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MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: April 15, 2022

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. Levan Easley

AD2 order dated April 3, 2019, affirming judgment of conviction. Decision below: 171 AD3d 785, 96 NYS3d 320. Stein, J., granted leave September 21, 2020. Argued March 15, 2022.

ISSUES PRESENTED: (1) Whether the trial court acted within its discretion in denying a Frye hearing to challenge DNA evidence based on the use of FST. (2) Whether materials underlying the FST – the source code, algorithm, and validation studies – had to be turned over to the defense as Brady material. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. John Wakefield

AD3 order dated August 15, 2019, affirming judgment of conviction. Decision below: 175 AD3d 158, 107 NYS3d 487. Fahey, J., granted leave September 29, 2020. Argued March 15, 2022.

ISSUES PRESENTED: (1) Whether the trial court's Frye ruling was erroneous because defendant was not provided the opportunity to review the source code underlying the software program (TrueAllele) used to arrive at the DNA analysis. (2) Whether the defendant was deprived of his right to confrontation, at trial, by being denied access to the source code. (Assigned counsel: Matthew C. Hug, 21 Everett Road Extension, Albany, N.Y. 12205.)

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II. Cases Scheduled for Argument

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. Argued April 19, 2022.

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, 28th Floor, NYC 10005.)

People v. Marc Mitchell

AT1 order dated October 23, 2020, affirming judgment of conviction. Decision below: 69 Misc.3d 133(A). Rivera, J., granted leave January 26, 2021. Argued April 20, 2022.

ISSUE PRESENTED: Whether the misdemeanor complaint provided reasonable cause to believe the defendant was guilty of fraudulent accosting (PL 165.30); the definition of “accost.” (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Dashawn Deverow

AD2 order dated February 26, 2020, modifying the sentence and otherwise affirming. Decision below: 180 AD3d 1064, 118 NYS3d 677. Wilson, J., granted leave July 13, 2020. Argued April 21, 2022.

ISSUES PRESENTED: (1) Batson: Whether the defense made out a prima facie case at step one. (2) Excluding a defense witness who would have contradicted the sole eyewitness’ account and limiting cross of that eyewitness. (3) Excluding 911 call and DNA evidence. (4) Sandoval.

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(Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Luis Rodriguez

AD2 order dated October 21, 2020, reversing judgment of conviction. Decision below: 187 AD3d 1063, 133 NYS3d 589. Rivera, J. (AD dissenter), granted leave to People December 28, 2020. To be argued April 21, 2022.

ISSUE PRESENTED: Whether screen-shots purporting to depict selected portions of a text message conversation between the defendant and the complainant were properly admitted into evidence, even though the text messages themselves did not establish the defendant as the author. (Assigned counsel for defendant: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Carlos Galindo

AT2 order dated June 12, 2020, reversing judgment of conviction and dismissing on CPL 30.30 grounds. Decision below: 70 Misc3d 16, 127 NYS3d 223. Wilson, J., granted leave to People February 28, 2021. To be argued May 18, 2022.

ISSUE PRESENTED: Whether the 2020 amendments to CPL 30.30 adding a subdivision stating that “the term offense shall include vehicle and traffic law infractions,” have retroactive application to cases pending on direct appeal at the time of the amendment. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Sergio Cerda

AD2 order dated March 24, 2021, affirming judgment of conviction. Decision below: 192 AD3d 1041, 141 NYS3d 319. Rivera, J., granted leave July 13, 2021. To be argued May 19, 2022.

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ISSUE PRESENTED: Whether the trial court erred in applying the Rape Shield Law (PL 60.42) to exclude evidence (portions of a lab report) supporting an alternative explanation for the complainant's injuries.

People v. Ron Hill

AT1 order dated November 20, 2020, affirming judgment of conviction. Decision below: 69 Misc.3d 145(A), 133 NYS2d 719. DiFiore, Ch.J., granted leave June 4, 2021. To be argued May 19, 2022.

ISSUE PRESENTED: Whether the accusatory instrument charging seventh-degree drug possession for possession of an unspecified synthetic cannabinoid, was jurisdictionally defective, given that not all synthetic cannabinoids are illegal in this State. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

III. Cases Waiting to be Scheduled

People v. Hasahn D. Murray

AD1 order dated December 29, 2020, affirming judgment of conviction. Decision below: 189 AD3d 688, 138 NYS3d 33. Leave granted by Renwick, J. (AD dissenter), February 4, 2021. (Taken off SSM.)

ISSUE PRESENTED: Whether an alternate juror who had been discharged and gone home was still "available for service" (CPL 270.35[1]) to replace a seated juror who had to be discharged due to engaging in misconduct, or whether the court should have granted the defense motion for a mistrial rather than recalling and seating the alternate. (Assigned counsel: Abigail Everett and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Tramel Cuencas

AD2 order dated December 30, 2021, affirming judgment of conviction. Decision below: 192 AD3d 109, 138 NYS3d 584. Chambers, J. (AD decision author), granted leave May 7, 2021.

ISSUES PRESENTED: Payton. (1) Whether officers violated defendant's right to counsel by going to his residence for the sole purpose of making a warrantless arrest, absent exigent circumstances, so as to avoid triggering defendant's right to counsel; and (2) whether the second-floor-apartment resident of a two-family residence tacitly consented to the police entry into the residence so that defendant could be arrested inside his first-floor apartment. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Oscar Sanders

AD1 order dated May 27, 2021, affirming judgment of conviction. Decision below: 194 AD3d 652, 147 NYS3d 56. Rivera, J., granted leave September 27, 2021.

ISSUES PRESENTED: (1) Whether the trial court erred in ordering the defendant to be handcuffed during the rendition of the verdict and the polling of the jury and, if so, whether the error was harmless. (2) Whether the defendant was properly sentenced as a discretionary persistent felony offender. (3) The refusal to submit third-degree assault as a lesser included offense of second-degree assault. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Rebecca Ruiz

AD4 order dated August 26, 2021, reversing judgment of conviction and granting a new trial. Decision below: 197 AD3d 915, 153 NYS3d 290. NeMoyer, J. (AD dissenter), granted leave to People September 15, 2021.

ISSUE PRESENTED: Whether the trial court erred in refusing to charge the defense of temporary innocent possession of a weapon,

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where the defendant did not possess the gun before using it—as the jury found—for self-defense. (Assigned counsel for defendant: David C. Schopp, Legal Aid Bureau of Buffalo, 237 Main Street, Suite 1602, Buffalo, N.Y. 14203.)

People v. Peter Carman

AD2 order dated May 5, 2021, affirming SORA risk-level assessment, with one dissent. Decision below: 194 AD3d 760, 147 NYS3d 119. Court of Appeals granted leave November 17, 2021.

ISSUES PRESENTED: (1) Whether counsel at the risk-level hearing was ineffective for failing to ask for a downward departure. (2) Whether that issue was raised in the Appellate Division in the defendant’s pro se supplemental brief.

People v. Christopher J. Weber

AD4 order dated June 17, 2021, affirming SORA risk-level assessment. Decision below: 195 AD3d 1544, 145 NYS3d 895. Court of Appeals granted leave November 18, 2021.

ISSUES PRESENTED: (1) Whether the Fourth Department should have, in an earlier decision, remanded for an upward departure determination, since the prosecutor had never asked for an upward departure during the original SORA proceeding. (2) Whether an upward departure was properly granted, on remand, for the same reason. (Counsel for defendant: Monroe County Public Defender, 10 N. Fitzhugh Street, Rochester, NY 14618.)

People v. Harold Tindal

AD2 order dated March 31, 2021, affirming judgment of conviction. Decision below: 192 AD3d 1146, 141 NYS3d 351. Wilson, J., granted leave November 12, 2021.

ISSUES PRESENTED: (1) Whether a defendant must join a Batson challenge of a jointly-tried co-defendant to preserve that claim for appellate review; (2) the sufficiency of the evidence of criminal

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trespass; and (3) ineffective assistance of counsel. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Anthony Lagano

AT2 order dated July 30, 2021, reversing judgment of conviction for second-degree harassment and dismissing the accusatory instrument. Decision below: 72 Misc3d 138A, 150 NYS3d 495. Fahey, J., granted leave to People November 29, 2021.

ISSUE PRESENTED: Whether the defendant's outburst constituted a genuine threat of physical harm.

People ex rel Molinaro v. Warden

AD2 order dated June 16, 2021, reversing denial of State habeas corpus petition and granting the writ. Decision below: 195 AD3d 885, 150 NYS3d 123. Court of Appeals granted leave to People December 14, 2021.

ISSUE PRESENTED: Whether the criminal court judge was allowed to order the criminal defendant confined to jail during a CPL Article 730 competency examination when the defendant was otherwise entitled to pretrial release under CPL Articles 510 and 530. (Assigned counsel for relator: Lisa Schreibersdorf, Brooklyn Defenders Services, 177 Livingston Street, Brooklyn, NY 11201.)

People v. Rudolph Kaval

AD2 order dated May 5, 2021, reversing judgment of conviction sentencing the defendant as a persistent violent felony offender. Decision below: 194 AD3d 746, 148 NYS3d 214. Dillon (AD dissenter), J., granted leave to People December 13, 2021.

ISSUE PRESENTED: Whether, where the defendant was originally sentenced as a persistent violent felony offender, and on appeal the Second Department, upon the People's concession that one of the violent predicates fell outside the 10-year tolling period, had held that the

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defendant was not a persistent violent and remanded for resentencing, the resentencing court was permitted to sentence the defendant, once again, as a persistent violent based upon the People's new evidence as to tolling. (Assigned counsel for defendant: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Luis Jimenez

AD2 order dated December 2, 2020, reversing dismissal of indictment and reinstating it. Decision below: 189 AD3d 882, 136 NYS3d 153. Hinds-Radix (AD dissenter), J., granted leave February 11, 2021.

ISSUE PRESENTED: Whether the Appellate Division correctly determined that there was no reasonable view of the evidence warranting an instruction to the grand jury on the defense of justification under PL 35.05(2), where the defendant allegedly struck a dog, that trying to bite him, with a stick. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Santino Guerra

AD1 order dated March 23, 2021, affirming judgment of conviction. Decision below: 192 AD3d 563, 143 NYS3d 355. Rivera, J., granted leave August 16, 2021.

ISSUE PRESENTED: Whether People v. Miller (39 NY2d 543) should be overruled, allowing admission of a complainant's prior violent acts for the purposes of proving the complainant was the initial aggressor in support of a justification defense, even if the defendant did not know about the acts. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Rakeem Douglas

AD1 order dated April 27, 2021, affirming judgment of conviction. Decision below: 193 AD3d 622, 142 NYS3d 813. Fahey, J., granted leave August 24, 2021.

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ISSUE PRESENTED: Whether the police conducted a valid inventory search of the defendant's car, in that the search was made pursuant to an NYPD procedure that did not sufficiently cabin the officer's discretion. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Donnell Baines

AD1 order dated December 10, 2021, affirming judgment of conviction, after modifying it. Decision below: 178 AD3d 476, 116 NYS3d 476. Wilson, J., granted leave July 13, 2021.

ISSUES PRESENTED: (1) The facial sufficiency of the search warrant; whether the warrant described with particularity the property to be seized; whether the suppression court improperly considered supporting materials not attached to the warrant or incorporated by reference. (2) Whether the defendant was improperly allowed to go pro se at the suppression hearing. (3) Sufficiency of the evidence. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Ronald K. Johnson

AD4 order dated April 30, 2021, affirming judgment of conviction. Decision below: 193 AD3d 1429, 147 NYS3d 823. Fahey, J., granted leave August 23, 2021.

ISSUE PRESENTED: State Due Process Right to a Speedy Trial: Whether the defendant's due process rights were violated by an 8-year pre-indictment delay, where the ability to defend at trial was not prejudiced by the delay, but the delay deprived the defendant of an opportunity to negotiate a sentence that would have run concurrently with a sentence he was already serving. (Assigned counsel: Jill Paperno, Monroe County Public Defender, Rochester, NY 14614.)

IV. New Leave Grants

People v. Dakota W. Baldwin

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AD3 order dated September 23, 2021, affirming judgment of conviction. Decision below: 197 AD3d 1442, 151 NYS3d 918. Wilson, J., granted leave January 22, 2022.

ISSUE PRESENTED: Whether the Third Department erred in requiring a showing of “extraordinary circumstances” or an “abuse of discretion” in order to invoke its interests of justice jurisdiction to reduce a sentence.

People v. Kesean R. McKenzie-Smith

AD4 order dated October 9, 2020, reversing a judgment of conviction. Decision below: 187 AD3d 1668, 133 NYS3d 368. Wilson, J., granted leave to People February 28, 2022.

ISSUE PRESENTED: Whether the defendant’s absence from a sidebar conference held prior to the waiver of his rights under *People v. Antommarchi* (80 NY2d 247) requires reversal and a new trial.

People v. Daniel Talluto

AD4 order dated January 28, 2022, affirming SORA risk level determination with designation of defendant as a “sexually violent offender.” Decision below: 201 AD3d 1333, 162 NYS3d 231. In Court of Appeals based on two-judge dissent.

ISSUE PRESENTED: Whether defendant was properly designated a “sexually violent offender” (Correction Law 168-a[7][b]) where defendant was convicted of a felony in another jurisdiction “for which [he] is required to register as a sex offender in [that] jurisdiction” (Correction Law 168-a[3][b]) even though he would not qualify as a “sexually violent offender” had he committed the same conduct in New York.