

# Decisions of Interest

MAY 8, 2023

## CRIMINAL

### FIRST DEPARTMENT

#### ***People v Garcia*** | May 4, 2023

CONSPIRACY | CIRCUMSTANTIAL EVIDENCE CHARGE | REVERSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 2<sup>nd</sup> degree conspiracy. The First Department reversed and remanded for a new trial. Supreme Court should have granted the defendant's request for a circumstantial evidence charge because there was no direct evidence of his participation in the conspiracy. The court's standard instructions on reasonable doubt and inferences were insufficient. They did not advise the jury to apply the circumstantial evidence standard to the People's entire case and exclude beyond a reasonable doubt every reasonable hypothesis of innocence. The error was not harmless; the circumstantial evidence was not overwhelming. Center for Appellate Litigation (Elizabeth G. Caldwell, of counsel) represented the appellant.

[People v Garcia \(2023 NY Slip Op 02392\)](#)

#### ***People v Lacy*** | May 4, 2023

JURISDICTIONALLY DEFECTIVE INDICTMENT | DISMISSED

The defendant appealed from a New York County Supreme Court judgment convicting him of persistent sexual abuse after a nonjury trial. The First Department reversed and dismissed the indictment. The indictment was jurisdictionally defective because it did not specify which of the three discrete qualifying offenses the defendant was alleged to have committed (*see People v Hardware*, 200 AD3d 431 [1st Dept 2021], *lv denied* 38 NY3d 927 [2022]). The indictment alleged that the defendant engaged in sexual contact without the victim's consent. But lack of consent and sexual contact are elements shared by all three qualifying offenses. Office of Appellate Defender (Sam Steinbrock-Pratt, of counsel) represented the appellant.

[People v Lacy \(2023 NY Slip Op 02394\)](#)

### SECOND DEPARTMENT

#### ***People v Delaurentis*** | May 3, 2023

#### ***People v Lowe***

#### ***People v Luis R.***

OOP DURATION | JAIL TIME CREDIT

The defendants in these unrelated cases appealed from Kings County Supreme Court judgments convicting them of certain crimes, which brought up for review orders of

protection issued at sentencing. The Second Department affirmed the convictions but vacated the expiration provision of the orders of protection and remitted for new determinations of the duration of the orders. The orders of protection did not credit the defendants for their jail time served. Appellate Advocates (David P. Greenberg, Russ Altman-Merino, and Anna Kuo, of counsel) represented the appellants.

[People v Delaurentis \(2023 NY Slip Op 02326\)](#)

[People v Lowe \(2023 NY Slip Op 02330\)](#)

[People v Luis R. \(2023 NY Slip Op 02332\)](#)

### ***People v Torres*** | May 3, 2023

INVALID WOA | COURT'S CONDITION | AFFIRMED

The defendant appealed from a Westchester County Court judgment convicting him of 1<sup>st</sup> degree manslaughter and 1<sup>st</sup> degree assault based on his guilty plea. The Second Department affirmed the judgment but found the waiver of appeal unenforceable. County Court conditioned the promised sentence on the defendant's waiver of his right to appeal. While a court may condition its acceptance of a plea agreement on such a waiver, it should articulate on the record its reason for doing so. Here, the court's generic reasons—judicial economy and avoiding a trial—were insufficient to warrant requiring the defendant to waive his right to appeal.

[People v Torres \(2023 NY Slip Op 02335\)](#)

### ***People v Taback*** | May 3, 2023

PEOPLE'S APPEAL | CPL 30.30 | COVID-19 EXECUTIVE TOLL

The People appealed from two orders of the Orange County Court that: (1) granted the defendant's 30.30 motion; and (2) adhered to that determination upon reargument. The Second Department reversed and reinstated the indictment. Executive Order 202.87, relating to the COVID-19 pandemic, tolled the speedy trial statute. Thus, only 75 days were chargeable to the People—from October 1, 2019 (when the felony complaint was filed) through December 30, 2020 (the effective date of the Executive Order), and from May 23, 2021 (the end date of the Executive Order) through July 6, 2021 (the date the People filed their COC/SOR).

[People v Taback \(2023 NY Slip Op 02334\)](#)

## THIRD DEPARTMENT

### ***People v Weaver*** | May 4, 2023

CORAM NOBIS | DEPRAVED INDIFFERENCE INSTRUCTION | REVERSED

The defendant appealed from an Albany County Court judgment convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW after a jury trial. The Third Department affirmed the judgment in 2018 (167 AD3d 1238 [3d Dept 2018], *lv denied* 33 NY3d 955 [2019])—but later granted the defendant's coram nobis motion, reinstated the appeal, reversed in the interest of justice and remanded for a new trial on the murder charge. County Court's jury instructions on depraved indifference murder failed to explain the culpable mental state as required by *People v Feingold* (7 NY3d 288 [2006]). The court twice instructed the jury on the overruled objective standard—that the circumstances of the homicide determined

the defendant's depraved indifference—and the record did not show that the charge as a whole provided the jury with the correct rules to apply to reach a verdict. Craig S. Leeds represented the appellant.

[People v Weaver \(2023 NY Slip Op 02352\)](#)

***People v Spirito*** | May 4, 2023

WARRANTLESS SEARCH | PAROLEE | DISSENT

The defendant appealed from a Tioga County Court judgment convicting him of 3<sup>rd</sup> degree CPW (2 counts) based on his guilty plea. The Third Department affirmed. Justice Aarons dissented, finding that the search of the defendant's home—during which parole officers found gun parts and two extended magazines—was illegal. A parole officer's search of a parolee must be substantially related to the performance of duty in the particular circumstances. The search was prompted solely by a tip from the defendant's mother, with whom he lived, that she saw a picture of the defendant with a gun and was worried that he had a gun. The mother did not testify at the suppression hearing. Absent any proof as to when the photograph was taken, the People failed to establish the basis of the mother's knowledge and the warrantless search could not properly be based on her tip.

[People v Spirito \(2023 NY Slip Op 02353\)](#)

## FOURTH DEPARTMENT

***People v Ashley*** | May 5, 2023

GRAND JUROR | FELONY CONVICTION | AUTOMATIC DISMISSAL

The defendant appealed from a Cayuga County Court judgment convicting him of 1<sup>st</sup> and 2<sup>nd</sup> degree murder, 1<sup>st</sup> degree attempted robbery, 2<sup>nd</sup> degree CPW, 4<sup>th</sup> degree conspiracy, and tampering with physical evidence based on his guilty plea. The Fourth Department vacated the plea and dismissed the indictment. The grand jury was illegally constituted because one of the jurors had previously been convicted of a felony offense (see CPL 210.35 [1]). County Court erred in requiring the defendant to show prejudice—a violation of CPL 210.35 (1) requires automatic dismissal of the indictment. David P. Elkovitch represented the appellant.

[People v Ashley \(2023 NY Slip Op 02432\)](#)

***People v Grayson*** | May 5, 2023

CPL 330 MOTION | HEARING REQUIRED | REMITTED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2<sup>nd</sup> degree conspiracy, 1<sup>st</sup> and 2<sup>nd</sup> degree CSCS, and 3<sup>rd</sup> degree CPCS (3 counts) after a jury trial. The Fourth Department held the appeal in abeyance and remitted for a hearing on the defendant's CPL 330.30 motion. Supreme Court erred by summarily denying the motion. A codefendant who raised the same issue in his appeal was granted a CPL 330 hearing on remittal from the Fourth Department, but the defendant was not given an opportunity to participate in that hearing (see *People v Woodard*, 199 AD3d 1377, 1379-1380 [4th Dept 2021]). Bridget L. Field represented the appellant.

[People v Grayson \(2023 NY Slip Op 02435\)](#)

### ***People v King*** | May 5, 2023

DISCOVERY REFORM | APPLIED TO PENDING CASE | DISMISSED

The defendant appealed from an Onondaga County Supreme Court judgment convicting him of 2<sup>nd</sup> degree assault and other crimes after a jury trial. The Fourth Department reversed and dismissed the indictment. The People initially announced readiness in March 2019. A trial was scheduled for January 27, 2020. Defense counsel moved for CPL 30.30 dismissal that day because the People had not filed a COC in compliance with the new discovery requirements. Supreme Court erred by denying the motion. Because the case was pending in the trial court, and not on appeal, when the discovery laws changed, *People v Galindo* (38 NY3d 199 [2022]) was not controlling. The People were placed in a state of unreadiness on January 1, 2020, resulting in an additional 26 days of pre-readiness delay. Combined with the initial pre-readiness delay, and subtracting two contested periods of excludable time, the People were not ready until the 185th day. The Hiscock Legal Aid Society (Susan M. Norman, of counsel) represented the appellant.

[People v King \(2023 NY Slip Op 02409\)](#)

### ***People v Swanton*** | May 5, 2023

JUSTIFICATION CHARGE | REQUIRED | REVERSED

The defendant appealed from a Herkimer County Court judgment convicting him of 2<sup>nd</sup> degree murder, 1<sup>st</sup> degree assault, and 1<sup>st</sup> degree criminal use of a firearm (2 counts) after a jury trial. The Fourth Department reversed and ordered a new trial on counts 1, 3 and 5. County Court erred by refusing to give a justification charge. Even if the defendant's account of a physical altercation—during which he shot two neighbors who came to his house to continue a dispute from a party that night—was “extraordinarily unlikely,” the court was required to give the justification charge. The defendant testified that one of the neighbors punched him immediately upon arriving at the defendant's home, pinned him to the ground and continued to attack him. The defendant knew that the neighbor owned at least one gun and did not know if he was armed that night. Frank Policelli represented the appellant.

[People v Swanton \(2023 NY Slip Op 02433\)](#)

## TRIAL COURTS

### ***People v Frazzini*** | 2023 WL 3239952

CPW | CONSTITUTIONAL

The defendant moved to dismiss an indictment charging her with 2<sup>nd</sup> degree CPW, contending that Penal Law § 265.03 (3) was unconstitutional. Erie County Supreme Court denied the motion. The defendant lacked standing to challenge NY's pistol permit statute as she never applied for a pistol permit and did not suffer the actual harm of a denial. Her challenge to the CPW statute, based primarily on *Bruen* (142 S Ct 2111 [2022]), was insufficient to declare the statute unconstitutional. *Bruen* did not invalidate NY's ability to implement pistol permit licensing rules and regulations—only NY's discretionary “proper cause” standard was affected. The defendant's inability to obtain a permit based on her prior conviction for a serious offense is statutory, not discretionary. Restrictions on the exercise of rights conferred by the Second Amendment have not rendered it “second class” compared to other constitutional rights.

[People v Frazzini \(2023 NY Slip Op 50410\[U\]\)](#)

### ***People ex rel. Bradley v Baxter*** | May 4, 2023

HABEAS CORPUS | DECLARATORY JUDGMENT | BAIL REFORM

The petitioner commenced a CPLR article 70 proceeding seeking a writ of habeas corpus on the ground that his pretrial detention violated CPL 510.10 and 530.20. His release rendered the petition moot; but the Fourth Department held that the mootness exception applied, converted the proceeding into a declaratory judgment action, and transferred the action to Supreme Court (203 AD3d 1576). Supreme Court granted the declaratory judgment, declaring that the petitioner was wrongly detained following arraignment on nonqualifying offenses based on his record of two or more prior felony convictions. Under bail reform laws, bail or remand may be ordered only for qualifying offenses. The double predicate rule must be interpreted to apply only to such offenses. If the Legislature had intended otherwise, it could have so stated. The Monroe County Public Defender (Benjamin L. Nelson, of counsel) represented the petitioner.

## FAMILY

### FOURTH DEPARTMENT

#### ***Matter of Juliet W. (Amy W.)*** | May 5, 2023

DERIVATIVE NEGLECT | MENTAL ILLNESS / DISABILITY | AFFIRMED

The mother appealed from an amended 2021 Cattaraugus County Family Court order which held that she derivatively neglected the subject child. The Fourth Department affirmed. Orders from 2016 and 2018—which terminated the mother’s parental rights over other children based on permanent neglect and the mother’s mental illness and intellectual disability—were so close in time to the instant proceeding that it could reasonably be assumed that the conditions still existed. Despite the mother’s testimony that the issues that resulted in the neglect finding had been effectively remediated, Family Court found that the mother’s largely untreated mental illness and intellectual disability rendered her unable to care for the child for the foreseeable future. There was no basis to disturb Family Court’s credibility determinations.

[\*Matter of Juliet W. \(Amy W.\) \(2023 NY Slip Op 02417\)\*](#)

#### ***Weisbrod-Moore v Cayuga County*** | May 5, 2023

CVA | NO SPECIAL DUTY | REVERSED

In this negligence action brought under the Crime Victims Act, defendant Cayuga County appealed from a Cayuga County Supreme Court order denying its pre-answer motion to dismiss the complaint. The Fourth Department reversed. The plaintiff sought damages based on sexual and physical abuse she sustained while in foster care. The Fourth Department departed from the First and Second Departments in holding that the plaintiff could not establish a special duty based upon the County’s alleged violation of its duties under the Social Services Law (*see George v Windham*, 169 AD3d 876, 877 [2d Dept 2019]; *Sean M. v City of New York*, 20 AD3d 146, 158-160 [1st Dept 2005]). Nor could she establish a special relationship between the parties based upon the County’s voluntary assumption of a duty generating justifiable reliance; negligent performance of a statutory duty cannot be equated with the breach of a duty voluntarily assumed.

[\*Matter of Weisbrod-Moore v Cayuga County \(2023 NY Slip Op 02445\)\*](#)

# SUPREME COURT - DIVORCE

***Suzuki v Greenberg*** | 2023 WL 3034729

CUSTODY ORDER | COUNSEL'S DECEIT | TREBLE DAMAGES

The plaintiff wife moved for summary judgment awarding treble damages under Judiciary Law § 487. New York County Supreme Court granted the motion against the husband's attorney. In the context of a divorce action initiated by the husband, the parties entered a 2015 settlement including a parenting plan. Thereafter, a neglect proceeding was commenced against the father, and Family Court issued a 2018 final order superseding the parenting plan and granting custody to the mother. In seeking a judgment of divorce in 2020, the father's attorney filed documents falsely stating that the father was the custodial parent and was never a party to a neglect proceeding and omitting the 2018 custody order. In an amended judgment of divorce, the wife was granted sole custody and, because of his misrepresentation, the husband was ordered to pay the wife's attorney's fees of \$18,258. In the instant matter, the husband's attorney was directed to pay the wife three times that amount—\$54,774—for intentionally deceiving the court.

[Suzuki v Greenberg \(2023 NY Slip Op 31289\[U\]\)](#)

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