

Decisions of Interest

JULY 3, 2023

CRIMINAL

US SUPREME COURT

Counterman v Colorado | June 27, 2023

NOT TRUE THREATS | PROTECTED SPEECH

The petitioner appealed from a Colorado appellate court order affirming his conviction of a stalking offense. The U.S. Supreme Court vacated the judgment. The petitioner sent hundreds of Facebook messages to the victim, some suggesting he was surveilling her, others expressing anger and envisaging harm befalling her, thereby inducing her extreme fear and anxiety. Colorado charged the petitioner under a statute making it unlawful to repeatedly communicate in a manner that would cause a reasonable person to suffer serious emotional distress and that did cause such distress. True threats of violence are unprotected, but the prosecution had to show that the petitioner consciously disregarded a substantial risk that his communications would be viewed as threatening violence. In lacking such requirement, the Colorado standard violated the First Amendment.

[Counterman v Colorado \(No. 22–138\)](#)

FIRST DEPARTMENT

People v Sittler | June 29, 2023

SORA | OUT-OF-STATE MISDEMEANOR | REGISTERABLE OFFENSE

The defendant appealed from a Bronx County Supreme Court order adjudicating him a level one sex offender. The First Department affirmed. The defendant's prior Nebraska misdemeanor conviction of enticement by electronic communication device was the equivalent of the New York felony of disseminating indecent material to minors in the first degree, a registerable sex offense. Although the Nebraska misdemeanor was broader than the New York felony—it did not require that the defendant importune, invite or induce a minor to engage in sexual conduct—the defendant's conduct brought him within the scope of the New York statute. The initial suggestion to meet came from the 15-year-old complainant, but the defendant's response suggesting an earlier time constituted a separate invitation, which qualified the Nebraska offense as the equivalent of a registerable offense in New York.

[People v Sittler \(2023 NY Slip Op 03550\)](#)

SECOND DEPARTMENT

People v Pulliam | June 28, 2023

UNFAIR TRIAL | TRIAL JUDGE AS ADVOCATE | REVERSED

The defendant appealed from a Queens County Supreme Court judgment convicting him of 3rd degree robbery and 5th degree CPSP. The Second Department reversed and remitted for a new trial before a different judge. The court's participation in the questioning of witnesses deprived the defendant of a fair trial. The court took on the function and appearance of an advocate, sometimes with a running commentary on the testimony—giving the impression that it found the testimony credible and the People's case meritorious. Appellate Advocates (Caitlyn Carpenter and Anders Nelson, of counsel) represented the appellant.

[People v Pulliam \(2023 NY Slip Op 03482\)](#)

FOURTH DEPARTMENT

People v Colon | June 30, 2023

SANDOVAL | NO BALANCING TEST | REVERSED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree CPW after a jury trial. The Fourth Department reversed and remanded for a new trial. Supreme Court abused its discretion when it granted so much of the People's *Sandoval* proffer that sought to cross-examine the defendant about a prior conviction for attempted 2nd degree CPW and include the name of the offense. The court erroneously stated that it was bound by the holding of *People v Stanley* (155 AD3d 1684 [4th Dept 2017]) to allow the questioning, rather than weighing the probative value of the conviction against the potential for undue prejudice. The Monroe County Public Defender (Bridget L. Field, of counsel) represented the appellant.

[People v Colon \(2023 NY Slip Op 03583\)](#)

People v Montgomery | June 30, 2023

VTL § 1156 | NO PROBABLE CAUSE | REVERSED

The defendant appealed from an Onondaga County Court judgment convicting him of 2nd degree CPW based on his guilty plea. The Fourth Department reversed, vacated the guilty plea, and granted the defendant's suppression motion. Before police executed a search warrant that allowed them to search any person found in the defendant's brother's residence, they saw the defendant exit the building and walk down the middle of the street. Police ordered him to stop; he ran and was apprehended. Police found a discarded firearm along his path. County Court erred in denying the defendant's suppression motion. His walking in the roadway did not provide probable cause to believe he violated the Vehicle and Traffic Law. There was no evidence that a safe sidewalk was available or that walking on the left side of the road, or its shoulder, was practicable (see VTL § 1156 [a], [b]). Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented the appellant.

[People v Montgomery \(2023 NY Slip Op 03606\)](#)

People v McCracken | June 30, 2023

PAYTON | PAROLE WARRANT | HEARING REQUIRED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree murder based on his guilty plea. The Fourth Department reserved decision and remitted. The defendant requested a suppression hearing based on an alleged *Payton* violation. Relying on *People v Johnson* (140 AD3d 1630 [4th Dept 2016]), Supreme Court found that the defendant's outstanding parole warrant was facially sufficient and alone justified police entry and his arrest—without holding a hearing. However, *Johnson* does not stand for the proposition that a defendant is limited solely to a facial challenge if arrested in their residence based on a parole warrant. Supreme Court erred in declining to hold a hearing where the defendant challenged the factual basis for and the validity of the parole violation warrant. The Monroe County Public Defender (James A. Hobbs, of counsel) represented the appellant.

[People v McCracken \(2023 NY Slip Op 03614\)](#)

People v Smith | June 30, 2023

FOR CAUSE CHALLENGE | JUROR BIAS | REVERSED

The defendant appealed from a Monroe County Court judgment convicting him of 3rd degree burglary. The Fourth Department reversed and ordered a new trial. County Court erred in denying the defendant's for cause challenges of two prospective jurors whose statements cast serious doubt on their ability to render an impartial verdict. Both prospective jurors stated that they would be more likely to credit a police officer's testimony over the defendant's testimony. When the court tried to rehabilitate them, they both repeated that they would likely credit a police officer over the defendant. After the court denied the defendant's challenges for cause, the defendant exhausted all of his peremptory challenges. The Monroe County Conflict Defender (Carolyn R. Walther, of counsel) represented the appellant.

[People v Smith \(2023 NY Slip Op 03647\)](#)

Matter of James (nee Nancy) P. v Boller | June 30, 2023

WRIT OF PROHIBITION | PSYCH EVAL | DVSJA | DISMISSED

The Fourth Department dismissed the petitioner's CPLR article 78 petition seeking to prohibit enforcement of respondent Hon. M. William Boller's order requiring the petitioner to submit to a reciprocal psychiatric evaluation by the People's expert in the underlying DVSJA proceeding. The Fourth Department expressed no view on whether it was legal error for Supreme Court to order the petitioner to undergo the psychiatric evaluation, but any such error would constitute merely one component of the larger resentencing proceeding; it would not have a proceeding-wide effect. Thus, a writ of prohibition does not lie.

[Matter of James \(nee Nancy\) P. v Boller \(2023 NY Slip Op 03642\)](#)

TRIAL COURTS

People v Hamlett | 2023 WL 4243362

PRETRIAL HEARING | PHYSICAL RESTRAINTS | DUE PROCESS

The defendant, prior to a *Mapp* hearing, moved for the court to remove the restraints on his wrists. Queens County Criminal Court granted the motion. An indiscriminate policy to shackle any incarcerated person produced to a courtroom violates the Due Process

Clause. Freedom from bodily restraint has always been recognized as the core of the liberty protected against arbitrary governmental action. Visible shackling undermines the presumption of innocence, physically hinders the right to assistance of counsel at a suppression hearing and degrades the dignity of the court. The same individualized analysis for imposing shackles in a public court applies to pre-trial hearings, bench trials, and jury trials alike. Queens Defenders represented the defendant.

[People v Hamlett \(2023 NY Slip Op 23192\)](#)

People v Jackson | 2023 WL 4304741

SEARCH WARRANT | OVERBROAD | MOTION GRANTED IN PART

The defendant controverted three search warrants authorizing the search of his iPhone and records related to his Facebook and Snapchat accounts. Kings County Supreme Court granted the motion as to the iPhone warrant, held the motion in abeyance as to the social media warrants, and ordered a hearing to determine the defendant's standing to challenge those warrants. While the complainant alleged that the defendant had taken nude photos and videos of her while she was underage and posted those materials to Facebook, the phone warrant was devoid of factual allegations that the photos had been taken with a cellphone, much less the seized iPhone. A hearing was required to determine whether the defendant has a legitimate expectation of privacy in the social media accounts and whether efforts were made to keep the information private. Craig Newman represented the defendant.

[People v Jackson \(2023 NY Slip Op 50640\[U\]\)](#)

People v Arroyo | 2023 WL 4171056

BAIL | MULTIPLE FELONY CONVICTIONS | MOTION DENIED

The defendant was arraigned in Rochester City Court on several non-qualifying offenses (see CPL 510.10). City Court remanded him under the double predicate rule based on his four prior felonies (see CPL 530.20 [2] [a]). The defendant moved for an order releasing him on his own recognizance or under non-monetary conditions. City Court denied the motion. The legislative history of the January 2020 amendment to CPL 530.20 (2) shows that the Legislature reviewed the predicate felon provision and clearly intended that double predicate felons would not be eligible to be released by local criminal courts when charged with a felony (*cf. People ex rel. Bradley v Baxter*, 2023 NY Slip Op 23145 [Sup Ct, Monroe County [2023]]).

[People v Arroyo \(2023 NY Slip Op 50612\[U\]\)](#)

Matter of J.P v W.M. | 2023 WL 3140076

TERPO | CRIMINAL CONDUCT | COUNSEL ASSIGNED

The NYS Police sought a temporary extreme risk protection order (TERPO) against the respondent, alleging that, while under the influence of alcohol, he loaded a shotgun and threatened to shoot his sick, elderly dog and then himself. Despite the civil nature of the proceeding and the absence of a provision for the assignment of counsel in the statute, Franklin County Supreme Court sua sponte assigned the respondent counsel. The respondent could not legally possess a firearm because of a prior conviction, and the acts alleged in the TERPO petition implicated him in a crime. The assignment of counsel was necessary to protect the respondent's due process rights.

[Matter of J.P. v W.M. \(Index No. 2023-141\)](#)

FAMILY

SECOND DEPARTMENT

Matter of Gabriel v Pierre | June 28, 2023

HABEAS CORPUS | UCCJEA | INCOVENIENT FORUM

The father appealed from several Orange County Family Court orders which granted the mother's habeas corpus petition, directed that the children be returned to her physical custody, and dismissed the father's modification petition. The Second Department affirmed. Two years after Family Court awarded the mother custody of the parties' three children, she and the children moved to North Carolina. Family Court subsequently issued an order on consent that continued the initial custody order and awarded the father parental access during school breaks. After his 2021 summer visit in New York, the father did not return the children. The father wrongfully withheld the children, and the mother was entitled to a writ of habeas corpus. Family Court properly deferred jurisdiction to North Carolina by weighing the relevant factors under the UCCJEA. It was also appropriate to not appoint an AFC; the case turned primarily on jurisdiction and involved a prior consent order.

[Matter of Gabriel v Pierre \(2023 NY Slip Op 03463\)](#)

FOURTH DEPARTMENT

Matter of Timar P. (James B.) | June 30, 2023

JD | RIGHT TO BE PRESENT | REVERSED

The respondent appealed from an Oneida County Family Court order adjudicating him to be a juvenile delinquent. The Fourth Department reversed and remitted. Family Court violated the respondent's right to be present at the fact-finding hearing. The court did not advise him that he had a right to be present and that the fact-finding hearing would proceed in his absence. Thus, the respondent did not voluntarily, knowingly, and intelligently waive his right to be present. Susan B. Marris represented the respondent-appellant.

[Matter of Timar P. \(James B.\) \(2023 NY Slip Op 03654\)](#)

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