

# CENTER FOR APPELLATE LITIGATION

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## MEMORANDUM

**To:** Chief Defender & Colleague

**From:** Bob Dean

**Date:** March 15, 2020

**Subject:** Attached

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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](http://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!

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

**I. Cases Awaiting Decision**

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. Argued February 12, 2020.

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., 9<sup>th</sup> Floor, NYC 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. Argued February 12, 2020.

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.)

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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. Argued February 12, 2020.

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.)

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. Argued February 12, 2020.

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, 28<sup>th</sup> Floor, NYC 10005.)

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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. Argued February 13, 2020.

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, 28<sup>th</sup> Floor, NYC 10005.)

People v. Jose Perez

AD2 order dated June 27, 2018, affirming level-two SORA risk determination. Court of Appeals granted leave October 16, 2018. Argued February 13, 2020.

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 “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.)

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**II. Cases Scheduled For Argument**

People v. Donna Middleton

Washington County Court order dated July 25, 2018, affirming judgment of conviction. Feinman, J., granted leave January 30, 2019. To be argued March 17, 2020.

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. 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. To be argued March 17, 2020.

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.)

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. To be argued March 18, 2020.

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.

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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. To be argued March 24, 2020.

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. David M. Holz

AD4 order dated December 21, 2018, affirming judgment of conviction. Decision below: 167 AD3d 1417, 90 NYS3d 724. Whalen, J. (AD dissenter), granted leave February 25, 2019. To be argued March 25, 2020.

ISSUE PRESENTED: The defendant was indicted for two separate burglaries, one on October 1st and one on October 3rd. The defendant challenged the refusal to suppress jewelry related only to the October 3rd burglary. The defendant pleaded guilty to the count relevant to the October 1st burglary, to cover the count related to the October 3rd burglary. Whether the Appellate Division has the jurisdiction pursuant to CPL 710.70(2) to review the denial of the motion to suppress. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

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 April 28, 2020.

ISSUES PRESENTED: Where a juror made an outburst during cross-examination of a prosecution witness, whether the judge erred in refusing

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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 May 5, 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. 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. To be argued May 5, 2020.

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.

People v. Limmia Page

AD4 order dated November 9, 2018, affirming suppression of evidence. Decision below: 166 AD3d 1472, 87 NYS3d 409. Wilson, J., granted leave to People April 3, 2019. To be argued May 5, 2020.

ISSUES PRESENTED: (1) Whether a marine interdiction agent with the U.S. Customs and Border Protection Air and Marine Operations effected a valid citizen’s arrest (CPL 140.30). (2) Whether evidence seized as a result of an invalid citizen’s arrest is subject to suppression. (Assigned

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counsel for respondent: David C. Schopp, The Legal Aid Society of Buffalo, Inc., 290 Main Street, Suite 350, Buffalo, NY 14202.)

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. To be argued May 6, 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.)

**III. Cases Waiting to be Scheduled**

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 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, 28<sup>th</sup> Floor, NYC 10005.)

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



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

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., 9<sup>th</sup> Floor, NYC 10038.)

People v. Rickey Alston

AD1 order dated January 22, 2019, affirming judgment of conviction. Decision below: 169 AD3 1, 92 NYS3d 18. Renwick, J. (AD dissenter), granted leave April 30, 2019. (SSM.)

ISSUES PRESENTED: (1) Whether defendant's conviction for possessing a "gravity knife" should be dismissed in light of the recent legislation decriminalizing "gravity knives" as a per se weapon, and since his case is still pending on direct appeal. (2) Whether the court violated the plain language of C.P.L. 200.60 by forcing Mr. Alston to decide whether to admit his prior conviction before the trial commenced. (3) Whether the court erred in admitting two video recordings taken from a police officer's cell phone of surveillance video allegedly depicting the incident, where the prosecution failed to lay an adequate foundation. (4) Whether a conviction under a Washington D.C. statute can serve as a valid predicate felony conviction. (Assigned counsel: Ben Wiener and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> 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.

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. 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.

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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.

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.

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, 28<sup>th</sup> Floor, NYC 10005.)

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.

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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.)

People v. Darryl Hemphill

AD1 order dated June 11, 2019, affirming judgment of conviction. Decision below: 173 AD3d 471, 103 NYS3d 64. Manzanet-Daniels (AD dissenter), J., granted leave October 1, 2019. (SSM.)

ISSUES PRESENTED: (1) Legal sufficiency of the evidence of defendant's identity as the shooter. (2) The introduction into evidence, over objection, of the guilty plea allocution of a third party (Morris) to the effect that he did not possess the gun that killed the victim, but rather some other gun. (3) Barring defense counsel from confronting a People's eyewitness with a prior identification of a different shooter (Morris). (4) The court's allowing the prosecution to repeatedly impeach its own witness, and to unfairly attack of the credibility of a key defense witness. (5) Prosecutorial misconduct on summation. (6) The removal of the defendant from the courtroom prior to the jury's being polled, without adequate warning. (7) The prosecution's failure to present exculpatory evidence to the grand jury. (8) The court's refusal to hold a Franks hearing

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despite specific allegations of false statements in support of the DNA search warrant. (9) Speedy trial: the 7-year delay in prosecution. (10) The court's refusal to grant a short adjournment to file a CPL 330.30 motion alleging serious juror misconduct. (Assigned counsel: Claudia S. Trupp and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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.

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.)

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. 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.

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

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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.)

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, 28<sup>th</sup> Floor, NYC 10005.)

People v. Kieth Brooks

AT1 order dated June 3, 2019, affirming CPL 30.30 dismissal. Decision below: 63 Misc.3d 158 (A), 2019WL2347138. Wilson, J., granted leave to People October 9, 2019.

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**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.

**ISSUE PRESENTED:** (1) The trial court's refusal to charge the defense of temporary innocent possession of a weapon. (2) Whether the trial court

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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 Ibarguen

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., 9<sup>th</sup> 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.

ISSUE PRESENTED: Whether the Appellate Term properly reversed a traffic conviction for the refileing of a simplified traffic information



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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.

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, 28<sup>th</sup> Floor, NYC 10005.)

**IV. New Leave Grants**

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, 28<sup>th</sup> 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, 28<sup>th</sup> Floor, NYC 10005.) (See also People v. Dave Lewis with the same issue.)

People v. Anthony Lora

AD1 order dated November 21, 2019, reversing, on a People’s appeal, the grant of CPL 30.30 motion. Decision below: 177 AD3d 518, 114 NYS3d 56. Acosta, J. (AD dissenter), granted leave January 27, 2020.

ISSUE PRESENTED: The motion court summarily granted the defense CPL 30.30 motion due to the People’s default on failure to respond to the motion. Whether CPL 470.15(3)(c) allows the intermediate appellate court to reverse a lower court ruling on a People’s appeal based upon an “improvident exercise of discretion.” (Assigned counsel: Jan Hoth and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

**COURT OF APPEALS UPDATE -  
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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.

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, 28<sup>th</sup> Floor, NYC 10005.)

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.