

# CENTER FOR APPELLATE LITIGATION

120 WALL STREET - 28<sup>TH</sup> FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535



*ATTORNEY-IN-CHARGE*  
ROBERT S. DEAN

*ASSISTANT ATTORNEY-IN-CHARGE*  
MARK W. ZENO

*SENIOR SUPERVISING ATTORNEYS*  
ABIGAIL EVERETT  
BARBARA ZOLOT  
CLAUDIA S. TRUPP

*MANAGING ATTORNEY*  
DAVID J. KLEM

*SUPERVISING ATTORNEYS*  
ROBIN NICHINSKY  
ARIELLE REID  
BEN A. SCHATZ  
MOLLY SCHINDLER  
KATE SKOLNICK  
MARIANNE C. YANG

*ASSISTANT MANAGING ATTORNEY*  
BRITTANY FRANCIS

*ATTORNEY-IN-CHARGE*  
ROBERT S. DEAN

(212) 577-2523 EXT. 502  
[rdean@cfal.org](mailto:rdean@cfal.org)

## MEMORANDUM

**To:** Chief Defender & Colleague

**From:** Bob Dean

**Date:** November 15, 2019

**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. 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. Argued October 17, 2019.

ISSUE PRESENTED: A physician prescribed a combination of 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. 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. Argued October 23, 2019.

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, 28<sup>th</sup> 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. Argued October 23, 2019.

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. Storm U. Lang

AD4 order dated October 5, 2018, affirming judgment of conviction. Decision below: 165 AD3d 1584, 85 NYS3d 642. DiFiore, Ch. J., granted leave January 31, 2019. Argued October 23, 2019.

ISSUE PRESENTED: Whether defendant's waiver of the right to appeal (a) the validity of his waiver of indictment, and (b) the denial of YO, was valid, in light of the waiver's misrepresentation of the defendant's appellate rights. (Assigned counsel: David C. Schopp, The Legal Aid Society of Buffalo, Inc., 290 Main Street, Suite 350, Buffalo, NY 14202.)

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. Argued October 24, 2019.

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.

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(Assigned counsel: John Vang and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

**II. Cases Scheduled for Argument**

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. To be argued November 19, 2019.

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

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. To be argued November 20, 2019.

ISSUES PRESENTED: (1) Whether the court erred by, after informing the parties prior to summations that it would instruct the 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., 9<sup>th</sup> Floor, NYC 10038.)

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. To be argued November 20, 2019.

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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. 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. To be argued November 20, 2019.

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

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. To be argued November 21, 2019.

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

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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. To be argued November 21, 2019.

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: whether 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.)

**III. Cases Waiting to be Scheduled**

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

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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.

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.

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

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Defense Practice, 199 Water Street, New York, NY 10038.)

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 “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. 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. (SSM.)

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



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

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.)

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

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

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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. 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.)

People v. Donna Middleton

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

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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. 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.)

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., 9th Floor, NYC 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.

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

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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. 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.

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

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. 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.

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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.)

People v. Rashid Bilal

AD1 order dated March 7, 2019, reversing judgment of conviction. Decision below: 170 AD3d 83, 96 NYS3d 1. Tom (AD dissenter), J., granted leave to People May 14, 2019. (SSM.)

ISSUES PRESENTED: Search and Seizure (1) Whether the police had only a level-one Debour predicate based solely upon a radio run with a vague description that defendant did not even meet. (2) Whether the defendant voluntarily “abandoned” the gun during the illegal police pursuit. (3) Whether the Appellate Division’s determinations were mixed questions of law and fact. (Assigned counsel for respondent: Matthew Bova and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Zhakariyya Muhammad

AD1 order dated April 4, 2019, affirming judgment of conviction. Decision below: 171 AD3d 442, 98 NYS3d 55. Renwick (AD dissenter), J., granted leave June 4, 2019. (SSM.)

ISSUES PRESENTED: (1) Whether the trial court coerced a verdict by granting the jury’s request to continue deliberations on a Friday afternoon, after two deadlock notes, without addressing the schedule conflict presented by the unavailability of three of the jurors as of the following Monday. (2) Whether the two Allen charges to the deadlocked jury were appropriate. (3) Whether the court erred in giving its final charge to the jury in writing without first obtaining defense counsel’s consent. (4) Whether the sentencing court improperly considered acquitted counts. (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. 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.

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. 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.

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.



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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.

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. 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.

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.)

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People v. Victor Diaz

AD4 order dated April 26, 2019, affirming order designating defendant a SORA level-two sex offender. Decision below: 171 AD3d 1511, 97 NYS3d 567. Court of Appeals granted leave September 5, 2019.

ISSUE PRESENTED: Does a bare allegation of “forcible compulsion,” unaccompanied by any factual description of defendant’s conduct, constitute clear and convincing evidence to support the assessment of 10 points under SORA risk factor one. ( Defendant’s counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

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.)

**IV. New Leave Grants**

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

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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 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.

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.

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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 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

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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.

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.

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.