

Decisions of Interest

SEPTEMBER 26, 2022

CRIMINAL

SECOND DEPARTMENT

People v Samuel | Sept. 21, 2022

HEARSAY | HARMLESS ERROR

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department affirmed. The trial court erred in admitting a 911 call made by a neighbor after the shooting. The statement of a nonparticipant may not be admitted as an excited utterance unless it can be inferred that the declarant had an opportunity to personally observe the event. Further, her statement did not qualify as a present sense impression. But the error was harmless.

[People v Samuel \(2022 NY Slip Op 05224\)](#)

People v Bradshaw | Sept. 21, 2022

RETROACTIVE FEE | EX POST FACTO

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree rape and other crimes. The Second Department affirmed. The imposition of a supplemental sex offender victim fee for crimes committed before the effective date of Penal Law § 60.35(1)(b) did not violate the Ex Post Facto Clause. Rather than serving as a form of punishment, the fee was designed for fiscal purposes. *See generally People v Guerrero*, 12 NY3d 45. Previous Second Department decisions holding otherwise should no longer be followed.

[People v Bradshaw \(2022 NY Slip Op 05216\)](#)

THIRD DEPARTMENT

People v Cain | Sept. 22, 2022

GRAND JURY | DISMISSAL

The defendant appealed from a Washington County Court judgment, convicting him of attempted 1st degree promoting prison contraband. The Third Department reversed. Based on the shackling of his hands in the presence of the grand jury, the defendant moved unsuccessfully to dismiss the indictment. The issue survived his guilty plea. The People failed to justify the restraints. They asserted that the shackles were hidden by the table where the defendant sat. But concealing one's hands may be interpreted as having something to hide. Further, no cautionary instructions were given. The error was not

harmless. The indictment was dismissed, without prejudice to the People to re-present appropriate charges to another grand jury. Theresa Suozzi represented the appellant. [People v Cain \(2022 NY Slip Op 05239\)](#)

People v Moore | Sept. 22, 2022

SORA | INEFFECTIVE | COMMUNICATION

The defendant appealed from a Broome County Court order, which classified him as a level-three sex offender. The Third Department reversed based on ineffective assistance of SORA counsel. A core aspect of the attorney-client relationship was communication—an attorney must consult with and counsel the client. During the hearing, counsel admitted that he had not spoken with the client. Further, counsel failed to present a defense or raise any objections. The matter was remitted for a new hearing with different assigned counsel. Angela Kelley represented the appellant. (See ILS ACP Standards, Standard 9.2 – Client-Centered Representation, at p 24).

[People v Moore \(2022 NY Slip Op 05242\)](#)

[ILS ACP Standards | ny.gov](#)

FAMILY

SECOND DEPARTMENT

Smisek v DeSantis | Sept. 21, 2022

SHARED CUSTODY | CHILD SUPPORT

The mother appealed from an order of Nassau County Family Court, which denied her objections to an order granting the father's motion to dismiss her child support petition. The Second Department reversed. The parents shared physical custody, and Family Court concluded that the father was the custodial parent since he had more overnights with the children. That was error. Neither parent could be said to have physical custody of the children most of the time. As the parent with higher income, the father should have been deemed the noncustodial parent for support purposes. See *Bast v Rossoff*, 91 NY2d 723; *Baraby v Baraby*, 250 AD2d 201. A strict counting of overnights might not always reflect the reality of the situation and could encourage gamesmanship. Custody arrangements should be governed by the parents' desire to spend time with their children, not to impact support. A flexible approach was more likely to promote CSSA objectives—to increase child support. Matthew Seidner represented the appellant.

[Smisek v DeSantis \(2022 NY Slip Op 05210\)](#)