

# Reverse & Reassign

## Red Flags of Improper Judicial Conduct



New York’s intermediate appellate courts rarely overturn criminal cases, whether by reversing or remitting them.<sup>1</sup> In extraordinarily rare circumstances, these courts may not only overturn a case but also reassign it to a *different* lower court judge than the one who presided over the initial proceedings. Such reassignments, which we refer to as Reassignments to a Different Judge (RDJs), serve as a red flag, suggesting the possibility of judicial impropriety that goes beyond getting the law wrong.

## 1. Examples of RDJs

### Judge Ruled on the Credibility of Law Clerk’s Spouse in a Constitutional Rights Hearing

In *People v. Suazo*,<sup>2</sup> a unanimous panel of four appellate judges determined that Judge Kenneth C. Holder had “improvidently exercised his discretion” to preside over the suppression hearing, the hearing that determines whether the police obtained evidence in accordance with, or in violation of, a defendant’s constitutional rights.

Judge Holder’s assessment of the credibility of one witness, a detective, was “critical” to the outcome of the hearing. The detective was also the spouse of Judge Holder’s law clerk—the person whose “duties and responsibilities are most intimately connected with the judge’s own exercise of the judicial function,” in the words of the appellate court. Judge Holder decided to keep the case and rule on the credibility of his own clerk’s spouse.

In reassigning the case to a different judge, the appellate judges noted that Judge Holder “should have recused himself,” and in choosing not to do so he “created, at a minimum, the appearance that [he] could not be impartial” in assessing the detective’s credibility.

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<sup>1</sup> A remittal, or remand, usually means that the lower court must hear part of the case again, for example by conducting a hearing or by resentencing the defendant. For an overview of the possible outcomes of a case on appeal, see *The Decision*, New York Courts (2024).

<sup>2</sup> *People v. Suazo*, 120 A.D.3d 1270 (2d Dep’t 2014).

### **“Simply inexcusable”**

In *People v. Leggett*,<sup>3</sup> a unanimous panel of five appellate judges found that Judge Robert A. Neary engaged in “pervasive denigration”—repeatedly and unfairly criticizing the defense attorney in front of the jury. The appellate court deemed Judge Neary’s behavior so severe that it undermined the defendant’s right to a fair trial.

In one instance, the defense attorney objected during the prosecution’s closing argument, to which Judge Neary responded by stating, “Would you behave like a professional, please and not a clown.” In another instance, Judge Neary admonished defense counsel, in the jury’s presence, “by asking him whether he wished to ‘behave like a gentleman’ or ‘[be] escorted out.’ ”

Calling this and other comments “simply inexcusable,” the appellate court reversed the case and ordered that a new trial take place before a different judge.

### **“You’ve never done anything worthwhile in your entire life”**

In *People v. Ward*,<sup>4</sup> three appellate judges determined that the “cumulative effect” of Judge Vincent Del Giudice’s “rulings and jury instructions,” along with the prosecutor’s conduct at trial, deprived the defendant of his right to a fair trial. The appellate court explained that Judge Del Giudice’s “intemperate remarks” necessitated a new trial to be presided over by a different judge. The appellate court quoted the following remarks:

*Sir, you’re a murderer, all right. You lie, you cheat, you do everything you can to get over on society. . . . Notwithstanding your nefarious membership in an organization, all right, it’s clear to this Court that not only are you guilty beyond all doubt, not beyond a reasonable doubt but beyond a shadow of a doubt. . . . You are just trying to guild the lilly [sic], if you understand what that means, all right. You’re guilty. There is no question about it. . . . [Y]our whole life you never, you’ve never done anything worthwhile in your entire life, only been a scourge on society. . . . You’re a scourge, a real scourge on society. . . . You should be excised from the body politic and be incarcerated for as long as possible.*

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<sup>3</sup> *People v. Leggett*, 76 A.D.3d 860 (1st Dep’t 2010).

<sup>4</sup> *People v. Ward*, 175 A.D.3d 722 (2d Dep’t 2019).

## 2. Different Types of Judicial Conduct Can Trigger a RDJ

While RDJs indicate judicial impropriety, the specific reasons for such impropriety, and the types of conduct involved, vary.

When an appellate court overturns a case, it does not automatically reassign it to a new judge. As discussed in the section “RDJs Are Extraordinarily Rare,” below, the overturning of a case on appeal is a rare occurrence, and reassignment is even rarer.

Moreover, a finding of improper judicial conduct does not necessarily result in reassignment. Appellate courts frequently cite a judge’s “improvident” exercise of discretion,<sup>5</sup> “abuse” of discretion,<sup>6</sup> or other “improper” actions<sup>7</sup> as reasons, either wholly or in part, for overturning a case. However, many such findings do not lead to the reassignment of the case.

There appears to be no articulable legal framework that specifies which improper judicial conduct mandates reassignment. Among the 66 cases identified as RDJs, the appellate courts ordered reassignments in 50 cases due to a range of judicial actions, ranging from denigrating the defense counsel to coercing guilty pleas. In the remaining 16 RDJ cases, the appellate courts did not clearly articulate the reason for reassignment.<sup>8</sup>

However, the body of RDJs we have identified suggests that, in a significant number of instances, reassignment occurs when a judge’s improper conduct evinces bias, prejudice, or otherwise creates an appearance of bias.

<sup>5</sup> See, e.g., *People v. McLeod*, 122 A.D.3d 16 (1st Dep’t 2014) (“[Judge Maxwell Wiley] improvidently exercised [his] discretion by precluding the proposed line of questioning concerning the witness’s prior crimes—thereby allowing the witness to avoid asserting his Fifth Amendment privilege in the jury’s presence.”).

<sup>6</sup> *People v. George*, 183 A.D.3d 436 (1st Dep’t 2020) (“[Judge Abraham L. Clott] abused [his] discretion in denying defendant’s [motion to vacate the conviction] without first holding a hearing on his claim that his counsel was ineffective.”); *People v. Andrews*, 210 A.D.3d 1429 (4d Dep’t 2022) (“[Judge Donald E. Todd] abused [his] discretion in precluding the defendant from calling that witness. . . the error was not harmless, and that a new trial must be granted.”).

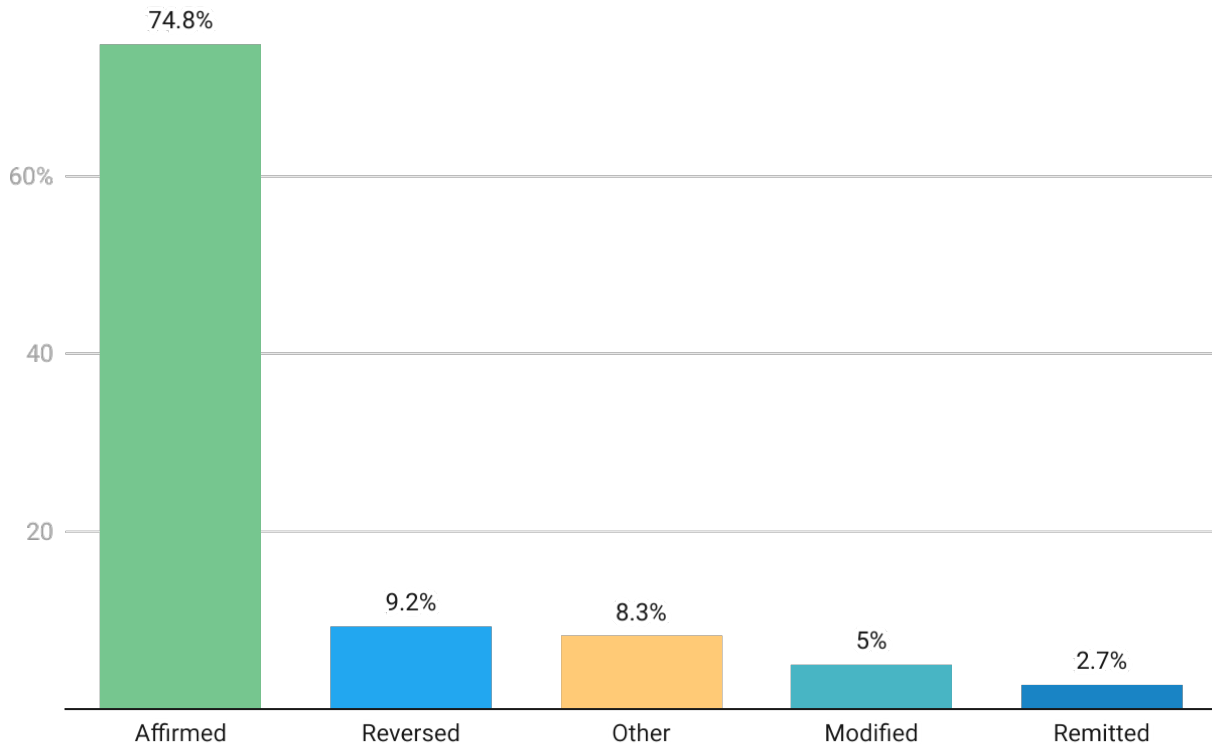
<sup>7</sup> *People v. Bradley*, 99 A.D.3d 934 (2d Dep’t 2012) (“[Judge Susan M. Capeci] improperly precluded the defendant from adducing testimony. . . the preclusion of such material and exculpatory evidence deprived the defendant of a fair trial.”); *People v. Brown*, 104 A.D.3d 864 (2d Dep’t 2013). (“By permitting the prosecutor to instruct the jury on matters of law during the course of his summation, [Judge Bruce Balter] improperly surrendered [his] nondelegable judicial responsibility[, this] significantly impaired the integrity of the proceedings and deprived the defendant of a fair trial, requiring reversal.”).

<sup>8</sup> See, e.g., *People v. Kirby*, 196 A.D.3d 601 (2d Dep’t 2021); *People v. Demagall*, 63 A.D.3d 34 (3d Dep’t 2009).

### 3. RDJs Are Extraordinarily Rare

One reason for the rarity of RDJs is that intermediate appellate courts rarely overturn cases.<sup>9</sup>

**Figure 1: Intermediate Appeal Outcomes in NY Criminal Cases, 2007-2023**



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*The number of appellate decisions in each category is available in the HTML version of this report.*

Of the 49,830 appellate criminal decisions in 2007-2023, only 66 decisions reassigned an overturned case to a different judge. This constitutes 1% of all reversed and remitted cases, or 0.1% of all cases. Given that only about 7.5% of New York felony convictions are appealed,<sup>10</sup> many cases never undergo scrutiny by appellate judges for potential improper judicial decision-making that could warrant a reversal, let alone a reassignment.

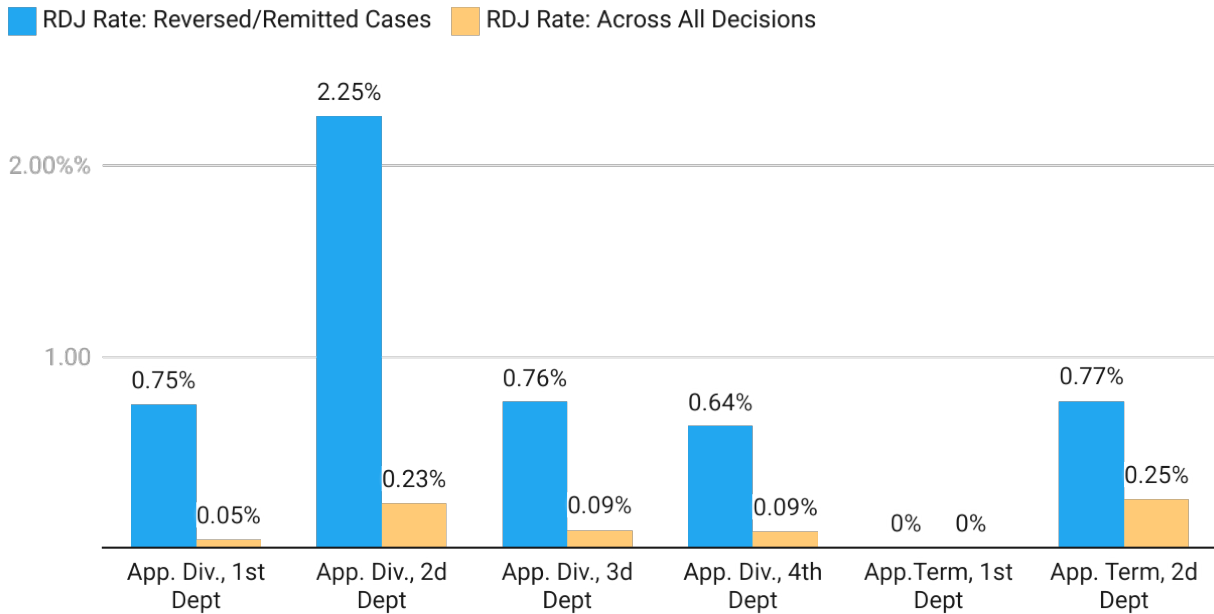
RDJ rates are relatively uniform across the intermediate appellate courts, with

<sup>9</sup> The “Other” category includes rulings on Anders motions; moot *habeas corpus* cases; and denial of writ of error *coram nobis*, among other issues. See, e.g., *People ex rel. Teishman v. Riordan*, 36 A.D.3d 504 (1st Dep’t 2007); *People ex rel. Abreu v. Warden of Rikers Is. Correctional Facility*, 37 A.D.3d 353 (1st Dep’t 2007); *People v. Griffin*, 147 A.D.3d 974 (2d Dep’t 2017).

<sup>10</sup> Scrutinize and The Center on Race, Inequality, and the Law at NYU School of Law, *Excessive Sentencers* (2024).

two notable exceptions: the Appellate Division of the Second Department, which utilizes reassignment more often than its counterparts, albeit still very rarely, and the Appellate Term of the First Department, which has not made an RDJ finding in 17 years.

**Figure 2: RDJ Rates Are Extraordinarily Low and Vary by Intermediate Court**






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#### 4. Findings: RDJs By Judge

The table below lists all 66 cases reassigned in New York State from 2007 to 2023. Considering the variable and fact-specific nature of these cases, we include a relevant quote and a link to the appellate opinion for each decision in our dataset for convenient access.

**Table 1: RDJs By Judge**

Judge	RDJs 	County	Status	Relevant Quote
Ronald D. Hollie	 8	Queens	Retired	2017: "[C]onducted excessive and prejudicial questioning of trial witnesses." 2017: "[E]xcessive and prejudicial interference with the examination of witnesses." 2018: "[C]reated the impression that [he] was an advocate on behalf of the People." 2018: "[C]onducted excessive and prejudicial questioning of trial witnesses." 2019: "[C]onducted excessive and prejudicial questioning of trial witnesses." 2020: "[Judge's] interference deprived the defendant of a fair trial." 2020: "[C]reated the impression that [he] was an advocate on behalf of the People." 2021: "[C]reated the impression that [he] was an advocate for the People."
Vincent Del Giudice	 5	Kings	Active	2014: "[I]ntemperate remarks...suggested that [he] improperly sentenced the defendant based on a crime for which he was acquitted." 2019: "[I]ntemperate remarks" made at sentencing. 2021: RDJ unexplained. 2022: "[R]emarks made by the [Judge] throughout the proceedings." 2023: RDJ unexplained.
Douglas S. Wong	 2	Queens	Retired	2011: "[E]vinced a predisposition to reject or discredit the defendant's evidence." 2012: RDJ unexplained.
Ira Margulis	 2	Queens	Retired	2021: "[I]mprovidently exercised his discretion in denying the defendant's request to recuse himself." 2021: "[I]mprovidently exercised his discretion in denying the defendant's request to recuse himself." (co-defendant's case).
Meryl J. Berkowitz	 2	Nassau	Active	2008: RDJ unexplained. 2008: "[F]airness of the process as a whole' was compromised by the combination of defense counsel's conduct and the response of the [Judge]."
Michael A. Gary	 2	Kings	Retired	2011: "[S]entenced] based upon the violation of a condition not previously imposed upon the defendant as part of his plea agreement and [made] intemperate remarks." 2017: RDJ unexplained.
Thomas E. Moran	 2	Monroe	Active	2019: "[N]egotiated and entered into a [plea] agreement with a [codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence." 2021: "[N]egotiated and entered into a [plea] agreement with a [codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence."
Anthony J. Ferrara	 1	New York	Retired	2015: RDJ unexplained.
Arlene R. Silverman	 1	New York	Retired	2007: "[O]bstruct[ed] counsel's effort to present a defense for his client."
Barry Kron	 1	Queens	Retired	2011: "[P]redispos[ed] to deny the defendant's motion without regard to the evidence presented at the hearing."
Barry M. Donalty	 1	Oneida	Retired	2008: "[Judge] disqualified [from ruling on motion to vacate judgment] by reason of the fact he was District Attorney [ ] at the time of defendant's conviction."
Bryan E. Rounds	 1	Ulster	Retired	2022: "[G]iven the information that [the judge] was privy to [at sentencing,] remittal to a different judge is warranted."
Corey E. Klein	 1	Nassau	Active	2023: "[U]nduly coerced [the defendant] into pleading guilty."
Daniel R. King	 1	Lewis	Active	2021: "[Made] coercive statements [during plea negotiations, including a] misleading insinuation [regarding sentencing after trial]."
Danny K. Chun	 1	Kings	Active	2020: "[D]eclined to exercise the full scope of [his] authority [to] protect...the defendant's right to counsel."

Additional 35 rows not shown.

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*A searchable table is available at [www.scrutinize.org/reverse-reassign](http://www.scrutinize.org/reverse-reassign)*

## 5. Conclusion: RDJs Require Close Reading of the Appellate Decision

In our previous report, *Excessive Sentencers*,<sup>11</sup> we used appellate decisions to calculate the number of times a judge engaged in excessive sentencing and the number of years reduced from their sentences. Unlike the central metric in that report, excessive sentence findings, the reassignment metric is not as easily quantifiable and requires close scrutiny by interested parties seeking to assess judicial decision-making and impacts.

To help readers understand these decisions, we include links to them and selected quotes in our table of findings. We encourage decision-makers and the public to review these decisions as part of analyzing the RDJ metric.

Additionally, we recommend obtaining other case documents, such as transcripts and appellate briefs from the appellate docket, to gain a more detailed understanding of the conduct that prompted the appellate court to reassign the case.

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<sup>11</sup> Scrutinize and The Center on Race, Inequality, and the Law at NYU School of Law, *Excessive Sentencers* (2024).



## Appendix: Data & Methodology

Our dataset includes appellate decisions issued by all four Appellate Divisions and both Appellate Terms from 2007 to 2023, covering all intermediate appellate decisions in New York State. These appellate decisions are publicly accessible via a variety of legal databases.

Each appellate decision provides relevant information about the lower court proceeding, including:

- The **county** where the case was litigated;
- The **date** of the appellate decision;
- The **appellate court** that issued the decision;
- The **name** of the lower court judge who presided over the appealed case;
- The **outcome** ordered by the appellate court, be it a reversal, remittal, modification, or affirmance; and
- Whether the appellate court **reassigned the case to a different judge** upon reversal or remittal.

Of 49,830 criminal appellate decisions between 2007 and 2023, we identify 108 (0.2%) decisions that contain language relating to reassignment upon reversal or remittal. We remove 39 decisions that contain language relating to reassignment but which do not actually involve reassigning cases,<sup>12</sup> leaving us with 69 decisions in which the appellate courts ordered reassignment.

In three cases,<sup>13</sup> the appellate court reassigned a case because the prosecutor failed to abide by their commitment concerning a sentencing recommendation upon a guilty plea. Based on precedent originating from the United States Supreme Court,<sup>14</sup> New York courts reassign such cases to a different judge upon remittal for resentencing. Because these cases definitely do not relate to judicial impropriety, we exclude them from our dataset.<sup>15</sup>

We obtain judges' statuses (active or retired) through the New York State Unified

<sup>12</sup> See, e.g., *People v. Brown*, 186 A.D.3d 1236 (2d Dep't 2020) (noting that the case was reversed and reassigned in a prior proceeding).

<sup>13</sup> See *People v. Garcia*, 69 A.D.3d 1229 (3d Dep't 2010); *People v. Cline*, 79 A.D.3d 1449 (3d Dep't 2010); *People v. Lodge*, 54 A.D.3d 875 (2d Dep't 2008).

<sup>14</sup> *Santobello v. New York*, 404 U.S. 257 (1971); *People v. Santobello*, 39 A.D.2d 654 (1st Dep't 1972). See also *People v. Tindle*, 61 N.Y.2d 752 (1984).

<sup>15</sup> None of the 16 RDJ cases in which the appellate court did not explain its reason for reassignment involved a prosecutor breaking their sentencing commitment after a guilty plea.

Court System's Judicial Directory.<sup>16</sup> We consider judges with profiles on that website to be currently active and those without profiles to be retired.

In three of the 66 cases where reassignment was ordered by the discretion of the appellate court, the lower court judges had already retired when the appeal decision was published. These cases do not indicate that the appellate court uses reassignment for administrative purposes (unrelated to judicial conduct, discretion, or decision of the original judge), since, when original judges retire, cases are automatically reassigned without the need for appellate judges to specify a reassignment, as they did in these instances. Therefore, it appears that the appellate court was unaware of the judges' retirements when it issued these decisions.

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<sup>16</sup> *Judicial Directory*, NYCourts.gov (2024).