

# Decisions of Interest

DECEMBER 10, 2021

## CRIMINAL

### FIRST DEPARTMENT

#### ***People v Challenger*** | Dec. 9, 2021

DETECTIVE | LAY OPINION

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2<sup>nd</sup> degree robbery and another crime. The First Department reversed. The trial court erred in allowing an arresting detective to offer lay opinion testimony that the defendant was the person depicted in two surveillance videos, where the jury was capable of making that determination. The error was not harmless. The Center for Appellate Litigation (John Palmer and Rita Maxwell) represented the appellant.

[People v Challenger \(2021 NY Slip Op 06927\) \(nycourts.gov\)](#)

#### ***People v Spruill*** | Dec. 7, 2021

SENTENCE | NO RECORD

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3<sup>rd</sup> degree grand larceny and other crimes upon his plea of guilty, and sentencing him to an aggregate term of 3½ to 10½ years. The First Department reduced the sentence to 2 to 6 years and vacated surcharges and fees imposed. The sentence imposed was excessive, given the defendant's age, his lack of a criminal record, and the nonviolent nature of the crimes. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant.

[People v Spruill \(2021 NY Slip Op 06819\) \(nycourts.gov\)](#)

#### ***People v Manley*** | Dec. 7, 2021

GANG GUNS | EXPERT

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2<sup>nd</sup> degree CPW and sentencing him as a second violent felony offender. The First Department reduced the sentence from 12 to 8 years and otherwise affirmed. The trial court properly allowed expert testimony on “community guns”—which gangs shared and kept outdoors in closed containers under constant observation—to explain the unusual behavior of the defendant and fellow gang members vis-à-vis a backpack containing the pistol. During summation, it was inappropriate for the prosecutor to squeeze the trigger to emphasize operability. However, this single impropriety did not deprive the defendant

of a fair trial. The Center for Appellate Litigation (Matthew Christiana, of counsel) represented the appellant.

[People v Manley \(2021 NY Slip Op 06814\) \(nycourts.gov\)](#)

***People v McDowell*** | Dec. 9, 2021

SNEAKERS | INCRIMINATING

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3<sup>rd</sup> degree robbery and other crimes. The First Department affirmed. The defendant wore certain sneakers to trial. The prosecutor believed they were the footwear the perpetrator was wearing in a surveillance video and asked the court to sign an order allowing her to photograph them. During a lunch recess, the defendant changed his sneakers, and the trial court properly allowed the People to prove that fact as relevant to consciousness of guilty.

[People v McDowell \(2021 NY Slip Op 06929\) \(nycourts.gov\)](#)

***People v Gainey*** | Dec. 9, 2021

OUT-OF-STATE | NO TESTIMONY

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2<sup>nd</sup> degree robbery. The First Department affirmed. The lower court properly denied the defendant's application to take out-of-state testimony from the only identifiable person who spoke to the victim right after the robbery. The person had relocated to California, but the defendant did not show exceptional circumstances warranting invocation of CPL Article 680. He did not explain why the witness could not come to New York or establish the materiality of the testimony sought.

[People v Gainey \(2021 NY Slip Op 06925\) \(nycourts.gov\)](#)

## SECOND DEPARTMENT

***People v Feddaoui*** | Dec. 8, 2021

CHALLENGE | DENIED

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2<sup>nd</sup> degree robbery and another crime. The Second Department reversed and ordered a new trial. Supreme Court erred in denying the defendant's for-cause challenge to a prospective juror who stated that she would expect the defense to present evidence. Her subsequent responses fell short of providing unequivocal assurances of impartiality. Since the defendant exhausted his peremptory challenges, the denial of his challenge constituted reversible error. Appellate Advocates (Sean Nuttall and Chelsea Lopez, of counsel) represented the appellant.

[People v Feddaoui \(2021 NY Slip Op 06859\) \(nycourts.gov\)](#)

***People v Douglas*** | Dec. 8, 2021

PLEA | NEGATED

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 4<sup>th</sup> and 5<sup>th</sup> degree criminal possession of stolen property. The Second Department reversed, vacated the plea, and remitted. As charged, the 4<sup>th</sup> degree offense required

possession of “a motor vehicle...other than a motorcycle.” During his plea allocution, the defendant admitted to possession of a motorcycle. Where a defendant’s factual recitation negated an essential element of the crime pleaded to, the court could not accept the plea without making further inquiry to ensure that the defendant understood the nature of the charge and that the plea was intelligently entered. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.

[People v Douglas \(2021 NY Slip Op 06857\) \(nycourts.gov\)](#)

***People v Acevedo-Lopez*** | Dec. 8, 2021

AGE 6 | UNSWORN

The defendant appealed from a Rockland County Court judgment, convicting him of predatory sexual assault against a child and other crimes. The First Department reduced the punishment and otherwise affirmed. County Court properly accepted unsworn testimony of the six-year-old complainant. The record demonstrated that the victim had sufficient intelligence and capacity to justify the reception of the testimony. The defendant’s admissions and the unsworn testimony cross-corroborated each other.

[People v Acevedo-Lopez \(2021 NY Slip Op 06853\) \(nycourts.gov\)](#)

***People v Alvarado*** | Dec. 8, 2021

ORDER OF PROTECTION | DURATION

The defendant appealed from a Nassau County Court judgment, convicting him of 2<sup>nd</sup> degree criminal contempt. The Second Department affirmed. The challenge to the duration of the order of protection was unpreserved for appellate review since the defendant did not raise the issue at sentencing or move to amend the order on such ground. A defendant seeking adjustment of an order of protection should request relief from the issuing court, resorting to the appellate courts only if necessary.

[People v Alvarado \(2021 NY Slip Op 06856\) \(nycourts.gov\)](#)

## THIRD DEPARTMENT

***People v Davis*** | Dec. 9, 2021

5<sup>th</sup> AMENDMENT | WITNESS

The defendant appealed from a judgment of Rensselaer County Court, convicting him of 4<sup>th</sup> degree grand larceny and other crimes. The Third Department affirmed. County Court properly permitted the People to call the defendant’s brother as a witness after he expressed the intention to invoke his Fifth Amendment privilege against self-incrimination. The People believed that the brother could not plead the Fifth because he had already pleaded guilty, and they did not seek to build their case on the brother’s assertions of privilege. The brother only used the privilege three times. Each time, County Court directed him to answer, thus rendering those responses subject to cross-examination. There was no danger of the jury drawing improper inferences.

[People v Davis \(2021 NY Slip Op 06883\) \(nycourts.gov\)](#)

## ***People v Gilmore*** | Dec. 9, 2021

440.10 | ACCESS TO COURTS

The defendant appealed from an order of Schenectady County Supreme Court denying his CPL 440.10 motion. The Third Department affirmed. The defendant urged that his constitutional rights to meaningful access to the courts were violated because the jail used a “paging system” that required inmates to request case law by exact citation, thus preventing him from adequately researching the case law. However, the defendant did not submit sworn allegations substantiating such claims and alleging that shortcomings in the library or legal assistance program hindered his efforts to pursue non-frivolous legal claims. See generally *Lewis v Casey*, 518 US 343, 351.

[People v Gilmore \(2021 NY Slip Op 06880\) \(nycourts.gov\)](#)

## **FAMILY**

### **FIRST DEPARTMENT**

#### ***Matter of Jayson C.*** | Dec. 7, 2021

JD DISCOVERY | EQUAL PROTECTION

In a juvenile delinquency proceeding, the respondent appealed from an order of Bronx County Family Court, which declined to direct the presentment agency to provide certain discovery. See Family Ct Act §§ 365.1, 365.2, 1112 (a). The First Department reversed. The agency named 14 police officers involved in the respondent’s arrest on weapon possession charges and disclosed that nine of the officers were involved in a pending lawsuit. The respondent sought disclosure, as required under CPL 245.20 (1) (k) (iv) (prosecution shall disclose evidence and information that tends to impeach credibility of testifying prosecution witness). While not all CPL provisions are applicable to Family Court, in this case, the denial of disclosure deprived the respondent of equal protection of the laws. A respondent in a JD proceeding has the same right to cross-examine witnesses as a criminal defendant. There was no reason to allow more limited access to impeachment materials. The legislature was considering legislation that would amend the Family Court Act to provide for broad disclosure. Legal Aid Society, NYC (John Newbery, of counsel) represented the alleged JD.

[Matter of Jayson C. \(2021 NY Slip Op 06794\) \(nycourts.gov\)](#)

#### ***Amber N. v Andrew S.*** | Dec. 7, 2021

PATERNITY | ESTOPPEL

The respondent appealed from an order of NY County Family Court, which equitably estopped him from seeking genetic marker testing and declared him to be the father of the child. The First Department affirmed. The respondent was named on the child’s birth certificate, was married to the mother, and assumed the role of parent for the first 11 years of the boy’s life. In reliance on such conduct, the child, now almost 13, formed a familial relationship with his paternal grandfather and great-grandmother.

[Matter of Amber N. v Andrew S. \(2021 NY Slip Op 06810\) \(nycourts.gov\)](#)

## SECOND DEPARTMENT

***Matsui v Matsui*** | Dec. 8, 2021

CUSTODY | NO ARBITRATION

The wife appealed from an order and a judgment of divorce rendered by Queens County Supreme Court. The Second Department dismissed the appeal from the order, reversed the judgment, and remitted. The right of direct appeal from the order terminated upon entry of the judgment. See *Matter of Aho*, 39 NY2d 241. However, the issues raised on appeal from the order were brought up for review on appeal from the judgment. See CPLR 5501 (a) (1). Supreme Court erred in not exercising jurisdiction over custody on the basis that the stipulation of settlement contained an arbitration clause. Custody matters are not subject to arbitration; the court's *parens patriae* role must not be usurped. Steven Forbes represented the appellant.

[Matsui v Matsui \(2021 NY Slip Op 06843\) \(nycourts.gov\)](#)

## THIRD DEPARTMENT

***Matter of Athena Y.*** | Dec. 9, 2021

VACCINE | CHILD

The mother, a respondent in an Article 10 proceeding, appealed from a Rensselaer County Family Court order granting the AFC's application to allow the subject 13- and 15-year-old children to receive the Covid-19 vaccine. Parents generally have the right to make health care decisions for minor children. There are some statutory exceptions, including for emergencies, immunizations to attend public school, and family planning. Pending before the Senate is a bill that would allow children aged 14 and older to be vaccinated against Covid-19 without parental consent. Social Services Law § 383-b allows the DSS Commissioner to consent to medical services for any child in Department custody under certain circumstances; and Family Ct Act § 233 gives the court authority to direct whatever is medically necessary and appropriate to ensure a child's welfare. A hearing was required before Family Court could properly grant the instant request over the mother's objection. Upon remittal, the court must address whether: (1) the mother's refusal to authorize vaccination was acceptable medically, given all relevant circumstances; and (2) the children were fully informed and had the capacity to consent. Douglas Broda represented the appellant.

[Matter of Athena Y. \(Ashleigh Z.\) \(2021 NY Slip Op 06908\) \(nycourts.gov\)](#)

***Matter of Chloe L.*** | Dec. 9, 2021

SEXUAL ABUSE | MOM'S NEGLECT

The petitioner and AFC appealed from an order of Schoharie County Family Court, dismissing the agency's neglect proceeding against the mother. The Third Department modified. Dismissal was proper as to a few allegations, but improper as to others. These included that the mother showed the teenager how to use a device for sexual gratification; engaged in sexual activity with the stepfather while the child was present; and showed the child pornographic videos. The petitioner offered testimony from the grandmother

about changes in the child's behavior and from a caseworker about statements indicating child sexual abuse accommodation syndrome. Veronica Reed represented the child.  
[Matter of Chloe L. \(Samantha L.\) \(2021 NY Slip Op 06892\) \(nycourts.gov\)](#)

***Wessels v Wessels*** | Dec. 2, 2021

VIOLATION | NOT WILLFUL

The mother appealed from an order of Albany County Family Court, which found that the father did not willfully violate a prior child support order. The Third Department affirmed. The father was hired, by his brother, as a purchasing agent at a salary of \$125,000. Through no fault of his own, the father lost the job. After diligent efforts to find similar work, he restarted his landscaping business and made \$42,000—close to what he previously earned. The father tried to modify support, made regular albeit reduced payments, and borrowed money to cover large support payments. [This summary from the last DECISIONS is amended here.]

[Matter of Wessels v Wessels \(2021 NY Slip Op 06739\) \(nycourts.gov\)](#)

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