

Decisions of Interest

JANUARY 17, 2023

CRIMINAL

FIRST DEPARTMENT

People v Delacruz | Jan. 12, 2023

SORA | VICTIM NOT HELPLESS

The defendant appealed from an order of Bronx County Supreme Court finding him a level-two sex offender. The First Department reduced the adjudication to level one. The victim’s testimony—that she was “fighting” with the defendant, trying to push him away, and shouting “stop” during the sexual assault—did not support the assessment of 20 points for a physically helpless victim. Legal Aid Society of New York (Harold Ferguson, of counsel) represented the appellant.

[People v Delacruz \(2023 NY Slip Op 00165\)](#)

People v Olivieri | Jan. 12, 2023

PROTECTIVE ORDER DURATION | VINDICTIVE PROSECUTION

The defendant appealed from a judgment of New York County Supreme Court convicting him, upon his plea of guilty, of 3rd degree stalking and 2nd degree bail jumping. The First Department vacated the expiration date of the order of protection and remitted. As the People conceded, the order exceeded the maximum statutory duration and did not account for jail time credit. Indicting the defendant for bail jumping did not constitute vindictive prosecution, where he rejected the People’s offer to refrain from pursuing that charge if he withdrew a pending motion to take back his guilty plea to a different charge. Legal Aid Society, NYC (Simon Greenberg, of counsel) represented the appellant.

[People v Olivieri \(2023 NY Slip Op 00166\)](#)

THIRD DEPARTMENT

People v Rivera | Jan. 12, 2023

WAIVER OF APPEAL | VERDICT

The defendant appealed from a Montgomery County Court judgment convicting him of 2nd degree murder and 2nd degree conspiracy, following a jury trial. The Third Department affirmed. After the verdict, the defendant waived his right to appeal and agreed to testify against the codefendant in exchange for an agreed-upon sentence. The waiver was

invalid because it mischaracterized the rights being waived. But the convictions were supported by legally sufficient evidence and were not against the weight of the evidence. [People v Rivera \(2023 NY Slip Op 00129\)](#)

FAMILY

FIRST DEPARTMENT

Gloria B. v Rachelle B.T. | Jan. 12, 2023

FAMILY OFFENSE | AGGRAVATING CIRCUMSTANCES

The petitioner appealed from an order of New York County Family Court issuing a two-year order of protection against the respondent, upon a finding that she committed a family offense, but declining to find aggravating circumstances. The First Department modified. The respondent's repeated harassment of the petitioner in violation of a final order of protection constituted aggravating circumstances warranting extending the duration to five years. Thomas Villecco represented the appellant.

[Matter of Gloria B. v Rachelle B.T. \(2023 NY Slip Op 00148\)](#)

SECOND DEPARTMENT

Matter of Omar G. | Jan. 11, 2023

JD | REVERSED

The respondent appealed from orders of Kings County Family Court, finding that he committed acts which, were he an adult, would constitute 2nd degree CPW, criminal possession of a firearm, and EWC, and adjudicating him a juvenile delinquent. The Second Department modified by vacating the adjudication as to CPW and remitted for a new hearing on that charge. Family Court erroneously admitted a video of the respondent's mother being questioned by police officers under the excited utterance exception. The statements in response to police questioning occurred a sufficient period after the event for the mother to have regained her composure. Austin Idehen represented the appellant.

[Matter of Omar G. \(2023 NY Slip Op 00085\)](#)

THIRD DEPARTMENT

Donald OO. v Tiffany OO. | Jan. 12, 2023

NONDISPOSITIONAL | APPEAL DISMISSED

The custodial grandfather appealed from an order of Fulton County Family Court, which granted the AFC's motion for an order directing him to produce the children for a meeting with the AFC. The Third Department dismissed the appeal. The order was made pending a hearing on the underlying custody petition. There was no appeal as of right from such

a nondispositional order in an Article 6 proceeding. See Family Ct Act § 1112 (a) (appealable orders). The grandfather did not seek permission to appeal, and the appellate court declined to treat the notice of appeal as a request for leave to appeal. Further, the custody petitions had been withdrawn, rendering the appeal moot.

[Matter of Donald OO. \(2023 NY Slip Op 00131\)](#)



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