudice
People v Go (2022 NY Slip Op 04258)

People v Tiger
207 AD3d 574
(2nd Dept) (7/15/22 DOI)
Reversal of 440.10 denial. The nurse defendant was hired to provide home care for a physically disabled child. After the defendant bathed the child, her skin was red and peeling, and the defendant was accused of having caused thermal burns. Defense counsel did not consult a medical expert and did not obtain a skin biopsy report indicating that the condition was caused by an allergic reaction to the child's medication.
People v Tiger (2022 NY Slip Op 04568)

People v Werkheiser
208 AD3d 1474
(3rd Dept) (9/19/22 DOI)

Error to deny 440 motion based on new evidence, innocence, and ineffective assistance. Six affidavits explained that one of the victims had recanted. A child psychologist opined that victim B was coerced into fabricating her allegations by her sister, the other victim, and noted the low IQ and cognitive deficits of both victims. Trial counsel failed to call an expert to refute the People's claims about child sex abuse accommodation syndrome and to explore the victims' susceptibility to false memories.
People v Werkheiser (2022 NY Slip Op 05188)

People v Jones
2022 NY Slip Op 05892
(3rd Dept) (10/24/22 DOI)
In reversing the summary denial of a CPL 440.10 hearing, the Third Department parted company with the First Department and declared that the *People v Robinson* (97 NY2d 341) standard did not preclude a challenge to a traffic stop premised on racial profiling, at least under our State constitution.
People v Jones (2022 NY Slip Op 05892)

Denial affirmed or grant reversed

People v Maggio
2022 NY Slip Op 06262
(2nd Dept) (11/21/22 DOI)
Grant of 440 reversed. plea was not rendered involuntary by the plea court's failure to ensure that the defendant was aware that his driver's license could be permanently revoked due to his conviction. The DMV regulation that resulted in the denial of relicensing did not exist when the defendant pleaded guilty. Further, the potential collateral consequence was not of such great importance that fundamental fairness nonetheless required that a defendant be warned of such consequence upon entering the guilty plea.
https://nycourts.gov/reporter/3dseries/2022/2022_06262.htm

People v Gonyea
2022 NY Slip Op 06835
(3rd Dept) (12/2/22 DOI)
In a 440 motion, the defendant contended that counsel was ineffective. When determining how and when to raise IAC arguments, defendants no longer had to distinguish between claims based on the record versus matters outside the record, pursuant to an amendment to CPL 440.10. *See* L 2021, ch 501. In his motion, the defendant urged that counsel was ineffective in failing to pursue various pretrial hearings. But the motion did not establish that there were no legitimate or strategic reasons for forgoing the motions.
https://nycourts.gov/reporter/3dseries/2022/2022_06835.htm

440.20 motions

People v David
203 AD3d 739
(2nd Dept) (3/4/22 DOI)
Reversal of grant of CPL 440.20 motion seeking to set aside the defendant's certification as a sex offender. A defendant's certification as a sex offender was part of the judgment of conviction but not the sentence. The relief sought was not available under CPL 440.20.
People v David (2022 NY Slip Op 01310) (nycourts.gov)

People v Maloy
204 AD3d 1090
(3rd Dept) (4/8/22 DOI)

If Penal Law § 70.30 applied, CPL 440.20 was not the proper vehicle to seek relief. County Court did not err in denying the assignment of counsel. A criminal defendant did not have an unqualified right to counsel in collateral proceedings, and the instant motion lacked merit.
People v Maloy (2022 NY Slip Op 02312) (nycourts.gov)

People v Matias
205 AD3d 557
(1st Dept) (5/20/22 DOI)
CPL 440.20 motion denial. The defendant's sentence of 50 years to life, imposed for a double murder committed at age 16, was constitutional. Recent developments in juvenile psychology and mitigating factors presented by the defendant were outweighed by the egregiousness of the crime, the absence of remorse or rehabilitation, and the defendant's prison disciplinary history.
People v Matias (2022 NY Slip Op 03332) (nycourts.gov)

People v Leon
June 17, 2022 (Unpublished)
In a CPL 440.20 motion, the defendant sought to vacate an aggregate sentence of 50 years to life, imposed in 1987 for two murders, committed when he was 16. He contended that the sentence constituted cruel and unusual punishment in violation of the 8th Amendment. The People agreed that the sentence may have *become* unconstitutional. Westchester County Superior Court granted the motion. *Miller v Alabama*, 567 US 460, set forth factors to be considered when determining whether a defendant was beyond the capacity to change and thus eligible for a life sentence. In sentencing the defendant for his horrific acts, the original sentencing court gave no thought to his possible capacity for rehabilitation, focusing only on retribution and punishment. The defendant, who had suffered a troubled childhood, had shown remorse and had achieved an extraordinary record in completing rehabilitative programs. The motion court reduced the aggregate sentence to 36 years to life, thus rendering the defendant eligible to go before the parole board.

***Anders* briefs**

People v Cosme
202 AD3d 521
(1st Dept) (2/11/22 DOI)
Assignment of new counsel. The *Anders* brief did not recite underlying facts or analyze relevant issues as to the defendant's mental health. Counsel's letter to defendant about the brief was written in English, even though the client had been aided by an interpreter at the plea proceedings.
People v Cosme (2022 NY Slip Op 00952) (nycourts.gov)

People v Jones
202 AD3d 827
(2nd Dept) (2/11/22 DOI)
Assignment of new counsel. The *Anders* brief submitted did not adequately analyze whether the plea was knowing, intelligent, and voluntary; the defendant was deprived of effective assistance impacting the validity of his plea; and the sentence was excessive.
People v Jones (2022 NY Slip Op 00879) (nycourts.gov)

People v Wimberly
203 AD3d 1225
(3rd Dept) (3/4/22 DOI)
In a prior decision in this case, the appellate court relieved former counsel and made it clear that new counsel should challenge the waiver of appeal. Inexplicably, current assigned appellate counsel failed to do so, and the unchallenged waiver foreclosed review of the YO claim.

People v Wimberly (2022 NY Slip Op 01346) (nycourts.gov)

People v Motta
203 AD3d 968
(2nd Dept) (3/21/22 DOI)
Anders brief. The Second Department assigned new counsel. Nonfrivolous issues existed, including whether the defendant was deprived of effective assistance at the SORA hearing to determine his risk level.
People v Motta (2022 NY Slip Op 01822) (nycourts.gov)

People v Smith
204 AD3d 838
(2nd Dept) (4/14/22 DOI)
Anders brief rejected. There was no indication that counsel communicated with the defendant to see whether he wanted to withdraw his plea of guilty, even though a client's express consent was needed to seek vacatur of the plea.
People v Smith (2022 NY Slip Op 02438) (nycourts.gov)

People v Oballe
75 Misc 3d 130 (A)
(App Term, 2nd Dept) (6/6/22 DOI)
Anders brief. New counsel. Possible issues included whether: *Boykin* rights were not adequately explained; the defendant received an insufficient *Peque* warning; and counsel was ineffective in not moving to dismiss. New counsel was directed to advise the defendant of risks that were inherent in such issues.
People v Oballe (2022 NY Slip Op 50433(U)

People v Mcmillian
207 AD3d 946
(3rd Dept) (7/25/22)
Appellate counsel filed an *Anders* brief. The appellate court assigned new counsel. There were issues of arguable merit pertaining to the validity of the waiver of appeal and whether County Court conducted an adequate inquiry before denying a request for new counsel.
People v Mcmillian (2022 NY Slip Op 04664)

People v White
208 AD3d 601
(2nd Dept) (8/22/22 DOI)
In *Anders* brief, appellate counsel appeared to suggest that an excessive sentence argument would be frivolous because the defendant's punishment—twice the statutory minimum—was negotiated. However, the Appellate Division had authority to reduce a negotiated sentence.
People v White (2022 NY Slip Op 04981)

People v Mirabal
208 AD3d 1465
(3rd Dept) (9/19/22 DOI)
Anders brief. There was in issue of arguable merit with respect to the validity of the defendant's appeal waiver that might potentially impact other issues, such as the severity of the sentence, the defendant's predicate sentencing status, and whether he was accurately advised of his potential sentencing exposure.
People v Mirabal (2022 NY Slip Op 05185)

People v Wilhelm
209 AD3d 414

(1st Dept) (10/11/22 DOI)
Appeal held in abeyance and directed counsel to communicate with the client about the *Anders* brief filed and advise him of his right to file a pro se supplemental brief.
People v Wilhelm (2022 NY Slip Op 05507)

People v Wright
209 AD3d 1046
(2nd Dept) (10/31/22 DOI)
The defendant appealed from a Suffolk County Court judgment, convicting him of 7th degree CPCS and another crime. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. The brief contained an inadequate statement of facts and did not analyze potential appellate issues or address facts in the record that might support an appeal.
People v Wright (2022 NY Slip Op 06020)

People v Brown
2022 NY Slip Op 06712
Anders brief rejected. The brief did not reflect that counsel had consulted with the defendant at any point during the representation.
People v Brown (2022 NY Slip Op 06712)

Certificate of good conduct

Streety v DOCCS
203 AD3d 1509
(3rd Dept) (4/1/22 DOI)
Reversal. In finding that it would be inconsistent with the public interest to grant a Certificate of Good Conduct, DOCCS failed in its duty to articulate a factual basis beyond the conviction itself for such conclusion.
Matter of Streety v Annucci (2022 NY Slip Op 02170) (nycourts.gov)

DVSJA

People v Coles
202 AD3d 706
(2nd Dept) (2/3/22 DOI)
Summary denial of CPL 440.47 motion reversed. Supreme Court erred in finding that the defendant failed to make the requisite preliminary evidentiary showing. She submitted affidavits of her sister and mother and a transcript of her interrogation by police.
People v Coles (2022 NY Slip Op 00678) (nycourts.gov)

People v Burns
207 AD3d 646
(2nd Dept) (7/25/22 DOI)
DVSJA resentencing granted. The father's substantial abuse of the defendant was a significant contributing factor to the murder of the father's girlfriend. Term of 25 years to life was unduly harsh, given the nature of the crime, the defendant's age at the time, his accomplishments in prison, and his family support.
People v Burns (2022 NY Slip Op 04638)

FOIL

Appellate Advocates v DOCCS

203 AD3d 1244
(3rd Dept) (3/4/22 DOI)
A FOIL request sought documents related to how the Board of Parole decided parole-release applications. Art. 78 proceeding. Affirmance. A dissent opined that neither the attorney-client privilege nor the intra-agency exemption precluded the release of training materials prepared for the Board.
Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision (2022 NY Slip Op 01354) (nycourts.gov)

NYCLU v Syracuse Police
2022 NY Slip Op 06348
(4th Dept) (11/21/22 DOI)
Partial grant of Article 78 regarding FOIL application. The records at issue concerned open complaints, as well as closed but unsubstantiated complaints, of police misconduct. Supreme Court erred in determining that the personal privacy exemption under Public Officers Law § 87(2)(b) allowed the respondents to categorically withhold the records at issue.
New York Civ. Liberties Union v Syracuse (2022 NY Slip Op 06348)

PLSNY v DOCCS
2022 NY Slip Op 07277
(3rd Dept) (12/27/22 DOI)
Appellate court awarded counsel fees awarded to PLS in Article 78. In denying the initial FOIL request, the respondent merely quoted the statutory language and failed to detail how the release of the subject video would interfere with investigations or could endanger correction officers.
PLSNY V DOCCS (2022 NY Slip Op 07277)

License revocation

M/O Endara-Caicedo v NYS DMV
38 NY3d 20
(COA) (2/18/22 DOI)
In an administrative license-revocation hearing, the refusal of a motorist arrested for DUI to submit to a chemical test could be used against him—even if such refusal occurred more than two hours after arrest. *See* VTL § 1194 (2) (a) (1). One judge dissented.
Matter of Endara-Caicedo v Vehicles (2022 NY Slip Op 00959) (nycourts.gov)

MHL Art. 10

State of NY v Scott M.
201 AD3d 1356
(4th Dept) (1/31/22 DOI)
The petitioner did not prove that the respondent was a dangerous sex offender requiring confinement. The record showed only the possibility that he had touched an unknown adult female. The petitioner's expert failed to address the respondent's successful integration into the community while under strict supervision.
Matter of State of New York v Scott M. (2022 NY Slip Op 00595) (nycourts.gov)

MRTA

People v Ghedini
74 Misc 3d 869
(4th Dept) (2/7/22 DOI)

The defendant pleaded guilty to 2nd degree criminal possession of marihuana—a class D felony under Penal Law § 221.25, which has since been repealed. He made a CPL 440.46-a motion to vacate the conviction. Supreme Court vacated the conviction and dismissed the accusatory instrument in the interests of justice.
People v Ghedini (2022 NY Slip Op 22056) (nycourts.gov)

People v Fabien
206 AD3d 436
(1st Dept) (6/10/22 DOI)
The MRTA provides that no finding of reasonable cause to believe a crime has been committed may be based solely on the odor of marijuana, but the law does not have retroactive effect.
People v Fabien (2022 NY Slip Op 03695)

SARA

Alvarez v Annucci
38 NY3d 974
(COA) (3/25/22 DOI)
SARA school-grounds residency restriction applied to offenders under post-release supervision. Two-judge dissent. SARA's plain language provided that the residency restriction applied only to those "on parole and conditionally released."
Matter of Alvarez v Annucci (2022 NY Slip Op 01957) (nycourts.gov)

People v Ortiz
203 AD3d 1436
(3rd Dept) (3/25/22 DOI)
County Court did not set forth reasons for excluding the victim impact statement from PSR. The defendant had no opportunity to review the statement. Sentence vacated, remittal to different judge.
People v Ortiz (2022 NY Slip Op 02041) (nycourts.gov)

People ex rel. Jones v Collado
208 AD3d 691
(2nd Dept) (8/1/22 DOI)
The respondents erred in not releasing the petitioner. He was wrongly confined in prison for many months past the expiration of his determinate sentence. When a level-three offender reached his maximum expiration date, DOCCS had to release him to an approved residence or an RTF
People ex rel. Jones v Collado (2022 NY Slip Op 04768)

Sealing

People v Miranda
205 AD3d 734
(2nd Dept) (5/6/22 DOI)
Reversal of denial of CPL 160.59 motion to seal conviction of attempted 3rd degree promoting prosecution. When the defendant was convicted, "sex offense" as defined in SORA did not include the instant crime.
People v Miranda (2022 NY Slip Op 03009) (nycourts.gov)

People v Witherspoon
2022 NY Slip Op 05866
(2nd Dept) (10/24/22 DOI)

CPL 160.59 (3) (f) did not require a court to summarily deny a motion to seal an eligible offense where the defendant was subsequently convicted of a crime in another state. Instead, such conviction was a factor for the motion court to consider in its discretionary determination.
People v Witherspoon (2022 NY Slip Op 05866)

Violation of probation

People v Davidson
201 AD3d 1025
(3rd Dept) (1/10/21)
VOP hearing. County Court asked counsel if he had discussed plea offer with the defendant. Counsel said he had explained the deal but was concerned about the defendant's understanding of issues. No confidential information was disclosed. Remarks were appropriate. Affirmed.
People v Davidson (2022 NY Slip Op 00073) (nycourts.gov)

People v Hancarik
202 AD3d 1151
(3rd Dept) (2/3/22 DOI)
Expiration of prison term and PRS period did not moot the defendant's challenge to the determination that he violated the conditions of his probation. Affirmed.
People v Hancarik (2022 NY Slip Op 00692) (nycourts.gov)

People v Jones
204 AD3d 831
(2nd Dept) (4/14/22 DOI)
Error to summarily revoke probation and impose imprisonment. The defendant did not admit to violating probation, so the lower court was required to hold a hearing.
People v Jones (2022 NY Slip Op 02432) (nycourts.gov)

MISCELLANEOUS

Competency

People ex rel. Molinaro v Warden
2022 NY Slip Op 07093
(COA) (12/19/22 DOI)
The COA declared that, when a defendant was not in custody, a court could not remand him into custody solely because a CPL Article 730 examination had been ordered. The appeal was academic, but the mootness exception applied.
Molinaro v Warden (2022 NY Slip Op 07093))

Habeas corpus

Nonhuman Rights Project v Breheny
2022 NY Slip Op 03859
(COA) (6/17/22 DOI)
Decision about a habeas corpus petition on behalf of an elephant contains a discussion by dissenting Judge Wilson that transcends the anomalous context and offers an expansive view of the power and scope of habeas corpus relief. Such ancient vehicle can be used to challenge detentions that did not violate any statutory right or were otherwise legal but were unjust in a specific case and is an innovative vehicle to challenge existing laws and societal norms on a case-by-case basis and to spur change.

Nonhuman Rights Project v Breheny (2022 NY Slip Op 03859)

Regulations

Stevens v DCJS
206 AD3d 88
(1st Dept) (5/6/22 DOI)
Familial DNA Search Regulations set forth in 9 NYCRR 6192 were vacated since the respondents exceeded their authority in promulgating the policy-driven and inherently legislative regs.
Matter of Stevens v New York State Div. of Criminal Justice Servs. (2022 NY Slip Op 03062) (nycourts.gov)