

CENTER FOR APPELLATE LITIGATION

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MEMORANDUM

To: Chief Defender & Colleague
From: Bob Dean
Date: March 15, 2019
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. Omar Alvarez

AD1 order dated September 28, 2017, denying writ of error coram nobis. Wilson, J., granted leave February 8, 2018. Argued February 12, 2019.

ISSUE PRESENTED: Whether assigned appellate defense counsel was ineffective for, inter alia, failure to include in his Appellate Division brief an excessive sentence argument for a very young defendant who received a sentence of 66 2/3 years to life, after trial. And whether the analysis should be informed by the totality of the circumstances, i.e., that appellate counsel also (a) failed to communicate with his client, (b) filed a woefully substandard brief, and (c) failed to notify his client of the decision or seek leave to appeal to the Court of Appeals. (Assigned counsel on the coram: Christina A. Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Timothy Martin

AD1 order dated February 21, 2017, affirming judgment of conviction. Decision below: 147 AD3d 587, 48 NYS3d 54. Rivera, J., granted leave September 28, 2017. Argued February 14, 2019.

ISSUE PRESENTED: Whether the defendant's admission to the police that he lived in the apartment that was the subject of a search warrant for drugs was admissible at trial under the pedigree exception to the Miranda requirement, even though it was the product of custodial interrogation that was likely to elicit an incriminating response. (Assigned counsel: Megan Byrne & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Carlos Tapia

AD1 order dated June 6, 2017, affirming judgment of conviction. Decision below: 151 AD3d 437, 56 NYS3d 78. Kapnick, J. (AD dissenter) granted leave September 26, 2017. Argued February 14, 2019.

ISSUES PRESENTED: (1) The sufficiency of the evidence of attempted first-degree assault, where no dangerous instrument was recovered from the crime scene and there was no evidence that defendant knew that his co-defendant was armed with a dangerous instrument. (2) The denial of a motion to suppress the line-up ID. (3) The admission of a police officer's grand jury testimony as past recollection recorded. (Assigned counsel: Christina A. Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

II. Cases Scheduled for Argument

People v. Boris Brown

AD1 order dated November 21, 2017, affirming judgment of conviction and CPL 440.10 motion denial. Decision below: 155 AD3d 509, 65 NYS3d 36. Wilson, J., granted leave May 7, 2018. To be argued March 19, 2019.

ISSUES PRESENTED: (1) Whether a defendant in a murder trial can agree to be represented by an attorney paid for by a suspect in the murder while that attorney concurrently represents the suspect in other criminal matters or is that an unwaivable conflict of interest barred by the ethical rules? (2) Whether a defendant waives that conflict of interest when he agrees to forgo having the attorney cross-examine the suspect in the unlikely event that suspect testifies but when the defendant is never advised that the conflict precludes the attorney from pointing the finger at the suspect, thereby foreclosing his best and only reasonable defense? (3) Whether a 440 court's error in failing to make findings of fact or reach conclusions of law in contravention of C.P.L. § 440.30(7) requires the reviewing court to remand the matter for correction or can that error be

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excused on appeal because one claim advanced by the prosecution, but not the principal arguments, supported the 440 court's denial of the application? (Assigned counsel: David J. Klem and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Nicholas Hill

AD1 order dated May 30, 2017, affirming judgment of conviction. Decision below: 150 AD3d 627, 57 NYS3d 14. Gesmer, J. (AD dissenter), granted leave August 22, 2017. To be argued March 20, 2019.

ISSUE PRESENTED: Search & Seizure: The police retained defendant's proffered identification while investigating defendant's explanation about who he was visiting in a particular apartment building. Whether the hearing court properly denied defendant's motion to suppress physical evidence on the basis that the police officer's retention of the ID constituted a significant and unreasonable interruption of his freedom of movement. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Agape A. Towns

AD4 order dated June 9, 2017, affirming judgment of conviction. Decision below: 151 AD3d 1638, 57 NYS3d 276. DiFiore, Ch.J., granted leave February 28, 2018. To be argued March 26, 2019.

ISSUE PRESENTED: (1) Whether the trial court deprived defendant of a fair trial by personally negotiating a cooperation agreement with a codefendant by promising to impose a lenient sentence in return for his testimony against the defendant; (2) Whether a witness's testimony should have been precluded as the fruit of the poisonous tree because the police learned of the witness's identity after violating the defendant's right to counsel (attenuation). (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender,

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Monroe County Public Defender, 10 N. Fitzhugh St., Rochester,
NY 14614.)

People v. Fidel Vega

AD1 order dated November 14, 2017, affirming judgment of conviction. Decision below: 155 AD3d 462, 63 NYS3d 7. Wilson, J., granted leave May 4, 2018. To be argued March 26, 2019.

ISSUE PRESENTED: (1) Whether a non-deadly physical force in defense of a person charge is incompatible with a crime containing, as an element, the use of a dangerous instrument? Here, the trial court charged the jury that if it found that the defendant used a dangerous instrument, as required by the relevant assault statute, it had to apply the analysis for justification in the use of deadly force. Only if it did not find that element proven could it analyze the defendant's actions under the ordinary physical force standard. (2) Whether a defendant can be guilty of burglary for entering a locked bedroom, occupied by his grown daughter, in his own apartment. (3) Whether the trial court properly precluded defense counsel from cross-examining the assault complainant about her mental illness history for violent behavior. (Assigned counsel: Arielle Reid and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Hassan Rkein

AD1 order dated July 13, 2017, affirming judgment of conviction. Decision below: 152 AD3d 434, 55 NYS3d 653. Rivera, J., granted leave February 22, 2018. To be argued March 27, 2019.

ISSUE PRESENTED: Whether the court erred in refusing the defense request for a justification charge as to second-degree assault: (1) Whether there was a reasonable view of the evidence that defendant used anything less than deadly physical force when he hit the victim in the head with a pint beer glass; (2) Whether defendant could be justified in using such force where the victim had merely

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pushed him. (Assigned counsel: Christina A. Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Darryl Brown

AD1 order dated February 20, 2018, reversing judgment of conviction, with dissents. Decision below: 160 AD3d 39, 71 NYS3d 422. Kahn, J. (AD dissenter), granted leave to People April 26, 2018. To be argued March 27, 2019.

ISSUE PRESENTED: Whether the trial court erred in denying the defense request for a justification charge. In the light most favorable to the defendant, did the evidence show that he reasonably could have feared for his life when he shot the deceased?

People v. John Giuca

AD2 order dated February 7, 2018, reversing denial of 440.10 motion and remanding for a new trial. Decision below: 158 AD3d 642, 71 NYS3d 111. Wilson, J., granted leave to the People June 28, 2018. To be argued April 30, 2019.

ISSUE PRESENTED: Whether there must be a new trial because the People failed to turn over Brady material, i.e., the prosecution witness's expectation of a benefit for his co-operation.

People v. David Mendoza

AD2 order dated November 1, 2017, affirming judgment of conviction. Decision below: 155 AD3d 652, 64 NYS3d 54. DiFiore, Ch. J., granted leave May 16, 2018. To be argued May 2, 2019.

ISSUE PRESENTED: Whether defendant was deprived of IAC when his attorney advanced a “nullification” defense at trial. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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People v. Jaime Lopez-Mendoza

AD1 order dated November 28, 2017, affirming judgment of conviction. Decision below: 155 AD3d 526, 65 NYS3d 519. Rivera, J., granted leave May 8, 2018. To be argued May 2, 2019.

ISSUES PRESENTED: (1) Whether defendant's IAC claim is reviewable on direct appeal. (2) Whether the error in admission of DNA evidence was harmless. (3) The admissibility of the carpet fiber evidence. (Assigned counsel: Christina Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

III. Cases Waiting to be Scheduled

People v. Manuel Rodriguez

AD1 order dated October 24, 2017, affirming judgment of conviction. Decision below: 154 AD3d 594, 63 NYS3d 46. Rivera, J., granted leave April 10, 2018.

ISSUE PRESENTED: The sufficiency of the evidence to establish third-degree grand larceny of the proceeds of a stolen check, where defendant exercised dominion and control over the funds (deposited by someone into her bank account) but not the stolen check itself. (Assigned counsel: Christina A. Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Derrick Ulett

AD2 order dated August 30, 2017, affirming judgment of conviction and denial of CPL 440.10 motion. Decision below: 153 AD3d 945, 60 NYS3d 396. Feinman, J., granted leave April 26, 2018.

ISSUES PRESENTED: The prosecution suppressed Brady material, a grainy video surveillance tape of a murder. (1) Was there a "reasonable probability" that the verdict would have been different had the tape been turned over? (Although blurry, the video shows a series of events different from what the prosecution witnesses testified to.) (2) Whether the prosecutor's deliberate misstatement on

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summation, that no such video existed, warrants a new trial.
(Assigned counsel: Leila Hull and Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Rong He

AD2 order dated December 27, 2017, affirming judgment of conviction. Decision below: 156 AD3d 907, 68 NYS3d 130. Hall, J. (AD dissenter), granted leave March 2, 2018. (Taken off SSM.)

ISSUES PRESENTED: (1) Whether the failure to disclose contact information for multiple non-testifying eyewitnesses constituted a Brady violation. (2) Whether a statement obtained from defendant after a Payton violation was sufficiently attenuated from the illegal arrest. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Victor Thomas

AD1 order dated February 1, 2018, affirming judgment of conviction. Decision below: 158 AD3d 434, 70 NYS3d 190. Fahey, J., granted leave May 10, 2018.

ISSUES PRESENTED: (1) Whether the carelessly-executed appeal waiver validly forfeited the Huntley issue where (a) the defendant first learned of the waiver mid-way through the plea proceeding, after he had already allocuted, (b) the waiver, up to that point, had not been by discussed by the parties, (c) the court told appellant that the waiver covered any “challenge to this plea and this sentence,” and (d) the written waiver’s terms, requiring that the defendant forfeit the right to even file a notice of appeal, had been struck down as invalid and unconscionable over two months earlier by the Appellate Division. (2) Whether the police conducted the functional equivalent of interrogation of the un-Mirandized defendant by confronting him with a highly incriminating photograph and telling him, “You’re here to speak about this.” (Assigned counsel: Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Nicole Green

AD4 order dated April 27, 2018, affirming judgment of conviction. Decision below: 160 AD3d 1422, 72 NYS2d 870. Wilson, J., granted leave September 18, 2018.

ISSUE PRESENTED: Whether the appeal waiver covered an excessive sentence claim where the defendant was not told of the period of PRS she would receive until she had already executed the waiver. (Assigned counsel: David C. Schopp, The Legal Aid Society of Buffalo, Inc., 290 Main Street, Suite 350, Buffalo, NY 14202.)

People v. Michael Cubero

AD3 order dated April 26, 2018, affirming, with dissents, a judgment of conviction. Decision below: 160 AD3d 1298, 75 NYS3d 658. Lynch, J. (AD dissenter), granted leave June 20, 2018.

ISSUES PRESENTED: A constitutional challenge to a statute creating a Justice Center for the Protection of People with Special Needs (Exec. Law § 522[2]), vesting it with the authority to prosecute crimes involving abuse or neglect of people with disabilities, was not interposed by defense counsel. The appellate record is silent as to whether the District Attorney granted the special prosecutor authority to prosecute the case, so as to render the proceedings constitutional. (1) Whether, pursuant to its interest of justice jurisdiction or by its inherent authority, the Appellate Division may remit the matter for fact-findings. (2) Whether defense counsel was ineffective for failing to raise the constitutional argument. (Assigned counsel: George J. Hoffman, Jr., P.O. Box 264, East Greenbush, NY 12061.)

People v. Stan Xuxui Li

AD1 order dated November 30, 2017, affirming judgment of conviction. Decision below: 155 AD3d 571, 67 NYS3d 1. DiFiore, Ch. J., granted leave June 25, 2018.

ISSUE PRESENTED: A physician prescribed a combination of

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opioids and alpraxolam to patients, who later overdosed. (1) The sufficiency of the evidence of reckless manslaughter. (2) Whether there is sufficient evidence of reckless endangerment, in that the defendant placed the patients at imminent risk of death.

People v. Omar Deleon

AD1 order dated January 30, 2018, reversing lower court's order dismissing and reducing counts of an indictment. Decision below: 157 AD3d 649, 70 NYS3d 460. Wilson, J., granted leave June 28, 2018.

ISSUES PRESENTED: The defendant placed a "fishing device" (a water bottle coated with a sticky substance) in a mailbox into which a law enforcement task force had inserted more than \$3,000 in money orders, but was arrested before he extracted it; no evidence was presented that any of the envelopes containing money orders had stuck to the device. Whether the lower court erred in finding that the attempted grand larceny charges required evidence of an intent to steal a certain value. (Assigned counsel: Tina Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Clarence Rouse

AD1 order dated March 20, 2018, affirming judgment of conviction. Decision below: 159 AD3d 530, 73 NYS3d 45. Rivera, J., granted leave August 6, 2018.

ISSUES PRESENTED: (1) Whether the trial court wrongly restricted cross-examination of a police witness concerning his prior instances of lying to a federal prosecutor, and two prior federal criminal cases where both courts had found the same officer incredible; (2) Whether, during cross-examination, the trial court's persistent interruptions and belittling of counsel in front of the jury deprived appellant of his right to a fair trial; (3) Whether the trial court erroneously excluded two 911 calls which contradicted the police officer's observations of the crime scene. (Assigned counsel: John Vang and Robert S. Dean, Center for Appellate Litigation, 120 Wall

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Street, 28th Floor, NYC 10005.)

People v. Cadman Williams

AD1 order dated February 8, 2018, affirming judgment of conviction. Decision below: 158 AD3d 471, 71 NYS3d 23. Rivera, J., granted leave August 16, 2018.

ISSUES PRESENTED: (1) Whether the court abused its discretion as a matter of law in refusing to hold a Frye hearing to assess the general acceptance within the scientific community of the Low Copy Number Typing and the Forensic Statistical Tool used by OCME, where no appellate court had found general acceptance and courts of co-ordinate jurisdiction considering the issues had reached conflicting results. (2) Whether counsel was ineffective for failing to challenge the court's erroneous justification instructions, where, because the deceased sustained two independently fatal gunshot wounds, the court should not have charged that the jury had to determine whether each shot was justified; nor should the court have included an "initial aggressor" charge against appellant. (3) Whether the admission of appellant's recorded call, made while he was in pretrial detention in Rikers Island, contravened Federal and State wiretapping laws. (Assigned counsel: Mark W. Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Elijah Foster-Bey

AD2 order dated February 7, 2018, affirming judgment of conviction. Decision below: 158 AD3d 641, 67 NYS3d 846. Wilson, J., granted leave August 23, 2018 (new leave grant).

ISSUES PRESENTED: (1) The failure to hold a Frye hearing regarding Low Copy Number DNA testing and the Forensic Statistical Tool used by the OCME. (2) Whether the admission of DNA evidence violated defendant's right to confrontation. (3) Coercive Allen charge. (Assigned counsel: Dina Zloczower & Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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People v. Ramee McCullum

AD2 order dated January 31, 2018, affirming judgment of conviction. Decision below: 159 AD3d 8, 70 NYS3d 222. Rivera, J., granted leave July 24, 2018.

ISSUES PRESENTED: (1) Whether an occupant of a rental apartment, after a warrant of eviction has been issued, retains 4th Amendment standing to challenge a search, when a City Marshall has tendered “legal possession” of the premises to a landlord without physical eviction. (2) Whether, where the People and the court both commit an error of fact, the defendant is justified in relying on that error for purposes of preservation of an argument. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Mouhamed Thiam

AT1 order dated March 16, 2018, reversing judgment of conviction. Decision below: 59 Misc.3d 126 (A), 2018 WL 1371548. Stein, J., granted leave to People July 25, 2018.

ISSUES PRESENTED: (1) Where a defendant is charged only with misdemeanors or lesser charges in a multi-count accusatory instrument and at least one misdemeanor count is facially sufficient, does the trial court have jurisdiction over the defendant such that it may accept a plea to any count in the accusatory instrument, even those that are facially insufficient. (2) Whether a defendant may plead to a misdemeanor that is of an equal or higher grade than the misdemeanor charge that is facially sufficient.

People v. David Mairena

AD2 order dated May 31, 2017, affirming judgment of conviction. Decision below: 160 AD3d 986, 75 NYS3d 246. Fahey, J., granted leave July 26, 2018.

ISSUES PRESENTED: (1) Whether the court erred by, after informing the parties prior to summations that it would instruct the

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jury on the specific instrumentality of death in its first-degree manslaughter charge, then failing to include that language in its charge following summations. (2) Whether harmless error analysis is applicable. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Clinton Britt

AD1 order dated April 5, 2018, affirming judgment of conviction. Decision below: 160 AD3d 428, 74 NYS3d 207. Wilson, J., granted leave July 31, 2018.

ISSUES PRESENTED: (1) The sufficiency of the evidence that the defendant planned to pass off the counterfeit bills he possessed, so as to establish “intent to defraud, deceive or injure another,” as required by the first-degree forgery statute (PL 170.30). (2) Stop & Frisk: when defendant’s running away constituted “active flight.” (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Defense Practice, 199 Water Street, New York, NY 10038.)

People v. Robert M. Neulander

AD4 order dated June 29, 2018, reversing judgment of conviction, with dissents. Decision below: 162 AD3d 1763. Smith, J. (AD Dissenter), granted leave to People August 7, 2018.

ISSUE PRESENTED: Whether the trial court abused its discretion in failing to grant defendant’s CPL 330.30 motion based on juror misconduct. The juror had engaged in numerous text messages with third parties during the trial and regarding the trial (“make sure he’s guilty!”); when discovered, the juror sought to cover up her activities and lied about them under oath.

People v. Emmanuel Almonte

AD1 order dated April 26, 2018, affirming judgment of conviction. Decision below: 160 AD3d 594, 76 NYS3d 125. Rivera, J., granted leave August 9, 2018.

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ISSUES PRESENTED: (1) Whether the trial court properly admitted the victim’s 911 call as an excited utterance. (2) Whether the court properly refused to submit third-degree assault as a lesser included offense of second-degree assault; whether there was a reasonable view of the evidence that the injury was inflicted without the use of a deadly weapon or dangerous instrument. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Defense Practice, 199 Water Street, New York, NY 10038.)

People v. George Tsintzelis

AD2 order dated August 2, 2017, affirming judgment of conviction. Decision below: 153 AD3d 558, 59 NYS3d 741. Feinman, J., granted leave July 30, 2018.

ISSUES PRESENTED: (1) Whether the trial court erred in denying defendant’s discovery request pursuant to CPL 240.20 (1) (c) for the electronic raw data used to develop his DNA profile. (2) Whether the admission of DNA lab reports through the testimony of an analyst who didn’t perform or supervise the DNA testing violated defendant’s confrontation clause rights. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Defense Practice, 199 Water Street, New York, NY 10038.)

People v. Ganesh Ramlall

AT2 order dated April 6, 2018, affirming judgment of conviction. Decision below: 59 Misc.3d 134 (A), 2018 WL 1735440. Rivera, J., granted leave August 2, 2018.

ISSUE PRESENTED: State constitutional speedy trial (CPL 30.20): Whether the 30.20 motion as to the traffic infraction of “driving while ability impaired” (VTL 1191 [1]) should have been denied where the CPL 30.30 motion as to the misdemeanor (VTL 1192 [3]) had been granted. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Defense Practice, 199 Water Street, New York, NY 10038.)

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People v. James R. McIntosh

AD4 order dated June 15, 2018, modifying (by dismissing inclusory concurrent count) and otherwise affirming the judgment of conviction. Decision below: 162 AD3d 1612, 78 NYS3d 856. Lindley, J. (AD dissenter), granted leave August 15, 2018.

ISSUE PRESENTED: Whether, where defendant raised an intoxication defense, the error in refusing to submit second-degree manslaughter as a lesser included offense of second-degree murder was rendered harmless by the jury's ostensible decision to convict of second-degree murder as opposed to the submitted lesser of first-degree manslaughter. (Assigned counsel: James Hobbs & Tim Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Arthur W. Ellis, Jr.

AD3 order dated May 31, 2018, reversing conviction for failing to register as a sex offender (Corr. Law 168-f [4]) and dismissing the indictment. Feinman, J., granted leave to People August 17, 2018.

ISSUE PRESENTED: Whether, as a registered sex offender, the defendant was required to register his Facebook account with DCJS.

People v. Samuel J. Smith

AD4 order dated June 29, 2018, affirming judgment of conviction, with dissents. Decision below: 162 AD3d 1686, 80 NYS3d 577. Carni, J. (AD dissenter), granted leave August 17, 2018. To be argued May 2, 2019.

ISSUES PRESENTED: (1) Missing witness charge. Whether the initial burden of proving that the missing witness's testimony would be non-cumulative is on the proponent of the charge or, instead, on the opposing party. (2) Ineffective assistance of trial counsel for failing to object to the admissibility of evidence and the prosecutor's summation comments. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, Monroe County Public Defender,

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10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Tyrell Cook

AD1 order dated May 31, 2018, affirming judgment of conviction. Decision below: 161 AD3d 708, 78 NYS3d 314. Rivera, J., granted leave September 25, 2018.

ISSUES PRESENTED: (1) Whether hearing judges are allowed to reopen suppression hearings even after the prosecution has had a full and fair opportunity to present its evidence, so long as the judge has not yet decided the motion. (2) The denial of the motion to set aside the verdict based upon a juror’s introducing extra-record facts into deliberations. (3) The sufficiency of the evidence of “physical injury.” (Assigned counsel: Lexie Mitter and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Anonymous

AD1 order dated May 1, 2018, affirming judgment of conviction. Decision below: 161 AD3d 401, 77 NYS3d 10. DiFiore, Ch. J., granted leave October 24, 2018.

ISSUES PRESENTED: (1) Whether the People were entitled, pursuant to CPL 160.50(1)(d)(ii) to an order unsealing the defendant’s record on a previous case for the purpose of making a sentence recommendation on the instant case, and (2) if not, whether the defendant was entitled to a new sentencing proceeding. (Assigned counsel: Christina A. Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Jose Perez

AD2 order dated June 27, 2018, affirming level-two SORA risk determination. Court of Appeals granted leave October 16, 2018.

ISSUE PRESENTED: Whether the SORA hearing court erred in assessing defendant 30 points for risk factor nine (“Number and Nature of Prior Crimes”) based on a prior New Jersey conviction for

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“lewdness,” deemed a “misdemeanor sex crime” – per the SORA Guidelines – even though it is not the New York equivalent of a “sex offense” (Corr. Law 168-a(2)) and is not otherwise codified in Article 130 of the Penal Law. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Defense Practice, 199 Water Street, New York, NY 10038.)

People v. Sixtus Udeke

AT1 order dated December 13, 2017, affirming judgment of conviction. Decision below: 59 Misc. 3d 136(A), 2018 N.Y. Slip Op. 50524(U), 2018 WL 1749903 (Table). Wilson, J., granted leave December 13, 2018.

ISSUE PRESENTED: Whether a plea is knowing and voluntary where, during the allocution, the court tells the defendant he would have no right to a jury trial if the prosecution proceeded on a B misdemeanor, but, because he is an immigrant who faces deportation as a result of his conviction, he would have a right to a jury trial under People v. Suazo, 2018 N.Y. Slip Op. 08056, 2018 WL 6173962 (2018). (Assigned counsel: Benjamin Wiener & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Jose Delorbe

AD1 order dated October 18, 2018, affirming judgment of conviction and summary denial of CPL 440.10 motion. Decision below: 165 AD3d 531, 83 NYS3d 900. Fahey, J., granted leave December 27, 2018.

ISSUES PRESENTED: (1) Whether the Appellate Division properly grafted a preservation requirement on a Peque error (22 N.Y.3d 168), simply because the prosecution handed a generic form to the defendant, one year earlier, advising of potential immigration consequences. (2) The summary denial of a CPL 440.10 motion based upon a presumed lack of prejudice. (Assigned counsel: Robin Nichinsky and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Jose Velez

AD2 order dated August 8, 2018, affirming judgment of conviction. Decision below: 164 AD3d 622, 78 NYS3d 671. Fahey, J., granted leave December 19, 2018.

ISSUE PRESENTED: Whether the electronic raw data underlying the results of a DNA test conducted by the NYC OCME is discoverable as of right pursuant to CPL 240.20(1)(c). The Second Department said no, because the material was not in the prosecutor's possession or control. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

IV. New Leave Grants

People v. Damon Wheeler

AT 9 & 10 order dated September 27, 2018, affirming judgment of conviction. Decision below: 61 M3d 30, 85 NYS3d 329. Rivera, J., granted leave December 13, 2018.

ISSUES PRESENTED: (1) Whether an accusatory instrument alleging Obstructing Governmental Administration must allege sufficient facts demonstrating that the underlying governmental function was authorized. (2) Various trial errors. (Assigned counsel: Richard L. Herzfeld, 112 Madison Avenue, 8th Floor, New York, NY 10016.)

People v. Kendel R. Gregory

AD2 order dated July 18, 2018, affirming judgment of conviction. Decision below: 163 AD3d 847, 81 NYS3d 472. Rivera, J., granted leave December 13, 2018. (SSM.)

ISSUES PRESENTED: (1) Whether the trial court properly denied defendant's application to go pro se, because defendant sought to proceed on the theory that the court lacked jurisdiction to prosecute him because he was a secured party creditor under the UCC. (2) Whether the knapsack discarded by the defendant during a police

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pursuit should have been suppressed. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Gerald Francis

AD1 order dated September 6, 2018, affirming judgment of conviction. Decision below: 164 AD3d 1108, 82 NYS3d 401. Rivera, J., granted leave December 18, 2018.

ISSUE PRESENTED: Whether CPL 470.15(1) prevents an intermediate appellate court from reviewing the denial of a CPL 440.20 illegal sentence claim, in that the denial of the motion was not “adverse” to the defendant; his claim was that the sentence was illegally low, with the ultimate intention to withdraw his guilty plea. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. David R. Lang

AD3 order dated August 2, 2018, affirming judgment of conviction. Decision below: 164 AD3d 963, 82 NYS3d 229. Rivera, J., granted leave December 18, 2018.

ISSUES PRESENTED: (1) Where defendant raised an intoxication defense, whether he was entitled to a curative instruction because the police failed to conduct a timely blood alcohol level test. (2) Whether the judge properly discharged a sworn juror as unavailable without first consulting with defense counsel. (3) Whether the prosecutor’s comments during summation, prefacing conclusions with “I think” and “I don’t believe,” were improper.

People v. Edward Malloy

AD3 order dated November 21, 2018, affirming judgment of conviction. Decision below: 166 AD3d 1302, 88 NYS3d 652. Clark, J. (dissenter), granted leave January 10, 2019.

ISSUES PRESENTED: (1) Denial of defense Batson challenge, where the judge, after expressing skepticism about the prosecutor’s

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proffered reasons for the challenge, summarily denied the Batson motion without making any findings or stating a reason. (2) Sufficiency of the circumstantial evidence of murder and weapon possession. (3) Whether the grand jury proceedings were impaired when a grand juror repeatedly acknowledged knowing a witness. (4) The court's refusal to allow defendant's cousin to be called to the stand solely for the purpose of his invoking the 5th Amendment in front of the jury. (5) The legality of consecutive sentences for murder and weapon possession. (Assigned counsel: Paul J. Connolly, 2 Wedge Road, Delmar, NY 12054.)

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.

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. Robert Maffei

AD2 order dated October 24, 2018, affirming judgment of conviction. Decision below: 165 AD3d 1173, 86 NYS3d 201. Rivera, J., granted leave January 31, 2019.

ISSUES PRESENTED: (1) Whether defense counsel's failure to challenge a juror who stated he was not certain he could be impartial deprived the defendant of the effective assistance of counsel. (2) Whether this claim raised a "mixed question" of IAC that had to be brought via CPL 440.10 rather than on direct appeal. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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People v. Donna Middleton

Washington County Court order dated July 25, 2018, affirming judgment of conviction. Feinman, J., granted leave January 30, 2019.

ISSUES PRESENTED: (1) Whether the information charging attempted official misconduct (PL 195.00 [1]) sufficiently established the “intent to obtain a benefit” element. (2) Whether the acts charged fell outside defendant’s official duties.

People v. Mauricio Altamirano

AT2 order dated May 11, 2018, affirming judgment of conviction. Decision below: 61 Misc.3d 1, 77 N.Y.S.2d 594. Feinman, J., granted leave February 11, 2019.

ISSUES PRESENTED: (1) Whether, where the trial judge initially denied defense counsel’s timely request to instruct the jury on the defense of temporary innocent possession of a weapon, the judge erred in sua sponte giving the jury that instruction without allowing defense counsel to then reopen his summation. (2) Whether the error was harmless because in the Appellate Term’s view, the evidence did not warrant such an instruction. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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.

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.)