

CENTER FOR APPELLATE LITIGATION

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MEMORANDUM

To: Chief Defenders & Colleagues

From: Barbara Zolot

Date: July 14, 2023

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.

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

**CRIMINAL CASES CURRENTLY PENDING IN
THE NEW YORK COURT OF APPEALS**

I. Cases Awaiting Decision

N/A

II. Cases Scheduled for Argument

People v. Pablo Pastrana

AD1 order dated February 10, 2022, affirming judgment of conviction.. Decision below: 205 AD3d 461, 168 NYS3d 53. Rivera, J., granted leave July 27, 2022. Scheduled for argument September 13, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether the Marijuana Regulation and Taxation Act’s amendment to the Penal Law, adding Penal Law § 222.05(3) prohibiting a criminal court from resting a finding of reasonable cause “solely on evidence of . . . the odor of cannabis” applies to criminal prosecutions that are on direct appeal. (2) Whether Penal Law §265.03(3)—which criminalizes the possession of a firearm in a public place, a right that New York State Rifle & Pistol Association, Inc. v. Bruen found protected by the Second Amendment—is unconstitutional. (3) Whether the People can meet their burden of showing that a vehicle checkpoint was for a lawful purpose and conducted pursuant to constitutionally mandated guidelines, with the testimony of a single officer who stated that the checkpoint had been authorized for vehicle safety, but did not know who had authorized the checkpoint, how the checkpoint had been authorized, or why the location or timing had been chosen. (Assigned counsel: Mark Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Sebastian Telfair (taken off SSM)

AD2 order affirming judgment of conviction. Decision below: 155 A.D.3d 676 (2d Dep’t 2021). Leave granted by dissenting judge. (Counsel: Barry Krinsky, 50 Court Street, Suite 507, Brooklyn, NY 11201). Scheduled for argument September 13, 2023 at 2 pm.

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

ISSUES PRESENTED: (1) in gun possession prosecution, admissibility under *Molineux*'s "state of mind exception" of defendant's possession of different guns more than 10 years earlier; (2) constitutionality of defendant's gun possession conviction under *Bruen* where defendant had lawfully purchased and registered the gun in Florida.

People v. Jose M. Rivera

AD4 order, dated February 4, 2022, affirming judgment of conviction. Decision below: 202 A.D.3d 1480 (4th Dep't 2022). Wilson J. granted leave on October 13, 2022. Scheduled for argument September 13, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether, in light of *Bruen*'s holding that the Second Amendment protects public possession the same as in-home possession, the eligible youth distinction for YO eligibility between possessing a loaded firearm inside the home (which is non-violent and not an armed felony offense) and possessing a gun outside the home (an armed felony offense requiring mitigating circumstances) is no longer tenable; (2) Whether possessing a gun outside the home for protection purposes is necessarily a mitigating circumstance "bearing directly on the manner in which the crime was committed" under CPL § 720.10(3). (Assigned counsel: Timothy Donaher, Monroe County Public Defender, 10 North Fitzhugh Street, Rochester, N.Y. 14614.)

People v. Ramon Cabrera

AD1 order dated June 14, 2022, affirming judgment of conviction.. Decision below: 206 AD3d 479, 168 NYS3d 302. Rivera, J., granted leave on September 8, 2022. Scheduled for argument September 13, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether, upon seizing the defendant and handcuffing him purportedly for their safety, the police were required to administer *Miranda* warnings before asking whether he had firearms in his car. Bruen issues: (2) Whether, in light of *Bruen*, the police lacked reasonable suspicion to seize and arrest the defendant where he had an out-of-State license for the guns in his trunk. (3) Whether the defendant's conviction must be reversed and dismissed as unconstitutional in light of

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

Bruen. (4) Whether, in light of *Bruen*'s holding placing in-home possession on the same constitutional footing as public carry, the sentencing disparities the Penal Law draws between in-home possession and public carry are unconstitutional and render the sentence for possession of a loaded firearm outside home or place of business illegal. (Assigned counsel: Barbara Zolot and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. George Garcia

AD1 order dated May 3, 2022, affirming judgment of conviction.. Decision below: 205 AD3d 432, 167 NYS3d 500. Wilson, J., granted leave on December 9, 2022. Scheduled for argument September 13, 2023 at 2 pm.

ISSUES PRESENTED: Whether both Penal Law 265.03(3) (which criminalizes the possession of a firearm in public, a right that the USSC found protected by the Second Amendment in *Bruen*) and Penal Law 265.03 (1)(b) (which criminalizes possession with intent to use unlawfully) are unconstitutional. (Assigned counsel: Kate Skolnick and Mark Zeno, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Carlos L. David

AD4 order dated October 7, 2022 affirming judgment of conviction. Decision below: 209 A.D.3d 1276 (4th Dep't 2022). Cannataro, ACJ, granted leave on February 23, 2023. Scheduled for argument September 13, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether Penal Law 265.03, which criminalizes possession of a loaded firearm outside one's home or business, violates due process in light of the United States holding in *New York State Rifle & Pistol Assoc. v. Bruen*; (2) Whether inventory search was invalid. (Assigned counsel: Julie A. Cinca, Esq., Monroe County Public Defender, 10 N. Fitzhugh Street, Rochester, NY 14614.)

People v. Rakeem Douglas

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

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. Scheduled for argument September 14, 2023 (previously argued September 14, 2022; reargument ordered).

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. 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. Scheduled for argument September 14, 2023 (previously argued May 19, 2022; reargument ordered).

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.

III. Cases Waiting to be Scheduled

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. Argued March 16, 2023. Reargument ordered for a future date.

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.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Anthony Debellis

AD1 order dated May 19, 2022, affirming judgment of conviction.. Decision below: 205 AD3d 555, 166 NYS3d 535. Rivera, J., granted leave August 8, 2022. Argued March 16, 2023. Reargument ordered for a future date.

ISSUES PRESENTED: (1) Whether trial defense counsel was ineffective for conceding guilt of weapons possession while pursuing a baseless defense of temporary innocent possession of a weapon and failing to pursue the only applicable defense of voluntary surrender.. (2) Whether counsel was conflicted at sentencing due to his taking a position adverse to his client's pro se CPL 330.30 motion alleging ineffective assistance of counsel. (Assigned counsel: Matt Bova 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. Argued November 16, 2022. Reargument ordered for a future date.

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.)

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. Argued September 14, 2022. Reargument ordered for a future session.

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-

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

apartment resident of a two-family residence tacitly consented to the police entry into the residence so that defendant could be arrested inside his first-floor apartment. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. 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.) (On September 13, 2022, the Court granted leave in People v. Albert Cotto, with a similar issue.)

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 10005.)

People v. Jayquaine Seignious (People's appeal)

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

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

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.)

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,

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. Donna Jordan

AD2 order dated January 26, 2022, affirming judgment of conviction. Decision below: 201 AD3d 946, 160 NYS3d 117. Troutman, J., granted leave July 21, 2022.

ISSUES PRESENTED: (1) Confrontation Clause: What must the People elicit from a testifying criminalist to satisfy their burden of establishing that the criminalist conducted an independent analysis of the raw DNA testing data? (2) Right to present a defense and DA misconduct on summation: After successfully keeping out evidence that the defendant had consistently said prior to trial that a certain third party was the actual perpetrator, the ADA argued on summation that this person was "created" by the defendant and did not exist, and that the defendant tailored her trial testimony about this third person to what she had heard over the course of the trial. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Marcus Brown

AD2 order dated March 30, 2022, affirming an order designating the defendant as a level one sex offender. Decision below: 203 AD3d 1183, 163 NYS3d 440. Court of Appeals granted leave July 21, 2022.

ISSUE PRESENTED: Whether requiring someone to register as a sex offender for a robbery devoid of sexual conduct simply because his 10-year-old cousin was incidentally present violates due process. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Herman Anthony

AD2 order dated March 23, 2022, affirming an order designating the defendant as a level three sex offender. Decision below: 203 AD3d 1084, 162 NYS3d 787. Court of Appeals granted leave July 21, 2022. (SSM.)

ISSUES PRESENTED: Downward departure: (1) What constitutes the difference between the absence of an aggravating factor and the presence of a mitigating factor? (2) whether the SORA court abused its discretion as a matter of law in denying a downward departure. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Harvey Weinstein

AD1 order dated June 2, 2022, affirming judgment of conviction. Decision below: 207 AD3d 33, 170 NYS3d 33. DiFiore, Ch.J., granted leave August 19, 2022.

ISSUES PRESENTED: (1) Whether *Molineux* evidence (numerous witnesses and more than seven instances of uncharged sexual misconduct) was admitted for any material non-propensity purposes and whether the *Sandoval* ruling (allowing in 28 prior acts of brutish behavior and aggressiveness) deprived the defendant of his right to

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

testify on his own behalf. (2) Whether the tolling provisions of CPL 30.10 are applicable to defendant, a New York resident who, during intermittent travel, was neither subject to arrest nor even under investigation and whose whereabouts were known at all times. (Counsel: Barry Kamins, Aidala, Bertuna, and Kamins, 546 Fifth Avenue - 6th Floor, NY, NY 10036.

People v. Gonzalo Aguilar

AD1 order dated June 28, 2022, affirming judgment of conviction.. Decision below: 206 AD3d 572, 170 NYS3d 548 Rivera, J., granted leave September 15, 2022.

ISSUES PRESENTED: (1) Whether, where the court has charged justification in a homicide/assault case, and then the deliberating jury requests supplemental instructions on the “definition” of those charges, must the court grant defense counsel’s request to include the justification instruction in the supplemental charge? (2) Whether, where the defendant testified to a justification defense, did the court’s final jury instructions erroneously state that the defendant was an interested witness as a matter of law? (Assigned counsel: Jan Hoth and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Albert Cotto

AD1 order dated March 10, 2022, affirming an order designating the defendant as a level 3 sexually violent predicate sex offender. Decision below: 203 AD3d 492, 160 NYS3d 875. Court of Appeals granted leave September 13, 2022.

ISSUE PRESENTED: Whether the SORA hearing court abused its discretion or otherwise erred as a matter of law when it denied defendant’s request for an adjournment of the SORA hearing pending the outcome of an evaluation by a case review team under Mental Hygiene Law 10.05(e) as to whether he is a sex offender requiring civil

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

management pursuant to Mental Hygiene Law article 10. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People ex rel. Rankin v. Brann (People's appeal)

AD2 order dated January 11, 2022, sustaining a writ of habeas corpus to the extent of remitting the matter for an evidentiary hearing pursuant to CPL 530.60(2)(c) before bail could be revoked. Decision below: 201 AD3d 675, 159 NYS3d 501. Court of Appeals granted leave to People September 13, 2022.

ISSUE PRESENTED: Whether a criminal defendant released on bail and subsequently arrested for a new violent felony while out on bail was entitled to an evidentiary hearing under CPL 530.60(2)(c) before bail could be revoked. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Melvin Baez

AD2 order dated February 23, 2022, affirming judgment of conviction.. Decision below: 202 AD3d 1102, 159 NYS3d 878. Wilson, J., granted leave September 29, 2022.

ISSUES PRESENTED: (1) Whether the evidence was sufficient to establish a chain of custody of drugs after they were recovered and vouchered into police custody. (2) Whether the defendant was properly permitted to go *pro se*. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Freddie T. Wright

AD2 order dated March 16, 2022 affirming judgment of conviction. Decision below: 203 A.D.3d 965 (2d Dep't 2022). Wilson, J. granted

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

leave on September 29, 2022.

ISSUE PRESENTED: Whether the prosecutor's proffered reasons for striking two African American panelists were pretextual when those reasons - family members convicted of crimes, renter, no children, unmarried for one juror, and possible sympathy based on line of work for the other – were unevenly applied and lacked record support. (Assigned counsel Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Patrick Labate (People's appeal)

AT2 order dated April 8, 2022, dismissing reckless driving count of accusatory instrument. Decision below: 74 Misc.3d 138(A), 165 N.Y.S.3d 660. Wilson, J. granted leave to the People on October 11, 2022.

ISSUE PRESENTED: Whether 43 days of post-readiness time was chargeable to the People and the People's statement of readiness illusory, when, following later adjournments, the People were not ready for trial without explanation. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Jason Bohn

AD2 order dated October 6, 2021, affirming judgment of conviction. Decision below: 198 A.D.3d 669, 155 N.Y.S.3d 185. Cannataro A. Ch.J. granted leave on October 14, 2022.

ISSUES PRESENTED: (1) Whether the evidence was legally sufficient to support a first-degree murder conviction based on infliction of torture upon the victim; (2) denial of for-cause challenges; (3) Whether the trial court erred in qualifying a witness to testify for the prosecution as an expert on the issue of EED (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Steven Sidbury

AD1 order dated June 2, 2022 modifying and affirming judgment.
Decision below: 206 A.D.3d 413 (1st Dep't 2022). Rivera, J., granted leave on October 20, 2022.

ISSUE PRESENTED: (1) Sufficiency of evidence of arson - intentionally causing damage to a "building" - where defendant set fire to the cuffing port in the door of jail cell; (2) sufficiency of defendant's notice of intent to introduce expert psychiatric testimony under CPL § 250.10; (3) IAC for counsel's failure to request a lesser included charge. (Assigned counsel Caprice Jenerson, Office of the Appellate Defender, 11 Park Pl., New York, NY 10007.)

People v. Jorge Espinosa (SSM)

AD2 order dated July 20, 2022 affirming judgment of conviction.
Decision below: 207 A.D.3d 655 (2d Dep't 2022). Rivera J. granted leave on November 3, 2022.

ISSUE PRESENTED: Whether a defendant is deprived of the effective assistance of counsel when defense counsel fails to object under the Confrontation Clause to crucial DNA evidence admitted through a witness who did not witness, perform, or supervise the DNA testing. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. David Williams

AD1 order dated March 24, 2022, affirming judgment of conviction..
Decision below: 203 A.D.3d 612, 162 NYS3d 735. Troutman, J., granted leave on November 15, 2022.

ISSUE PRESENTED: Whether, after suppressing an undercover officer's ID on 4th Amendment grounds, the hearing court properly found an independent source without holding an independent source hearing. (Assigned counsel: Carola M. Beeney and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Jean Dufresne (SSM)

AD1 order dated October 18, 2022 affirming an order designating the defendant as a level 3 sexually violent predicate sex offender. Decision below: 209 A.D.3d 541. Court of Appeals granted leave on December 13, 2022.

ISSUE PRESENTED: Whether the SORA court lacked subject matter jurisdiction and deprived Jean Dufresne of his due process rights when it conducted a SORA hearing before Mr. Dufresne's release was imminent. (Assigned counsel: Shaina Watrous and Mark Zeno, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Matthew Corr

AD1 order dated June 29, 2022 affirming an order designating defendant as a level one sex offender. Decision below: 208 A.D.3d 136. Court of Appeals granted leave on January 5, 2023.

ISSUE PRESENTED: Whether the hearing court erred in denying Mr. Corr's application for a three-year credit for the time he was registered as a sex offender in Massachusetts, during which he was fully compliant, and instead requiring that he complete the full 20-year registration period required as a level one offender? (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Bryan McDonald

AD2 order dated July 20, 2022 affirming an order designating the defendant as a level one sex offender. Decision below: 207 A.D.3d 669. Court of Appeals granted leave on January 5, 2023.

ISSUE PRESENTED: Whether the hearing court's failure to credit Mr. McDonald's initial registration date in Delaware towards New York's 2- year SORA registration period contradicts well-established principles of statutory interpretation and violates the Equal Protection

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

guarantee under the state and federal Constitutions.(Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Devon T. Butler (taken off SSM)

AD1 order dated May 20, 2021 affirming judgment of conviction. Decision below: 196 A.D.3d 28 (3rd Dep't 2021). Leave granted by dissenting judge.

ISSUES PRESENTED: (1) Whether a canine sniff of a person's body is a search requiring probable cause; (2) whether AD3 exceeded its jurisdiction in violation of CPL 470.15(1) when it affirmed the denial of suppression on an issue of first impression not addressed by County Court. (Assigned counsel: Clea Weiss, Esq., 10 North Fitzhugh Street, Rochester, NY 14614).

Alcantara v. Annucci

On cross-appeals of AD3 order dated March 31, 2022, modifying judgment by reversing partial denial of defendants' motion for summary judgment and partial grant of summary judgment to plaintiffs; defendants' motion granted in its entirety and complaint dismissed, and, as modified, affirmed. Decision below: 203 A.D.3d 1483 (3rd Dep't 2022). Court of Appeals granted leave on January 10, 2023.

ISSUES PRESENTED: (1) Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities under Corr. Law § 2(6); (2) Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities under Corr. Law § 73; (3) Whether individuals held at the Fishkill Correctional Facility under Corr Law § 73(10) can be held at the Fishkill Correctional Facility)without DOCCS permitting or facilitating access to community-based employment, educational, and training opportunities for those residents. (Counsel: Willkie Farr & Gallagher LLP, New York City.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Cid C. Franklin (People's appeal)

AD2 order dated July 6, 2022, reversing judgment of conviction.
Decision below: 207 A.D.3d 476 (2d Dep't 2022). Singas, J., granted leave to People on December 30, 2022.

ISSUE PRESENTED: Whether the introduction of a form prepared by an employee of the Criminal Justice Agency violated defendant's rights under the Confrontation Clause because the employee who created the form did not testify. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Anthony Blue

AD1 order dated February 15, 2022, affirming judgment of conviction.
Decision below: 202 A.D.3d 546 (1st Dep't 2022). Wilson, J., granted leave on December 21, 2022.

ISSUES PRESENTED: (1) Whether text messages and other information obtained from defendant's cell phone were properly admitted when the forensic examination of the phone occurred more than 10 days after issuance of warrant (see CPL 690.30[1]); (2) whether time ostensibly attributed to a co-defendant's motion practice under CPL 30.30(4)(d) was erroneously excluded when defendant had not yet been arraigned on the indictment; (3) whether the court's pro se warning to defendant was inadequate where it failed to include the range of allowable punishments. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Danny Novas

AD1 order dated April 28, 2022, reversing order granting 330.30 and reinstating indictment and verdict. Decision below: 204 A.D.3d 613 (1st Dep't 2022). Wilson, J., granted leave on December 21, 2022.

ISSUE PRESENTED: Sufficiency of evidence that defendant had "cause to know" that personal injury had been caused to the victim in conviction for leaving the scene of an incident without reporting under VTL § 600(2)(a). (Assigned counsel: Caprice R. Jenerson, Office of the

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Fernando Ramirez

AD2 order dated August 31, 2022, affirming judgment of conviction. Decision below: 208 A.D.3d 897 (2d Dep't 2022). Cannataro, ACJ, granted leave on January 26, 2023.

ISSUES PRESENTED: (1) Whether defendant was deprived of his constitutional right to meaningfully participate in jury selection by County Court's COVID-19 safety procedures; (2) whether there was legally sufficient evidence that defendant committed aggravated vehicular homicide in the second degree; (3) whether the trial court should have granted a mistrial. (Assigned counsel: Laurette D. Mulry, Suffolk County Legal Aid, Riverhead, New York.)

People v. Kevin L. Thomas

AD3 order dated December 22, 2022, affirming judgment of conviction. Decision below: 211 A.D.3d 1326 (3rd Dept. 2022). Leave granted by dissenting judge (Aarons, J.) on February 2, 2023.

ISSUES PRESENTED: (1) Whether police lacked justification for prolonged traffic stop; (2) whether parole officer acted as a conduit for police in conducting vehicle search; (3) whether People's failure to produce dashcam video constituted a Brady violation. (Assigned counsel: John B. Casey, Esq., c/o Casey Law LLC, 4 Tower Place, Suite 100, Albany, NY 12203.)

People v. Yasif Sims (SSM)

AD3 order dated July 14, 2022, affirming judgment. Decision below: 207 A.D.3d 882. Wilson, J., granted leave on February 7, 2023.

ISSUES PRESENTED: Whether County Court failed to conduct a sufficient inquiry into whether defendant violated the terms of the plea agreement prior to imposing an enhanced sentence; whether the court

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

was required to conduct a hearing under People v. Outley (80 NY2d 702 [1993]); whether the court improperly imposed an enhanced sentence; whether the sentence was improperly based on hearsay; whether defendant was denied effective assistance of counsel. (Counsel: Noreen McCarthy, Keene Valley.)

People v. Juan Padilla-Zuniga (SSM)

AD2 order dated October 12, 2022, affirming judgment of conviction. Decision below: 208 A.D.3d 770 (2d Dep't 2022). Cannataro, ACJ, granted leave on February 10, 2023.

ISSUE PRESENTED: (1) Whether defendant entered a knowing, voluntary, and intelligent plea; (2) Whether defendant knowingly, voluntarily, and intelligently waived his right to appeal. (Assigned counsel: N. Scott Banks, Legal Aid Society of Nassau County, 40 Main Street, 3rd Floor, Hempstead, NY 11550.)

People v. Michael Bay

Cortland County Court order dated March 15, 2022, affirming judgment of conviction. Decision below: 2022 WL 19331926 (Cortland Co. 2022). Troutman, J., granted leave on February 15, 2023.

ISSUES PRESENTED: (1) Whether the People's certificate of compliance was invalid under CPL 30.30(1) because it was filed before disclosure of all of the discovery required under CPL 245.50; (2) whether CPL 245.50 precludes finding an illusory statement under CPL 30.30(1) based on a discovery violation; (3) whether, in response to a CPL 30.30(1) motion to dismiss based on a discovery violation, the court may issue a discovery sanction under CPL 245.80 in lieu of dismissal. (Counsel below: Cortland County Public Defender)

People v. Jorge Baque

AD2 order dated November 23, 2022 affirming judgment of conviction. Decision below 210 A.D.3d 1000 (2d Dep't 2022). Rivera, J., granted leave on February 17, 2023.

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

ISSUES PRESENTED: Whether Appellate Division applied the proper standard in addressing defendant's claim that verdict of guilt was against the weight of the evidence; application of "moral certainty" standard. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John Street, 9th Floor, New York, NY 10038.)

People v. Dwane Estwick

AD2 order dated August 24, 2022, affirming judgment of conviction. Decision below: 208 A.D.3d 799 (2d Dep't 2022). Cannataro, ACJ., granted leave on February 23, 2023.

ISSUES PRESENTED: (1) Whether Supreme Court properly denied defendant's Batson challenges; (2) Whether the evidence was legally insufficient to establish defendant's guilt for robbery in the first degree. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Jairo Castillo

AD1 order dated November 1, 2022, affirming judgment of conviction. Decision below: 210 A.D.3d 414 (1st Dep't 2022). Wilson, J., granted leave on March 16, 2023.

ISSUES PRESENTED: (1) Whether the denial of a justification charge was error where the initial shots were justified but the fatal shots struck the deceased in his back, where all the shots were fired in rapid succession; (2) whether the court violated the defendant's right to confrontation and to present a complete defense by curtailing the defendant's cross-examination of the sole eyewitness on her motive to fabricate and then refusing to declare a detective called to elicit that evidence a hostile witness; (3) applicability of CPL § 210.45(1)'s "in writing" requirement where the parties orally argue the merits of a mid-trial motion to dismiss. (Assigned counsel: Matthew Bova and Jenay Nurse Guilford, Center for Appellate Litigation, 120 Wall Street - 28th floor, New York, NY 10005.)

IV. New Leave Grants

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Brandon Williams

AD2 order dated April 6, 2022 affirming judgment of conviction. Decision below: 204 A.D.3d 704. Wilson, J., granted leave on February 24, 2023.

ISSUES PRESENTED: (1) Whether admission of a co-defendant's testimonial statement without a limiting instruction violated the Confrontation Clause; (2) whether harmless error analysis applied to the Confrontation Clause violation. (Assigned counsel: Twyla Carter, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

Matter of Prisoners' Legal Services of NY v. DOCCS

AD3 order dated October 27, 2022, affirming lower court's order dismissing claims raised in a combined proceeding pursuant to CLPR article 78 and action for declaratory relief. Decision below: 209 A.D.3d 1028. Court of Appeals granted leave on March 21, 2023.

ISSUE PRESENTED: Whether the Appellate Division erred in declining to apply the mootness exception to reach the merits of the portion of the petition challenging the application of Freedom of Information Law exemptions to certain materials when respondent DOCCS disclosed those materials during the pendency of the proceeding. (Counsel: Debevoise & Plimpton, LLP, New York City, and Prisoners' Legal Services of New York, Albany.)

People v. Tyrone Peters

AD2 order dated October 27, 2021 denying application for writ of error coram nobis to vacate a prior decision and order of the Appellate Division, dated August 8, 2012 [98 A.D.3d 687]. Decision below: 198 A.D.3d 987 (2d Dep't 2021). Wilson, C.J., granted leave on March 3, 2023.

ISSUE PRESENTED: Whether defendant was denied the effective assistance of appellate counsel. (Assigned counsel: Eric Nelson, Esq., 54 Florence Street, Staten Island, NY 10308.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Corey Dunton (People's appeal)

AD1 order dated July 5, 2022 granting writ of error coram nobis to vacate a decision and order of the Appellate Division, dated June 18, 2020 [184 AD3d 473]. Decision below: Motion No. 2022-00742 (1st Dep't July 5, 2022). Wilson, C.J., granted leave on March 31, 2023.

ISSUE PRESENTED: Whether the Appellate Division erred in granting defendant's coram nobis application based on appellate counsel's failure to argue that the court's removal of defendant from the courtroom during the reading of the verdict on the last charge and jury polling, without first issuing a warning, violated defendant's constitutional right to be present. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Darryl Watts

AD1 order dated November 29, 2022 affirming an order designating the defendant as a level two sexually violent offender. Decision below: 210 A.D.3d 595. Appeal as of right.

ISSUE PRESENTED: Whether defendant was denied due process when the SORA hearing court denied the defense's request to hold a competency hearing prior to the risk level classification hearing. (Assigned counsel: Twyla Carter, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Kenneth Fisher

AD3 order dated January 19, 2023 affirming judgment of conviction. Decision below: 212 A.D.3d 984. Rivera, J., granted leave on April 3, 2023.

ISSUES PRESENTED: (1) Whether the trial court properly denied defendant's motion for a mistrial under CPL 270.35 when a juror indicated she believed defendant may have followed her home during jury selection and other jurors feared for their safety; (2) whether the

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

court conducted a sufficient inquiry of the juror under People v. Buford (69 NY2d 290 [1987]). (Assigned counsel: Lisa A. Burgess, Esq., P.O. Box 440, Indian Lake, NY 12842.)

People v. Samuel Nektalov

AT2 decision dated December 23, 2022 affirming judgment of conviction. Decision below: 78 Misc.3d 1. Rivera, J., granted leave on May 24, 2023.

ISSUE PRESENTED: Whether the police lacked probable cause to stop the defendant's car where the prosecution failed to present any evidence beyond the arresting officer's conclusory testimony to support that the car windows were "excessively tinted," the only basis for the stop. (Assigned counsel: Twyla Carter, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Kenneth Garcia

AD2 order dated November 16, 2022 affirming judgment of conviction. Decision below: 210 A.D.3d 906. Wilson, C.J., granted leave on May 31, 2023.

ISSUES PRESENTED: (1) Whether the show-up identification was unduly suggestive where the complainant was only able to describe the perpetrator as "Hispanic," and identified appellant after he was surrounded by officers and standing with the two other assailants, whom the complainant had described in detail; (2) whether the proof of second-degree assault was insufficient where there was no evidence appellant knew his co-defendant was armed or that appellant shared his intent. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

Matter of NYCLU v. Rochester

AD4 order dated November 10, 2022 modifying lower court's order denying Article 78 seeking disclosure of certain law enforcement

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

disciplinary records. Decision below: 210 A.D.3d 1400. Court of Appeals granted leave to Rochester Corporation Counsel on June 13, 2023.

ISSUE PRESENTED: Whether law enforcement disciplinary records containing unsubstantiated claims or complaints must be disclosed following the revocation of former Civil Rights Law § 50-a or are exempt from disclosure by Public Officer's Law §87(b)(2). (Counsel: New York Civil Liberties Union Foundation, New York City, and Shearman & Sterling LLP, Washington, DC).

People v. Mark Watkins

AD1 order dated June 9, 2022 affirming judgment. Decision below: 206 A.D.3d 452. Troutman, J., granted leave on June 22, 2023.

ISSUE PRESENTED: Whether, in this single-witness stranger cross-racial identification, with no forensics or video depicting the perpetrator's face, was trial counsel – who argued a misidentification defense - ineffective for failing to request a cross-racial identification where the CJI had incorporated a cross-race charge six years earlier. (Assigned counsel: Elizabeth Vasily and Jenay Nurse Guilford, Center for Appellate Litigation, 120 Wall Street - 28th floor, New York, NY 10005.)