

Indigent Legal Services

Decisions of Interest

OCTOBER 23, 2024

CRIMINAL

COURT OF APPEALS

People v Sharp | October 17, 2024

SANDOVAL | RIGHT TO PRESENCE | NO MEANINGFUL PARTICIPATION | REVERSED AND REMITTED

Appellant appealed from a Fourth Department order affirming his conviction for unlawfully possessing a defaced firearm and unlawfully possessing a loaded firearm outside of his home or place of business. The Court of Appeals reversed and ordered a new trial. The trial court violated appellant's right to be present for a *Sandoval* hearing where he was excluded from the initial in-chambers conference. Such right belongs to the accused, and the presence of counsel is no substitute. The trial court's subsequent recitation of its ruling in appellant's presence did not cure the earlier error as the court did not entertain argument or invite the opportunity for meaningful participation from appellant. Monroe County Public Defender, David R. Juergens, of counsel, represented Sharp.

[People v Sharp, 2024 NY Slip Op 05132](#)

[Oral Argument](#)

APPELLATE DIVISION, FIRST DEPARTMENT

People v Santana | October 17, 2024

EXCESSIVE SENTENCE | PROBATIONARY TERM REDUCED

Appellant appealed from a New York County judgment convicting him of attempted third-degree CSCS and sentencing him to five years' probation. The First Department reduced the sentence to four years' probation in the interest of justice. The Legal Aid Society NYC (Mary-Kathryn Smith, of counsel) represented Santana.

[People v Santana, 2024 NY Slip Op 05144](#)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Williams | October 16, 2024

30.30 | PRE-INDICTMENT SOR | REVERSED AND REMITTED

Appellant appealed from a Queens County Supreme Court judgment convicting him of second-degree CPW following a guilty plea. The Second Department reversed the judgment and dismissed the indictment, granting appellant's CPL § 30.30 motion because appellant was deprived of his statutory right to a speedy trial. As the prosecution conceded, its statement of readiness was illusory and ineffective to stop the speedy trial clock where it was filed before the indictment was filed. The prosecution further conceded that it failed thereafter to declare readiness until after the six-month period had expired. Murray E. Singer represented Williams.

[People v Williams, 2024 NY Slip Op 05116](#)

People v Eldridge | October 16, 2024

SORA | ADJOURNMENT ERRONEOUSLY DENIED | REVERSED AND REMITTED

Appellant appealed from an Orange County Court order designating him a level three sex offender. The Second Department reversed and remitted for a new risk level assessment hearing. The lower court improvidently exercised its discretion by denying counsel's request for a brief adjournment of the hearing to review documents his client had just told him about, which could have affected the risk level designation, and to determine whether the documents should have been offered in evidence. The adjournment request was not made for purposes of delay, and the need did not arise from a failure to exercise due diligence. That appellant was scheduled to be released only two days after the hearing was not sufficient reason to deny the adjournment request. Thomas R. Villecco represented Eldridge.

[People v Eldridge, 2024 NY Slip Op 05117](#)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Rebecca XX | September 26, 2024

DVSJA | SELF-REPORTING, INCONSISTENT STATEMENTS | RESENTENCING DENIED

Appellant appealed a Madison County Court judgment denying her DVSJA resentencing motion pursuant to CPL § 440.47. The Third Department affirmed. County Court found that there was insufficient evidence to show that, at the time of the offense, appellant was a victim of substantial domestic violence, or that the abuse was a contributing factor to the crime—in this case, the shooting of her fiancé resulting in a second-degree murder conviction after a plea. The Third Department noted that appellant's testimony regarding physical, sexual, and emotional abuse was not corroborated by evidence such as medical or police records. The court also deferred to County Court's determination that appellant's daughters lacked credibility, because their testimony about the abuse, as well as the

nature and extent of appellant's substance abuse, was inconsistent with earlier statements to police and probation. Veronica Reed represented Rebecca XX.

[People v Rebecca XX. \(2024 NY Slip Op 04645\)](#)

People v Poulos | October 17, 2024

REQUEST TO PROCEED PRO SE | SUPPRESSION - SEARCH WARRANT | REVERSED AND DISMISSED

Appellant appealed a Warren County Court judgment convicting him of third-, fourth-, and seventh-degree CPCS and third-degree CSCS. The Third Department reversed, dismissed two counts of the indictment, and remanded for a new trial. County Court erred in summarily denying appellant's request to represent himself at trial, rather than conducting a colloquy to determine whether his waiver of the right to counsel was voluntary and intelligent. County Court also erred in denying a motion to suppress evidence obtained via a cell phone search, since the warrant application contained no direct link between the cell phone and evidence of a crime. A second application—submitted after the search had occurred—did not cure the violation. Because the sales charges were a direct result of the cell phone search, those counts were dismissed. Paul J Connolly represented Poulos.

[People v Poulos \(2024 NY Slip Op 05152\)](#)

[Oral Argument \(starts at 01:50\)](#)

People v Lipka | October 17, 2024

INVOCATION OF RIGHT TO COUNSEL | HUNTLEY HEARING | REVERSED

Appellant appealed a Chemung County Court judgment convicting him of first-degree burglary after a plea. The Third Department reversed, finding that County Court erroneously denied the motion to suppress appellant's statements to police. During the interview, appellant's statement "that's what I want a lawyer for," constituted an unequivocal invocation of his right to counsel, and any statements made after that point should have been suppressed. The error was not harmless, because the record did not establish that the decision to plead guilty was entirely independent of the suppression decision. Matthew C. Hug represented Lipka.

[People v Lipka \(2024 NY Slip Op 05153\)](#)

[Oral Argument \(starts at 00:05\)](#)

People v Shuler | October 17, 2024

CPL § 440.10 | IAC | FAILURE TO MAKE MERITORIOUS SPEEDY TRIAL MOTION | REVERSED AND DISMISSED

Appellant appealed a Schenectady County Court judgment convicting him of second-degree attempted robbery, as well as a second order denying his CPL § 440.10 motion to vacate the conviction. The Third Department reversed, concluding that County Court erred in denying the 440 motion. Defense counsel failed to make a meritorious speedy trial motion, because the prosecution failed to have appellant produced from DOCCS in time for the statutory speedy-trial deadline. Counsel's failure deprived appellant of meaningful representation. The court dismissed the indictment since the time to prosecute under it had expired. Martin J. McGuinness represented Shuler.

[People v Shuler \(2024 NY Slip Op 05154\)](#)
[Oral Argument \(starts at 00:20\)](#)

People v Bryan | October 17, 2024

ANDERS BRIEF | NEW COUNSEL ASSIGNED

Appellant appealed a Rensselaer County Supreme Court judgment convicting him after a plea of disseminating indecent material to a minor. Appellate counsel filed an *Anders* brief seeking to be relieved on the ground that there were no nonfrivolous issues to be raised. The Third Department granted the application to be relieved but assigned new counsel, finding issues of arguable merit, including whether appellant's motion to withdraw his plea was properly denied and whether his appeal waiver was valid.

[People v Bryan \(2024 NY Slip Op 05155\)](#)

People v Smith | October 17, 2024

FAILURE TO INSTRUCT JURY ON INTOXICATION DEFENSE | REVERSED AND REMITTED

Appellant appealed a Clinton County Court judgment convicting him of second- and third-degree assault, second-degree attempted assault, and third-degree CPW. The Third Department reversed and remitted for a new trial. County Court wrongly refused to instruct the jury on the intoxication defense, despite observations of appellant drinking alcohol, slurring his words, and giggling, as well as his own statement that he "must have blacked out" and could not remember much of the evening in question. Lisa A. Burgess represented Smith.

[People v Smith \(2024 NY Slip Op 05158\)](#)

People v Alexander | October 17, 2024

CROSS-RACIAL ID INSTRUCTION | REVERSED

Appellant appealed a Broome County Court judgment convicting him of third-degree burglary. The Third Department reversed and remitted for a new trial. The trial included the testimony of a police officer who was familiar with appellant and identified him in surveillance video footage. County Court erroneously denied defense counsel's request for a cross-racial identification jury instruction. Under [People v Boone](#), the defense is entitled to that instruction upon request, and the officer's previous familiarity with appellant did not warrant a different result. Because the evidence of identity was not overwhelming, the error was not harmless. John A. Cirando represented Alexander.

[People v Alexander \(2024 NY Slip Op 05160\)](#)

[Oral Argument \(starts at 00:17\)](#)

People v Mosher | October 17, 2024

CONTINUATION OF PROBATION | SCOPE OF COURT'S AUTHORITY | REMITTED FOR RESENTENCING

Appellant appealed a Tioga County Court judgment revoking his probation and imposing a prison term of 3 ½ years' imprisonment, followed by 1 ½ years of PRS. The Third Department reversed and vacated the sentence. County Court erred in concluding that it

could not extend appellant's probation because he had been incarcerated for longer than six months. Because appellant was sentenced to a five-year probation term on a second charge, the court was permitted to extend probation if it did not impose an additional term of incarceration. Since the record indicated that the court had wished to continue probation but did not believe it was legally permissible, the Third Department remitted for resentencing. Sandra M. Colastoti represented Mosher.

[People v Mosher \(2024 NY Slip Op 05161\)](#)

People v Rock | October 17, 2024

WEIGHT OF THE EVIDENCE | KNOWLEDGE OF OOP | REVERSED AND DISMISSED

Appellant appealed a Clinton County Court judgment convicting him of first-degree falsifying business records and attempted CPW. The Third Department reversed, finding the verdict to be against the weight of the evidence. While the prosecution alleged that appellant attempted to purchase a shotgun in violation of a 1993 New Jersey restraining order prohibiting him from doing so, there was insufficient proof that appellant knew the order was active or that it was issued after a hearing where he had the opportunity to meaningfully participate. LaMarche Safranko Law PLLC (Joshua R. Friedman, of counsel) represented Rock.

[People v Rock \(2024 NY Slip Op 05162\)](#)

[Oral Argument \(starts at 00:09\)](#)

TRIAL COURTS

People v Atkinson | 2024 WL 4499058

DNA | COLD CASE | 29-YEAR DELAY IN PROSECUTION NOT UNREASONABLE | DISMISSAL MOTION DENIED

In 2023, Atkinson was charged with two counts of first-degree murder for a 1994 double homicide in Manhattan, based on DNA testing from crime scene items that resulted in a CODIS hit. The technology used for the 2023 testing did not exist at the time of the 1994 investigation, nor when the NYPD Cold Case Unit reinvestigated the case in 2004. New York County Supreme Court held the 29-year delay in prosecution was not unreasonable. Although the OCME began routinely performing this more advanced DNA testing in 2008, over 14 years before Atkinson's arrest, "law enforcement officials cannot be expected to reopen each and every cold case investigation simultaneously as soon as a new methodology for evidence gathering or mechanism for testing is invented or accredited." The court declined to adopt the reasoning of [People v Grant](#), 82 Misc3d 991 [Sup Ct, Kings Cty 2024], where the court dismissed the prosecution of a 1992 homicide based on a 16-year delay in testing trace amounts of semen from a decedent's mouth.

[People v Atkinson \(2024 NY Slip Op 24262\)](#)

***People v Armeli* | 2024 WL 4499058**

CIVIL RIGHTS LAW § 52 | REQUEST TO RECORD BENCH TRIAL | MOTION DENIED

Armeli, Executive Director of the National Centers for Advocacy & Justice (“NCAJ”), a self-described civil rights advocacy organization, was charged with second-degree aggravated harassment for allegedly making repeated phone calls to the Orchard Park Police Department in Erie County. The NCAJ moved for permission to take video and audio recordings of the court proceedings and the likely bench trial, for the purpose of broadcast and publication. Justice Court of Orchard Park, Erie County, denied the motion on jurisdictional grounds, holding that video and audio recordings would violate Civil Rights Law § 52. The court further exercised its discretion to deny the request to take still photography, citing the need to maintain the integrity of the courtroom. Justice Court granted the motion, however, to the extent it construed it as a request by NCAJ to intervene and left open the possibility that Armeli could employ his own stenographer.

[People v Armeli \(2024 NY Slip Op 51404\(U\)\)](#)

***People v Frazier* | 2024 WL 4522272**

ERLINGER | JURY NOT REQUIRED WHERE NO TOLLING INVOLVED | 2FO SENTENCE APPROPRIATE

Frazier was charged with second-degree CPW and related counts, and the prosecution offered a plea to attempted second-degree CPW with a sentence of five years’ imprisonment. Indicating his desire to take the plea offer, Frazier nevertheless challenged the offered sentence under *Erlinger*, as it would require second-felony-offender adjudication based on a non-jury finding that he had a prior conviction for attempted second-degree burglary in 2019. Reviewing recent New York case law following *Erlinger*, New York County Supreme Court denied the motion, ruling that *Erlinger* does not apply, since Frazier conceded that he had four prior felony convictions (the earliest from 2017) and there was no tolling issue presented.

[People v Frazier \(2024 NY Slip Op 24268\)](#)

FAMILY

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Alayah K. (Leopold B.) | October 16, 2024

VIOLATION OF ORDER OF PROTECTION ALONE INSUFFICIENT FOR NEGLECT | REVERSED

The father appealed from a Kings County Family Court order granting custody of the subject child to the maternal grandmother at disposition after a finding of neglect. The Second Department reversed, vacated the finding of neglect, denied the petition, and dismissed the proceeding. The court held that a violation of an order of protection, standing alone, is insufficient to establish neglect. The presentment agency failed to establish, by a preponderance of the evidence, that the child's contact with the nonrespondent mother during an overnight stay at the maternal grandmother's home impaired the child's physical, mental, or emotional condition or that there was imminent danger of impairment. Lisa A. Manfro represented the father.

[Matter of Alayah K. \(Leopold B.\) \(2024 NY Slip Op 05101\)](#)

Matter of Logan M. (Christina C.) | October 16, 2024

1028 HEARING | TEMPORARY ORDER OF PROTECTION | REVERSED

The mother appealed from a Suffolk County Family Court order, issued after a § 1028 hearing, returning the subject child to the maternal aunt's home with a temporary order of protection against the mother. The Second Department reversed. The Family Court's determination that allowing the mother to reside with the child would present an imminent risk to the child lacked a sound and substantial basis in the record. While the record showed that the mother interfered with the child's medical care, there was also evidence that, while the mother was residing with the child and maternal aunt, the child attended all his medical appointments and did not have any seizures. Arza Feldman represented the mother.

[Matter of Logan M. \(Christina C.\) \(2024 NY Slip Op 05104\)](#)

Matter of Yordani M. V. Y. (Sulma M. V. Y.—Jorge M. P. L.) | October 16, 2024

SPECIAL IMMIGRANT JUVENILE STATUS | REVERSED

The mother appealed from a Queens County Family Court order denying the motion for an order making specific findings enabling the subject child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status. The Second Department reversed, granted the motion, and found that it would not be in the subject child's best interests to be returned to Guatemala based upon an independent factual review of the record. Bruno J. Bembi represented the mother.

[Matter of Yordani M. V. Y. \(Sulma M. V. Y.--Jorge M. P. L.\) \(2024 NY Slip Op 05106\)](#)

APPELLATE DIVISION, THIRD DEPARTMENT

Matter of Mark AA. v Susan BB. | October 17, 2024

UCCJEA JURISDICTIONAL DETERMINATION | REVERSED AND REMITTED

The father appealed from an Albany County Family Court order finding that Massachusetts was a more convenient forum, declining jurisdiction, and transferring the petitions to the Massachusetts court. The Third Department reversed and remitted for further development of the record and a prompt determination in compliance with the UCCJEA. The parties had not offered—nor were invited to provide—any testimony regarding the relative convenience of the two forums. Family Court’s order declined jurisdiction without any discussion of the relevant statutory factors or how they resulted in Massachusetts being the superior forum. Albany County Public Defender’s Office (Nina Schwartzman, of counsel) represented the father.

[Matter of Mark AA. v Susan BB. \(2024 NY Slip Op 05173\)](#)

[Oral Argument](#)



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New York State Office of Indigent Legal Services

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

(518) 486-6602 | SASC@ils.ny.gov