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MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: July 15, 2021

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 Scheduled for Argument

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. To be argued August 31, 2021.

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. 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. To be argued August 31, 2021.

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.

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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. To be argued September 1, 2021.

ISSUES PRESENTED: 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. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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. To be argued September 2, 2021.

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.

II. Cases Waiting to be Scheduled

People v. William A. Wilkins

AD4 order dated August 22, 2019, modifying judgment of conviction. Decision below: 175 AD3d 867, 107 NYS3d 521. Curran, J. (AD dissenter), granted leave October 8, 2019. Argued April 28, 2022. Case set down for reargument at a future date.

ISSUES PRESENTED: (1) Whether the Antommarchi violation requires reversal or was, instead, obviated. (2) Whether a trial court's error in

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giving a no-adverse-inference charge regarding the defendant's not testifying, over objection, is subject to harmless error analysis. (3) Whether reversal is required because the court sua sponte and over objection explained to the jury that the third person at defendant's table was a deputy guarding the defendant. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

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 May 4, 2021. Case set down for reargument at a future date.

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. 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. Argued March 23, 2021. Case set down for reargument at a future date.

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.)

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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. 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. Manuel Morales

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

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People v. Donovan Buyund

AD2 order dated November 13, 2019, modifying judgment of conviction. Decision below: 179 AD3d 161, 112 NYS3d 179. Stein, J., granted leave to People July 15, 2020.

ISSUES PRESENTED: (1) Whether a sentencing court's certification of defendant as a sex offender pursuant to SORA is part of the sentence component of a judgment of conviction and sentence, and thus reviewable on direct appeal of the judgment. (2) Whether a conviction for burglary as a sexually motivated felony is a registerable sex offense under Corr. Law 168-a(2)(a). (Assigned counsel for defendant: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

Matter of Pedro Endara-Caicedo v. NYS DMV

AD1 order dated February 13, 2020, affirming dismissal of Article 78 petition. Decision below: 180 AD3d 499, 115 NYS3d 880. Court of Appeals granted leave September 10, 2020.

ISSUE PRESENTED: Whether VTL 1194(2) permits the refusal of a motorist arrested for DUI to submit to a chemical test to be used in an administrative license revocation hearing even if the test is offered, and the refusal occurs, more than two hours after arrest. (Counsel for petitioner: Marika Meis & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Don Williams

AD4 order dated June 12, 2020, affirming judgment of conviction. Decision below: 184 AD3d 1125, 125 NYS3d 811. Fahey, J., granted leave September 1, 2020.

ISSUES PRESENTED: (1) Whether the trial court erred when, in response to a jury note, it projected a portion of the court's final instructions on a screen for the jury as it simultaneously reread that portion of the charge to the jury; (2) Whether the defendant was deprived of a fair trial by a remark made by the court and comments by

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the prosecutor on cross and on summation; (3) The denial of a defense challenge for cause. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

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.

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: Paul Skip Laisure, 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.

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.)

People v. Jeffrey Bush

AD2 order dated July 29, 2020, affirming judgment of conviction. Decision below: 185 AD3d 1048, 126 NYS3d 405. Rivera, J., granted leave November 9, 2020.

ISSUE PRESENTED: Whether the defendant was required to preserve his claim that his guilty plea was not knowing, voluntary, and intelligent

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where he was not made aware, until sentence was pronounced, that he would be subject to a one-year period of conditional discharge. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

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. (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.)

People v. Quaniece S. Taylor

AD2 order dated July 8, 2020, modifying judgment of conviction by dismissing inclusory concurrent count, and otherwise affirming. Decision below: 185 AD3d 724, 127 NYS3d 555. Barros, J. (AD dissenter), granted leave November 9, 2020. (SSM.)

ISSUE PRESENTED: Batson: Whether the People’s statement in response to a defense Batson challenge that the People were challenging “African-American” jurors, that a juror “was from Trinidad” and thus not “African-American,” satisfied their step two burden of giving a non-race-based reason for the strike; whether the issue was preserved when the court prevented defense counsel from immediately objecting and then summarily ruled that the reason was race-neutral. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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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.

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: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Michael Lamb

AD1 order dated November 10, 2020, affirming judgment of conviction. Decision below: 188 AD3d 470, 135 NYS3d 97. Wilson, J., granted leave February 28, 2021.

ISSUE PRESENTED: Whether, in a sex-trafficking prosecution, where defendant is charged with trafficking a particular victim based on coercive conduct wholly outside New York, the People can establish jurisdiction in New York to prosecute that victim-specific conduct by showing that defendant participated in internet-related sex business in New York unrelated to the trafficking victim. (Assigned counsel: Mark Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Vladimir Duarte

AT1 order dated November 27, 2020, affirming judgment of conviction. Decision below: 63 Misc.3d 148(A), 134 NYS3d 123. Rivera, J., granted leave March 3, 2021.

ISSUE PRESENTED: Whether the defendant made an unequivocal request to go pro se when he said, “I would love to go pro se,” and the judge ignored him, or whether it was a) rendered equivocal because he said it after complaining about his lawyer, or b) abandoned when he didn’t make the request more than once. (Assigned counsel: Molly

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Schindler and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Gustavo Lantigua

AD1 order dated April 30, 2020, reversing summary denial of CPL 440.10 Padilla motion and remanding for a hearing. Decision below: 184 AD3d 80, 123 NYS3d 95. Webber (AD dissenter), J., granted leave to People January 28, 2021.

ISSUE PRESENTED: Whether the defendant was entitled to a hearing on his CPL 440.10 Padilla motion where defense counsel gave erroneous advice that the guilty plea would not result in mandatory deportation, but the People’s case against the defendant was strong.

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.

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,” has retroactive applications 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.)

Matter of Luis Alvarez v. Annucci

AD2 order dated August 19, 2020, affirming dismissal of Article 78 petition. Decision below: 186 AD3d 704, 127 NYS3d 303. Court of Appeals granted leave May 4, 2021. (SSM.)

ISSUE PRESENTED: Whether SARA applies to people on PRS after serving through their maximum expiration date in prison. (Counsel for petitioner: Molly Schindler & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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III. New Leave Grants

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: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)