Indigent Legal Services

# Decisions of Interest

MARCH 4, 2022

## CRIMINAL

## FIRST DEPARTMENT

### ***People v Lindsey*** | March 1, 2022

COUNSEL | NOT ADVERSE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 4th degree grand larceny and sentencing him as a second felony offender. The First Department affirmed. Defense counsel's response to the client's attacks on his effectiveness did not constitute taking an adverse position. At the court's invitation, counsel made statements describing his own general performance and conceding that there was no ground to challenge the predicate felony, despite the defendant's belief.
People v Lindsey (2022 NY Slip Op 01275) (nycourts.gov)

### ***People v Belle*** | March 3, 2022

PREDICATE | EQUIVALENT

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW and another crime, and from an order denying a CPL 440.20 motion to set aside the sentence. The First Department affirmed. The plea court correctly adjudicated the defendant a second violent felony offender based on his Massachusetts weapon possession conviction. That was proper. The MA and NY definitions of "firearm" were equivalent for predicate felony purposes.
People v Belle (2022 NY Slip Op 01399) (nycourts.gov)

### ***People v Pena*** | March 3, 2022

*PEQUE* | UNPRESERVED

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree burglary. The narrow exception to the preservation requirement did not apply to his *Peque* claim. Months before the defendant's plea, the People announced in open court that they were serving a notice of immigration consequences, so the defendant had a reasonable opportunity to object to the plea court's failure to advise him of the potential deportation consequences. *[NOTE: cf. People v Amantecatl, infra.]*
People v Pena (2022 NY Slip Op 01402) (nycourts.gov)

### ***Bryant v State*** | March 3, 2022

COURT OF CLAIMS ACT § 8-B | INAPPLICABLE

The claimant appealed from Court of Claims order granting the defendant's motion to dismiss his claim seeking compensation for his unjust conviction and incarceration. The vacatur of his conviction was based on ineffective assistance of counsel, which was not a ground for relief under Court of Claims Act § 8-b. *[NOTE: cf. Smythe v State, infra.]*
Bryant v State of New York (2022 NY Slip Op 01380) (nycourts.gov)

### ***Reese v City of NY*** | March 3, 2022

FALSE ARREST | TRIABLE

The parties cross-appealed concerning an order of Bronx County Supreme Court denying summary judgment motions in a case involving false arrest, malicious prosecution, and other claims. The First Department affirmed. Triable issues existed as to whether the police officers had probable cause to arrest the plaintiff for an open-container violation. Surveillance video evidence undermined an officer's account. The drugs found on the plaintiff in the search incident to arrest could not be used to establish probable cause.
Reese v City of New York (2022 NY Slip Op 01406) (nycourts.gov)

## SECOND DEPARTMENT

### ***People v Austin*** | March 2, 2022

COP CONFABULATOR | SUPPRESSION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree CPW, upon a jury verdict. The appeal brought up for review the denial of suppression. The Second Department reversed and dismissed the indictment. Supreme Court did not even try to reconcile contradictory accounts of officers Ramos and Pimentel as to where the defendant was sitting in a minivan and what he was doing when the officers arrived at the front windows. While Pimentel claimed that the defendant was trying to conceal a gun in a bag, ample evidence strongly suggested otherwise. Given the inconsistencies in the proof, it was impossible to determine whether the police lawfully searched the vehicle pursuant to the automobile exception. The lower court should have suppressed the gun. Appellate Advocates (Samuel Barr) represented the appellant.
People v Austin (2022 NY Slip Op 01306) (nycourts.gov)

### ***People v Gough*** | March 2, 2022

CLOTHES SEIZED | NO SUPPRESSION

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple offenses, upon a jury verdict. The Second Department modified. The trial court erred in not suppressing DNA evidence obtained from the defendant's clothing taken from the hospital the night of the shooting. The defendant had a legitimate expectation of privacy in his clothing. That police considered him a victim, not a suspect, did not strip him of Fourth Amendment protections. The People also failed to establish exigent circumstances. However, the error was harmless. The conviction of 2nd degree kidnapping and the related conviction of 2nd degree murder under count 3 of the

indictment were precluded by the merger doctrine, so those counts were dismissed. Appellate Advocates (Cynthia Colt, of counsel) represented the appellant.
People v Gough (2022 NY Slip Op 01317) (nycourts.gov)

### ***People v Dranchuk*** | March 2, 2022

PROBATION CONDITION | UNREASONABLE

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree assault, upon his plea of guilty, and imposing a sentence of community service and probation. The Second Department deleted a condition requiring the defendant to consent to a search of his person, vehicle, and home and to the seizure of drugs or weapons found. The issue did not require preservation and was not precluded by the appeal waiver. Probation conditions must be reasonably related to rehabilitation. The conviction arose from the defendant's assault of a taxicab driver and theft of her cell phone. When he committed the offense, the defendant was not armed. He told the probation department that he was under the influence of alcohol, but he was not found to need treatment. Appellate Advocates (David Goodwin) represented the appellant.
People v Dranchuk (2022 NY Slip Op 01312) (nycourts.gov)

### ***People v Hunter*** | March 2, 2022

YO | NO ELIGIBLITY RULING

The defendant appealed from two judgments of Queens County Supreme Court. The Second Department modified. As to 2nd degree CPW, an armed felony, the plea court failed to determine whether the defendant was an "eligible youth" and, if so, whether he should be afforded youthful offender treatment. Regarding resisting arrest, the court similarly did not decide if the defendant deserved YO status. The sentences were vacated and the matter remitted. In the interest of justice, the surcharge and fees imposed were also waived, pursuant to CPL 420.35 (2-a), which applied to offenders who were under age 21 at the time of the crime and which was enacted after the instant conviction. Legal Aid Society, NYC (Lauren Jones, of counsel) represented the appellant.
People v Hunter (2022 NY Slip Op 01320) (nycourts.gov)

### ***People v Dyshawn B.*** | March 2, 2022

FEES | VACATED

The defendant appealed from a judgment of Queens County Supreme Court, adjudicating him a youthful offender, upon his plea of guilty to 2nd degree CPW. The Second Department modified, given the retroactive application of amendments repealing mandatory surcharges and crime victim assistance fees for YOs. *See* Penal Law § 60.35 (1). Appellate Advocates (Lynn W.L. Fahey, of counsel) represented the appellant.
People v Dyshawn B. (2022 NY Slip Op 01308) (nycourts.gov)

### ***People v David*** | March 2, 2022

PEOPLE'S APPEAL | SORA RESENTENCE REVERSED

The People appealed from a resentence of Kings County Supreme Court, imposed upon the granting of the branch of the defendant's CPL 440.20 motion seeking to set aside his certification as a sex offender. The Second Department reversed and reinstated the

original sentence. A defendant's certification as a sex offender was part of the judgment of conviction but not the sentence. The relief sought was not available under CPL 440.20.
People v David (2022 NY Slip Op 01310) (nycourts.gov)

# APPELLATE TERM

### ***People v Hunter*** | 2022 NY Slip Op 50148 (U)

EMERGENCY DOCTRINE | SUPPRESSION

The defendant appealed from a judgment of Kings County Criminal Court, convicting him of disorderly conduct. The appeal brought up for review the denial of suppression. Appellate Term, Second Department reversed and dismissed. The defendant was arraigned for violating Agriculture & Markets Law § 353 by neglecting four dogs. After the motion court validated a police officer's warrantless entry of his apartment, the defendant entered the guilty plea. The emergency exception to the warrant requirement applied to animals, which were considered property. But the hearing evidence did not show that the officer had reasonable grounds to believe an emergency existed. He knew only that a 911 caller said the dogs were not being taken care of—not that there was a substantial threat of imminent danger to them. Thus, the lower court should have suppressed the officer's observations regarding the condition of the apartment and the dogs and the written statement obtained by exploiting the illegal entry. Appellate Advocates (Olivia Gee and Michael Arthus, of counsel) represented the appellant.
People v Hunter (2022 NY Slip Op 50148(U)) (nycourts.gov)

### ***People v Amantecatl*** | 2022 WL 599232

*PEQUE* | VIOLATION

The defendant appealed from a judgment of Kings County Criminal Court, convicting him of disorderly conduct. Appellate Term, Second Department held the appeal in abeyance. The defendant pleaded guilty in satisfaction of an accusatory instrument charging him with 3rd degree assault, EWC, and other offenses. The trial court did not mention possible deportation. Since the defendant's plea and sentencing occurred in the same proceeding, he had no ability to object, and the claim was reviewable absent a motion. *People v Peque*, 22 NY3d 168, declared that trial courts must make all defendants aware that, if they are not U.S. citizens, their felony guilty pleas may expose them to deportation. The COA reserved on whether that rule applied to a guilty plea to a misdemeanor and said nothing about violations. However, in the exercise of caution and based on the nature of the charges, the appellate court considered the merits. The matter was remitted so that the defendant could move to vacate the plea by establishing a reasonable probability that, had the plea court warned him about deportation, he would have opted to go to trial. Steven Feldman represented the appellant.
People v Amantecatl (2022 NY Slip Op 22055) (nycourts.gov)

### ***People v Ambrosini*** | 2022 WL 599230

78 MPH | REASONABLE

The defendant appealed from a judgment of Suffolk County District Court. The Appellate Term, Second Department reversed the conviction of driving at an unreasonable and imprudent speed. Vehicle & Traffic Law § 1180 (a) provided that "no person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." The evidence was legally insufficient to establish the traffic infraction. The police officer provided no testimony as

to any condition or hazards at the relevant time, so the court could not determine whether 78 mph was too fast. Keith Lavallee represented the appellant.
People v Ambrosini (2022 NY Slip Op 22054) (nycourts.gov)

# THIRD DEPARTMENT

### ***People v Crumedy*** | March 3, 2022

SIX-YEAR PERIOD | COURSE OF CONDUCT | TOO LONG

The People appealed from a Columbia County Court order, which granted the defendant's motion to dismiss eight counts of the indictment. The Third Department affirmed. On appeal, the People sought reinstatement of count 1, charging 2nd degree course of sexual conduct against a child. Such crime required that the conduct occurred over at least three months. While CPL 200.50 (6) did not define the outer parameters of the permissible period, the six-year interval charged in this indictment was too long to provide sufficient notice to the defendant, given that the charge was based on a few discrete acts not connected to any more particular time frames within the stated period.
People v Crumedy (2022 NY Slip Op 01351) (nycourts.gov)

### ***Appellate Advocates v DOCCS*** | March 3, 2022

PAROLE | FOIL | DISSENTS

The petitioner appealed from a judgment of Albany County Supreme Court, which dismissed an Article 78 petition. The Third Department affirmed. A FOIL request sought documents related to how the Board of Parole decided parole-release applications. The respondent partially complied. Two justices separately dissented in part. The first dissent opined that neither the attorney-client privilege nor the intra-agency exemption precluded the release of training materials prepared for the Board. Further, documents entitled "Board of Parole Interviews" and "Favorable/Unfavorable Court Decisions" contained no exempt material and should have been fully disclosed.
Matter of Appellate Advocates v New York State Dept. of Corr. & Community Supervision (2022 NY Slip Op 01354) (nycourts.gov)

### ***People v Wimberly*** | March 3, 2022

APPEAL WAIVER ISSUE | COURT IS IGNORED

The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. The Third Department affirmed, while expressing dismay with counsel. On appeal, the defendant contended that the court below abused its discretion in denying him youthful offender eligibility for the armed offense. In a prior decision in this case, the appellate court relieved former counsel and made it clear that new counsel should challenge the waiver of appeal. Inexplicably, current assigned appellate counsel failed to do so, and the unchallenged waiver foreclosed review of the YO claim.
People v Wimberly (2022 NY Slip Op 01346) (nycourts.gov)

# FAMILY

## FIRST DEPARTMENT

***Matter of Jacob V.*** | March 2, 2022

ARTICLE 10 | AFFIRMED

The respondents appealed from an order of Bronx County Family Court, which found that they abused the subject child. The First Department affirmed. Hospital records and expert testimony established that the two-year-old child sustained multiple, serious injuries which ordinarily would not occur absent an act or omission by his caretakers. No medical treatment was sought for the painful injuries. The respondents did not produce evidence that the injuries suffered over a brief period were likely nonaccidental.

Matter of Jacob V. (Shelly R.--Adonis V.) (2022 NY Slip Op 01407) (nycourts.gov)

## SECOND DEPARTMENT

***Nizen v Jacobellis*** | March 2, 2022

SUPPORT OBJECTIONS | DEFECTIVE EMAIL SERVICE

The father appealed from an order of Suffolk County Family Court denying his objections to a Support Magistrate's child support order. The Second Department affirmed. The father had used email to serve his objections on the pro se mother. Family Court properly denied the objections based on improper service. Since Family Ct Act § 439 (e) did not set forth permissible methods of service, the CPLR applied. Under section 2103, service by email was not allowed upon a party who had not appeared by an attorney.

Matter of Nizen v Jacobellis (2022 NY Slip Op 01299) (nycourts.gov)