

Decisions of Interest

APRIL 14, 2022

CRIMINAL

FIRST DEPARTMENT

People v Jones | April 12, 2022

ARREST | HEARING

The defendant appealed from a judgment of New York County Court, convicting him of 3rd degree CPCS and 2nd degree CPW. The appeal brought up for review the denial of his motion for a suppression hearing regarding an arrest warrant allegedly executed in violation of CPL 120.80. The First Department remanded and held the appeal in abeyance. The motion papers were sufficient to warrant a hearing, where the defendant's assertions were specific, and the People responded with conclusory denials. *See People v Hightower*, 85 NY2d 988. The Office of the Appellate Defender (Kami Lizarraga, of counsel) represented the appellant.

[People v Jones \(2022 NY Slip Op 02369\) \(nycourts.gov\)](#)

People v Gaccione | April 14, 2022

MOLINEUX | "MADE" MAN

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder. The First Department affirmed. The trial court properly allowed evidence of the defendant's conviction of witness tampering for an incident committed two years before the instant homicide. The evidence was probative of his desire to become a "made" member of the Genovese crime family—the alleged motive for his participation in the homicide—and of his relationship with a cooperating non-accomplice witness involved in the 1990 incident. Further, the proof tended to explain why the defendant confessed his role in the homicide to this witness.

[People v Gaccione \(2022 NY Slip Op 02500\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

People v Gomez | April 13, 2022

SORA | REVERSED

The defendant appealed from an order of Westchester County Supreme Court, which designated him a level-three predicate sex offender. The Second Department reversed and designated him a level-two offender. Supreme Court erred in assessing 30

points under risk factor 5 (30 points for victim aged 10 or less; 20 points for victim aged 11 to 16). The current offense was committed when the victim was 14. Further, the SORA court should not have imposed 30 points under risk factor 9 concerning prior convictions. The instant offense occurred in 2004, and the defendant did not plead guilty to the other crimes until 2011. Legal Aid Society of Westchester County (Debra Cassidy, of counsel) represented the appellant.

[People v Gomez \(2022 NY Slip Op 02440\) \(nycourts.gov\)](#)

People v Jones | April 13, 2022

VOP | HEARING

The defendant appealed from a judgment of Kings County Supreme Court, summarily revoking probation and imposing a sentence of imprisonment. The Second Department reversed. The defendant did not admit to violating probation, so the lower court was required to hold a hearing. See CPL 410.70 (1). Legal Aid Society, NYC (Hilary Dowling, of counsel) represented the appellant.

[People v Jones \(2022 NY Slip Op 02432\) \(nycourts.gov\)](#)

People v Rice | April 13, 2022

SUPPRESSION | TRESPASSER

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The Second Department affirmed. The appeal brought up for review the denial of suppression. The defendant failed to establish that he had a legitimate expectation of privacy in the curtilage of a vacant house where he was a trespasser. To the extent that he relied on the fact that the driveway was shared with the house next door, he was merely a guest there. Further, the defendant left his backpack alongside the vacant house, and when an officer asked about it, the defendant did not claim the backpack. Thus, he purposefully divested himself of it.

[People v Rice \(2022 NY Slip Op 02437\) \(nycourts.gov\)](#)

People v Smith | April 13, 2022

ANDERS | NEW COUNSEL

The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of DWI and AUO of a motor vehicle, upon his plea of guilty. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. There was no indication that counsel communicated with the defendant to see whether he wanted to withdraw his plea of guilty, even though a client's express consent was needed to seek vacatur of the plea. Counsel also failed to argue excessive sentence.

[People v Smith \(2022 NY Slip Op 02438\) \(nycourts.gov\)](#)

THIRD DEPARTMENT

People v Sherwood | April 14, 2022

DISSENT | BRADY

The defendant appealed from a judgment of Sullivan County Court, convicting him of 2nd degree rape and another crime, upon a jury verdict. The Third Department affirmed.

One justice dissented. Four days before trial, the defendant received records from the victim's forensic evaluation regarding child sexual abuse evaluation and a physical examination. The withheld material was material, and the defendant was prejudiced by the *Brady* violation. He was denied an opportunity to investigate and interview other potential defense witnesses well in advance of trial or to develop a more detailed argument regarding whether he could cross-examine the victim and present certain witnesses without running afoul of the Rape Shield Law. With more time, he could have called the examining physician and/or retained his own medical expert to review the records.

[People v Sherwood \(2022 NY Slip Op 02455\) \(nycourts.gov\)](#)

***People v Gertz* | April 14, 2022**

MENTAL ILLNESS | CROSS

The defendant appealed from a judgment of Ulster County Court, convicting him of 1st degree sexual abuse. The Third Department affirmed. The trial court did not deprive the defendant of his right to confront a witness when it limited his cross-examination of the mother regarding her mental illness. He was permitted to question her about whether, at the time of the incident, she was experiencing any symptoms related to her mental illness that could have affected her recollection of our incident.

[People v Gertz \(2022 NY Slip Op 02457\) \(nycourts.gov\)](#)

***People v Faublas* | April 14, 2022**

ANDERS | NEW COUNSEL

The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of drug sale and possession crimes. Appellate counsel submitted an *Anders* brief. The Third Department assigned new counsel. There was an issue of arguable merit regarding the appeal waiver that could potentially impact the reviewability of an argument on excessive sentence.

[People v Faublas \(2022 NY Slip Op 02456\) \(nycourts.gov\)](#)

FAMILY

FIRST DEPARTMENT

***Matter of Saaphire A.W.* | April 12, 2022**

MARIJUANA | NEGLECT

The mother appealed from an order of disposition rendered by Bronx County Family Court in an Article 10 proceeding. The First Department modified. The appeal brought up for review an order finding neglect based on marijuana use. Such finding was vacated. Evidence that the mother smoked marijuana while pregnant, and that mother and child tested positive at the time of birth, was insufficient to sustain the neglect finding. There was no proof that the drug impacted the mother's behavior or otherwise harmed the child.

or placed her at imminent risk. The neglect finding was inconsistent with the legalization of marijuana. Thomas Villecco represented the appellant.

[Matter of Saaphire A.W. \(Lakesha B.\) \(2022 NY Slip Op 02382\) \(nycourts.gov\)](#)

Mastrocola v Alcott | April 12, 2022

COORDINATOR | TERMINATED

The mother appealed from an order of New York County Supreme Court, which denied her motion to enforce the parties' custody stipulation. The First Department reversed. The mother's proposed access schedule adhered to the agreement, the father did not submit a proposal, and the parent coordinator recommended access that violated the stipulation. Thus, the mother's schedule should have been adopted, and the coordinator should have been replaced, as requested by the mother. Dawn Cardi represented the appellant.

[Mastrocola v Alcott \(2022 NY Slip Op 02364\) \(nycourts.gov\)](#)

Mark R. v Kimberly V. | April 12, 2022

ESTOPPEL | INAPPLICABLE

Bronx County Family Court denied the mother's motion to dismiss the petitioner's paternity petition based on equitable estoppel. The First Department affirmed. While the mother's current husband had assumed the role of father, the petitioner had consistently asserted paternity, had planned for the child, had lived with him for a time, and had not acquiesced in the formation of the husband-child bond. Further, there was no indication that providing the DNA test results to the petitioner would harm the young child.

[Matter of Mark R. v Kimberly V. \(2022 NY Slip Op 02376\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

Fitzsimmons v Fitzsimmons | April 13, 2022

MICHAEL B. | REMITTAL

The father appealed from custody orders issued by Suffolk County Family Court. The Second Department (which had stayed enforcement of one challenged order, which modified parental access) reversed and remitted. Family Court granted sole residential custody to the mother. In their briefs, the AFCs had reported new developments. Changed circumstances may have particular significance in custody matters and may render the record insufficient to review whether a decision served the children's interests. *See Matter of Michael B.*, 80 NY2d 299. The matter was remitted to reopen the hearing, including conducting in camera interviews with the children. Del Atwell represented the appellant.

[Matter of Fitzsimmons v Fitzsimmons \(2022 NY Slip Op 02411\) \(nycourts.gov\)](#)

Felgueiras v Cabral | April 13, 2022

DELEGATION | REMITTAL

The mother appealed from a custody order issued by Rockland County Family Court. The Second Department modified. Family Court erred in allowing the father to determine whether the mother's parental access should be suspended and not giving her a right to judicially challenge his determinations concerning her compliance with the Personalized

Recovery Oriented Services program. The provisions constituted an improper delegation of authority to the father. Warren Hecht represented the appellant.

[Matter of Felqueiras v Cabral \(2022 NY Slip Op 02410\) \(nycourts.gov\)](#)

Matter of Jose F. M. P. | April 13, 2022

SIJS | REVERSED

In a Family Ct Act Article 6 guardianship proceeding, the child appealed from an order of Nassau County Family Court. The Second Department reversed. The order denied an application seeking findings that reunification of the child with his father was not viable due to parental neglect and that it would not be in the child's best interests to return to Guatemala. The findings were sought to enable the child to petition for special immigrant juvenile status. The father mistreated the child and prevented him from attending school for more than one year. In Guatemala, the child had no viable caregiver. The Door's Legal Services Center (Svitlana Kobtseva) represented the appellant.

[Matter of Jose F. M. P. \(Francisco D. M. G.\) \(2022 NY Slip Op 02414\) \(nycourts.gov\)](#)



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