

# Decisions of Interest

NOVEMBER 28, 2022

## CRIMINAL

### FIRST DEPARTMENT

#### ***People v Girard*** | Nov. 22, 2022

SIDEBAR | MATERIAL STAGE | PRESENCE

The defendant appealed from a judgment of New York County Supreme Court convicting him of attempted 2<sup>nd</sup> degree murder and other crimes. The First Department reversed and ordered a new trial. There was a violation of the defendant's right to be present at a sidebar conference concerning his testimony. He had specific knowledge that would have helped advance his position as to his justification defense. The defendant did not waive his right to participate; he was never asked if he wished to be present. The Center for Appellate Litigation (Allison Haupt, of counsel) represented the appellant.

[People v Girard \(2022 NY Slip Op 06645\)](#)

#### ***People v Dean*** | Nov. 22, 2022

MIRANDA | PEDIGREE PLUS

The defendant appealed from a judgment of NY County Supreme Court convicting him of 2<sup>nd</sup> degree murder. The First Department affirmed. Supreme Court properly denied the defendant's motion to suppress his statements to police. The questions asked did not require *Miranda* warnings, even though the discussion went beyond routine pedigree matters, such as where the defendant had been staying. While police knew that the crime occurred in a specific hotel, they did not ask about topics that were related to the crime or reasonably likely to elicit an incriminating answer. Expert identification of an injury as a bite mark was not so unreliable as to preclude expert testimony; and any error was harmless. While the validity of "bite mark matching" was questionable, such proof was not presented at trial.

[People v Dean \(2022 NY Slip Op 06643\)](#)

### SECOND DEPARTMENT

#### ***People v Holloway*** | Nov. 23, 2022

CONSTRUCTIVE POSSESSION | INSUFFICIENT PROOF

The People appealed from an order of Queens County Supreme Court, which dismissed two counts of an indictment charging 2<sup>nd</sup> degree CPW. The Second Department affirmed. Proof that the defendant possessed a loaded handgun, which was found in an unoccupied car parked behind his house, was legally insufficient. The prosecution failed to establish that the defendant

owned, rented, or controlled the vehicle in which the weapon was found. Steven Goldenberg represented the defendant on appeal.

[People v Holloway \(2022 NY Slip Op 06716\)](#)

***People v Baque* | Nov. 23, 2022**

CRIMINALLY NEGLIGENT HOMICIDE | INFANT

The defendant appealed from a judgment of Queens County Supreme Court convicting him of criminally negligent homicide and EWC. The Second Department affirmed, finding that the verdict was not against the weight of the evidence. The proof showed that the defendant consoled his infant daughter when she awoke crying at 2 a.m. The child was dead when the mother went to her at 6:30 a.m. Expert testimony established that the child died from violent shaking, and her injuries could not have been caused by normal jostling. Because the defendant was the only person to care for the child in the hours before she died, the jury could reasonably have concluded that he caused her death.

[People v Baque \(2022 NY Slip Op 06711\)](#)

***People v Porter* | Nov. 23, 2022**

DISCOVERY | NO VIOLATION

The defendant appealed from a judgment of Queens County Supreme Court convicting him of attempted 2<sup>nd</sup> degree murder and other crimes. The Second Department affirmed. At trial, the People's used a recording that was not turned over until after defense counsel made an opening statement. That was not a discovery violation. Under CPL former 240.20 (1) (g), upon demand, the People were required to disclose any recording they intended to introduce at trial. However, until defense counsel questioned proof that the defendant went by the nickname "Sonny," the prosecution had not intended to use the instant recording.

[People v Porter \(2022 NY Slip Op 06720\)](#)

***People v Selby* | Nov. 23, 2022**

PROBATION CONDITION | UPHELD

The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2<sup>nd</sup> degree course of sexual conduct against a child, upon his plea of guilty. The Second Department affirmed. On appeal, the defendant challenged a condition of probation requiring him to refrain from contact with other sex offenders. The restriction was not too broad or vague; it was clear that the defendant was expected to not engage in purposeful acts that could result in the prohibited contact. Federal courts had construed comparable conditions—prohibiting contact with ex-convicts, gang members, or minors—to exclude incidental contacts. Further, the instant condition did not subject the defendant to strict liability; it was to be construed to prohibit *knowing* contact with any sex offender.

[People v Selby \(2022 NY Slip Op 06722\)](#)

***People v Torres* | Nov. 23, 2022**

SORA | NOTICE REQUIRED

The defendant appealed from a Rockland County Court order adjudicating him a level-two sex offender. The Second Department affirmed. County Court's assessment of 10 additional points that had not been requested by the Board or the People was improper. The sua sponte departure from the Board's recommendation deprived the defendant of his due process right to notice and a meaningful opportunity to respond. But the error was harmless; deducting the points would not have altered the presumptive risk level.

[People v Torres \(2022 NY Slip Op 06730\)](#)

### ***People v Thurmond*** | Nov. 23, 2022

SORA | NOTICE REQUIRED

The defendant appealed from an order of Kings County Supreme Court adjudicating him a level-three sex offender. The Second Department affirmed. In determining that an upward departure was warranted, Supreme Court erroneously considered aggravating factors not raised by the Board or the People. However, the error was harmless because the People provided sufficient proof of other aggravating factors to support the departure.

[People v Thurmond \(2022 NY Slip Op 06728\)](#)

### ***People v Brown*** | Nov. 23, 2022

ANDERS BRIEF | DUTY TO CONSULT

The defendant appealed from a judgment of Suffolk County Supreme Court convicting her of attempted 2<sup>nd</sup> degree robbery. After an *Anders* brief was filed, the Second Department relieved appellate counsel and assigned new counsel. The brief identified a non-frivolous issue that could have been argued, and stated that the defendant did not give written consent to raise the issue. However, the brief did not reflect that counsel had fulfilled his duty to consult with the defendant.

[People v Brown \(2022 NY Slip Op 06712\)](#)

## THIRD DEPARTMENT

### ***People v Jenkins*** | Nov. 23, 2022

MURDER | INSUFFICIENT PROOF

The defendant appealed from a Chemung County Court judgment, convicting him of 2<sup>nd</sup> degree murder. The Third Department reversed and dismissed the indictment, finding the evidence legally insufficient. The People's theory of accessorial liability was that the defendant's display of a gun during a bar fight prolonged the attack and delayed others from transporting the victim to the hospital. However, the proof did not establish that the defendant shared his companion's homicidal intent. What had begun as a fist fight then escalated, and the companion stabbed the victim in the chest. Pamela Bleiwas represented the appellant.

[People v Jenkins \(2022 NY Slip Op 06652\)](#)

### ***People v Reed*** | Nov. 23, 2022

TODDLER | UNSWORN WITNESS

The defendant appealed from a Washington County Court judgment, convicting him of 2<sup>nd</sup> degree aggravated sexual abuse and other crimes. The Third Department reversed and ordered a new trial. County Court erred in allowing the three-year-old complainant to testify without first inquiring as to whether she had the requisite intelligence and capacity to give unsworn testimony. The error was not harmless. The appellate court reached the unpreserved issue in the interest of justice. Jason Goldman represented the appellant.

[People v Reed \(2022 NY Slip Op 06657\)](#)

## FAMILY

### THIRD DEPARTMENT

#### ***Sarah QQ. v Raymond PP.*** | Nov. 23, 2022

CPS RECORDS | CUSTODY REVERSED

The father appealed from an order of Saratoga County Family Court, which granted the mother's petition to modify custody. The Third Department reversed and remitted for a new fact-finding hearing. Family Court erred in refusing to admit CPS records regarding indicated findings against the mother concerning her abuse and/or neglect of another child. The CPS documents included statements by the subject child. Hearsay evidence regarding abuse and neglect allegations could be admitted in a custody proceeding if it was corroborated by other evidence. Lisa Burgess represented the appellant.

[Sarah QQ. v Raymond PP. \(2022 NY Slip Op 06659\)](#)

#### ***Brittni P. v Michael P.*** | Nov. 23, 2022

ALCOHOL ABUSE | CUSTODY REVERSED

The mother appealed from an order of Greene County Family Court, which dismissed her custody modification petition. The Third Department reversed and transferred primary physical custody from the father to the mother. Despite troubling proof of the father's alcohol abuse, Family Court did not obtain an adequate alcohol assessment. The mother did not have substance abuse issues, had overcome mental health issues, and had achieved a stable home life. The appellate AFC strongly supported the mother's position, particularly during oral argument. Michelle Rosien represented the appellant, and Pamela Joern represented the child.

[Brittni P. v Michael P. \(2022 NY Slip Op 06667\)](#)

#### ***Nicole B. v Franklin A.*** | Nov. 23, 2022

BIASED JUDGE | CUSTODY REVERSED

The mother appealed from an order of Chemung County Family Court, which granted the father's motion to dismiss her custody modification petition at the close of her proof. The Third Department reversed. The injuries suffered by the child while in the father's care, together with the mother's improved parenting abilities and housing, demonstrated a change in circumstances. The matter was remitted for a new hearing before a different judge. The record showed that the judge below had prejudged the case and was unable to be fair. Christopher Hammond represented the appellant.

[Nicole B. v Franklin A. \(2022 NY Slip Op 06672\)](#)

#### ***Kilts v Kilts*** | Nov. 23, 2022

FAMILY OFFENSE | NOT PROVEN

In an Article 8 proceeding, the respondent appealed from an order of Otsego County Family Court. Upon a finding that the respondent committed the family offense of disorderly conduct, Family Court issued an order of protection. The petitioner did not make a prima facie showing that the respondent had the requisite intent to create a public inconvenience, annoyance, or alarm. Her threat against the petitioner's life did not draw the attention of others to the scene. The Rural Law Center of New York (Kristin Bluvus, of counsel) represented the appellant.

[Kilts v Kilts \(2022 NY Slip Op 06660\)](#)