No. 6
February 11, 2026

NEW YORK OFFICIAL REPORTS

ADVANCE SHEETS

Law Reporting Bureau

No. 6
February 11, 2026

NEW YORK OFFICIAL REPORTS

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COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed by the Court of Appeals Clerk's Office 1/9/26-1/15/26

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rules of the Court of Appeals (22 NYCRR) § 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rules of the Court of Appeals (22 NYCRR) § 500.23 and direct any questions to the Clerk's Office.

For January 9, 2026 through January 15, 2026, the following preliminary appeal statements were filed:

PEOPLE v JEFFERSON (EARL) (229 AD3d 723):

APL-2025-00206

2nd Dept. App. Div. order of 7/24/24; affirmance; leave to appeal granted by Warhit, J., 11/17/25; **Crimes—Vacatur of Judgment of Conviction—Whether the motion court properly determined that an undisclosed recorded statement did not constitute Brady material or newly discovered evidence; whether, following a hearing, defendant's CPL article 440 motion was properly denied;** Supreme Court, Kings County, denied defendant's motion pursuant to CPL 440.10 to vacate a judgment of the same court (rendered 6-4-92), convicting defendant of murder in the second degree (two counts), upon a jury verdict, and imposed sentence; App. Div. affirmed.

PEOPLE v VASSELL (RAY) (236 AD3d 933):

APL-2025-00221

2nd Dept. App. Div. order of 3/19/25; modification; leave to appeal granted by Halligan, J., 12/22/25; **Crimes—Appeal—Whether defendant was denied the effective assistance of appellate counsel, the right of confrontation, or due process by the denial of access on direct appeal to a trial exhibit consisting of a photograph of the victim; Crimes—Trial—Adjournment—Whether the trial court erred in denying defendant's request to delay the proceedings for him to receive ashes for Ash Wednesday;** Supreme Court, Kings County, convicted defendant of criminal sexual act in the first degree (6 counts), sexual abuse in the first degree (16 counts), incest in the first degree (6 counts), endangering the welfare of a

child (2 counts), tampering with a witness in the fourth degree, and criminal contempt in the second degree, upon a jury verdict, and sentenced him, as a second felony offender; App. Div. modified as a matter of discretion in the interest of justice, by reducing the sentences imposed on counts 1,2, 4, 5, 7, 8, 10, 11, 13, 14, 16, and 17 from determinate terms of imprisonment of 15 years, to be followed by 20 years of postrelease supervision to determinate terms of imprisonment of 8 years, to be followed by 20 years of postrelease supervision, and, as so modified, affirmed.

WENEGIEME v JP MORGAN CHASE (2025 NY Slip Op 79048[U]):

APL-2025-00219

2nd Dept. App. Div. order of 10/22/25; dismissal; sua sponte examination of whether any jurisdictional basis exists for an appeal as of right; **Appeal—Appealable paper—Whether the Appellate Division properly dismissed the appeal on the ground that no appeal lies from an order entered on the default of the appealing party;** App. Div. dismissed appeal and denied respondents' motion as academic.

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Permanency Hearing Orders Superseded by Subsequent Permanency Hearing Orders.—In two Family Court Act article 10 neglect proceedings, the Appellate Division properly determined that respondent mother's appeals from expired permanency hearing orders were moot, and did not abuse its discretion in determining that the issues raised below were not sufficiently substantial or novel to warrant an exercise of its discretion to retain the appeals despite mootness. At the time the Appellate Division entered its decisions, both permanency hearing orders were superseded by subsequent permanency hearing orders, which continued the children's placement in foster care. Because the orders from which respondent appealed had been replaced by subsequent orders, they no longer affected respondent's rights and therefore were moot. The issues raised were standard issues of the sort that arise in permanency hearing adjudications, and the record did not demonstrate that the issue of whether the referee erred by claiming to lack the power to return the children to respondent's care prior to a dispositional hearing was likely to recur. Moreover, adopting a blanket mootness exception allowing appellate review of all mooted permanency hearing orders would be imprudent and not workable.— *Matter of Joshua J. (Tameka J.)*, 44 NY3d 394.

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Suspension.—Respondent attorney engaged in a pattern of misappropriation of fiduciary funds based on 11 matters in which respondent issued funds from his attorney escrow account to his clients and/or for personal purposes when there were no and/or insufficient corresponding funds on deposit; failed to maintain required bookkeeping records for the escrow account when he failed to maintain a contemporaneous ledger or similar record showing the sources of all funds deposited, the names of all persons for whom the funds were held, a description and amount of funds held, and the names of all persons to whom the funds were disbursed; and engaged in conduct that adversely reflected on his fitness as a lawyer based on his awareness that a suspended attorney was referring cases to him (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.15 [a], [d]; 8.4 [h]). Under the totality of the circumstances, including, in mitigation, respondent's pro bono work and his contributions in the legal and civic community, and, in aggravation, that respondent failed to honor his obligations as a fiduciary and repeatedly misappropriated clients' funds, which inured to his own benefit, respondent was

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EQUAL ACCESS TO JUSTICE ACT.

Prevailing Party — Prevailing in Whole.—Under the State Equal Access to Justice Act (EAJA), which makes counsel fees available to a party with limited financial resources who has sued to challenge unreasonable governmental action and succeeded in acquiring a substantial part of the relief sought in the lawsuit, a party "prevails in whole" when the party obtains all of the relief sought in a lawsuit against the State—including when that relief is granted voluntarily by the State after the action is commenced—and is thus a prevailing party as a matter of law (*see* CPLR 8602 [f]). To the extent *Matter of Clarke v Annucci* (190 AD3d 1245, 1247 [3d Dept 2021], *lv dismissed* 37 NY3d 935 [2021]) is to the contrary, it should no longer be followed. A plaintiff or petitioner who obtains full relief from the State need not demonstrate that the civil action catalyzed the State's complete reversal to be a prevailing party. The party must only show that it received from the State all of the relief requested that could have been awarded in a final judgment on the merits or settlement in the party's favor. Accordingly, petitioner was a prevailing party in his CPLR article 78 proceeding to review the Office of Temporary and Disability Assistance's (OTDA) denial of his application for rental assistance, which had been dismissed as moot because OTDA voluntarily granted the relief before answering. Petitioner received the reversal of OTDA's denial of rental assistance plus utility arrears that he sought when he commenced the proceeding. He therefore prevailed in whole, making him a prevailing party under the State EAJA.— *Matter of Markey v Tietz*, 244 AD3d 78.

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Sexual Abuse — Clear and Convincing Evidence of Innocence.—The Court of Claims made no reversible error in dismissing claimant's action pursuant to Court of Claims Act § 8-b alleging that he had been unjustly convicted and imprisoned after the complainant recanted allegations of sexual abuse and the judgment of conviction was vacated, as claimant did not prove his innocence by clear and convincing evidence. Although the Court of Claims stated that the challenged statements "point[ed] to the truth of [the complainant's] accusations," it identified substantial additional evidence supporting its conclusion that claimant's proof was not clear and convincing. Given the abundance of nonhearsay evidence supporting the court's conclusion, even if the contested statements were hearsay, the error was not prejudicial. Each of the court's findings which claimant argued were based on evidence outside the record also had record support. Moreover, the court did not erroneously presume that the complainant's recantation testimony was inherently unreliable. The court set forth specific reasons, based on its factual findings and careful attention to the demeanor of the witnesses, to support its conclusion that the complainant's recantation was not credible.— *Tuckett v State of New York*, 44 NY3d 432.

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DECIDED IN THE

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STATE OF NEW YORK

THOMAS J.K. SMITH
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In the Matter of Joshua J. Westchester County Department of Social Services, Respondent; Tameka J., Appellant. (Proceeding No. 1.)

In the Matter of Christopher J. Westchester County Department of Social Services, Respondent; Tameka J., Appellant. (Proceeding No. 2.)

Argued April 8, 2025; decided May 20, 2025

PROCEDURAL SUMMARY

Appeal, by permission of the Court of Appeals, from two orders of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 11, 2023. The Appellate Division, in each order, dismissed an appeal, as academic, from a permanency hearing order of Family Court, Westchester County (Arlene Gordon-Oliver, J.; Meryl H. Guzman, Ct. Atty. Ref.), entered in proceedings pursuant to Family Court Act article 10, which had continued the children's placement with petitioner until the completion of the next permanency hearing or pending further order of the court.

Matter of Joshua J. (Tameka J.), 220 AD3d 776, affirmed.

Matter of Joshua J. (Tameka J.), 220 AD3d 777, affirmed.

HEADNOTE

Appeal — Academic and Moot Questions — Permanency Hearing Orders Superseded by Subsequent Permanency Hearing Orders

In two Family Court Act article 10 neglect proceedings, the Appellate Division properly determined that respondent mother's appeals from expired permanency hearing orders were moot, and did not abuse its discretion in determining that the issues raised below were not sufficiently substantial or novel to warrant an exercise of its discretion to retain the appeals despite mootness. At the time the Appellate Division entered its decisions, both permanency hearing orders were superseded by subsequent permanency hearing orders, which continued the children's placement in foster care. Because the orders from which respondent appealed had been replaced by subsequent orders, they no longer affected respondent's rights and therefore were moot. The issues raised were standard issues of the sort that arise in permanency hearing adjudications, and the record did not demonstrate that the issue of whether the referee erred by claiming to lack the power to return the children to respondent's care prior to a dispositional hearing was likely to recur. Moreover, adopting a blanket mootness exception allowing appellate review of all mooted permanency hearing orders would be imprudent and not workable.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Appellate Review §§ 552–557; Am Jur 2d Juvenile Courts and Delinquent and Dependent Children § 125.

Carmody-Wait 2d §§ 70:334–70:335, 70:339; Carmody-Wait 2d Proceedings Involving Abused and Neglected Children, Destitute Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:204–119A:205.

McKinney's, Family Ct Act art 10.

New York Family Court Practice (2d ed) §§ 2:101, 14:1–14:3.

NY Jur 2d Appellate Review §§ 587, 599; NY Jur 2d Domestic Relations: Family Court Proceedings §§ 709, 720.

Siegel, NY Prac (6th ed) §§ 525, 612.

ANNOTATION REFERENCE

See ALR Index under Abuse of Persons; Children and Minors; Judgments, Orders, and Decrees; Moot and Abstract Matters; Neglect of Child.

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POINTS OF COUNSEL

George E. Reed, Jr., White Plains, for appellant. I. A judicial exception to mootness on appeals from extension of foster care placement is mandatory in order to effectuate the statutory right to appeal. (*Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573; *Matter of Jonathan F.*, 3 AD3d 336; *Matter of Jolani P. [Parris M.]*, 184 AD3d 574; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578; *Matter of Peter T. [Shay S.P.]*, 173 AD3d 1046.) II. The record on appeal from a permanency hearing order begins with the filing of a permanency report, and does not include the entire record of the underlying child protective proceeding. III. A permanency order based on a determination that a referee does not have the power to return a child to the parent before a dispositional hearing has been completed is invalid. (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275.) IV. A

referee does not have the power to conduct a permanency hearing without consent or an order of reference. V. A permanency order based on a hearing where a 13 year old was excluded from hearing testimony and proof against his will, without findings to support such exclusion, is invalid. VI. Where the parent is ready, willing and able to care for her child, her child should be returned to her.

William E. Horowitz, Briarcliff Manor, Attorney for Child Joshua J. I. Statutory and due process rights of children are violated by routine dismissals of appeals of permanency orders as moot. (*Matter of Alachi I. [Shelby J.]*, 215 AD3d 1014; *Matter of Newton v McFarlane*, 174 AD3d 67; *Simmons v Reynolds*, 898 F2d 865; *Rankel v County of Westchester*, 135 AD3d 731; *Duchesne v Sugarman*, 566 F2d 817.) II. The present appeals qualify for exceptions to the mootness doctrine. (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707; *Matter of Emmanuel B. [Lynette J.]*, 175 AD3d 49; *Matter of Lucinda R. [Tabitha L.]*, 85 AD3d 78; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816; *Southerland v City of New York*, 680 F3d 127.) III. The Supreme Court of California has recently addressed the issue of exceptions to mootness in the context of child neglect. IV. The Court of Appeals should modify the exception to mootness test for appeals of permanency orders. V. Family Court gave insufficient weight to the child's desire to participate in his permanency hearings. VI. Family Court improvidently exercised its discretion to adjourn the dispositional hearing. (*Matter of Frank C.*, 70 NY2d 408; *Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275.) VII. Material and relevant evidence from prior proceedings in the underlying matter should not be excluded from the record on appeal of a permanency order. (*Matter of Desirea F. [Angela F.]*, 136 AD3d 1074.) VIII. The US Supreme Court has spoken on the issue of mootness in the context of a case involving biological time limits. (*Roe v Wade*, 410 US 113; *Friends of Earth, Inc. v Laidlaw Environmental Services [TOC], Inc.*, 528 US 167.)

Joan Iacono, Scarsdale, Attorney for Child Christopher J. I. A permanency hearing is not a proceeding separate and apart from the Family Court Act article 10 proceeding which resulted in the placement or removal of a child. II. A procedural distinction must be recognized between a pre-disposition permanency hearing and a post-disposition permanency hearing. (*Matter of Lacee L. [Stephanie L.]*, 32 NY3d 219; *Matter of Bridget Y. [Kenneth M.Y.]*, 92 AD3d 77.) III. A pre-dispositional perma-

nency hearing does not substitute for the initial dispositional hearing. (*Matter of Demetria FF. [Tracy GG.]*, 140 AD3d 1388.) IV. The record on appeal is the entire Family Court Act article 10 record when a permanency hearing is held concurrently with the article 10 proceeding. V. The permanency order is valid. (*Matter of Marie B.*, 62 NY2d 352; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *Matter of Damani B. [Theresa M.]*, 174 AD3d 524; *Matter of Edward C.Y. v Jessica E.H.*, 220 AD3d 503; *Matter of Hiliana R. v Cesar A.P.J.*, 167 AD3d 463.)

John M. Nonna, County Attorney, White Plains (*Justin R. Adin* and *Jason S. Whitehead* of counsel), for respondent. I. Appellant's challenges to the permanency orders do not warrant consideration under the exception to the mootness doctrine. (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707; *People ex rel. Molinaro v Warden, Rikers Is.*, 39 NY3d 120; *Coleman v Daines*, 19 NY3d 1087; *City of New York v Maul*, 14 NY3d 499; *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148.) II. The Family Court did not abuse its discretion when it limited Joshua J.'s participation at the October 13, 2022 permanency hearing. (*Henry v New Jersey Tr. Corp.*, 39 NY3d 361; *Matter of Eric W.*, 68 NY2d 633; *Matter of Peter L.*, 59 NY2d 513.) III. Appellant consented to the referee presiding over the permanency hearing by failing to object and actively participating in the hearing. (*People v Davis*, 13 NY3d 17; *Matter of Carlos G. [Bernadette M.]*, 96 AD3d 632; *Morton v Brookhaven Mem. Hosp.*, 308 AD2d 566; *Matter of Heather J.*, 244 AD2d 762; *Chalu v Tov-Le Realty Corp.*, 220 AD2d 552.) IV. Both permanency determinations are supported by sound and substantial record evidence. (*Zuckerman v City of New York*, 49 NY2d 557.) V. The court attorney-referee's misstatement of the law was harmless given the sufficiency of the unchallenged hearing evidence. (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d 389.) VI. Appellant's dehors-the-record claim is meritless.

Willkie Farr & Gallagher LLP, New York City (*Philip F. DiSanto*, *Larissa R. Marcellino* and *Katherine Higginbotham* of counsel), for The Children's Law Center, amicus curiae. I. Participation in permanency proceedings by children 10 and over is the rule, not the exception, under New York law. (*Bank of Am., N.A. v Kessler*, 39 NY3d 317; *People v Ocasio*, 28 NY3d 178; *People v Mobil Oil Corp.*, 48 NY2d 192; *Kingdomware Technologies, Inc. v United States*, 579 US 162; *Matter of Anonymous v Molik*, 32 NY3d 30.) II. A court presiding over a per-

manency hearing should presume that participation—not exclusion—is in the "best interests" of a child. III. Child participation in permanency hearings leads to fairer, more complete, and more effective permanency proceedings.

Latham & Watkins LLP, New York City (*Arlene Chow* of counsel), *Lawers for Children*, New York City (*Betsy Kramer* of counsel), and *The Legal Aid Society*, New York City (*Melissa Friedman* and *Theresa B. Moser* of counsel), for Lawers for Children and another, amici curiae. I. Children's rights to attend their permanency hearings should be abridged only upon strict compliance with the dictates of the Family Court Act. (*Matter of Kimberly RR. [Gloria RR.—Pedro RR.]*, 165 AD3d 1428.) II. A permanency hearing following completion of the fact-finding hearing should be consolidated with the dispositional hearing when it is in the child's best interest. (*Matter of Telsa Z. [Denise Z.]*, 84 AD3d 1599; *Matter of Lacee L. [Stephanie L.]*, 32 NY3d 219.) III. Referees should not preside over permanency hearings prior to completion of the dispositional hearing. (*People v Allen*, 9 Misc 3d 235; *Schanback v Schanback*, 130 AD2d 332; *Rezzadeh v Lucas*, 253 AD2d 698; *Kardanis v Velis*, 90 AD2d 727.) IV. The Court should not establish an exception to the mootness doctrine for appeals from permanency hearings. (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707; *Matter of Nigel XX. [Tabitha YY.]*, 106 AD3d 1407; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578; *Matter of Kimberly G. [Natasha G.]*, 203 AD3d 1418; *Matter of Shawn S.*, 163 AD3d 31.)

Brooklyn Defender Services, Family Defense Practice, Brooklyn (*Amy Mulzer* of counsel), *Family Justice Law Center*, New York City (*Anna Arons* and *David Shalleck-Klein* of counsel), and *Legal Services of the Hudson Valley, Family Defense Unit*, White Plains (*Katherine Sexton* of counsel), for Brooklyn Defender Services and others, amici curiae. I. The legislature intended for permanency hearings to provide meaningful court oversight to ensure that family reunification was not needlessly delayed. (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275.) II. There is widespread failure to comply with the requirements of Family Court Act § 1089. (*Batista v Delbaum, Inc.*, 234 AD2d 45.) III. In the absence of a mootness exception, the deficiencies of permanency hearings have escaped appellate review. (*Matter of Malazah W. [Antoinette W.]*, 183 AD3d 754; *Matter of Jihad N. [Devine N.]*, 180 AD3d 1164; *Matter of Destiny F. [Takara E.]*, 217 AD3d 1400; *Matter*

of Jonathan F., 3 AD3d 336; *Matter of Lacee L. [Stephanie L.]*, 153 AD3d 1151.) IV. The unchecked deficiencies of permanency hearings delay family reunification and harm marginalized New York families.

OPINION OF THE COURT

TROUTMAN, J.

Respondent mother contends that the Appellate Division abused its discretion by declining to invoke the mootness exception to review her appeals from two expired permanency hearing orders. The mother further asks this Court to recognize a new exception to the mootness doctrine, which would allow for appellate review of all mooted permanency hearing orders. Because we conclude that the Appellate Division providently exercised its discretion under these circumstances, and that a blanket mootness exception would be imprudent, we affirm the decision of the Appellate Division.

I.

In 2018, petitioner Westchester County Department of Social Services (DSS) commenced these Family Court Act article 10 neglect proceedings against the mother with respect to each of her four children. DSS alleged that the mother left her five-year-old daughter in the care of her 14-year-old daughter, and, on two occasions, the five year old was found alone in public without supervision. DSS further alleged that the mother allowed her 9- and 11-year-old sons to take public transportation to meet her at work without supervision. Despite being informed about each incident, the mother refused to make alternative care plans for the children or otherwise cooperate with DSS.

The mother consented to a finding of neglect, and a series of permanency hearings ensued regarding two of the children's placement in DSS custody.[1] In 2020, Family Court ordered that the two children be trial discharged to the mother's custody. Two months later, however, DSS reported that, in addition to not complying with Family Court's orders, the State Central Registry received a report alleging that the mother was physically aggressive toward one child on video; verbally abused the children; and provided inadequate food, clothing, and shelter for

1. The mother's other two children were placed in different settings. Their placement is not at issue here.

the children. In light of these allegations, Family Court terminated the trial discharge, and the children were returned to DSS custody.

Additional permanency hearings ensued. Relevant to this appeal, in March 2022, Family Court issued a permanency hearing order, which continued the children's placement with DSS until the next permanency hearing; approved a permanency goal of reunification with the mother; and ordered the mother, among other things, to participate in an intensive parenting program, submit to full psychological and psychiatric evaluations, and comply with the recommendations thereof.

The mother appealed, and during the pendency of her appeal from the March 2022 order, a referee conducted another permanency hearing. While the mother's counsel cross-examined a caseworker regarding the mother's visits with one of the children, the referee asked counsel about the relevance of his questioning. The mother's counsel responded that the questions were relevant to the "ultimate question" of "whether the children should be returned to [the mother]." The referee thereafter stated, "I don't have that authority today to do that, nor would I . . . . [T]his is a pre-dispositional permanency hearing, so this [c]ourt would not be issuing that order today regardless of what I were to hear." Counsel noted his objection to the referee's ruling and indicated that he would not ask "most of the questions that [he] was planning" in light of that ruling.

Following the hearing, in an October 2022 order, Family Court again continued the children's placement with DSS until the next permanency hearing, approved a permanency goal of reunification with the mother, and ordered the mother to submit to and comply with the recommendations of an intensive parenting program and psychological and psychiatric evaluations. The mother appealed the October 2022 permanency hearing order. During the pendency of that appeal, Family Court held another permanency hearing and issued a new order.[2]

The Appellate Division dismissed the mother's appeals from both the March and October 2022 orders (*see* 220 AD3d 776, 777 [2d Dept 2023]; 220 AD3d 777, 778 [2d Dept 2023]). The

2. In the superseding order, Family Court continued the children's placement with DSS until the next permanency hearing, approved a permanency goal of reunification with the mother, and directed the mother to comply with the same mandates ordered in previous permanency hearing orders.

Court concluded that, because the respective permanency hearing orders had "expired," the appeals were moot. The Court declined to invoke the exception to the mootness doctrine.

This Court thereafter granted the mother leave to appeal (*see* 41 NY3d 927 [2024]). We now affirm.

II.

Generally, " 'an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment' " (*Matter of Gonzalez v Annucci*, 32 NY3d 461, 470 [2018], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). Here, the Appellate Division properly determined that the mother's appeals are moot. At the time the Appellate Division entered its decisions, both permanency hearing orders were "superseded by subsequent permanency hearing orders, which continued the child's placement in foster care" (*Matter of Breeyanna S.*, 45 AD3d 498, 498 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Our dissenting colleagues propose that, because the "claimed errors" in the October 2022 permanency hearing "carried over into future proceedings," the order is not moot (Wilson, Ch. J., dissenting op at 414). This Court's well-established mootness doctrine simply provides no basis for that conclusion. The impact an error from an expired permanency hearing order *might* have in subsequent permanency hearings is not only entirely speculative, but the potential resolution of that error—long after its occurrence—is not an "immediate consequence" of the underlying order that would "directly affect[ ]" the rights of the parties (*Matter of Hearst Corp.*, 50 NY2d at 714; *see People ex rel. Geer v Common Council of Troy*, 82 NY 575, 576 [1880] ["We do not decide mere abstract questions from the determination of which no practical result can follow"]). The rights of the parties are instead controlled by the superseding order.

The Chief Judge's conclusion that the March 2022 permanency hearing order is not moot "because the failure to return [the mother's] children itself prevented [her] from developing a record in subsequent proceedings" is even more puzzling (Wilson, Ch. J., dissenting op at 416). The sole "alleged error" (*id.* at 417 n 14) the mother argued on appeal from the March 2022 order was that Family Court should not have continued the children's placement with DSS because the mother asserted at the hearing, through counsel, that she was "ready, willing

and able to have her children returned to her." Contrary to the Chief Judge's suggestion, this purported "error" did not in any way "impair[ ] [the mother's] ability to create a record useable in future proceedings to demonstrate that her children should be returned to her" (*id.*). Notably, it was the mother's decision not to introduce any evidence at the hearing; nothing prevented her from developing a record supporting why the children should be returned to her care, such as by demonstrating her compliance with Family Court's prior orders. Moreover, putting the mootness issue aside, we take issue with the Chief Judge's suggestion that a parent is somehow entitled to custody of their child, following a finding of neglect or abuse, for the purpose of "developing a record" (*id.*). This approach overlooks the sensitive nature of a child's custodial placement and is inconsistent with the Family Court Act's requirement that a child be placed "in accordance with [that child's] best interests and safety . . . , including whether the child would be at risk of abuse or neglect if returned to the parent" (Family Ct Act § 1089 [d]).

In sum, because the orders from which the mother appealed have been replaced by subsequent orders, the orders no longer affect the mother's rights and therefore are moot (*see Matter of Hearst Corp.*, 50 NY2d at 714; *Matter of Destiny F. [Takara E.]*, 217 AD3d 1400, 1401 [4th Dept 2023]; *cf. Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1401 [4th Dept 2019]).

III.

A court may nonetheless consider the merits of a moot controversy where "the controversy or issue involved is likely to recur, typically evades review, and raises a substantial and novel question" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811 [2003], *cert denied* 540 US 1017 [2003]). Where, as here, the Appellate Division dismisses an appeal that it has properly determined to be moot, our review "is limited to whether the Appellate Division abused its discretion in declining to invoke the mootness exception to review the merits of certain of petitioner's challenges in this proceeding" (*Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 42 NY3d 936, 937 [2024]; *see Matter of Anonymous*, 55 NY2d 1021, 1022 [1982]).

The mother appears to concede that the appeals are moot but maintains that the Appellate Division abused its discretion by not invoking the mootness exception to review the referee's ruling that she lacked the power to return the children to the mother pre-disposition.[3] Here, the Appellate Division did not abuse its discretion in determining that the issues raised below were "not sufficiently substantial or novel to warrant an exercise of [its] exceptional discretion to retain the appeal despite mootness" (*Matter of David C.*, 69 NY2d 796, 798 [1987]). They were simply standard issues of the sort that arise in permanency hearing adjudications, such as whether Family Court's determination was "supported by a sound and substantial basis in the record" (*Matter of Dakota F. [Angela H.]*, 180 AD3d 1149, 1151 [3d Dept 2020]; *see Matter of Damani B. [Theresa M.]*, 174 AD3d 524, 526 [2d Dept 2019]). To the extent the mother contends that the referee erred by claiming to lack the power to return the children to the mother's care prior to a dispositional hearing, the record does not demonstrate that the issue is likely to recur (*see generally Hearst Corp.*, 50 NY2d at 714).[4] For example, the mother does not refer to any prior instance in which the issue was raised but went unresolved, the issue does not implicate the application of a new statute, and the mother does not raise a systemic problem in the Family Court—such as consistent misinterpretation of a provision of the Family Court Act or the precedents of this Court. As a result, we cannot say that the Appellate Division abused its discretion in declining to invoke the exception to the mootness doctrine under these circumstances.[5]

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3. We respectfully disagree with Judge Rivera's assertion that the Appellate Division abused its discretion by declining to review the "open question[ ]" of "whether a blanket exception to mootness applies to at least some expired permanency orders in a pending Family Court matter" (Rivera, J., dissenting op at 420). It is difficult to conceive why a court would need to invoke the mootness exception to address whether a blanket mootness exception exists. The blanket mootness exception proposed by the mother is a potential method by which an appellate court could review the merits of an expired permanency hearing order—not a justification for invoking the existing mootness exception in the first instance.

4. While our dissenting colleagues correctly observe that the referee repeated the same ruling at one subsequent permanency hearing, we note that, according to the mother, the purported error has not since recurred.

5. Contrary to Judge Rivera's suggestion, merely because one might determine that the mootness exception applies to these facts does not require this Court to hold that the Appellate Division erred as a matter of law. Absent an abuse of discretion, it is not the role of this Court to substitute its discretion for that of the Appellate Division.

IV.

Notwithstanding the Appellate Division's discretionary determination not to invoke the mootness exception, the mother invites us to adopt a blanket mootness exception, which would allow the Appellate Division to review all mooted permanency hearing orders, regardless of the issues presented on appeal. We decline the invitation to guarantee appellate review of these orders regardless of mootness (*see generally Matter of David C.*, 69 NY2d at 798 [declining to recognize a blanket mootness exception in the context of Mental Hygiene Law retention proceedings]).[6] As this Court made clear in *Matter of David C.*, "[t]he determination whether to consider particular issues despite their mootness must depend additionally on the recurring, novel and substantial nature of those issues as they are presented" (*id.*).

Even assuming the Court could properly create such a blanket exception, the mother's proposed rule is not workable or prudent inasmuch as it would unnecessarily flood appellate courts with appeals that, in many cases, present only moot issues whose resolution would have no real impact on the rights of the parties or the law of this State. Moreover, the purpose of the permanency hearing scheme established by Family Court Act article 10-A is to "provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (Family Ct Act § 1086). The six-month schedule governing hearings reflects an understanding that the circumstances of a child or parent may change rapidly, requiring a change in permanency goal. Appellate review of the merits of a permanency hearing order, decided upon circumstances that may have since changed, risks undermining the purpose of article 10-A by injecting unnecessary uncertainty into the life of the child.

Additionally, to the extent that the mootness issue surrounding permanency hearing orders can be addressed through an automatic expedited appeal process, this appeal is not a proper vehicle by which to implement that process. While we appreci-

6. We further reject the notion that a blanket mootness exception should apply to "at least some" appeals from permanency hearing orders (Rivera, J., dissenting op at 420, 426). Initially, we note that narrowing the application of a *blanket* mootness exception is not a blanket mootness exception at all. Moreover, it is entirely unclear which permanency hearing orders would be subject to the exception and why our ordinary mootness exception is insufficient to determine which orders are reviewable on appeal.

ate Chief Judge Wilson's observations that the legislature empowered courts to adopt rules aimed at expediting Family Court Act article 10-A appeals (*see* Family Ct Act § 1121 [1], [7]), and that our courts have successfully navigated expedited appeals in the election law context, such changes to the appellate process are more appropriately addressed through administrative or legislative means.

Finally, we note, contrary to the mother's suggestion, there is no evidence that appellate courts reflexively dismiss appeals from permanency hearing orders for mootness. Where the Appellate Division considers issues within the permanency hearing context sufficiently novel and substantial, that Court often invokes the mootness exception and addresses those issues on the merits (*see e.g. Matter of Malachi B. [Administration for Children's Servs.]*, 228 AD3d 570, 570-571 [1st Dept 2024]; *Matter of Lacee L. [Stephanie L.]*, 153 AD3d 1151, 1151 [1st Dept 2017], *affd* 32 NY3d 219 [2018]; *Matter of Cleophus B. [Torrence B.]*, 93 AD3d 1241, 1241-1242 [4th Dept 2012], *lv denied* 19 NY3d 807 [2012]; *Matter of Latanya H. [Halvorsen]*, 89 AD3d 1528, 1529 [4th Dept 2011]; *Matter of Heaven C. [Julia B.]*, 71 AD3d 1301, 1302 [3d Dept 2010]; *see also Matter of Shawn S.*, 163 AD3d 31, 33 [4th Dept 2018]; *Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1098 n 2 [3d Dept 2012]). There is simply no support for the mother's claim to the contrary.

Accordingly, the orders of the Appellate Division should be affirmed, without costs.

Chief Judge WILSON (dissenting). I write separately because I do not believe this appeal is moot; were it moot I would join fully in Judge Rivera's dissent. There has been no final disposition in Tameka's case. In both of the orders she has appealed, Tameka asserts the court erred by continuing foster care placement rather than returning her children. At least one of those errors—the referee's determination that she was powerless to return the children to Tameka—is admitted by all the parties. That, as well as other errors, tainted the subsequent proceedings because the failure to return her children prevented Tameka from developing a record that could have been used in future proceedings to demonstrate that her children were not at risk of abuse or neglect in her care, and served to decrease the later likelihood that her children would ever be returned (*see Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015] ["the appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring conse-

quences that befall a party as a result of the order which the party seeks to appeal"]). Because the initial errors tainted later determinations—and because the later determinations continued the placement of her children in foster care—I would hold that Tameka's appeal is not moot, and remand to the Appellate Division to resolve her challenges on the merits.[1]

I.

In 2018, Tameka J., a mother of four children, left her 14-year-old daughter in charge of her younger siblings. The daughter fell asleep, and, on two occasions, the five year old was found wandering outside their home. The Westchester County Department of Social Services (DSS) filed a neglect petition seeking to remove all of Tameka's children. The petition also alleged that Tameka once allowed her 11- and 9-year-old sons to take the bus together, to come to her work. Based on those three incidents, all four children were removed from her care and placed in foster care. Tameka is a single mother who works full-time at a mental-health center. (She sometimes relied on her 14 year old to care for her younger children after school until she returned from work between 7:30 and 8:30 p.m.) Throughout the proceedings, Tameka has remained involved in her children's lives and consistently expressed her desire to bring them home. This appeal concerns the middle two children, Christopher and Joshua. The permanency goal has always been to return Christopher and Joshua to their mother.

It is now seven years later, and Christopher and Joshua have not been returned to her, nor has any court determined that she can never have them back. Instead, they have been in foster care limbo, with the two brothers separated from each other. During that time, Tameka has participated in at least eight permanency hearings. Each has resulted in the extension of foster placement. Tameka has appealed from six of those hearings, but no appellate court has ever entertained the merits of her appeal, because each time, the Appellate Division has dismissed her appeal as moot, on the ground that a subsequent permanency hearing had taken place. Tameka has no ability to avoid the periodic permanency hearings, they are required by law, and they would occur even if she chose not to participate.

1. Christopher has turned 18 and the Family Court no longer has jurisdiction over him with respect to custody matters (*see* Family Ct Act §§ 651 [a], [b]; 119 [c]). Because the orders are moot as they pertain to Christopher, I join Judge Rivera's dissent regarding those portions of the orders.

The dispositional hearing, which began in March 2019, remains pending. While Tameka has been waiting for her case to be resolved, two of her children have turned 18 and aged out of the system. Christopher, who was 11 years old when he was put in foster care, recently turned 18. Joshua, who was 9 when he was removed, is now 16.

Those facts would be troubling anywhere, but they are especially concerning in New York, where the Legislature passed laws precisely to prevent what happened in this case. Compared to many other states, New York mandates more frequent permanency hearings (Family Ct Act § 1089 [a] [2]-[3]). Unlike many other states and especially important in this case, New York grants parties the right to appeal, on an expedited basis, the orders issued in permanency hearings (*id.* §§ 1112, 1121).

As this case illustrates, that right to appeal has proved illusory. Because of the six-month timeline for new hearings, by the time the Appellate Division hears an appeal, inevitably, a superseding permanency hearing has taken place and a subsequent order has been issued. The overwhelming practice of the Appellate Division has been, as here, to dismiss permanency hearing appeals as mooted by subsequent permanency orders and to refuse to entertain them on the merits (*see infra* Part III).

That practice is wholly inconsistent with the Family Court Act, which not only grants a right to appeal intermediate orders (which is not being honored), but also specifically outlines a procedure for expedited treatment of those appeals (which is being completely ignored) (Family Ct Act § 1121). The consequences for families are dire. Given the delays and challenges in reaching a final disposition, in many cases, a permanency hearing is the only opportunity, after the initial removal hearing, for a parent to be reunified with a child who has been removed. The absence of meaningful appellate review has both allowed systemic failures to go unchecked and permitted errors to carry over in subsequent hearings, further delaying parents' hopes of ever being reunited with their children.

The majority condones that practice, disregarding both the plain language of the statute and the clear legislative intent. Its decision has adverse consequences not only for parents, but also for the State, which has an economic interest in prevent-

ing children from remaining in foster care longer than necessary.[2]

II.

New York's foster care scheme is structured to uphold and safeguard the fundamental rights of parents to the care, custody, and control of their children (*Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 279 [2017] [" 'Looking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a normal family life in a permanent home is ordinarily best met in the child's natural home' "], citing *Matter of Michael B.*, 80 NY2d 299, 308-309 [1992]; *see Matter of Marino S.*, 100 NY2d 361, 372 [2003] ["It has long been the public policy of this State to keep biological families together and to require foster care agencies to exercise diligent efforts to reunite abused and neglected children with their birth parents, once rehabilitated"]).

Permanency hearings are a crucial part of that statutory scheme. After the court determines a child should be removed, the court sets a date for an initial permanency hearing, which must occur within eight months of removal, and every six months thereafter (Family Ct Act § 1089 [a] [2]-[3]). At each permanency hearing, among other requirements, the court must determine whether a child in foster care can be released from placement and returned "to the parent or other person legally responsible for the child's care," and, if the child will not be returned, the court must determine whether the agency made "reasonable efforts . . . to eliminate the need for placement" and "enable the child to safely return home" (*id.* § 1089 [d] [1], [2] [iii] [A]).

That requirement has constitutional dimensions. As we have long held—and recently reaffirmed in *Matter of Jamie J. (Michelle E.C.)* (30 NY3d 275, 285 [2017])—when the original reasons for a child's removal no longer apply, such as when the State has failed to prove neglect or abuse, Family Court lacks

2. *See* Angela Olivia Burton, *Introduction*, 20 CUNY L Rev 1, 19 (2016) ("[T]he minimum cost to keep one child in foster care for a year in New York City is $30,000"); Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child & Youth Servs Rev 42, 52 (2019) (discussing the potential cost-saving effects of vigorous parental representation that reduces children's stays in foster care by 118 fewer days on average and may save "millions of government dollars").

jurisdiction to issue orders or impose conditions on a child's release (*see Matter of Tammie Z.*, 66 NY2d 1, 4-5 [1985] ["If abuse or neglect is not proved, the court must dismiss the petition . . . at which time the child is returned to the parents"]; *Matter of Male Infant L.*, 61 NY2d 420, 427 [1984] ["For once it is found that the parent is fit . . . the inquiry ends and the natural parent may not be deprived the custody of his or her child"]).

The same logic applies to when parents have remedied the conditions that led to the initial removal. As the United States Supreme Court has recognized, parents' rights "do[ ] not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" (*Santosky v Kramer*, 455 US 745, 753 [1982]). To the contrary, "parents retain a vital interest in preventing the irretrievable destruction of their family life," and, "[i]f anything, [they] have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs" (*id.*).[3]

Reflecting the need to protect parents' rights, federal law requires, as a condition of federal funding, that states hold a "permanency planning hearing" within 14 months of a child's placement in foster care, and every 12 months thereafter (*see* 42 USC § 675 [5] [C]). Permanency hearings are not review hearings; the purpose is not merely to review case progress, but to determine a child's permanent placement (*id.* ["(the) hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent"]; *see* National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases at 78 [1995] ["A review hearing is to oversee case progress; a permanency planning hearing is to make a definitive long-term decision"]; *see also* 42

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3. Over a century ago, we articulated the rationale for that rule as follows:

> "Intemperate parents are deemed to be unfit custodians of their children, and the state steps in and cares for and supports them for the time being. It now appears that the parents have reformed, are living honorable lives, and are abundantly able to care for their children. It seems self-evident that public policy and every consideration of humanity demand the restoration of these children to parental control" (*Matter of Knowack*, 158 NY 482, 488 [1899]).

USC § 675 [5] [C] [iii] [requiring "procedural safeguards" at permanency hearings]).[4]

Federal law sets a floor. New York's permanency hearing framework deliberately provides protections beyond what federal law requires. New York's 2005 "Permanency Bill" was enacted to ensure that children placed out of their homes did not "stay[ ] needlessly . . . in foster care," and to provide them with "timely and effective judicial review that promotes permanency, safety and well-being in their lives" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 12; Family Ct Act § 1086; *see also Matter of Jamie J.*, 30 NY3d at 284-286).[5] In addition to other changes,[6] the 2005 amendments increased the frequency of permanency hearings, previously required only annually in accordance with the federal mandate, to require hearings every six months (Family Ct Act § 1089 [a] [2]-[3]).

In contrast to many other states, which do not permit appeals of permanency hearing orders, New York's Family Court Act expressly provides that the order resulting from a permanency hearing is appealable as of right (*id.* § 1112 [a] ["An appeal from an *intermediate or* final order in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court" (emphasis added)]).[7] The right to appeal permanency orders serves as a vital safeguard and is con-

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4. The concept of "permanency" originates from the federal Adoption Assistance and Child Welfare Act of 1980 (Pub L 96-272, 94 US Stat 500), which was enacted to deal with the problem of "foster care drift" (*see* HR Rep 96-136, 96th Cong at 50 [1979] ["(M)any children, because of the inadequacies of current review procedures, and lack of family reunification services, become 'lost' in foster care, and continue to remain in care unnecessarily at great cost to the government, themselves and their families"]).

5. *See* Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 Va J Soc Poly & L 546, 563 (2005) (describing the "pervasive delays" endemic to the New York Family Court system prior to 2005, and citing studies showing that New York ranked below the national standard for reunifying children with their families out of foster care).

6. For example, the Act granted indigent parents the right to have appointed counsel and specified that the rules of evidence applied at hearings (Family Ct Act § 1089 [d]).

7. Federal law is silent as to whether parties can appeal a permanency order, and many states do not provide a right to appeal (*see* Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases between Disposition and Permanency*, 10 Conn Pub Int L J 13, 29-32 [2010] [surveying state statutes and case law on the appealability of permanency hearing orders and finding that, as of 2010, "(a)t least twelve states plus the District

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sistent with the Legislature's intent—to create a forum "for a more thoughtful and substantive review of the issues that gave rise to foster care and that may be creating barriers to reunification or other permanency for the child" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 13; *see also* Rivera, J., dissenting op at 420-421).

III.

The Appellate Division dismissed both of Tameka's appeals as moot on the ground that each of the orders had expired and had been superseded by subsequent permanency hearing orders (*see* 220 AD3d 776, 777 [2d Dept 2023]; 220 AD3d 777, 778 [2d Dept 2023]).

Tameka's case reflects the common practice: across Departments, the overwhelming practice of the Appellate Division has been to dismiss as moot appeals of permanency orders that have expired or were succeeded by subsequent determinations (*see e.g. Matter of Gabrielle N. [Jacqueline T.]*, 139 AD3d 504 [1st Dept 2016]; *Matter of Victoria B. [Jonathan M.]*, 164 AD3d 578, 580 [2d Dept 2018]; *Matter of Cheyeanne E. [Scott E.]*, 154 AD3d 1206 [3d Dept 2017]; *Matter of Destiny F. [Takara E.]*, 217 AD3d 1400 [4th Dept 2023]).[8]

The system of perpetual mootness defies the plain text and legislative purpose of the Family Court Act, which not only provides a statutory right to appeal, but also sets out a procedure for expediting appeals. Family Court Act § 1121 specifically provides that, for article 10-A proceedings—which include permanency hearings—counsel for the parties and for the child must promptly notify the client of the right to appeal and the expedited appeal processes required in that section. Unlike a preference, which merely expedites the calendaring of a

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of Columbia explicitly bar such appeals, three states bar them with narrow exceptions, thirteen explicitly permit them in at least some cases, . . . at least one state court has noted conflicting opinions within that jurisdiction," and "(t)he remaining twenty-one states do not have clear case law on point"]).

8. In contrast, courts have generally held that the mootness exception applies to appeals of orders that changed permanency goals (and thus will review on the merits) (*see e.g. Matter of Peter T. [Shay S.P.]*, 173 AD3d 1046 [2d Dept 2019] [reviewed only as to change of permanency goal from reunification to adoption]). A lonely anomaly to this pattern is *Matter of Jolani P. (Parris M.)* (184 AD3d 574 [2d Dept 2020], *lv denied* 35 NY3d 911 [2020]), where, because of the pandemic and the Governor's tolling order of statutes of limitations for Family Court Act proceedings, the subsequent permanency hearing could not be held before the appeal from the prior permanency appeal was decided, and the appeal was therefore not moot.

perfected case (*see e.g.* CPLR 5521 [b]), an expedited appeal under section 1121 accelerates the entire appellate process by imposing strict deadlines at each stage. Specifically, the statute requires that transcripts must be ordered within 10 days of assignment of counsel and completed within 30 days of receipt of the order; counsel must then perfect the appeal within 60 days of receiving the transcript (Family Ct Act § 1121 [6] [b]; [7]; *see* Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1121 ["The thirty day rule is absolute"]). To prevent transcript delays from frustrating appeals, the statute empowers courts to adopt procedures to ensure timely preparation (Family Ct Act § 1121 [7]). It also requires the Appellate Division Departments to adopt rules governing the "expeditious" filing of briefs (*id.*). It is unreasonable to expect that the Legislature required that permanency determinations be treated with extreme expedition on appeal with expectation that they would be expedited to dismissal. Instead, the Legislature provided expedited treatment so that the appeals would be decided before the next six-month period occurred.[9]

The majority posits that the six-month schedule "reflects an understanding that the circumstances of a child or parent may change rapidly, requiring a change in permanency goal," and that appellate review of the merits "risks undermining the purpose of article 10-A by injecting unnecessary uncertainty into the life of the child" (majority op at 404). If that had been the Legislature's conclusion, it would not have provided for appeal of permanency hearings or would have limited the appeals to cases in which a hearing changed the permanency goal.

Indeed, the majority is substituting its own judgment as to the desirability of merits appeals of permanency hearings for the Legislature's determination. The 2005 amendments intro-

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9. The 2005 Permanency Bill, which transferred permanency hearings from article 10 to the newly created article 10-A, added a cross-reference to article 10-A in section 1121—clear evidence the Legislature intended the expedited appeal provisions to apply to permanency hearings (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 7). The 2005 bill also added the requirements for expediting transcripts and directing the Departments to establish rules for the expedited filing of briefs (*id.*; *see id.* at 14 [noting in the context of termination appeals that the bill would "eliminat(e) . . . obstacles that currently slow the appeals process"]). The majority's statement that "changes to the appellate process" aimed at expediting appeals are "more appropriately addressed through administrative or legislative means" (majority op at 404-405) overlooks the fact that the Legislature has already enacted such measures. It is the responsibility of courts to implement and ensure compliance with the Legislature's directives.

duced the requirement for more frequent permanency hearings as part of an effort to increase judicial oversight and improve decision-making to facilitate permanency for children placed out of their homes (*see e.g.* Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 13 ["These planned-for permanency hearings will provide a forum for a more thoughtful and substantive review of the issues that gave rise to foster care and that may be creating barriers to reunification or other permanency for the child"]).

As a fallback, the majority contends that requiring courts to decide the merits of permanency hearing appeals is "not workable or prudent" and "would unnecessarily flood appellate courts with appeals" (majority op at 404). I offer three responses. First, I fully agree with my dissenting colleague that if, as the majority suggests, our appellate courts already look to the merits of an issue to gauge whether it is "substantial or novel" enough to apply a mootness exception, it would not be much more work to decide that issue on the merits; Appellate Division decisions are often quite short (*see* majority op at 402; *see also* Rivera, J., dissenting op at 430-431). Second, the majority provides no basis for why a rule expediting appeals for permanency hearing orders is unworkable, when expedited appeals are implemented in other contexts, such as election law, without issue.[10]

Third, and most importantly, our role is to interpret the law and assess whether courts are applying it correctly.[11] We cannot disregard the plain text of the law simply out of concern it might increase courts' workload. If the Legislature has created too much work for courts, that is for the Legislature to address, either by providing more specifics on how appeals should be expedited, by creating more judgeships, or, if it so chooses, by limiting the right to appeal. At bottom, the majority's ratio-

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10. *See e.g. Justice Denied*, *supra* n 5 at 548 (citing New York's election law system as an example of the State's ability to operate a "time sensitive" legal framework, and referencing *Stoppenback v Sweeney* [98 NY2d 431 (2002)], an election law case challenging the validity of a congressional petition, in which both the Appellate Division and Court of Appeals issued decisions on the merits—after briefing and argument—within just two weeks).

11. The majority claims that Tameka "does not raise a systemic problem in the Family Court—such as consistent misinterpretation of a provision of the Family Court Act" (majority op at 403). I see no ambiguity in her argument that the "statutory right, however, is in almost every instance denied by a declaration of mootness by the Appellate Division," or that requiring courts to hear appeals of permanency orders extending foster care placement "is mandatory in order to effectuate the statutory right to appeal."

nale is that when courts are too busy, they can assert that as a justification to nullify a right explicitly granted by the Legislature (and which due process may require) (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 348 [2020] ["It is the distinct role of the courts to interpret the laws to give effect to legislative intent while safeguarding the constitutional rights of impacted individuals"]; *see also Mathews v Eldridge*, 424 US 319 [1976]).

IV.

Although I agree with my dissenting colleague that as to Christopher, who has aged out of Family Court's jurisdiction with respect to custody, this case fits into the mootness exception, insofar as the orders affect Joshua as well, it is unnecessary to reach the exception because the orders appealed from are not moot. Tameka appeals from two orders: one issued by a Family Court judge in March 2022, and the other issued by a referee in October 2022. In both cases, Tameka claims the court erred in failing to return her children. Neither order was mooted by subsequent proceedings, because in both, the claimed errors carried over into future proceedings.

"Where . . . a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003]; *see Matter of Grand Jury Subpoenas for Locals 17, 135, 257 & 608 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 72 NY2d 307, 311 [1988] ["(A)n appeal is not rendered moot if there remain undetermined rights or interests which the respective parties are entitled to assert"]; *see also Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]; *People ex rel. Geer v Common Council of Troy*, 82 NY 575, 575 [1880] ["The Court of Appeals will not decide mere abstract questions from the determination of which no practical result can follow"]).

First, the October 2022 order issued by the referee was not moot, because the error repeated in subsequent proceedings and had continuing effects. As DSS concedes, the referee erred in concluding she lacked power to return the children to Tameka so long as the dispositional determination was still

pending.[12] Family Court Act § 1089 (d) lists the options available in permanency hearings, the first of which is returning the child to the parent:

> "At the conclusion of each permanency hearing, the court shall, upon the proof adduced, and in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible, determine and issue its findings, and enter an order of disposition in writing:
>
> "(1) directing that the placement of the child be terminated and the child returned to the parent or other person legally responsible for the child's care with such further orders as the court deems appropriate . . . ."

The referee clearly made an error of law in holding that she lacked the power to return the children; her conclusion is flatly at odds with the statutory language, clear statutory purpose, and the constitutional requirement to return children to their parents (*see e.g. Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275, 285 [2017]). The referee repeated that error in at least one subsequent hearing. However, even setting aside that hearing, the error infected the other proceedings as well. Because the referee ruled she had no authority to return Tameka's children, Tameka's counsel explained to the referee that although he had proof he intended to offer, he would not do so because the referee said she was powerless to return the children no matter what the evidence showed. As a result, the error carried over into the subsequent permanency hearings, leading to a less developed record and undermining Tameka's continued efforts to seek the return of her children.

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12. In response to Tameka's counsel stating the ultimate question was "whether [her] children should be returned," the referee interrupted, stating,

> "It's pre-disposition, Mr. Reed, so this Court would not be returning children pre-disposition to a parent. I don't have that authority today to do that, nor would I; not when there's a case pending before Judge Oliver . . .
>
> "[T]his is a pre-dispositional permanency hearing, so this Court would not be issuing that order today regardless of what I were to hear."

Following the referee's statement, counsel explained that, "given the court's ruling," he would not present the proof he had intended to offer.

Second, although the March 2022 order occurred before the referee's statement and was not itself affected by it, that order was also not moot, because the failure to return her children itself prevented Tameka from developing a record in subsequent proceedings. Had her children been returned, as she argued they should have been, she would have had the opportunity to demonstrate that they were not at risk of abuse or neglect in her care (*see e.g.* § 1089 [d] [directing courts to consider at each permanency hearing "whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible"]). Alternatively, if the return had not gone well and there was further evidence of neglect, the court and agency would have had a more fully developed record to support continued placement at future permanency hearings. The failure to return had lasting consequences in another respect: It compounded the harm caused by the initial separation and potentially undermined the attachment interest in reunification. Although both the Legislature and courts have long recognized that reunification is the preferred outcome, children have an obvious interest in maintaining relationships with caregivers to whom they have become attached.[13] When reunification remains the stated goal and has not been achieved, the initial error continues to cause harm by eroding the child's attachment to the parent. Each subsequent permanency hearing that failed to reunite Tameka with Christopher and Joshua only compounded the harm.

In sum, the appeals were not moot, because the orders had profound, lasting implications on subsequent proceedings. The harm resulting from the errors was not merely speculative and continued to impact Tameka's rights in subsequent proceedings. The majority's observation that the admitted errors occurred several years ago goes not to mootness, but to the nature of the remedy, and further drives home the point that the legislative command for highly expedited appeals is being

13. *See Justice Denied*, *supra* n 5 at 570 ("[D]elay substantively affects the outcomes of child welfare cases in ways that it does not in other types of cases . . . Because children's lives are constantly evolving, their attachments and needs shift over time such that the ex ante best outcome can fall off the list of possible outcomes as time goes by. A child for whom the best result early in the case is to be returned to a parent who is the child's primary attachment figure may not have such an option later in the case. Later, the parent and the primary attachment figure often will no longer be the same person").

flouted (*see* majority op at 401).[14] Moreover, because no dispositional order has yet been entered and no final determination made in her case, Tameka's rights remain active and will be directly affected by today's decision (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980] [An appeal is not moot if "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment"]).

V.

The referee's error was the most flagrant, but not the only error, in these proceedings.[15]

Tameka contends that the court failed to obtain her consent to proceed before a referee, as required under New York Judiciary Law § 117 (which permits proceedings to be submitted to a referee only by stipulation of the appearing parties or by court order). The record does not contain any stipulation or order referring the case to a referee, and counsel for the Westchester DSS had no knowledge of the existence of either, so the proceedings before the referee appear to be entirely invalid.

She also contends that the court improperly excluded her then-13-year-old son Joshua from one of the hearings without making the requisite findings under Family Court Act § 1090-a

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14. The majority misunderstands my position in two ways. First, as to the March 2022 order, Tameka was not "prevented . . . from developing a record supporting why the children should be returned to her care" (majority op at 402), but rather, the error(s) impaired her ability to create a record useable in future proceedings to demonstrate that her children should be returned to her. Second, I do not contend she was "entitled to custody . . . for the purpose of developing a record" (majority op at 402 [internal quotation marks omitted]). I merely propose that, in the context of an alleged error in failing to return a child to their parent, where the ultimate goal of return to parent remains unaltered, the court's error is not rendered moot in future proceedings because those future proceedings depend on the entire record, including the prior errors, which keeps the issue alive.

15. Amici point to widespread problems with permanency hearings, including:

> "courts' failure to (1) comply with the statutory mandate to reunify children with their parents when continued placement is no longer necessary; (2) hold full evidentiary hearings, even when there are material issues in genuine dispute; (3) ensure that findings are made based on up-to-date and accurate information; (4) comply with statutory timelines; (5) consider the possibility of finding that the agency failed to make reasonable efforts to enable the child to return home; and (6) obtain consent from the parties before sending permanency hearings to referees to hear and determine."

(b) (2) regarding the exclusion of a child under the age of 14. The record does not contain the statutorily mandated findings, and therefore Joshua's exclusion from the proceedings appears to have been unjustified (Joshua stated on the record that he wished to attend the proceedings in their entirety).

Like the Appellate Division, the majority leaves these (and the other merits issues) for another day that, because of the majority's holding, will never come. We are left, therefore, with a system in which Family Courts make errors that affect family reunification, the Legislature has mandated super-expedited appeal of those decisions, but they are not reviewable because we deem them moot, to avoid a purported flood of appeals.

The practice above disproportionately impacts marginalized families. Racial and socioeconomic disparities in the child welfare system are striking and well-documented. Nonwhite children are overrepresented in foster care and are disproportionately subjected to invasive state action across the stages of a child protection case.[16] Low-income families are also much more likely to become subject to the child protection system.[17]

The flaws in the Family Court system are on full display in this case. Tameka was accused of neglect because she asked her 14-year-old daughter to babysit her other children and allowed her 9- and 11-year-old sons to take the bus to meet her at work. Ask yourself how many middle-class suburban families would be accused of child neglect and had all their children placed into foster care based on those facts. Instead of providing financial assistance for childcare, or helping her arrange alternative transportation, DSS removed her children. For nearly seven years, the system spent far more—on foster care,

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16. *See e.g.* New York State Office of Children and Family Services, Office of Research, Evaluation and Performance Analytics, Disproportionate Minority Representation in Child Welfare Services Dashboard: 2023 & Five Year Trends (2024), https://ocfs.ny.gov/reports/sppd/dmr/Disparity-Rate-Packet-2023-Dashboard.xlsx (documenting racial disparities in the child welfare system in New York State); E. Jason Baron, Joseph J. Doyle Jr., Natalia Emanuel & Peter Hull, *Unwarranted Racial Disparity in U.S. Foster Care Placement*, National Bureau of Economic Research (Nov. 2024) ("Black children in the U.S. are twice as likely as white children to spend time in foster care").

17. New York State Bar Association, Report and recommendations of the Committee on Families and the Law Racial Justice and Child Welfare at 6-7, 10 (Apr. 2022), available at https://nysba.org/wp-content/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf?srsltid=AfmBOorHfbJ_hndba22GkgF8yMwR0fOJ3hZt_CpYCvrtBJnEXv8pPTWw.

court proceedings, and hearings—than it would have cost to help this family from the start. A better system would not have treated her family this way. A better system would have provided immediate appellate review instead of none.

VI.

The straightforward interpretation of the Family Court Act is that it provides for regular permanency hearings and gives parents an ability to challenge a permanency hearing order on a highly expedited appeal. Instead, an infinite loop of mootness perpetuates systemic delays and maintains families in limbo until children age out of the system and the appeal becomes truly moot.

The majority's explanation that our hands are tied cannot be the right answer. It is unfathomable that the Legislature intended this. I would hold simply that a parent who, as here, claims there has been an error in continuation of foster placement for a child, when the ultimate permanency goal is to return the child, may continue to pursue an appeal even if there has been a subsequent permanency determination, unless that subsequent permanency determination returns the child to the parent, or there has been a final order of disposition (which itself would be appealable). Because the orders appealed from are not moot (or even if they are, as my dissenting colleague explains), I would reverse the Appellate Division and remit for it to evaluate the merits of the claims Tameka has raised on appeal.

RIVERA, J. (dissenting). The article 10 Family Court proceedings against respondent mother have continued for over six years without any resolution. Throughout that time, mother's children have been in the foster care system administered by the Westchester County Department of Social Services (DSS). Mother's case exemplifies the protracted litigation that is all too common in New York's Family Courts, undermining stability for children and stalling family reunification as children languish in foster care.

The Legislature sought to remedy the deep-rooted problems of long-term foster care placements and the attendant delays to family reunification by ensuring timely Family Court oversight of cases where children have been removed from the home. To that end, it enacted Family Court Act § 1089, which provides for permanency hearings to review continued placement of children outside the home (Family Ct Act art 10-A;

Family Ct Act §§ 1086-1089). As required by law, Family Court must hold these hearings every six months until the child is reunified with the parent or an alternative permanency plan is adopted (Family Ct Act § 1089).

In mother's case, there have been numerous permanency hearings over the years, each continuing the placement of her children in foster care. Mother appeals from orders issued at two of those hearings. In one, the presiding referee concluded that they had no power to grant mother's request for return of the children to her care because, at the time, the Family Court judge had not issued a disposition order. The Appellate Division dismissed mother's appeals, which had been pending for over a year, as moot because the relevant permanency orders had expired by the time she appeared before that Court. Mother argued that they should apply a mootness exception to reach the merits of the appeals, and the Appellate Division declined to do so. That was error. The dismissed appeals fall squarely within the mootness exception for substantial and novel issues that are likely to recur and typically evade review (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Mother's appeals presented at least two open questions: (1) whether a Family Court referee has authority in a pre-disposition permanency hearing to order a child's return to their parent; and (2) whether a blanket exception to mootness applies to at least some expired permanency orders in a pending Family Court matter.[1] These issues are of statewide importance and implicate a parent's constitutional right to custody of their children (*see Matter of Jamie J. [Michelle E.C.]*, 30 NY3d 275 [2017]; *Nicholson v Scoppetta*, 3 NY3d 357, 380 [2004]). The Appellate Division abused its discretion when it failed to invoke the mootness exception to address these issues.

I.

"A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find 'better' parents" (*Matter of Jamie J.*, 30 NY3d at 279, quoting *Matter of Michael B.*, 80 NY2d 299, 308-309 [1992]). "Those rights are among our oldest and most funda-

1. Insofar as the majority concludes that a court must consider every colorable basis for invoking the mootness exception, I agree (*see* majority op at 403 n 3).

mental and are not only provided by statute, but also guaranteed to parents and children by our State and Federal Constitutions" (*id.* at 280). Family Court proceedings must protect those rights, as well as the rights of children.

Pursuant to the Family Court Act, "[t]he initial permanency hearing shall be commenced no later than six months from the date which is sixty days after the child was removed from [their] home," and

> "[s]ubsequent permanency hearings for a child who continues in out-of-home placement or who is freed for adoption shall be scheduled for a date certain which shall be no later than six months from the completion of the previous permanency hearing and such subsequent permanency hearings shall be completed within thirty days of the date certain set for such hearings" (Family Ct Act § 1089 [a] [2]-[3]).

"The permanency hearing shall be completed within thirty days" (Family Ct Act § 1089 [a] [2]). "Permanency hearings are intended to be automatically expedited" (Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1089). That intent ensures that a child who can be reunified with their parent does not "stay needlessly longer in foster care" (Senate Introducer's Mem in Support, Bill Jacket, L 2005, ch 3 at 12). Permanency hearings were designed to provide ongoing oversight, and, crucially, ongoing jurisdiction and authority to act in the child's best interest. In fact, the Legislature anticipated that "[s]imply providing the Court with *continuing jurisdiction* should reduce by months the time a child spends in foster care" (*id*. [emphasis added]).

To facilitate the implementation of an appropriate permanency plan, section 1089 requires preparation of a comprehensive up-to-date hearing report describing "the child's current permanency goal, which may be . . . return to the parent or parents," among other options (Family Ct Act § 1089 [c] [1] [i]).[2] The report must also include "a description of the reasonable efforts to achieve the child's permanency plan that have been taken by the local social services district or agency since the last hearing" (Family Ct Act § 1089 [c] [4]). "Unless the child is freed for adoption or there has been a determination by

2. The plan may include a goal for adoption, a referral for legal guardianship, placement with a relative, or another living arrangement (Family Ct Act § 1089 [c] [1] [ii]-[v]).

a court that such efforts are not required . . . , [the report shall describe] the reasonable efforts that have been made by the local social services . . . agency to eliminate the need for placement of the child and to enable the child to safely return home" (*id.* § 1089 [c] [4] [i]). The social services district or agency must serve the report no later than 14 days before the hearing on the parent and their attorney, parties responsible for the child's care, and the attorney for the child (Family Ct Act § 1089 [b] [1] [i]-[iii]).

Section 1089 provides for judicial oversight to ensure the expeditious disposition of the child's placement, including return to the parents:

> "At the conclusion of each permanency hearing, the court shall, upon the proof adduced, and in accordance with the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if returned to the parent or other person legally responsible, determine and issue its findings, and enter an order of disposition in writing:
>
> "(1) directing that the placement of the child be terminated and the child returned to the parent or other person legally responsible for the child's care with such further orders as the court deems appropriate; or
>
> "(2) where the child is not returned to the parent or other person legally responsible" (Family Ct Act § 1089 [d] [1]-[2]).

Throughout the process, reunification with the parent is a priority, if appropriate under the circumstances (*id.*). Thus, the court must determine whether the permanency goal should be to return the child to the parent(s), or to pursue one of the statutory alternatives:

> "(A) return to parent;
>
> "(B) placement for adoption with the local social services official filing a petition for termination of parental rights;
>
> "(C) referral for legal guardianship;
>
> "(D) permanent placement with a fit and willing relative; or

> "(E) placement in another planned permanent living arrangement that includes a significant connection to an adult willing to be a permanency resource for the child if the child is age sixteen or older [and other conditions are met]" (*id.* § 1089 [d] [2] [i]).

The court must also determine whether the social services district or agency made the required reasonable efforts to achieve the permanency goal (*id.* § 1089 [d] [2] [iii]). The court may, as it deems appropriate, order services tailored to the needs of the child and the family to achieve the permanency plan (*id.* § 1089 [d] [2] [viii] [A]). This may include "an order directing a local social services district or agency to undertake diligent efforts to encourage and strengthen the parental relationship when it finds such efforts will not be detrimental to the best interests of the child and there has been no prior court finding that such efforts are not required" (*id.* § 1089 [d] [2] [viii] [F]).

Despite the best intentions of the Legislature, the judiciary, and advocates, delays are endemic in the Family Courts, impacting this comprehensive permanency framework and the primary goal of reunification. When there is a case opened against a parent, the Family Court holds a fact-finding hearing to decide whether the child has been abused or neglected. If so, then the Family Court schedules a dispositional hearing to hear evidence and determine the most appropriate placement for the child. Permanency hearings were designed to be periodic, ongoing checks throughout this process to ensure whether the child is placed in the best interest of the child. However, one study found that only *half* of all cases statewide had a dispositional hearing before the first permanency hearing, and 32% of cases had a permanency hearing take place before any dispositional hearing (Alicia Summers, *New York Quality Permanency Hearings Statewide Findings Report*, New York State Unified Court System Child Welfare Court Improvement Project, available at https://ww2.nycourts.gov/sites/default/files/document/files/2018-10/CWCIP_Statewide_findings_report.pdf). The average statewide time to disposition was 203 days, and the average time from removal to closure of the case was 2.78 years, with many cases including delays much longer than this average (*id*. at 19, 21; *see also* NYS Senate Committee on Judiciary et al., *The Crisis in New York's Family Courts, A Report on the Senate Hearing* at 21, 23, 29 [Feb. 2024], https://www.nysenate.gov/sites/

default/files/admin/structure/media/manage/filefile/a/2024-02/2.12-family-court-hearing-report-w-graphics-1.pdf [noting "undue delays, where cases drag on for multiple years with no fact-finding"]).

II.

As relevant to this appeal, in 2018, two of mother's children were removed. On consent, Family Court entered an order of neglect. Family Court issued several pre-dispositional permanency orders, meaning the court had not made a final determination on the permanency plan. Indeed, the disposition hearing commenced in 2021 and had not been completed three years later. During the pendency of the disposition hearing, the permanency hearings continued. Mother represents that at least eight orders have been issued, all of which were appealed.

At one of the first two hearings, mother requested return of the children. The presiding referee stated that they had no authority to grant that relief. Based on the referee's legal conclusion, mother's counsel determined not to put forward evidence that mother claims would have supported her request for the children to return home. She appealed the resulting permanency order continuing placement. While that appeal was pending, Family Court held the next permanency hearing, which resulted in another order continuing placement. Mother appealed that order. During the year while these appeals were pending in the Appellate Division, Family Court issued two subsequent permanency orders.[3] The Appellate Division concluded that mother's two appeals were moot because the relevant permanency orders had expired (*see* 220 AD3d 776, 777 [2d Dept 2023]; 220 AD3d 777, 778 [2d Dept 2023]). The Court rejected mother's request to invoke the mootness exception in both appeals.

Mother concedes that the two adverse permanency orders denying return of her children expired during the pendency of her appeals before the Appellate Division and that, as a consequence, the appeals are moot. However, she argues that the mootness exception applies, and that her arguments would prevail on the merits. She further asserts that the Court should recognize a judicial exception to mootness on appeals from

3. Mother also appealed these subsequent orders, although those are not before us here. Those orders, too, were mooted by another round of subsequent orders.

Family Court's extension of foster care placement, as necessary to effectuate the Family Court Act's statutory right of appeal. DSS responds that there is nothing substantial or novel about the regular mooting of permanency order appeals, and that applying a blanket mootness exception would serve no purpose other than flooding the courts. DSS also argues that, in any event, the permanency determinations below were supported by sound and substantial record evidence.[4]

III.

A.

"It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal" (*Hearst Corp.*, 50 NY2d at 713 [citations omitted]). Thus, courts may not "consider[ ] questions which, although once live, have become moot by passage of time or change in circumstances" (*id.* at 714). "[A]n appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*id.*). However, we have recognized an "exception to the [mootness] doctrine which permits the courts to preserve for review important and recurring issues which, by virtue of their relatively brief existence, would be rendered otherwise nonreviewable" (*id.*). The exception applies when the moot issue is likely to recur, typically evades review, and involves "a . . . significant or important question[ ] not previously passed on, i.e., substantial and novel" (*id.* at 715; *Alcantara v Annucci*, 42 NY3d 142, 147 [2024]; *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020]).[5] We review an Appellate Division's decision not to invoke the mootness excep-

4. The Attorney for the Child representing the younger of the two children argues that there should be a procedural distinction between a pre-disposition permanency hearing and a post-disposition permanency hearing, and that a pre-disposition permanency hearing does not substitute for the initial dispositional hearing. Furthermore, they argue that the permanency order was valid and a judicial exception to mootness is not warranted. Mother did not preserve this argument and thus whether this distinction matters cannot be considered on this appeal.

5. To the extent that the Court has on rare occasion referred to the third factor in the disjunctive—"substantial or novel" (*City of New York v Maul*, 14

(n. cont'd)

tion under an abuse of discretion standard (*see Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Corr. & Community Supervision*, 42 NY3d 936, 937 [2024]).

B.

The only question before us is whether the Appellate Division abused its discretion in refusing to invoke the mootness exception, first, to assess the scope of the referee's authority to order return of the children to mother before the Family Court's issuance of a disposition order, and, second, to ensure appellate review of at least some permanency orders appeals from which might otherwise be moot.[6]

These issues implicate a parent's constitutional right to custody (*see Matter of Jamie J.*, 30 NY3d at 280). And neither this Court nor the Appellate Division has opined on these matters. Significantly, mootness dismissals of orders from permanency hearings, which by law must be held every six months, may, as mother asserts, undermine the legislative intent of reunification and, instead, extend foster care placements. Therefore, the Appellate Division abused its discretion in declining to invoke the mootness exception to consider these issues of statewide importance, resolution of which would impact large numbers of parents and children.

C.

Turning to the scope of the referee's authority in a permanency hearing to order the return of the children, the majority erroneously concludes that the mootness exception does not apply because this open question is not likely to recur (majority op at 403). That assertion is belied by the record here, where the referee throughout the permanency hearings adhered to

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NY3d 499, 507 [2010]; *Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1091 [2022])—the correct articulation is that found in *Hearst Corp.* and the overwhelming majority of our decisions discussing the exception or citing *Hearst Corp.* (*see e.g. Alcantara*, 42 NY3d at 147; *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020]; *Matter of Gonzalez v Annucci*, 32 NY3d 461, 470 [2018]).

6. The majority misconstrues the second of these issues (*see* majority op at 403 n 3, 404 n 6). Whether a blanket mootness exception should apply to permanency orders is a substantial and novel question. That question is likely both to recur and to evade review so long as the Appellate Division determines the mootness of each appeal in isolation, as it did here. In answering that question, the Appellate Division might have concluded that a blanket exception was warranted, but only as to some (not all) permanency orders.

their determination that they lacked authority to grant the relief requested by mother.[7] Moreover, we have never held that the exception only applies to a "new statute," as suggested by the majority (*id.*). Nor is it dispositive that mother "does not raise a systemic problem in the Family Court" (*id.*). The question presented by mother's appeals is not whether the referee misapplied an established interpretation of the Family Court Act, but rather the scope of that authority given the lack of case law defining a referee's power at a permanency hearing before Family Court has issued a disposition order. Given the lack of a definitive answer to this question and the short life span of permanency orders, the referee's misinterpretation of the law (if it is a mistake) may recur and is likely to evade review. Apparently, this question escaped review of DSS and the Family Court Judge. Moreover, this potential error is compounded at each permanency hearing because a parent, such as mother, has no opportunity to present evidence supporting an argument for return of the children as it develops during the course of the Family Court proceedings, thus prolonging those proceedings. And the longer the Family Court proceedings continue and the children are separated from their parents, the more difficult to achieve the goal of reunification—the same goal ordered by the Family Court here (*see* American Academy of Pediatrics, Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 Pediatrics 1145, 1146 [Nov. 2000], available at https://www.umassmed.edu/globalassets/faces/documents/fostercare-general/developmental-issues-for-young-children-in-foster-care.pdf [noting that the longer a child's placement is extended, the more harm accrues]).

D.

The majority appears to concede that the Appellate Division should have considered a blanket application of the mootness exception to appeals from permanency orders and addresses that question on the merits (*see* majority op at 403 n 3). Given the novelty and significance of the issue, that these orders

7. Although the error occurred at least twice here, there is no general requirement of established repetition in the case on appeal, only a likelihood that the issue will recur in the future in some other case (*see e.g. Matter of Codey [Capital Cities, Am. Broadcasting Corp.]*, 82 NY2d 521, 527 [1993]; *Coleman v Daines*, 19 NY3d 1087, 1090 [2012]). To the extent the majority suggests otherwise, the majority contradicts well-established precedent.

expire within six months or fewer, that many expired orders have lasting effects in the Family Court proceedings, and that orders are nearly certain to expire during a lengthy appellate process, the Appellate Division abused its discretion in declining to invoke the exception and reach the merits. I would remit for the Appellate Division to consider both the legal ramifications and practical implications of a blanket exception for mootness purposes. The Appellate Division's extensive experience with these cases can inform its analysis. In fact, the majority relies on intermediate appellate courts' experiences to reach its own conclusion in these appeals to reject an exception, regardless of the continuing relevance of a permanency order (*id*. at 402-403). I believe we would benefit from the Appellate Division's initial views on the matter.

Even if I agreed that we should resolve this issue in these appeals, I would not adopt the majority's analysis. First, the majority's reliance on *Matter of David C.* (69 NY2d 796, 798 [1987]) is misplaced. That case does not support rejection of the mootness exception here (majority op at 403). *Matter of David C.* is a short memorandum decision regarding the right to a "rehearing" of a retention order pursuant to Mental Hygiene Law § 15.35, not a direct appeal from a permanency order issued under Family Court Act § 1089. Further, the *Matter of David C.* language quoted by the majority cites to *Matter of Barbara C.*—where this Court dismissed the appeal in an entry for lack of preservation below—and *Hearst Corp*. (*id.* at 798, citing *Matter of Barbara C*., 64 NY2d 866, 868 [1985]). Neither case stands for the broad proposition promoted by the majority.

Second, the majority's further reliance on Appellate Division case law is similarly unavailing. In *Matter of Dakota F. (Angela F.)*, the Appellate Division applied an exception to the mootness doctrine to address the Family Court's imposition of contradictory permanency goals, noting that "this is not the only time that Family Court has improperly ordered concurrent permanency goals" (92 AD3d 1097, 1099 n 3 [3d Dept 2012]). *Matter of Damani B. (Theresa M.)* (174 AD3d 524, 527 [2d Dept 2019]) solely serves as an example of the Appellate Division reviewing a live claim as to whether a Family Court's determination was supported by a "sound and substantial basis in the record." Under the majority's view, we would never have occasion to take corrective action to address errors from permanency hearings such as those alleged here. If the Appellate Division determined the challenge was moot because it lacked

merit and dismissed without invoking the exception, then we would not grant leave because, according to the majority, the Appellate Division did not abuse its discretion.

Finally, the majority's assertion that "there is no evidence that appellate courts reflexively dismiss appeals from permanency hearing orders for mootness" (majority op at 405) lacks support in the record or the cases cited. The parties have presented no data to support that conclusion. In fact, the few occasions in which the Appellate Division has invoked the mootness exception for Family Court cases have mostly involved similar questions of jurisdiction and decision-making authority raised by permanency orders (*Matter of Malachi B. [Administration for Children's Servs.]*, 228 AD3d 570, 570-571 [1st Dept 2024] [applying mootness exception to address whether "Family Court has the decision-making authority as to the appropriateness of the child's continued placement in a (Qualified Residential Treatment Program) at every permanency hearing"]; *Matter of Cleophus B. [Torrence B.]*, 93 AD3d 1241, 1241-1242 [4th Dept 2012] [applying mootness exception to address whether Family Court had jurisdiction to impose conditions on father despite dismissing the neglect petition against him], *lv denied* 19 NY3d 807 [2012]; *Matter of Shawn S.*, 163 AD3d 31, 33 [4th Dept 2018] [applying mootness exception to address the question of whether the court "lacked the authority to compel the child to be present at the permanency hearing"]).

IV.

The merits of the underlying issues are not a factor in determining whether to invoke the mootness exception, except insofar as they bear upon whether a question is "substantial" (*see Hearst Corp.*, 50 NY2d at 715; *Alcantara*, 42 NY3d at 147; *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 195-196 [2020]). Nevertheless, it bears noting that mother's arguments are significant and compelling.

DSS concedes that the referee's decision was error. Indeed, the Family Court Act provides that at the end of each permanency hearing, the court must issue an order of disposition in writing, with the first dispositional option listed as, "directing that the placement of the child be terminated and the child returned to the parent or other person legally responsible for the child's care with such further orders as the court deems appropriate" (Family Ct Act § 1089 [d] [1]). "[U]pon the proof adduced, and in accordance with the best interests and safety of

the child" the court must evaluate the evidence and make a factual determination about whether to contemporaneously terminate the child's placement (Family Ct Act § 1089 [d]).

Mother makes a persuasive argument that a mootness exception for permanency orders is necessary so that the right to appeal those orders is not rendered illusory. Permanency hearings must take place every six months (Family Ct Act § 1089 [a] [2]-[3]), and the resulting order is appealable as of right (Family Ct Act § 1112). On its face, a parent's appeal will in all likelihood be rendered moot by expiration of that time frame during the case's pendency.

Frequent mootness dispositions would also be contrary to the legislative intent. The permanency hearings process was designed to ensure prompt and ongoing judicial oversight to prevent children from being lost in the foster care system. We have noted that article 10-A of the Family Court Act, which outlines the permanency hearing process,[8] "establish[es] uniform procedures for permanency hearings for all children who are placed in foster care . . . [in order] to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives" (*Matter of Lacee L. [Stephanie L.]*, 32 NY3d 219, 226 [2018]).

Nor is there any basis for the majority's conclusion that a blanket exception is "not workable or prudent" because it would "flood appellate courts with appeals" with moot issues that "have no real impact on the rights of the parties or the law of this State" (majority op at 404). There is no data to support the bald assertion that an exception would lead to a dramatic increase in appeals from permanency orders that would not have otherwise been filed, but for the exception, and that by comparison any additional appeals would be less meritorious. Moreover, if, as the majority assumes, the Appellate Division engages in a merits analysis as part of its mootness determination, then the court has already done the work that the majority says would be overburdensome. All that is required is to externalize the mootness analysis and address the merits where the issue falls within the mootness exception. In any case, the Family Court Act provides for an appeal by right of a

8. While article 10-A of the Family Court Act outlines the permanency hearing process, DSS commenced the underlying Family Court neglect action under article 10 (Merril Sobie, Prac Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 1089).

permanency order and the court is obligated to follow the law and avoid nullifying that right.[9]

For the reasons I discuss, I would reverse because even if the issues presented in mother's appeals are moot, the exception to mootness applies here. I dissent.

Judges GARCIA, SINGAS and CANNATARO concur. Chief Judge WILSON dissents in an opinion, in which Judge HALLIGAN concurs. Judge RIVERA dissents in a separate dissenting opinion.

Orders affirmed, without costs.

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9. Chief Judge Wilson, joined by Judge Halligan, similarly rejects the majority's argument from administrative convenience (*see* Wilson, Ch. J., dissenting op at 413-414). In so doing, the Chief Judge is guided, as I am, by the Legislature's intent of promoting family reunification (*see id.* at 408, 410-411).

[— NE3d —, — NYS3d —]

ALI TUCKETT, Appellant, v STATE OF NEW YORK, Respondent.

Argued March 13, 2025; decided May 22, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered December 22, 2023. The Appellate Division, with two Justices dissenting, affirmed a judgment of the Court of Claims (Debra A. Martin, J.), which had dismissed claimant's Court of Claims Act § 8-b claim.

Tuckett v State of New York, 222 AD3d 1348, affirmed.

HEADNOTE

State — Unjust Conviction and Imprisonment Act — Sexual Abuse — Clear and Convincing Evidence of Innocence

The Court of Claims made no reversible error in dismissing claimant's action pursuant to Court of Claims Act § 8-b alleging that he had been unjustly convicted and imprisoned after the complainant recanted allegations of sexual abuse and the judgment of conviction was vacated, as claimant did not prove his innocence by clear and convincing evidence. Although the Court of Claims stated that the challenged statements "point[ed] to the truth of [the complainant's] accusations," it identified substantial additional evidence supporting its conclusion that claimant's proof was not clear and convincing. Given the abundance of nonhearsay evidence supporting the court's conclusion, even if the contested statements were hearsay, the error was not prejudicial. Each of the court's findings which claimant argued were based on evidence outside the record also had record support. Moreover, the court did not erroneously presume that the complainant's recantation testimony was inherently unreliable. The court set forth specific reasons, based on its factual findings and careful attention to the demeanor of the witnesses, to support its conclusion that the complainant's recantation was not credible.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Evidence §§ 653, 1310, 1325; AM JUR 2d Penal and Correctional Institutions §§ 163, 186.

CARMODY-WAIT 2d Actions in the Court of Claims §§ 120:23, 120:25.

MCKINNEY'S, Court of Claims Act § 8–b.

NY JUR 2d Criminal Law: Procedure § 2334; NY JUR 2d Government Tort Liability §§ 7, 156–157.

ANNOTATION REFERENCE

Construction and Application of State Statutes Providing

Compensation for Wrongful Conviction and Incarceration. 53 ALR6th 305.

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Query: "Court of Claims" /s (unjust! /3 convict! or imprison!) /s compensat! or damag!

POINTS OF COUNSEL

Neufeld Scheck Brustin Hoffmann & Freudenberger, LLP, New York City (*Katie McCarthy, Paul Neufeld* and *Amelia Green* of counsel), and *Easton Thompson Kasperek Shiffrin LLP*, Rochester (*Brian Shiffrin* of counsel), for appellant. I. The Court of Claims expressly relied on evidence outside the record in reaching its decision, an error that requires reversal. (*Central Hanover Bank & Trust Co. v Eisner*, 276 NY 121; *People v Ashwal*, 39 NY2d 105; *People v Arnold*, 96 NY2d 358; *People v Grant*, 45 NY2d 366; *Matter of Simpson v Wolansky*, 38 NY2d 391.) II. The trial court's application of an irrebuttable presumption against crediting recantation evidence contradicts law and science. (*People v Shilitano*, 218 NY 161; *Corley v United States*, 556 US 303; *Miller v Alabama*, 567 US 460; *J. D. B. v North Carolina*, 564 US 261; *Graham v Florida*, 560 US 48.)

Letitia James, Attorney General, Albany (*Frank Brady, Barbara D. Underwood* and *Jeffrey W. Lang* of counsel), for respondent. I. The Court of Claims properly considered N.M.'s out-of-court statements as evidence of his then-present state of mind. (*Hecker v State of New York*, 20 NY3d 1087; *People v Edwards*, 47 NY2d 493; *People v Ricco*, 56 NY2d 320.) II. The Court of Claims did not rely on evidence outside the record. (*Central Hanover Bank & Trust Co. v Eisner*, 276 NY 121; *Nestorowich v Ricotta*, 97 NY2d 393; *Kaufman v Quickway, Inc.*, 14 NY3d 907; *Nucci v Proper*, 95 NY2d 597; *Letendre v Hartford Acc. & Indem. Co.*, 21 NY2d 518.) III. The Court of Claims did not apply an irrebuttable presumption that N.M.'s recantation was unworthy of belief. (*People v Shilitano*, 218 NY 161; *People v Wong*, 11 AD3d 724; *People v Pringle*, 155 AD3d 1660; *People v Jenkins*, 84 AD3d 1403.)

Davis Polk & Wardwell LLP, New York City (*Elizabeth A. Tippett, Amelia T.R. Starr* and *Shreya R. Kundur* of counsel),

for New York State Association of Criminal Defense Lawyers and others, amici curiae. I. Children in hot situations, like the one N.M. faced with his family, can be prompted to make false accusations due to their susceptibility to suggestion and lack of appreciation for consequences. II. Recantation of childhood accusations are credible when, as here, they are driven by a maturing psyche, rather than external coercion. (*People v Spicola*, 16 NY3d 441; *People v Shilitano*, 218 NY 161; *Dozier v State of New York*, 134 AD2d 759.) III. Evaluations of veracity based on lay behavioral observations are unreliable.

Covington & Burling LLP, New York City (*C. William Phillips* and *Celin Carlo-Gonzalez* of counsel), for The Innocence Project, amicus curiae. I. The Court of Appeals should revisit and reject the presumption that recantations are inherently unreliable. (*People v Shilitano*, 218 NY 161; *People v Nelson*, 171 AD3d 1251; *People v Riddick*, 136 AD3d 1124; *People v Tiger*, 32 NY3d 91; *People v Savvides*, 1 NY2d 554.) II. The Court of Appeals should adopt a multifactor test for evaluating the reliability of recantation evidence. (*People v Wong*, 11 AD3d 724; *People v Ezaugi*, 2 NY2d 439; *People v Romero*, 7 NY3d 633; *People v Kuzdzal*, 31 NY3d 478.)

OPINION OF THE COURT

HALLIGAN, J.

Claimant Ali Tuckett seeks to recover damages from the State pursuant to Court of Claims Act § 8-b, alleging that he was unjustly convicted and imprisoned. The Court of Claims concluded that he did not prove his innocence by clear and convincing evidence and dismissed his claim. The Appellate Division affirmed. Tuckett argues that the Court of Claims improperly relied on hearsay evidence, evidence outside the record, and an impermissible presumption about witness credibility. Seeing no reversible error, we affirm.

I.

Tuckett's claim is based on his now-vacated 2011 conviction for sexual abuse of his minor cousin, for which he was sentenced to an 18-year determinate term of imprisonment. At the time of the alleged assault, Tuckett was 35 years old; his cousin, N.M., was around 11. The People's case against Tuckett relied primarily on N.M.'s testimony that Tuckett had sexually abused him. N.M.'s mother and aunt also testified against Tuckett.

In 2013, N.M. told his mother that he had lied about the sexual abuse. She eventually shared this information with a prosecutor, who immediately interviewed N.M. Shortly thereafter, the prosecutor sent a letter to Tuckett disclosing that N.M. had recanted the allegation of sexual abuse.

With this newly discovered evidence in hand, Tuckett moved to vacate his judgment of conviction pursuant to CPL 440.10 (1) (g).[1] He supported the motion with a sworn affidavit from N.M., which stated that N.M.'s allegations against Tuckett "were completely false" and originally "came up when [N.M.] was asked by his mother or brother whether [Tuckett] had done anything to [him]." N.M. "said no and kept saying no," but when his brother "confronted [him] about finding what he thought was sperm on the bedpost," N.M. eventually "said yes to get [his brother] off [his] back." N.M. further stated that he "decided to come forward because [he] got tired of lying."

Upon receiving Tuckett's motion, County Court, before whom Tuckett's bench trial was conducted, held a hearing on the motion during which it heard testimony from N.M., his mother, and his brother. It then granted Tuckett's motion, apparently with some reluctance. In its brief order, County Court noted that it "previously found [N.M.] credible in his accusation against [Tuckett]," and that it was "troubled" by N.M.'s recantation and had "concerns about what is actually behind [his] about-face." But it "carefully observed [N.M.'s] demeanor" and concluded that his "insistence on [Tuckett's] innocence . . . cannot be said to be incredible on its face." Because Tuckett was convicted "primarily on the strength of [N.M.'s] testimony" and there was no "real proof establishing an improper motive for [N.M.'s] recantation," the court concluded that it was required to vacate the judgment of conviction against Tuckett and order a new trial. The People did not pursue the charges further, and the court dismissed the indictment.

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1. CPL 440.10 (1) (g) allows a court to vacate its earlier judgment on the ground that

> "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence."

The following month, Tuckett filed this claim against the State, seeking damages for unjust conviction and imprisonment pursuant to Court of Claims Act § 8-b. Tuckett needed to "prove by clear and convincing evidence" the remaining two elements of his claim: that "he did not commit any of the acts charged in the accusatory instrument" and that "he did not by his own conduct cause or bring about his conviction" (Court of Claims Act § 8-b [5] [c], [d]). He intended to develop evidence that several of his family members had been influenced to testify against him at the criminal trial because he purportedly failed a polygraph test, and so he hired an expert who would testify that the results were flawed and that an independent analysis showed his answers to the test were "strongly truthful."[2] At the State's request, the Court of Claims excluded that evidence on the ground that polygraph results are inadmissible at trial in New York and no exception to that rule applied. The court further stated that Tuckett's burden was to show actual innocence, not to critique the police investigation that led to his conviction.

The Court of Claims held a three-day virtual trial in February 2022. It heard testimony from seven witnesses: Tuckett, N.M., N.M.'s mother, the mother of Tuckett's son, two police officers involved in the initial criminal investigation, and the prosecutor. Although Tuckett had planned to have N.M.'s aunt testify about how the failed polygraph test impacted her criminal trial testimony, he decided not to call her once the court excluded evidence regarding the polygraph.

During the proceedings, several transcripts from the criminal trial and grand jury proceedings were marked and delivered to the court as potential impeachment materials. Tuckett objected to admission of nonparty prior testimony on hearsay grounds, and most of those transcripts were not admitted. Ultimately, only three transcripts were admitted: Tuckett's criminal trial testimony, his deposition related to the section 8-b claim, and selected criminal trial testimony from a physician who had examined N.M. Although there was some confusion along the way about what had been admitted into evi-

2. The dissent accepts as true Tuckett's allegation that "the police misrepresented to him and to several family members that he had failed the polygraph" (dissenting op at 444). But the Court of Claims did not make that finding. And even if Tuckett had called an expert to offer a different interpretation of the polygraph, such testimony could not establish that the results were misrepresented to him and his family.

dence, the court confirmed at the close of trial that it understood what had been admitted and stated that it would "literally throw out" all the other documents.

The Court of Claims concluded that Tuckett failed to establish his innocence by clear and convincing evidence (*Tuckett v State of New York*, Ct Cl, May 19, 2022, Martin, J., claim No. 129488). Relying on the testimony of an investigating officer and the prosecutor, along with an inference based on the fact of Tuckett's conviction that the grand jury and criminal trial judge had found N.M. to be credible, the court determined that N.M.'s original accusations were "truth[ful]." It also determined, based primarily upon its assessment of the testimony from N.M. and Tuckett before the Court of Claims, that N.M.'s recantation was "not credible." Concluding that the evidence of Tuckett's innocence was "equivocal," the court dismissed the claim.

The Appellate Division affirmed in a split decision (222 AD3d 1348 [4th Dept 2023]). The Court rejected Tuckett's argument that the Court of Claims had improperly relied on evidence outside the record, concluding that there was sufficient evidence in the record to support each of the findings he contested. Although it agreed with Tuckett that the court had relied on hearsay evidence, it deemed the error harmless because the hearsay was not essential to the determination that N.M.'s recantation was not credible. Having identified no reversible error in the Court of Claims's order, the Appellate Division declined to disturb the determination that Tuckett failed to prove his innocence by clear and convincing evidence.

Two Justices dissented and would have reversed for two independent reasons (*see id.* at 1351 [Montour & DelConte, JJ., dissenting]). First, they were persuaded that the Court of Claims improperly and prejudicially relied on evidence outside the record. Second, they determined that the court's reliance on hearsay statements was not harmless. Thus, they would have reinstated Tuckett's claim and ordered a new trial.

Tuckett appealed as of right (*see* CPLR 5601 [a]).

II.

Tuckett raises three challenges. First, he argues that the Court of Claims rested its determination that N.M.'s accusations were credible on inadmissible hearsay. Second, asserting that some of the court's findings of fact are not supported by

record evidence, he argues that the court must have improperly relied on evidence outside the record. Finally, Tuckett argues that the Court of Claims erroneously presumed that N.M.'s recantation evidence was unreliable. We address each argument in turn.

A.

Tuckett contends that the Court of Claims improperly relied on two out-of-court unsworn statements that N.M. allegedly made in 2011 to the investigating officer and the prosecutor. He identifies the following passage from the court's decision as the source of this error:

> "Several pieces of testimony point to the truth of N.M.'s accusations: (1) after initially reporting the abuse to [the investigating officer], N.M. said he felt better because he didn't like keeping secrets from his mother and (2) N.M. expressed concerns to [the prosecutor] about his health and anatomy because of the abuse. It is unlikely that N.M. would have made this statement to [the investigating officer] or voiced concerns about his body to [the prosecutor] if he was lying about the abuse."

We need not decide whether the statements N.M. made to the investigating officer and the prosecutor are inadmissible hearsay. Even assuming they are, the key question is whether the error prejudiced "a substantial right of a party" (CPLR 2002; *see also* Vincent C. Alexander, Prac Commentaries, McKinney's Cons Laws of NY, CPLR 2002 ["The erroneous admission of improper evidence is harmless error, and thus not a basis for reversal, if there is reason to believe the outcome would have been the same even if the evidence had been excluded"]; Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 2002.02 [4th ed, Apr. 2025 update] [same]). We conclude that any reliance on these statements did not prejudice Tuckett.

Although the Court of Claims stated that the statements "point[ed] to the truth of N.M.'s accusations," it identified substantial additional evidence supporting its conclusion that Tuckett's proof was not clear and convincing. The court emphasized "the context of Tuckett's behavior" during the time in question and aspects of the recantation it found "unconvincing." It placed significant weight on N.M.'s "unusual demeanor," noting that in testifying about his recantation he had a "shock-

ingly flat affect" and that he testified "as an adult to undo the wrong he presumably inflicted on Tuckett . . . without emotion or apparent remorse." The court likewise observed that N.M.'s mother "testified with the same flat affect and apparent lack of remorse as N.M." It found their lack of remorse particularly striking given that "neither N.M. nor [his mother] has ever apologized" to Tuckett. And the court explained that it lacked confidence in Tuckett's testimony because his memory of the events surrounding the incident was faulty and his explanations for his interactions with N.M. around that time sounded like "an afterthought excuse."

Beyond its observations of the testifying witnesses, several additional pieces of evidence supported the court's determination. For example, the court noted that N.M. "offered little explanation about what prompted" his recantation. It also inferred from N.M.'s mother's decision to wait "months" to inform the prosecutor of the recantation that she was "apparently unconvinced that N.M. was going to stick with this new story." Although the court considered Tuckett's alibi and his willingness to take a polygraph test after the incident, it found that evidence unpersuasive. Given the abundance of nonhearsay evidence supporting the court's conclusion, even if the contested statements are hearsay, the error was not prejudicial.

B.

Tuckett also argues that the Court of Claims erred by making findings of fact based on evidence outside the record—specifically, N.M.'s grand jury and criminal trial testimony, N.M.'s aunt's criminal trial testimony, and the CPL 440 order, none of which were admitted into evidence. "It is elementary" that a factfinder may "not decide an issue upon . . . facts outside the record" (*Central Hanover Bank & Trust Co. v Eisner*, 276 NY 121, 125 [1937]), and we will reverse where a finding of fact lacks support in the record and the error engenders prejudice (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 430-431 [2012]; *People v Brown*, 48 NY2d 388, 394 [1979]). Having carefully reviewed the record in this appeal, we conclude that each of the challenged statements has record support.

Tuckett identifies three findings that he says were based on N.M.'s grand jury and criminal trial testimony. The first is the court's determination that there was considerable criminal

trial testimony about N.M.'s 11th birthday party held at a go-kart place. But in the Court of Claims, both Tuckett and N.M. testified at length about the go-kart party, including its timing in relation to the alleged abuse, and N.M. recalled that he had testified about the party during the criminal trial. Evidence introduced to impeach N.M. during his testimony in the Court of Claims also supports the second finding that Tuckett disputes, namely, that Tuckett showed N.M. photos of nude women. Contrary to Tuckett's assertion, the court was entitled to rely on that impeachment evidence as evidence-in-chief (*see e.g. Kaufman v Quickway, Inc.*, 14 NY3d 907, 908 [2010]). There is also evidence showing that N.M.'s testimony was consistent during the grand jury and criminal trial proceedings, which is the third finding Tuckett challenges. The prosecutor, who prosecuted the criminal case once the indictment was returned, testified in the Court of Claims that N.M.'s testimony was consistent throughout the proceedings, and the court could infer that N.M.'s grand jury testimony was in accord since it resulted in an indictment.

Tuckett's efforts to show the court relied on N.M.'s aunt's criminal trial testimony to find facts about the alleged abuse are equally unavailing. Tuckett testified in the Court of Claims that he and N.M. had been playing video games in the bedroom on the relevant date, that N.M. ran out of the room crying, and that N.M.'s aunt saw that behavior. N.M. confirmed during his testimony that he and Tuckett were alone in the bedroom and that they "did occasionally keep the door closed." And in his deposition, Tuckett said that N.M.'s aunt confronted him after seeing N.M. crying. When Tuckett explained that he had beaten N.M. in a video game, she told him to "stop messing with that boy." The court could readily infer from this testimony that the aunt was disturbed.[3]

Nor are we persuaded that the court improperly relied on the transcript from the CPL 440 proceedings and the resulting

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3. The dissent's contrary view rests on the Court of Claims's statement that "the defense presented evidence of . . . daily interactions behind closed doors over a period of months" (*see* dissenting op at 448). But the court's specific, and more nuanced, findings of fact are supported by record evidence, including: "from late 2008 through about April 2009, Tuckett went every day to [N.M.'s] house" and "played video games . . . alone or with N.M. . . . often with the door closed"; "during the summer of 2009, Tuckett was with [N.M.] almost daily playing video games in [N.M.'s] bedroom, where they were frequently alone"; N.M. "was alone in the bedroom with Tuckett with the door closed when he was molested"; "from the beginning of 2009 through the summer of 2009," Tuckett was "often playing video games alone in the

(n. cont'd)

order. In support of his argument, Tuckett relies on the following passage:

> "[A]t the hearing on the motion to vacate the judgment in June 2015, it is evident that Judge Argento doubted the validity of the victim's recantation, stating, '[t]he Court is troubled by the developments in this matter because it previously found the victim credible,' and had 'concerns about what is actually behind [N.M.'s] about-face' (Claim, ex. F)."

The quotation and citation make clear that the court relied not on the hearing transcripts, but only on the CPL 440 order itself, which was attached to Tuckett's claim as exhibit F. Courts regularly "take judicial notice of their own prior proceedings and records, including exhibits, even sua sponte after trial" (*Musick v 330 Wythe Ave. Assoc., LLC*, 41 AD3d 675, 676 [2d Dept 2007] [citations omitted]; *see also Long v State of New York*, 7 NY3d 269, 275 [2006] [taking judicial notice of another court's records in a section 8-b action]). We see no error in the Court of Claims doing the same.

C.

Finally, Tuckett argues that the Court of Claims erroneously presumed that N.M.'s recantation testimony is inherently unreliable. Its application of that presumption, he says, is reflected in the court's brief invocation of *People v Shilitano* (218 NY 161 [1916]). He asks us to clarify that *Shilitano* does not impose such a presumption and argues that we should reverse because the court applied the wrong standard.

Tuckett is correct that *Shilitano* does not establish an irrebuttable (or even a strong) presumption that recantation testimony is unreliable. *Shilitano* instead held that a court considering the weight to be given to original accusations and a subsequent recantation should consider, among other things, "the motives which actuated" the conflicting statements (*id.* at 170; *see also e.g. People v Stetin*, 192 AD3d 1331, 1333-1334 [3d Dept 2021] [setting forth a six-factor test to apply when considering recantation evidence]).

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bedroom with N.M., with the door closed"; and Tuckett "frequented [N.M.'s] house and spent time alone with N.M. in his bedroom with the door closed."

And although the dissent criticizes the court for not "providing [Tuckett] an opportunity to rebut" the aunt's testimony (dissenting op at 449), the Court of Claims did not bar Tuckett from calling N.M.'s aunt. Tuckett himself stated that he chose not to call the aunt as a matter of "trial strategy."

The Court of Claims's decision does not reflect a misunderstanding of *Shilitano*. The court set forth specific reasons, based on its factual findings and "careful attention to the demeanor of the witnesses," to support its conclusion that N.M.'s recantation was not credible.[4] Because the court's passing reference to *Shilitano* does not show that it improperly applied a presumption of unreliability to N.M.'s recantation, Tuckett's final argument neither establishes a basis for reversal nor gives us reason to revisit our decision in *Shilitano*. In light of the foregoing, we further conclude that Tuckett's argument for reversal based on cumulative error fails.

III.

A claimant who asserts a damages claim against the State under section 8-b must prove their innocence by clear and convincing evidence. That task "is certainly not a simple one" (*Reed v State of New York*, 78 NY2d 1, 11 [1991]). After hearing from and observing Tuckett and N.M., the Court of Claims determined that the accusations were credible and the recantation was not, and that Tuckett therefore failed to carry his burden. We see no reversible error in that decision.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

RIVERA, J. (dissenting). N.M. recanted the allegations he made at 11 years old, that his adult cousin, claimant Ali Tuckett, sexually abused him. There is reason to believe N.M.'s recantation. No forensic evidence or eyewitness testimony confirmed N.M.'s accusation and claimant always maintained his innocence. N.M. has repeatedly explained that he initially lied because he felt pressured by his religious family to blame claimant when he was caught watching same-sex pornography. Five years after claimant's conviction, when N.M. was 16 years old, N.M. recanted because he said he felt guilty and was tired of lying.

At claimant's CPL 440.10 hearing to vacate his conviction, N.M. testified under oath before the same judge who presided over claimant's bench trial and who found claimant guilty of

4. The dissent contends that the Court of Claims "failed to account for the possibility" that emotional or environmental factors may have influenced N.M.'s demeanor (dissenting op at 453). It is not our role to second-guess the factfinder based on such speculation (*see e.g. Matter of Liccione v John H.*, 65 NY2d 826, 827 [1985]).

the alleged sexual abuse. N.M.'s renunciation of his prior allegation led the judge "in good conscience" to vacate the judgment of conviction, explaining that N.M. was not incredible and there was no proof of an improper motive for the recantation. The court subsequently dismissed the indictment after the prosecutor decided not to retry claimant. By then, claimant had been imprisoned for over five years.

Claimant sued New York State for his wrongful conviction, and at the civil trial N.M. again testified that claimant never sexually abused him. The State failed to directly counter that testimony. Nevertheless, the Court of Claims disbelieved N.M. and dismissed the claim, concluding that the evidence of claimant's innocence was equivocal. That was error. Claimant is entitled to a new trial because the court relied on matters dehors the record as "corroboration" for N.M.'s initial abuse allegations, relied on an outdated categorical presumption against recantation testimony, and overemphasized N.M.'s perceived "flat affect" during a virtual proceeding. I dissent.

I.

Factual Background and the Section 8-b Petition for Damages against the State

N.M. was raised by a religious family headed by his maternal grandfather, who was the pastor of a small church that consisted mainly of family members. The church espoused conservative views, including teaching that same-sex relations were sinful, and that watching same-sex pornography was "one of the worst sins."

Claimant is N.M.'s older cousin. Claimant's maternal grandparents adopted him after his mother's death, and he lived with the grandparents into his late teens. Claimant, who had previously pleaded guilty to drug possession, was the only member of the family who had been incarcerated. After his parole, claimant, then 35 years old, returned to live with his grandparents. He attended the grandfather's church four times per week and would go every day to his aunt's nearby home. The family ran a childcare center on the first floor of the house, so claimant would spend time on the second floor, playing video games with then 10-year-old N.M. in N.M.'s bedroom.

Around this time, N.M.'s brother caught N.M. watching pornography and saw a white stain on N.M.'s bed, which he assumed was evidence that N.M. masturbated. The family

members asked if claimant was to blame for N.M.'s conduct. Initially, N.M. said that nothing had happened. Eventually, however, to deflect attention from his pornography interests, N.M. gave in to the repeated questions and suggestions that claimant was involved and alleged that claimant sexually abused him. N.M.'s mother reported the allegations to the police, but N.M. did not think his accusation would lead to claimant's imprisonment.

Claimant maintained his innocence, waived his *Miranda* rights, and offered to take a polygraph test. Claimant asserted that, years later, he learned that the police misrepresented to him and to several family members that he had failed the polygraph.[1] He testified before the grand jury, continuing to deny wrongdoing and proclaiming his innocence. N.M., by then 11 years old, also testified before the grand jury, repeating that claimant sexually abused him. Claimant was indicted on five counts related to the alleged abuse. And although he understood that he was facing 25 years to life in prison, claimant refused plea deals offering one or two years' incarceration.

At claimant's bench trial the following year, N.M. repeated his allegations. The trial turned on this testimony, as there was no forensic evidence of sexual abuse. Nor was there any direct eyewitness evidence, although family members testified to observing the two together and N.M.'s aunt testified that one day she saw N.M. run out of claimant's bedroom crying. The judge found claimant guilty of two counts of criminal sexual act in the first degree, two counts of sexual abuse in the first degree, and one count of endangering the welfare of a child. The court sentenced claimant to 18 years' incarceration followed by 15 years' postrelease supervision.

Two years after the conviction, N.M.'s mother asked him about what she perceived to be odd behavior, and N.M. told her that claimant never abused him and that he made up the accusation. His mother was shocked and feared that N.M.'s prior statements might be considered perjury. At his mother's direction, N.M. repeated the recantation to his grandfather. After a few months and following the death of the grandfather, N.M., now 15 years old, told the prosecutor that he made up the al-

1. The majority questions whether claimant could have proven this assertion (*see* majority op at 436 n 2). The State, however, has never contested that the police misrepresented the polygraph results, but rather argued only that any misrepresentation, even if proven, was irrelevant to establishing claimant's innocence.

legations about claimant. N.M. did not report that his brother caught him watching pornography.

A year later, N.M. testified under oath at claimant's CPL 440.10 hearing to vacate the conviction, presided over by the same judge who had found claimant guilty at the criminal trial. N.M. again testified that he made up the allegations and that claimant had not sexually abused him. He explained that he would have been more embarrassed to disclose that he had viewed pornography, especially same-sex pornography, than he was to falsely accuse claimant. The judge vacated the conviction and ordered a new trial based on N.M.'s recantation. The court found N.M. was not incredible and that there was no proof of an improper motive to recant.

Claimant sued the State of New York for damages from his wrongful conviction. To prevail under Court of Claims Act § 8-b, claimant had to establish "by clear and convincing evidence" that "he did not commit any of the acts charged in the accusatory instrument" underlying the conviction (Court of Claims Act § 8-b [5] [c]). Claimant, N.M., and his mother testified at a virtual trial before the Court of Claims. Claimant testified to his innocence, and N.M. and his mother testified about the recantation. N.M. also testified that he felt guilty when he looked at claimant at the CPL 440.10 hearing and during the Court of Claims trial. N.M. again explained that he came forward because he felt he had to "set things right" after having "put [claimant] in jail for nothing."

Several transcripts were admitted into evidence: (1) claimant's 2011 criminal trial testimony; (2) claimant's 2018 civil deposition testimony, wherein he again testified that he did not commit this crime; and (3) excerpts of the criminal trial testimony from a physician regarding her examination of N.M. Several other transcripts, however, were delivered to the court as potential impeachment materials but ultimately not admitted. These included the criminal trial transcript of N.M.'s aunt's testimony, as well as other transcripts from the trial and the grand jury. Nonetheless, at various points during the section 8-b trial, the Court of Claims mistakenly indicated that all transcripts had been admitted.

The court dismissed the verified claim, concluding that the evidence of claimant's innocence was equivocal. The court first rejected N.M.'s recantation, working from "the long held presumption that '[t]here is no form of proof so unreliable as

recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character' " (quoting *People v Shilitano*, 218 NY 161, 170 [1916]). In addition to the presumption against recantation testimony, the court took into account what it considered to be N.M.'s weak justification for recanting, his mother's disbelief at his claim that he made up the abuse, and the prosecutor's and the CPL 440.10 hearing judge's observations about N.M.'s demeanor. The court further relied upon what it termed N.M.'s "flat affect" while testifying about his feelings of guilt and remorse. The court also noted that N.M. had not resumed a relationship with claimant, "barely seeing or speaking to him since [claimant] left prison."

The court also rejected claimant's testimony, noting that claimant did not sufficiently remember details about his time alone in the bedroom with N.M. Furthermore, the court found unpersuasive that claimant took a polygraph test and testified before the grand jury because, according to the court, "it is well known" that the test results are inadmissible, and it was likely that claimant would have been indicted even if he had not testified before the grand jury. And although claimant maintained that he was not at the house during the time of the alleged abuse because he was selling drugs elsewhere, the court considered this admission and claimant's overall criminal history as evincing claimant's determination to place his self-interests above others.

The Appellate Division affirmed dismissal of the verified claim (222 AD3d 1348 [4th Dept 2023]). Two Justices dissented on the grounds that the Court of Claims considered grand jury and trial testimony not in evidence, as well as inadmissible hearsay statements that went to N.M.'s credibility (*see id.* at 1351 [Montour & DelConte, JJ., dissenting]). Claimant appealed as of right pursuant to CPLR 5601 (a). For the reasons I discuss, I would reverse and order a new trial.

II.

Evidence Outside the Record Relied upon by the Court of Claims

Claimant argues, as he did below, that the Court of Claims relied on evidence outside the record. Claimant preserved his claims that the court erroneously relied on: (1) hearsay evi-

dence of N.M.'s statements to the police and the prosecutor prior to claimant's criminal trial; and (2) the aunt's criminal trial testimony.[2] The State responds that the court did not improperly rely on outside or inadmissible evidence. I conclude that claimant has established that the court erroneously relied on the hearsay and the aunt's criminal trial testimony and that these errors, alone or in combination, warrant reversal and a new trial.

A.

Hearsay Evidence of N.M.'s Out-of-Court Statements

I begin with the sole point of agreement between the majority and dissent in the Appellate Division. Specifically, all Justices agreed that N.M.'s out-of-court statements to a police officer that he felt better after disclosing the abuse and was concerned the abuse might affect his health constituted inadmissible hearsay (*see* 222 AD3d at 1350; *id.* at 1351 [Montour & DelConte, JJ., dissenting]). The Justices' dispute centers on whether the court relied on the statements. On that point, the Court of Claims was crystal clear: it relied on the hearsay as testimony that "point[ed] to the truth of N.M.'s accusations" against claimant. We, of course, must take the court at its word (*see Baba-Ali v State of New York*, 19 NY3d 627, 636-637 & n 8 [2012]). Put another way, the court expressly stated that it relied on the hearsay to determine that N.M. initially told the truth when he asserted that claimant sexually abused him, which led the court to further conclude that N.M.'s recantation was not credible.[3]

This error was not harmless. It is well settled that "an error is only deemed harmless when there is no view of the evidence

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2. I agree with the majority that claimant's two other claims are without merit. First, evidence admitted at the section 8-b trial indicated that claimant had shown N.M. pictures of naked women, that N.M. had alleged that claimant had abused him around the time of N.M.'s 11th birthday party, and that N.M.'s testimony before the grand jury and at the criminal trial was consistent (*see* majority op at 439-440). Thus, there is no basis to conclude the Court of Claims relied on external evidence when discussing these matters. Second, the Court of Claims did not rely on the CPL 440.10 hearing transcript in its decision but rather on the CPL 440.10 order, which was attached as an exhibit to the petition and was properly before the court (*see id.* at 441).

3. Defense counsel objected to the hearsay evidence and the Court of Claims overruled the objections. Thus, we may assess whether the court erred in considering the hearsay (*see e.g. Flynn v Manhattan & Bronx Surface Tr. Operating Auth.*, 61 NY2d 769, 771 [1984]; *Meagher v Long Is. R.R. Co.*, 27 NY2d 39, 45-46 [1970]). The State's claim that the evidence falls within

(n. cont'd)

under which appellant could have prevailed" (*Marine Midland Bank v Russo Produce Co.*, 50 NY2d 31, 43 [1980]). In other words, an error is not harmless if it "could have affected the outcome of the trial" (*Lifson v City of Syracuse*, 17 NY3d 492, 498 [2011]). Thus, the key question is whether the only reasonable view was that the Court of Claims would have found N.M. credible but for the hearsay evidence (*cf. Tyrrell v Wal-Mart Stores*, 97 NY2d 650, 651-652 [2001] [ordering a new trial where the prevailing party failed to establish admissibility of evidence under hearsay exception]). By its own statements, the court unequivocally relied on this hearsay in rejecting N.M.'s recantation. Thus, the error was not harmless.

B.

The Aunt's Criminal Trial Testimony

Claimant next asserts that the Court of Claims relied on unadmitted evidence of the aunt's criminal trial testimony. "It is elementary that a judge should not decide an issue upon personal knowledge of facts outside the record" (*Central Hanover Bank & Trust Co. v Eisner*, 276 NY 121, 125 [1937]; *see also Snediker v County of Orange*, 58 NY2d 647 [1982]; *Alford v Sventek*, 53 NY2d 743, 745 [1981]). Claimant points principally to the following statement concerning N.M.'s aunt:

> "[N.M.] was alone in [a] bedroom with [claimant] with the door closed" and he "ran out of the room crying, which his [a]unt . . . witnessed and testified about at the criminal trial. She was disturbed by this but [claimant] told her that it happened because he had beaten N.M. at a video game, a story N.M. repeated at the Court of Claims trial."

The Court of Claims could not have known the content of the aunt's testimony without reviewing the criminal trial transcript. The aunt did not testify at the section 8-b trial, nor was her criminal trial testimony admitted into evidence. However, the transcript was submitted to the court, giving the court ready access to its contents. Critically, the court found that N.M. and claimant interacted daily "behind closed doors" over several months. Yet, no one at the section 8-b trial testified that the door was always closed, including on the day N.M. ran

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the state-of-mind hearsay exception is unpersuasive, as the court considered the statements for the truth of N.M.'s allegations of sexual abuse (*cf. People v Ricco*, 56 NY2d 320, 328 [1982]).

out crying. Indeed, N.M. testified that no one had an expectation of privacy in his bedroom. He explained that the bedroom door had no lock, to reach any other room on the floor one would have to walk past his bedroom, and the room was above a childcare center the family ran down the stairs. Claimant did testify that the aunt "might have said something" at the criminal trial about N.M. crying, but also that he was "not 100 percent sure" of such testimony.

That the Court of Claims admitted confusion over what prior criminal trial testimony was admitted into evidence further supports the conclusion that the court relied on evidence outside the record. Indeed, we cannot be certain what the court actually relied upon to reach its conclusion that both N.M. and claimant were not credible, given that the court had difficulty tracking the admitted evidence.

Claimant states that he intended to impeach the aunt's prior testimony by calling her to testify and showing that she became concerned about his interactions with N.M. only after the investigators falsely represented that claimant failed a polygraph test. The Court of Claims concluded that the effect of any alleged misrepresentation occurred before claimant's conviction and was therefore irrelevant to the section 8-b proceeding. Claimant asserts that due to the court's ruling, he then changed his strategy and did not call the aunt. As a consequence, the court relied on the aunt's testimony without providing claimant an opportunity to rebut it.[4] Therefore, the Court of Claims' reliance on the aunt's trial testimony was prejudicial.

In sum, each error on its own requires reversal. Even if that were not the case, in combination, these errors prejudiced the claimant and require a new trial.

III.

Shilitano's Presumption against the Reliability of Recantations and Science to the Contrary in Child Abuse Cases

Claimant further argues that the Court of Claims deployed an outdated and refuted presumption against recantation evi-

4. The majority observes that claimant himself elected not to call the aunt to testify (*see* majority op at 440-441 n 3). That is irrelevant. We do not require parties to anticipate that courts might erroneously look outside the record.

dence pronounced in *Shilitano*. Claimant asks that we overrule the presumption full stop or clarify that the presumption is not justified in child abuse cases. The State counters that the Court of Claims did not apply an irrebuttable presumption against N.M.'s recantation testimony but rather assessed N.M.'s credibility by reference to multiple factors. According to the State, *Shilitano* did not adopt a categorical presumption but rather acknowledged that recantation should be viewed with skepticism and assessed for reliability based on all of the circumstances of the case. The research supports claimant's assertion that recantation evidence should not be presumed inherently unreliable in child sexual abuse cases. Courts should reject a presumption against such recantations. Here, the Court of Claims assessed N.M.'s recantation working from a negative presumption, and as a result ignored plain indicia of N.M.'s reliability.

A.

In *Shilitano*, the defendant appealed his conviction for the murder of a police officer and the denial of his motion for a new trial based on newly discovered evidence. In support of the motion, defendant submitted recantation evidence of several of the prosecution's trial witnesses. In rejecting the argument that the mere fact of recantation entitles a defendant to a new trial, this Court made the following generalization about the character of violent crime witnesses:

> "Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice" (*Shilitano*, 218 NY at 169).

Shilitano and several of the witnesses were Italian-American, living in Manhattan's Little Italy, where the shooting took place. The Court's offensive statement is best understood as a product of its time—the early 1900s—when discrimination and

bias against Italian immigrants in the City was prevalent.[5]

Even though the *Shilitano* Court reviewed various factors in assessing the recantations at issue in that case, it did so through the lens of the presumption against recantations. Thus, *Shilitano* and the courts applying its adverse presumption ground the analysis in the negative—the recantation is inherently unreliable—and assume that the original statement was accurate and truthful (*see id.* at 170 [explaining that courts must "endeavor to discern the motives" of both the trial and the recantation testimony but explaining that the latter is "untrustworthy"], 171-178 [analyzing the various testimony]; *People v Wong*, 11 AD3d 724, 725-726 [3d Dept 2004] [setting forth six factors for evaluating recantation evidence]; *People v Stanton*, 200 AD3d 1307, 1312 [3d Dept 2021] [describing recantation evidence as "inherently unreliable"]).

As amici argue, *Shilitano*'s presumption is often misplaced when a witness who testified as a child to having suffered sexual abuse recants as an adult. Of course, child sexual abuse is all too real (*see Nellenback v Madison County*, 44 NY3d 329, 346-347 [2025, Rivera, J., dissenting]). But there is an "overwhelming consensus" among psychological researchers that children are suggestible in ways that increase the risk of false abuse allegations (Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L Rev 33, 36 [2000]). This suggestibility increases in high-pressure situations, such as when a parent, police officer, or lawyer questions a child. "If a child was never abused, but adults suspected that they were, and suggestively questioned the child about abuse, then one might observe non-disclosure, followed by initial denial (when the child was first questioned), followed by a disclosure (when the child acquiesced to suggestion)" (Thomas D. Lyon, Breanne E. Wylie & Zsofia Szojka, *Understanding child sexual abuse*

5. To say so is not to dishonor *Shilitano*'s author, Judge Samuel Seabury. In the 1930s, following his judicial tenure, Seabury led what became known as the Seabury hearings, which investigated corruption in the municipal courts, police department, and district attorney's office. His investigations eventually led to the resignation of then-New York City Mayor James Walker. Earlier in his career, Seabury had been involved in reform politics, championing the single-tax movement of Henry George and railing against the corruption of Tammany Hall (*see generally Samuel Seabury*, Historical Society of the New York Courts, available at https://history.nycourts.gov/biography/samuel-seabury/ [accessed May 2, 2025]).

disclosures, delays, and denials at 4-5 [Jan. 21, 2025], in Child sexual abuse: Disclosure, delay, and denial [M.E. Lamb, I. Hershkowitz & M.E. Pipe, editors, 2d ed, Routledge], available at https://papers.ssrn.com/so13/papers.cfm?abstract_id=5106305 [accessed May 2, 2025]). Consistent with this research, recantation appears "uncommon among sexually abused children" (Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 Psych, Pub Pol & L 194, 217 [2005]). In other words, when those who testified as children *do* recant—and especially when they do so as adults or under less suggestive circumstances—there is good reason to take the recantation seriously. To treat such evidence as presumptively "untrustworthy" is mere judicial prejudice, at odds with the social-scientific consensus (*Shilitano*, 218 NY at 170). It is time that we abandon the presumption that in these cases an adult's recantation of their childhood testimony is inherently unreliable and instead assess recantations on the strength of the evidence, without first tipping the scales against them.

B.

The Court of Claims applied *Shilitano*'s presumption of unreliability and accordingly failed to properly consider the indicia of reliability supporting N.M.'s recantation. Although we generally defer to a court's credibility determinations, there is no basis to do so in this case, where the record contradicts the court's reasoning.

The Court of Claims first erred in discrediting N.M.'s motives for falsely accusing claimant of sexual abuse. These motives precisely track those that scholars have identified as underlying false abuse allegations by children. N.M. was an 11 year old, raised in a religious family, when he was caught committing the terrible "sin" of viewing same-sex pornography. N.M. admits that he succumbed to pressure from his family to put blame on claimant and thus to deflect attention from his sexual interests. N.M. has steadfastly recanted his allegations.

The Court of Claims effectively failed to consider N.M.'s motive for recanting. The CPL 440.10 order vacating claimant's conviction—the same order quoted by the Court of Claims to support its determination—found no proof of an improper motive. And as the State concedes, the evidence suggests no such motive, even as it amply explains why N.M. falsely accused

claimant years earlier. To the contrary, from the moment he recanted as a teenager, and ever since, N.M. has risked the ire of his family and prosecution for perjury. He has publicly acknowledged his shame for sending an innocent person to prison because, as a child, he wanted to avoid embarrassment. Yet the court dismissed N.M.'s desire to "set things right" after having "put [claimant] in jail for nothing" as a "weak justification."

Notably, the Court of Claims heavily relied on what it described as N.M.'s "flat affect" but failed to account for the possibility that this "affect" was due to N.M.'s inability to look at claimant as he admitted under oath that he had falsely accused him. Nor did the court consider that N.M.'s testimony was provided virtually and not in-person, which may have affected the quality of N.M.'s voice and tone.[6] The court also noted that N.M. had not communicated or contacted claimant, but N.M. testified to the difficulty of facing him, even years later and even after telling the truth.

Finally, it bears noting the Court of Claims concluded that claimant was not credible, in part, because of his criminal history. The court concluded that claimant's proffered alibi that at the time of the alleged abuse he was involved in criminal drug activity illustrated that claimant placed his interests above others. That claimant committed drug crimes does not establish that he sexually abused a child.

Contrary to the majority, the Court of Claims' failures are fatal to the decision below. The majority brushes aside the court's discussion of *Shilitano* as a mere "passing reference" and contends that the court "set forth specific reasons, based on its factual findings and 'careful attention to the demeanor of the witnesses,' to support its conclusion that N.M.'s recantation was not credible" (majority op at 442). But *Shilitano*'s "presumption" was plainly the foundation for the Court of Claims' analysis. And in ignoring *Shilitano*'s directive to consider " 'the motives which actuated' the conflicting statements" (*id.* at 441, quoting *Shilitano*, 218 NY at 170), the Court of Claims ne-

6. The majority invokes the general proposition that we generally "afford[ ] great weight" to the trial judge's credibility determinations (*Matter of Liccione v John H.*, 65 NY2d 826, 827 [1985]; *see* majority op at 442 n 4 [citing *Matter of Liccione*]). Even if that proposition were applicable here, grave risks attend credibility assessments based upon a witnesses' demeanor in virtual hearings (*see Vazquez Diaz v Commonwealth*, 487 Mass 336, 356, 167 NE3d 822, 842 [2021, Kafker, J., concurring]).

glected the single most important indicium of reliability. We cannot overlook such grave errors.

IV.

Claimant was incarcerated for several years based on the testimony of N.M., who as a child alleged that claimant sexually abused him. N.M. recanted a few years after the criminal trial, explaining the personal reasons and the family pressures that led to his initial accusation and his recantation. N.M. feels guilt and shame; he cannot face claimant. Claimant seeks damages for the years he spent in prison, damages the Legislature allows if he establishes by clear and convincing evidence that he is innocent of the alleged abuse (*see* Court of Claims Act § 8-b [5] [c]). The Court of Claims concluded that he failed to meet his burden, but that decision is based on evidence not in the record and on a presumption contrary to the research on child sexual abuse recantations. Claimant is entitled to a new trial where the court will rely only on the record evidence and assess N.M.'s recantation without assuming it is inherently unreliable.

Chief Judge WILSON and Judges GARCIA, SINGAS, CANNATARO and TROUTMAN concur. Judge RIVERA dissents in an opinion.

Order affirmed, with costs.

[— NE3d —, — NYS3d —]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v HU SIN, Appellant.

Argued March 13, 2025; decided May 22, 2025

PROCEDURAL SUMMARY

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of that Court, entered June 9, 2023. The Appellate Division affirmed a judgment of the Erie County Court (James F. Bargnesi, J.), which had convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and rape in the third degree.

People v Hu Sin, 217 AD3d 1439, affirmed.

HEADNOTE

Crimes — Fair Trial — *Molineux* Evidence in Rape Prosecution Where Defense of Consent Offered — Evidence of Prior Sexual Assaults Relevant to State of Mind

In defendant's prosecution for raping his sister-in-law in which he presented a defense of consent, the trial court did not err in admitting evidence that defendant had previously sexually assaulted two of his other sisters-in-law as relevant to a non-propensity purpose. *Molineux* evidence is admissible where a defendant offers a theory of defense that assumes the underlying conduct but disputes that the defendant possessed the requisite guilty intent or state of mind in the commission of said conduct. The focus in that situation is not on the actual doing of the act, for the act is either conceded or established by other evidence. Rather, the element in issue is the actor's state of mind, and evidence of other similar acts is admitted under this exception because no particular intent can be inferred from the nature of the act committed. The primary question for the jury here was not whether sexual intercourse occurred but whether defendant possessed the requisite intent: did he intend to have sexual intercourse with the victim without her consent and did he intend to use forcible compulsion to do so. That defendant had previously sexually assaulted the victim's sisters under hauntingly similar circumstances had obvious relevance as tending to refute defendant's claim of an innocent state of mind. Given the similarity of the prior acts, and the fact that the court repeatedly instructed the jury that the evidence could not be considered for propensity purposes, the trial court did not abuse its discretion in determining that the potential prejudice of the evidence did not outweigh the probative value of such evidence in aiding the jury's deliberations.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Criminal Law §§ 112, 412; AM JUR 2d Rape §§ 5, 53, 79, 82.

Carmody-Wait 2d Fundamentals of Criminal Evidence §§ 193:16, 193:19, 193:21–193:22, 193:31–193:32; Carmody-Wait 2d Charge and Instruction to Jury § 200:31.

LaFave, et al., Criminal Procedure (4th ed) §§ 24.4, 24.8.

NY Jur 2d Criminal Law: Procedure §§ 2068–2069, 2072, 2810; NY Jur 2d Criminal Law: Substantive Principles and Offenses §§ 614, 668.

ANNOTATION REFERENCES

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.

Admissibility, in Rape Case, of Evidence that Accused Raped or Attempted to Rape Person Other Than Prosecutrix-Prior Offenses. 86 ALR5th 59.

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Query: prosecut! charg! convict! /s rap! & evidence show! proof prove! proving demonstrat! establish! /s mens-rea "state #of mind" inten! & prior previous! /s bad-act convict! assaul! rape! & (instruct! charg! /7 jury juror /s propensity) (defense /9 consen!)

POINTS OF COUNSEL

Thomas J. Eoannou, Buffalo, for appellant. The court erred in permitting the introduction of *Molineux* evidence, where, inter alia, the prejudicial value far outweighed its probative value. (*People v Allweiss*, 48 NY2d 40; *People v Mercado*, 188 AD2d 941; *People v Hudy*, 73 NY2d 40; *People v McKinney*, 24 NY2d 180; *People v Arafet*, 13 NY3d 460.)

Michael J. Keane, District Attorney, Buffalo (*Michael J. Hillery*, *Daniel J. Punch* and *Paul J. Williams, III* of counsel), for respondent. The trial court properly admitted evidence of prior bad acts for nonpropensity purposes and any prejudice was mitigated by appropriate limiting instructions. (*People v Cook*, 93 NY2d 840; *People v Chrisley*, 126 AD3d 1495; *People v Alvino*, 71 NY2d 233; *People v Dorm*, 12 NY3d 16.)

OPINION OF THE COURT

Singas, J.

At defendant's trial for raping his sister-in-law, the court permitted the prosecution to introduce evidence that defendant had previously sexually assaulted two of his other sisters-in-law. We now hold that the trial court did not err in admitting this evidence and affirm.

I.

Defendant was arrested shortly after the victim, his sister-in-law, reported to police that defendant had raped her while her young child watched. As the victim testified at trial, she lived in the upstairs apartment of a two-story house with her husband, two children, sister, and niece. Defendant lived in the downstairs apartment with his wife (the victim's sister), children, and aunt. On May 25, 2017, around 10:00 a.m., the victim and her young child were sleeping in her bedroom when defendant entered the room purporting to deliver a piece of mail. Defendant came to sit on the bed beside the victim and propositioned her for sex. The victim immediately declined, telling defendant that he was like a brother or father to her, and tried to exit the room.

Defendant became physically aggressive toward the victim, grabbing at her, pulling her hair, and hitting her head into the wall. The victim managed to run out of the room, with her child following, but defendant caught up with her, grabbed her again, and pushed her onto the floor. Defendant got on top of the victim, pulled her skirt up, and raped her. The victim testified that she screamed for defendant's aunt, who was in the apartment below, and tried to physically resist defendant without success. While defendant was raping the victim, he told her: "I am waiting for all your sister. I want to do like this. So I am waiting for this time." Defendant only stopped once the victim's child went to get help, upon the victim's instruction. Once defendant had exited the apartment, the victim fled to a nearby friend's house with her child and called her sister, A.A. Shortly thereafter, the victim's family members brought her back to her home and called the police, and defendant was arrested.

Defendant was charged with rape in the first degree under a forcible compulsion theory (*see* Penal Law § 130.35 [1]), sexual abuse in the first degree under a forcible compulsion theory (*see id.* § 130.65 [1]), and rape in the third degree under a lack of consent by reason other than incapacity theory (*see id.* § 130.25 [3]). Prior to trial, the People sought permission to

introduce evidence that defendant attempted to forcibly rape B.B., the victim's sister, between 2011 and 2012, and attempted to forcibly rape A.A. in March 2017. The People asserted that, among other things, the evidence was admissible to demonstrate that defendant's "conscious objective was to rape" the victim. The trial court granted the People's *Molineux* application over defendant's objection, later instructing the jury that it could consider the evidence with respect to defendant's "guilty knowledge," that his actions "were not the product of accident or mistake," and "that his actions were part of a common scheme or plan." The court told the jurors that they could not consider the evidence "for the purpose of proving that the defendant had a propensity or predisposition to commit the crimes charged."

In accordance with the court's decision, A.A. and B.B. testified that defendant had previously assaulted them. They both described situations where defendant would get them alone, push them to the floor, pull up their skirts, and attempt to rape them. A.A. testified that, after his assault, defendant told her that he would "do another your sister too" and would "rape all [of her] family" if she told anyone what happened. Both A.A. and B.B. disclosed these assaults to the victim prior to May 25, 2017, as well as to other family members, and did not report the incidents to law enforcement.

At trial, defendant offered a defense of consent. Defense counsel suggested to the jury that defendant and the victim were having an affair, that the victim was using defendant to conceive a child, and that on the day in question, the victim and defendant had rough, consensual sex. Specifically, counsel stated that "we have hair being pulled perhaps for another reason. Perhaps a sexual preference" and at another point that "[p]eople pull hair when they have sex many times." Further, counsel intimated that the victim was claiming that defendant raped her because her child caught her in the act and she needed an explanation so that her husband would not divorce her.

Defendant was convicted on all counts. The Appellate Division affirmed, with one Justice dissenting (*see* 217 AD3d 1439 [4th Dept 2023]). The Court held that the *Molineux* evidence was admissible "for the purposes of completing the narrative and providing relevant background information of the family dynamic" (*id.* at 1439 [internal quotation marks omitted]). Further, the Court deemed the evidence "relevant to establish de-

fendant's use of force" because "[i]t was defendant's theory at trial to suggest that defendant and the victim were engaged in rough but consensual sexual acts" (*id.* at 1440). The dissenting Justice granted defendant leave to appeal.

II.

The enduring *Molineux* rule "states that evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Denson*, 26 NY3d 179, 185 [2015] [internal quotation marks omitted]; *see People v Molineux*, 168 NY 264 [1901]). "When we limit *Molineux* or other propensity evidence, we do so for policy reasons, due to fear of the jury's human tendency to more readily believe in the guilt of an accused person when it is known or suspected that [they have] previously committed a similar crime" (*People v Frumusa*, 29 NY3d 364, 370 [2017] [citation omitted]). But if "the proffered *Molineux* evidence is relevant to some material fact in the case, other than the defendant's propensity to commit the crime charged, it is not to be excluded merely because it shows that the defendant had committed other crimes" (*Denson*, 26 NY3d at 185 [internal quotation marks omitted]).

The *Molineux* Court provided specific examples of non-propensity purposes for which evidence of a defendant's prior bad acts may be admitted: when the evidence

> "tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; and (5) the identity of the person charged with the commission of the crime on trial" (*People v Cass*, 18 NY3d 553, 560 [2012]).

Molineux evidence is not limited to these categories (*id.*; *see People v Rojas*, 97 NY2d 32, 37 [2001]), and this Court has upheld the admission of *Molineux* evidence in other circumstances, such as when it is "relevant to complete the narrative of the events charged in the indictment" or when it "provide[s] necessary background information" (*People v Morris*, 21 NY3d 588, 594 [2013]).

"In assessing whether evidence of a defendant's prior criminal acts should be admitted at trial, a trial court is required to engage in a two-step analysis" (*Denson*, 26 NY3d at 185). "First, the trial court must determine whether the People have 'identif[ied] some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant' " (*id.*, quoting *Cass*, 18 NY3d at 560). This first step is purely a question of law, which this Court reviews de novo (*see Cass*, 18 NY3d at 560 n 3). If the People meet this burden, the court must move to step two which requires it to make a "discretionary determination" as to whether "the probative value of the evidence outweighs the potential for prejudice to the defendant" (*People v Leonard*, 29 NY3d 1, 7 [2017]). If the answer is yes, the court may admit the evidence and if the answer is no, the court may not. This step two determination "falls to the sound discretion of the trial court" and is thus reviewed for abuse (*People v Valentin*, 29 NY3d 150, 156 [2017]).

A.

This Court has consistently deemed *Molineux* evidence admissible where a defendant offers a theory of defense that assumes the underlying conduct but disputes that the defendant possessed the requisite guilty intent or state of mind in the commission of said conduct (*see Valentin*, 29 NY3d at 156; *Cass*, 18 NY3d at 561; *People v Israel*, 26 NY3d 236, 243 [2015]; *People v Bradley*, 20 NY3d 128 [2012]; *People v Ingram*, 71 NY2d 474 [1988]; *People v Alvino*, 71 NY2d 233 [1987]; *People v Santarelli*, 49 NY2d 241 [1980]; *People v Calvano*, 30 NY2d 199 [1972]; *People v Schwartzman*, 24 NY2d 241 [1969]; *People v Katz*, 209 NY 311, 329 [1913]; *cf. People v Crandall*, 67 NY2d 111, 118 [1986]; *People v McKinney*, 24 NY2d 180, 185 [1969]). This rule makes sense because the focus in that situation

> "is not on the actual doing of the act, for the act is either conceded or established by other evidence. Rather, the element in issue is the actor's state of mind, and evidence of other similar acts is admitted under this exception because no particular intent can be inferred from the nature of the act committed" (*Matter of Brandon*, 55 NY2d 206, 211 [1982]).

This Court's decision in *Alvino* is illustrative. There, the defendant, an employee of the New York State Department of Motor Vehicles, was accused of issuing a false driver's license

in exchange for money. The defendant admitted that he had, in fact, issued a false driver's license but claimed that he was busy with other work at the time and had not checked the details of the request for the license. This Court held that "[i]n light of this defense, the evidence of prior uncharged crimes"—that defendant had engaged in 15 prior transactions of a similar nature—"was unquestionably admissible to establish defendant's intent and the absence of mistake" (*Alvino*, 71 NY2d at 244). Similarly, in *People v Hernandez*, decided alongside *Alvino*, the defendant was accused of possessing cocaine with intent to sell. This Court acknowledged "the strong likelihood that the jury would infer from the evidence, and particularly [the defendant's] possession of 21 glassines, that he was a seller of cocaine" (*id.* at 245-246). However, the defendant admitted to the crime of possession, but claimed that he possessed the cocaine for his own personal use and thus, lacked the requisite criminal intent. As such, this Court held that evidence that the defendant had sold drugs on three prior occasions was properly admitted to prove the defendant's intent to sell (*id.* at 247).

We now apply those well-established *Molineux* principles here. In this case, "guilt cannot be predicated upon the mere commission of the act charged as a crime" (*see Katz*, 209 NY at 328) because defendant's consent theory assumes that sexual intercourse occurred, and sexual intercourse between two adults is not an inherently criminal act. Rather, under the charged statutes, the act is only elevated to the realm of criminality when accompanied by a guilty mens rea. Specifically, with respect to third-degree rape, the People were required to prove that defendant intended to have sexual intercourse with the victim without her consent—i.e., defendant knew or had reason to know that the victim had not consented but intended to have sex with her regardless (*see* Penal Law § 130.25 [3]). With respect to first-degree rape and first-degree sexual abuse, the People were required to prove the aforementioned intent and further, that defendant had "the intent to forcibly compel [the victim] to engage" in the sexual act (*People v Williams*, 81 NY2d 303, 316-317 [1993]; *see* Penal Law §§ 130.35 [1]; 130.65 [1]).

Even if one could conclude that a defendant's criminal intent is readily inferable from the specific circumstances of the sexual encounter, a consent defense in an acquaintance context creates ambiguity not around whether the act occurred but around the defendant's state of mind in engaging in the act (*cf. Valen-*

tin, 29 NY3d at 156 [stating that a defendant's intent to sell drugs is "usually readily inferable from the sale itself" but where the defendant disputes that they had the intent to sell, *Molineux* evidence may be admitted to establish that intent (brackets omitted)]; *People v Vargas*, 88 NY2d 856, 858 [1996] [*Molineux* evidence of prior sexual assault not admissible in stranger rape case where the complainant and defendant presented "two starkly contrasting scenarios . . . with only credibility in issue"]). In other words, a defendant presenting such a defense has provided a narrative that might still be "strongly indicative of guilt" but is "not incompatible with innocence," such that "the real issue" becomes whether the defendant is "a guiltless scapegoat or a guilty conspirator" (*see Katz*, 209 NY at 329). In that case, under our traditional *Molineux* principles, "evidence of [the defendant's] complicity in similar offenses under such circumstances as to support the inference that the act charged was not innocently or inadvertently committed" is relevant under step one of *Molineux* (*id.* at 328). The court may then allow admission of such evidence if it determines, under step two, that the probative value of such evidence is not outweighed by the potential prejudice to the defendant.

That is precisely the situation here. Defendant presented a theory at trial that the sexual act was consensual. Thus, the primary question for the jury was not whether sexual intercourse occurred but whether defendant possessed the requisite intent: did he intend to have sexual intercourse with the victim without her consent and did he intend to use forcible compulsion to do so. That defendant had previously sexually assaulted the victim's sisters—defendant's other sisters-in-law—under hauntingly similar circumstances "has obvious relevance as tending to refute defendant's claim of an innocent state of mind" (*Ingram*, 71 NY2d at 480). It tends to make "the innocent explanation improbable" (*id.*).

Additionally, the unique facts of this case render the *Molineux* evidence relevant as background information pertaining to the nature of defendant's relationship with the victim and the dynamics of the family at large (*see Leonard*, 29 NY3d at 7). During the charged rape, defendant stated: "I am waiting for all your sister. I want to do like this. So I am waiting for this time." Isolated, this statement may leave the jury puzzled. The *Molineux* evidence fills that gap and provides clarity and context for the jury. Further, defendant threatened to rape one of A.A.'s sisters if she told anyone what defendant did, and

A.A. did disclose defendant's assault on her to multiple members of the family, making evidence of that assault particularly illuminating (*cf. People v Till*, 87 NY2d 835, 837 [1995]). Lastly, defense counsel suggested during opening argument that this family may have been engaging in "inner family marriages," thus rendering defendant's relationships with the other women in the family pertinent.

Chief Judge Wilson would admit this prior bad act evidence to clarify whether defendant had previously raped all the sisters or "just" the older one, or whether any prior rape was completed or "just attempted," and suggests that such clarification is necessary, in part, to cure a translation problem (*see* Wilson, Ch. J., concurring op at 465-466). We reject the notion that admission of this inherently prejudicial evidence should be determined based on the victim's or defendant's ability to speak English. Nor do we fault defense counsel for eliciting the nurse's testimony regarding the prior bad acts to blunt the court's pretrial ruling deeming the evidence admissible (*see* Wilson, Ch. J., concurring op at 465 n 2). As for Judge Rivera's determination that this *Molineux* evidence was properly admitted under the common scheme or plan exception (*see* Rivera, J., concurring op at 466), that exception has never been applied in these circumstances and we decline to review the exception's appropriateness here.

Accordingly, the trial court did not err in deeming the *Molineux* evidence relevant to a non-propensity purpose.

B.

Given the similarity of the prior acts, and the fact that the court repeatedly instructed the jury that the evidence could not be considered for propensity purposes, we further hold that the trial court did not abuse its discretion in determining that the potential prejudice of the evidence did not outweigh the probative value of such evidence in aiding the jury's deliberations.

Although the parties did not brief this Court's recent decision in *People v Weinstein* (42 NY3d 439 [2024]), we note that it does not mandate a different result. *Weinstein* is distinct, and plainly inapposite here. For example, in that case, there were "significant differences between [the] complainants and the *Molineux* witnesses," including that the *Molineux* witnesses only interacted with the defendant "for brief periods" but the "complainants had long-term relationships with [the] defend-

ant," which rendered the *Molineux* evidence too dissimilar to the charged assaults to shed light on the defendant's intent with respect to the complainants (*id.* at 463-464; *see People v Ventimiglia*, 52 NY2d 350, 359-360 [1981]). Moreover, unlike the case here, *Weinstein* was "not a single-victim prosecution" but rather involved three complainants such that each charged incident acted as quasi-*Molineux* with respect to the other charged incidents (42 NY3d at 463).

Here, as we have explained, the *Molineux* evidence in this case was properly admitted under our traditional *Molineux* jurisprudence. Accordingly, the order of the Appellate Division should be affirmed.

Chief Judge WILSON (concurring). The question here is much simpler than one would guess from the majority's writing. At trial, the victim testified that while Mr. Sin was sexually assaulting her, Mr. Sin said that he sexually assaulted her older sister, wanted to sexually assault all her sisters, and had waited to sexually assault her. Mr. Sin admits that testimony was properly admitted, not through any *Molineux* exception, but as an admission, which the jury was entitled to consider without limitation. However, the victim's testimony, rendered through a Burmese translator whose accuracy throughout the trial was questioned,[1] was unclear as to whether the prior assaults were actual or attempted. On these unusual facts, the victim's sisters' testimony was relevant to clarify the meaning of the victim's testimony. Therefore, although I concur in the judgment, I would resolve this case on a far simpler ground: the sisters' testimony was needed to resolve the ambiguities in the victim's testimony, and was " 'inextricably interwoven' " with that testimony (*People v Ventimiglia*, 52 NY2d 350, 361 [1981], citing *People v Vails*, 43 NY2d 364, 368 [1977]).

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1. After the victim completed her testimony, a juror (who herself was a translator, but not of Burmese) notified the court that she believed that the Burmese translator was not translating the victim's statements properly, based on her observation of the interactions between the victim and the translator, in which there appeared to be conversations between the two that were not being translated. The court conducted an inquiry and admonished the translator to translate literally. After several other witnesses had testified, counsel conducted an on-the-record examination of the translator to establish that she had been repeatedly translating "penis" as "peanut." Many of her other translated answers were not proper English. Even in the colloquy with the court about the quality of her translation, when she was not translating anything, her sole substantive response that was more than a couple of words was: "Sometime when I pronounce S, not right way. Sometime even my name William, I have to say Williams, but I forget to say S." On appeal, Mr. Sin has not raised any challenge to the interpreter's ability.

I.

"[E]vidence of prior crimes may be admissible 'if it helps to establish some element of the crime under consideration or is relevant because of some recognized exception to the general rule' " (*People v Telfair*, 41 NY3d 107, 114 [2023], quoting *People v Alvino*, 71 NY2d 233, 241-242 [1987]). In addition to the five exceptions articulated in *People v Molineux* (168 NY 264, 293 [1901]), we have held evidence admissible where it is found to be " 'needed as background material' " (*People v Till*, 87 NY2d 835, 837 [1995], citing *People v Montanez*, 41 NY2d 53, 58 [1976]) and " 'inextricably interwoven' " with other properly admitted evidence in the case (*Ventimiglia*, 52 NY2d at 361, citing *Vails*, 43 NY2d at 368). "To be inextricably interwoven in the *Vails* sense the evidence must be explanatory of the acts done or words used in the otherwise admissible part of the evidence" (*id*.). Evidence is not admissible as background where "there was no ambiguity that could not have been easily dealt with by far less prejudicial means" (*People v Resek*, 3 NY3d 385, 390 [2004]).

The victim testified, without objection, that while the Mr. Sin was raping her, he said, "I am waiting for all your sister. I want to do like this. So I am waiting for this time." When she was asked to clarify what the defendant had said about her sisters, she responded, "So he tried to my older sister too he did that way." Those statements could be interpreted to mean that Mr. Sin had raped all her sisters, or just her older sister, or raped her older sister and attempted to rape her other sisters, or just attempted to rape one or more of her sisters. Because those statements were garbled and unclear, the sisters' testimony was crucial in clarifying their meaning.[2]

After the victim testified about the uncharged assaults, the victim's sisters provided *Molineux* testimony about prior incidents in which Mr. Sin had sexually assaulted and attempted to rape them.[3] That testimony resolved the ambiguities in the nurse's and the victim's testimony. For example, the

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2. On cross-examination of the emergency room nurse, defense counsel elicited testimony that the victim's sister who accompanied the victim to the hospital told the nurse "that this had occurred with her other sisters also." That testimony, like the victim's testimony, is unclear about what "this" was, and does not help to clear up the ambiguity in the victim's testimony. (Of course, Mr. Sin does not object to the nurse's testimony, because his counsel elicited it.)

3. Although the court had initially ruled pretrial that the *Molineux* evidence was admissible only to show a "common plan or scheme" (*see Molineux*,

(n. cont'd)

sisters' testimony clarified that neither of the prior incidents was a rape; both were attempted rapes in which Mr. Sin eventually gave up.

Therefore, under these highly unusual circumstances, where some evidence of defendant's bad acts was properly admitted without limitation, not through a *Molineux* exception, but in testimony that was susceptible of varying interpretations, admission of the sisters' testimony to resolve the ambiguities was properly admitted as "inextricably interwoven" with the properly admitted testimony (*see e.g. Vails*, 43 NY2d at 368 [in defendant's prosecution for selling drugs, officer's testimony referencing the defendant's prior sale was "inextricably interwoven with" and "intrinsic to" the sale charged in the indictment]). Accordingly, I concur in the result.

RIVERA, J. (concurring in the result). I concur only in the result. The trial evidence established that defendant was a family predator, attacking each of his sisters-in-law and relying on linguistic isolation and family pressure to keep the victims silent. Under the circumstances of this case, the challenged *Molineux* testimony "was properly admissible in evidence 'for the purposes of completing the narrative and providing relevant background information [concerning] the family dynamic' " as it related to defendant's predatory behavior (217 AD3d 1439, 1439 [4th Dept 2023], quoting *People v Elmore*, 175 AD3d 1003, 1004 [4th Dept 2019]). Moreover, as the trial court concluded, the testimony also fell within the *Molineux* exception for a common scheme or plan, as applied to the particular facts of this sexual assault case (*see People v Molineux*, 168 NY 264, 293 [1901]). Indeed, "the testimony of the victim's two sisters was probative insofar as it helped explain the victim's conduct in the aftermath of the rape as well as why defendant would make such an overt and brazen sexual advance on the victim while her son was present" (217 AD3d at 1439).

Judges GARCIA, CANNATARO and TROUTMAN concur. Chief Judge WILSON concurs in result in an opinion, in which Judge HALLIGAN concurs. Judge RIVERA concurs in result in a separate opinion.

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168 NY at 305), the court's limiting instruction, to which defense counsel did not object, listed several additional purposes. The court reiterated those additional purposes in the jury charge, also without objection by defense counsel.

Order affirmed.

[— NE3d —, — NYS3d —]

THE PEOPLE OF THE STATE OF NEW YORK ex rel. PETER A. BARTA, on Behalf of SHYHEID GIBSON, Appellant, v LOUIS A. MOLINA, Respondent.

Argued September 10, 2025; decided October 16, 2025

PROCEDURAL SUMMARY

APPEAL, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 25, 2023, in a proceeding pursuant to CPLR article 70. The Appellate Division dismissed the writ of habeas corpus.

People ex rel. Barta v Molina, 220 AD3d 953, affirmed.

HEADNOTE

Appeal — Academic and Moot Questions — Habeas Corpus

The Appellate Division did not abuse its discretion in dismissing as moot so much of the petition as sought defendant's immediate release. Insofar as the petition sought other relief, the petition was moot and the Court of Appeals declined to invoke the exception to the mootness doctrine.

APPEARANCES OF COUNSEL

Queens Defenders, Forest Hills (*Peter A. Barta* of counsel), for appellant.

Melinda Katz, *District Attorney*, Kew Gardens (*Amanda Iannuzzi* and *John M. Castellano* of counsel), for respondent.

The Legal Aid Society, New York City (*Arielle Reid* and *Philip Desgranges* of counsel), for The Legal Aid Society, amicus curiae.

OPINION OF THE COURT

Judgment affirmed, without costs. The Appellate Division did not abuse its discretion in dismissing as moot so much of the petition as sought defendant's immediate release. Insofar as the petition sought other relief, the petition is now moot, and we decline to apply the mootness exception.

Concur: Chief Judge WILSON and Judges RIVERA, GARCIA, SINGAS, CANNATARO, TROUTMAN and HALLIGAN.

REPORTS OF CASES

DECIDED IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

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[241 NYS3d 536]

In the Matter of Peter Markey, Appellant, v Daniel W. Tietz, as Commissioner of the Office of Temporary and Disability Assistance, Respondent.

Third Department, August 14, 2025

PROCEDURAL SUMMARY

Appeal from an order of the Supreme Court, Albany County (Gerald Connolly, J.), entered June 7, 2024, in a proceeding pursuant to CPLR article 78. The order denied petitioner's motion for counsel fees.

Matter of Markey v Tietz, 2024 NY Slip Op 34902(U), reversed.

HEADNOTE

State — Equal Access to Justice Act — Prevailing Party — Prevailing in Whole

Under the State Equal Access to Justice Act (EAJA), which makes counsel fees available to a party with limited financial resources who has sued to challenge unreasonable governmental action and succeeded in acquiring a substantial part of the relief sought in the lawsuit, a party "prevails in whole" when the party obtains all of the relief sought in a lawsuit against the State—including when that relief is granted voluntarily by the State after the action is commenced—and is thus a prevailing party as a matter of law (*see* CPLR 8602 [f]). To the extent *Matter of Clarke v Annucci* (190 AD3d 1245, 1247 [3d Dept 2021], *lv dismissed* 37 NY3d 935 [2021]) is to the contrary, it should no longer be followed. A plaintiff or petitioner who obtains full relief from the State need not demonstrate that the civil action catalyzed the State's complete reversal to be a prevailing party. The party must only show that it received from the State all of the relief requested that could have been awarded in a final judgment on the merits or settlement in the party's favor. Accordingly, petitioner was a prevailing party in his CPLR article 78 proceeding to review the Office of Temporary and Disability Assistance's (OTDA) denial of his application for rental assistance, which had been dismissed as moot because OTDA voluntarily granted the relief before answering. Petitioner received the reversal of OTDA's denial of rental assistance plus utility arrears that he sought when he commenced the proceeding. He therefore prevailed in whole, making him a prevailing party under the State EAJA.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Administrative Law §§ 345, 347, 352.

Carmody-Wait 2d Actions by or Against the State §§ 126:138–126:140; Carmody-Wait 2d Proceeding Against a Body or Officer § 145:449.

McKinney's, CPLR art 78; 8602 (f).

NY JUR 2d Article 78 and Related Proceedings § 406; NY JUR 2d Attorneys at Law § 223; NY JUR 2d Costs in Civil Actions § 16; NY JUR 2d State of New York §§ 189–191.

SIEGEL, NY PRAC (6th ed) § 414.

ANNOTATION REFERENCE

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 ALR2d 1379.

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Query: ("Equal Access #to Justice Act" or EAJA /p "prevailing party") & "catalyst theory"

APPEARANCES OF COUNSEL

Orrick, Herrington & Sutcliffe LLP, New York City (*Parth Sagdeo* of *Orrick, Herrington & Sutcliffe LLP*, Menlo Park, California, of counsel, admitted pro hac vice), for appellant.

Letitia James, Attorney General, Albany (*Jonathan D. Hitsous* of counsel), for respondent.

OPINION OF THE COURT

AARONS, J.P.

Appeal from an order of the Supreme Court (Gerald Connolly, J.), entered June 7, 2024, in Albany County, which, in a proceeding pursuant to CPLR article 78, denied petitioner's motion for counsel fees.

Pursuant to the New York State Equal Access to Justice Act (CPLR art 86 [hereinafter the State EAJA]), "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (CPLR 8601 [a]). "The purpose of the [State] EAJA is to encourage individuals, small businesses and not-for-profit corporations to challenge state action when it lacks substantial justification by allowing them to recover fees and litigation expenses" (*Kimmel v State of New York*, 29 NY3d 386, 396 [2017] [internal quotation marks, brackets, emphasis and citation omitted]). To carry out this purpose, the Legislature created a mechanism to recover counsel fees that is "similar" (*id.*) to the Federal Equal Access to Justice Act (28 USC § 2412 [hereinafter the Federal EAJA])

and "the significant body of case law that has evolved thereunder" (CPLR 8600).

Petitioner, a resident of New York County, seeks counsel fees under the State EAJA in connection with this CPLR article 78 proceeding that he commenced to review a determination of the Office of Temporary and Disability Assistance (hereinafter OTDA) denying his application for rental assistance under the COVID-19 Emergency Rental Assistance Program (L 2021, ch 56, § 1, part BB, § 1, subpart A, as amended by L 2021, ch 417 [hereinafter ERAP]). Before answering the petition, OTDA rescinded its denial, determined petitioner was eligible for ERAP and granted his application for rental assistance and also awarded utility arrears. Supreme Court then dismissed the proceeding as moot. Because the relief was voluntarily granted by OTDA rather than on the merits of petitioner's challenge, the court denied his motion for counsel fees as he was not a prevailing party as required by the State EAJA. Petitioner appeals.

There are three requirements for a party to successfully recover counsel fees under the State EAJA: (1) the party must be a prevailing party, (2) the position of the State—i.e., "the act, acts or failure to act from which judicial review is sought" (CPLR 8602 [e])—may not be substantially justified, and (3) special circumstances may not render the award of counsel fees unjust (*see* CPLR 8601 [a]; 8602 [f]).[1] Under the State EAJA, a prevailing party is a "plaintiff or petitioner in the civil action against the [S]tate who prevails in whole or in substantial part where such party and the [S]tate prevail upon separate issues" (CPLR 8602 [f]). Accordingly, counsel fees are available to a party with limited financial resources who has sued to challenge unreasonable governmental action and "succeeded in acquiring a substantial part of the relief sought in the lawsuit" (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 355 [1995]; *see* CPLR 8602 [d], [f]).

Petitioner's claim, however, is precluded by our decision in *Matter of Clarke v Annucci* (190 AD3d 1245, 1247 [3d Dept 2021], *lv dismissed* 37 NY3d 935 [2021]), in which we held that a party does not prevail under the State EAJA based upon the

1. The State EAJA also restricts eligibility to, as relevant here, "an individual whose net worth, not including the value of a homestead used and occupied as a principal residence, did not exceed fifty thousand dollars at the time the civil action was filed" (CPLR 8602 [d] [i]). There is no contention that petitioner fails this eligibility requirement.

catalyst theory, which is when "the desired result is achieved because the proceeding brought about the voluntary change in the respondent's conduct" (*id.* at 1246 n; *see Matter of Criss v New York State Dept. of Health*, 192 AD3d 1545, 1545 [4th Dept 2021]). The sole basis for petitioner's counsel fee application is the catalyst theory: petitioner contends that he is a prevailing party because his challenge to the denial of his ERAP application spurred OTDA to grant him all the relief he sought in the litigation.[2]

Insisting that *Clarke* was wrongly decided, petitioner invites us to overrule it and recognize the catalyst theory under the State EAJA (*see Matter of Jaquez v Tietz*, 237 AD3d 433, 434 [1st Dept 2025]; *Matter of Liu v Ruiz*, 200 AD3d 68, 74 [1st Dept 2021], *lv dismissed* 38 NY3d 1124 [2022]; *Matter of Solla v Berlin*, 106 AD3d 80, 83-91 [1st Dept 2013], *revd on other grounds* 24 NY3d 1192 [2015]). "Even under the most flexible version of the doctrine of stare decisis, prior decisions should not be overruled unless a compelling justification exists for such a drastic step" (*Grady v Chenango Val. Cent. Sch. Dist.*, 40 NY3d 89, 96 [2023] [internal quotation marks, brackets, ellipsis and citations omitted]). Moreover, "[p]recedents involving statutory interpretation are entitled to great stability" (*People v Hobson*, 39 NY2d 479, 489 [1976]).

Although "legal questions, once settled, should not be reexamined every time they are presented" (*People v Bing*, 76 NY2d 331, 338 [1990]), we accept petitioner's invitation to revisit *Clarke*. There, an incarcerated individual brought a CPLR article 78 proceeding to annul the disposition of a disciplinary hearing, but that challenge was rendered moot when the agency administratively reversed the disposition before judicial review was complete (*see Matter of Clarke v Annucci*, 190 AD3d at 1245-1246). We denied the individual's application for counsel fees, finding it persuasive that "the United States Supreme Court has clearly held that a voluntary resolution of a matter lacks the necessary judicial imprimatur to warrant an award of counsel fees" (*id.* at 1247 [internal quotation marks, brackets and citations omitted]).

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2. For present purposes, our references to complete or full relief, or all of the relief sought or requested, and similar expressions all mean to the maximum relief that the party requested that could be awarded in a judgment on the merits or settlement agreement in the party's favor that disposes of the litigation (*see* CPLR 8602 [c]). We therefore exclude requests for alternative and temporary relief (*cf. Matter of Gonzalez v New York State Dept. of Corr. & Community Supervision*, 152 AD3d 680, 683 [2d Dept 2017]).

Indeed, we had already applied that rule in *Matter of Vetter v Board of Educ., Ravena-Coeymans-Selkirk Cent. School Dist.* (53 AD3d 847, 849 [3d Dept 2008], *mod on other grounds* 14 NY3d 729 [2010]), in which the movant sought counsel fees under the Federal Civil Rights Attorney's Fees Awards Act of 1976 (*see* 42 USC § 1988; *Hensley v Eckerhart*, 461 US 424, 429 [1983]). As such, *Vetter* was controlled by *Buckhannon Board & Care Home, Inc. v West Virginia Dept. of Health and Human Resources* (532 US 598 [2001]), which rejected the catalyst theory because the term prevailing party as used in federal fee-shifting statutes is a term of art that implies a "judicially sanctioned change in the legal relationship of the parties" (*id.* at 605; *see Lackey v Stinnie*, 604 US 192, 202 [2025]). Consequently, courts applying the Federal EAJA stopped recognizing the catalyst theory after *Buckhannon* was handed down in 2001 (*see e.g. Ma v Chertoff*, 547 F3d 342, 344 [2d Cir 2008]; *Elliott v United States Dept. of State*, 122 F Supp 3d 39, 43 [SD NY 2015]). Courts applying the State EAJA followed suit (*see e.g. Matter of Auguste v Hammons*, 285 AD2d 417, 418 [1st Dept 2001]; *see also Matter of Gonzalez v New York State Dept. of Corr. & Community Supervision*, 152 AD3d 680, 683 [2d Dept 2017] [relying on authorities that, in turn, rely on *Buckhannon*]), and *Clarke* is this Court's contribution to that canon.

The First Department also declined to recognize the catalyst theory until its 2013 decision *Matter of Solla v Berlin* (106 AD3d at 89). In *Solla*, the First Department overruled its own rejection of the catalyst theory 12 years earlier, concluding that its prior decision had overemphasized *Buckhannon* with no attention paid to the differences between the State EAJA and Federal EAJA (*id.* at 82; *see Matter of Auguste v Hammons*, 285 AD2d at 418). *Clarke*'s reasoning similarly relies heavily on *Buckhannon*'s logic without engaging with the text of the State EAJA (*see Matter of Clarke v Annucci*, 190 AD3d at 1246-1247, quoting *Swergold v Cuomo*, 99 AD3d 1141, 1145 [3d Dept 2012], *lv denied* 20 NY3d 859 [2013], and citing *Matter of Gonzalez v New York State Dept. of Corr. & Community Supervision*, 152 AD3d at 683).

Upon reflection, a strict application of *Buckhannon* is incompatible with the State EAJA's text. As an initial matter, the Legislature wrote a statutory definition of "prevailing party" into the State EAJA, so we must interpret that defini-

tion rather than construct one as *Buckhannon* did.[3] In addition, a party must apply for counsel fees "within [30] days of final judgment in the action" (CPLR 8601 [b]). The Federal EAJA defines "final judgment" as either a judgment or an "*order of* settlement" (28 USC § 2412 [d] [2] [G] [emphasis added]), and therefore the Federal EAJA does not conflict with *Buckhannon*'s rule requiring a judicially sanctioned outcome. Under the State EAJA, however, " '[f]inal judgment' means a judgment that is final and not appealable, and settlement" (CPLR 8602 [c]). A settlement agreement reduced to a writing subscribed by the parties to be bound is enforceable even without judicial imprimatur (*see* CPLR 2104; *Matter of Pittsford Canalside Props., LLC v Village of Pittsford Zoning Bd. of Appeals*, 181 AD3d 1235, 1237 [4th Dept 2020]; *Glenville Police Benevolent Assn. v Mosher*, 31 AD3d 874, 875 n [3d Dept 2006]). The fact that the Federal EAJA provides the model for the State EAJA supports a presumption that the Legislature made a conscious choice to change "order of settlement" (28 USC § 2412 [d] [2] [G]) to "settlement" (CPLR 8602 [c]; *see Matter of Doe v City of Schenectady*, 84 AD3d 1455, 1458 [3d Dept 2011]). That choice is negated by "the holding in *Buckhannon* that even a voluntary relinquishment of the State's position must be judicially sanctioned" (*Matter of Solla v Berlin*, 106 AD3d at 89; *see* Assembly Mem in Support of 2009 NY Assembly Bill A7395 [observing that, after *Buckhannon*, "the courts no longer find these litigants to be the 'prevailing party' entitled to attorney's fees where the case settles at any time prior to a final judgment"]).

Having persuaded us to depart from *Clarke*, we turn to petitioner's contention that the State EAJA reaches a party claiming to have prevailed in litigation against the State by catalyzing voluntary administrative action. "The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000] [internal quotation marks and citation omitted]; s*ee Matter of Shannon*, 25 NY3d 345, 351 [2015]). "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the

3. The Federal EAJA defines the term prevailing party only with respect to eminent domain proceedings, excluding from coverage a party who has obtained a final judgment in such proceedings by settlement (*see* 28 USC § 2412 [d] [2] [H]).

plain meaning thereof" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). "The plain meaning of the language of a statute must be interpreted in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage" (*People v Litto*, 8 NY3d 692, 697 [2007] [internal quotation marks and citations omitted]; *accord Matter of Affiliated Brookhaven Civic Orgs., Inc. v Planning Bd. of the Town of Brookhaven*, 209 AD3d 854, 856 [2d Dept 2022]). Further, "the legislative history of an enactment may also be relevant and is not to be ignored, even if [the] words [are] clear" (*Riley v County of Broome*, 95 NY2d at 463 [internal quotation marks and citation omitted]). "We are also guided in our analysis by the familiar principle that a statute must be construed as a whole and that its various sections must be considered together and with reference to each other" (*Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012] [internal quotation marks, ellipsis and citation omitted]; *accord Matter of Shannon*, 25 NY3d at 351).

In plain language, to prevail means to win (*see e.g.* Letter from Assembly Member Robin Schimminger, Sept. 21, 1989, Bill Jacket, L 1989, ch 770 at 6; Webster's Ninth New Collegiate Dictionary 932 [Merriam-Webster 1983], prevail ["to gain ascendancy through strength or superiority: triumph"]).[4] In this respect, the statute uses the term "prevail" to define two types of prevailing parties: (1) the party who "[wins] in whole" and (2) the party who wins "in substantial part where such party and the [S]tate [win on] separate issues" (CPLR 8602 [f]).[5] Six years after the State EAJA was enacted, the Court of Appeals held in *Matter of New York State Clinical Lab. Assn. v Kaladjian* that a party may demonstrate it prevailed in "substantial part" by "identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained" (85 NY2d at 355). There, the challenger sought annulment of an agency determination on two

4. The First Department credited another definition of prevail: " 'to be or become effective or effectual' " (*Matter of Solla v Berlin*, 106 AD3d at 88, quoting Merriam-Webster's Collegiate Dictionary [11th ed 2004]; *accord* Webster's Ninth New Collegiate Dictionary 932, prevail [second definition]).

5. Adding to the confusion, the State EAJA also directs courts to award counsel fees using "*prevailing* market rates" (CPLR 8601 [a] [emphasis added]), meaning "predominant" or "most frequent" (Webster's Ninth New Collegiate Dictionary 932, prevail [third definition], prevailing [second definition]).

constitutional grounds and a declaration that the agency's reading of its regulation was arbitrary and capricious. The agency won on the constitutional grounds and the challenger won only on the third ground, but that win on the merits did not accomplish the main goal of the litigation: annulling the agency's adverse determination; thus, the challenger was not a prevailing party under the State EAJA (*see id*.).

Though *Kaladjian* does not address the statutory prerequisite that the party and the State "prevail upon separate issues" (CPLR 8602 [f]), its reasoning equates "issues" with the "grounds" for relief asserted by the party (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d at 355). Such reasoning implies that the litigation results in an outcome on the merits of the party's grounds for relief.

Given that *Kaladjian* defines "in substantial part" just by the degree of relief obtained, a party "who prevails in whole" must be a party who obtains all of the relief requested, but it is unclear whether the prerequisite to win on "issues" applies to a wholly prevailing party (CPLR 8602 [f]). The relevant language directly modifies a party "who prevails . . . in substantial part," and therefore could be read as applying only in that circumstance (CPLR 8602 [f]). On the other hand, the dual objects of "prevails" in the same sentence—to win the relief sought *and* to win on issues—could imply that a party "who prevails in *whole*" is a party who wins all the relief sought *and* wins on the merits of the issues that dispose of the litigation (CPLR 8602 [f] [emphasis added]; *cf. Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d 485, 491 [2010]). The two reasonable interpretations of the same language render it ambiguous (*see Matter of Nichols v Bacon*, 175 AD3d 831, 833 [3d Dept 2019]; *cf. Matter of New York State Dept. of Labor [Unemployment Ins. Appeal Bd.] v New York State Div. of Human Rights*, 71 AD3d 1234, 1237 [3d Dept 2010], *lv denied* 15 NY3d 714 [2010]).

When confronted with ambiguous language in a statute, we look beyond the words to consider the statute's purpose, "the history of the times, the circumstances surrounding the statute's passage, and attempted amendments" (*Riley v County of Broome*, 95 NY2d at 464 [internal quotation marks, ellipsis and citation omitted]; *see Matter of NYC Org. of Pub. Serv. Retirees, Inc. v Campion*, 43 NY3d 228, 235 [2024]; *People v Litto*, 8 NY3d at 697). Additionally, "we ordinarily interpret the meaning of an ambiguous word in relation to the meanings of

adjacent words" (*Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d at 491). To the extent the State EAJA is modeled on the Federal EAJA, "[f]ederal case law can provide useful guidance" (*Albunio v City of New York*, 23 NY3d 65, 73 [2014]; *see* CPLR 8600).

As the Court of Appeals stated in *Kimmel v State of New York* (29 NY3d at 396), the State EAJA is a remedial statute. While *Kimmel* acknowledges that fee-shifting statutes generally receive a narrow construction, a fee-shifting statute "that is remedial in nature . . . may nonetheless be interpreted broadly" (*id.* at 396 n 6). "As such, [the State EAJA] should be liberally construed to carry out the reforms intended and to promote justice, and interpreted broadly to accomplish its goals" (*id.* at 396 [internal quotation marks, brackets and citations omitted]; *contra Matter of Criss v New York State Dept. of Health*, 192 AD3d at 1549; *Matter of Peck v New York State Div. of Hous. & Community Renewal*, 188 AD2d 327, 327 [1st Dept 1992]).[6] In light of the State EAJA's remedial purpose, we may not read into it any limitations that are not "clearly expressed" (*Kimmel v State of New York*, 29 NY3d at 397 [internal quotation marks and citations omitted]).

There is no clearly expressed requirement in the State EAJA that a party "prevails in whole" only if the party obtains complete relief on the merits of the dispositive issues asserted in the litigation (CPLR 8602 [f]). To recognize such a limitation anyway undermines the State EAJA's purpose by discouraging

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6. The Court of Appeals also identified the Federal EAJA as a remedial statute (*see Kimmel v State of New York*, 29 NY3d at 396). Yet, while *Kimmel* instructs courts to liberally construe the State EAJA, *Buckhannon* instructs courts to narrowly construe fee-shifting statutes because they are in derogation of the so-called "American Rule . . . of not awarding fees to a prevailing party absent explicit statutory authority" (*Buckhannon Board & Care Home, Inc. v West Virginia Dept. of Health and Human Resources*, 532 US at 602 [internal quotation marks and citation omitted]). *Kimmel* stands in stark contrast to *Kaladjian*, where the Court of Appeals determined that the Legislature's departure from the Federal EAJA—in particular, the definition of "prevailing party" in the State EAJA—"was intended to limit the State's liability for fee awards" (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d at 355; *see Kimmel v State of New York*, 29 NY3d 386, 411 [2017, Garcia, J., dissenting]). *Kaladjian*, however, was addressed to a party "who prevails . . . in substantial part" (CPLR 8602 [f]), which language the Court of Appeals determined to be more restrictive than the award of counsel fees under the Federal EAJA to a party "who has succeeded on merely 'any significant issue' in the litigation which achieved only 'some of the benefit' sought in bringing the lawsuit" (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d at 355, quoting *Hensley v Eckerhart*, 461 US at 433).

plaintiffs and petitioners with modest finances from challenging final agency determinations so obviously wrong that the State simply declines to defend them in court (*see Kimmel v State of New York*, 29 NY3d at 396). Although we take no position on whether OTDA's determination here fits that description, the legislative history and statutory purpose clearly indicate that the Legislature wanted to reach parties reluctant to seek judicial review of meritorious claims because the *prospect* of maintaining a costly action was too daunting. Consistent with this history and purpose, we do not read the statute to require parties to an action against the State who obtain everything in their prayers for relief to have actually endured expensive, years-long litigation to obtain it (*cf.* Assembly Mem in Support of 2009 NY Assembly Bill A7395). The text of the State EAJA, the legislative record, our collective judicial experience and common sense all lead us to conclude that the Legislature could have rationally determined that parties who receive complete relief from the State after the commencement of litigation have prevailed "in whole" even if the State folds and gives it to them.

Furthermore, when enacting the State EAJA, the Legislature announced that it looked to the Federal EAJA's interpretive federal case law "that has evolved" (CPLR 8600). Thus, to the extent federal case law helps us resolve ambiguities in the State EAJA, decisions that the Legislature would have read prior to the State EAJA's enactment are more persuasive than decisions handed down after its enactment (*see Albunio v City of New York*, 23 NY3d at 73; *People v Litto*, 8 NY3d at 697; *Riley v County of Broome*, 95 NY2d at 464). When the State EAJA was enacted in 1989—just over a decade before *Buckhannon* was decided—"the catalyst theory was a standard generally accepted by United States [Circuit] Courts . . . in evaluating whether to award counsel fees under the Federal EAJA" (*Matter of Solla v Berlin*, 24 NY3d 1192, 1195 [2015]; *see e.g. Vitale v Secretary of Health & Human Servs.*, 673 F Supp 1171, 1177-1178 [ND NY 1987]; *see generally Matter of Solla v Berlin*, 106 AD3d at 87). The text of the statute and the weight of the federal case law in 1989 persuade us that, if we had the opportunity to interpret the State EAJA shortly after its enactment, we would have awarded counsel fees based upon the catalyst theory—at least with respect to a party who "prevails in whole" (CPLR 8602 [f]).

Respondent also points out that legislators have unsuccessfully proposed amending the State EAJA to authorize the

award of counsel fees based upon the catalyst theory (*see e.g.* 2013 NY Assembly Bill A2068, 2013 NY Senate Bill S713-A [passed Assembly, died in Senate]; 2011 NY Assembly Bill A3264, 2011 NY Senate Bill S5131 [same]; 2009 NY Assembly Bill A7395, 2009 NY Senate Bill S4534 [same]). We do not find those failed amendments persuasive evidence that the Legislature intended for us to read the State EAJA as requiring every prevailing party to obtain judicially sanctioned relief on the merits, as "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 184 [2016] [internal quotation marks and citations omitted]). Indeed, those bills were not introduced to expand the State EAJA's reach but instead to counteract *Buckhannon* and its progeny, which had "effectively repealed the [State] EAJA" (Assembly Mem in Support of 2009 NY Assembly Bill A7395; *accord* Assembly Mem in Support of 2013 NY Assembly Bill A2068; Assembly Mem in Support of 2011 NY Assembly Bill A3264). "As a result of this failure to award fees as contemplated by the [State] EAJA, attorneys are increasingly unwilling to take on these matters" (Assembly Mem in Support of 2009 NY Assembly Bill A7395; *accord* Assembly Mem in Support of 2013 NY Assembly Bill A2068; Assembly Mem in Support of 2011 NY Assembly Bill A3264).

Accordingly, we hold that a party prevails in whole when the party obtains all of the relief sought in a lawsuit against the State—including when that relief is granted voluntarily by the State after the action is commenced—and is thus a prevailing party under the State EAJA as a matter of law (*see* CPLR 8602 [f]). To the extent *Clarke* is to the contrary, it should no longer be followed.

As a consequence of our interpretation of the State EAJA, a plaintiff or petitioner who obtains full relief from the State need not demonstrate that the civil action, in fact, catalyzed the State's complete reversal to be a prevailing party (*compare Matter of Solla v Berlin*, 24 NY3d at 1195).[7] To hold otherwise would be tantamount to requiring a party who "prevails in

7. In reversing the First Department's award of State EAJA counsel fees in *Solla*, the Court of Appeals assumed, without deciding, that "the catalyst theory applies to the definition of a 'prevailing party' for the purpose of CPLR 8601" (*Matter of Solla v Berlin*, 24 NY3d at 1195). Accordingly, the Court of Appeals, in dicta, observed,

(n. cont'd)

whole" to prove it would have won on moot "issues" (CPLR 8602 [f]), which limits prevailing-party status in a way not clearly expressed by the statute's text (*see Kimmel v State of New York*, 29 NY3d at 397), and risks transforming counsel fee motion decisions into advisory opinions addressed to the merits of the underlying challenge. Thus, to "prevail[ ] in whole" under our application of the catalyst theory to the State EAJA, the party must only show that it received from the State all of the relief requested that could have been awarded in a final judgment on the merits or settlement in the party's favor (*compare Pastore v Sabol*, 230 AD2d 835, 837 [2d Dept 1996]).[8]

We recognize that reasons other than the strength of the party's challenge may impel the State to administratively reverse itself in the midst of litigation. The State EAJA's substantial-justification requirement, however, must be assessed on the record before an agency when it issued the challenged determination—and thus before commencement of litigation (*see* CPLR 8601 [a]).[9] Consequently, the reasons for the State's voluntary reversal could factor into a court's equitable

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> "Under the pre-*Buckhannon* federal precedent that petitioner [Solla] would have us apply, a fee claimant recovers [counsel] fees only if his or her lawsuit prompted a change in position by the party from which claimant seeks reimbursement. The party from which plaintiffs [or petitioners] seek their fees and costs must be prompted into action in order for fees to be recoverable" (*id.* [internal quotation marks and citations omitted]).

Applying—but not adopting—the catalyst theory as set out in federal case law, the sole basis for the Court's reversal was its finding that the petitioner's lawsuit did not catalyze the State to voluntarily change its position (*see id.* at 1195-1196). We too do not adopt the federal case law's articulation of the catalyst theory based upon our analysis of how the language, history and purpose of the State EAJA express the Legislature's intent, resorting to pre-*Buckhannon* federal case law to guide—not control—our interpretation of the statute (*see Albunio v City of New York*, 23 NY3d at 73).

8. The Second Department in *Pastore v Sabol* (230 AD2d at 837) denied without explanation the party's motion for counsel fees in a combined CPLR article 78 proceeding and declaratory judgment action where, after litigation had commenced, an agency voluntarily reversed an administrative determination withholding benefits, and the trial court erred in awarding to the party a declaration that the agency's interpretation of the relevant statute was incorrect. The State's reversal of the administrative determination rendered the party's declaratory judgment claim academic even though the State did not voluntarily grant such relief (*see id.*; *see generally* CPLR 3001).

9. Regardless of whether our interpretation of "prevails in whole" (CPLR 8602 [f]) increases the number of prevailing parties moving for State EAJA counsel fees, a motion may still be denied if it fails either of the remaining substantial-justification and special-circumstances requirements (*see* CPLR 8601 [a]). Indeed, even a party who wins an action in a judgment on the

(n. cont'd)

calculus in determining whether "special circumstances make an award unjust" (CPLR 8601 [a]; *see* CPLR 8602 [e]).

Relatedly, although we no longer read the State EAJA to require every prevailing party to obtain judicially sanctioned relief, we do not otherwise address a party "who prevails . . . in substantial part" (CPLR 8602 [f]). Petitioner's case does not require us to resolve whether the catalyst theory applies where a party has substantially, but not wholly, prevailed. We continue to impose an additional requirement on a substantially prevailing party to show a win against the State on the merits of one or more "issues" in litigation, and a corresponding win by the State on the merits of one or more "separate issues" (CPLR 8602 [f]; *see generally Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d at 355-356). Therefore, a party claiming to have prevailed in substantial part must still demonstrate that relief was obtained on the merits in an outcome that changes the legal relationship between the party and the State—for example, a judgment on the merits or a settlement agreement (*see* CPLR 8601 [a]; *cf. Matter of Clarke v Annucci*, 190 AD3d at 1247).

In this case, petitioner received the reversal of OTDA's denial of rental assistance plus utility arrears that he sought when he commenced this proceeding. He therefore prevailed in whole, making him a prevailing party under the State EAJA (*see* CPLR 8602 [f]). Since Supreme Court denied petitioner's motion because he was not a prevailing party under *Clarke*, the court had no occasion to address the other two requirements for counsel fees—namely, whether the State's position was substantially justified and whether special circumstances make fee recovery unjust (*see* CPLR 8601 [a]). Further, it is unclear which parts of the appellate record comprise the administrative record that was before OTDA when it issued the challenged determination, preventing us from reaching the substantial-justification prong ourselves (*see* CPLR 8601 [a]). We therefore remit to Supreme Court to evaluate the remaining two State EAJA requirements and, if warranted, calculate and award counsel fees in accord with the statute.

Lynch, Ceresia, McShan and Powers, JJ., concur.

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merits and obtains complete relief may still be denied counsel fee recovery where the agency's determination, though incorrect, is found to have been substantially justified (*see e.g. Matter of Sutherland v Glennon*, 256 AD2d 984, 985 [3d Dept 1998]; *Matter of Rivers v Corron*, 222 AD2d 863, 864-865 [3d Dept 1995]; *Matter of Scibilia v Regan*, 199 AD2d 736, 737 [3d Dept 1993]).

Ordered that the order is reversed, on the law, with costs, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

[240 NYS3d 506]

In the Matter of Darmin T. Bachu, an Attorney, Respondent. Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts, Petitioner.

Second Department, August 20, 2025

PROCEDURAL SUMMARY

Disciplinary proceeding instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Respondent was admitted to the bar on April 17, 1996, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Suspension

Respondent attorney engaged in a pattern of misappropriation of fiduciary funds based on 11 matters in which respondent issued funds from his attorney escrow account to his clients and/or for personal purposes when there were no and/or insufficient corresponding funds on deposit; failed to maintain required bookkeeping records for the escrow account when he failed to maintain a contemporaneous ledger or similar record showing the sources of all funds deposited, the names of all persons for whom the funds were held, a description and amount of funds held, and the names of all persons to whom the funds were disbursed; and engaged in conduct that adversely reflected on his fitness as a lawyer based on his awareness that a suspended attorney was referring cases to him (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.15 [a], [d]; 8.4 [h]). Under the totality of the circumstances, including, in mitigation, respondent's pro bono work and his contributions in the legal and civic community, and, in aggravation, that respondent failed to honor his obligations as a fiduciary and repeatedly misappropriated clients' funds, which inured to his own benefit, respondent was suspended from the practice of law for a period of two years.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Attorneys at Law §§ 37, 62–65.

Carmody-Wait 2d Officers of Court §§ 3:248, 3:284–3:287, 3:334, 3:382–3:383, 3:385.

22 NYCRR 1200.0, rules 1.15 (a), (d); 8.4 (h).

NY Jur 2d Attorneys at Law §§ 176, 186–187, 437, 441–444, 511, 518.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions.

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APPEARANCES OF COUNSEL

David W. Chandler, Brooklyn (*Sara Mustafa* of counsel), for petitioner.

Foley Griffin, LLP, Garden City (*Thomas J. Foley* of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts served the respondent with a notice of petition and a verified petition, both dated July 26, 2022, containing four charges of professional misconduct. The respondent served and filed a verified answer dated August 16, 2022, admitting to some of the factual allegations contained in the petition but denying the conclusions of law contained therein. By amended answer dated January 23, 2024, the respondent admitted all of the factual specifications contained in the petition, except the respondent continued to "den[y] knowledge or information" that attorney Michael Gangadeen was immediately suspended from the practice of law by a decision and order of this Court dated February 22, 2016, as alleged in charge four of the petition. The respondent also continued to deny the conclusions of law contained in the petition. By decision and order on application dated November 2, 2023, this Court referred the matter to the Honorable Michael L. Pesce, as Special Referee, to hear and report. A preliminary conference at which the respondent did not appear was held on December 22, 2023, and a hearing was conducted on February 7, 2024. In his report, the Special Referee sustained all four charges in the petition. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as this Court deems just and proper. The respondent submits an affirmation which does not challenge the Special Referee's report or the Grievance Committee's motion and contends that the sanction of a public censure is appropriate based on the mitigation presented.

The Petition

The petition contains four charges of professional misconduct. The respondent maintained an escrow account at JPMorgan Chase Bank, titled "Darmin Bachu, Attorney at Law, Attorney Trust Account IOLA," with an account number ending in 6908 (hereinafter the escrow account). Charge one relates to 11 matters in which the respondent issued funds from the escrow account to his clients and/or for personal purposes when there were no and/or insufficient corresponding funds on deposit.

Chand Matter

On November 10, 2016, check number 5349 in the amount of $4,000, made payable to Monica Chand, cleared the escrow account. This check was payment to Chand for her share of a settlement. On November 14, 2016, check number 5354 in the amount of $2,000, made payable to the respondent for his legal fees, cleared from the escrow account. As a $6,000 settlement fund that the respondent received on behalf of Chand was not in the escrow account until November 29, 2016, check numbers 5349 and 5354 cleared against other client funds.

Frederic Matter

On December 14, 2016, check number 5379 in the amount of $8,333.33, made payable to the respondent for his legal fees in the Kasiana Frederic matter, cleared from the escrow account. As a $25,000 settlement fund that the respondent received on behalf of Frederic was not in the escrow account until December 16, 2016, check number 5379 cleared against other client funds.

On December 28, 2016, escrow check number 5393 in the amount of $8,333.33, made payable to the respondent purportedly for his legal fees, cleared from the escrow account, reducing the balance of the funds held for the Frederic matter to $8,333.34. On December 29, 2016, check number 5391 in the sum of $16,666.67, made payable to Frederic, cleared against other client funds.

Azeez Matter

On January 5, 2017, check number 5398 in the amount of $4,000, made payable to Shazam Azeez, cleared from the escrow account. This check was payment to Azeez for his share of a settlement. As a $6,000 settlement fund that the respondent received on behalf of Azeez was not in the escrow account until January 10, 2017, check number 5398 cleared against other client funds.

Johnson Matter

On January 19, 2017, check number 5409 in the amount of $1,666.66, made payable to the respondent for his legal fees in the Aura Johnson matter, cleared from the escrow account. As a $5,000 settlement fund that the respondent received on behalf of Johnson was not in the escrow account until January 27, 2017, check number 5409 cleared against other client funds.

Abrams Matter

On February 21, 2017, check number 5447 in the amount of $5,000, made payable to Michele Reynolds Abrams, cleared from the escrow account. This check was payment to Abrams for her share of a settlement. As the funds for a $7,500 settlement check that the respondent received on behalf of Abrams were not in the escrow account until February 22, 2017, check number 5447 cleared against other client funds.

Rahman Matter

On July 3, 2017, check number 5494 in the amount of $4,737.33, made payable to Minhajur Rahman, cleared from the escrow account. As the funds for a $4,737.33 settlement check that the respondent received on behalf of Rahman were not in the escrow account until July 31, 2017, check number 5494 cleared against other client funds.

Porter Matter

On July 24, 2017, check number 5489 in the amount of $1,179.40, made payable to Lester Porter, cleared from the escrow account. The respondent failed to deposit a settlement check in the amount of $1,179.40 that he received on behalf of Porter until July 31, 2017. Therefore, check number 5489 cleared against other client funds in the escrow account.

Juman Matter

On December 23, 2016, the respondent deposited a $10,000 settlement check into the escrow account on behalf of his client Feroz Juman. That same day, the respondent issued check number 5389 in the amount of $3,333.33, payable to himself for his legal fees in this matter, which also cleared on the same date. On January 30, 2017, check number 5420 (dated Jan. 27, 2017) in the amount of $6,666.67, made payable to Juman cleared from the escrow account, reducing to $0 the balance in the escrow account held for Juman. On January 28, 2017, the

respondent issued another check to himself in the amount of $3,333.33, purportedly for his legal fees in this matter, which cleared against other client funds in the escrow account on January 30, 2017.

Gomez Matter

On January 27, 2017, the respondent deposited a $115,460.01 settlement check into the escrow account on behalf of his client Lourdes Gomez. On January 30, 2017, the respondent issued check number 5424 in the amount of $67,711.98 to Gomez, representing her share of the settlement proceeds. On January 30, 2017, check number 5433 in the amount of $38,884.68, made payable to the respondent for his purported legal fees in the Gomez matter, cleared from the escrow account. On February 10, 2018, check number 5438 in the amount of $7,276.28, made payable to the respondent, cleared the escrow account. After these checks were issued, the balance held for Gomez in the escrow account was $1,587.07. Nevertheless, the respondent issued check number 5442 in the amount of $11,532.20 payable to Bridgeview Legal Funding to satisfy a lien on behalf of Gomez. On February 17, 2017, check number 5442 cleared, at least in part, against other client funds.

Deodharry Matter

On December 9, 2016, the respondent deposited a $12,000 settlement check into the escrow account on behalf of his client Davywattie Deodharry. After issuing check number 5377 in the amount of $3,903.33 to himself purportedly for his legal fees and check number 5388 in the amount of $8,000 to Deodharry, representing her share of the settlement fund, as of December 23, 2016, the remaining balance held for Deoharry in the escrow account was $96.67. Approximately six months later, the respondent issued check number 5533 in the amount of $290 to himself, purportedly for his expenses relating to this matter. On June 7, 2018, check number 5533 cleared, at least in part, against other client funds.

Deen Matter

On September 24, 2015, the respondent deposited a settlement check in the amount of $6,000 into the escrow account on behalf of his client Joshua Deen. On September 24, 2015, check number 4875 in the amount of $1,901.91, made payable to the respondent for his legal fees, cleared from the escrow account.

On October 2, 2015, and check number 4885 in the amount of $3,803.84, made payable to Deen representing his share of the settlement funds, cleared from the escrow account. After the checks were issued, the remaining balance in the escrow account held for Deen was $294.25. More than two years later, on or about January 16, 2018, the respondent issued to Deen a second settlement check (number 5510) in the amount of $3,803.84, which cleared, at least in part, against other client funds in the escrow account.

Based on the foregoing, charge one alleges that the respondent engaged in a pattern of misappropriation of fiduciary funds, in violation of rule 1.15 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0).

Charge two alleges that the respondent misappropriated fiduciary funds, in violation of rule 1.15 (a) of the Rules of Professional Conduct, when check number 5458 in the amount of $11,000, made payable to Bhumilla Bachu, a family member, cleared from the escrow account on April 12, 2017, when there were no corresponding funds on deposit. Charge three alleges that the respondent failed to maintain required bookkeeping records for the escrow account, in violation of rule 1.15 (d) of the Rules of Professional Conduct, when he failed to maintain a contemporaneous ledger or similar record for the escrow account showing the sources of all funds deposited, the names of all persons for whom the funds were held, a description and amount of funds held, and the names of all persons to whom the funds were disbursed.

Charge four alleges that the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of rule 8.4 (h) of the Rules of Professional Conduct. Specifically, by order dated February 22, 2016, Michael Gangadeen was immediately suspended from the practice of law by this Court. Subsequent to Gangadeen's suspension, he requested that MetLife Insurance Company issue checks to the respondent totaling $425,883.30, representing funds owed to three of Gangadeen's former clients. On September 14, 2016, after depositing the MetLife checks into the escrow account, the respondent issued a check in the amount $420,883.30 ($5,000 less than the amount deposited into the escrow acccount), made payable to "Michael Gangadeen, Esq." The petition alleges that the respondent knew or should have known that Gangadeen had been suspended from the practice of law at the time of the transaction.

In the respondent's initial answer, he admitted some factual allegations but denied that he violated any Rules of Professional Conduct. In his amended answer, the respondent admitted that he engaged in a pattern of misappropriation of fiduciary funds and all the factual specifications as to charges one and two, but he continued to deny that he violated any Rules of Professional Conduct. The respondent admitted all the factual specifications as to charge three and denied that he violated any Rules of Professional Conduct. As to charge four, the respondent denied knowing that Gangadeen was a suspended attorney and denied violating any Rules of Professional Conduct.

The Hearing Record

The respondent admitted that his law firm had maintained multiple escrow accounts for the law firm's different practices. The respondent also admitted that prior to the Grievance Committee's investigation, he did not keep a ledger for the escrow accounts and there was "not much reconciliation." Regarding the Frederic matter, the respondent testified that when he withdrew his legal fees before the funds were available, it was "[j]ust poor management. Poor oversight. [A] [s]tupid mistake." The respondent paid himself twice in this matter. The respondent stated that because he did not have a ledger for the escrow account, he was distributing funds "in a haphazard way" and that he used previously issued checks to determine whether funds had been distributed.

For the Juman matter, the respondent admitted that he also paid himself twice due to the same lack of oversight.

Although not charged, at his examination under oath (hereinafter EUO), the respondent admitted that in April 2017, he paid a client, Toni Dixon, $22,000 in cash, purportedly because the client was disabled and did not have a bank account. The respondent also admitted issuing a check in the amount of $8,333 to Dixon, but the respondent did not explain how Dixon was able to cash that check. The respondent testified that the $22,000 he paid to Dixon came from cash that the respondent kept in his office, which came from the respondent's "big criminal defense practice." The respondent stated that he never withdrew $22,000 from the escrow account to reimburse himself because of "real bad bookkeeping." The respondent admitted that he began reconciling the escrow account and maintaining a ledger only after being investigated by the Griev-

ance Committee. The respondent paid another client, Ricky Ramgobin, $6,809 in cash for that client's share of certain settlement funds. The funds paid to Ramgobin were taken from cash the respondent kept at his office, and the respondent never withdrew funds from the escrow account to reimburse himself.

Regarding the Deen matter where the respondent twice paid settlement funds to the client, the respondent testified that he had been "scammed" by the client because the client falsely claimed that he had not been paid. The respondent admitted, however, that when the client returned to the respondent's office two years after the client was originally paid his share of the settlement funds and asked for a second check, the respondent did not check his records before issuing a new check to the client.

As to charge two, the respondent explained that his father's sister-in-law was the payee of the $11,000 check. The respondent had borrowed funds from his cousin, the payee's daughter, and the check was to repay that loan. The respondent intended to issue the check from his business account and did not realize that he had issued the check from the escrow account until the Grievance Committee's investigation (more than one year later). The respondent stated that he did not reimburse the escrow account upon discovering this purported mistake because the respondent believed that he had personal funds in the escrow account. At his EUO, the respondent admitted that the $11,000 check to repay his loan cleared against other client funds in the escrow account.

As to charge four, during his EUO, the respondent admitted that he was aware Gangadeen had been suspended from the practice of law and that was why Gangadeen was referring cases to the respondent. Nevertheless, inexplicably, the respondent subsequently submitted an answer and an amended answer in which he claimed that he was not aware of Gangadeen's suspended status. According to the respondent, Gangadeen asked the respondent to take over a case where the "only work was to collect the settlement." The three clients were relatives of Gangadeen, and according to the respondent, had instructed the respondent in writing to issue the entire settlement fund to Gangadeen, minus $5,000 that the clients had agreed to pay the respondent for accepting the settlement checks. The respondent did not execute a retainer agreement or other formal documentation with these clients because the only remaining work on the case was to accept the settlement

funds. The respondent further stated that he "did not take much of a fee on this." The respondent testified that based on the written instructions from the clients, he "assume[d] everything was okay" to distribute the funds to Gangadeen. The record includes a letter signed by the three clients, indicating that they "authorized" the respondent to pay their settlement funds to their cousin, Gangadeen. This letter was not executed in 2016, when the respondent testified that he received written permission to disburse the settlement funds to Gangadeen. Rather, the letter was dated February 10, 2022, seven days before the respondent's EUO. Therefore, the respondent's testimony that he received a written request/authorization from his clients before he issued the check to Gangadeen is unsupported.

The respondent testified that he has contributed to many charitable organizations and that he routinely has performed pro bono work when clients were unable to pay for his services. The respondent's law office also provided internships to high school students. The respondent submitted the testimonies of two character witnesses and nine character letters to support his mitigation. In further mitigation, the respondent testified that he made mistakes with his escrow account because he was "overwhelmed" by a criminal case brought against him by the Queens County District Attorney. The respondent stated, "In October 2016, unfortunately, I was chosen to be arrested for taking a tax credit. . . . For whatever reason, the [District Attorney's] office chose me. They usually don't arrest on these types of cases. . . . [T]he [District Attorney's] office singled me out and wanted to make some kind of spectacle of me." Due to the arrest, the respondent became depressed and complained to his general practitioner that he suffered from nervousness, anxiety, sleeplessness, and loss of appetite. The respondent was diagnosed with reactive depression and stress related to work problems. During cross-examination, the respondent admitted that the misconduct charged in the petition predated his criminal arrest and that the professional misconduct spanned more than three years. The respondent also admitted that he did not see a therapist when he was suffering from depression and anxiety, nor did his doctor recommend that he see one.

The Special Referee asked the respondent if he had other "incidents with law enforcement." The respondent answered that in early 2016, there was "an incident with the feds"

wherein he was charged with writing an "improper letter for a client" who had committed fraud. The respondent stated that action was dismissed.

The Special Referee's Report

The Special Referee sustained all four charges in the petition and found that the respondent failed to submit any arguments or evidence to demonstrate the he was unaware of Gangadeen's suspension as an attorney by this Court's February 22, 2016 order. The Special Referee also found that the respondent had accepted responsibility and had a solid reputation in both the legal and civic community.

By notice of motion and affirmation both dated May 22, 2024, the Grievance Committee moves to confirm the report of the Special Referee, which sustained all four charges in the petition, and to impose such discipline upon the respondent as this Court deems just and proper. The Grievance Committee reports that the respondent's disciplinary history consists of the following: by order dated July 20, 2022, this Court censured the respondent based on his conviction on March 5, 2019, of attempted possession of stolen property in the fifth degree, in violation of Penal Law §§ 110.00, 165.40, a class B misdemeanor (*see Matter of Bachu*, 208 AD3d 39 [2d Dept 2022]). The respondent was issued a letter of advisement in June 2022, and letters of caution in May 2014 and November 2015, all for misconduct unrelated to the escrow account.

The respondent submits an affirmation which does not challenge the Special Referee's report or the Grievance Committee's motion to confirm, but contends that a public censure is the appropriate sanction given the mitigation, among other things, that the respondent simply failed to properly manage his law practice during a "particularly stressful period in his life," that no client lost money, and that the respondent has a strong record of community service.

Findings and Conclusion

In view of the evidence adduced at the hearing and the respondent's admissions, we find that the Special Referee properly sustained all four charges. Accordingly, the Grievance Committee's motion to confirm the Special Referee's report is granted. In determining an appropriate measure of discipline, we have considered in mitigation, inter alia, the respondent's pro bono work and his contributions in the legal and civic com-

munity. We reject as mitigation the respondent's contention that he committed the charged misconduct because he was undergoing a stressful period in his life. The respondent admitted that he failed to properly manage his escrow account until the Grievance Committee's investigation, and the record indicates that this mismanagement predated the respondent's arrest. The respondent also committed a crime, was caught, and was prosecuted. The respondent now wishes to use the fact that he suffered stress as a result of being caught for his crime as mitigation for further misconduct that he committed. There is no dispute that the respondent was stressed during the period of his prosecution, but such stress was caused by the respondent's own criminal conduct, a situation he created, and cannot be used to mitigate the respondent's disregard of his fiduciary duties.

Notwithstanding the mitigation advanced, we find that the respondent failed to honor his obligations as a fiduciary and repeatedly misappropriated clients' funds, which inured to his own benefit.

Under the totality of the circumstances, we find that the respondent's misconduct warrants his suspension from the practice of law for a period of two years.

LaSalle, P.J., Dillon, Barros, Connolly and Christopher, JJ., concur.

Ordered that the Grievance Committee's motion to confirm the Special Referee's report is granted; and it is further,

Ordered that the respondent, Darmin T. Bachu, is suspended from the practice of law for a period of two years, commencing September 19, 2025, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than March 19, 2027. In such application (*see* 22 NYCRR 1240.16), the respondent shall furnish satisfactory proof that during the period of suspension, he (1) refrained from practicing or attempting to practice law, (2) fully complied with this opinion and order and with the terms and provisions of the rules governing the conduct of disbarred or suspended attorneys (*see id.* § 1240.15), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (a), and (4) otherwise properly conducted himself; and it is further,

Ordered that the respondent, Darmin T. Bachu, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15); and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this Court, the respondent, Darmin T. Bachu, shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Darmin T. Bachu, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15 (f).

REPORTS OF SELECTED CASES

DECIDED IN THE

APPELLATE TERM

OF THE SUPREME COURT

AND OTHER COURTS

OF THE

STATE OF NEW YORK

OTHER THAN THE

COURT OF APPEALS AND THE APPELLATE DIVISION
OF THE SUPREME COURT

THOMAS J.K. SMITH
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Volume 88
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2026

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Abstracts of Appellate Term Cases Selected for Online Publication

1 People v Diomande (Mamadi), 2026 NY Slip Op 50032(U). Motor Vehicles—Aggravated Unlicensed Operation of Motor Vehicle—Sufficiency of Accusatory Instrument. (App Term, 1st Dept, Jan. 15, 2026)

2 Cardinal Spellman High Sch. v Chenault, 2026 NY Slip Op 50033(U). Contracts—Breach or Performance of Contract—Payment of High School Tuition Arrears. (App Term, 1st Dept, Jan. 15, 2026)

3 Mejia v Tu Stilo Salon Spa, 2026 NY Slip Op 50034(U). Courts—Small Claims—Inadequate and Excessive Damages. (App Term, 1st Dept, Jan. 15, 2026)

4 Goyal v Scarano Architect PLLC, 2026 NY Slip Op 50035(U). Courts—Small Claims—Substantial Justice. (App Term, 1st Dept, Jan. 15, 2026)

5 875 Riv. View Realty LLC v Marzullo, 2026 NY Slip Op 50041(U). Landlord and Tenant—Rent Regulation—Succession Rights of Family Member. Motions and Orders—Reargument or Renewal. (App Term, 1st Dept, Jan. 20, 2026)

6 Hickman v Carmona, 2026 NY Slip Op 50042(U). Courts—Small Claims—Hearsay Evidence. (App Term, 1st Dept, Jan. 20, 2026)

7 425x50 LLC v Residential Bd. of Mgrs. of Stella Tower Condominium, 2026 NY Slip Op 50043(U). Courts—Small Claims—Lack of Competent Evidence. (App Term, 1st Dept, Jan. 20, 2026)

SELECTED CASES DECIDED

IN

OTHER COURTS

OF THE

STATE OF NEW YORK

[239 NYS3d 794]

HYACINTH GREEN IRREVOCABLE LIVING TRUST, by ONEIL O. GREEN, as Trustee, Petitioner, v NIGEL P.A. GREEN et al., Respondents.

Civil Court of the City of New York, Kings County, July 1, 2025

HEADNOTES

Landlord and Tenant — Month-to-Month Tenancy — Conversion from Tenancy at Will — Occupancy of Indefinite Duration

Frauds, Statute of — Conveyances and Contracts Concerning Real Property — Oral Lease — Indefinite Term

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RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Landlord and Tenant §§ 27, 115–118, 120; AM JUR 2d Statute of Frauds §§ 45, 47, 80, 83.

CARMODY-WAIT 2d Summary Proceedings to Recover Possession of Real Property § 90:33.

DOLAN, RASCH'S NEW YORK LANDLORD AND TENANT, INCLUDING SUMMARY PROCEEDINGS (5th ed) §§ 2:1, 2:35, 30:29, 30:42, 30:57–30:58.

NEW YORK CONTRACT LAW (2d ed) §§ 3:12, 3:19.

NY JUR 2d Frauds, Statute of §§ 102, 130, 319; NY JUR 2d Statute of Landlord and Tenant §§ 15, 29, 37, 65, 945, 947.

WILLISTON ON CONTRACTS (4th ed) § 25:10.

ANNOTATION REFERENCE

See ALR Index under Landlord and Tenant; Frauds, Statute of.

APPEARANCES OF COUNSEL

David S. Harris for petitioner.

Nigel P.A. Green, respondent pro se.

OPINION OF THE COURT

KAREN MAY BACDAYAN, J.

This is a holdover proceeding commenced in July 2024 seeking possession of the entire basement at 669 East 82nd Street, Brooklyn, NY 11236, alleged to be a two-family dwelling (hereinafter the house or the subject building). The petition alleges that petitioner is the Hyacinth Green Irrevocable Living Trust by Oneil Green (hereinafter Oneil) as trustee. The petition further alleges that respondent Nigel P.A. Green (hereinafter Nigel or respondent) is a tenant of the subject premises who entered into possession under an oral month-to-month rental agreement on an unknown date, and the other respondents are Nigel's undertenants. (NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition ¶¶ 3-4, 7.) The petition alleges that the premises are not subject to the Good Cause Eviction Law because petitioner is a "small landlord" as statutorily defined, who owns no more than 10 units within New York State, owning only the subject house. (*Id.* at 2.) Attached to the petition is a 90-day notice of termination to respondents, dated March 18, 2024, stating petitioner elects not to "renew your lease" and that respondent's lease "expires" on June 30, 2024. (*Id.* at 4, 90-day notice of termination.)

Nigel filed an answer on February 18, 2025, whereby he asserts that he is not a tenant of the subject premises. Rather, Nigel asserts he has a one-third ownership interest in the house as a beneficiary of petitioner. He alleges he has "sought either a formal inclusion as a co-owner of the trust property, or, in the alternative, a cash buyout reflecting [his] equitable share in the property's value." (NYSCEF Doc No. 5, answer ¶¶ 1, 6.) The answer refers to a Supreme Court proceeding under index number 191/2023 and alleges there is a "judicial stay of possession" in that proceeding, and that he has levied a notice of

pendency in connection with the Supreme Court action which "effectively nullifies" this proceeding. (*Id.* ¶¶ 3, 7-9.) Read liberally, the answer also raises defenses of collateral estoppel, res judicata, unclean hands, lack of subject matter jurisdiction to determine the parties' ownership rights, pending appellate proceedings (alleging an appeal to the Appellate Division, Second Department of the underlying Supreme Court action has been perfected), consolidation with the Supreme Court action and a Family Court proceeding, or, alternatively, to stay the instant proceeding until such time as those related matters are fully resolved. (*Id.* ¶¶ 11-25.)

Gleaned from the pretrial conference is that respondent claims he was not paying rent, but rather making payments toward the mortgage for the subject building which he claims to own in part, despite concededly being removed from the deed for the subject building in 2005. Respondent represents that there was a promise between the parties that his removal from the deed was only temporary. At the outset, petitioner discontinued as against Jane and John Doe based on respondent's representation that no other individuals aside from himself, his wife (and corespondent), and his minor child reside in the premises.

The trial took place over two days: June 12, 2025, and June 17, 2025.

The Trial

All parties were sworn in prior to their testimony. From the evidence adduced at trial, the court makes the following findings of fact:

This dispute arises amidst an ongoing legal battle between family members regarding the ownership of the house located at 669 E 82nd Street, Brooklyn, NY 11236 (the house). Hyacinth Green (hereinafter Hyacinth) is Oneil and Nigel's mother. When the house was purchased, Hyacinth included Nigel and Oneil on the deed on the advice of a "church sister," and because they are her male children ("they are men"). In evidence are the following deeds: petitioner's exhibit 1—deed dated June 26, 2000, between Sandra Weiner and Nigel, Oneil, and Hyacinth; petitioner's exhibit 2—deed dated January 20, 2005, between Nigel, Oneil and Hyacinth, transferring the property to Oneil and Hyacinth; petitioner's exhibit 3—deed dated November 19, 2009, transferring the property from Hyacinth and Oneil to Hyacinth; and petitioner's exhibit 4—current deed dated November 3, 2020, transferring the

property from Hyacinth to petitioner, the Hyacinth Green Irrevocable Living Trust by Oneil O. Green as trustee. The parties dispute whether or not Nigel contributed financially to the purchase of the house in 2000, and whether Nigel provided any financial documentation to secure the mortgage. Nigel testified that he paid for the closing and that he provided documentation when applying for the initial mortgage. Oneil and Hyacinth testified that Nigel made no contributions to the purchase of the house whatsoever, and Hyacinth testified that she could not recall whether Nigel provided any proof of his finances when they applied for the mortgage.

Soon after closing on the house in June 2000, Nigel, then an owner, offered to "rent" the first-floor apartment, and Hyacinth agreed to allow Nigel to occupy the first-floor apartment for the sum of $850 per month. Hyacinth recalled "clearly" that Nigel walked into the house the day after the closing and told her he would rent the first floor from her instead of her renting it to "a stranger." This agreement was not in writing, and, from the record before the court, the agreement was for an indefinite term, albeit Nigel was a deeded owner at the time. Oneil and Hyacinth also had an oral agreement that Oneil would occupy the basement apartment and pay Hyacinth $550 or $600 per month. Oneil testified that he and Nigel paid "rent" to Hyacinth because the house belonged to their mother. Nigel testified that he was not paying rent, but, rather, was paying toward the mortgage of the house which he partially owns, even after he transferred his interest to Hyacinth and Oneil in 2005 and was no longer a deeded owner. Hyacinth did not provide receipts to Nigel until the Supreme Court action was commenced, "because it was between mother and son." Hyacinth testified that she was charging both Oneil and Nigel "rent" for their use and occupancy. Hyacinth always "knew" when Nigel paid his rent because it came from a particular bank account.

In 2003, the mortgage was refinanced. A check for $26,268.68, dated July 29, 2003, was issued to the three of them as part of the transaction. Hyacinth and Oneil testified that they signed the check over to Nigel because Nigel told them it could not be cashed with three payees, and that Nigel then took the money. Nigel's testimony in this regard was inconsistent. On the one hand, he testified that he never received any of the money; on the other hand, he testified that the check proves he was a part owner. Hyacinth credibly testified that Nigel asked to meet her at "the subway" where she signed the check over to

him; that she does not know whether Oneil had yet endorsed the check when she endorsed it; that she never received any of the money; and that Nigel told her he was going to use the money to buy a house in Florida for her to live in as she aged. Oneil testified that he never received any of the money from the $26,268.68 check.

In 2005, Nigel was considering filing for bankruptcy and did not want his mother to lose the house as a result. At that time, the three of them agreed that Nigel's interest would be transferred to Hyacinth and Oneil, who then owned the property as joint tenants with rights of survivorship. Nigel remained on the first floor paying Hyacinth pursuant to their prior agreement. Nigel testified that he, Hyacinth, and Oneil all sat around his mother's dining room table and agreed that—at some point in the future to be decided by all three of them—he would become a deeded owner again. Nigel offered a copy of a document purporting to be this agreement, which he testified was signed by all three family members at the same time in each other's presence. Nigel believes that the original is in his mother's safe. *In direct contradiction*, both Hyacinth and Oneil testified that they had never seen this document prior to the commencement of the trial, and that the signatures on the document were not their signatures.

The property was transferred twice after 2005: in 2009, from Hyacinth and Oneil to Hyacinth, and then in 2020, from Hyacinth to petitioner. Nigel was not involved in either transfer. In or about 2013, Nigel purchased a home in Maryland. At or about the same time, "out of love" for his brother "and wanting [his brother] to enjoy a nicer space, a bigger space," Nigel agreed with his brother to "switch" apartments such that Nigel would live in the basement and Oneil would live on the first floor. Nigel testified, without documentary evidence in support, that he renovated the entire first floor and, "being an owner," took care of repairs. Similarly, he testified that after he moved to the basement, he renovated it in 2018 and in doing so spent almost $40,000; he fixed the roof and replaced the boiler "on [his] own" when it broke. Nigel stated he was relying on the "agreement" with Hyacinth and Oneil—which both unequivocally disavowed—that he was only temporarily removed from the deed, which is why he paid his portion of the mortgage and spent money on the renovation and repairs.

The text messages in evidence (respondent's exhibit L) indicate that both Nigel and Hyacinth expected that a sum

certain would be paid to Hyacinth by Nigel each month. In the text messages, Hyacinth characterized the payments as rent, and Nigel characterized the payments as contributions toward the mortgage. Both Hyacinth and Nigel acknowledged that these messages were sent after the commencement of a Supreme Court proceeding challenging title, in which Nigel claims to be a rightful owner who, until commencement of this holdover proceeding, was paying toward the mortgage.

The court declined respondent's request to submit a posttrial memorandum of law, instead allowing respondent to make his arguments on the record in closing. Respondent made two interrelated arguments: (1) he never had a lease as pleaded in the notice of termination, but rather had possession of the premises under an oral agreement to pay a share of the mortgage because he maintains an ownership interest; and (2) any such agreement, whether to pay rent or to pay a portion of the mortgage, is void as against the statute of frauds.[1]

The Law and its Application to the Facts

For the following reasons, the court finds that Nigel's tenancy was, initially, a tenancy at will which ripened over time into a month-to-month tenancy. (*Sawicka v Schwimmer*, 187 AD3d 957, 959 [2d Dept 2020] [holding the absence of a lease term in an oral agreement "create(s) an at-will tenancy, which is not barred by the statute of frauds"] [citation omitted]; *Israelson v Wollenberg*, 63 Misc 293, 295 [App Term, 1st Dept 1909] ["Where one goes into possession of land under an (agreement for more than one year), his tenancy, at its inception, is a tenancy at will. By paying a monthly rent defendant then became a tenant from month to month"] [internal quotation marks and citation omitted].) However, over time, a tenancy at will can ripen into a monthly hiring. (*Wollenberg*, 63 Misc at 295; *Hand v Knaul*, 116 Misc 714 [Onondaga County Ct 1921] [holding that an indefinite oral lease to pay rent of varying

1. Nigel provided the court with two citations: *Anderson v Tompkins*, 96 NY2d 781 (2001), and *OLeary*, 117 AD3d 1585, which he stated was from 2014 but did not provide the citation for the Judicial Department. The court could not find either case after searching on both Westlaw and LexisNexis. When searching for "*Anderson*," the court did find an 1820 case from the state of Virginia, *Anderson v Tompkins* (1 Brock 456), whose headnotes on Westlaw speak to types of tenancies but not to the statute of frauds. The court could not find any cases for *OLeary*: a search for 117 AD3d 1585 found a criminal court decision from the Fourth Appellate Division, *People v Munoz*.

amounts in advance of each month for different apartments of the same landlord was a monthly hiring].)[2]

Here, the notice of termination refers to a "lease" expiration; and the petition refers to Nigel's tenancy as an "oral month to month rental agreement." A landlord-tenant relationship can be created either orally or by a writing. (*Stern* v *Equitable Trust Co. of N.Y.*, 238 NY 267, 269 [1924].) Oral leases are valid in certain circumstances, and the nomenclature is not necessarily dispositive. "In order for an agreement, *oral* [as herein] *or written*, to be enforceable *as a lease*, all the essential terms must be agreed upon. These essential terms include the area to be leased, the duration of the lease, and the price to be paid." (*Matter of Davis v Dinkins*, 206 AD2d 365, 366-367 [2d Dept 1994] [emphasis added and citations omitted].) If Nigel *believed* he was paying towards a mortgage for which he was no longer legally obligated, Hyacinth *believed* Nigel was paying rent. Regardless of their subjective beliefs, the court finds that these monthly payments fit neatly into the definition of "rent" provided in RPAPL 702 (1): "[T]he term 'rent' shall mean the monthly or weekly amount charged in consideration for the use and occupation of a dwelling pursuant to a written or oral rental agreement."

The statute of frauds, invoked by respondent as rendering his oral lease invalid, is codified in General Obligations Law § 5-703 which provides in relevant part:

> "An estate or interest in real property, *other than a lease for a term not exceeding one year*, . . . cannot be created [or] granted . . . *unless by* act or *operation of law*, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing." (General Obligations Law § 5-703 [1] [emphasis added].)

General Obligations Law § 5-701 provides that if the agreement establishing the landlord-tenant relationship is for more than one year, then it must be in writing.

Real Property Law § 232 states in full:

> "Duration of certain agreements in New York

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2. In *Knaul*, the court was tasked with determining whether the tenancy at will had ripened into a tenancy from "month-to-month" *or* a "monthly hiring" for the purposes of deciding if the tenant must give a landlord notice to terminate their tenancy. This distinction is not relevant here.

> "An agreement for the occupation of real estate in the city of New York, which shall not particularly specify the duration of the occupation, shall be deemed to continue until the first day of October next after the possession commences under the agreement."

In *Stauber v Antelo* (163 AD2d 246, 248 [1st Dept 1990]), citing to Real Property Law § 232 and holding that an agreement to occupy a definite area of the premises for an indefinite term became a month-to-month tenancy "by operation of law," the Appellate Division, First Department set forth what by then had become a self-evident legal construction relevant to the case at bar:

> "It is axiomatic that in New York, a person who enters upon property by permission of the owner for an indefinite period, even without the reservation of rent, is considered to be a tenant at will. Moreover, the acceptance of rent on a monthly basis creates a month-to-month tenancy." (*Stauber*, 163 AD2d at 248 [citations omitted].)

To this day, Real Property Law § 232 appears rarely in case law despite its ease of applicability. (*See e.g. Chinea v Chinea*, 85 Misc 3d 1232[A], 2025 NY Slip Op 50323[U] [Suffolk Dist Ct, 6th Dist 2025] [finding that, without any mention of Real Property Law § 232, a tenancy of indefinite duration was a tenancy at will that became a month-to-month tenancy].) Applying Real Property Law § 232 to the facts herein, Nigel's occupancy of indefinite duration (tenancy at will) of the *first-floor apartment* terminated on October 1, 2005, i.e., "the first day of October next" after he transferred ownership to Hyacinth and Oneil on January 20, 2005; and Nigel's *second oral lease* of indefinite duration to exclusively occupy the basement apartment terminated by operation of law on "the first day" of the October after the commencement of the tenancy in or about 2014. (*Id*.) The application of Real Property Law § 232 renders Nigel a month-to-month tenant of the first floor from at least 2005—when he deeded his interest in the house to Hyacinth and Oneil—until 2014, when he relocated to the basement unit with an agreement to pay a sum certain for use and occupancy of a specific area of the house; when Nigel took occupancy of the basement apartment for an agreed upon fixed sum, his tenancy at will in the basement, pursuant to Real Property Law § 232, expired the "October next" by operation of law. (*Id*.) Thereafter, Nigel became a month-to-month tenant by continu-

ing to pay monthly for the exclusive use of the basement apartment.

Even without reference to the infrequently cited Real Property Law § 232, case law has long supported this court's finding that Nigel's tenancy at will ripened into a month-to-month tenancy under the facts adduced herein. In *Fink v Standard Bread Co.* (61 Misc 626 [App Term, 1st Dept 1909]), the parties had entered into an oral lease providing, among other stipulations not relevant here, for a term of "ten years, at a fixed rent payable in monthly instalments." (*Fink*, 61 Misc at 626.) The *Fink* court held that the "oral lease . . . to make a fixed payment each month" was invalid under the statute of frauds, and that

> "the rule in such cases is that the lease is ineffectual to vest any term whatever in the lessee, and when the latter goes into possession under such a lease, with the consent of the lessor, such lessee becomes, in the absence of any other agreement, a tenant at will merely, subject to liability to pay rent, at the stipulated rate, for the use and occupation." (*Id.*)

Here, as in *Fink*, Nigel took occupancy under an oral lease to occupy the first floor of the house for a fixed sum per month for an indefinite period of time, an agreement that was invalid under the statute of frauds. Nigel ceased to have an ownership interest in the property in 2005 when the deed was transferred to Hyacinth and Oneil as joint tenants with rights of survivorship. He thereafter continued to reside in and have exclusive enjoyment of the first-floor apartment as *other than an owner*, paying $850 monthly for his use and occupancy for an indefinite term. In or about 2014, after his purchase of the Maryland property, Nigel moved to the basement apartment and paid a lower monthly amount to Hyacinth for the next 10 years, again for an indefinite term.

In *Israelson v Wollenberg* (63 Misc 293, 295 [App Term, 1st Dept 1909]), the court found that although the defendant's tenancy was a tenancy at will "at its inception," he became "a tenant from month to month" when he paid, and plaintiff accepted, a monthly rent. (*Wollenberg*, 63 Misc at 295.)[3] Here, when Nigel's relationship with Hyacinth as a co-owner ceased

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3. Neither *Fink v Standard Bread Co.* (61 Misc 626 [App Term, 1st Dept 1909]) nor *Israelson v Wollenberg* (63 Misc 293, 295 [App Term, 1st Dept 1909]) makes mention of Real Property Law § 232. It is not clear to the court

(n. cont'd)

to exist, as recorded in the 2005 deed, Nigel, as in *Wollenberg*, continued in occupancy of the first floor paying to Hyacinth, which Hyacinth accepted, a fixed sum per month. The court finds that—under the reasoning in *Wollenberg* and *Fink* at that juncture, Nigel's *first* tenancy *at will* of the first-floor apartment became a month-to-month *tenancy*. Here as in *Wollenberg*, "[t]his is the only legal construction which the facts will permit." (*Id*. [citation omitted]; *see also East Ramapo Cent. Sch. Dist. v Mosdos Chofetz Chaim, Inc.*, 52 Misc 3d 49, 51 [App Term, 2d Dept, 9th & 10th Jud Dists 2016]; *Douglass v Seiferd*, 18 Misc 188, 191 [App Term, 1st Dept 1896] [implying a tenancy "from the manner in which the rent is paid, for where it is paid by the week, month, quarter or year, a weekly, monthly, quarterly or yearly hiring is presumed, according to the circumstances"].)

Approximately 10 years later, Nigel and Hyacinth agreed to Nigel's *second* tenancy at will, which, shortly thereafter, became a month-to-month tenancy. When Nigel relocated from the first floor to the basement as a nonowner in or about 2014, paying from the inception of his occupancy of the basement apartment an amount upon which he and Hyacinth mutually agreed, he entered into exclusive possession of a specific area of the house under an oral lease of indefinite duration which graduated into a month-to-month tenancy for which Nigel paid to Hyacinth $600 per month. (*See Fink*, 61 Misc at 626; *Wollenberg*, 63 Misc at 295; *Dinkins*, 206 AD2d at 367; *Seiferd*, 18 Misc at 191.) Hyacinth and Nigel formed a binding agreement, manifested not by their "subjective intent" but by their "objective manifestations of [their] intent . . . as gathered by their expressed words and deeds." (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977] [citation omitted].)[4]

Recently, in *Chinea v Chinea* (85 Misc 3d 1232[A], 2025 NY Slip Op 50323[U] [Suffolk Dist Ct, 6th Dist 2025]), on facts strikingly similar to those in the instant case, petitioner commenced a proceeding for possession of real property from respondents who were not on the deed to the building therein, nor was there a written lease between the parties. Respondents had entered into an agreement with petitioner to help

whether Real Property Law § 232 was in effect at the time, passing the legislature as it did in 1909.

4. When *Wollenberg* was decided in 1909, it is not clear whether Real Property Law § 232 had been enacted, passing the legislature as it did in 1909.

petitioner "pay the mortgage" from February 2023 to February 2025. Respondents claimed an ownership interest in the property. The *Chinea* court rejected respondents' argument that "this is 'not a Landlord-Tenant situation' because [they] never had a lease." (2025 NY Slip Op 50323[U], *2.) Without mention of Real Property Law § 232, the court concluded that while the original agreement of indefinite duration was invalid under the statute of frauds, the tenancy that had been created was a monthly tenancy in compliance with General Obligations Law § 5-703. The court found "that the [p]etitioner and [r]espondents had an oral lease pursuant to which the [r]espondents were to pay [a fixed sum] per month (in *either* rent *or* mortgage)," declining to differentiate between rent payments and mortgage payments. (*Id.* at *4 [emphasis added].) The court found that "[w]hile [r]espondents claimed they made payments directly to the mortgage company . . . and claimed that they expended funds to improve and/or maintain the property, they produced no proof of the same." (*Chinea*, 2025 NY Slip Op 50323[U], *2-3.) Finally, the court "reject[ed] the [r]espondents' contention that they had an ownership interest in the [s]ubject [p]remises because such contention [was] contradicted by the two deeds entered into evidence." (*Id.* at *4.)

Likewise here, the purported agreement between Hyacinth, Oneil, and Nigel—to make Nigel a part owner at some point in the future—never came to fruition. Indeed, since Nigel's transfer of his interest in the house to Hyacinth and Oneil in 2005, there have been two recorded deeds transferring ownership of the house, neither of which comprised any transfer of interest to Nigel. As in *Chinea*, Nigel testified that, because he has an ownership interest in the house, he improved the house by renovating both the first-floor and basement apartments, fixing the roof, and replacing the boiler. As in *Chinea*, Nigel presented no documentary evidence to support his testimony. As in *Chinea*, whether Nigel's payments to petitioner are characterized as rent payments or payments towards the mortgage, there was an oral agreement for Nigel to occupy the basement and to pay a fixed sum per month while in occupancy of the basement. (*See Evans v Evans*, 85 Misc 3d 1254[A], 2025 NY Slip Op 50531[U], *2 [Civ Ct, Queens County 2025] [after trial in a summary holdover proceeding, finding an oral tenancy from month-to-month where "(r)espondent testified he did not consider . . . payments to be rent," but the court found petitioner's characterization of the arrangement as an oral month-to-month tenancy to be more credible].)

Whether through the application of Real Property Law § 232, or pursuant to the case law, supra, Nigel's tenancy at will ripened at least a decade ago into a month-to-month tenancy which can only be terminated upon appropriate notice as prescribed by statute. (Real Property Law §§ 232-a; 226-c.) The court holds that petitioner properly terminated Nigel's tenancy, that the notice given is reasonable under the attendant circumstances, and that petitioner is entitled to possession of the premises. Respondent's remaining defenses have been considered and are without merit.[5]

Conclusion

Accordingly, it is hereby ordered that a possessory judgment shall enter in favor of petitioner as against all named respondents; and it is further ordered that the warrant may issue forthwith without a stay; and it is further ordered that the execution of the warrant is stayed through December 31, 2025, for respondents to vacate, conditioned upon payment to petitioner of $600 by July 7, 2025, and thereafter by the fifth of each month, commencing August 5, 2025; and it is further ordered that Hyacinth shall provide receipts as required by law (Real Property Law § 235-e); and it is further ordered that the earliest execution date is July 8, 2025 (which means that if respondent does not pay $600 directly to Hyacinth, who must provide a receipt, on or before July 7, 2025, or by the fifth of each month thereafter through December 2025, Hyacinth may cause the marshal to serve a marshal's notice as required by law).

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5. The court finds Nigel did not prove his entitlement to the equitable defenses of collateral estoppel, res judicata, estoppel, or unclean hands based on petitioner's "refusal to recognize" his purported "ownership interest." (NYSCEF Doc No. 5, answer ¶ 23.) Nigel did not present any order from the Supreme Court action that stays this proceeding, thus the "pending appellate proceedings" are not a defense to this proceeding. Nigel further asserted that this court lacks jurisdiction to determine the parties' respective ownership rights, and that this proceeding should either be consolidated with the Supreme Court action and a Family Court proceeding, or in the alternative should be stayed "until such time as those related matters are fully resolved." (NYSCEF Doc No. 5, answer ¶ 22.) While Nigel is correct that this court cannot determine ownership rights, it need not do so to find petitioner established standing to maintain this holdover proceeding; any issue regarding petitioner's deed for the subject building (or any preceding deeds) is the subject of the Supreme Court action. As for consolidation, Nigel did not file a motion seeking to consolidate this proceeding with the Supreme Court action or the Family Court proceeding, nor would this court have the authority to do so.

[239 NYS3d 494]

The People of the State of New York v Johnnie Vickers, Defendant.

Supreme Court, Bronx County, July 8, 2025

HEADNOTES

Crimes — Sentence — Persistent Violent Felony Offender — Tolling Determination under *Erlinger*

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Criminal Law § 714; Am Jur 2d Habitual Criminals and Subsequent Offenders §§ 1–2, 20, 22, 30; Am Jur 2d Jury §§ 3, 5.

Carmody-Wait 2d Right to Jury Trial § 49:53; Carmody-Wait 2d Sentencing Procedures §§ 203:144–203:105, 203:108, 203:133, 203:145, 203:147.

NY Jur 2d Criminal Law: Procedure §§ 3343–3344, 3347, 3358, 3380, 3385; NY Jur 2d Jury § 10.

ANNOTATION REFERENCE

Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes. 7 ALR5th 263.

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Query: prior +2 convict! /s toll! or 70.04 & "persistent violent felony offender" or PVFO

APPEARANCES OF COUNSEL

Jodi Morales, Bronx, for defendant.

Darcel D. Clark, District Attorney, Bronx (*Karl Miller* of counsel), for the People.

OPINION OF THE COURT

Jeffrey Rosenblueth, J.

Background and Procedural History

On April 19, 2024, following a jury trial in Bronx County, defendant was convicted of manslaughter in the first degree under Penal Law § 125.20 (1), a class B violent felony offense, for stabbing Adam Saunders to death on February 18, 2021.

Defendant's NYS Division of Criminal Justice Services fingerprint response record (rap sheet) reveals that he was previously convicted of violent felony offenses in 1999 and 2003. Specifically, on April 19, 1999, defendant pleaded guilty to robbery in the first degree, a class B violent felony offense in Kings County, and on October 20, 2003, defendant pleaded guilty to robbery in the first degree in Kings County.

On July 25, 2024, the trial judge in the instant matter,[1] pursuant to New York Penal Law § 70.08, sentenced defendant as a persistent violent felony offender (PVFO), to an indeterminate term of imprisonment of 20 years to life imprisonment. Subsequently, on October 7, 2024, the trial court vacated its sentence and adjourned the matter for further consideration in light of the United States Supreme Court's decision in *Erlinger v United States* (602 US 821 [2024]). *Erlinger* held that a jury must determine beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions for the purpose of a specific federal enhanced sentencing statute (*id*.).

The issue presented for the court is whether *Erlinger* is applicable to New York's persistent violent felony offender sentencing statute. Specifically, whether it is constitutionally permissible for the court, rather than a jury, to determine whether the defendant can be adjudicated a persistent violent felony offender.

Conclusions of Law

New York Penal Law § 70.08 sets forth, in pertinent part, that "[a] persistent violent felony offender is a person who stands convicted of a violent felony offense . . . after having previously been subjected to two or more predicate violent felony convictions as defined in paragraph (b) of subdivision one of section 70.04."

Penal Law § 70.04 (1) (b) provides, in relevant part, that a predicate violent felony conviction is "a violent felony offense" for which a "sentence must have been imposed not more than *ten years* before commission of the felony of which the defendant presently stands convicted" provided that

> "any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded

1. The trial judge has since retired.

> and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (Penal Law § 70.04 [1] [b] [i], [iv], [v] [emphasis added]).

The procedure for determining whether a defendant is a persistent violent felony offender is set forth in New York Criminal Procedure Law § 400.16, which references several sections in CPL 400.15 that pertain to sentencing a defendant as a second violent felony offender. Notably, regarding the manner in which a hearing is to be conducted to determine whether a defendant is PVFO, CPL 400.15 (7) (a) mandates that "[a] hearing pursuant to this section must be *before the court without jury*" (emphasis added).

New York's persistent violent felony offender statute does not run afoul of *Erlinger v United States*.

At the outset, it is essential to highlight the federal statute and factual issues that were involved in *Erlinger*'s enhanced sentencing which, in this court's view, have no bearing to New York's persistent violent felony offender sentencing statute. In *Erlinger*, the United States Supreme Court addressed the federal Armed Career Criminal Act (ACCA) which exposed a defendant to enhanced sentencing if the defendant had three prior convictions for certain offenses that were "committed on occasions different from one another" (18 USC § 924 [e] [1]). In *Erlinger*, the defendant's three prior crimes were a series of burglaries that he committed "within a span of days" (*id.* at 821, 826). *Erlinger* claimed that his crimes did not occur on separate distinct occasions but instead arose from a "single criminal episode" (*id.* at 821, 872). The Court stated that to determine whether they were separate crimes under the ACCA, it was necessary to conduct "an assessment of the facts surrounding those offenses" including whether the three crimes were "similar or intertwined" in purpose and character and if they were "committed close in time" and in similar locations (*id.* at 827-828). The Court held that those factual issues regarding the ACCA's "occasions" inquiry which involved a determination of the defendant's intent and purpose had to be found by a jury, rather than a judge, beyond a reasonable doubt (*id.* at 833-835).

Prior to *Erlinger*, the U.S. Supreme Court directly addressed the subject of a defendant's constitutional right to a jury trial

with respect to enhanced sentencing in the seminal case of *Apprendi v New Jersey* (530 US 466 [2000]), which is prominently cited in *Erlinger*. In *Apprendi*, the Court struck down a New Jersey statute that permitted a judge to impose a higher level of punishment if it found, by a preponderance of the evidence, that a defendant's *motivation or purpose* in unlawfully possessing a weapon was to intimidate the victim based upon a racial bias. In doing so, the U.S. Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" (*id.* at 490).[2]

As such, it logically flows that *Erlinger* merely applied *Apprendi* to a specific type of fact related to prior convictions and did not establish a new constitutional rule. The underlying constitutional principle at play in *Erlinger*, and invoked by the defendant here, was established in 2000, when *Apprendi* was decided, and *Erlinger* did not cover any new ground. Indeed, the Court in *Erlinger* stated (at 835) that "this case is as nearly on all fours with *Apprendi* . . . as any we might imagine" (*People v Rivera*, 85 Misc 3d 1032 [Sup Ct, NY County 2024]; *see also People v Taylor*, 86 Misc 3d 263 [Sup Ct, Nassau County 2024] [the decision in *Erlinger* reiterated the *Apprendi* doctrine]).

Importantly, it is critical to recognize that in both *Erlinger* and *Apprendi*, the context in those cases dealt with factually analyzing the nature of a defendant's *motivation and purpose in committing the underlying prior crimes*—specifically, in *Erlinger*, whether the crimes were committed during one criminal episode or on different occasions (*Erlinger* at 841 ["a qualitative assessment about 'the character and relationship' of the offenses . . . (and) whether the (prior) crimes shared 'a common scheme or purpose' "]), and in *Apprendi*—whether the defendant committed the crime with racial bias.

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2. This exception referenced in *Apprendi*—the fact of a prior conviction could be found by a sentencing judge, without a jury—was previously established in the case of *Almendarez-Torres v United States* (523 US 224 [1998]). Notably, the Court explained that recidivism "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence" (*id.* at 243). Although the *Erlinger* Court was critical of *Almendarez-Torres*, notably, it did not overrule it (*Erlinger*, 602 US at 838 ["(N)o one in this case has asked us to revisit *Almendarez-Torres*. Nor is there need to do so today . . . It persists as a 'narrow exception' permitting judges to find only 'the fact of a prior conviction' "]).

Here, in contrast to the nuanced assessments that were required in applying the federal statutes in *Erlinger* and *Apprendi*, no such analysis is needed with respect to New York's persistent violent felony offender statute. As described above, *Erlinger* and *Apprendi* both required a "*qualitative*" analysis requiring *subjective* discretionary determinations, whereas New York's 10 year look back period and tolling provisions under Penal Law § 70.04 (1) (b) (iv) and (v) only necessitate a mechanical "*quantitative*" finding based upon an *objective* numerical calculation which is governed by applying elementary arithmetic to official certified state government records. Further, as to the provision in Penal Law § 70.04 (1) (b) (ii), the "[s]entence upon [a] prior conviction must have been imposed before commission of the present felony," it merely entails inspecting certified certificates of dispositions which unambiguously indicate the dates of defendant's prior convictions.

Moreover, the Supreme Court in *Erlinger* acknowledged that its holding was narrow in scope with the following language: "While recognizing [petitioner] was entitled to have *a jury resolve ACCA's occasions inquiry* unanimously and beyond a reasonable doubt, *we decide no more than that*" (*Erlinger* at 835 [emphasis added]). Thus, it is apparent that the decision in *Erlinger* applied to a specific finding under a particular federal statute that has no relevance to the instant matter (*see also State v Porter*, 2024 WL 4052187, *2, 2024 Ariz App Unpub LEXIS 780, *5 [Sept. 5, 2024, No. 1 CA-CR 23-0157 (unreported)] [construing *Erlinger* to hold only that the defendant "was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt, (but) . . . no more than that"]; *State v Anderson*, 31 Wash App 2d 668, 681, 552 P3d 803, 811 [2024] ["*Erlinger's* holding is limited to resolving ACCA's occasions inquiry"]; *People v Lark*, 2024 WL 4523469, *11, 2024 Cal App Unpub LEXIS 6600, *29-32 [Oct. 18, 2024, C097702]).

In New York, although there is no appellate authority which directly addresses *Erlinger*, after *Apprendi*, the New York Court of Appeals has confronted and rejected constitutional challenges to its persistent violent felony offender statutory scheme (*see People v Bell*, 15 NY3d 935 [2010]; *People v Leon*, 10 NY3d 122 [2008]).

Similarly, the Appellate Divisions in New York on multiple occasions have rejected *Apprendi* challenges to the PVFO statute (*see People v Johnson*, 24 AD3d 967 [3d Dept 2005]; *People*

v Highsmith, 21 AD3d 1037 [2d Dept 2005]; *People v Regan*, 11 AD3d 640 [2d Dept 2004]; *People v Rice*, 285 AD2d 617 [2d Dept 2001]).

Significantly, on the federal level, particularly, in *Washington v Graham* (2007 WL 3197335, 2007 US Dist LEXIS 79598 [ED NY, Oct. 24, 2007, CV-07-1706 (BMC)(LB)], *affd* 355 Fed Appx 543 [2d Cir 2009]) the court held that *tolling* is part of the "fact of conviction," which falls under the exception of *Apprendi*. The court reasoned that calculation of the tolling period is

> "readily ascertainable as a matter of public record in all but the unusual case. *The dates and amount of time served are as or more closely related to the conviction [itself] than any of the other facts surrounding it* . . . If the exception is to include any facts beyond the public record of conviction itself, *the amount of time served would remain within the scope of permissible determinations by the sentencing judge*" (2007 WL 3197335, *5-6, 2007 US Dist LEXIS 79598, *14-15 [emphasis added]; *see also Kelly v Lee*, 2014 WL 4699952, 2014 US Dist LEXIS 132972 [ED NY, Sept. 22, 2014, No. 11-CV-3903(CBA)] [no clearly established federal law requires that a jury make the tolling calculation]; *Cruz v Ercole*, 2010 WL 4860668, 2010 US Dist LEXIS 125389 [SD NY, Nov. 19, 2010, 07 Civ 9868 (RJH)(DF)]).

Finally, when determining the dates of a defendant's prior felony convictions and calculating tolling, inasmuch as both a judge and jury would be bound by the same objective contents of the official certified New York State records, requiring only a jury to perform the ministerial task of reviewing these documents would not only be an enormous waste of resources, it would not in any way assure a more just outcome (*see People v Rivera*).

Based upon all the forgoing, this court declines to expand the limited holding in *Erlinger* and firmly agrees with other New York trial courts that the dates of defendant's prior convictions and the sentences imposed as well as the rote task of mathematical calculations required for tolling can be determined by a judge beyond a reasonable doubt, with proof of certified official records, rather than by a unanimous jury (*see People v Berry*, 86 Misc 3d 1203[A], 2025 NY Slip Op 50859[U] [Sup Ct, Queens County 2025]; *People v Jackson*, 86 Misc 3d 411 [Sup Ct, Queens County 2025]; *People v Taylor*, 86 Misc 3d

263; *People Rivera*, 85 Misc 3d 1032; *People v McKinley*, 85 Misc 3d 467 [Sup Ct, NY County 2024]; *People v Harnett*, 2024 NY Slip Op 34684[U] [Sup Ct, Bronx County 2024]).

Wherefore, this court will conduct a hearing pursuant to the procedure set forth in CPL 400.16 to determine whether under Penal Law § 70.08, defendant is a mandatory persistent violent felony offender and thereafter, sentence him accordingly.

[234 NYS3d 927]

The People of the State of New York v Styles Salter, Defendant.

Supreme Court, Erie County, July 10, 2025

HEADNOTES

Crimes — Sentence — Second Violent Felony Offender — Admission of Prior Conviction

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Criminal Law § 782; Am Jur 2d Habitual Criminals and Subsequent Offenders §§ 30–31, 39, 41, 55.

Carmody-Wait 2d Sentencing Procedures § 203:134; Carmody-Wait 2d Appeals in Criminal Cases § 207:57.

LaFave, et al., Criminal Procedure (4th ed) § 26.6.

NY Jur 2d Criminal Law: Procedure §§ 3365, 3370, 3570.

ANNOTATION REFERENCE

Concession, admission, or statement by defendant's attorney in criminal case as obviating necessity of introducing evidence on the point. 70 ALR 94.

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Query: "second violent felony offender" & ("criminal history" or (prior /s conviction or offense) /p admi*! /p unpreserv! or preserv!)

APPEARANCES OF COUNSEL

Styles Salter, defendant pro se.

Michael J. Keane, District Attorney (*Mindy VanLeuvan* of counsel), for the People.

OPINION OF THE COURT

Betty Calvo-Torres, J.

The defendant moves to set aside his sentence pursuant to CPL 440.20, claiming he was denied his right to a jury trial on the issue of whether he was a second violent felony offender. The People argue that the defendant does not have the right to

a jury trial on this issue, and that the issue is unpreserved. The court agrees that the issue is unpreserved. The court makes its findings after considering the defendant's affidavit in support of motion to set aside sentence dated April 3, 2025, and the People's opposing affidavit dated June 12, 2025.

The defendant stands convicted after entering a plea of guilty to criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), under indictment 01016-2019, and criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), and resisting arrest (Penal Law § 205.30), under indictment 01270-2020. Before sentencing, the People filed with the sentencing court a statement pursuant to CPL 400.15 alleging that the defendant was a second violent felony offender. The defendant was sentenced as a second violent felony offender under Penal Law § 70.04.

The defendant now contends that his sentence should be set aside because he was denied a jury trial to determine if he was in fact a second violent felony offender, citing *Erlinger v United States* (602 US 821 [2024]). However, upon review of the transcript of the defendant's sentencing, attached to the defendant's moving papers as exhibit A, it is clear the defendant admitted he was convicted of a prior violent felony offense as alleged by the People in their statement pursuant to CPL 400.15. This admission was made after the defendant had consulted with counsel. Because the defendant did not contest his criminal history, the issue of whether he had a right to a jury trial to decide if he had in fact been convicted of the prior offense is unpreserved (*People v Hernandez*, 43 NY3d 591 [2025]).

Accordingly, the court declines to decide whether the defendant has a right to a jury trial to determine if he is a second violent felony offender, and the defendant's motion to set aside his sentence is denied.

[239 NYS3d 765]

Dean Taylor, Plaintiff, v City of Buffalo et al., Defendants.

Supreme Court, Erie County, April 23, 2025

HEADNOTES

Crimes — Witnesses — Expert Witness — Deliberate Indifference to Police Practices

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Civil Rights § 81; Am Jur 2d Expert and Opinion Evidence §§ 23, 26, 28–30; Am Jur 2d Municipal, County, School, and State Tort Liability §§ 348, 359, 382–383, 385.

Carmody-Wait 2d Particular Types of Evidence §§ 194:180, 194:182, 194:192.

Dobbs Law of Torts (2d ed) §§ 75–76, 355.

NY Jur 2d Evidence and Witnesses §§ 634, 638–641, 652, 654, 669, 672; NY Jur 2d Government Tort Liability §§ 135, 141–142.

New York Law of Torts § 17:67.

ANNOTATION REFERENCES

Liability of supervisory officials and governmental entities for having failed to adequately train, supervise, or control individual peace officers who violate plaintiff's civil rights under 42 U.S.C.A. § 1983. 70 ALR Fed 17.

What constitutes policy or custom for purposes of determining liability of local government unit under 42 U.S.C.A. § 1983—modern cases. 81 ALR Fed 549.

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Query: (expert /s testimony or witness or report) /p "deliberate indifference" or (excessive /5 force)

APPEARANCES OF COUNSEL

Trek Fulater and *Ryan M. Sollenne* for defendants.

Blake Zaccagnino and *Leonard D. Zaccagnino* for plaintiff.

OPINION OF THE COURT

John J. DelMonte, J.

Decision on *Frye* Hearing

Plaintiff Dean Taylor (plaintiff) timely served an expert disclosure filing, to wit, plaintiff's expert disclosure dated March 28, 2025 (marked as hearing exhibit 1 and previously filed in New York State Courts Electronic Filing System [NYSCEF] as Document No. 88). Defendants opposed the expert disclosure on various grounds by way of a motion in limine (NYSCEF Doc No. 77). The motion was fully opposed by plaintiff and was heard for oral argument on April 17, 2025, at which time the court ordered a *Frye* hearing to be conducted on April 22, 2025, commencing at 10:00 a.m. which was thereafter mutually adjourned to 2:00. The hearing was ordered to determine the admissibility and scope of the proffered testimony of plaintiff's proposed expert witness, Anjana Malhotra, Esq., in support of plaintiff's *Monell* municipal liability cause of action against defendant City of Buffalo (the defendant city) under 42 USC § 1983 (*see* NYSCEF Doc No. 1, complaint, second cause of action). That cause of action is substantially grounded on the plaintiff's liability theory commonly known and referred to as "deliberate indifference" based on allegations of the Buffalo Police Department's (BPD) alleged long-time lack of cogent recognition of the history of complaints of malignant use of force filed for many years against its officers which has been compounded by its hierarchal failure to investigate those complaints and implement a clean and clear policy of definitive discipline to send a message to its members that such misconduct will not be tolerated.

The hearing proceeded with Ms. Malhotra being called by plaintiff's counsel for questioning on the three elements required to be shown to validate the proposed expert testimony: (1) the education, training, experience and skill set of the proposed expert witness in the field of proposed professional or scientific knowledge; (2) the ability of the witness to express and render an opinion on the subject matter to a reasonable degree of certainty; and (3) demonstrating that the proposed expert witness's testimony exceeded the knowledgeable "ken" of the average common man juror. The Court of Appeals has put the crux of the proper use and admissibility of an expert when such testimony is appropriately found to be needed "on an issue which involves a 'professional or scientific knowledge or skill not within the range of ordinary training or intelligence.' " (*Selkowitz v County of Nassau*, 45 NY2d 97, 102 [1978].) Tangentially, there are also cases where an expert has been allowed to testify on a restricted or limited basis (*see Su-*

pensky v State of New York, 2 AD3d 1436 [4th Dept 2003] [as a witness to authenticate certain publications of standards and practices in the industry at issue]). In the realm of non-scientific or uniquely professional knowledge (e.g., medical or legal malpractice), the Court of Appeals has recognized that "particularly 'in the social science arena, we have measured the reliability of novel hypotheses and theories—not just methodologies—against the *Frye* standard.' " (*People v Powell*, 37 NY3d 476, 489-490 [2021] [citation omitted].) The present case comes under the penumbra of this overarching statement from the Court of Appeals which was further expounded upon with its reiteration that

> " '[i]t is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness.' " (*Id.* at 490 [citation omitted], quoting *People v Taylor*, 75 NY2d 277, 288 [1990].)

Ms. Malhotra testified extensively with respect to her exemplary educational and academic achievements, buttressed by her professional work experience with the New York State Attorney General's Office assigned to the Civil Rights Bureau, her affiliated time and involvement as a teaching and clinical studies professor at the University of Buffalo Law School, while also immersing herself on a continuing course of legal education in the field of civil rights with numerous courses at John Jay College addressing the threshold issues of civil and constitutional rights under the Federal and State Constitutions and the rights and remedies to be recognized when violations occur, as well as her time, research and extensive role as the lead supervisor and principal author of a clinical study report dated and issued to the New York State Attorney General's Office on August 30, 2017, relating to the pattern of policies, procedures and practices of the BPD relative to its course of dealing with citizen-filed complaints of "use of force" or "excessive use of force" by officers of the BPD (such reports being filed either directly by the complainant citizen with the BPD or its Internal Affairs Department [IAD] [or by way of the complainant filing a lawsuit, regardless of whether he/she filed an IAD report] as well as those reports internally reported by officers under the BPD's Manual of Policies [MOP]) (the AG Report). The full depth of the witness's educational, profes-

sional work and related experience fully satisfied *prong one* of the three-step analysis notwithstanding the fact that there was only tangential reference to Ms. Malhotra ever being previously found to qualify as an "expert" witness by a trial court.*

Ms. Malhotra was not asked pointedly about *prong two*, but based on her other testimony the court reasonably infers that she would have answered any inquiry about her ability to render an opinion on most of the underlying issues in dispute with a reasonable degree of certainty in the disciplinary field of "police practices" in the affirmative.

The challenging element of concern in this action stems from *prong three*: is the body of professed expertise and knowledge developed to review and examine the implementation of good and constitutionally compliant "police practices" a field of unique human knowledge that has been customarily associated with needing expert testimony. It has been held that in cases where an expert has been allowed to testify about common and ordinary negligence where his testimony "did not exceed the scope of common knowledge, the admission of such proof constituted *reversible error*" (*Berger v Tarry Fuel Oil Co*., 32 AD3d 409, 409 [2d Dept 2006] [citations omitted] [emphasis added]). Indeed, based on the hearing record, it is unclear whether the "experts in my field" referred to by the witness have been found to qualify as being in a field of special, unique, professional or scientific knowledge. See *Chase Scientific Research v NIA Group* (96 NY2d 20 [2001]) for a digesting of the critical analysis given to this issue and how it was found to be very restrictive by the Court of Appeals.

Multiple cases involving the section 1983 cause of action raised in this action have found expert testimony (or sworn expert affidavit submissions) to be relevant. In *Vann v City of New York* (72 F3d 1040 [2d Cir 1995]), the court recognized and adopted two lines of potential evidentiary support for a plaintiff to "establish the pertinent custom or policy by showing that the municipality, alerted to the possible use of excessive force by its police officers, exhibited deliberate indifference." (*Id.* at 1049.) The court continued by saying,

> "the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. An obvious need may be

* The record includes her testimony about, and an affidavit filed by her in, a previous case as an expert witness (the affidavit was received as an exhibit without objection) in a case against the BPD in 2019, *Rupp v City of Buffalo.*

> demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents." (*Id.* [citation omitted].)

Essentially, that's part one of the available line of proof that could potentially support a plaintiff's *layman's* efforts to make the case. The court then went on as follows:

> "Deliberate indifference may also be shown through expert testimony that a practice condoned by the defendant municipality was 'contrary to the practice of most police departments' and was 'particularly dangerous' because it presented an unusually high risk that constitutional rights would be violated." (*Id.* at 1049 [citations omitted].)

More cogently, the *Vann* court explicitly noted that the defendant's argument that its decision in a prior case, *Sarus v Rotundo* (831 F2d 397 [2d Cir 1987]), that found no liability for deliberate indifference where a municipality had adopted supervisory mechanisms for dealing with problem officers, was misplaced by reason of the fact that "[t]he plaintiffs in *Sarus* presented no evidence as to the municipality's response to any prior incident of misconduct, no evidence that superior methods were in use in other police departments, *and no expert testimony* as to proper police procedures." (*Vann* at 1050 [emphasis added].)

The acceptable use of expert testimony, albeit in the form of an affidavit, in a *Monell* claim lawsuit was more recently recognized with explicit reference to *Vann* as the source for laying out the test for section 1983 liability in *Jackson v City of Saratoga Springs* (81 Misc 3d 490 [Sup Ct, Saratoga County 2023]). In an exhaustive and exquisitely drafted opinion, Supreme Court Justice Buchanan digested the core elements of proof in one of these cases pointedly, as follows:

> "Proof of deliberate indifference can take the form of repeated complaints of civil rights violations with no meaningful attempt to investigate or to prevent further incidents. It can also be shown by expert testimony that a practice condoned by the municipality presented an unusually high risk that constitutional rights would be violated." (*Id.* at 501 [citation omitted].)

Conclusion

Based on the foregoing it is the court's determination and decision to allow the plaintiff to proffer his proposed expert witness to testify specifically and consistent within the parameters of the form of expert proof outlined in the above quoted language of the courts in *Vann* and *Jackson* on the elements of deliberate indifference by way of credible and recognizable data shown to be within the use and acceptance of the professionals in the field of "police practices" to examine the generally accepted policies, procedures and practices recognized by the professionals in that field of law enforcement behavior as the baseline of performance by a local law enforcement agency, in this case the BPD, to uphold constitutional protections against violations of physical assault and harm in violation of the Fourth Amendment of the Constitution, and what degree of deviation from that baseline is viewed as improper and creating the risk of causing such Fourth Amendment harm to the public.

The expert witness shall not be asked or permitted to testify about the details of settlements or discuss the disposition reached in other cases of alleged excessive use of force. The unique facts of those cases are not to be interposed or put before the jury in the trial of this action. The scope of the witness's testimony must be strictly connected to and derived from credible foundational sources of data that show the baseline for compliance with the generally accepted and fundamental policies, procedures and practices to be followed by all relevantly relatable law enforcement agencies and what the statistical deviation from such baseline results may allow counsel for the parties to argue to the jury, their client's position on whether the BPD's behavior and actions should be viewed to hold or not hold it (the BPD) accountable for some measure of deliberate indifference for its "conscious decision to ignore them [such policies, etc.], effectively ratifying them." (*Jackson* at 501, quoting *Amnesty Am. v Town of W. Hartford*, 361 F3d 113, 126 [2d Cir 2004].) The expert witness is not to be asked or otherwise coaxed or nuanced to provide any opinion on the foregoing issue which is the ultimate question of fact to be decided by the jury.

Accordingly, the defendants' motion in limine on the preclusion of the plaintiff's expert disclosure and proffered expert

testimony is denied within the limitations for such testimony to be offered as set forth above.

[236 NYS3d 579]

The People of the State of New York v Paul Godwin, Defendant.

Criminal Court of the City of New York, Bronx County, July 15, 2025

HEADNOTES

Crimes — Aggravated Harassment — Serious Offense — Intimate Relationship under CPL 370.15

RESEARCH REFERENCES

By the Publisher's Editorial Staff

Am Jur 2d Domestic Abuse and Violence §§ 9–10; Am Jur 2d Trial § 1443.

Carmody-Wait 2d Appeals in Criminal Cases § 207:143.

NY Jur 2d Criminal Law: Procedure § 3705; NY Jur 2d Criminal Law: Substantive Principles and Offenses §§ 1778, 1792; NY Jur 2d Domestic Relations: Family Court Proceedings §§ 503, 505.

ANNOTATION REFERENCE

See ALR Index under Criminal Law; Evidence; Harassment; Verdicts.

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Query: "aggravated harassment" /p "intimate relationship"

APPEARANCES OF COUNSEL

Darcel D. Clark, District Attorney (*Michael Briggs* of counsel), for the People.

The Bronx Defenders (*Ivan Marchena* of counsel) for defendant.

OPINION OF THE COURT

Craig J. Ortner, J.

On April 1, 2025, defendant Paul Godwin pleaded guilty to one count of aggravated harassment in the second degree, in violation of Penal Law § 240.30 (4). The People allege that the

defendant and complainant,[1] E.R., were members of the same family or household, to wit, that they were in an intimate relationship, and filed CPL 370.15 notice. Defendant denies the relationship. As discussed herein, the significance of this dispute is that if the relationship alleged were established, defendant's conviction would then be designated a "serious offense" (CPL 370.15). That, in turn, would impact his ability to lawfully own or possess a firearm in the future.

On May 13, 2025, the court held a hearing pursuant to CPL 370.15. For the reasons discussed below, the court determines that the People have met their burden of establishing that the defendant and complainant are in or were in an intimate relationship. Therefore, defendant's conviction for aggravated harassment in the second degree (Penal Law § 240.30 [4]) constitutes a "serious offense" and must be reported to the State Division of Criminal Justice Services in accordance with CPL 370.15.

Procedural History

On August 18, 2024, the defendant was arrested in connection with the instant matter. Defendant was arraigned on a criminal court complaint the next day, August 19, 2024. At the arraignment, the People filed and served notice pursuant to CPL 370.15 stating that "the defendant and victim are in or were in an intimate relationship" and that the defendant is charged with a qualifying crime (People's CPL 370.15 notice).

On October 18, 2024, the People filed and served a superseding information (SSI) signed by the complainant on October 1, 2024. In the SSI, the complainant affirmed, inter alia, "that she and the defendant are former intimate partners." On November 20, 2024, the defendant appeared in court and was arraigned on the information. The People carried over all previously filed notices from the August 19, 2024 criminal court arraignment.

On April 1, 2025, the defendant pleaded guilty to aggravated harassment in the second degree (Penal Law § 240.30 [4]) and was sentenced to a conditional discharge and a five-year full and final order of protection in favor of the complainant. Pursuant to CPL 370.15, the court asked the defendant whether he admitted to being in a current or former intimate relationship with the complainant as alleged in the People's CPL

1. The court uses the terms "complainant" and "victim" interchangeably throughout this decision.

370.15 notice. Defendant denied any such relationship. The matter was therefore adjourned for a CPL 370.15 hearing.

On May 13, 2025, the court held the CPL 370.15 hearing. The People called one witness, Officer Liam San Giorgio, and moved five items into evidence: the handwritten complaint report (People's exhibit 1); the domestic incident report (DIR) (People's exhibit 2); the complainant's medical records (People's exhibit 3); Officer San Giorgio's body-worn camera footage (BWC) (People's exhibit 4); and the SSI filed on October 18, 2024 (People's exhibit 5). The defense did not call any witnesses or introduce any evidence.

Findings of Fact

On August 18, 2024, at approximately 5:00 a.m., the defendant and complainant were at the defendant's apartment, when the complainant attempted to leave (People's exhibit 2). The defendant grabbed the complainant's hair, threw her to the floor, and struck her in the nose, resulting in a laceration and bleeding (People's exhibit 1; People's exhibit 2; People's exhibit 5). The defendant's mother called the police (People's exhibit 2 at 2).

At 5:40 a.m., Officer San Giorgio, who was working as a member of the NYPD, responded (hearing tr at 13, lines 17-22). When Officer San Giorgio entered the apartment, he observed the defendant and complainant in the kitchen (*id.* at 14, lines 5-7). The complainant and defendant were standing in an embrace, with the complainant's shirt appearing to be covered in blood (People's exhibit 4 at 3:46; tr at 14, lines 6-7). Officer San Giorgio asked the complainant and defendant to step out of the kitchen (tr at 14, lines 10-11). Officer San Giorgio observed that the defendant appeared intoxicated and confused (*id.* at 14, line 13; at 19-20). Defendant told the officer, "Me and my girlfriend had an argument" (People's exhibit 4 at 3:49). The defendant's mother, who was also present in the apartment, stated, "that's not your girlfriend . . . she don't want you" (People's exhibit 4 at 3:51; tr at 20, lines 20-24).

After the defendant was placed in handcuffs, Officer San Giorgio escorted him outside and directed him to the back of a marked police vehicle (People's exhibit 4 at 15:14). Defendant repeatedly asked to speak to the complainant, stating, "can I just say something to my baby before I go?" and "can I just say something to my wife?" (*id.* at 12:37, 15:38). Defendant also told Officer San Giorgio that he wanted to tell the complainant, "Baby, I love you" (*id.* at 12:37).

While Officer San Giorgio escorted the defendant outside, another officer, Officer Miguel Rojas, spoke with the complainant and prepared a DIR (tr at 23, lines 14-15; People's exhibit 2). Officer Rojas filled out the first page of the DIR, where he provided a description of the incident based on the complainant's statements. Officer Rojas also indicated that the defendant and complainant were "intimate partner[s]/dating" (People's exhibit 2 at 1). The complainant filled out the second page of the DIR, where she wrote a statement of the allegations and signed under penalty of perjury (*id.* at 2).

Later that morning, at around 6:39 a.m. the complainant sought treatment at a hospital for a nasal laceration and facial swelling (People's exhibit 3 at 5). The complainant informed the emergency department nurse that she had been assaulted "by her boyfriend" and that "police arrested the boyfriend" (*id.* at 21).

Conclusions of Law

In New York, when a person is convicted of a felony or "serious offense" he or she is barred from obtaining a firearms related license (Penal Law § 400.00). However, until 2018, the term "serious offense" did not explicitly include misdemeanor crimes of domestic violence. Concerned about the association between domestic violence and shootings, the New York State Legislature in 2018 enacted new laws to include within the definition of "serious offense" misdemeanor crimes involving domestic violence. The stated purpose of these laws was to prohibit domestic violence perpetrators, whether convicted of felonies or misdemeanors, from obtaining firearms (*see* Senate Introducer's Mem in Support of 2018 NY Senate Bill S8121, enacted as L 2018, ch 60).

Among the provisions of the 2018 bill were the additions of Penal Law § 265.00 (17) (c) as well as CPL 370.15[2] and 370.25 (*see* 2018 NY Senate Bill S8121). These provisions convert certain misdemeanor crimes into "serious offenses" when committed against a member of the same family or household and place specific obligations on the court, including notifying the relevant authorities that a defendant has been convicted of a "serious offense" (Penal Law § 265.00 [17] [c]; CPL 370.25 [1]).

CPL 370.15 outlines the procedure for determining the status of those misdemeanors that only constitute "serious offenses"

2. Technically, Bill S8121 repealed the previous version of CPL 370.15 and enacted a completely new statute in its place (2018 NY Senate Bill S8121).

when committed against a member of the same family or household. First, CPL 370.15 (1) provides an exhaustive list of qualifying misdemeanor charges, including aggravated harassment in the second degree.[3] When a defendant is charged with a qualifying offense, the People must, within 45 days of arraignment, file and serve "notice alleging that the defendant and the person alleged to be the victim of such crime were members of the same family or household," as defined in CPL 530.11 (1) (CPL 370.15 [1]). "Such notice shall include the name of the person alleged to be the victim of such crime and shall specify the nature of the alleged relationship" (CPL 370.15 [2]).

Upon conviction of a qualifying misdemeanor offense, the court must determine whether the defendant and victim are related in the manner described in the People's notice. This can occur one of two ways: if the defendant admits to the relationship, the inquiry is satisfied. If the defendant denies the relationship, or remains silent, then the court must conduct a hearing solely on the issue of the nature of the defendant's relationship to the victim as alleged in the People's notice (CPL 370.15 [2]).

At a CPL 370.15 hearing, the People bear the burden of establishing beyond a reasonable doubt that the defendant and complainant were related or situated in the manner alleged in the People's notice (CPL 370.15 [3]). The court may consider relevant, reliable hearsay[4] (*id*.). Additionally, "[f]acts previously proven at trial or elicited at the time of entry of a plea of guilty shall be deemed established beyond a reasonable doubt and shall not be relitigated" (*id*.).

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3. Here, the CPL 370.15 notice designates assault in the third degree as the "serious offense" for purposes of the statute. As noted above, defendant pleaded guilty to aggravated harassment in the second degree. However, defendant never challenged the adequacy of the notice despite fully litigating the relationship issue, thus waiving any objections (*see People v Garcia*, 290 AD2d 299 [1st Dept 2002]). Furthermore, on its face CPL 370.15 does not require that the People specify which offense they intend to rely on in establishing that the conviction was for a "serious offense." As the notice contains the name of the victim and specifies the nature of the relationship, the court deems the notice adequate.

4. The statute does not define what constitutes "reliable hearsay." As defense did not object to any of the People's evidence, this court need not delve into this issue. However, it is worth noting that the Court of Appeals has deemed hearsay to be reliable in the context of Sex Offender Registration Act hearings, "if, based on the circumstances surrounding the development of the proof, a reasonable person would deem it trustworthy" (*People v Mingo*, 12 NY3d 563, 574 [2009]).

This court is unaware of any appellate, or even persuasive authority on CPL 370.15 hearings. Thus, this case appears to be one of first impression, at least in Bronx Criminal Court. The court is guided, therefore, by the statutory text of CPL 370.15, CPL 530.11, and case law on adjacent issues, including the interpretation of CPL 530.11 in other contexts.

As the People's CPL 370.15 notice alleges that the defendant and complainant "are in or were in an intimate relationship," the court must decide whether the People have established such relationship beyond a reasonable doubt.

Defining Intimate Relationship

The Criminal Procedure Law does not explicitly define "intimate relationship." Rather, CPL 530.11 provides a non-exhaustive list of factors that the court may consider when determining whether the parties were in such a relationship.[5] These factors include "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship" (CPL 530.11 [1] [e]). The CPL further provides that an intimate relationship is not a "casual acquaintance nor ordinary fraternization between two individuals in business or social contexts" (*id.*). "Because the Legislature declined to include a definition of the term 'intimate relationship' . . . courts should construe the term using its usual and commonly understood meaning" (*Matter of Jessica D. v Jeremy H.*, 77 AD3d 87, 89-90 [3d Dept 2010] [determining, for purposes of family court jurisdiction, that two people were in an intimate relationship under Family Ct Act § 812 (1) (e), which contains identical language to CPL 530.11 (1) (e)] [internal quotation marks and citations omitted]).

Intimate relationships, which have been the subject of plays, poems, and songs for millennia, are multifaceted and complicated. Determining whether two people are in, or were in, an intimate relationship requires that courts adopt a holistic approach and engage in a "case-by-case" analysis (*see Matter of Seye v Lamar*, 72 AD3d 975, 976 [2d Dept 2010]; *see also Jessica D.,* 77 AD3d at 89-90 [finding that an intimate relationship was established where the parties had an intermittent sexual relationship and periodically lived together]; *People v*

5. CPL 530.11 dictates procedures for family offense matters and confers concurrent jurisdiction over criminal and family courts for certain acts or offenses committed against "members of the same family or household," which is defined in subdivision (1).

Brabant, 229 AD3d 892, 894-895 [3d Dept 2024] [holding the defendant's admission that he and the victim were in an intimate relationship, despite maintaining separate residences, sufficient to establish that they were members of the same family or household]; *People v Shortell*, 146 AD3d 1076, 1077 [3d Dept 2017] [finding a legally sufficient basis for an intimate relationship where the defendant lived with the victim "most of the time" for three years, the defendant and victim were sexually intimate, and the defendant referred to the victim as "his girl"]).

Here, the court finds that the People have met their burden of establishing beyond a reasonable doubt that the defendant and complainant are in or were in an intimate relationship. In making this determination, the court considers the following factors: both the complainant and defendant referred to each other using terms commonly associated with romantic partners; the complainant was at the defendant's residence during early morning hours; the complainant and defendant demonstrated physical intimacy; and the complainant and defendant acted with familiarity indicative of an intimate relationship.

First, the court notes that the complainant and defendant referred to each other using terms traditionally associated with romantic, or intimate relationships. As depicted on Officer San Giorgio's body-worn camera footage, the defendant called the complainant his "girlfriend," "wife," "my lady," and "my baby" (People's exhibit 4 at 3:49, 5:49, 8:04, 9:08, 15:38). As Officer San Giorgio led the defendant to the back of the police car, the defendant stated, "Can I just say something to my baby before we go? . . . I need to just say, 'baby I love you' " (*id.* at 12:37). The complainant also referred to the defendant as her "boyfriend" and "intimate partner" in multiple sources. In the superseding information, signed by the complainant under penalty of perjury on October 1, 2024, the complainant affirmed that she and the defendant are "former intimate partners" (People's exhibit 5). The complainant's medical records from the hospital, where she was admitted less than one hour after Officer San Giorgio arrived on scene, reflect that the complainant reported being "assaulted by her boyfriend," and that she further informed hospital staff that "police arrested the boyfriend" (People's exhibit 3 at 5, 21).

In addition to the complainant's and defendant's words, their behavior was also consistent with that of intimate partners. For instance, the complainant was present at the defendant's

apartment at the early hour of 5:00 a.m. when the incident occurred. Additionally, Officer San Giorgio's BWC shows the complainant and defendant standing in an embrace until the police asked them to step outside of the kitchen (People's exhibit 4 at 3:46). Standing alone, an embrace or presence in another adult's apartment at an early hour might not be sufficient to establish an intimate relationship. But when considered together and in light of the way the defendant and complainant each independently and repeatedly referred to each other, they paint the picture of an intimate relationship (*see Brabant*, 229 AD3d at 894-895; *Shortell*, 146 AD3d at 1077).

Defendant argues that the People have not met their burden of establishing an intimate relationship. Specifically, he avers that the People's evidence fails to establish the duration of the relationship or detail how many times the defendant and complainant interacted, both of which are factors listed in CPL 530.11 (1) (e). Defendant also avers that the People fell short by only calling Officer San Giorgio to testify as he did not interview the complainant but rather spoke only with the defendant. The defense argues that the court should not credit the defendant's statements referring to the complainant as his "wife," "girlfriend," etc. because he made such statements while intoxicated and they are merely indicative of wishful thinking. As evidence of wishful thinking, the defense points to the fact that the defendant's mother can be heard on Officer San Giorgio's BWC, stating "that's not your girlfriend . . . she don't want you" (People's exhibit 4 at 3:51).

The court is not persuaded by these arguments. Although the People did not establish the duration of the relationship or frequency of interactions, these are not necessary elements for establishing an intimate relationship. Rather, they are factors that a court "may consider" (CPL 530.11 [1] [e]). As for defendant's argument that Officer San Giorgio's testimony was insufficient, the court would be more persuaded if there were no other evidence in addition to his testimony. However, the People's evidence included medical records, police reports, and sworn statements by the complainant. Similarly, although defendant may have been intoxicated while speaking with the police, the court did not consider his statements in a vacuum. Rather, the court also took into consideration the complainant's statements as well as both individuals' actions. In fact, even defendant's mother's statement, "that's not your girlfriend,"

which was made at the defendant's residence shortly after 5:30 a.m., taken in context, indicates a certain familiarity with the complainant—the natural inference being that this is more than a casual acquaintance.

Conclusion

Pursuant to CPL 370.15, the court finds that the defendant, Paul Godwin, and victim, E.R., were members of the same family or household in that they were in an intimate relationship as defined by CPL 530.11 (1) (e). Therefore, defendant's conviction of aggravated harassment in the second degree (Penal Law § 240.30 [4]), to which he pleaded guilty on April 1, 2025, constitutes a "serious offense." Accordingly, defendant's conviction shall be reported to the State Division of Criminal Justice Services within three business days of this decision as one in which the defendant and the victim were members of the same family or household as defined in CPL 530.11 (1) (*see* CPL 370.15 [1], [2]). Defendant is hereby ordered to immediately surrender any firearms, rifles, or shotguns in his possession (CPL 370.25).[6]

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6. Defendant has not indicated that he possesses firearms, rifles, or shotguns. Still, the court gives this instruction in an abundance of caution.

[239 NYS3d 445]

CODY H. et al., Individually and as Parents and Natural Guardians of A.H., an Infant, Claimants, v STATE OF NEW YORK, Defendant. (Claim No. 137291.)

Court of Claims, June 16, 2025

HEADNOTES

State — Sovereign Immunity — Governmental Function — Newborn Screening Program

State — Claim against State — Negligence — Special Relationship

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Municipal, County, School, and State Tort Liability §§ 38, 44–45, 53, 83–87, 102, 105; AM JUR 2d States, Territories, and Dependencies §§ 98–99.

CARMODY-WAIT 2d Actions in the Court of Claims §§ 120:7, 120:10–120:11; CARMODY-WAIT 2d Actions by or Against the State §§ 126:129–126:130.

DOBBS LAW OF TORTS (2d ed) §§ 342, 344, 346.

NY JUR 2d Government Tort Liability §§ 19–21, 33, 191; NY JUR 2d Health and Sanitation § 147; NY JUR 2d State of New York § 184.

NEW YORK LAW OF TORTS §§ 17:2, 17:8, 17:43, 17:45, 17:47.

ANNOTATION REFERENCE

State's immunity from tort liability as dependent on governmental or proprietary nature of function. 40 ALR2d 927.

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APPEARANCES OF COUNSEL

Steve Foley Law (*Stephen R. Foley* of counsel) for claimants.

Letitia James, Attorney General (*Michael T. Feeley* of counsel), for defendant.

OPINION OF THE COURT

FRANCISCO CALDERON, J.

The tragic facts of this case are largely undisputed. In March 2021, claimant Brittany H. gave birth to her and claimant Cody H.'s first child, claimant A.H. Shortly thereafter, a blood sample was taken from A.H. for the State's Newborn Screening Program—an initiative started by the State in the 1960s that now tests for over 50 conditions, including spinal muscular atrophy (SMA). A.H.'s sample screened positive for SMA. However, due to a transcriptional error, A.H.'s pediatrician was sent a report indicating that A.H. did not screen positive for any of the tested conditions. A few months after her birth, A.H. began experiencing the symptoms of SMA and was subsequently diagnosed with such. However, because A.H. did not begin treatment until after her symptoms manifested, the deleterious effects of her condition could not be averted.

Claimants commenced this action, alleging that defendant is negligent for inaccurately relaying the results of A.H.'s screening. Defendant answered, raising 23 affirmative defenses. Claimants now move, following discovery, to strike all of defendant's affirmative defenses. Defendant opposes the motion and cross-moves for summary judgment to dismiss the claim. Claimants oppose defendant's cross-motion. The parties were permitted to supplement their papers in response to the Court of Appeals' decision in *Weisbrod-Moore v Cayuga County* (44 NY3d 187 [2025]). The court heard the parties for oral argument on April 23, 2025. For the reasons stated below, claimants' motion to strike defendant's affirmative defenses is denied and defendant's cross-motion for summary judgment is granted.

Factual Background

In support of their motion, claimants submit, among other exhibits, the depositions of Michele Caggana, Brittany H., and Cody H.; the original and corrected reports with A.H.'s screening results; reports generated by the Wadsworth Center in relation to this incident; the brochure about the newborn screening program given to parents; and excerpts from the Wadsworth Center's website.

As stated in her deposition, Dr. Michele Caggana is the Deputy Director for the Division of Genetics, Director of the Newborn Screening Program, and Chief of the Laboratory of Human Genetics at the Wadsworth Center, a division of the Department of Health. Dr. Caggana relayed that the newborn

screening program began in 1965 to test for a condition known as phenylketonuria. Since then, the program has expanded to test for numerous disorders that, if discovered early, can be effectively treated. This testing is compulsory pursuant to the Public Health Law absent a religious exception. All parents with newborns receive a brochure explaining what the genetic testing involves and that their doctor will receive a report with the results. The testing is conducted at the Wadsworth Center. Dr. Caggana explained, and as supplemented by the Wadsworth Center's website, that one of the conditions covered by the program is SMA, which is a genetic neuromuscular disorder that can be effectively treated before symptoms develop. If the condition is not uncovered early, a child with SMA will manifest symptoms within a few months and suffer permanent muscle degeneration.

Dr. Caggana first learned of A.H. when she was contacted by a physician treating her who suspected that she had SMA. Dr. Caggana conducted an investigation and discovered that, although A.H. had tested positive for SMA, the control value for the test had been accidentally entered into the results column. Therefore, although A.H. should have screened positive for SMA, she instead received a negative report. After this was uncovered, a new report for A.H. was generated indicating that she was positive for SMA.

While Dr. Caggana stated that the tests are reliable, she also stressed that the screening program is not intended to be a diagnostic test. In other words, even if an infant screens positive for a condition, they should not be diagnosed until follow-up testing is performed by the infant's pediatrician. Both the brochure given to parents and the Wadsworth Center website warn that a negative screen does not necessarily mean an infant will be healthy, with the latter stating that "[p]arents *should not* be told that a negative screen rules out SMA" (Wadsworth Ctr website excerpts, affirmation in supp of mot, exhibit K, 17). Similarly, the screening report received by pediatricians states that "[t]hese tests are not diagnostic" (negative rep, *id.*, exhibit D, 2).

During her deposition testimony, Ms. H. stated that she brought A.H. to see her pediatrician within one week of her birth. At that time, the pediatrician indicated that A.H. was healthy. However, approximately two months after her birth, the pediatrician began to have concerns about A.H.'s muscular development and recommended that she see a neurologist.

Eventually, A.H. was diagnosed with SMA. Ms. H. was told by the physician that, had A.H. been diagnosed earlier, she likely would not have developed symptoms of SMA. A.H. began treatment shortly after her diagnosis. However, she requires use of a wheelchair, cannot crawl or walk, and cannot transition from one body position to another on her own. She also requires extensive physical therapy every week. Mr. H.'s deposition confirmed Ms. H.'s recounting of events.

Claimants also submitted the affirmation of Abigail Schwaede, M.D., a doctor with board certification in neurology and special qualification in child neurology. Dr. Schwaede averred that, if SMA is diagnosed early, infants can be treated before the onset of symptoms and without negative effects. However, because A.H. was diagnosed after the onset of symptoms, she suffered from permanent neuromuscular deficits that could have been avoided had she started treatment earlier.

In response, defendant submitted an affirmation from Dr. Caggana and the test result from a private laboratory in which A.H. was diagnosed with SMA. In her affirmation, Dr. Caggana provided more information about the screening program. In particular, she stated that New York is one of only two states that does not charge for newborn screening services and that the program is instead funded through a suballocation by the Department of Financial Services, with a 2023-2024 allotment of $14,088,017. Between 205,000 and 227,000 infants are tested each year through the program, resulting in the State reporting around 1.7 million test results over the course of six years. The program began testing for SMA in 2018 following a two-year pilot study.

Law and Analysis

Because it is potentially dispositive, the court will first address defendant's motion for summary judgment to dismiss the claim. The proponent of a motion for summary judgment bears the initial burden of establishing the right to judgment as a matter of law by tendering sufficient evidence, in admissible form, demonstrating the absence of material issues of fact from the case (*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 496 [2019], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On such motion, "the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn" in favor of the non-moving party (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d at

496 [internal quotation marks and citations omitted]). Once the moving party has demonstrated its prima facie entitlement to summary judgment, the burden shifts to the opposing party to demonstrate the existence of a triable issue of material fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], citing *Alvarez*, 68 NY2d at 324).

When asserting a common-law negligence claim in New York, a claimant "must demonstrate (1) a duty owed by the defendant to the [claimant], (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022] [internal quotation marks and citation omitted]). Thus, "[i]n any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the [claimant]" (*Gilson v Metropolitan Opera*, 5 NY3d 574, 576 [2005]; *see Weisbrod-Moore v Cayuga County*, 44 NY3d 187, 191 [2025]). When a negligence claim is asserted against the State, the court must first determine whether the State's actions were governmental or proprietary. Then, if the actions were governmental in nature, the claimant must demonstrate that the defendant owed them a special duty. If the claimant does so, the defendant may still not be liable if it can prove it is entitled to the defense of governmental immunity.

A. Governmental or Proprietary Function

On a negligence claim against the State, "the first issue for a court to decide is whether the [State] was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *accord Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 713 [2017]). If its actions are proprietary, the State "is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" and it may not rely on the establishment of a special relationship or governmental immunity (*Applewhite*, 21 NY3d at 425). A governmental entity's activities are "purely proprietary" when it "substitute[s] for or supplement[s] traditionally private enterprises"; in contrast, a governmental entity "will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (*Applewhite*, 21 NY3d at 425 [internal quotation marks and citations omitted]). By way of example, a governmental entity that functions in a landlord capacity is acting in a proprietary role (*see e.g. Miller v State of*

New York, 62 NY2d 506, 508 [1984] ["When the State operates housing, it is held to the same duty as private landlords"]; *Moore v Del-Rich Props., Inc.*, 151 AD3d 1817, 1820 [4th Dept 2017] ["It is well established that maintenance and care related to buildings with tenants is generally a proprietary function"]), whereas police and fire protection services are operated in a governmental capacity (*see e.g. Valdez v City of New York*, 18 NY3d 69, 75 [2011] ["(I)t is undisputed that . . . police protection . . . is a classic governmental, rather than proprietary, function"]; *Harland Enters. v Commander Oil Corp.*, 64 NY2d 708, 709 [1984] ["A fire department is not chargeable with negligence for failure to exercise perfect judgment in discharging the governmental function of fighting fires"]).

However, determining where certain actions fall on the spectrum between proprietary and governmental "may present a close question for the courts to decide" and, therefore, "when the liability of a governmental entity is at issue, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability" (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728 [2018] [internal quotation marks, brackets, and citations omitted]). The classification of any particular activity is dependent "on several considerations, including whether the activity was historically performed by government, whether it is best executed by government[,] and whether it is undertaken for profit or revenue" (*Matter of Karedes v Colella*, 100 NY2d 45, 50 [2003]; *accord Bouchard v State of New York*, 206 AD3d 1495, 1497 [3d Dept 2022]; *Kochanski v City of New York*, 76 AD3d 1050, 1051-1052 [2d Dept 2010]). Whether a specific action is governmental or proprietary is a question of law (*see Bouchard*, 206 AD3d at 1496).

To determine whether the government or the private sector has historically performed newborn screening for genetic conditions broadly and SMA specifically, the court must first examine the history of the newborn screening program in New York. Public Health Law § 2500-a (1) requires "the administrative officer or other person in charge of each institution caring for infants [28] days or less of age . . . to cause to have administered to every such infant or child in its or [their] care a test for diseases and conditions designated by the commissioner." The first version of this statute was passed by the Legislature and signed into law in 1964. With its passage, New York became the second state, after Massachusetts, to establish a

screening program. Initially, the statute only screened for phenylketonuria, "an inborn error of metabolism which occurs once in about 10,000 to 15,000 births and which, unless detected shortly after birth, will result in serious [developmental disabilities]" (Ten-Day Bill Budget Rep, Bill Jacket, L 1964, ch 785 at 2). The legislation was projected to result in "long range savings" stemming from the early treatment of phenylketonuria by decreasing the burden on the State to care for those who could become wards of the State and allow for those infants to become "contributing members of society" (*id.* at 3). The Department of Health wrote a letter in support of the bill in which it noted "the bill does not carry an appropriation, it being apparently contemplated by the sponsors of the legislation that the cost of the program during the first fiscal year will be absorbed by the purchasers of medical care" (Letter from NY St Dept of Health, Mar. 19, 1964, *id.* at 4). However, the letter proposed that "it would be more economical for the public to operate a central testing system" and pointed out that there were funds potentially available for that purpose (*id.*). Although the court has not been able to determine the exact point in time that the Wadsworth Center started conducting testing, its website indicates that by 1975 its involvement with the newborn screening program was well-established—that year, screening staff from other states journeyed to the Center to learn how to screen for sickle cell disease (*see* Newborn Screening History/Timeline, https://wadsworth.org/programs/newborn/screening/history [accessed June 16, 2025]). By regulation, "screening . . . shall be performed by [the Wadsworth Center]" (*see* 10 NYCRR 69-1.2 [a]; 69-1.1 [n]).

SMA was first identified in the late 1800s; however, it was not known to be a genetic condition until the mid-1990s (*see* Hisahide Nishio et al., *Spinal Muscular Atrophy: The Past, Present, and Future of Diagnosis and Treatment*, Intl J of Molecular Scis, vol 24, issue 15 [2023], available at https://pmc.ncbi.nlm.nih.gov/articles/PMC10418635/ [accessed June 16, 2025]). Prior to 2016, there were no drugs or treatments that could stop the progression of SMA and it was therefore considered incurable (*see id.*). That changed in 2016 when the first drug to treat SMA was approved by the Food and Drug Administration (FDA). A second drug was approved in 2019 and a third in 2020 (*see id.*). Because the drugs were most effective if they were started prior to the onset of symptoms, discovering SMA early became crucial to treating the condition

(*see id*.). Between January 2016 and September 2018, New York State conducted a pilot study for screening SMA in newborns (*see* Bo Hoon Lee et al., *Newborn Screening for Spinal Muscular Atrophy in New York State*, Neurology, vol 99, No. 14 [2022], available at https://pmc.ncbi.nlm.nih.gov/articles/PMC9576300/ [accessed June 16, 2025]). Following that successful trial, the State added SMA to its newborn screening program on October 1, 2018 (*see id*.). In its announcement, the Wadsworth Center mentioned that, with the addition of SMA and other conditions added to the program on the same date, the State was screening for all of the conditions on the Secretary of Health and Human Services' Recommended Uniform Screening Panel (*see* Newborn Screening Program Adds Three More Disorders Beginning October 1, 2018, https://wadsworth.org/news/newborn-screening-program-adds-three-more-disorders-beginning-october-1-2018 [accessed June 16, 2025]).

The extensive history of newborn screening in New York—dating back to 1965 when Public Health Law § 2500-a went into effect—demonstrates that this function has traditionally been performed by the State. The Wadsworth Center, on behalf of the State, has been responsible for conducting screenings as part of the program for over 50 years. Although the program started by just testing for phenylketonuria, the State has significantly expanded the program and proactively adds new tests when screening at birth becomes useful. This is particularly clear with respect to SMA. Prior to 2016, SMA was incurable and therefore there was no need to conduct genetic screening tests at birth. When the first drug for treating SMA was approved by the FDA in 2016, New York immediately began conducting a pilot study to add SMA to the screening program. Upon the pilot study's conclusion in September 2018, SMA was quickly added to the screening program that October.

Claimants have not provided the court with any evidence that newborn screening—particularly taking samples from a child for testing *at birth*—has historically been performed by the private sector. Although other states often use private labs to support their testing operation, the screening programs themselves are uniformly state-operated. Therefore, the court finds that newborn screening has historically been performed by the State.

The court next turns to whether this activity is best executed by the government. In general, where governmental employees

perform medical care for specific individuals, that action is proprietary because the State is acting in the same capacity as a doctor in the private sector (*see e.g. Andrews v County of Cayuga*, 96 AD3d 1477, 1477-1478 [4th Dept 2012]; *D'Avolio v Prado*, 277 AD2d 877, 879 [4th Dept 2000]; *Rattray v State of New York*, 223 AD2d 356, 357 [1st Dept 1996]). However, emergency medical services are a governmental function; in *Applewhite*, the Court determined that the emergency medical technicians from New York City's Fire Department were acting in a governmental capacity even though private ambulance operators "provide[d] supplemental support for [this] critical governmental duty" (21 NY3d at 428).

Although not a medical treatment case, the court finds *Drever v State of New York* (134 AD3d 19 [3d Dept 2015]) to be particularly instructive. There, the Court determined that the Department of Motor Vehicles' operation of the Donate Life Registry was done in a governmental capacity, because "facilitating the identification of organ and tissue donors and the making of anatomical gifts through DMV applications and renewals" was done to "protect[ ] and promot[e] the health and welfare of the public through the exercise of its general police powers" (*Drever*, 134 AD3d at 24). Additionally, the Court held that "[the] defendant is particularly well-suited to facilitate and encourage the enrollment of organ donors" (*id.* at 25). The Court also held that the establishment of the Donate Life Registry was akin to other public health measures that were governmental in nature (*see id.* at 24) including the maintenance of a registry of childcare centers (*see generally McLean v City of New York*, 12 NY3d 194 [2009]) and operation of a lead poisoning prevention and treatment program (*see generally Pelaez v Seide*, 2 NY3d 186 [2004]).

The court finds that the newborn screening program is best executed by the State. Only the State, through the application of its general police powers, could mandate screening for all newborns in the State. The program is unquestionably operated, like the Donate Life Registry, to "protect[ ] and promot[e] the health and welfare of the public" by identifying hidden conditions shortly after an infant's birth so that they can be effectively treated (*Drever*, 134 AD3d at 24; *see Applewhite*, 21 NY3d at 427-429). The private sector could not operate this type of program at this scale. Therefore, notwithstanding that medical treatment may be proprietary in an individual capacity, the operation of this state-wide program is best executed by defendant.

As for revenue, it is clear that where the government participates in an activity for profit, that activity is generally considered proprietary (*see e.g. Karedes*, 100 NY2d at 50-51; *Bouchard*, 206 AD3d at 1499-1500). In contrast, an activity that is performed for free or without profit motive is generally considered governmental (*see e.g. Applewhite*, 21 NY3d at 429 [charging a fee to defray costs not inapposite to governmental function]; *Drever*, 134 AD3d at 25 [operating a program with no profit weighed in favor of governmental function]). The newborn screening program is operated free of charge and without any apparent profit motive. Therefore, there is no indication on this front that the government is acting in a proprietary capacity.

Taken together, the court determines, as a matter of law, that the operation of the newborn screening program is governmental because it has historically been performed by the State, the State is in the best position to execute the program, and it is not undertaken for profit or revenue. This outcome also comports with the policy considerations set forth in *Applewhite*. As the Court of Appeals held there,

> "[t]he rationale underlying the government-function doctrine rests on several critical concerns: that the costs of tort recoveries would be excessively burdensome for taxpayers; the threat of liability could dissuade [governmental entities] from maintaining [vital] services; and extensive exposure to liability could consequently render . . . governments less, not more, effective in protecting their citizens" (*Applewhite*, 21 NY3d at 430).

Here, defendant would face open-ended liability from the over 200,000 newborns that are tested through the program each year. There would be a substantial risk that this "unknown liability exposure" would be burdensome to taxpayers and could dissuade the State government from continuing to operate this free and beneficial program (*id.*). This court "decline[s] to adopt a rule that has the potential to undermine" the effectiveness of the newborn screening program (*id.*).

B. Special Duty/Special Relationship

In order to find the State liable for negligence, the duty it breached "must be more than that owed the public generally" (*Ferreira*, 38 NY3d at 310 [internal quotation marks and citations omitted]). Arising from this principle, the special duty doctrine serves to "limit the class of citizens to whom the

[State] owes a duty of protection" (*id.* [internal quotation marks and citation omitted]). There are three ways a special relationship may be established: "(1) the [claimant] belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the [claimant] beyond what was owed to the public generally; or (3) the [State] took positive control of a known and dangerous safety condition" (*Applewhite*, 21 NY3d at 426). The claimant bears the burden of demonstrating the existence of a special duty (*see id.*).

The first type of special duty exists if the "governing statute . . . authorize[s] a private right of action" (*McLean*, 12 NY3d at 200 [internal quotation marks and citation omitted]). If the statute does not explicitly authorize a private right of action, one may be implied where "(1) the [claimant] is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme" (*id.* [internal quotation marks and citation omitted]).

Defendant sufficiently argues, and claimants fail to rebut, that Public Health Law § 2500-a does not create an implied private right of action.[1] Unquestionably, A.H. was part of the class of people for whose benefit the statute was enacted. However, there is not any indication in the text of the statute, the statutory scheme as a whole, or in the legislative history that a private right of action would promote the legislative purpose of the statute or be consistent with the legislative scheme. Instead, the broader legislative scheme which the newborn screening program is part of provides the Commissioner with the authority to "establish minimum standards in accordance with established and accepted medical principles for local maternal and child health services" (Public Health Law § 2500 [2]), including to determine which tests to perform on a newborn's sample. Additionally, nothing within the statute's legislative history indicates that it was intended or even believed to create a private right of action. Therefore, the first type of special duty cannot be established (*see T.T. v State of New York*, 151 AD3d 1345, 1348-1349 [3d Dept 2017]; *Signature Health Ctr., LLC v State of New York*, 92 AD3d 11, 15 [3d Dept 2011], *lv denied* 19 NY3d 811 [2012]).

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1. Neither party argues that the statute expressly creates a private right of action.

Turning to the second kind of special duty, to find that the government voluntarily assumed a special duty to the claimant beyond what is owed to the public generally, the claimant must establish the presence of four elements:

> "(1) an assumption by the [State], through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the [State]'s agents that inaction could lead to harm; (3) some form of direct contact between the [State]'s agents and the injured party; and (4) that party's justifiable reliance on the [State]'s affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *accord Applewhite*, 21 NY3d at 430-431).

Each element "must be present for a special duty to attach" (*Maldovan v County of Erie*, 39 NY3d 166, 172 [2022] [internal quotation marks and citation omitted], *rearg denied* 39 NY3d 1067 [2023]).

Defendant argues that claimants will be unable to prove the existence of a special duty on this ground because there is no evidence that any of defendant's agents assumed an affirmative duty to act on claimants' behalf, that those agents had direct contact with claimants, and that claimants justifiably relied on such an undertaking.[2] Specifically, defendant posits that there was no direct contact between it and claimants because the test results were conveyed to A.H.'s pediatrician, not to claimants themselves.

Here, although claimants received a brochure at the hospital, there is no evidence that any agent of defendant communicated with them at that time and the brochure itself indicates that test results will be conveyed to the pediatrician provided. Once the Wadsworth Center concluded its screening, the flawed results were sent to the pediatrician and contained a notice under the label "Attention Health Care Provider" that clearly indicated the results were meant to be received by a medical professional (negative rep, affirmation in supp of mot, exhibit D, 2).

The question therefore becomes whether direct contact may be established between claimants and defendant via A.H.'s pediatrician. In the court's view, the physician-patient relation-

2. Defendant does not argue, at this juncture, that there is an absence of material issues of fact with respect to the agent's knowledge that inaction could lead to harm.

ship, which "operates and flourishes in an atmosphere of transcendent trust and confidence and is infused with fiduciary obligations" (*Aufrichtig v Lowell*, 85 NY2d 540, 546 [1995]), could be viewed as the kind of close relationship that would permit claimants to establish direct contact through their relationship with the pediatrician. However, the Court of Appeals has clearly held that "direct contact and reliance by someone other than the [claimant is] sufficient to create a special relationship *only* where the person making the contact was acting on behalf of [their] *immediate family*" (*Laratro v City of New York*, 8 NY3d 79, 84 [2006] [emphasis added]; *accord Tara N.P.*, 28 NY3d at 715). Although this court might decide otherwise were this an issue of first impression, the court will not deviate from clear and established precedent. Therefore, because the pediatrician is not an immediate family member and there is no other evidence of direct contact between claimants and defendant, defendant has demonstrated that claimants will be unable to establish both direct contact and justifiable reliance (*see Tara N.P.*, 28 NY3d at 715 ["(I)n the absence of direct contact between (the claimant) and (the defendant), the critical element of justifiable reliance cannot be met" (internal quotation marks and citation omitted)]; *see also Lauer v City of New York*, 95 NY2d 95, 102-103 [2000]; *Etienne v New York City Police Dept.*, 37 AD3d 647, 649 [2d Dept 2007]).

Accordingly, the burden shifts to claimants to raise a triable issue of fact. In response, claimants attempt to argue that there was direct contact with claimants through the brochure they were given and through the pediatrician. As previously discussed, this contact is insufficient. Claimants have not proved that they or any immediate family member had *direct* contact with defendant's agents. The unnamed hospital staffer who gave them the brochure and their pediatrician are insufficient to create such a link between them and the State. Therefore, claimants will be unable to prove the second type of special duty.

Finally, the third type of special duty only exists in "rare circumstances" (*Sutton v City of New York*, 119 AD3d 851, 852 [2d Dept 2014], *lv denied* 24 NY3d 918 [2015]) and requires that the State "take[ ] positive control of a known and dangerous safety condition" (*Ferreira*, 38 NY3d at 317; *see Smullen v City of New York*, 28 NY2d 66, 72-73 [1971]). The State "must 'affirmatively act to place the [claimant] in harm's way,' through words or conduct that 'induce the [claimant] to embark on a

dangerous course [they] would otherwise have avoided' " (*Szydlowski v Town of Bethlehem*, 162 AD3d 1188, 1190 [3d Dept 2018] [brackets and emphasis omitted], quoting *Abraham v City of New York*, 39 AD3d 21, 28 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008]; *see Ferreira*, 38 NY3d at 317; *Sutton*, 119 AD3d at 852-853).

Here, defendant has demonstrated that there is no evidence that the State took positive direction and control over a known and dangerous safety condition and claimants have failed to rebut this showing with triable issues of fact. The undisputed evidence shows that the false negative on A.H.'s screening results was caused by an unintentional transcription error. No one at the Wadsworth Center was aware that a mistake had been made and therefore could not have *affirmatively* acted to put A.H. in harm's way. In the absence of any evidence that defendant's agents took positive control over the situation or that the situation was even known to them, claimants cannot establish the third type of special duty (*see Sutton*, 119 AD3d at 852-853; *Lewis v State of New York*, 68 AD3d 1513, 1515 [3d Dept 2009]; *Battaglia v Town of Bethlehem*, 46 AD3d 1151, 1153-1154 [3d Dept 2007]).

In summary, defendant has demonstrated its entitlement to summary judgment by showing that claimants will be unable to prove all three kinds of special duty. In response, claimants have not presented a material issue of fact sufficient to rebut defendant's showing. Therefore, defendant's cross-motion for summary judgment is granted.

Conclusion

Based upon the foregoing, defendant's cross-motion for summary judgment to dismiss the claim is granted and claimants' motion to strike defendant's affirmative defenses is denied as academic. Accordingly, claim No. 137291 is dismissed.

37 Moulier v 2264 Morris Ave. Owner LLC, 2025 NY Slip Op 52134(U). Labor—Safe Place to Work—Fall from Scaffold—Sole Proximate Cause. Labor—Safe Place to Work—Nondelegable Duty under Labor Law § 241 (6)—Failure to Specify Violated Industrial Code Provisions. (Sup Ct, Bronx County, Nov. 21, 2025, Crawford, J.)

38 Joseph v LaGuardia Gateway Partners, LLC, 2025 NY Slip Op 52135(U). Labor—Safe Place to Work—Construction Project—Elevation-Related Hazard—Injury while Lifting Baker Scaffold. (Sup Ct, Bronx County, Dec. 1, 2025, Crawford, J.)

39 Iankov, Matter of, 2025 NY Slip Op 52136(U). Husband and Wife and Other Domestic Relationships—Divorce—Foreign Divorce Decree. (Sur Ct, Suffolk County, Dec. 9, 2025, Messina, Jr., S.)

40 Maria M., Matter of, 2025 NY Slip Op 52137(U). Guardian and Ward—Revocation of Guardianship—Least Restrictive Means to Protect Individual—Demonstrated Autonomy. (Sur Ct, Suffolk County, Dec. 9, 2025, Messina, Jr., S.)

41 AP v RP, 2025 NY Slip Op 52138(U). Husband and Wife and Other Domestic Relationships—Equitable Distribution—Valuation of Assets—Business Valuation. Husband and Wife and Other Domestic Relationships—Divorce—Amendment of Complaint—Addition of Proposed Third Party. (Sup Ct, Richmond County, Dec. 30, 2025, Castorina, Jr., J.)

42 K.P.H., Matter of (K.H.S.), 2025 NY Slip Op 52139(U). Parent, Child and Family—Abused or Neglected Child—Return to Parent's Care. (Fam Ct, NY County, Nov. 24, 2025, McFarland, J.)

43 Toporovsky v Toporovsky, 2026 NY Slip Op 50028(U). Lis Pendens—When Available—Member's Action against Limited Liability Company—Part of Relief Sought Could Affect Title to, or Possession, Use or Enjoyment of, Real Property. (Sup Ct, Bronx County, Jan. 12, 2026, Gomez, J.)

44 Cahn v Chapler, 2026 NY Slip Op 50029(U). Libel and Slander—Actionable Words—Social Media Posts—Statement That Physician Had Affair with Patient's Daughter in Violation of Medical Code of Ethics. Libel and Slander—Privilege—Common-Interest Privilege—Email between Former Spouses Regarding Travel with Their Child. (Sup Ct, NY County, Jan. 9, 2026, Ramseur, J.)

45 Mercedes-Benz Veh. Trust v Follman, 2026 NY Slip Op 50030(U). Contracts—Formation of Contract—Mutual Assent. Accounts and Accounting—Account Stated—Express or Implied Agreement. (Civ Ct, Kings County, Jan. 12, 2026, Waterman, J.)

46 Echtenkamp, Matter of, 2026 NY Slip Op 50031(U). Attorney and Client—Privilege—Communications with Third Party Acting as Client's Agent. Disclosure—Material Exempt from Disclosure—Attorney's Work Product—Report from Prior Attorney to New Attorney About Actions Taken during Representation. (Sur Ct, Erie County, Jan. 9, 2026, Mosey, S.)

47 Palmer v Montalil, 2025 NY Slip Op 52140(U). Labor—Safe Place to Work—Construction Site—Statutory and Common-Law Negligence—Struck by Hose Being Pulled over Fence. (Sup Ct, Bronx County, Dec. 1, 2025, Crawford, J.)

48 Adames v Congregation Kehilath Jeshurun, 2025 NY Slip Op 52141(U). Labor—Safe Place to Work—Fall from Scaffold—Sole Proximate Cause. (Sup Ct, Bronx County, Dec. 2, 2025, Crawford, J.)

49 F.J.O. v Free-Nozil, 2025 NY Slip Op 52142(U). Physicians and Surgeons—Malpractice—Pediatrics—Congenital Dislocation of Hips. (Sup Ct, Kings County, Dec. 23, 2025, Frias-Colón, J.)

50 Reformed Dutch Church of Schodack at Muitzeskill, Matter of, v Assessor of the Town of Schodack, N.Y., 2026 NY Slip Op 50036(U). Taxation—Real Property Tax—Exemptions—Non-profit Organizations—Property Not in Actual Use. (Sup Ct, Rensselaer County, Jan. 13, 2026, Mendez, J.)

51 Z.J.V. v A.A.V., 2026 NY Slip Op 50037(U). Husband and Wife and Other Domestic Relationships—Counsel Fees—Compensation of Attorney for Child. Disclosure—Preclusion Order—Expert Report on Domestic Violence in Matrimonial Action—Failure to Disclose—Res Judicata. (Sup Ct, Westchester County, Jan. 5, 2026, Hyer, J.)

52 People v Ortiz (Ervin), 2026 NY Slip Op 50038(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, Bronx County, Jan. 8, 2026, Sorrentino, J.)

53 Shibley v City of New York, 2026 NY Slip Op 50039(U). Civil Rights—Discrimination in Employment—Failure to Allege Discriminatory Animus. (Sup Ct, NY County, Jan. 12, 2026, Kingo, J.)

54 High Beam Coffee LLC v Global Roots LLC, 2026 NY Slip Op 50040(U). Injunctions—Preliminary Injunction—Commercial Lease—Interference with Tenant's Buildout of Premises. (Sup Ct, Kings County, Jan. 13, 2026, Maslow, J.)

55 Davis v Time Warner Cable N.Y. City LLC, 2025 NY Slip Op 52143(U). Labor—Safe Place to Work—Liability as General Contractor or Agent of Owner. Labor—Safe Place to Work—Fall from Ladder—Sole Proximate Cause. (Sup Ct, Bronx County, Dec. 2, 2025, Crawford, J.)

56 McCloskey v Port Auth. of N.Y. & N.J., 2025 NY Slip Op 52144(U). Labor—Safe Place to Work—Violation of Industrial Code—Summary Judgment. (Sup Ct, Bronx County, Dec. 2, 2025, Crawford, J.)

57 People's Alliance Fed. Credit Union v Campbell, 2025 NY Slip Op 52145(U). Bills, Notes and Checks—Fraud—Failure to Follow Safeguards. (Sup Ct, Queens County, Oct. 29, 2025, Maldonado Cruz, J.)

58 Lehan, Matter of, v Montgomery, 2025 NY Slip Op 52146(U). Corporations—Dissolution—Oppressive Action. Contracts—Breach or Performance of Contract—Material Breach—Failure to Pay Salary. (Sup Ct, Suffolk County, Oct. 28, 2025, Hudson, J.)

59 De La Rosa v New York & Presbyt. Hosp., 2026 NY Slip Op 50044(U). Disclosure—Material Exempt from Disclosure—Attorney's Work Product—Narrative Witness Statements. Witnesses—Subpoena Duces Tecum—Motion to Quash—Statutorily Privileged Material. (Sup Ct, NY County, Jan. 7, 2026, King, J.)

60 People v Guevarez (R.), 2026 NY Slip Op 50045(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. Crimes—Right to Speedy Trial—Invalid Certificate of Compliance. (Crim Ct, Bronx County, Jan. 12, 2026, Goodwin, J.)

61 C.K. v Almondo, 2026 NY Slip Op 50046(U). Judgments—Default Judgment—Failure to Comply with Court Rules. Insurance—No-Fault Automobile Insurance—Serious Injury. (Sup Ct, Kings County, Jan. 8, 2026, Maslow, J.)

62 KLD v SBPH, 2026 NY Slip Op 50047(U). Husband and Wife and Other Domestic Relationships—Divorce—Foreign Divorce Decree—Comity. (Sup Ct, Richmond County, Jan. 6, 2026, Castorina, Jr., J.)

63 People v Cameron (Jarnel), 2025 NY Slip Op 52147(U). Crimes—Disclosure—Automatic Discovery—Belated Disclosure. Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Sup Ct, Queens County, Nov. 25, 2025, Miret, J.)

64 People v J.D., 2025 NY Slip Op 52148(U). Infants—Adolescent Offenders—Extraordinary Circumstances Warranting Retention in Youth Part—Possession of Loaded Firearm Inside School during School Hours. (Sup Ct, Nassau County, Oct. 29, 2025, Watson, J.)

65 Lefferts Ave. Ventures LLC v Keennlyside, 2026 NY Slip Op 50048(U). Landlord and Tenant—Rent—Action to Recover Rent Arrears—Applicable Statute of Limitations. (Civ Ct, Kings County, Jan. 14, 2026, Malik, J.)

66 Pinette v Gauthier, 2026 NY Slip Op 50049(U). Conflict of Laws—What Law Governs—Dispute over Jointly Titled Motor Vehicle—Application of Florida Law. (Civ Ct, Kings County, Jan. 15, 2026, Waterman, J.)

67 Burroughs v Peters, 2026 NY Slip Op 50050(U). Judgments—Default Judgment—Failure to Sufficiently Establish Facts. (Sup Ct, Monroe County, Jan. 14, 2026, Bringewatt, J.)

68 Dumornay v Etienne, 2026 NY Slip Op 50051(U). Motor Vehicles—Collision—Parked Vehicle Struck by Reversing Vehicle—Summary Judgment. (Sup Ct, Kings County, Jan. 16, 2026, Maslow, J.)

69 Synchrony Bank v Anwar, 2026 NY Slip Op 50052(U). Process—Affidavit of Service—Description of Individual. (Sup Ct, Kings County, Jan. 19, 2026, Maslow, J.)

70 United Wholesale Mtge., LLC v Kings County Clerk's Off., 2026 NY Slip Op 50053(U). Process—Service of Process—Improper Service—Affidavit Claiming Service on Retired Employee. Parties—Proper Parties—Vacatur of Satisfaction of Mortgage—Mortgage Filed in Office of City Register Not County Clerk's Office. (Sup Ct, Kings County, Jan. 16, 2026, Maslow, J.)

71 Shared Cooper LLC v Callejas, 2026 NY Slip Op 50054(U). Landlord and Tenant—Eviction—Good Cause Eviction Law—Failure to Pay Rent. (Civ Ct, NY County, Jan. 20, 2026, Stoller, J.)

72 Herlihy, Matter of, v Yonkers Pub. Schs., 2026 NY Slip Op 50055(U). Civil Rights—Discrimination in Employment—Probationary Employee—Retaliation Claim—Email Request for Information Not Protected Activity. Unemployment Insurance—Benefits—Disqualification—Reason Inconsistent with Reason for Termination. (Sup Ct, Westchester County, Jan. 16, 2026, Pulver, J.)

73 Utilisave, LLC v Fox Horan & Camerini, LLP, 2026 NY Slip Op 50056(U). Attorney and Client—Malpractice—Participation in Challenged Extension of Employment Agreement. (Sup Ct, NY County, Jan. 20, 2026, Kingo, J.)

74 Errico v 3 Nelson Ave Inc., 2026 NY Slip Op 50057(U). Motor Vehicles—Collision—Rear-End Collision. (Sup Ct, Westchester County, Jan. 12, 2026, Jamieson, J.)

75 Gonzalez v Marte, 2026 NY Slip Op 50058(U). Process—Service of Process—Nail and Mail Service—Due Diligence. (Sup Ct, Westchester County, Jan. 15, 2026, Jamieson, J.)

76 People v Portalatin (Eric), 2026 NY Slip Op 50059(U). Crimes—Disclosure—Automatic Discovery—Records of Medical Examiner. (Crim Ct, Kings County, Jan. 20, 2026, Glick, J.)

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