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MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: July 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 Scheduled for Argument

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.) To be argued September 7, 2022.

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. 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. To be argued September 8, 2022.

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.)

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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. To be argued September 13, 2022.

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--and, indeed, throughout 1 ½ years of pretrial proceedings, including representing himself in his grand jury appearance and in two CPL 30.30 motions. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

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. To be argued September 14, 2022.

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. 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. To be argued September 14, 2022.

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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.)

II. Cases Waiting to be Scheduled

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. Argued May 19, 2022. Ordered to be reargued in a later session.

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. 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.)

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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, 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.)

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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 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.)

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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 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

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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. Dakota W. Baldwin

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. Mamadou Ba

AT1 order dated January 7, 2022, modifying judgment of conviction to correct an illegally high surcharge and otherwise affirming. Decision below: 73 Misc.3d 148(A); 157 NYS3d 661. Rivera, J., granted leave March 24, 2022.

ISSUE PRESENTED: Whether the Appellate Term improperly rejected a request to reduce a sentence in the interest of justice because the sentence was not illegally high and was the result of a negotiated plea. Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

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.

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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.

People v. Darrell Hemphill

US Supreme Court order of January 20, 2022; reversal and remand. Decision below: 142 S.Ct. 681. (SSM)

ISSUE PRESENTED: Whether the admission of evidence violating the Confrontation Clause was harmless beyond a reasonable doubt. (Assigned counsel: Claudia Trupp, Matthew Bova, and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Michael Myers

AD4 order dated October 8, 2021, affirming judgment of conviction. Decision below: 198 AD3d 1373, 155 NYS3d 669. Singas, J., granted leave March 24, 2022.

ISSUE PRESENTED: Huntley Hearing: Did an incarcerated prisoner—the defendant-- impliedly consent to the monitoring and recording of his outgoing call to a person who was, unbeknownst to him, the subject of an eavesdropping warrant, so that the People did not need to comply with the notice provisions of CPL 700.70 before introducing the call into evidence at trial. Whether that call was an “intercepted communication” under CPL 700.50 (3)(a) in light of that

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implied consent. (Assigned counsel: Philip Rothschild, Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202.)

People v. Nathaniel Boone

AD1 order dated February 3, 2022. Decision below: 202 AD3d 449, 158 NYS3d 579. Court of Appeals granted leave May 24, 2022.

ISSUE PRESENTED: Whether the SORA hearing court lacked subject matter jurisdiction to conduct a risk-level hearing where the defendant was no longer scheduled to be released to the community due to the commencement of civil commitment proceedings against him. (Assigned counsel: Nicole Geoglis and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Lance Rodriguez

AD2 order dated May 19, 2021, affirming judgment of conviction. Decision below: 194 AD3d 968, 147 NYS3d 678. Fahey, J., granted leave May 19, 2021.

ISSUE PRESENTED: Whether a police investigative stop of a moving bicyclist on a public road is a *De Bour* level 3 seizure requiring reasonable suspicion. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

III. New Leave Grants

People v. Yoselyn Ortega

AD1 order dated February 8, 2022, affirming judgment of conviction. Decision below: 202 AD3d 489, 162 NYS3d 347. Garcia, J., granted leave June 1, 2022.

ISSUE PRESENTED: Whether the introduction of the non-testifying medical examiner's autopsy reports and testimony of an expert witness based upon those reports, violated the defendant's constitutional right to confrontation. (Assigned counsel: Abby Everett and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC

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People v. Jayquaine Seignious

AD1 order dated February 10, 2022, modifying judgment of conviction by dismissing one count and otherwise affirming. Decision below: 202 AD3d 511, 162 NYS3d 358. Singas, J., granted leave to People May 31, 2022.

ISSUE PRESENTED: Whether the Appellate Division properly held that the trial court erroneously submitted, at the People's request, second-degree burglary as a lesser-included-offense of second-degree burglary as a sexually motivated felony. The Appellate Division held that, although second-degree burglary is a lesser-included offense, its submission to the jury reflected a change in the People's theory of the case. (Assigned counsel for Respondent: John Vang and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People ex rel Rivera v. Superintendent

AD3 order dated December 16, 2021, reversing Supreme Court's grant of a State habeas petition that ordered a State prisoner released on parole. Decision below: 200 AD3d 1370, 160 NYS3d 411. Court of Appeals granted leave May 24, 2022.

ISSUE PRESENTED: Whether the application of SARA's school-grounds residency restriction, enacted after petitioner's conviction, violated the Ex Post Fact Clause. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

Matter of Stevens v. NYSDCJS

AD1 order dated May 5, 2022, reversing dismissal of Article 78 proceeding to annul the Familial DNA Search Regulations promulgated by DCJS, granting the petition, and vacating the Regulations. Decision below: 169 NYS3d 1. Case has gone up to the Court of Appeals on a two-judge dissent,

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ISSUE PRESENTED: Whether petitioners, relatives of persons whose genetic profiles are in the New York State DNA database, have standing to challenge regulations adopted by DCJS governing familial DNA searches.

People v. Michael Heiserman

AD3 order dated April 21, 2022, reversing judgment of conviction and granting a new trial. Decision below: 204 AD3d 1249, 166 NYS3d 387. Colangelo (AD dissenter), J., granted leave to People June 7, 2022.

ISSUE PRESENTED: Whether the court properly denied the defendant, on trial for assaulting a police sergeant while in custody, a charge on self-defense against the sergeant's excessive use of physical force; whether the sergeant's precipitous use of pepper spray to defendant's face could have constituted excessive physical force.

People v. Thomas J. Perdue

AD4 order dated March 11, 2022, affirming judgment of conviction. Decision below: 203 AD3d 1638, 163 NYS3d 737. Rivera, J., granted leave June 17, 2022.

ISSUES PRESENTED: (1) Whether the court properly allowed the People's witness to identify the defendant at trial for the first time, where there had been no pretrial identification procedure. (2) Whether the trial court properly ruled that the defendant "opened the door" to the People's witness's redirect testimony. (Assigned counsel: Mark Funk, Monroe County Conflict Defender, 80 West Main Street, Suite 300, Rochester, N.Y. 14614.)