

# Decisions of Interest

MARCH 11, 2022

## CRIMINAL

### FIRST DEPARTMENT

#### ***People v Reid*** | March 8, 2022

SENTENCE | CONCURRENT

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW (two counts) and sentencing him as a persistent violent felony offender to an aggregate term of 50 years to life. The First Department modified. The sentence for possessing a loaded firearm with intent to use it unlawfully against another had to run concurrently with the term for murder, because there was no evidence that the defendant possessed the weapon with an unlawful intent distinct from his intent to kill the victim. The midtrial closure of the courtroom to all spectators was proper under the extraordinary circumstances presented, where the court made detailed findings regarding photos taken in the courtroom and posted online and spectators' intimidating behavior. Richard Greenberg represented the appellant.

[People v Reid \(2022 NY Slip Op 01425\) \(nycourts.gov\)](#)

### SECOND DEPARTMENT

#### ***People v Arline*** | March 9, 2022

PREDICATE | NOT EQUIVALENT

The defendant appealed from judgments of Queens County Supreme Court, convicting him of multiple rape charges. The Second Department vacated his adjudication as a second violent felony offender. The defendant's prior Florida burglary conviction did not constitute a predicate violent felony conviction. Appellate Advocates (De Nice Powell, of counsel) represented the appellant.

[People v Arline \(2022 NY Slip Op 01462\) \(nycourts.gov\)](#)

#### ***People v Rodriguez*** | March 9, 2022

ORDER OF PROTECTION | JAIL-TIME CREDITS

The defendant appealed from a resentence imposed upon a conviction of 1<sup>st</sup> degree course of sexual conduct against a child. The appeal brought up for review an order of protection. The Second Department vacated the durational provision of the order and remitted, since jail-time credits were not considered and the period imposed otherwise

exceeded the maximum duration. See CPL 530.13 (4). Appellate Advocates (Anders Nelson, of counsel) represented the appellant.

[People v Rodriguez \(2022 NY Slip Op 01466\) \(nycourts.gov\)](#)

***People v Paterno* | March 9, 2022**

SORA | UPWARD DEPARTURE | REVERSED

The defendant appealed from a Suffolk County Court order, designating him a level-three sex offender. The Second Department reversed. The SORA court erred in granting an upward departure. The People failed to prove, by clear and convincing evidence, the proffered aggravating factor, including that the defendant engaged in unprotected sexual conduct with the victim. The Legal Aid Society of Suffolk County (Genevieve Cahill, of counsel) represented the appellant.

[https://nycourts.gov/reporter/3dseries/2022/2022\\_01470.htm](https://nycourts.gov/reporter/3dseries/2022/2022_01470.htm)

***People v Agosto* | March 9, 2022**

JUSTIFICATION | COMBAT BY AGREEMENT

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2<sup>nd</sup> degree assault. The Second Department affirmed. The trial court properly instructed the jury. A justification defense may be negated by proof that the physical force involved was the product of combat by agreement not specifically authorized by law. Under a reasonable view of the evidence, the jury could have found there was a tacit agreement between the defendant and the complainant.

[People v Agosto \(2022 NY Slip Op 01461\) \(nycourts.gov\)](#)

## THIRD DEPARTMENT

***People v Brown* | March 10, 2022**

SENTENCE | REDUCED

The defendant appealed from a judgment of Columbia County Court, convicting him of 1<sup>st</sup> degree criminal possession of marijuana, upon his plea of guilty. The Third Department modified. The defendant was sentenced to five years in prison plus two years' post-release supervision, while his codefendant received a split sentence of six months in jail plus five years' probation. The reviewing court stated that neither the codefendant's lesser sentence nor the MRTA (repealing Penal Law § 221.30) warranted modification of the defendant's sentence. However, in the interest of justice, his sentence was reduced to time served (three years), given his age, physical condition, and prior criminal history. Stephen Carney represented the appellant.

[People v Brown \(2022 NY Slip Op 01483\) \(nycourts.gov\)](#)

***People v Parker* | March 10, 2022**

SENTENCE | CONCURRENT

The defendant appealed from a judgment of St. Lawrence County Court, revoking probation and imposing a term of imprisonment. The Third Department modified. The lower court should not have imposed consecutive sentences upon resentencing the defendant for two counts of 4<sup>th</sup> degree CPW. Sentences imposed for two offenses could

not run consecutively where a single act constituted two offenses. The defendant's convictions were based on his act of constructively possessing two rifles in a locked safe on a certain date. There was no proof of any separate act by him which constituted possession of one gun as opposed to the other. County Court also erred in issuing permanent orders of protection in favor of two persons who were not victims or witnesses to the conduct that formed the basis for the CPW convictions. The Rural Law Center of New York (Kelly Egan) represented the appellant.

[People v Parker \(2022 NY Slip Op 01487\) \(nycourts.gov\)](#)

### ***People v Harris* | March 10, 2022**

CAUSATION | MANSLAUGHTER

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2<sup>nd</sup> degree manslaughter and other offenses. The Third Department affirmed. The defendant, Jodi Noisseau, and the victim drank and took drugs at a hotel one night. Upon checking out the next morning, the defendant and Noisseau could not awaken victim, who was foaming at the mouth and clearly needed medical care. Yet they transported her to the apartment of Noisseau, who continued taking drugs. Many hours later, the victim died in the apartment, and her body was then disposed of in the snow beside a residential street. The defendant's conduct set in motion the events that foreseeably resulted in the victim's death. Not obtaining medical help was a gross deviation from what a reasonable person would have done.

[People v Harris \(2022 NY Slip Op 01484\) \(nycourts.gov\)](#)

## **FAMILY**

### **FIRST DEPARTMENT**

#### ***Hilary C. v Michael K.* | March 10, 2022**

FUGITIVE DISENTITLEMENT | INAPPLICABLE

The father appealed from an order of New York County Family Court entered in proceedings under Articles 6 and 8 of the Family Court Act. The First Department modified. The father was in Japan, but the appellate court declined to dismiss the appeal pursuant to the felony disentitlement doctrine. There was no nexus connecting the father's fugitive status and the instant proceedings. He had appeared virtually in court, communicated with counsel, and consented to relief sought by the mother. Further, the father had complied with probation terms and pledged to return to New York to comply with any court order. Upon his own admission, he had knowingly and willfully violated a court order directing him not to communicate with the attorneys of record in a disparaging way and to refrain from using profanity. Thus, Family Court properly found the father in civil contempt, but 30 days' incarceration was inappropriate. The disposition was vacated and replaced with time served. Philip Katz represented the appellant.

[Matter of Hilary C. v Michael K. \(2022 NY Slip Op 01512\) \(nycourts.gov\)](#)

### ***Matter of Levi L.* | March 10, 2022**

NY v TEXAS | TEMPORARY JURISDICTION

The mother appealed from an order of Bronx County Family Court, rendered in an Article 10 proceeding. The mother neglected her children, given her untreated mental illness, which caused her to threaten suicide in front of them and then to drive from her Texas home to the father's Bronx home with a loaded gun. Family Court properly exercised temporary emergency jurisdiction over the proceeding during the neglect proceedings, in the absence of any orders to safeguard the children from the Texas court assigned to the divorce proceeding there. Ultimately, the court in Texas—which remained the home state—did step in to protect the children.

[Matter of Levi L. \(Deanna R.\) \(2022 NY Slip Op 01516\) \(nycourts.gov\)](#)

## SECOND DEPARTMENT

### ***Fisch v Davidson* | March 9, 2022**

DIVORCE | VENUE

The defendant appealed from a divorce action order which denied her motion to change the venue from Suffolk to New York County. The Second Department reversed. The case presented two issues relating to the parties' residence: (1) whether their seasonal use of a Southampton house on weekends prior to March 2020 made them residents of Suffolk County; and (2) whether their retreat to such second home at the outset of the pandemic made the defendant a resident of Suffolk County. The answer to both questions was no.

[Fisch v Davidson \(2022 NY Slip Op 01442\) \(nycourts.gov\)](#)

## THIRD DEPARTMENT

### ***Andrea II. v Joseph HH.* | March 10, 2022**

CUSTODY | AFC | NEW FACTS

The mother appealed from an order of Broome County Family Court modifying custody. The Third Department affirmed. There was a change in circumstances. The parties now resided in different states, the child had reached school age, and the prior order did not address where the child would attend school. The brief of the appellate AFC advised the reviewing court of a subsequent development—police responded to a mental health complaint by the paternal grandfather against the father. The Appellate Division could take notice of new facts and allegations to the extent that they indicated that the record was no longer sufficient for determining a parent's fitness for custody. *See Matter of Michael B.*, 80 NY2d 299. There was no need to remit here, though. The reviewing court was advised at oral argument that no further proceedings were initiated based upon the alleged incident; and record evidence supported the award of primary physical custody to the father.

[Matter of Andrea II. v Joseph HH. \(2022 NY Slip Op 01492\) \(nycourts.gov\)](#)