

# Decisions of Interest

DECEMBER 17, 2021

## CRIMINAL

### COURT OF APPEALS

#### ***People v Lamb*** | Dec. 16, 2021

SEX TRAFFICKING | NEW TRIAL

Upon the defendant's appeal from a First Department order, the Court of Appeals reversed his sex trafficking convictions and ordered a new trial. The sex trafficking statute had two distinct but linked elements—by an enumerated coercive act, the offender must advance, or profit from, prostitution. The trial court's supplemental instruction erroneously severed the link between the elements. Judge Singas concurred, opining that the incorrect instruction prejudiced the defendant, and exploring the arguments regarding territorial jurisdiction. Judge Wilson wrote a separate concurrence, observing that the fundamental question was whether New York had jurisdiction to prosecute a defendant for sex trafficking without showing that the coercive conduct used against a particular victim resulted in advancing or profiting from prostitution in NY. Judge Fahey dissented. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_07057.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_07057.htm)

#### ***People v Wilkins*** | Dec. 14, 2021

ANTOMMARCHI | DISSENT

A divided Court of Appeals upheld a murder conviction. The defendant's claim pursuant to *People v Antommarchi* (80 NY2d 1247) and CPL 260.20 was rejected. He acquiesced in the continued voir dire of prospective juror CK in open court and failed to object to his pre-waiver absence from the sidebar with CK. Judge Fahey dissented, joined by Judges Rivera and Wilson. An *Antommarchi* violation had occurred when prospective juror CK approached the bench in the defendant's absence and discussed an issue relating to her bias or hostility. Until after such sidebar conference, the trial court did not advise the defendant that he had the right to be present at this material stage of the trial. The violation was not waived retroactively when, upon being informed about his rights, the defendant did not object. An implied waiver occurred only when the defendant was previously informed of his *Antommarchi* rights and then chose not to attend conferences. The majority found it relevant that the defendant had the chance to assess CK's demeanor during the post-sidebar voir dire. But prospective jurors may speak more freely during sidebars than in front of the entire panel. The majority opinion dishonored precedent regarding preservation and diluted the defendant's right to be present for

sidebar conferences involving the voir dire of prospective jurors concerning their ability to weigh the evidence objectively.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_06936.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_06936.htm)

## FIRST DEPARTMENT

### ***People v Lopez*** | Dec. 14, 2021

ILLICIT TESTIMONY | HARMLESS

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1<sup>st</sup> degree robbery and other crimes. The First Department affirmed. The People should not have elicited testimony from a detective suggesting that the non-testifying codefendant implicated the defendant in the crime, or testimony implying that the victim had identified the defendant in a lineup. However, the errors were harmless.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06962.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06962.htm)

### ***People v Robertson*** | Dec. 14, 2021

EXPERT | DOMESTIC VIOLENCE

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2<sup>nd</sup> degree strangulation and 2<sup>nd</sup> degree assault. The First Department affirmed. The trial court properly allowed proof of two prior assaults by the defendant against the victim to provide background as to the nature of their relationship, as relevant to motive and intent. Also properly admitted was expert testimony on the dynamics of domestic violence—to aid the jury in evaluating the behavior of the victim after the assault. The expert testified in general terms, without expressing opinions on the facts of this case. Limiting instructions given as to the above proof mitigated any prejudice.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06964.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06964.htm)

### ***People v Graham*** | Dec. 16, 2021

DEFENSE COUNSEL | MEA CULPA

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW. The First Department affirmed. Defense counsel admitted ineffectiveness in failing to properly investigate and prepare for trial. Yet the defendant did not establish that he was deprived of meaningful representation by conflict-free counsel. Defense counsel moved for a suppression hearing, objected to a *Molineux/Sandoval* application, and raised a *Batson* challenge. At trial, defense counsel competently cross-examined witnesses and filed a CPL 330 motion. The defendant did not show that his defense was impaired by defense counsel's conduct.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07068.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07068.htm)

## APPELLATE TERM, SECOND DEPT.

### ***People v Garai*** | 2021 NY Slip Op 51199 (U)

SPEEDY TRIAL | INEFFECTIVE COUNSEL

The defendant appealed from a judgment of Kings County Criminal Court, convicting him of 3<sup>rd</sup> degree sexual abuse and other crimes. The Appellate Term, Second Department reversed and dismissed the accusatory instrument. Since the defendant was initially charged with class A misdemeanors, the People were required to be ready for trial within 90 days of commencement of the action, but they failed to do so. Defense counsel was ineffective in not moving to dismiss the information based on the statutory speedy trial violation. Appellate Advocates (Anna Kou, of counsel) represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51199.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51199.htm)

***People v Zahangir*** | 2021 NY Slip Op 51157 (U)

LAS | COUNSEL | FINANCIAL INQUIRY

The defendant appealed from judgments of City Court of Newburgh in Orange County, convicting him of DWI charges. The Appellate Term, Second Department reversed and ordered a new trial. The defendant's right to counsel was violated. Legal Aid informed the court that the defendant was financially ineligible for its services. When the defendant said that he could not afford an attorney, the court had a duty to inquire further. But no specific financial information was sought. The fact that a defendant owned a car or lived with his parents in a house they owned did not mean he could afford an attorney. John R. Lewis represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51157.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51157.htm)

***People v Curtis*** | 2021 WL 5871566

LAS | COUNSEL | DISQUALIFIED

In an appeal from a judgment of Queens County Criminal Court, convicting the defendant of disorderly conduct, he argued that the court erred in disqualifying his Legal Aid attorney. The Appellate Term, Second Department affirmed. The discovery that LAS had twice previously represented the complainant, who did not waive any conflict, supported the disqualification to preempt a potential problem at trial. The conflict emerged before proof was presented. One justice dissented, observing that courts should not arbitrarily interfere with the attorney-client relationship. LAS's representation of the victim was remote in time and unrelated to the defendant's case, and counsel disclaimed knowledge of the prior cases.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_21334.htm](https://nycourts.gov/reporter/3dseries/2021/2021_21334.htm)

***People v Green*** | 2021 NY Slip Op 51166 (U)

STRANGERS | ON A TRAIN

The defendant appealed from an order of Queens County Criminal Court, which designated him a level-two sex offender. The Appellate Term, Second Department affirmed, rejecting the defendant's contention that the People did not establish forcible compulsion against a victim/stranger. A "stranger" is anyone who is not an actual acquaintance of the offender. Such term could encompass a person living in the same apartment building, if the relationship between the offender and victim was limited to their passing in the hallway or sharing an elevator, and could include someone sharing a train with the defendant, as occurred here.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_51166.htm](https://nycourts.gov/reporter/3dseries/2021/2021_51166.htm)

## THIRD DEPARTMENT

### ***People v Hansel*** | Dec. 16, 2021

SEX RELATIONS PROOF | REVERSIBLE ERROR

The defendant appealed from a Broome County Court judgment, convicting him of predatory sexual assault against a child and 1<sup>st</sup> degree rape (three counts). The Third Department reversed and ordered a new trial. County Court erred in allowing the victim's mother to testify that the defendant had a voracious sexual appetite, but then stopped having frequent sex with her. The proof—allowed as circumstantial evidence that the defendant's sexual desires were being met elsewhere—permitted the jury to improperly speculate that he had turned to the victim. The error was not harmless. Thomas Saitta represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07035.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07035.htm)

### ***People v Hajratalli*** | Dec. 16, 2021

HARSH SENTENCE | NO PRIOR HISTORY

The defendant appealed from a Saratoga County Court judgment, convicting him of 2<sup>nd</sup> degree burglary (two counts) and another crime, in connection with night-time break-ins at two residences. The Third Department modified. The maximum sentences, imposed consecutively, amounted to an aggregate prison term of 30 years. That was harsh and excessive. The defendant had no prior criminal history; his conduct did not result in any physical touching; and the presentence report set forth other mitigating circumstances. Thus, the burglary terms would run concurrently. One justice dissented. Kevin Luibrand represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07036.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07036.htm)

### ***People v Serrano*** | Dec. 16, 2021

RIGHT TO COUNSEL | DISSENT

The defendant appealed from a Schenectady County Court judgment, convicting him of 1<sup>st</sup> degree assault and other crimes. The Third Department affirmed. The People improperly elicited testimony, from the detective who interviewed the defendant, that he had invoked his rights to counsel and against self-incrimination. But the questioning was harmless. One justice dissented. The rights to counsel and to remain silent are fundamental. The trial court failed to provide prompt curative instructions that the jury must not draw adverse inferences from the request for counsel. Reversal was required.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07037.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07037.htm)

### ***People ex rel. Rivera v Superintendent*** | Dec. 16, 2021

SARA | EX POST FACTO

The respondent appealed from a judgment of Sullivan County Supreme Court, which granted the petitioner's CPLR Article 70 petition for release to parole supervision. The Third Department reversed. The defendant contended that, because SORA and SARA were enacted after the crimes, their application to him violated the Ex Post Facto Clause, but that constitutional prohibition applied only to penal statutes. SARA was enacted to protect children, not to further punish sex offenders.

[People ex rel. Rivera v Superintendent, Woodbourne Corr. Facility \(2021 NY Slip Op 07044\) \(nycourts.gov\)](#)

## FAMILY

### COURT OF APPEALS

***Anderson v Anderson*** | Dec. 16, 2021

NUPTIAL AGREEMENT | TOO LATE

Under Domestic Relations Law § 236 (B) (3), the acknowledgment of a nuptial agreement must be contemporaneous—although not necessarily simultaneous—with the signing of the agreement. Permitting an unreasonably delayed commitment would be at odds with the purpose of having parties consider terms designed based on their lives at the time of execution and their predictions of their future together—not on events that transpired years later, including economic success or failure. This wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years. His acknowledgment was ineffective, and the agreement was unenforceable. The only remedy was for the parties to reaffirm the agreement's terms, which did not occur.

[https://www.nycourts.gov/reporter/3dseries/2021/2021\\_07058.htm](https://www.nycourts.gov/reporter/3dseries/2021/2021_07058.htm)

### FIRST DEPARTMENT

***Matter of T.S. (K.A.-S.U.)*** | Dec. 16, 2021

DERIVATIVE ABUSE | REVERSED

The respondents appealed from an order of New York County Family Court, entered in an Article 10 proceeding. The First Department upheld the abuse finding as to a daughter, whom the respondents failed to protect from sexual abuse by the grandfather. But the appellate court vacated the finding of derivative abuse of the 17-year-old son. There was no proof that the grandfather's abuse was ever directed at the teen, who only became aware of the abuse upon his sister's disclosure several years after the fact.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_07073.htm](https://nycourts.gov/reporter/3dseries/2021/2021_07073.htm)

***Cindy M. v Marisol M.*** | Dec. 14, 2021

ARTICLE 8 | COUNSEL NOT RELIEVED

The petitioner appealed from an order of Bronx County Family Court, which denied her family offense petition seeking an order of protection against the respondent on behalf of her child. The First Department held the appeal in abeyance. Counsel had filed a motion to be relieved but had not submitted a letter confirming that the petitioner received the brief and notice that she had a right to file a pro se brief. Therefore, the motion was denied without prejudice to renew, and counsel was directed to inform the petitioner of her rights.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06955.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06955.htm)

***Giovanni De M. v Nick W.*** | Dec. 14, 2021

ARTICLE 8 | HARASSMENT | UNCONSTITUTIONAL

The respondent appealed from an order of New York County Family Court, which found that he had committed certain family offenses by his obnoxious actions against the man who had married his mother. The First Department modified. Vacatur was ordered as to the finding that the respondent committed the family offense of 2<sup>nd</sup> degree aggravated harassment, based on Penal Law § 240.30(1)(a) as it existed before its 2014 amendment. The statute was found unconstitutionally vague by *People v Golb*, 23 NY3d 455.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06947.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06947.htm)

***Cleary-Thomas v Thomas*** | Dec. 14, 2021

COVID TEST | ROUTINE

The wife appealed from an order of New York County Supreme Court. The First Department affirmed. Her request that the husband obtain her consent before having the children tested for Covid-19 was unreasonable. The motion court correctly found that such a test was diagnostic, not treatment, and was routine and not so invasive as to require both parties' consent.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06946.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06946.htm)

## SECOND DEPARTMENT

***Assad v Assad*** | Dec. 15, 2021

DIVORCE | CHILD SUPPORT

The wife appealed from an order of Queens County Supreme Court entered in post-divorce proceedings. The Second Department modified. The trial court erred in summarily denying the plaintiff's motion to modify the parties' stipulation to increase child support. Three years had passed since the last support order was entered; and the husband's gross income had increased by 15%. See Domestic Relations Law § 236 (B) (9) (b) (2) (ii); Family Ct Act § 451 (3) (b). A hearing was needed. It was also error to impose counsel fees against the wife. Her motion was not so lacking in merit as to justify such award to the husband, the monied party. Finally, Supreme Court should not have restricted the wife's filing of future motions and imposed prospective sanctions. Jennifer Moran represented the wife.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_06978.htm](https://nycourts.gov/reporter/3dseries/2021/2021_06978.htm)



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