Indigent Legal Services

# Decisions of Interest

FEBRUARY 3, 2022

## CRIMINAL

## FIRST DEPARTMENT

### ***People v Acosta*** | Feb. 3, 2022

*PADILLA* | INEFFECTIVE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPCS. The First Department held the appeal in abeyance and remanded. The defendant was deprived of effective assistance when counsel failed to advise him that his guilty plea to a drug-related felony would result in mandatory deportation and merely stated that "this may and probably will affect his immigration status." The defendant was to be afforded the opportunity to move to vacate his plea upon a showing that there was a reasonable probability that he would not have pleaded guilty if alerted to the deportation consequences of his plea. The Office of the Appellate Defender (Emma Shreefter, of counsel) represented the appellant.
People v Acosta (2022 NY Slip Op 00737) (nycourts.gov)

### ***People v Ramos*** | Feb. 1, 2022

MARIJUANA | NO VACATUR

The defendant appealed from a judgment of New York County Supreme Court. The First Department affirmed, declining to vacate a conviction of 2nd degree possession of marijuana. Penal Law Article 221 was replaced by Art. 222, under which possession of 80 oz. in one's home is legal. The new Article does not apply to defendants sentenced before its enactment, but CPL 440.46-a provides a mechanism to resentence persons convicted under former Art. 221 where their conduct would constitute a lesser offense or no offense under Art. 222. The charge of 2nd degree CPW—as presented to the grand jury and in a special information—was based on the defendant possessing a loaded firearm and having been previously convicted of a crime. The trial court properly removed an irrelevant indictment allegation about weapon possession not having occurred in the home or place of business. The defendant had notice of the People's actual theory.
People v Ramos (2022 NY Slip Op 00631) (nycourts.gov)

### ***People v Ugwu*** | Feb. 1, 2022

CONFIRMATORY ID | EXPERT ON PCP

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree assault. The First Department affirmed. The trial court correctly

determined that the victim was so familiar with the defendant that her identification was confirmatory. The responding officer testified that, over a six-month period, the victim saw the defendant regularly in a park; he often spoke to her; and she had a clear view of his face. The trial court aptly permitted the defendant to introduce expert testimony potentially relevant to the reliability of the victim's testimony, including about the possible effects of her use of PCP. But precluding expert testimony that PCP may cause memory loss was appropriate where there was no proof that the victim suffered such effect.
People v Ugwu (2022 NY Slip Op 00634) (nycourts.gov)

### ***People v Townsend*** | Feb. 3, 2022

GRAND JURY | NO IAC

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPW, upon a plea of guilty. The First Department affirmed. To the extent that the record permitted review, an ineffective assistance claim was rejected. The determination as to whether a defendant would testify before the grand jury was a strategic one properly made by counsel—though the better practice may be for counsel to first consult the client. In any event, the defendant failed to show prejudice flowing from defense counsel's decision to waive his testimony before the grand jury.
People v Townsend (2022 NY Slip Op 00738) (nycourts.gov)

## SECOND DEPARTMENT

### ***People v Coles*** | Feb. 2, 2022

CPL 440.47 | HEARING

The defendant appealed from an order of Kings County Supreme Court, which summarily denied her CPL 440.47 motion for resentencing under Penal Law § 60.12. The Second Department reversed. Upon her guilty plea, the defendant was convicted of 1st degree manslaughter and sentenced to 20 years' imprisonment plus post-release supervision. She sought DVSJA relief, alleging that the codefendant subjected her to domestic violence that was a significant contributing factor to her participation in the crime against a third party. Supreme Court erred in finding that the defendant failed to make the requisite preliminary evidentiary showing. She submitted affidavits of her sister and mother and a transcript of her interrogation by police. Such evidence corroborated claims that the codefendant abused her and was a member of her family or household. The matter was remitted for a hearing. The Legal Aid Society of NYC (David Crow, Lawrence Hausman, and Cleary Gottlieb, LLP, of counsel) represented the appellant.
People v Coles (2022 NY Slip Op 00678) (nycourts.gov)

## THIRD DEPARTMENT

### ***People v Belcher-Cumba*** | Feb. 3, 2022

SENTENCING | CPL 380.20

The defendant appealed from a Broome County Court judgment, convicting him of attempted 1st degree robbery, upon his plea of guilty. The Third Department modified.

CPL 380.20 required that courts pronounce sentence in every case where a conviction is entered. County Court did not pronounce the length of the term of imprisonment in open court. Thus, the sentence was vacated and the matter remitted for resentencing. Clea Weiss represented the appellant.
People v Belcher-Cumba (2022 NY Slip Op 00691) (nycourts.gov)

### ***People v Hancarik*** | Feb. 3, 2022
VOP | NOT MOOT
The defendant appealed from a Delaware County Court judgment, which revoked his probation and imposed a sentence of imprisonment. The Third Department affirmed. The expiration of the prison term and the period of supervision did not moot the defendant's challenge to the determination that he violated the conditions of his probation. Such finding was a continuing stain on his record, carrying potential future consequences. To the extent that prior Third Department decisions held to the contrary, they should no longer be followed. On the merits, the People proved the VOP.
People v Hancarik (2022 NY Slip Op 00692) (nycourts.gov)

### ***People v Kelly*** | Feb. 3, 2022
VOP | ATTEMPTED BURGLARY
The defendant appealed from a judgment of Albany County Supreme Court, which revoked his probation and imposed a sentence of imprisonment. The Third Department affirmed. A state trooper's testimony about seeing the defendant lurking outside his hotel room window and an arm pushing through the open window—together with the defendant's admission that he briefly reached into the window to touch the curtain—established by a preponderance of the evidence that he violated probation by engaging in attempted 2nd degree burglary. The defendant's explanation, that he was curious about the fabric of the window covering, was unworthy of belief.
People v Kelly (2022 NY Slip Op 00695) (nycourts.gov)

## FAMILY

# FIRST DEPARTMENT

### ***Matter of Briany T.*** | Feb. 1, 2022
ARTICLE 10 | MENTAL HEALTH RECORDS
The Article 10 respondent appealed from orders of Bronx County Family Court, which denied his motions to disclose mental health treatment records relating to the child, 13, who charged that he sexually abused her. The First Department modified. Notations in ACS case records purportedly indicated that, when the child was four, she recanted allegations of inappropriate touching by another man and that she had received counseling for issues relating to the false allegation. The respondent claimed that the records were necessary to his fabrication defense. Confidential mental health records may be disclosed if the interests of justice outweigh the necessity of confidentiality. *See*

Mental Hygiene Law § 33.13 (c) (1). Pursuant to Family Ct Act § 1038 (d), Family Court must balance the movant's need for discovery vs. potential harm to the child. The appellate court ordered in camera review of records on the child's prior treatment but held that records on current counseling were off-limits. Upon review, Family Court must determine whether any information tended to support the defense. Bronx Defenders (Shanee Brown, of counsel) represented the appellant.
Matter of Briany T. (Justino G.) (2022 NY Slip Op 00629) (nycourts.gov)

# SECOND DEPARTMENT

### ***Johnson v Watson*** | Feb. 2, 2022

CUSTODY | REVERSED

The father appealed from an order of Kings County Supreme Court, which granted the mother's petition to modify custody. The Second Department reversed. The mother sought to eliminate certain overnight parental access because the father worked on Thursday nights. But that situation existed when the parties agreed to a parenting plan, so it was not a change in circumstances. The petition should have been dismissed without a hearing. Robert Marinelli represented the appellant.
Matter of Johnson v Watson (2022 NY Slip Op 00663) (nycourts.gov)

### ***O'Connor v O'Connor*** | Feb. 2, 2022

FAMILY OFFENSE | REVERSED

The petitioner appealed from an order of Rockland County Family Court, which dismissed her family offense petition against her ex-husband. The Second Department reversed. The lower court held that the petitioner could not prove her allegations because the child's out-of-court statements were inadmissible. Yet the teenager could have testified in open court. If accepted as true, the petitioner's allegations could constitute a family offense. Warren Hecht represented the appellant.
Matter of O'Connor v O'Connor (2022 NY Slip Op 00667) (nycourts.gov)

### ***Matter of Nila S.*** | Feb. 2, 2022

FCA § 1061 | REVERSED

The mother appealed from an order of Queens County Family Court, which denied her Family Ct Act § 1061 motion to modify an order of disposition. The Second Department reversed. The mother demonstrated good cause to vacate the neglect finding and grant a suspended judgment. She had no prior child protective history; showed remorse and insight about how her actions affected the children; and was committed to addressing the issues that led to the neglect, including by complying with court-ordered services and treatment. The requested relief would be in the best interests of the children. Richard Cardinale represented the appellant.
Matter of Nila S. (Priscilla S.) (2022 NY Slip Op 00670) (nycourts.gov)

# THIRD DEPARTMENT

***Tammy OO. v NYS OCFS*** | Feb. 3, 2022

INDICATED REPORT | DISSENT | NO HARM

The petitioner commenced an Article 78 proceeding to review an OCFS determination, which denied her application to declare unfounded, and expunge, reports maintained by the Central Register of Child Abuse and Maltreatment. The matter was transferred to the Third Department, which confirmed the challenged determination and dismissed the petition. Two justices dissented. They agreed that substantial evidence supported the determination that the petitioner failed to exercise a minimum degree of care in providing the child with proper supervision and guardianship. However, the dissenters opined that the record did not support the finding that the child was harmed or at imminent risk of harm. OCFS's determination on that score was conclusory. Indeed, the challenged decision noted that, when the subject child stayed with a neighbor, the residence was safe and posed no concerns. The neighbor was even approached about potentially obtaining custody of the child.

Matter of Tammy OO. v New York State Off. of Children & Family Servs. (2022 NY Slip Op 00706) (nycourts.gov)

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