

Decisions of Interest

June 6, 2022

CRIMINAL

FIRST DEPARTMENT

People v Sidbury | June 2, 2022

ARSON | SENTENCE SLASHED

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree arson after a jury trial, and sentencing him as a second violent felony offender. He intentionally caused damage to a building by setting fire in the cuffing port of the door of his jail cell (an integral part of the door that allowed items to be transferred in and out). The First Department reduced the sentence from 25 to 10 years. The Office of the Appellate Defender (Stephen Strother) represented the appellant.

[People v Sidbury \(2022 NY Slip Op 03578\)](#)

People v Weinstein | June 2, 2022

SEX ASSAULT VICTIMS | BEHAVIOR

The defendant movie mogul appealed from a judgment of New York County Supreme Court, convicting him of 1st degree criminal sexual act and 3rd degree rape. The First Department affirmed. The trial court properly permitted expert testimony about rape trauma syndrome to explain behavior that might seem counterintuitive. In a similar vein, *Molineux* evidence was correctly permitted to help jurors understand victim behavior that might otherwise seem incongruent. The *Sandoval* ruling allowed the People to refer to 32 separate bad acts. The amount of the material was troublingly large, but the acts were relevant to credibility and a willingness to place one's interests about those of others.

[People v Weinstein \(2022 NY Slip Op 03576\)](#)

People v Salley | May 31, 2022

PUNGENT POT | PROBABLE CAUSE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The First Department affirmed. The appeal brought up for review the denial of suppression. During a lawful stop for a traffic infraction, the police noticed the odor of marijuana. Under the law at the time, that mere aroma justified the search of the vehicle and its occupants. Penal Law § 222.05 (3) (eff. 3/21/31), regarding whether a finding of probable cause may be based upon evidence of the odor of cannabis, should not be applied retroactively.

[People v Salley \(2022 NY Slip Op 03481\)](#)

People v Shepherd | May 31, 2022

PROSECUTOR AS JUROR | CHALLENGE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary. The First Department affirmed. The trial court properly denied the defendant's challenge for cause to a Bronx prosecutor. The record did not show that such prospective juror had a relationship to the instant prosecuting office that was likely to preclude her from rendering an impartial verdict, and her answers otherwise established that she could be impartial.

[People v Shepherd \(2022 NY Slip Op 03482\)](#)

People v Holmes | May 31, 2022

PRO SE | ISOLATED REMARK

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary, upon his plea of guilty. The First Department affirmed. There was no violation of the defendant's right to represent himself. The need for a searching inquiry by the court was not triggered by the defendant's isolated remark, which was followed by his apparent agreement with the court's statement that going pro se was not a good idea.

[People v Holmes \(2022 NY Slip Op 03483\)](#)

SECOND DEPARTMENT

People v Allen | June 1, 2022

YO | ARMED FELONY

The defendant appealed from a resentencing imposed by Kings County Supreme Court for his convictions of 1st degree robbery and 2nd degree CPW, upon his plea of guilty. The Second Department vacated the mandatory surcharges and fees imposed upon resentencing. Supreme Court properly declined to make a youthful offender adjudication. Having been convicted of an armed felony, the defendant was eligible for YO treatment only if mitigating circumstances bore directly on the way the crime was committed or his participation was minor. Neither test was not met. Appellate Advocates (Jonathan Schoepp-Wong and Sarah Cohen) represented the appellant.

[People v Allen \(2022 NY Slip Op 03525\)](#)

People v Jones | June 1, 2022

MIXED VERDICT | MERCY

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of certain robbery counts. The First Department affirmed. As to the first incident, the acquittal of 1st degree robbery did not render the verdict of guilty of 3rd degree robbery against the weight of the evidence. In conducting a weight-of-evidence review of a mixed jury verdict, the Appellate Division had authority to consider that the jury may not have acted irrationally, but instead may have shown mercy. The defendant's absence from a proceeding regarding the admissibility of the gun did not require reversal where the result was wholly favorable to him. While the trial court should have waited until he was present to discuss its prior *Molineux* ruling, his right to be present was not violated. The defendant

was present at the initial arguments, and the later discussion did not offer an opportunity for his meaningful participation.

[People v Jones \(2022 NY Slip Op 03528\)](#)

APPELLATE TERM

People v Godfrey | 2022 NY Slip Op 50432(U)

INFORMATION | DUPLICITOUS

The defendant appealed from a judgment of Nassau County District Court, convicting him of 2nd degree aggravated harassment, upon a jury verdict. Appellate Term, Second Department dismissed the information since it was duplicitous. The accusatory instrument charged one count of aggravated harassment but alleged that two offenses occurred on two distinct dates, separated by nearly one month. Nassau County Legal Aid Society (Tammy Feman and Argun Ulgen, of counsel) represented the appellant.

[People v Godfrey \(2022 NY Slip Op 50432\(U\)\)](#)

People v Flores | 2022 NY Slip Op 50431(U)

INFORMATION | FACIALLY INSUFFICIENT

The defendant appealed from a judgment of a Justice Court in Putnam County, convicting him of 4th degree CPW. Appellate Term, Second Department dismissed the accusatory instrument. The defendant's guilty plea did not forfeit the issue of facial insufficiency—a jurisdictional defect. Regarding intent to use the weapon unlawfully against another, the complainant sheriff merely saw an imitation pistol holstered on the defendant's side. Steven A. Feldman represented the appellant.

[People v Flores \(2022 NY Slip Op 50431\(U\)\)](#)

People v Taylor | 2022 NY Slip Op 50449(U)

PEQUE | PREJUDICE

The defendant appealed from a judgment of a Justice Court in Westchester County, convicting him of 2nd degree harassment. Appellate Term, Second Department reversed and remitted. Justice Court failed to inform the defendant that he could possibly be deported based on a guilty plea. In seeking to vacate the plea, he established a reasonable probability that, if properly warned, he would have rejected the plea offer. The defendant had moved from Jamaica to Brooklyn at age 11, and he wished to remain here. Further, had he gone to trial and been convicted, the potential immigration consequences would have been the same, since he pleaded guilty as charged. Thomas Keating represented the appellant.

[People v Taylor \(2022 NY Slip Op 50449\(U\)\)](#)

People v Oballe | 2022 NY Slip Op 50433(U)

PEQUE | ANDERS

The defendant appealed from a judgment of a Justice Court in Putnam County, convicting him of EWC. Appellate counsel submitted an *Anders* brief. Appellate Term, Second Department assigned new counsel. Possible issues included whether: the appeal waiver was a nullity since it was written in Spanish without an English translation; *Boykin* rights

were not adequately explained; the defendant received an insufficient *Peque* warning; and defense counsel was ineffective in not moving to dismiss, where there was no supporting deposition of the complainant. New counsel was directed to advise the defendant of risks that were inherent in such issues given that he had originally been charged with two felonies.

[People v Oballe \(2022 NY Slip Op 50433\(U\)\)](#)

See ILS Appellate Standards and Best Practices, Standard X (counseling about risks), XXII (issue selection), XXIII (*Anders* briefs).

[ILS Appellate Standards.pdf](#)

THIRD DEPARTMENT

People v Smith | June 2, 2022

ROBBERY | INSUFFICIENT PROOF

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of several crimes. The Third Department dismissed 1st and 2nd degree robbery counts. There was legally insufficient evidence to prove intent for accessorial liability. Indeed, considerable evidence suggested that the defendant was not one of the masked individuals who robbed the victim. The defendant maintained that he merely brokered a drug deal between the victim and a perpetrator and was unaware of a plan to attack and rob the victim; and the sparse circumstantial evidence did not support the People's theory. Steven Sharp represented the appellant.

[People v Smith \(2022 NY Slip Op 03547\)](#)

People v Marone | June 2, 2022

COLLOQUY | PERJURY | NEGATED

The defendant appealed from a Greene County Court judgment. The Third Department reversed. The defendant's statements during the plea colloquy negated an essential element of 3rd degree perjury. Given his limited explanation about an emailed affidavit, County Court was obliged to further inquire. The record demonstrated only that the defendant filed an unsworn document. Bruce Knoll represented the appellant.

[People v Marone \(2022 NY Slip Op 03543\)](#)

People v Roshia | June 2, 2022

440 | RECUSAL | REVERSAL

The defendant appealed from a St. Lawrence County Court order, summarily denying his CPL 440.10 motion to vacate a judgment convicting him of 1st degree criminal sexual abuse. The Third Department reversed and remitted in the interest of justice. The County Court judge should have recused himself, given that: (1) his law clerk was the former DA who prosecuted the defendant; (2) the defendant's motion made allegations about the DA's conduct while prosecuting him; and (3) there was a need to maintain an appearance of impartiality. The Rural Law Center of NY (Kelly Egan) represented the appellant.

[People v Roshia \(2022 NY Slip Op 03546\)](#)

People v Harris | June 2, 2022

MANSLAUGHTER | VELEZ ERROR

The defendant appealed from a Supreme Court judgment, convicting him of 1st degree manslaughter. The Third Department reversed and ordered a new trial. The defendant claimed self-defense, but the trial court failed to deliver an instruction that, if the jury found him not guilty of 2nd degree murder, any lesser counts must not be considered. See *People v Velez*, 131 AD3d 129. The Albany County Alternate Public Defender (Steven Sharp, of counsel) represented the appellant.

[People v Harris \(2022 NY Slip Op 03548\)](#)

FOURTH DEPARTMENT

People v Jones | June 3, 2022

PARTIAL PRINT | INSUFFICIENT PROOF

The defendant appealed from a County Court judgment, convicting him of 2nd degree burglary. The Fourth Department dismissed the indictment, finding that the verdict was against the weight of evidence. After a residence was burglarized, police found several fingerprints on a piece of paper near the point of entry. A fingerprint examiner opined that the print was made by the defendant's index finger—even though the print matched only 22% of the characteristics of his inked print. There was no indication that a second examiner made a positive verification. The People's expert had acknowledged on cross-examination that a second examiner, particularly a blind verification, significantly increased the accuracy of fingerprint analysis. No other proof linked the defendant to the crime. Monroe County Public Defender (William Clauss) represented the appellant.

[People v Jones \(2022 NY Slip Op 03590\)](#)

People v King | June 3, 2022

CPW | INSUFFICIENT PROOF

The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 2nd degree CPW. The Fourth Department dismissed the indictment, finding the evidence legally insufficient. The defendant's mere presence in the house where the weapon was found did not establish constructive possession. True, that night, the defendant was the only person in the residence whose DNA profile matched that of a major contributor to DNA found on the gun. However, that did not support an inference of his constructive possession when the weapon was discovered. One justice dissented. Gary Muldoon represented the appellant.

[People v King \(2022 NY Slip Op 03606\)](#)

People v Hill | June 3, 2022

ATTEMPTED MURDER | INSUFFICIENT PROOF

The defendant appealed from a Supreme Court judgment convicting him of multiple crimes arising from a home burglary and robbery. The Fourth Department dismissed the count of attempted 2nd degree murder. A video of an encounter between the defendant and a victim revealed that the gun may have accidentally discharged. The Monroe County Public Defender (Brian Shiffrin, of counsel) represented the appellant.

[People v Hill \(2022 NY Slip Op 03619\)](#)

***People v DeJesus* | June 3, 2022**

MOLINEUX | NEW TRIAL

The defendant appealed from a Cattaraugus County Court judgment, convicting him of 1st and 2nd degree robbery and other crimes. The Fourth Department granted a new trial. It was error to permit *Molineux* evidence of the defendant's alleged involvement in a burglary of the victim's home three days prior to the instant offenses to show intent. Intent could be inferred from the victim's testimony that, while wielding a baseball bat, the defendant directed him to comply with demands of a masked shooter to turn over money and property. The error was not harmless. The Legal Aid Bureau of Buffalo (Allyson Kehl-Wierzbowski) represented the appellant.

[People v DeJesus \(2022 NY Slip Op 03584\)](#)

***People v Bovio* | June 3, 2022**

PLEA | MURDER | ELEMENT NEGATED

The defendant appealed from a Seneca County Court judgment, convicting him of 2nd degree murder, upon a plea of guilty. The Fourth Department vacated the plea. The defendant pushed his toddler stepson, causing him to strike his head on the floor and die days later. During the plea colloquy, when stating through counsel that he did care for the victim, the defendant negated the mens rea element of depraved indifference. Before accepting the plea, County Court had a duty to inquire further. But the court failed to probe to reestablish that the defendant did not care whether the victim lived or died. Caitlin Connelly represented the appellant.

[People v Bovio \(2022 NY Slip Op 03591\)](#)

***People v King* | June 3, 2022**

PLEA | SUPPRESSION | REASONABLE SUSPICION

The defendant appealed from an Onondaga County Court judgment, convicting him of 3rd degree CPCS and another crime. The Fourth Department dismissed the indictment. Police saw the defendant's vehicle in the parking lot of an apartment complex known for drug activity, and they knew of his prior drug convictions. When police stopped their vehicle in front of his parked car so he could not drive away—thereby seizing him—they lacked a reasonable suspicion regarding criminal activity. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.

[People v King \(2022 NY Slip Op 03595\)](#)

***People v Davis* | June 3, 2022**

PLEA | IAC | HEARING

The defendant appealed from a Wayne County Court judgment, convicting him of attempted 2nd degree gang assault (two counts), upon his plea of guilty. The Fourth Department reserved decision. Counsel had advised the defendant that he was likely to be convicted at trial of attempted 2nd degree assault. That was erroneous, since such offense was a legal impossibility for trial purposes. The record raised a genuine factual issue as to the voluntariness of the plea, so County Court erred in summarily denying the defendant's motion to withdraw his pleas. Bridget Field represented the appellant.

[People v Davis \(2022 NY Slip Op 03610\)](#)

***People v Williams* | June 3, 2022**

440 | IAC | HEARING

The defendant appealed from an Onondaga County Court order, which, following a hearing, denied his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree murder and other crimes upon a jury verdict. The Fourth Department reversed. Trial counsel had failed to interview a witness who was present during the shootings and could provide potentially exculpatory evidence.

The defense investigator and trial counsel said they did not pursue the matter because the witness' version of events was inconsistent with other accounts and he had a criminal history. But without delving into the information, counsel could not make an informed decision. John Lewis represented the appellant.

[People v Williams \(2022 NY Slip Op 03625\)](#)

People v Franklin | June 3, 2022

SEX OFFENSE | SENTENCE SLASHED

The defendant appealed from an Oneida County Court judgment, convicting him of four counts of predatory sexual assault against a child. The Fourth Department reduced the aggregate term from 80 years to life to 30 years to life. Although the defendant's conduct was heinous and despicable, he had no prior criminal record, and the reduced sentence would provide an opportunity for him to demonstrate rehabilitation in the future. The Oneida County Public Defender (Patrick Marthage, of counsel) represented the appellant.

[People v Franklin \(2022 NY Slip Op 03616\)](#)

People v Muhammad | June 3, 2022

COURTROOM | INADVERTENT CLOSING

The defendant appeal from an Onondaga County Court judgment convicting him of 2nd degree murder and another crime. The Fourth Department affirmed. Concerned about distracting the jurors, the court had an ill-advised standing policy that prohibited anyone from entering while a witness was testifying. A misunderstanding led to a group of people waiting in the hallway for the doors to open while the jury was hearing testimony. They were not excluded by an affirmative act of the court. The brief, inadvertent closing did not violate the defendant's right to a public trial.

[People v Muhammad \(2022 NY Slip Op 03598\)](#)



Cynthia Feathers

Director, Appellate & Post-Conviction Representation

New York State Office of Indigent Legal Services

80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov

(518) 949-6131 | cynthia.feathers@ils.ny.gov | (she/her/hers)

Decisions of Interest

June 6, 2022

FAMILY

SECOND DEPARTMENT

Katie M. T.-J. v Jemel D. T. | June 1, 2022

PATERNITY | ADJOURNMENT

The respondent appealed from an order of filiation of Queens County Family Court, which adjudicated him the father of the child. The Second Department affirmed. The notice of appeal was deemed to be an application for leave to appeal, and leave was granted. See Family Ct Act § 1112 (a); *Matter of Caroline D. v Travis S.*, 168 AD3d 410 (no appeal lies as of right from order of filiation where order of support has been requested). The appeal brought up for review the denial of an adjournment of an equitable estoppel hearing. Family Court properly denied the respondent's request and allowed him to participate by phone, while his attorney represented him in the courtroom. The trial court had accommodated several requests for new counsel. Further, the respondent had a history of nonappearance and did not give a satisfactory explanation for this absence.

[Katie M. T.-J. v Jemel D. T. \(2022 NY Slip Op 03512\)](#)

Matter of Skkyy M. R. | June 1, 2022

FCA § 1028 APP | DENIED

The father appealed from an order of Queens County Family Court, which denied his Family Ct Act § 1028 application for return of the child. The Second Department affirmed. The father had failed to acknowledge the circumstances that led to removal. Return of the child would present an imminent risk, which could not be mitigated by reasonable efforts. The father lacked credibility.

[Matter of Skkyy M. R. \(2022 NY Slip Op 03518\)](#)

THIRD DEPARTMENT

Matter of Micah S. | June 2, 2022

NEGLECT | NO HARM

The father appealed from Saratoga County Family Court orders, which found that he neglected his daughter and derivatively neglected his son. The Third Department reversed. Imminent risk of harm to the girl was not shown by: (1) the father's hostility toward a caseworker during a visit; (2) a single instance of domestic violence; (3) the

father having opened a car door as a vehicle in which his daughter was a passenger was slowly beginning to pull away; and (4) his use of marijuana. The appellate court noted with disfavor that Family Court assigned a single AFC for both children even though their interests significantly diverged. Cheryl Sovern represented the appellant.

[Matter of Micah S. \(2022 NY Slip Op 03554\)](#)

Matter of Andreija N. | June 2, 2022

SEXUAL ABUSE | FLAWED CASE

The Department of Social Services appealed from an order of Montgomery County Family Court, which dismissed an abuse/neglect petition. The Third Department affirmed. The mother was not a proper party upon appeal. As a nonrespondent, she had a limited role under Family Ct Act § 1035 (d). Since her arguments did not pertain to a custody decision made within the child protective proceeding, her appeal was dismissed. Where the petitioner had repeatedly failed to move to amend its petition prior to the close of proof, Family Court properly excluded evidence offered to prove conduct not alleged in the petition. The trial court correctly refused to qualify the child's counselor as an expert, given her lack of expertise in diagnosing child sexual abuse. Many deficiencies contaminated the interview in which purported disclosures were made, including egregious deviations from guidelines for forensic interviews of children.

[Matter of Andreija N. \(2022 NY Slip Op 03552\)](#)

[Family Ct Act § 1035 | FindLaw](#)

Neil VV. v Joanne WW. | June 2, 2022

CUSTODY | CHANGE OF CIRCUMSTANCES

The father appealed from an order of Franklin County Family Court sua sponte and summarily dismissing his custody modification petition. The Third Department reversed. The pleading set forth sufficient allegations that, if established at a hearing, could support the relief sought. The AFC and Social Services agency agreed that the father alleged a change in circumstances warranting a hearing, and the grandmother had conceded that point in court, but changed her tune upon appeal. Lisa Burgess represented the appellant.

[Neil VV. v Joanne WW. \(2022 NY Slip Op 03557\)](#)

Matter of James JJ. | June 2, 2022

JD | DISMISSAL

The County Attorney appealed from an order of Warren County Court sua sponte dismissing a juvenile delinquency petition in the furtherance of justice. The Third Department reversed. That extraordinary remedy was to be sparingly used and was not appropriate here. Family Court emphasized that the respondent's acts would constitute a mere misdemeanor. However, the respondent's conduct toward his girlfriend—during her pregnancy and after she gave birth—was violent and was part of an escalating trend.

[Matter of James JJ. \(2022 NY Slip Op 03555\)](#)

FOURTH DEPARTMENT

Kennell v Trusty | June 3, 2022

CUSTODY | CHANGE IN CIRCUMSTANCES

The mother appealed from an order of Steuben County Family Court awarding physical custody to the nonparent petitioner. The Fourth Department affirmed. Once the petitioner established extraordinary circumstances, Family Court was required to decide if a change of circumstances had occurred since the prior order. The trial court failed to do so, but the reviewing court had the authority to independently review the record, and it found extensive changes. The child's expressed strong preference to live with the petitioner was among the salient factors. The proof also supported a finding that the modification was in the child's best interests.

[Kennell v Trusty \(2022 NY Slip Op 03596\)](#)

Akol v Afet | June 3, 2022

CUSTODY | DEFAULT | COUNSEL

The father appealed from a custody order of Onondaga County Family Court. The Fourth Department vacated the part of the order stating that it was entered upon default based on the father's failure to appear in court. He was represented by counsel, so the order was not entered on the default of the aggrieved party, and the appeal was not precluded. The hearing was properly held in his absence, and proof supported the challenged order.

[Akol v Afet \(2022 NY Slip Op 03641\)](#)



Cynthia Feathers

Director, Appellate & Post-Conviction Representation

New York State Office of Indigent Legal Services

80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov

(518) 949-6131 | cynthia.feathers@ils.ny.gov | (she/her/hers)