

Decisions of Interest

JULY 1, 2022

CRIMINAL

FIRST DEPARTMENT

People v Sulayman | June 28, 2022

PHOTO ARRAY | SUGGESTIVE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree robbery and another crime. The First Department reversed, suppressed a photo identification, and ordered a new trial, preceded by an independent source hearing. The photo array was unduly suggestive because the defendant was the only person wearing distinctive clothing that fit the description of the suspect. The witness fixated on an unusual garment the robber wore—a white shirt with a distinctive black design. The fillers wore solid-colored shirts without designs. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

[People v Sulayman \(2022 NY Slip Op 04132\)](#)

People v Williams | June 28, 2022

PRO SE DEFENDANT | DISRUPTIVE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree robbery. The First Department affirmed. At the outset of trial, the defendant was permitted to represent himself. However, midway through his testimony, his self-representation was terminated because of his escalating agitated behavior. He was combative with witnesses and the court and repeatedly made arguments to the jury—all despite admonishments from the trial court.

[People v Williams \(2022 NY Slip Op 04135\)](#)

People v Aguilar | June 28, 2022

DEFENSE EXPERT | UNQUALIFIED

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree murder and other crimes. The First Department affirmed. The trial court properly declined to qualify a defense psychiatrist as an expert on the effects of ketamine—a drug the victims had used at the time of the incident. The proposed expert, who had limited clinical experience with a few patients who had taken the drug, had not done research, written articles, or given lectures on ketamine.

[People v Aguilar \(2022 NY Slip Op 04131\)](#)

SECOND DEPARTMENT

People v Miles | June 29, 2022

SENTENCES | CONCURRENT

The defendant appealed from a Putnam County Court judgment, convicting him of 3rd degree CSCS (three counts) and 3rd degree CPCS (three counts), upon a jury verdict. For each sale conviction, the defendant was sentenced to consecutive eight-year terms followed by two years' post-release supervision. Such terms were to run concurrently to concurrent eight-year terms plus PRS imposed for possession counts. The Second Department ordered that all sentences would run concurrently with each other. Thomas Keating represented the appellant.

[People v Miles \(2022 NY Slip Op 04181\)](#)

People v Corr | June 29, 2022

SORA | OUT-OF-STATE | REGISTRATION

The defendant appealed from an order of Kings County Supreme Court, designating him a level-one sex offender under SORA. The Second Department affirmed. Correction Law § 168-h (1) provided, in relevant part: "The duration of registration and verification for a sex offender *** who is classified as a level one risk *** shall be annually for a period of twenty years from the **initial date** of registration [emphasis added]." The defendant urged that the 20-year period must be reduced by the time he was registered as a sex offender in Massachusetts. In a matter of first impression, the appellate court held that "initial date" referred to registration with DCJS. SORA did not mention registration under any other state's laws, and the section addressing an offender's relocation to New York did not provide that the duration of registration here was impacted by registration elsewhere.

[People v Corr \(2022 NY Slip Op 04183\)](#)

APPELLATE TERM

People v Faris | June 27, 2022 | Unpublished

SORA | FORCIBLE TOUCHING | FORCIBLE COMPULSION

The defendant appealed from an order of Queens County Criminal Court, designating him a level-two sex offender. Appellate Term, Second Department modified, adjudicating him to be a level-one offender. In 2019, the defendant pleaded guilty to forcible touching, pursuant to Penal Law § 130.52 (1) (intentionally, and for no legitimate purpose, forcibly touching the sexual parts of another person to degrade or abuse such person or gratify the actor's sexual desire). At a subsequent SORA hearing, defense counsel objected to 10 points the People sought to assess under Risk Factor 1 (forcible compulsion). Counsel asserted that no proof established that the defendant used forcible compulsion when he touched the victim's vagina over her clothing with one hand and stated, "I want to grab you." Under Penal Law § 130.00 (8), "forcible compulsion" meant, in relevant part, to compel by use of physical force or a threat which placed a person in fear of immediate death or physical injury. The People failed to introduce clear and convincing evidence that the defendant overcame the victim's physical resistance with his superior size and

strength or that she feared what he would do if she did not submit. One judge dissented. Legal Aid Society, NYC (Nancy Little and Will Page, of counsel) represented the appellant.

THIRD DEPARTMENT

People v Faucett | June 30, 2022

LEGALLY INSUFFICIENT | HOMICIDE | DISMISSED

The defendant appealed from a Tioga County Court judgment, convicting him of criminally negligent homicide. The Third Department reversed and dismissed the indictment. While driving a tractor trailer, the defendant struck the victim's vehicle—a Department of Transportation pickup truck stopped on the shoulder with flashing lights to alert motorists of roadwork. The defendant, who did not see the vehicle, was going 70 mph in a 65-mph zone and was sober. His unexplained failure to see the vehicle did not support the conviction. John Stevens represented the appellant.

[People v Faucett \(2022 NY Slip Op 04195\)](#)

People v Santiago | June 30, 2022

AGAINST WEIGHT | TERRORISTIC | DISMISSED

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of making a terroristic threat. The Third Department reversed and dismissed the indictment. Concerned that correction officers were harassing his brother, the defendant called a DOCCS investigator and said, "I'm going to blow an officer's head off." The verdict was against the weight of evidence. The defendant did not cause a reasonable fear of the imminent commission of an offense. No warnings were issued about his threat. Steven Sharp represented the appellant.

[People v Santiago \(2022 NY Slip Op 04196\)](#)

People v Felli | June 30, 2022

PEOPLE'S APPEAL | NO AUTOMATIC STAY

The defendant appealed from a judgment of Schuyler County Court, convicting him of 2nd degree promoting prison contraband and 7th degree CPCS. The Third Department modified, vacating the contraband charge. Previously, the defendant had successfully moved to dismiss count one of an indictment charging him with 1st degree promoting prison contraband, based on legally insufficient proof before the grand jury. When the People appealed, County Court stayed the dismissal order and proceeded to a bench trial on the full indictment. There was no statutory authorization for the stay; and absent a stay, there would have been no occasion for the defendant to be convicted of the subject lesser included offense. Christopher Hammond represented the appellant.

[People v Felli \(2022 NY Slip Op 04192\)](#)

People v Castro | June 30, 2022

ASSAULT RIFLE | REGISTRATION

The defendant appealed from a Saratoga County Court judgment, convicting him of 1st degree assault and several other crimes arising from a shooting. The Third

Department modified. The conviction for failure to register an assault rifle was based on legally insufficient evidence. The firearm was owned by the defendant's brother and was only in the defendant's possession, so he had no registration obligation. The trial court did not err in precluding a psychiatric defense based on the defendant's prescription medications. The court allowed him to file a late notice, given belated disclosure of a video of him exhibiting disturbing behavior during a police interview. But the defendant then failed to timely execute releases for prosecution access to his medical records. Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.

[People v Castro \(2022 NY Slip Op 04191\)](#)

People v Michalski | June 30, 2022

WAIVER OF INDICTMENT | INVALID

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree criminal contempt. The Third Department reversed and dismissed. The waiver of indictment was invalid—a jurisdictional claim not forfeited by the plea of guilty. CPL 195.10 provided that a defendant could waive indictment and consent to be prosecuted by an SCI, under certain circumstances, prior to the filing of an indictment. When the defendant agreed to be prosecuted by an SCI, he had already been indicted. Clea Weiss represented the appellant.

[People v Michalski \(2022 NY Slip Op 04190\)](#)

People v Reese | June 30, 2022

GUILTY PLEA | ELEMENT NEGATED | AT SENTENCING

The defendant appealed from an Ulster County Court judgment, convicting him of 2nd degree CPW. The Third Department reversed and remitted. The crime required a loaded firearm. The defendant negated that element—at sentencing—when he said the handgun was in his bedstand drawer and was not loaded. The narrow exception to the preservation requirement was implicated. County Court failed to conduct a further inquiry or give the defendant the chance to withdraw his plea. Eric Galarneau represented the appellant.

[People v Reese \(2022 NY Slip Op 04194\)](#)

People v Buckley | June 30, 2022

440 | IAC | HEARING

The defendant appealed from a Broome County Court order, which summarily denied his CPL 440.10 motion. A special prosecutor advised the trial court that he was withdrawing an agreement based on the defendant's failure to fully cooperate in the prosecution of another perpetrator. The defendant was entitled to a hearing to delve into whether counsel was ineffective in failing to demand a hearing regarding the alleged lack of cooperation. Kathy Manley represented the appellant.

[People v Buckley \(2022 NY Slip Op 04197\)](#)

FAMILY

FIRST DEPARTMENT

Sara D. v Lassina D. | June 28, 2022

SIJS | REVERSED

The petitioner appealed from an order of Bronx County Family Court, which declined to make a special finding that her reunification with her father was not viable, thus rendering her ineligible for special immigrant juvenile status (SIJS). The First Department reversed. The petitioner, age 17, was born in the Ivory Coast and had lived with a cousin in the U.S. since 2019. Her mother was deceased. While she was in her home country, her father had not provided for her medical and emotional needs. Further, he had not contributed to her financial support or maintained regular contact with her since she had been in this country. The petitioner's uncontroverted testimony also supported a finding of neglect based on his father's excessive use of corporal punishment. The Door Legal Services Center (Hannah Weichbrodt, of counsel) represented the appellant.

[Sara D. v Lassina D. \(2022 NY Slip Op 04119\)](#)

Matter of Esther N. | June 28, 2022

NEGLECT | DOMESTIC VIOLENCE

The father appealed from an order of Bronx County Family Court, finding that he neglected his four children. The First Department affirmed. A single instance of domestic violence may support a finding of neglect. The proof showed that the father punched the mother during an argument, in the presence of two children, who feared for her safety and summoned police. Further, the younger two children, who were in their bedroom when the incident occurred, were in imminent danger of physical impairment.

[Esther N. \(Onyebuchi N.\) \(2022 NY Slip Op 04126\)](#)

Jeter v Poole | June 28, 2022

INDICATED REPORT | COUNSEL

In an Article 78 proceeding, the petitioner sought review of an OCFS determination, denying her request to amend and seal an indicated report finding that she maltreated her adopted child. The First Department confirmed the determination. The petitioner's due process rights were not violated by the failure to assign counsel to her. She was only entitled to an adequate opportunity to obtain legal representation. While the administrative proceedings might impact her job status, they did not implicate the liberty of the child or her care. See *Matter of Ella B.*, 30 NY2d 352. The ACOD in Family Court did not create a presumption that maltreatment was not proven by a fair preponderance of the evidence. The indicated report was relevant and reasonably related to childcare employment. As to the child's recantation, that was a common reaction among abused children and need not be credited here. The change in the Social Services Law did not impact this case since the fair hearing was held and the decision rendered before the amendment's effective date. There was no basis to give the new law retroactive effect.

[Jeter v Poole \(2022 NY Slip Op 04121\)](#)

SECOND DEPARTMENT

Charter v Allen | June 28, 2022

FAMILY OFFENSE | INTIMATE RELATIONSHIP

The petitioner appealed from an order of Kings County Family Court, which granted the application of the respondent to dismiss a family offense petition based on a lack of subject matter jurisdiction. The Second Department reversed, reinstating the petition and remitting. At issue was whether the parties had an “intimate relationship”—a fact-specific determination that often required a hearing. The record showed that the parties had known each other for more than 20 years. The petitioner’s sister and the respondent held themselves out as spouses and had a daughter who considered the petitioner her aunt. The parties engaged in general social activities at each other’s homes—separate units in the same three-family house. They also attended various celebrations as a pair and traveled together. Cheryl Charles-Duval represented the appellant.

[Charter v Allen \(2022 NY Slip Op 04167\)](#)

THIRD DEPARTMENT

Matter of Hakeem S. | June 30, 2022

NEGLECT | REVERSED

The mother appealed from an order of Schenectady County Family Court, which found that she neglected her children. The Third Department reversed and dismissed the petition. The record was devoid of proof that the children suffered emotional harm when their mother was drinking and then was asleep in the bathroom at a homeless shelter. Although there was a period when she was taken to the hospital, shelter staff watched them. While the mother’s conduct was far from ideal and things could have turned out differently, the petitioner did not establish that the children were ever in imminent danger. One justice dissented. Michelle Rosien represented the appellant.

[Hakeem S. \(Sarah U.\) \(2022 NY Slip Op 04214\)](#)

William V. v Christine W. | June 30, 2022

CUSTODY | ACCESS REINSTATED

The mother appealed from an order of Otsego County Family Court regarding visitation. The Third Department modified. The mother’s supervised visitation should not have been suspended—a drastic remedy. The record did not show that the mother caused bent glasses and marks on the son’s leg. While the mother-son relationship was rocky, there were positive aspects. Rural Law Center of New York (Kristin Bluvass, of counsel) represented the mother.

[William V. v Christine W. \(2022 NY Slip Op 04199\)](#)

Erick RR. v Victoria SS. | June 30, 2022

CUSTODY | ACCESS EXPANDED

The father appealed from an order of Broome County Family Court regarding custody and visitation. Family Court correctly sustained the mother’s physical custody of the child,

rather than ordering the child to relocate to North Carolina, where the father lived. However, his parenting time had to be expanded to include four weeks in the summer to facilitate the deeper bond and more significant relationship he sought with the child. Barrett Mack represented the father.

[Erick RR. v Victoria SS. \(2022 NY Slip Op 04209\)](#)



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Decisions of Interest

JULY 1, 2022 (Part 2)

CRIMINAL

FOURTH DEPARTMENT

People v Baek | July 1, 2022

INDICTMENT | DUPLICITOUS

The defendant appealed from an Allegany County Court judgment, convicting him of 3rd degree rape. The Fourth Department reversed. The sole count of the indictment charged only one offense. On its face, the indictment was not duplicitous. However, as amplified by the bill of particulars, it was. The bill of particulars alleged that the defendant engaged in two separate and distinct acts of nonconsensual sexual intercourse with the victim. The jury heard proof about both acts, with no instructions as to which act to consider when rendering a verdict. The defendant was entitled to pretrial notice of the charges so he could adequately prepare a defense. The indictment was dismissed with leave to the People to re-present the charge to another grand jury. Emily Stoufer-Quinn represented the appellant.

[People v Baek \(2022 NY Slip Op 04263\)](#)

People v Go | July 1, 2022

440 HEARING | IAC | IMMIGRATION

The defendant appealed from an Erie County Court order, which denied his CPL 440.10 motion to vacate a judgment convicting him of attempted 3rd degree arson. The Fourth Department reversed. The defendant contended that counsel rendered ineffective assistance regarding immigration consequences of his guilty plea. Counsel did not inform him that the subject crime was an aggravated felony. Further, counsel erroneously stated that the risk of deportation diminished because the crime occurred more than five years before the defendant obtained a green card. The matter was remitted for a hearing on prejudice—whether there was a reasonable probability that, but for counsel’s misadvice, the defendant would not have pleaded guilty and would instead have gone to trial. Matthew Borowski represented the appellant.

[People v Go \(2022 NY Slip Op 04258\)](#)

People v Piasta | July 1, 2022

RESTITUTION | REMITTAL

The defendant appealed from a Genesee County Court judgment, convicting him of 2nd degree robbery and other crimes, and an order setting restitution. The Fourth Department affirmed the judgment and reversed the order. The appellate court rejected the argument that defense counsel was ineffective in failing to preserve the issue of the denial of a for-cause challenge to a prospective juror. Jury selection was a quintessentially tactical decision based on a myriad of factors. The merits of the instant challenge were not clear-cut. Regarding restitution, an undetailed, vague letter from an insurer was insufficient to support the \$6,000 ordered. Thus, the

matter was remitted. Legal Aid Bureau of Buffalo (Leah Farwell, of counsel) represented the appellant.

[People v Piasta \(2022 NY Slip Op 04243\)](#)

People v Stefanovich | July 1, 2022

CONSTITUTIONAL SPEEDY TRIAL | DISSENT

The defendant appealed from a judgment of Oswego County Supreme Court, convicting him of 1st degree rape. The Fourth Department affirmed. One judge dissented, based on the unreasonable preindictment delay. There was no good cause for the delay, which was based on inadvertence by the People. They did not seek to indict the defendant until six years after they came into possession of DNA evidence linking him to the crime. The delay deprived him of his right to due process, so the indictment should have been dismissed, the dissenter opined.

[People v Stefanovich \(2022 NY Slip Op 04241\)](#)

People v Jackson | July 1, 2022

STATUTORY SPEEDY TRIAL | NOT FORFEITED

The defendant appealed from a judgment of Onondaga County Supreme Court, which convicted him of 2nd degree CPW and other crimes. The Fourth Department affirmed. The defendant's challenge to the denial of his statutory speedy trial motion was reviewable pursuant to subdivision (6) of CPL 30.30, which became effective January 1, 2020, before the instant judgment was rendered. However, the argument lacked merit.

[People v Jackson \(2022 NY Slip Op 04257\)](#)



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