

# Decisions of Interest

JULY 31, 2024

## CRIMINAL

### SECOND DEPARTMENT

#### ***People v Delvalle*** | July 24, 2024

IDENTIFICATION | WEIGHT OF THE EVIDENCE | REVERSED AND DISMISSED

The appellant appealed from a Queens County Supreme Court judgment convicting him of 3<sup>rd</sup> degree robbery and other related charges after a nonjury trial. The Second Department reversed and dismissed the indictment. The complainant's wallet was stolen during a fight. After a car chase lasting about 20 minutes, the complainant chased down the appellant on foot and, believing him to be the perpetrator, beat him badly. The appellant did not have the complainant's wallet and his clothing did not match the perpetrator's description. Given certain discrepancies in the witnesses' testimony and the complainant's strong motive to establish that he had not beaten an innocent man, the identification evidence was against the weight of the evidence. Appellate Advocates (Lynn W. L. Fahey and David Fitzmaurice, of counsel) represented the appellant.

[Oral Argument \(starts at 8:20\)](#)

[People v Delvalle \(2024 NY Slip Op 03896\)](#)

#### ***People v Dillon H.*** | July 24, 2024

UNDER 21 | SURCHARGES AND FEES VACATED

The appellant appealed from Kings County Supreme Court judgments adjudicating him a youthful offender. The Second Department vacated the imposition of mandatory surcharges and fees and otherwise affirmed. CPL 420.35 (2-a) applies retroactively and permits the waiver of mandatory surcharges and fees for individuals who were less than 21 years old at the time of the crime. Appellate Advocates (Steven C. Kuza, of counsel) represented the appellant.

[People v Dillon H. \(2024 NY Slip Op 03897\)](#)

### THIRD DEPARTMENT

#### ***People v James*** | July 25, 2024

CPL 30.30 | DISCOVERY | HELD AND REMITTED

The appellant appealed from an Albany County Supreme Court judgment convicting him of 2<sup>nd</sup> degree criminal use of drug paraphernalia, 4<sup>th</sup> degree CPCS (two counts), and 3<sup>rd</sup> degree CPCS (two counts). The Third Department held the appeal and remitted for further proceedings on the appellant's CPL 30.30 motion. The court failed to inquire into whether

the People's belated addition of trial witnesses rendered their initial COC illusory. The court erroneously relied on a generalized statement in the People's standing affirmation of diligence that they had complied with their discovery obligations. Remittal was required to determine whether the People had exercised due diligence and made reasonable inquiries. The Albany County Alternate Public Defender (Steven M. Sharp, of counsel) represented the appellant.

[Oral Argument](#)

[People v James \(2024 NY Slip Op 03910\)](#)

## FOURTH DEPARTMENT

***People v Shammah*** | July 26, 2024

CPL 30.30 | REVERSED AND DISMISSED

The appellant appealed from a Seneca County Court judgment convicting him of 3<sup>rd</sup> degree CPW. The Fourth Department reversed and dismissed the indictment. The appellant met his initial burden on his 30.30 motion by demonstrating that the People announced readiness 394 days after he was charged by felony complaint. The People failed to establish that the contested 125-day period preceding their statement of readiness was excludable based on the appellant's purported request that they "hold off" presenting the matter to the grand jury. Their blanket assertion that all delays were at the request of the appellant was insufficient. Easton Thompson Kasperek Shiffryn, LLP (David M. Abbatoy, of counsel) represented the appellant.

[Oral Argument \(starts at 1:32:00\)](#)

[People v Shammah \(2024 NY Slip Op 03971\)](#)

***People v Callara*** | July 26, 2024

SPECIAL PROSECUTOR | NO JURISDICTION | REVERSED AND DISMISSED

The appellant appealed from an Orleans County Court judgment convicting him of 4<sup>th</sup> degree grand larceny and petit larceny. The Fourth Department reversed and dismissed the indictment. The appellant was prosecuted by a special district attorney appointed by County Court after the elected district attorney was disqualified. Dismissal was required because the special district attorney was without jurisdiction to prosecute the case; he did not live or maintain a law office in Orleans County or in an adjacent county. The Legal Aid Society of Buffalo, Kerry A. Conner, of counsel) represented the appellant.

[Oral Argument \(starts at 1:10:50\)](#)

[People v Callara \(2024 NY Slip Op 03969\)](#)

***People v Moore*** | July 26, 2024

COLLATERAL ESTOPPEL | NOT HARMLESS ERROR | REVERSED AND REMITTED

The appellant appealed from a Monroe County Court judgment convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW (two counts). The Fourth Department reversed and ordered a new trial. The appellant's first trial ended with an acquittal on two counts of 2<sup>nd</sup> degree menacing and a deadlocked jury on the remaining counts. The People were collaterally estopped from introducing evidence relating to the menacing charges at his retrial. Thus, County Court erred in allowing in testimony that the appellant had pulled out a gun and waved it at the victim and a witness in the hours preceding the murder. The

testimony was not essential; it provided only background information and a potential motive. Because there was a reasonable possibility that this evidence contributed to the conviction, the error was not harmless. The Monroe County Public Defender (Clea Weiss, of counsel) represented the appellant.

[Oral Argument \(starts at 1:16\)](#)

[People v Moore \(2024 NY Slip Op 03941\)](#)

### ***People v Smith*** | July 26, 2024

UNAVAILABLE WITNESS | FIFTH AMENDMENT | REVERSED AND REMITTED

The appellant appealed from a Monroe County Court judgment convicting him of attempted 2<sup>nd</sup> degree murder, 1<sup>st</sup> degree assault, and 1<sup>st</sup> degree criminal use of a firearm. The Fourth Department reversed and remitted for a new trial. The court erred in declaring the victim unavailable based on her intent to invoke the Fifth Amendment privilege against self-incrimination. Shortly before the appellant's retrial, the victim informed the prosecutor that she no longer remembered the shooter's identity. Her attorney advised her to invoke the Fifth out of fear that she would perjure herself on the stand. While the victim could have invoked the Fifth to avoid implicating herself in past perjury, she could not do so based on an intent to perjure herself in the future. The Monroe County Public Defender (Drew R. Dubrin, of counsel) represented the appellant.

[Oral Argument \(starts at 1:33:40\)](#)

[People v Smith \(2024 NY Slip Op 03973\)](#)

### ***People v Campbell*** | July 26, 2024

DRUG FACTORY PRESUMPTION | REVERSED AND REMITTED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 3<sup>rd</sup> degree CPCS and 2<sup>nd</sup> degree criminally using drug paraphernalia (two counts). The Fourth Department reversed and granted a new trial. The court erred in applying the drug factory presumption. The drugs were found in a room on the ground floor. The appellant was first seen on the second floor, walking out of his room wearing only his underwear. He was not apprehended near the drugs or in a manner suggesting that he had just moments before engaged in drug distillation or packing, as contemplated by the drug factory presumption. The Monroe County Conflict Defender (Fabienne N. Santacroce, of counsel) represented the appellant.

[Oral Argument \(starts at 52:30\)](#)

[People v Campbell \(2024 NY Slip Op 03995\)](#)

### ***People v Baker*** | July 26, 2024

DISCOVERY | CPL 30.30 | REVERSED AND REMITTED

The appellant appealed from a Wayne County Court judgment convicting him of 1<sup>st</sup> degree sexual abuse based on his guilty plea. The Fourth Department held the appeal and remitted for a 30.30 time calculation. The People failed to show that they exercised due diligence and made reasonable efforts to identify mandatory discovery materials before filing their initial COC. Although they promptly turned over materials once they became aware of them, they submitted no evidence that they made any efforts to ascertain their existence before filing the initial COC. Notably, the belated materials

included a forensic report which had been completed more than six months earlier. The Wayne County Public Defender (Brian Shiffirin, of counsel) represented the appellant.

[Oral Argument \(starts at 1:35:53\)](#)

[People v Baker \(2024 NY Slip Op 04006\)](#)

### ***People v Colella*** | July 26, 2024

INEFFECTIVE ASSISTANCE OF COUNSEL | REVERSED AND REMITTED

The appellant appealed from an Erie County Supreme Court judgment convicting him of 3<sup>rd</sup> degree grand larceny. The Fourth Department reversed and remitted for a new trial. The appellant allegedly stole a car. A police report indicated that there was a video of a person wearing a hoodie and dark pants abandoning the car, whereas a witness reported that the appellant was wearing a gray t-shirt and gray jogging pants that night. The video was either lost or destroyed, and the appellant's former attorney moved to dismiss based on the People's failure to turn it over. After that attorney was relieved as counsel, the court assigned a new attorney, who withdrew the motion and stipulated to precluding any mention of the video at trial. This constituted ineffective assistance of counsel. There was no legitimate strategy for withdrawing the *Brady* motion, and the proffered strategic reason for the stipulation—that no description had been given of the person leaving the vehicle—was faulty. Erickson Webb Scolton & Hajdu (Lyle T. Hajdu, of counsel) represented the appellant.

[Oral Argument \(starts at 1:25:30\)](#)

[People v Colella \(2024 NY Slip Op 04012\)](#)

### ***People v Anderson*** | July 26, 2024

SANDOVAL HEARING | APPELLANT NOT PRESENT | REVERSED AND REMITTED

The appellant appealed from a Monroe County Court judgment convicting him of course of sexual conduct against a child. The Fourth Department reversed and remitted for a new trial. The record after a reconstruction hearing showed that the *Sandoval* proceedings were held outside the appellant's presence and his presence was not superfluous; the court's ruling was a compromise and not wholly unfavorable to the defense. The Monroe County Public Defender (Piotr Banasiak, of counsel) represented the appellant.

[Oral Argument \(starts at 21:12\)](#)

[People v Anderson \(2024 NY Slip Op 04042\)](#)

### ***People v Cromwell*** | July 26, 2024

SORA | FOREIGN DESIGNATION CLAUSE | UNCONSTITUTIONAL AS APPLIED

The appellant appealed from a Chautauqua County court order designating her a sexually violent offender. The Fourth Department reversed. SORA's foreign designation clause was unconstitutional as applied to the appellant. County Court designated her a sexually violent offender based solely on her prior, out-of-state conviction for a nonviolent sex offense. Mislabeled her a sexually violent offender was not rationally related to any legitimate governmental interest. The Chautauqua County Public Defender (Heather Burley, of counsel) represented the appellant.

[Oral Argument \(starts at 33:58\)](#)

[People v Cromwell \(2024 NY Slip Op 03934\)](#)

### ***People v Shaw*** | July 26, 2024

LESSER INCLUSORY | MODIFIED | *PAYTON* DISSENT

The appellant appealed from a Monroe County Court judgment convicting him of 1<sup>st</sup> degree murder (two counts), 2<sup>nd</sup> degree murder (two counts), attempted 2<sup>nd</sup> degree murder, 1<sup>st</sup> degree assault, and 2<sup>nd</sup> degree CPW (two counts). The Fourth Department vacated and dismissed the 2<sup>nd</sup> degree murder counts as lesser inclusory offenses, directed that the sentences imposed on the CPW convictions run concurrently with the others, and otherwise affirmed, with one justice dissenting. Although the appellant's arrest was unlawful under *Payton*, the tenant's valid consent to search the apartment—where the appellant had stayed overnight and the gun was found—attenuated any initial illegality. In the dissent's view, the tenant's consent was involuntary and the gun should have been suppressed. SWAT officers stormed the apartment, ordered the tenant to lie on the ground, grabbed her and placed her in the back of a police car. She was only allowed to leave after giving consent. Even if the tenant's consent was voluntary, it was not sufficiently attenuated from the *Payton* violation. The Monroe County Public Defender (Clea Weiss, of counsel) represented the appellant.

[Oral Argument \(starts at 1:06:50\)](#)

[People v Shaw \(2024 NY Slip Op 03936\)](#)

### ***People v Junot*** | July 26, 2024

UPWARD DEPARTURE | FACTORS ALREADY CONSIDERED | MODIFIED

The appellant appealed from a Monroe County Court order adjudicating him a level two sex offender. The Fourth Department reduced the adjudication to level one. The court erred in granting the People's request for an upward departure based on their proffered aggravating factors. The appellant's oral sexual conduct and the continuing course of sexual misconduct were already considered by risk factors two and four. The Monroe County Public Defender (David R. Juergens, of counsel) represented the appellant.

[People v Junot \(2024 NY Slip Op 04025\)](#)

### ***People v Bummer-Smythe*** | July 26, 2024

DVSJA | *LAFONTAINE* INAPPLICABLE | RESENTENCING DENIED

The appellant appealed from an Erie County Court order denying her DVSJA resentencing motion. The Fourth Department affirmed, finding that the sentence of 25 years-to-life was not unduly harsh because of appellant's disciplinary history while incarcerated and her current success on parole supervision. Although the lower court had not reached this issue, the Fourth Department had jurisdiction to affirm on this ground because the restrictions of CPL 470.15 (1) and *People v LaFontaine* (92 NY2d 470 [1998]) do not apply to the DVSJA, which involves the kind of "single multipronged legal ruling" analyzed in *People v Garrett* (23 NY3d 878 [2014]). However, the lower court erroneously held that appellant's abuse by her husband/co-defendant was not a significant contributing factor to her participation in the crime. Courts must take a "full picture" approach to this factor and "consider the cumulative effect of the abuse together with the events immediately surrounding the crime" (*People v Smith*, 69 Misc 3d 1030, 1038 [Erie County Ct 2020]). In holding otherwise, the hearing court applied "outdated notions" regarding the behavior of domestic violence survivors that "cannot be reconciled with

modern understanding of the effects of domestic violence,” including giving undue weight to minimal inconsistencies in appellant’s accounts of her role in the homicide.

[Oral Argument \(starts at 1:16:20\)](#)

[People v Bummer-Smythe \(2024 NY Slip Op 04003\)](#)

***People v Gamble*** | July 26, 2024

MOLINEAX | HARMLESS ERROR | AFFIRMED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 2<sup>nd</sup> degree CPW and 2<sup>nd</sup> degree assault. The Fourth Department affirmed. The court erred in permitting the victim to testify about a prior uncharged bad act where the appellant allegedly pulled a knife on the victim about one month before the shooting. This evidence was improperly admitted under *Molineux*; it did not tend to establish motive and was highly prejudicial propensity evidence. However, this error was harmless. Steven A. Feldman represented the appellant.

[People v Gamble \(2024 NY Slip Op 03992\)](#)

## FAMILY

## TRIAL COURTS

***M.D.S. v. E.W.*** | 2024 WL 3515708

PARENT’S FREE SPEECH | OUTWEIGHED BY CHILDREN’S BEST INTERESTS

The AFC sought an emergency order directing the mother to delete her website, which published information about the family, and prohibiting her from any future online posts relating to evidence and claims raised in the divorce proceeding. New York County Supreme Court granted the motion. The restraint on the mother’s First Amendment right to free speech was outweighed by the need to protect the children’s best interests, especially given their ages and the name of the website (the grandfather’s well-known pen name), which made the website more than likely to be accessible to the children. The relief sought was tailored as precisely as possible to the needs of the case. Lauren M. Friend represented the children.

[M.D.S. v E.W. \(2024 NY Slip Op 50947\[U\]\)](#)

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