

# Decisions of Interest

JANUARY 22, 2024

## CRIMINAL

### COURT OF APPEALS

#### ***People v Appiah*** | January 16, 2024

WOA INVALID | REMITTED ON EXCESSIVE SENTENCE CLAIM

The appellant appealed from a Third Department order affirming his 2<sup>nd</sup> degree assault conviction. The Court of Appeals held that the appellant's waiver of appeal was invalid and remitted to the Third Department to consider the appellant's excessive sentence challenge. Two of the three-Justice Third Department majority found the waiver to be invalid but declined to reduce the appellant's sentence in the interest of justice. The third Justice, finding the waiver to be valid, did not reach the merits of the excessive sentence claim. Steven M. Sharp represented the appellant.

[People v Appiah \(2024 NY Slip Op 00158\)](#)

### FIRST DEPARTMENT

#### ***People v Tolbert*** | January 18, 2024

SORA | REGISTRATION REQUIREMENT | RETROACTIVITY UNCLEAR

The appellant appealed from a Bronx County Supreme Court order adjudicating him a level two sex offender. The First Department reversed and remitted. The provision requiring individuals to register in NY if a felony conviction in another jurisdiction requires them to register in that jurisdiction only applies retroactively to individuals who had not completed their sentence before January 1, 2000. There was no proof that the appellant had not completed his New Jersey sentence before that date, and that the NJ offense was therefore registerable. Further, if the offense is deemed registerable, points were incorrectly assessed for a continuing course of sexual misconduct and the removal of those points would reduce the presumptive risk level to a level one. Because this error influenced the People's decision not to seek an upward departure, they would be entitled to seek a departure on remand. The Legal Aid Society of NYC (Simon Greenberg, of counsel) represented the appellant.

[People v Tolbert \(2024 NY Slip Op 00239\)](#)

#### ***People v Ortiz*** | January 18, 2024

SENTENCE REDUCED | BENEFIT NULLIFIED | PEOPLE'S CONSENT

The appellant appealed from a New York County Supreme Court judgment convicting him of 3<sup>rd</sup> degree burglary and imposing a 3 ½ to 7-year sentence based on his guilty

plea. The First Department reduced the sentence to 3 to 6 years. The appellant pleaded guilty with the understanding that his sentence would run concurrently to a 9-year previously imposed sentence, and that he would not have to serve prison time beyond the 9-year sentence. The 9-year sentence was later reduced to 6 years, nullifying a benefit that materially induced the appellant's guilty plea which would entitle him to withdraw his plea. However, he only sought a sentence reduction to which the People consented. The Office of the Appellate Defender (Samuel Steinbock-Pratt, of counsel) represented the appellant.

[People v Ortiz \(2024 NY Slip Op 00245\)](#)

### ***People v Lewis*** | January 18, 2024

SORA | NO INTERLOCUTORY APPEAL

The appellant appealed from a Bronx County Supreme Court order denying his motion to dismiss his SORA proceeding. The First Department dismissed the appeal and remanded. The appellant moved to dismiss his SORA proceeding before a risk classification hearing was held, arguing that the Board incorrectly determined that he had to register in NY based on his federal conviction. Supreme Court denied the motion and held that the appellant must proceed with the hearing; the appellant appealed the order before the hearing was conducted. A defendant's liberty interest relative to SORA is not adjudicated until a determination is made following a hearing. Correction Law § 168-n (3) only allows an appeal "as of right" from a risk level determination order, and a challenge to the registrability of an underlying foreign conviction is reviewable in an appeal from the final risk level determination.

[People v Lewis \(2024 NY Slip Op 00248\)](#)

## SECOND DEPARTMENT

### ***People v Hernandez*** | January 18, 2024

SUPPRESSION | NO REASONABLE SUSPICION | REVERSED

The appellant appealed from a Queens County Supreme Court judgment convicting him of 2<sup>nd</sup> degree CPW based on his guilty plea. The Second Department reversed, granted suppression, and remitted. Officers approached two men who were shoving a man on a bicycle. The bicyclist and one of the other men fled. The appellant walked quickly away, but a police car stopped in front of him. The officers asked what was going on, and the appellant "bladed himself"—turned so he was standing sideways in relation to the officers—and asked why he was being stopped. An officer grabbed him by the jacket, touched his right rear pants pocket, and felt what he thought was a gun. The appellant was arrested and made a statement to officers at the precinct. Despite many reports of robberies in the area and the appellant's initial reaction, the police did not have reasonable suspicion to detain and frisk him. The gun and the appellant's statement should have been suppressed. Appellate Advocates (Sean H. Murray, of counsel) represented the appellant.

[People v Hernandez \(2024 NY Slip Op 00196\)](#)

## ***People v Marshall*** | January 18, 2024

SECOND FELONY OFFENDER | PROCEDURAL ERRORS | REVERSED

The appellant appealed from a Dutchess County Court judgment convicting him of 2<sup>nd</sup> degree CPCS and sentencing him as a second felony offender based on his guilty plea. The Second Department vacated the sentence and remitted for resentencing. County Court erred by sentencing the appellant as a second felony offender without following the procedural requirements of CPL 400.21 or giving the appellant notice and an opportunity to be heard on the issue. Yasmin Daley Duncan represented the appellant.

[People v Marshall \(2024 NY Slip Op 00199\)](#)

## THIRD DEPARTMENT

### ***People v Marcellus*** | January 18, 2024

PEQUE | 440 HEARING REQUIRED | REVERSED

The appellant appealed from a Schenectady County Court judgment convicting him of 3<sup>rd</sup> degree CPCS based on his guilty plea and an order summarily denying his CPL 440.10 motion. The Third Department reversed and remitted for a 440 hearing. The appellant came to the U.S. in 2000 as an asylee from Haiti and became a lawful resident in 2006. Trial counsel rendered ineffective assistance by misadvising that his conviction may render him deportable. As an “aggravated felony,” it made his deportation mandatory and rendered him ineligible for cancellation of a removal order. The appellant averred that he would have gone to trial had he known that he was pleading to a mandatory deportable crime. He had been residing in Schenectady County for eight years, was self-employed, and had triplets with his long-term partner. Angela Kelley represented the appellant. [NOTE: While factually distinct, this holding essentially overruled *People v Marte-Feliz*, 192 AD3d 1397 (3d Dept 2022)].

[People v Marcellus \(2024 NY Slip Op 00209\)](#)

## TRIAL COURTS

### ***People v Thomas*** | 2024 WL 189383

BRADY VIOLATION | COC/SOR INVALID | DISMISSED

Thomas moved to dismiss felony sex abuse charges on speedy trial grounds. Columbia County Court granted the motion. The People’s failure to advise Thomas, until nearly the eve of trial, that the alleged child victim had repeatedly denied any abuse by Thomas during a recorded interview constituted a *Brady* violation that rendered their COCs deficient. Since the alleged victim’s name was prominently displayed on Temporary Orders of Protection previously issued to Thomas, any decision by the People to withhold the recording would not have protected the alleged victim’s identity. Nor could the People have relied in good faith upon a prior court order deeming their disclosures adequate and declining to strike their COC/SOR—that order was based upon their material misrepresentation that they had complied with their *Brady* obligations. Shane Hug represented Thomas.

[People v Thomas \(2024 NY Slip Op 50043\[U\]\)](#)

### THIRD DEPARTMENT

***Matter of Richard TT. (Kara VV.)*** | January 18, 2024

NEGLECT | COUNSEL RELIEVED WITHOUT NOTICE | REVERSED

The mother appealed from a Schenectady County Family Court order adjudicating the subject children to be neglected. The Third Department reversed the neglect finding and remitted for a new fact-finding hearing. Two justices dissented. After the mother failed to appear at two permanency hearing dates, Family Court granted her assigned counsel's request to be relieved. Family Court then proceeded with the permanency hearing and held a fact-finding hearing without the mother or any counsel for her present. There was no indication that the mother's attorney notified her that she was seeking to withdraw as counsel or that the mother had voluntarily absented herself. Reversal was required because the mother was denied the right to counsel, regardless of the merits of her position. In the dissent's view, the issue of whether the mother was denied due process was not properly before the Court; the neglect finding was entered on default, and she never moved for vacatur. Monique B. McBride represented the mother.

[Matter of Richard TT. \(Kara VV.\) \(2024 NY Slip Op 00215\)](#)

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