

CENTER FOR APPELLATE LITIGATION

120 WALL STREET - 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535



ATTORNEY-IN-CHARGE
ROBERT S. DEAN

ASSISTANT ATTORNEY-IN-CHARGE
MARK W. ZENO

SENIOR SUPERVISING ATTORNEYS
BARBARA ZOLOT
CLAUDIA S. TRUPP

MANAGING ATTORNEY
DAVID J. KLEM

SUPERVISING ATTORNEYS
ROBIN NICHINSKY
ARIELLE REID
BEN A. SCHATZ
MOLLY SCHINDLER
KATE SKOLNICK
MARIANNE C. YANG

ASSISTANT MANAGING ATTORNEY
BRITTANY FRANCIS

ATTORNEY-IN-CHARGE
ROBERT S. DEAN

(212) 577-2523 EXT. 502
rdean@cfal.org

MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: July 15, 2020

Subject: Attached

Here is a list of significant criminal cases pending in the New York Court of Appeals and the issues presented. Cases that the Court has selected for SSM consideration are generally not included. Leave grants were to the defendant unless otherwise noted.

The Center does this update every two months for its own attorney staff. As a matter of professional courtesy, we also send it to Chief Defenders who do substantial appellate work. Feel free to distribute copies to any members of your staff. This update is also available on our web site (www.appellate-litigation.org).

Although every attempt has been made to ensure the accuracy of the summaries, no express or implied guarantees are made. If your office is handling one or more of these cases and wishes to share some insight not apparent from the intermediate appellate court decision or the Clerk's summary of issues, please feel free to contact me. Your input will be added to the next edition.

We offer a special feature to our online visitors. Our online "Eye on Eagle" section (NYCA link) includes pdf links to all decided cases, and, for selected cases, a short CAL blog flagging what we think is important or noteworthy about the cases.

Happy reading!

**COURT OF APPEALS UPDATE -
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**CRIMINAL CASES CURRENTLY PENDING IN
THE NEW YORK COURT OF APPEALS**

I. Cases Awaiting Decision

People v. Robert Hinshaw

AD4 order dated March 22, 2019, affirming judgment of conviction. Decision below: 170 AD3d 1680, 96 NYS3d 445. Whalen, J. (AD dissenter), granted leave June 4, 2019. Submitted for April-May, 2020, Session.

ISSUE PRESENTED: Search & Seizure. Reasonable Suspicion For Car Stop. Whether the State trooper had reasonable suspicion to stop defendant's car based solely on a DMV computer check, which indicated that the car had been impounded, but which also stated that "it should not be treated as a stolen vehicle hit" and "[n]o further action should be taken based solely on the impound response." The trooper testified that he was entitled to simply ignore that language.

II. Cases Scheduled For Argument

People v. Edward Hardy

AT2 order dated February 1, 2019, affirming judgment of conviction. Decision below: 63 M3d 6, 92 NYS3d 536. Fahey, J., granted leave April 18, 2019. Was to be argued May 6, 2020. To be argued September 8, 2020.

ISSUE PRESENTED: Whether a local criminal court accusatory instrument can be amended by altering its factual allegations (here, a significant date change) pursuant to the court's "inherent authority" – as opposed to CPL 100.45, which would not permit such an amendment. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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People v. Jonathan Batticks

AD1 order dated October 30, 2018, affirming judgment of conviction. Decision below: 165 AD3d 591, 84 NYS3d 769. Fahey, J., granted leave February 1, 2019. To be argued September 9, 2020.

ISSUES PRESENTED: Where a juror made an outburst during cross-examination of a prosecution witness, whether the judge erred in refusing to conduct a Buford inquiry as to whether the juror was grossly unqualified. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Robin Pena

AT1 order dated October 29, 2018, affirming grant of motion to suppress. Decision below: 61 Misc.3d 134A, 2018 WL 5584501. Garcia, J., granted leave to People May 14, 2019. To be argued September 9, 2020.

ISSUE PRESENTED: Whether a police officer made an “objectively reasonable mistake of law” in stopping defendant’s vehicle, which had working brake lights on the right and left side as required by the VTL, but had a defective center brake light, which is not required by the VTL.

People v. Reginald Goldman

AD1 order dated April 23, 2019, reversing judgment of conviction. Decision below: 171 AD3d 581, 99 NYS3d 257. Fahey, J., granted leave to People June 18, 2019. To be argued September 10, 2020.

ISSUES PRESENTED: (1) Whether, pursuant to Matter of Abe A., 56 N.Y.2d 288, the hearing court erred in precluding defense counsel from reviewing the People’s application for a search warrant to obtain a saliva sample for DNA purposes. Whether being in custody or an unrelated matter voids the People’s obligation pursuant to Abe A. (2) Whether the People properly authenticated a music video posted on social media, where no one testified who was there during the filming or who participated in editing it. (Assigned counsel for Respondent: Alexandra L. Mitter and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People ex. rel. Negron v. Superintendent, Woodbourne

AD3 order dated January 16, 2019, granting Article 78 petition. Decision below: 170 AD3d 12, 94 NYS3d 703. Third Department granted leave to Attorney General May 3, 2019. To be argued October 13, 2020.

ISSUE PRESENTED: Third Department found the “unambiguous” reading of Executive Law § 259-c (14) to be that sex offender residency restrictions apply to individuals being released to parole supervision if their SORA risk level has been set to Level 3 AND they are being released to supervision for the enumerated sex offense that led to the Level 3 adjudication. The statute does not apply if the individual was previously adjudicated at Level 3 for a prior sex conviction but is currently on parole supervision for a non-enumerated offense. *NB* The Fourth Department took the opposite position in People ex rel. Garcia v. Annucci, 167 A.D.3d 199 (4th Dept. 2018). The Negron opinion does not discuss the separate statutory requirement of residency restrictions for individuals on supervision for an enumerated sex offense involving an under-age complainant. (Assigned counsel to Petitioner-Respondent: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Everett D. Balkman

AD4 order dated March 22, 2019, affirming judgment of conviction. Decision below: 170 AD3d 1678, 96 NYS3d 442. Wilson, J., granted leave September 9, 2019. To be argued October 14, 2020.

ISSUE PRESENTED: Whether the police officer had reasonable suspicion to stop a vehicle in which defendant was a passenger based upon an indication by the onboard computer system in his patrol car that there was a “similarity hit” between the vehicle’s registered owner and a person with an active warrant. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

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People v. Benito Lendof-Gonzalez

AD4 order dated March 15, 2019, modifying judgment of conviction by reversing and dismissing counts of attempted first and second-degree murder, and otherwise affirming. Decision below: 170 AD3d 1508, 95 NYS3d 675. Garcia, J., granted leave to People June 27, 2019. To be argued October 15, 2020.

ISSUE PRESENTED: A fellow jail inmate, soon to be released, agreed with the defendant's plan to kill his wife and the wife's mother. The fellow inmate did nothing to effectuate the crimes but, instead, immediately contacted and cooperated with the authorities. Whether there was sufficient evidence of an "attempt." The Fourth Department said no: defendant was guilty of only criminal solicitation. (Assigned counsel for the defendant: Robert M. Graff, P.O. Box 339, Lockport, NY 14094.)

III. Cases Waiting to be Scheduled

People v. James Forbes

AD1 order dated November 8, 2018, affirming judgment of conviction. Decision below: 166 AD3d 414, 88 NYS3d 6. Wilson, J., granted leave January 29, 2019. Was to be argued March 24, 2020. To be rescheduled.

ISSUES PRESENTED: (1) The "identity" or "modus operandi" exception to the Molineux rule: whether defendant's identity as to two separate theft incidents was "conclusively established." (2) Whether CPL 200.20 (2)(c) eliminates the discretionary analysis by the trial court as to whether prejudice outweighs probative value. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Cesar Garcia

AT1 order dated June 3, 2019, affirming judgment of conviction. Decision below: 63 Misc.3d 158(A), 2019 WL 2347176. Wilson, J., granted leave August 29, 2019.

ISSUE PRESENTED: Whether the defendant was denied his right to trial

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by jury under People v. Suazo, where he was (as it turned out) acquitted after a bench trial of those counts which would have resulted in automatic deportation and convicted only of a count which would not have. (Assigned counsel: Mark W. Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Javon Loney

AD2 order dated August 1, 2018, modifying and otherwise affirming the judgment of conviction. Decision below: 164 AD3d 523, 77 NYS3d 879. Wilson, J., granted leave March 1, 2019.

ISSUES PRESENTED: (1) The refusal to instruct the jury that the voluntariness of the possession is an element of weapon possession under PL 265.02 (7); (2) the denial of the motion to suppress physical evidence; (3) prosecutorial misconduct on summation. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Howard Powell

AD2 order dated November 7, 2018, affirming judgment of conviction. Decision below: 166 AD3d 660, 87 NYS3d 31. Rivera, J., granted leave April 26, 2019.

ISSUE PRESENTED: Whether the trial court erred in denying, after a Frye hearing that demonstrated the proffered testimony's relevance to the specific circumstances of the case, defendant's motion to present expert testimony on the topic of false confessions. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Tyrone D. Gordon

AD2 order dated February 6, 2019, affirming granting of motion to suppress physical evidence. Decision below: 169 AD3d 714, 91 NYS3d 716. Wilson, J., granted leave to People April 22, 2019.

ISSUE PRESENTED: Whether a search warrant of a particular house at a certain address also covered two vehicles not described in the warrant but located on the property.

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People v. Sergio Del Rosario

AD2 order dated March 6, 2019, affirming level-three SORA adjudication. Decision below: 170 AD3d 759, 93 NYS3d 580. Court of Appeals granted leave June 3, 2019.

ISSUE PRESENTED: Whether the courts below erred in concluding that defendant's familial relationship with the victim was an aggravating circumstance not adequately taken into account by the SORA risk assessment instrument, thus justifying an upward departure. (Counsel for defendant: Clare J. Degnan, Westchester Legal Aid Society, 150 Grand Street, 1st Floor, White Plains, NY 10601.)

People v. Frederic Badji

AD1 order dated April 9, 2019, affirming judgment of conviction. Decision below: 171 AD3d 499, 95 NYS3d 808. Garcia, J., granted leave June 19, 2019.

ISSUE PRESENTED: The sufficiency of proof of larceny of the victim's credit card where there was no proof that defendant possessed a physical credit card when he used intangible credit card information to make purchases. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Tyrone Wortham

AD1 order dated April 5, 2018, affirming judgment of conviction. Decision below: 160 AD3d 431, 75 NYS3d 570. Stein, J., granted leave August 15, 2019.

ISSUES PRESENTED:(1) Whether admissions made in response to routine pedigree questions during the execution of a search warrant are admissible under the pedigree exception to the Miranda requirement if, although the question was not designed to elicit an incriminating response, the answer was nonetheless reasonably likely to be incriminating. (2) Whether defendant was entitled to a Frye hearing on the reliability of FST DNA evidence. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

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People v. Leslie K. Olds

Niagara County Court order dated July 31, 2018, affirming judgment of conviction for endangering the welfare of a child. Wilson, J., granted leave August 28, 2019.

ISSUE PRESENTED: Whether the sentence imposed was vindictive.

People v. Charo N. Allen

AT2 order dated May 30, 2019, affirming District Court dismissal of the accusatory instrument. Decision below: 63 Misc.3d 159 (A), 2019WL2364339. Wilson, J., granted leave to People October 9, 2019.

ISSUE PRESENTED: Whether the District Court correctly dismissed the accusatory instrument for facial insufficiency because the factual allegations it contained were solely based upon the written English statement, which had been translated into Spanish for the complainant without a certificate of translation attesting to the accuracy of the translation. (Assigned counsel for defendant: Laurette D. Mulry and Edward E. Smith, Suffolk County Legal Aid Society, Appeals Bureau, 300 Center Drive, 1st Floor, Riverhead, NY 11901.)

People v. Kenneth Slade

AT1 order dated June 6, 2019, affirming judgment of conviction. Decision below: 63 Misc.3d 161 (A), 2019WL2402155. Wilson, J., granted leave October 9, 2019.

ISSUE PRESENTED: Whether the court erred in denying Mr. Slade's motion to dismiss under C.P.L § 30.30 where the prosecution failed to file a certificate of translation to convert the accusatory instrument for two-and-a-half years after arraignment. (Assigned counsel: John Palmer and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Kieth Brooks

AT1 order dated June 3, 2019, affirming CPL 30.30 dismissal. Decision

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below: 63 Misc.3d 158 (A), 2019WL2347138. Wilson, J., granted leave to People October 9, 2019.

ISSUE PRESENTED: Whether a certificate of translation was required to convert the accusatory instrument to an information, and whether the People's failure to file one within the CPL 30.30 time period required dismissal. (Assigned counsel for respondent: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Eric Iverson

AT9 &10 order dated June 6, 2019, reversing judgment of conviction of traffic offenses. Decision below: 63 Misc.3d 163(A), 2019WL2454999. Fahey, J., granted leave to People October 3, 2019.

ISSUE PRESENTED: Whether the hearing officer at the Traffic and Parking Violations Agency properly entered default judgments against defendant when he had pleaded not guilty to VTL violations but then failed to appear for trial and no trial was held. (Leave to appeal was also granted in People v. Jack J. Cucceraldo on the same issue.)

People v. Richard B. Gaworecki

AD3 order dated July 18, 2019, modifying order which partially granted motion to dismiss counts of an indictment. Decision below: 174 AD3d 1143, 104 NYS3d 418. Mulvey (AD dissenter), J., granted leave August 29, 2019.

ISSUE PRESENTED: Whether the evidence before the grand jury was sufficient to make out second-degree manslaughter or criminally negligent homicide, where the indictment alleged that the defendant sold the victim heroin, which resulted in the victim's subsequent overdose and death.

People v. Lance Williams

AD1 order dated May 30, 2019, affirming judgment of conviction. Decision below: 172 AD3d 637, 102 NYS3d 28. Wilson, J., granted leave November 1, 2019.

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ISSUE PRESENTED: (1) The trial court's refusal to charge the defense of temporary innocent possession of a weapon. (2) Whether the trial court properly denied the motion to set aside the verdict based on improper conduct (threats) toward a juror. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Nicole Hodgdon

AD3 order dated July 11, 2019, reversing the motion court's grant of dismissal of the indictment. Decision below: 175 AD3d 65, 106 NYS3d 198. Fahey, J., granted leave October 18, 2019.

ISSUE PRESENTED: Whether Executive Law § 522 allows a special prosecutor to prosecute individuals accused of crimes against vulnerable persons where the special prosecutor obtains the written consent of the district attorney to do so and the district attorney retains ultimate responsibility for the prosecution. Leave was also granted in People v. Justin Hope and People v. Maria Y. Viviani on the same issue.

People v. Eric Ibarquen

AD2 order dated June 26, 2019, affirming judgment of conviction. Decision below: 173 AD3d 1207, 101 NYS3d 616. Stein, J., granted leave November 7, 2019.

ISSUES PRESENTED: (1) Whether the court erred in summarily denying defendant's motion to suppress evidence where defendant alleged standing in the premises by virtue of being a social guest. (2) Whether the failure to charge on cross-racial ID was harmless error. (3) The court's charge on consciousness of guilt. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Daria N. Epakchi

AT9&10 order dated June 6, 2019 dismissing simplified traffic information. Decision below: 63 Misc.3d 161(A), 2019 WL 2454910. DiFiore, Ch. J., granted leave to People November 27, 2019.

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ISSUE PRESENTED: Whether the Appellate Term properly reversed a traffic conviction for the refiling of a simplified traffic information charging the same offense that was earlier dismissed for failure to timely provide a supporting deposition.

People v. Darrin McGhee

AD1 order dated December 19, 2019, reversing judgment of conviction. Decision below: 180 AD3d 26, 2019 WL 6902810. Tom, J. (AD dissenter), granted leave to People December 26, 2019. (SSM.)

ISSUE PRESENTED: Whether the People violated Brady by not turning over to trial defense counsel the statement of a second eyewitness who provided exonerating information. (Assigned counsel for defendant: Ben A. Schatz and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Bradford L. Shanks

AD3 order dated July 18, 2019, affirming judgment of conviction. Decision below: 174 AD3d 1142, 104 NYS3d 791. Wilson, J., granted leave December 10, 2019.

ISSUE PRESENTED: Defendant, convicted after trial, filed post-verdict motions. Prior to sentence, defendant was offered a sentence of time served if he withdrew his motions and waived his right to appeal. Defendant accepted the offer. Whether the Appellate Division correctly held that defendant's appellate claim of pervasive judicial bias was forfeited by the appeal waiver.

People v. Drury Duval

AD1 order dated November 26, 2019, affirming judgment of conviction. Decision below: 179 AD3d 62, 2019 WL 6313046. Gesmer, J. (AD dissenter), granted leave February 4, 2020.

ISSUE PRESENTED: Whether the search warrant authorizing the search of defendant's home was sufficiently specific, as to the place to be searched, to allow for the search of the entire residence. The search

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warrant just had the address on it and characterized it solely as a “private residence,” whereas it was a three unit building. In *Groh v. Ramirez*, 540 US 551 (2004), the Supreme Court held that deficiencies in the search warrant cannot be cured by reference to materials that were not incorporated into the warrant. The majority distinguished *Groh* as a *Bivens* civil case. (Assigned counsel: Hunter Haney and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Carlos Torres

AT1 order dated September 23, 2019, affirming judgment of conviction. Decision below: 65 Misc.3d 19, 108 NYS3d 269. Feinman, J., granted leave February 10, 2020.

ISSUE PRESENTED: New York City Administrative Code § 19-190(b), failure to exercise due care to avoid collision with a pedestrian. (1) Whether the statute is unconstitutional because it criminalizes an act committed without due care, a civil negligence standard; (2) whether it is pre-empted by the Penal Law and the VTL. (Assigned counsel: Katharine Skolnick and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.) (See also People v. Dave Lewis with the same issue.)

People v. George Brown

AD1 order dated November 26, 2019, affirming judgment of conviction. Decision below: 177 AD3d 575, 110 NYS3d 849. Wilson, J., granted leave February 20, 2020. (SSM.)

ISSUE PRESENTED: Whether an otherwise valid appeal waiver forecloses review of the defendant’s claim that the trial court violated his right to make a statement on his own behalf prior to sentencing pursuant to CPL § 380.50(1), a violation that could not have been anticipated at the execution of the waiver; and whether, following the imposition of sentence, the defendant’s query whether he would get a chance to speak preserved the issue for appeal. (Assigned counsel: Jody Ratner and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Joseph Schneider

AD2 order dated October 16, 2019, affirming judgment of conviction. Decision below: 176 AD3d 979, 112 NYS3d 248. Leave granted by Fahey, J., January 15, 2020.

ISSUE PRESENTED: Whether Supreme Court in Kings County lacked jurisdiction to issue eavesdropping warrants to intercept cellular telephone calls and electronic messages that were made and received outside of New York State.

People v. Sharon Lashley

AD1 order dated December 12, 2019, affirming judgment of conviction. Decision below: 178 AD3d 506, 111 NYS3d 851. Leave granted to the People by Rivera, J., March 27, 2020.

ISSUE PRESENTED: Whether the People's failure to allege tolling in a predicate felony statement is something to which the defendant must object. (Assigned counsel: Allison Kahl and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Russell Smith

AD1 order dated December 12, 2019, affirming judgment of conviction. Decision below: 178 AD3d 524, 111 NYS3d 845. DiFiore, Ch.J., granted leave April 30, 2020. (SSM).

ISSUE PRESENTED: Whether a trial court may deny a CPL 330.30 motion without a hearing when a deliberating juror reports to his fellow jurors that he has observed the defendant commit a crime outside the courtroom. (Assigned counsel: Mark Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

IV. New Leave Grants

People v. Manuel Morales

AD2 order dated October 30, 2019, affirming judgment of conviction.

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Decision below: 176 AD3d 1235, 109 NYS3d 650. Wilson, J., granted leave April 9, 2020.

ISSUE PRESENTED: Whether the trial court properly permitted a witness to make a first-time, in-court identification during trial. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Ryan Laws

AD4 order dated November 15, 2019, reversing judgment of conviction. Decision below: 177AD3d 1404, 110 NYS3d 605. Garcia, J., granted leave to People April 29, 2020.

ISSUE PRESENTED: Whether defendant's waiver of indictment was jurisdictionally defective and reviewable on direct appeal, notwithstanding defendant's guilty plea and waiver of the right to appeal. (Leave was also granted in People v. Zaquan Walley, with the same issue.)