Indigent Legal Services

# Decisions of Interest

DECEMBER 4, 2024

## CRIMINAL

## COURT OF APPEALS

### ***People v Shader*** | November 26, 2024 (Troutman, J.)

SORA RISK MODIFICATION |DENIAL AFFIRMED |DISSENT

Appellant appealed from the denial of his request for a modification of his SORA risk level pursuant to Correction Law 168-o[2]. In a 4-3 decision, the Court of Appeals held that the SORA court did not abuse its discretion in modifying appellant's risk level from a level 3 to a level 2 but denying his request for a reduction to level 1. Appellant in 1977 at the age of 19 had entered a woman's home, bound, and raped her. By that time, appellant had a history of sexual offense. Following his release on parole after serving 21 years in prison, appellant was found to be a level 3 offender at a SORA hearing in 1998. In 2021 he filed for a modification to risk level 1 relying on his treatment history, full-time employment, stable relationship with his wife, role as a stepfather, and age. Appellant had fully complied with his SORA conditions and submitted an expert psychological report outlining his low risk of re-offense. The Board did not oppose the requested modification. The Court of Appeals held that the SORA court properly considered all the relevant information in determining the appropriate modification, including appellant's 2003 misdemeanor convictions for non-sexual offenses. The majority noted that its decision did not preclude appellant from petitioning for a further modification based on updated facts or relief from registration after 30 years on the registry. Chief Judge Wilson, in dissent joined by Judges Rivera and Halligan, found that the SORA court erred in considering non-sexual misdemeanors, as they were legally irrelevant, and it was an abuse of discretion to consider appellant's 1977 offense and history pre-dating the original SORA risk-level determination given its remoteness. Jill Sanders represented Shader.

People v Shader (2024 NY Slip Op 05873)

Oral Argument

### ***People v Vaughn*** | November 26, 2024 | (Troutman, J.)

EYEWITNESS IDENTIFICATION EXPERT TESTIMONY | NOT ABUSE OF DISCRETION | AFFIRMED | DISSENT

Appellant appealed from a Second Department order affirming his conviction for first-degree robbery and second-degree burglary. The case involved two Asian eyewitnesses who identified a Black man wearing a brown sweatshirt, evidence of a brown hoodie removed from appellant several days later at his arrest, and a surveillance video that did not clearly depict the assailant's face. The Court of Appeals affirmed, holding that the trial court did not abuse its discretion in limiting the testimony of the defense eyewitness

identification expert to the topic of cross-race effect. The trial court "reached this determination by weighing the probative value of the testimony against, among other things, the prospect of unduly delaying trial," given counsel's mid-trial oral request and his failure to submit, at the court's request, case law on the admissibility of expert testimony on additional factors affecting eyewitness identification reliability. In cases that turn on accurate eyewitness identification, corroborating evidence is not a dispositive first step, nor a determinative factor, in deciding whether to admit expert testimony. To the extent that the holdings in the *LeGrand* line of cases have been misinterpreted to suggest a two-step process, they should not be followed. Judge Rivera dissented and would have reversed and ordered a new trial. There is scientific consensus that various factors, including the three raised—stress, weapon focus, and confidence relative to accuracy—impact memory in a way that increases misidentification. The majority erroneously allowed judicial economy to take precedence over appellant's constitutional right to present a defense, given that the trial court rejected the defense expert's testimony on the ground that it was unnecessary, which was "wrong on the law," not on the ground that it was untimely. Judge Rivera noted that the majority's decision incentivizes defense attorneys to request *Frye* hearings in every case involving eyewitness identification, even when judicial precedent supports admission.
People v Vaughn (2024 NY Slip Op 05874)
Oral Argument

### ***People v Peters*** | November 25, 2024 (Memorandum)
CORAM NOBIS | NO REVIEWABLE ISSUES ON APPEAL | AFFIRMED
Appellant appealed from a Second Department order denying his *pro se* writ of error coram nobis on the ground of ineffective assistance of appellate counsel. The Court of Appeals affirmed, concluding that because counsel assigned to represent appellant at the Court of Appeals failed to present any of the claims raised below, there were no reviewable issues before for the Court. Appellant was not precluded from filing another coram nobis application raising the ineffectiveness of appellate counsel on his original direct appeal or any other grounds not previously raised.
People v Peters (2024 NY Slip Op 05871)
Oral Argument

## APPELLATE DIVISION, FIRST DEPARTMENT

### ***People v Urena*** | November 27, 2024
MULTIPLICITOUS COUNTS | INTEREST OF JUSTICE | RAPE CONVICTION VACATED
Appellant appealed from a Bronx County Court judgment convicting him of predatory sexual assault against a child, first-degree rape, and related charges. The First Department vacated the rape conviction in the interest of justice finding this count multiplicitous of the predatory sexual assault count. Even when such a count does not increase the imposed sentence, "the stigma of impermissible convictions must be remedied." Stephen N. Preziosi, represented Urena.
People v Urena (2024 NY Slip Op 05906)

# APPELLATE DIVISION, SECOND DEPARTMENT

### ***People v Jules*** | November 27, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

Appellant appealed from a Rockland County Court judgment convicting him of second-degree assault and resisting arrest, following a guilty plea. The Second Department affirmed but found the appeal waiver invalid because the court's colloquy mischaracterized the rights being waived as an absolute bar to taking a direct appeal and failed to explain that appellate review was available for select issues. However, appellant's sentence was not excessive. Salvatore C. Adamo represented Jules.
People v Jules (2024 NY Slip Op 05988)

### ***People v Martines*** | November 27, 2024

DEFICIENT *ANDERS* BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

Appellant appealed from a Nassau County Supreme Court judgment convicting him after a guilty plea of first-degree manslaughter and second-degree conspiracy. Appellate counsel filed an *Anders* brief. The Second Department granted counsel's motion to withdraw and assigned new counsel to prosecute the appeal after finding the *Anders* brief deficient. It failed to address the validity of appellant's appeal waiver or whether appellant's sentence was excessive, where it was not the minimum authorized by statute.
People v Martines (2024 NY Slip Op 05990)

# APPELLATE DIVISION, THIRD DEPARTMENT

### ***People v Cha-Narion D.*** | November 27, 2024

YOUTHFUL OFFENDER | ABUSE OF DISCRETION | REVERSED

Appellant appealed from an Albany County Court judgment convicting him of second-degree attempted murder, denying his request to adjudicate him a youthful offender (YO), and sentencing him to 6 years' imprisonment followed by 5 years' PRS. The Third Department reversed, finding that it was an abuse of discretion to deny YO status. Appellant had numerous mental health and cognitive diagnoses, and had suffered traumatic childhood events that exacerbated those issues. There were additional mitigating factors, including a lack of serious injury to the complainant and appellant's limited criminal history. The Third Department substituted its discretion for that of County Court, adjudicated appellant a YO, and modified the sentence to 1 1/3 to 4 years' imprisonment. Tina K. Sodhi, Alternate Public Defender, Albany (Steven M. Sharp of counsel) represented Cha-Narion D.
People v Cha-Narion D. (2024 NY Slip Op 05917)

### ***People v Melissa OO.*** | November 27, 2024

DVSJA | DISMISSAL WITHOUT PREJUDICE NOT APPEALABLE | APPEAL DISMISSED

Appellant appealed from a Chenango County Court order dismissing, without prejudice, her DVSJA petition for resentencing under CPL § 440.47 because appellant did not provide two pieces of evidence corroborating her abuse, as required by the statute. The Third Department dismissed the appeal. CPL § 440.47[3] specifically provides for an appeal as of right from a denial of a resentencing petition, but not from a dismissal without

prejudice. The court held that the proper remedy was to refile the petition with the required corroborating evidence. The Third Department noted that its prior decisions, as well as decisions from the Second and Fourth Departments, had reached the merits of without-prejudice dismissals in DVSJA resentencing cases, where the issue of appealability was never raised. Acknowledging that the lack of a statutory right to appeal in this situation "could insulate form appellate review certain trial court determinations where a defendant has exhausted his or her potential universe of evidentiary submissions," the court determined that the legislature, not the courts, must provide an appellate remedy. Not addressed was the question of the proper remedy where a trial court commits legal error in dismissing for a purported lack of corroboration.
People v Melissa OO. (2024 NY Slip Op 05920)

### ***People v James QQ.*** | November 27, 2024
DVSJA | DISMISSAL WITHOUT PREJUDICE NOT APPEALABLE | APPEAL DISMISSED
Appellant appealed from a Greene County Court order dismissing, without prejudice, his DVSJA petition for resentencing under CPL § 440.47. Applying the same reasoning expressed in *Melissa OO.*, the Third Department dismissed the appeal.
People v James QQ. (2024 NY Slip Op 05919)

## TRIAL COURTS

### ***People v Gardner***, 2024 WL 4863790
*ERLINGER* | TOLLING DETERMINATION REQUIRES JURY | FIRST FELONY OFFENDER STATUS GRANTED
Gardner filed a *pro se* CPL § 440.20 motion seeking to vacate his sentence of 7 years' imprisonment and 5 years' PRS for a second-degree CPW conviction on the grounds that he was improperly arraigned as a second-felony offender. After counsel was assigned on the motion, the U.S. Supreme Court decided *Erlinger*, and Gardner, through counsel, amended the motion to include an *Erlinger* claim that he must be resentenced as a first felony offender. Queens County Supreme Court granted the motion and directed that Gardner must be resentenced as a first felony offender. More than 10 years had elapsed between his prior conviction and his arrest in the instant case. Agreeing with *People v Banks* and *People v Lopez*, the court held that *Erlinger* dictates that the necessary tolling determination must be made by a jury; CPL § 400.15[7][a] prohibits the empaneling of the jury for this purpose; and Judiciary Law § 2-b[3] does not give a court authority to empanel a jury for fact-finding relevant to predicate sentencing, which would contravene CPL § 400.15[7]. Randall Unger represented Gardner.
People v Gardner (2024 NY Slip Op 24294)

### ***People v Perry***, 2024 WL 4847596
*ERLINGER* | TOLLING DETERMINATION REQUIRES JURY
Perry was charged in a 17-count indictment, including five violent felonies, and had two violent felony convictions more than 10 years prior. Before trial, the parties litigated whether he could be sentenced as a persistent violent felony offender. Adopting the reasoning of *People v Banks*, the court held that *Erlinger* requires a jury, not a judge, to make factual findings relevant to tolling for purposes of recidivist sentencing. While

Judiciary Law § 2-b[3] "allows courts to make incremental changes to existing forms of proceeding," "[w]holesale changes are more problematic." Nor does that statute allow judges to devise new proceedings expressly prohibited by CPL § 400.17[7][a]. The court noted the extremely narrow nature of the *Almendarez-Torres* exception that allows judges to find the *fact* of a prior conviction itself, which may be justified by the presence of due process protections surrounding a conviction not present in judicial fact-finding related to tolling. However, the court also cited extensive authority, including *Erlinger*, casting doubt on the viability of the *Almendarez-Torres* exception itself. Without legislative action, if Perry is convicted, the court held that it must sentence him without regard to convictions beyond the 10-year look-back period, noting that persistent felony offender sentencing would not require any tolling determination. Matthew Mobilia represented Perry.
People v Perry (2024 NY Slip Op 24293)

### ***People v H.C.***, 2024 WL 4901782

SORA MODIFICATION | PETITIONER ENTITLED TO REDACTED PSI

H.C. petitioned the Justice Court of the Town of Penfield, Monroe County, for a copy of his pre-sentencing investigation report (PSI) from his 2003 conviction for sexual misconduct to aid in preparation of a risk-level modification petition under CL § 168-o. Justice Court held that H.C. was entitled to a redacted copy of the PSI. CPL § 390.50[1], concerning the confidentiality and availability of PSI's, does not preclude disclosure; it "simply requires that the application for release of the PSI be made to the sentencing court[,] not the court presiding over the collateral matter." Under *People v Lashway*, petitioner has a due process right to disclosure of all materials considered by the Board of Examiners of Sex Offenders in determining its recommendation on the modification petition, as well as a right to review materials relied on by the court under *People v Baxin*. SORA classifications also "trigger[] certain due process safeguards, including the right to offer relevant materials in support of the application." Petitioner must be able to review the PSI in order to identify mitigating factors in support of the petition, as well as to rebut aggravating factors likely to be raised in opposition. William M. Swift represented H.C.
People v H.C. (2024 NY Slip Op 24300)

# FAMILY

## COURT OF APPEALS

### ***Matter of Jeter v Poole*** | November 25, 2024 (Troutman, J.)

SCR | RETROACTIVITY OF STATUTORY CHANGE | RIGHT TO COUNSEL | AFFIRMED | DISSENT

Appellant appealed from an Appellate Division order confirming OCFS's determination that: she had no constitutional right to assigned counsel at a State Central Register of Child Abuse and Maltreatment (SCR) name-clearing hearing; and that 2020 amendments to SSL § 422—creating an irrebuttable presumption in favor of Family Court Article 10 respondents at SCR fair hearings after dismissal of the underlying Article 10 petition—did not apply retroactively to her hearing. The Court of Appeals affirmed in a 4-3 decision. The majority held that inclusion on the SCR does not impact

rights involving physical liberty, bodily autonomy, or care and custody of one's children that warrant recognition of a constitutional right to assigned counsel in a civil proceeding, such as an Article 10 proceeding. Regarding the retroactivity of the statute, the legislature delayed the effective date for over 18 months at the time of the amendment, and ACS and OCFS were entitled to rely on the law as it existed at the time of the hearing. Finally, OCFS's determination was supported by substantial evidence in the record. Chief Judge Wilson dissented in an opinion joined by Judges Rivera and Halligan. The dissenters would have applied the well-established doctrine that when a law changes while a direct appeal is pending, the new law applies to that case. The dissent did not address the right-to-counsel claim, but noted that when appellant was represented by counsel, the Article 10 case was dismissed, but when she represented herself at the SCR hearing, she did not prevail.
Matter of Jeter v Poole (2024 NY Slip Op 05868)
Oral Argument

# APPELLATE DIVISION, THIRD DEPARTMENT

***Matter of Tiyani AA.*** | November 27, 2024
TPR | NO DEFAULT | AFFIRMED
Appellant appealed from a Schenectady County Family Court order finding the subject child to be abandoned and terminating appellant's parental rights. The Third Department affirmed, rejecting her argument that by conducting the hearing in her absence but allowing her to observe virtually, the court violated her due process rights. The court first noted that, although the order indicated that it was entered on default, it was not in fact a default, since her counsel had fully participated while appellant observed. Further, appellant's arguments regarding due process were unpreserved because counsel did not object or seek an adjournment for her to appear in person. In any event, the court would not have found a due process violation since counsel capably represented appellant's interests.
Matter of Tiyani AA. (2024 NY Slip Op 05923)



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