

# Decisions of Interest

JANUARY 23, 2023

## CRIMINAL

### FIRST DEPARTMENT

***People v Matthews*** | Jan. 19, 2023

ROSARIO | APPEAL HELD IN ABEYANCE

The defendant appealed from a judgment of New York County Supreme Court convicting him of 3<sup>rd</sup> degree assault and 2<sup>nd</sup> degree criminal contempt. The First Department held the appeal in abeyance and remanded for an in camera review of two police officers' memo books. Supreme Court should have reviewed the memo books to determine if they contained statements the victim made to the officers and thus constituted *Rosario* material to which the defendant was entitled. Legal Aid Society, NYC (Hannah Gladstein, of counsel) represented the appellant.

[People v Matthews \(2023 NY Slip Op 00243\)](#)

### SECOND DEPARTMENT

***People v Miller*** | Jan. 18, 2023

PEOPLE'S APPEAL | UNPRESERVED

The People appealed from an order of Queens County Supreme Court granting suppression. The Second Department affirmed. The People's assertion that an exception should be made to the exclusionary rule was unpreserved. Supreme Court's statements in this regard were mere dicta, which did not influence the final determination and thus did not establish that the court "expressly decided" the issue (see CPL 470.05 [2]).

[People v Miller \(2023 NY Slip Op 00219\)](#)

***People v Zephir*** | Jan. 18, 2023

EMOTIONAL APPEAL | HARMLESS ERROR

The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW. The Second Department affirmed. During summation, the People improperly appealed to jurors' emotions by adding to an autopsy photo of the victim the caption "I couldn't appear soft"—the defendant's own words during the trial. However, the error did not deprive him of a fair trial, and the proof of his guilt was otherwise overwhelming.

[People v Zephir \(2023 NY Slip Op 00222\)](#)

## THIRD DEPARTMENT

### ***People v Bateman*** | Jan. 19, 2023

RAPE | NO CORROBORATION | LEGALLY INSUFFICIENT

The defendant appealed from an Otsego County Court judgment convicting him of two counts of 2<sup>nd</sup> degree rape. The Appellate Division modified, dismissing count one as to which no evidence corroborated the defendant's admission that he and the victim engaged in sexual intercourse "a few times" in August 2017, when he was 46 and she was 14. Thus, the evidence was legally insufficient. The Rural Law Center of New York (Kristin Bluvas, of counsel) represented the appellant.

[People v Bateman \(2023 NY Slip Op 00249\)](#)

### ***People v Fisher*** | Jan. 19, 2023

SCARED JURORS | DISSENT

The defendant appealed from a Chemung County Court judgment, convicting him of 3<sup>rd</sup> degree CSCS (three counts). The Third Department affirmed. Two justices dissented in part, delving into the issue of disqualification of a grossly unqualified juror under CPL 270.35 (1). After jury deliberations had begun, an inquiry in response to a juror's note indicated that she was certain that the defendant had followed her home after jury selection, raising startling safety concerns. Further, the subject juror discussed the incident with the other jurors during deliberations, triggering their fears. Yet County Court failed to engage in the necessary probing and tactful inquiries.

[People v Fisher \(2023 NY Slip Op 00248\)](#)

## TRIAL COURTS

### ***Jiminez v Graham*** | 2022 WL 2789217

FEDERAL HABEAS CORPUS | *BRADY* VIOLATION

The First Department affirmed the petitioner's 2<sup>nd</sup> degree murder conviction, and State collateral proceedings were unsuccessful. District Court—SDNY granted the petitioner's habeas corpus petition. The State failed to disclose evidence indicating that the pivotal eyewitness was motivated to lie by a possible sentence reduction. In finding that only the failure to disclose a specific quid pro quo would violate *Brady*, the Appellate Division had unreasonably applied clearly established Federal law. The prosecutor had not complied with *Brady's* strictures in supplying "only breadcrumbs, leaving the defense with the onerous task of guessing which trails [would] eventually lead to exculpatory evidence." The prosecution case was weak, and there was a reasonable probability that, had the subject proof been disclosed, the outcome would have been different. The petitioner was to be released unless the State provided a new trial within 120 days. The District Attorney did not appeal. The Office of the Appellate Defender (Rosemary Herbert and Anastasia Heeger) represented the petitioner.

[Jiminez v Graham \(2022 WL 2789217\)](#)

***People v Lincoln-Lynch* | 2023 NY Slip 51326 (U)**

GRAND JURY | NO CORROBORATION INSTRUCTION | DISMISSED

The defendant moved to dismiss an indictment charging him with leaving the scene of an incident without reporting. Saratoga County Court granted the motion. The prosecutor failed to instruct the Grand Jury on CPL 60.50's corroboration requirement. Much of the GJ testimony was hearsay, and there was no instruction about exceptions to the hearsay rule. Further, the prosecutor elicited testimony about the defendant's prior medical treatment that was irrelevant and invited speculation that he was using pain medication during the incident. The cumulative effect of these errors impaired the integrity of the GJ proceeding and rendered it defective. Andrew Safranko represented the defendant.

[People v Lincoln-Lynch \(2023 NY Slip Op 51326 \[U\]\)](#)

***People v Riley* | 2023 WL 193716**

STAY-AWAY ORDER | NO REASONABLE BASIS

At arraignment, Bronx County Criminal Court issued a temporary, stay-away order of protection against the defendant. He requested a hearing pursuant to *Crawford v Ally*, 197 AD3d 27 (1st Dept 2021). The court modified, limiting the scope of the order. The stay-away provision deprived the defendant of a significant property interest, and the People failed to establish an articulable reasonable basis for such restriction. The complainant was uncooperative and did not want a stay-away order, and the People's other proof was not sufficiently reliable. Bronx Defenders (Aubree Aguinaga under the supervision of Samantha Tucker, of counsel) represented the defendant.

[People v Riley \(2023 NY Slip Op 23012\)](#)

***People v Lanfair* | 2023 WL 177643**

CPL 245.50 | DELAYED NOTICE | CHALLENGE FORFEITED

The defendant moved to invalidate the prosecution COC and SOR because the People failed to disclose street-camera and police-station footage. The defendant did not notify the People of the deficiencies until more than two months after the certificate and statement were filed, even though the street-camera footage had been referenced in the People's timely CPL 710.30 notice. The failure to alert the People "as soon as practicable" forfeited the defense challenge to that video (see CPL 245.50 [4]). But the defense had no prior knowledge of the other video. The timely challenge to the omission of the police-station footage nullified the COC and SOR, but Cohoes City Court accepted the People's corrected supplemental notices.

[People v Lanfair \(2023 NY Slip Op 23011\)](#)

***Matter of R.* | 2023 WL 107642**

COUNSEL | REFUSAL TO APPEAR | CONTEMPT

Kings County Supreme Court found defense counsel guilty of criminal contempt of court for disobeying an order to appear for a continued suppression hearing. The respondent cited a Rule on Engagement of Counsel, 22 NYCRR 125.1 (d), which required an attorney with a scheduling conflict in criminal cases to give preference to an incarcerated defendant's case. However, that rule was subject to subdivision (f) (no adjournment of ongoing trial except in sole discretion of judge), which also applied to pretrial suppression

hearings. The respondent should not have arrogated to himself the authority to adjourn a hearing simply by refusing to appear. A \$750 fine was imposed.

[Matter of R. \(2023 NY Slip Op 23002\)](#)

***People v JN*** | 2023 NY Slip Op 50030 (U)

RTA | NO EXTRAORDINARY CIRCUMSTANCES

The People moved for an order preventing removal of an action to the JD Part of Erie County Family Court. Youth Part denied the motion. Two adolescent offenders were backseat passengers in a car. After the car was pulled over, the driver sped away and the police pursued the vehicle. The car slowed down at one point, and police later found a loaded handgun there. One AO tried to flee. While both youths were charged with 2<sup>nd</sup> degree CPW and one with additional crimes, there were no allegations of violence; and no one saw the gun being thrown from the car. These facts were not heinous and did not constitute extraordinary circumstances. Giovanni Genovese and Gina Vallone-Bacon separately represented the AOs.

[People v JN \(2023 NY Slip Op 50030 \[U\]\)](#)

## FAMILY

### FIRST DEPARTMENT

***Matter of Michael Y.*** | Jan. 17, 2023

CPS RECORDS | SUBPOENA | CONTEMPT

The father appealed from an order of New York County Family Court denying his motion to hold ACS in contempt. The First Department reversed. In the Article 6 proceeding, the father alleged that the mother had made false reports of abuse against him. Family Court subpoenaed complete investigation notes and unfounded reports, but ACS produced redacted documents, which Family Court did not review in camera. No judicial determination was made to justify the redactions, pursuant to Social Services Law § 447 (7) (Commissioner may prohibit release of information that would identify person who made report or cooperated in investigation, if disclosure would harm such person). The matter was remanded for in camera review. Daniel Robinson represented the appellant.

[Matter of Michael Y. \(2023 NY Slip Op 00193\)](#)

### THIRD DEPARTMENT

***Matter of Syri'annah PP.*** | Jan. 19, 2023

TPR | ABANDONMENT | REVERSED

The father appealed from an order of Schenectady County Family Court granting DSS's application to terminate his parental rights. The Third Department reversed and dismissed the petition. DSS failed to establish that the father abandoned his children by evincing an intent to forego his parental rights. He filed numerous motions to resume visitation and have his children returned; intervened in the mother's neglect proceeding; and made

numerous inquiries about the children. Further, the agency thwarted his visits with the children. Michelle Rosien represented the appellant.

[Matter of Syri'annah PP. \(2023 NY Slip Op 00252\)](#)

***Matter of Harmony F.*** | Jan. 19, 2023

TPR | PERMANENT NEGLECT | MODIFIED

The father appealed from an order of Chenango County Family Court terminating his parental rights. The Third Department modified. Family Court correctly found permanent neglect but erred in declining to hold a dispositional hearing without first obtaining the consent of the parties (see Family Ct Act § 625 [a]). The appellate court was constrained to remit the matter to hold a dispositional hearing or obtain the parties' consent. Lindsay Kaplan represented the appellant.

[Matter of Harmony F. \(2023 NY Slip Op 00259\)](#)

***Harvey P. v Contrena Q.*** | Jan. 19, 2023

CHANGE IN CIRCUMSTANCES | MODIFIED

The child's custodian appealed from an order of Chemung County Family Court, which dismissed her custody modification petition, finding no change in circumstances. The Third Department modified. Hearing proof established that the father was not adhering to terms of the prior order. While visitation was to occur in a public place, it often occurred in private residences or hotels. Further, there was testimony that the father used drugs during visits. Such facts constituted a change in circumstances. The matter was remitted for a hearing on best interests. Lisa Miller represented the appellant.

[Harvey P. v Cotrena Q. \(2023 NY Slip Op 00257\)](#)

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