

# Decisions of Interest

JUNE 17, 2022

## CRIMINAL

### COURT OF APPEALS

#### ***People v Hill*** | June 16, 2022

ACCUSATORY INSTRUMENT | DEFECTIVE

The misdemeanor complaint charging 7<sup>th</sup> degree CPCS failed to allege a sufficient factual basis to conclude that the synthetic cannabinoid substance the defendant possessed was illegal; the complaint did not state that the substance was listed in Public Health Law § 3306 (g). The facially deficient count had to be dismissed, a unanimous Court of Appeals held, in an opinion by Judge Singas. Legal Aid Society, NYC (Harold Ferguson, of counsel) represented the appellant.

[People v Hill \(2022 NY Slip Op 03930\)](#)

#### ***People v Galindo*** | June 16, 2022

PEOPLE'S APPEAL | NO RETROACTIVITY

CPL 30.30 (1) (e), made effective while the defendant's direct appeal was pending, did not apply here. The amendment required the application of maximum times for prosecutorial readiness to accusatory instruments charging traffic infractions jointly with a felony, misdemeanor, or violation. Generally, retroactive operation of laws was disfavored, and nothing in the instant statutory amendment called for such operation. The Appellate Term order granting the defendant's motion to dismiss the accusatory instrument was reversed. Judge Rivera wrote for a unanimous court.

[People v Galindo \(2022 NY Slip Op 03928\)](#)

#### ***Nonhuman Rights Project v Breheny*** | June 14, 2022

HABEAS CORPUS | ELEPHANT | DISSENT

The Court of Appeals held that the First Department properly dismissed a petition for a writ of habeas corpus filed by the Nonhuman Rights Project, which sought the transfer of an elephant from the Bronx Zoo to an animal sanctuary. The writ was intended to protect the right of *human* beings to be free of unlawful confinement, Chief Judge DiFiore wrote for the majority. Judge Wilson dissented, opining that this extraordinary animal, possessing complex cognitive abilities, should be granted the right to petition for liberty. Historically, the Great Writ of Habeas Corpus was used to challenge detentions that did not violate any statutory right or were otherwise legal but were unjust in a specific case. See e.g. *Lemmon v People*, 20 NY 562 (1860) (habeas corpus relief to eight slaves

seeking liberation despite law legitimizing slavery). The flexibility of the Writ made it an innovative vehicle to challenge existing laws and societal norms on a case-by-case basis and to spur change. CPLR Article 70 could not curtail the reach of the Writ; it merely specified procedure. The word “person” in the statute could refer to any being or entity. Judge Rivera filed a separate dissenting opinion.

[Nonhuman Rights Project v Breheny \(2022 NY Slip Op 03859\)](#)

## FIRST DEPARTMENT

***People v J.F.*** | June 16, 2022

SEX OFFENDER | NO RELIEF AVAILABLE

The defendant appealed from an order of New York County Supreme Court, which denied his petition to modify his sex offender classification. The First Department affirmed. The defendant was ineligible for modification of his status. He had been adjudicated a level-one offender. There was no lower risk level, so his petition was really an application to be relieved of any further duty to register. But no provision in SORA allowed for such relief. Correction Law § 168-a (2) (3) did authorize the trial court to determine that a conviction of 2<sup>nd</sup> degree unlawful surveillance—the crime at issue here—did not require sex offender registration. However, that provision did not apply to modifications. It applied at the time of sentencing, and the defendant did not appeal from the judgment of conviction.

[People v J.F. \(2022 NY Slip Op 03973\)](#)

***People v Cabrera*** | June 14, 2022

HANDCUFFS | NO ARREST

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2<sup>nd</sup> degree CPW, upon his plea of guilty. The First Department affirmed. The appeal brought up for review the denial of suppression. Based on reliable information that the defendant was illegally transporting firearms into New York, police stopped him as he exited his car. In checking his ID, police noticed that he had a Florida concealed carry permit. When they asked the defendant if he had any firearms in the car, police did not have to *Mirandize* him, even if he was wearing handcuffs. While the detention was a seizure for 4<sup>th</sup> Amendment purposes, it did not constitute custody for *Miranda* purposes.

[People v Cabrera \(2022 NY Slip Op 03874\)](#)

## SECOND DEPARTMENT

***People v Dancy*** | June 15, 2022

INTERLOCK DEVICE | PROBATION

The defendant appealed from a Dutchess County Court judgment, convicting him of 1<sup>st</sup> degree vehicular manslaughter, upon his plea of guilty. The Second Department modified. County Court violated the VTL by directing that the defendant install and maintain an ignition interlock device for a three-year period, without imposing a sentence of probation or a conditional discharge. The matter was remitted for resentencing. Steven A. Feldman represented the appellant.

[People v Dancy \(2022 NY Slip Op 03904\)](#)

## THIRD DEPARTMENT

### ***People v Williams*** | June 16, 2022

AUTO HOMICIDE | DEPRAVED INDIFFERENCE

The defendant appealed from an Ulster County Court judgment, convicting him of multiple arising from a fatal car accident. The Third Department reduced the conviction of 2<sup>nd</sup> degree murder to 2<sup>nd</sup> degree manslaughter. The conviction was against the weight of evidence, given the lack of evidence of depraved indifference. One justice dissented in part, finding that the evidence fully supported the murder conviction. The defendant drove in an extremely reckless manner that showed an utter disregard for the value of human life. In response to a report about the defendant's erratic driving, an officer initiated a traffic stop. As the officer began to approach, the defendant fled the scene in his vehicle. A high-speed chase ensued. The defendant drove at 128 mph while approaching a yellow light. While he was highly intoxicated, his maneuvers upon the traffic stop indicated that he was conscious of his actions. Karen Leslie represented the appellant.

[People v Williams \(2022 NY Slip Op 03945\)](#)

### ***People v Kerrick*** | June 16, 2022

SENTENCE DISPARITY | REDUCED

The defendant appealed from a Franklin County Court judgment, convicting him of various crimes, upon a jury verdict. The Third Department modified. The other intruder's involvement in the crimes was substantial, but he cooperated and received a five-year term. Another cooperating perpetrator who played a lesser role received probation and six months in jail. Although the defendant was being sentenced as a second violent felony offender, considering the significant disparity in the sentences, the term for 1<sup>st</sup> degree burglary was reduced from 20 years to 12 years, plus post-release supervision. Catherine Barber represented the appellant.

[People v Kerrick \(2022 NY Slip Op 03941\)](#)

### ***People v Cook*** | June 16, 2022

PINGING | NO TAIN

The defendant appealed from an Ulster County Court judgment, convicting him of 3<sup>rd</sup> degree robbery, upon a jury verdict. The Third Department affirmed. The defendant argued that warrantless pinging of his cellphone was an illegal search and that any statements made to police after they located him should have been suppressed. Even if the pinging constituted an illegal search, the defendant's statements were sufficiently attenuated. Information gleaned from the pings was not exploited during the interview. Rather, the statements were obtained independently through other available evidence. Further, the statements were given hours after the defendant was identified by officers who knew him and he consented to going to the station and waived his *Miranda* rights. Thus, the statements were not tainted by the pinging.

[People v Cook \(2022 NY Slip Op 03934\)](#)

## ***People v Backus*** | June 16, 2022

PEOPLE'S APPEAL | DISMISSED

The People appealed from an Essex County Court order, which granted the defendant's motion to withdraw her guilty plea and vacate a judgment of conviction of 5<sup>th</sup> degree CPCS. The Third Department dismissed the appeal. No appeal lies from a determination made in a criminal proceeding unless provided for by statute. No judgment had been entered, and no right to appeal was available under CPL 450.20. The Legislature's policy to limit appellate proliferation in criminal matters was to be strictly honored.

[People v Backus \(2022 NY Slip Op 03949\)](#)

## FAMILY

### FIRST DEPARTMENT

## ***Matter of Francis O.*** | June 16, 2022

JD | DNA EXPUNGEMENT

In a juvenile delinquency proceeding, the appellant appealed from an interlocutory order of New York County Family Court denying his motion for expungement of DNA records. The First Department reversed. The appellant, then age 16, was arrested for stealing a credit card. Police interrogated him for two days without an adult present. An officer offered him a drink and then surreptitiously took a DNA sample. No DNA was collected from the incident; the sample taken from the appellant had no connection to the underlying incident. Under the Executive Law, Family Court had jurisdiction to order expungement. *See Matter of Samy F. v Fabrizio*, 176 AD3d 44. The proof did not establish that the appellant abandoned the cup; that he was aware that it would be used to collect a DNA sample, pursuant to an NYPD practice used against minors suspected of crimes; or that he waived his expectation of privacy. Maintaining the DNA profile in OCME's database in perpetuity was incompatible with the statutory purpose of JD proceedings—to focus on rehabilitation over punishment and afford youths a fresh start—and would result in substantial injustice to this appellant. Stephen Forbes represented the appellant.

[Matter of Francis O. \(2022 NY Slip Op 03969\)](#)

### SECOND DEPARTMENT

## ***Sorscher v Auerbach*** | June 15, 2022

CHILD SUPPORT | IMPUTED INCOME

The mother appealed from an order of Kings County Family Court, which directed the father to pay certain child support. The Second Department reversed and remitted. Upon the father's objections, Family Court had correctly found that, to impute income, the Support Magistrate improperly conducted her own research estimating the value of free housing and vehicle use he received. Rather than sustaining the elimination of such imputed income in an amended order, Family Court should have remitted the matter for

the Support Magistrate to properly determine the appropriate amounts, if any, to be imputed. Philp Kamaras represented the appellant.

[Sorscher v Auerbach \(2022 NY Slip Op 03898\)](#)

***Safir v Safir*** | June 15, 2022

CHILD SUPPORT | PENDENTE LITE

In a divorce action, the husband appealed from an order of Nassau County Supreme Court granting temporary child support. The Second Department affirmed. Modifications of pendente lite awards should rarely be made by an appellate court and then only under exigent circumstances. Perceived inequities in such awards can generally best be remedied by a speedy trial, where the parties' financial circumstances can be fully explored. The husband failed to establish any exigent circumstances.

[Safir v Safir \(2022 NY Slip Op 03917\)](#)

***Hogan v Smith*** | June 15, 2022

CUSTODY | DEFAULT | VACATUR

The mother appealed from a Dutchess County Family Court order, which denied her motion to vacate an order modifying custody upon her default. The Second Department reversed. When the mother failed to appear, the father moved to amend his petition to seek sole custody, and his wish was granted. In child custody proceedings, the law favored resolution on the merits, and defaults in such cases were more liberally opened than in other matters. Family Court erred in granting the father relief that far exceeded what he requested in his petition—without receiving any proof as to whether modification was required to protect the children's best interests. Further, the lower court abused its discretion in denying the motion to vacate. Carol Kahn represented the mother.

[Hogan v Smith \(2022 NY Slip Op 03894\)](#)