

CENTER FOR APPELLATE LITIGATION

120 WALL STREET - 28TH 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
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

DIRECTOR OF HOLISTIC DEFENSE
BRITTANY FRANCIS

ATTORNEY-IN-CHARGE
ROBERT S. DEAN

(212) 577-2523 EXT. 502
rdean@cfal.org

MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: November 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 Awaiting Decision

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. Re-argued October 5, 2021.

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

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. Argued October 5, 2021.

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 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.)

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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. Argued October 6, 2021.

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

People v. Tyrone Wortham

AD1 order dated April 5, 2018, affirming judgment of conviction. Decision below: 160 AD3d 431, 75 NYS3d 570. Stein, J., granted leave August 15, 2019. Argued October 7, 2021.

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.)

II. Cases Scheduled for Argument

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

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dissenter), granted leave October 8, 2019. Argued April 28, 2022. Case set down for reargument November 17, 2021.

ISSUES PRESENTED: (1) Whether the Antommarchi violation requires reversal or was, instead, obviated. (2) Whether a trial court's error in 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. 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. To be argued November 17, 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. 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, 2021. To be argued November 18, 2021.

ISSUE PRESENTED: Whether the People's failure to allege tolling in a predicate felony statement is something to which the defendant must

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object. (Assigned counsel: Allison Kahl and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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. To be argued January 4, 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. To be argued January 4, 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.)

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. To be argued January 6, 2022. (12p.m.)

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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. 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. To be argued January 6, 2022. (12p.m.)

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

III. Cases Waiting to be Scheduled

People v. Cesar Garcia

AT1 order dated June 3, 2019, affirming judgment of conviction. Decision below: 63 Misc.3d 158(A), 2019 WL 2347176. Wilson, J., granted leave August 29, 2019. 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.)

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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.)

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 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. (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. Quaniece S. Taylor

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

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. 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

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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," 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.)

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: Jan Hoth & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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

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be arrested inside his first-floor apartment. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Angelo Burgos

AD1 order dated January 25, 2021, affirming judgment of conviction. Decision below: 190 AD3d 431, 139 NYS3d 59. Rivera, J., granted leave May 4, 2021.

ISSUES PRESENTED: (1) Whether defendant received ineffective assistance of counsel when trial counsel did not disclose that he was suspended in another jurisdiction (Second Circuit) for a pattern of misconduct in neglecting client matters in criminal case; and (2) whether counsel was constructively suspended from the practice of law at the time of trial when the Appellate Division later imposed reciprocal discipline nunc pro tunc to a date preceding trial.

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.

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.)

IV. New Leave Grants

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

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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, 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.)