Indigent Legal Services

# Decisions of Interest

OCT. 11, 2022

## CRIMINAL

## FIRST DEPARTMENT

***People v Resheroop*** | Oct. 6, 2022

NEW COUNSEL | REVERSED

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree conspiracy. The First Department reversed and ordered a new trial. Supreme Court denied the defendant's request for new counsel without making any inquiry or giving him an opportunity to explain the basis for his request. The Center for Appellate Litigation (Danielle Krumholz, of counsel) represented the defendant.
https://nycourts.gov/reporter/3dseries/2022/2022_05606.htm

***People v Merchant*** | Oct. 6, 2022

CPL 30.30 (6) | RETROACTIVITY

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree assault. The First Department affirmed. Regardless of whether he validly waived the right to appeal, the defendant forfeited review of his speedy trial claim by pleading guilty. He was convicted before the Jan. 1, 2020 effective date of CPL 30.30 (6), which permits defendants who pleaded guilty to raise statutory speedy-trial claims on appeal and was not to be applied retroactively.
https://nycourts.gov/reporter/3dseries/2022/2022_05619.htm

***People v Wilhelm*** | Oct. 4, 2022

*ANDERS* | CLIENT COMMUNICATION

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of attempted 2nd degree assault upon his plea of guilty. The First Department held the appeal in abeyance and directed counsel to communicate with the client about the *Anders* brief filed and advise him of his right to file a pro se supplemental brief.
People v Wilhelm (2022 NY Slip Op 05507)

***People v Vidro*** | Oct. 6, 2022

SORA | EQUIVALENCY | PRISON DISCIPLINE

The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him a level-two sexually violent offender. The First Department affirmed. For his conduct—making sexually suggestive phone calls from his place of incarceration—

the defendant was found guilty of a disciplinary infraction but not a "sex offense." The latter determination did not have preclusive effect as to SORA risk factor 13 regarding "sexual misconduct." There was no basis to find that the criteria for commission of a "sex offense" for purposes of a disciplinary determination were equivalent to those for "sexual misconduct" within the meaning of the SORA risk factor.
https://nycourts.gov/reporter/3dseries/2022/2022_05616.htm

### ***People v Suttle*** | Oct. 6, 2022

SORA | EQUIVALENCY | OUT-OF-STATE CONVICTION

The defendant appealed from an order of New York County Supreme Court, adjudicating him a level-one sex offender. The First Department affirmed. The defendant was required to register as a sex offender in New York based on a Louisiana conviction that was not equivalent to any NY felony. SORA made some out-of-state felonies registrable based solely on how they were treated in the foreign jurisdiction. The defendant had not shown that his sex offender adjudication based on the conviction at issue—or disclosure of his HIV status incident to that registration—was contrary to Public Health Law § 2785.
https://nycourts.gov/reporter/3dseries/2022/2022_05618.htm

## SECOND DEPARTMENT

### ***People v Castrovinci*** | Oct. 5, 2022

SORA | RISK FACTORS 2 & 4 | REVERSED

The defendant appealed from an order of Kings County Supreme Court, designating her a level-two sex offender. The Second Department reversed and reduced the adjudication to risk-level one. Although the defendant's arguments regarding risk factors 2 and 4 were raised for the first time on appeal, the appellate court considered the merits in the interest of justice. The SORA court improperly assessed the challenged points where there was no sexual contact between the defendant and the victim, and thus her conduct did not satisfy the definition of a continuing course of sexual conduct. Lauren Jones represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_05550.htm

### ***People v Gutierrez*** | Oct. 5, 2022

SENTENCES | CONCURRENT

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of multiple offenses. The Second Department modified, providing that the sentences for 1st degree burglary (two counts) would run concurrently with those for 1st and 2nd degree assault. The burglaries did not involve disparate or separate acts from the assaults so as to support consecutive sentences. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_05543.htm

***People v Gough*** | Oct. 5, 2022

DISCOVERY SANCTION | RETROACTIVITY

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes. The Second Department affirmed. CPL 245.80 (1) (b), which mandated the imposition of a remedy or sanction when discoverable material was lost or destroyed, was not to be applied retroactively to a trial ruling which preceded the effective date of Jan. 1, 2020. The statute did not expressly or by necessary implication provide for retroactive effect. Moreover, the Legislature delayed the effective date for eight months, reflecting an intent to apply the provisions of CPL Article 245 prospectively only. https://nycourts.gov/reporter/3dseries/2022/2022_05542.htm

***People v Long*** | Oct. 5, 2022

RESTITUTION | MODIFIED

The defendant appealed from two Dutchess County Court judgments, convicting him of 2nd degree robbery. The Second Department modified, vacating the imposition of restitution, mandatory surcharge, and a crime victim assistance fee. The amounts of restitution awarded were not pronounced at sentencing. Such violations of CPL 380.20 and 380.40 (1) could be addressed on appeal, despite the valid waiver of appeal and failure to preserve the issue. Further, the imposition of surcharges and fees was inconsistent with the restitution directive. Steven A. Feldman represented the appellant. https://nycourts.gov/reporter/3dseries/2022/2022_05545.htm

***People v DiTore*** | Oct. 5, 2022

PEOPLE'S APPEAL | LICENSE | REVERSED

The People appealed from an order of Nassau County Supreme Court, granting the defendant's CPL 440.10 motion to vacate a judgment convicting him of DWI and related offenses. The Second Department reversed. The regulations that led to the denial of the defendant's application to restore his driver license did not exist when he pleaded guilty; and he failed to identify any conduct during the plea proceedings that constituted a due process violation. Further, loss of a driver license was a collateral consequence of a guilty plea and not a matter the court system controlled. Finally, the plea court did not promise that the defendant's license would automatically be reinstated after a one-year revocation. https://nycourts.gov/reporter/3dseries/2022/2022_05541.htm

# FOURTH DEPARTMENT

***People v Corey*** | Oct. 7, 2022

SUPPRESSION | REVERSAL

The defendant appealed from a Cayuga County Court judgment, convicting him of 2nd degree CPW and other crimes. The Fourth Department reversed. The lower court erred in refusing to suppress statements the defendant made while in custody without having been *Mirandized.* At the hospital, he called an officer to his bed and said, "I'm beat up." That spontaneous statement was not subject to suppression. But then the officer asked the defendant, "What happened," thereby eliciting his explanation about how he came to

illegally possess a weapon. The erroneous ruling may have impacted the defendant's decision to plead guilty. Craig Cordes represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_05646.htm

### ***People v Hill*** | Oct. 7, 2022

SOR | NOT ILLUSORY

The People appealed from a Jefferson County Court order, which granted the defendant's motion to dismiss the indictment. The Fourth Department reversed. The defendant did not demonstrate that the People's statement of readiness was illusory. For their SOR to be valid, the People did not have to contact their witnesses on every adjourn date or to produce them instantaneously. However, the majority admonished the prosecutor that she was required to obey trial court orders and timely have the case ready for trial. One justice dissented.
https://nycourts.gov/reporter/3dseries/2022/2022_05626.htm

### ***People v Kenney*** | Oct. 7, 2022

330.30 MOTION | DENIAL AFFIRMED

The defendant appealed from a Herkimer County Court judgment, convicting him of 1st degree rape. The Fourth Department affirmed. County Court did not err in summarily denying the defendant's motion to set aside the verdict, pursuant to CPL 330.30 (2) (during trial there occurred, out presence of court, improper conduct by juror which may have affected substantial right of defendant and was **not known to him prior to verdict**). The alleged juror misconduct was addressed by the court and counsel on the record at the time of trial. The defendant knew about the matter before the verdict but failed to act.
https://nycourts.gov/reporter/3dseries/2022/2022_05645.htm

### ***People v Allen*** | Oct. 7, 2022

330.30 MOTION | GRANT REVERSED

The People appealed from an Oswego County Court order granting the defendant's motion to set aside the verdict, pursuant to CPL 330.30 (1) (any ground **appearing in the record** which, if raised on appeal from judgment of conviction, would require reversal or modification of judgment as matter of law). The Fourth Department reversed. The motion was premised on matters outside the existing trial record.
https://nycourts.gov/reporter/3dseries/2022/2022_05647.htm

### ***People v Savery*** | Oct. 7, 2022

UNCHARGED CRIMES | AFFIRMED

The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree murder and other crimes. The Fourth Department affirmed. Evidence of prior bad acts was properly admitted. The proof as to the defendant's gang membership was interwoven with the narrative and was necessary background information to explain the relationship between the defendant, the decedent, and the eyewitnesses.
https://nycourts.gov/reporter/3dseries/2022/2022_05628.htm

## CRIMINAL COURT

***People v Ajunwa*** | 2022 NY Slip Op 50977(U)

DISMISSAL | REARGUMENT | DENIED

The People moved for leave to reargue a Bronx County Criminal Court decision and order granting a CPL 30.30 motion to dismiss, based on the People's failure to discharge their discovery duties before certifying compliance. The motion was denied. The CPL generally did not provide for leave to reargue, so criminal courts often turned to CPLR 2221. A motion for reargument must be based on matters of fact or law allegedly overlooked or misapprehended by the court. The People only restated their incorrect legal arguments and improperly sought to inject new facts. Contrary to their stance, nothing in the court's prior decision relied on facts outside of the record. An introductory paragraph—observing a troubling pattern among Bronx prosecutors—was not a part of the court's analysis. Moreover, courts could take judicial notice of such matters. Criminal Court denied the People's request for a new decision removing any reference to the assigned prosecutor's name and an admonishment regarding a misleading submission. The scolding was appropriate, and there was no right to prosecute a criminal case anonymously. The Legal Aid Society of NYC (Ilana Kornfeld, of counsel) represented the defendant.
https://nycourts.gov/reporter/3dseries/2022/2022_50977.htm

# FAMILY

## FIRST DEPARTMENT

***Matter of Taveon J.*** | Oct. 4, 2022

NEGLECT | 911 CALL

The mother appealed from an order of disposition of New York County Family Court, which brought up for review a fact-finding order holding that she neglected the subject children. The First Department affirmed. One child, age 11, was heard crying during a 911 call in which he stated that the mother's boyfriend choked her and threatened to kill the child. The tape was properly admitted as an excited utterance; and the child's consistent out-of-court statements to an ACS investigator and police officer immediately after the incident were corroborated by the 911 tape and other evidence.
Matter of Taveon J. (Selina T.) (2022 NY Slip Op 05512)

***F.L. v J.M.*** | Oct. 6, 2022

DIVORCE | PRIVACY

The nonparty appellant challenged an order of New York County Supreme Court, which denied his motion seeking access to motion papers submitted in connection with a prior order entered in their matrimonial action. Such prior order directed that: (1) the decision would be reissued using only the parties' initials to protect the privacy of the parties and their minor child; and (2) the website Leagle.com had to take down the cached published appellate decision that was recalled and vacated. In these circumstances, the appellant failed to provide "good cause" for granting public access to the motion papers.

https://nycourts.gov/reporter/3dseries/2022/2022_05590.htm

# SECOND DEPARTMENT

***Matter of Jadeliz M. Q.*** | Oct. 5, 2022

NEGLECT | SUMMARY JUDGMENT

The father appealed from an order of Kings County Family Court, which granted the petitioner's motion for summary judgment, finding that he neglected the subject child. The Second Department affirmed. The father's criminal conviction was properly given collateral estoppel effect where the identical issue had been resolved and the father had a full and fair opportunity to litigate the issue of his criminal conduct.
https://nycourts.gov/reporter/3dseries/2022/2022_05533.htm

***Sicina v Gorish*** | Oct. 5, 2022

WILLFUL VIOLATION | COUNSEL FEES

The respondent appealed from an order of Orange County Family Court, which granted a petition alleging that he violated an order of protection and awarded counsel fees. The Second Department modified. The court could properly order respondent to pay reasonable and necessary counsel fees, given the finding that the violation was willful. But a hearing was needed to determine the amount of the fees. Thus, the matter was remitted. Judith Richman represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_05535.htm

# FOURTH DEPARTMENT

***Matter of Grayson S.*** | Oct. 7, 2022

APPEAL TIMELY | NEGLECT REVERSED

The father appealed from an order of Oswego County Family Court, which held that he neglected his child. The Fourth Department reversed and dismissed the petition. As a threshold matter, the appellate court rejected arguments that the father did not timely take his appeal under Family Ct Act § 1113. Court service was effectuated by email, but the statute did not provide for service by any electronic means. Thus, the time to take an appeal did not begin to run. Regarding the merits, the single incident of the father losing his temper and striking a misbehaving child did not constitute neglect, where there was no proof of harm. Stephanie Davis represented the father.
Matter of Grayson S. (2022 NY Slip Op 05649)

***Johnson v Johnson*** | Oct. 7, 2022

CUSTODY | REVERSED

The father and AFC appealed from a Jefferson County Family Court order which dismissed his custody modification petition. The Fourth Department reversed and granted sole custody to the father. The parties had regressed to acrimony, the father provided a stable home, and the mother thwarted the father-child relationship. John Cirando represented the father, and Scott Otis represented the child.
Matter of Johnson v Johnson (2022 NY Slip Op 05651)