

CENTER FOR APPELLATE LITIGATION

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



EXECUTIVE DIRECTOR
JENAY NURSE GUILFORD

LEGAL DIRECTOR
MARK W. ZENO

MANAGING ATTORNEY
DAVID J. KLEM

BARBARA ZOLOT
SENIOR COUNSEL
CO-DIRECTOR COURT OF APPEALS LITIGATION

MEMORANDUM

To: Chief Defenders & Colleagues

From: Barbara Zolot

Date: March 15, 2024

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

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 AD3d 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. Steven Sidbury

AD1 order dated June 2, 2022 modifying and affirming judgment. Decision below: 206 AD3d 413. Rivera, J., granted leave on October 20, 2022. Argued February 13 at 2 pm.

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. Jonaiki Martinez Estrella (People's appeal)

AD1 order dated March 9, 2023, modifying judgment by vacating first-degree murder conviction and otherwise affirming. Decision below: 214 AD3d 459, 184 NYS3d 344. Troutman, J., granted leave to People on July 18, 2023. Argued February 14 at 2 pm.

ISSUE PRESENTED: Whether the evidence was legally sufficient to support defendant's conviction of murder in the first degree under Penal Law 125.27(a)(x) based on infliction of torture upon the victim. (Assigned counsel: The Feinman Law Firm, Steven N. Feinman, Esq., 19 Court Plaza, Suite 201, White Plains, NY 10601.)

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

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. Argued February 14 at 2 pm.

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.)

People v. Farod Mosley (taken off SSM)

AD4 order modifying judgment by reducing sentence and otherwise affirming. Decision below: 200 A.D.3d 1658, 158 N.Y.S.3d 511. Leave granted by dissenting judge. Argued February 14 at 2 pm.

ISSUES PRESENTED: (1) Whether County Court erred in allowing police detective to identify defendant in surveillance video; (2) Whether the trial court erred in declining defendant's request for an adverse inference instruction based on People's failure to preserve a surveillance video; (3) Whether defendant's conviction is supported by legally sufficient evidence; (4) Whether sentencing court abused its discretion in refusing to grant defendant youthful offender status. (Assigned counsel: Philip Rothschild, Esq., Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202-2057.)

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. Argued February 14 at 2 pm.

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 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

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

Kamins, Aidala, Bertuna, and Kamins, 546 Fifth Avenue - 6th Floor, NY, NY 10036.

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 NYS3d 660. Wilson, J. granted leave to the People on October 11, 2022. Argued February 15 at 2pm.

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. 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. Argued March 12 at 2 pm.

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. David Williams

AD1 order dated March 24, 2022, affirming judgment of conviction.. Decision below: 203 AD3d 612, 162 NYS3d 735. Troutman, J., granted leave on November 15, 2022. Argued March 13 at 2 pm.

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.)

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

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

AD2 order dated July 6, 2022, reversing judgment of conviction. Decision below: 207 AD3d 476. Singas, J., granted leave to People on December 30, 2022. Argued March 14 at 2 pm.

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; *amicus* brief filed by University of Buffalo School of Law Amicus Brief Practicum.)

People v. Yasif Sims (taken off SSM)

AD3 order dated July 14, 2022, affirming judgment. Decision below: 207 AD3d 882. Wilson, J., granted leave on February 7, 2023. Argued March 14 at 2 pm.

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 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, Esq., P.O. Box 756, Keene Valley 12943.)

People v. Kenneth Fisher

AD3 order dated January 19, 2023 affirming judgment of conviction. Decision below: 212 AD3d 984. Rivera, J., granted leave on April 3, 2023. Argued March 14 at 2 pm.

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 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. 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

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

473]. Decision below: Motion No. 2022-00742 (1st Dep’t July 5, 2022). Wilson, C.J., granted leave to People on March 31, 2023. Argued March 14 at 2 pm.

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; *amicus* brief filed by Center for Appellate Litigation.)

II. Cases Scheduled for Argument

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. Scheduled for argument April 17 at 2 pm.

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; *amicus* brief filed by Center for Appellate Litigation.)

People v. Jason Brown

AT1 decision dated June 23, 2023 affirming judgment of conviction. Decision below: 79 Misc.3d 127(A). Garcia, J., granted leave on September 27, 2023. Scheduled for argument April 17 at 2 pm.

ISSUE PRESENTED: Whether public safety concerns justified an automobile stop in the absence of a traffic violation. (Assigned counsel: Twyla Carter, Esq., Legal Aid Society, 199 Water Street, New York, NY 10038).

People v. Kevin L. Thomas

AD3 order dated December 22, 2022, affirming judgment of conviction. Decision below: 211 AD3d 1326 (3rd Dept. 2022). Leave granted by dissenting

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

judge (Aarons, J.) on February 2, 2023. Scheduled for argument April 17 at 2 pm.

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. Dominic Spirito

AD3 order dated May 4, 2023, affirming judgment. Decision below: 216 AD3d 1208, 188 NYS 3d 764. Leave granted by dissenting judge (Aarons, J.) on June 8, 2023. Scheduled for argument April 17 at 2 pm.

ISSUE PRESENTED: Whether warrantless search of defendant's residence by parole officer, based on tip from defendant's mother that she believed he had a gun, was unreasonable and in violation of the Fourth Amendment. (Counsel: D.J. & J.A. Cirando, PLLC, 250 South Clinton Street, Suite 350, Syracuse, NY 13202.)

People v. Eugene L. Lively

AD4 order dated July 28, 2023, affirming judgment of conviction. Decision below: 218 A.D.3d 1312, 194 N.Y.S.3d 641. Dissenter below (Bannister, J.) granted leave on October 10, 2023. Scheduled for argument April 17 at 2 pm.

ISSUE PRESENTED: Whether a warrantless search of defendant's person and residence by parole officer was unreasonable and in violation of the Fourth Amendment. (Counsel: Karen G. Leslie, Esq., P.O. Box 624, Riverhead, NY 11901-0603).

People v. Freddie T. Wright

AD2 order dated March 16, 2022 affirming judgment of conviction. Decision below: 203 AD3d 965. Wilson, J. granted leave on September 29, 2022. Scheduled for argument April 18 at 2 pm.

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

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

Advocates, 111 John St., 9th Floor, NYC 10038; *amicus* brief filed by Center on Race, Inequality, and the Law et al.)

People v. Dwane Estwick

AD2 order dated August 24, 2022, affirming judgment of conviction. Decision below: 208 AD3d 799. Cannataro, ACJ., granted leave on February 23, 2023. Scheduled for argument April 18 at 2 pm.

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; *amicus* brief filed by Center on Race, Inequality, and the Law et al..)

People v. Mark Watkins

AD1 order dated June 9, 2022 affirming judgment. Decision below: 206 AD3d 452. Troutman, J., granted leave on June 22, 2023. Scheduled for argument April 18 at 2 pm.

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.)

People v. Antwyne Lucas

AD2 order dated April 12, 2023 affirming judgment of conviction. Decision below: 215 A.D.3d 763, 185 N.Y.S.3d 710. Troutman, J., granted leave on August 22, 2023. Scheduled for argument April 18 at 2 pm.

ISSUES PRESENTED: (1) Whether defendant was denied the effective assistance of counsel when the suppression hearing testimony established that the complainant was unsure about defendant's role in the incident but counsel did not impeach the trial testimony of complaint or a detective that the complainant had previously identified defendant as the gunman and main perpetrator; (2) whether defendant was denied the effective assistance of counsel when counsel consented to the omission of a jury instruction on cross-

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

racial identification. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

III. Cases Waiting to be Scheduled

People v. Matthew Corr

AD1 order dated June 29, 2022 affirming an order designating defendant as a level one sex offender. Decision below: 208 AD3d 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 AD3d 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 guarantee under the state and federal Constitutions. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

Alcantara v. Annucci

AD3 order dated March 31, 2022 on cross-appeals, 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 AD3d 1483. 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

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

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.)

People v. Anthony Blue

AD1 order dated February 15, 2022, affirming judgment of conviction. Decision below: 202 AD3d 546. 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. Juan Padilla-Zuniga (SSM)

AD2 order dated October 12, 2022, affirming judgment of conviction. Decision below: 208 AD3d 770. 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. Jorge Baque

AD2 order dated November 23, 2022 affirming judgment of conviction. Decision below 210 AD3d 1000. Rivera, J., granted leave on February 17, 2023.

ISSUES PRESENTED: Whether Appellate Division applied the proper

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

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. Jairo Castillo

AD1 order dated November 1, 2022, affirming judgment of conviction. Decision below: 210 AD3d 414. 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.)

People v. Brandon Williams

AD2 order dated April 6, 2022 affirming judgment of conviction. Decision below: 204 AD3d 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 AD3d 1028. Court of Appeals granted leave on March 21, 2023.

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

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 AD3d 687]. Decision below: 198 AD3d 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.)

People v. Kenneth Garcia

AD2 order dated November 16, 2022 affirming judgment of conviction. Decision below: 210 AD3d 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 disciplinary records. Decision below: 210 AD3d 1400. Court of Appeals granted leave to Rochester Corporation Counsel on June 13, 2023.

ISSUE PRESENTED: Whether law enforcement disciplinary records

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

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. Kevin Sullivan

Erie County Court order dated February 6, 2023, reversing dismissal of charges on 30.30 grounds and reinstating charges. Decision below: not officially reported. Troutman, J., granted leave on July 5, 2023.

ISSUE PRESENTED: Whether People's certificate of compliance was invalid under CPL 30.30(1) because it was filed before disclosure of all the discovery required under CPL 245.50 (Counsel: Shawn P. Hennessy, Esq., P.O. Box 128, East Amherst, NY 14051.)

People v. Nolberto Contreras Vargas (SSM; People's appeal)

AD2 order dated December 28, 2022 reversing judgment of conviction. Decision below: 211 AD3d 1046, 180 NYS3d 299. Leave granted by dissenter (Dowling, J.) on June 5, 2023.

ISSUE PRESENTED: Whether error in admitting police testimony recounting the non-testifying witness's out-of court-statements was harmless error. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People ex rel. Neville v. Toulon

AD2 order dated April 19, 2023, modifying Supreme Court's denial of petition for writ of habeas corpus. Decision below: 215 AD3d 874, 187 NYS3d 742. Leave as of right.

ISSUE PRESENTED: Whether provision of Mental Hygiene Law § 10.11(d)(4) that directed Supreme Court to determine whether there was probable cause to believe that respondent was a dangerous sex offender requiring confinement based only upon the allegations of the petition for confinement and any accompanying papers, with no opportunity for him to be heard, was unconstitutional on its face and as applied to him. (Assigned Counsel: Michael D. Neville, Director, Mental Hygiene Legal Service, Second Judicial Department, Special Litigation and Appeals Unit, 600 Old

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

Country Road, Suite 224, Garden City, NY 11530.)

Matter of Sell v. Yehl

AD4 order dated November 18, 2022, confirming determination that petitioner had violated a disciplinary rule and dismissing article 78 petition. Decision below: 210 AD3d 1503, 176 NYS3d 828. Court granted petitioner's motion for leave to appeal on May 18, 2023.

ISSUES PRESENTED: (1) Whether a petitioner in a prison disciplinary proceeding has a right to a copy of the operation manual of a relevant drug testing device; (2) whether the determination was supported by substantial evidence; (3) whether petitioner's requests for certain witnesses were properly denied; (4) whether chain of custody for a urine sample was properly established. (Counsel: Mira de Jong, Esq., Lou Fox, Esq., 209 21st Street #8, Brooklyn, NY 11232.)

People v. Codie Hayward

AD3 order dated February 2, 2023, affirming judgment. Decision below: 213 AD3d 989, 182 NYS 3d 377. Leave granted by dissenting judge (Lynch, J.) on June 15, 2023.

ISSUES PRESENTED: (1) Whether defendant failed to preserve legal sufficiency claim; (2) whether defendant failed to preserve claim that evidence should have been suppressed because search warrant did not contain no-knock provision and police entered residence without announcing their presence; (3) whether county court improperly allowed confidential informant to testify about drug sale that preceded execution of search warrant and defendant's arrest; (4) whether defendant's counsel was ineffective for failing to challenge execution of search warrant. (Assigned Counsel: Kristin Bluvias, Esq., Rural Law Center of New York, Inc., 22 US Oval, Suite 101, Plattsburgh, NY 12903.)

People v. Eddie Robles

AD4 order dated December 23, 2022, affirming judgment. Decision below: 211 AD3d 1516, 180 NYS3d 752. Leave granted by dissenting judge (Lindley, J.) on June 25, 2023.

ISSUES PRESENTED: (1) whether police had reasonable suspicion to detain and frisk defendant; (2) where Appellate Division determined that

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

Supreme Court erred in refusing to suppress defendant's statement to police, whether Appellate Division properly applied harmless error doctrine to defendant's guilty plea. (Counsel: Cambareri & Brenneck, 300 South State Street, First Floor, Syracuse, NY 13202.)

People v. Raymond Williams (taken off SSM)

AD1 order dated May 9, 2023, affirming judgment. Decision below: 216 AD3d 466, 187 NYS3d 649. Leave granted by dissenting judge (Mendez, J.) on July 6, 2023.

ISSUE PRESENTED: Whether the evidence was legally sufficient to establish that defendant committed third-degree burglary. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007; Clearly Gottlieb Steen & Hamilton, LLP, One Liberty Plaza, New York, NY 10006-1404.)

People v. Kerbet Dixon

AD2 order dated December 28, 2022, affirming judgment. Decision below: 211 AD3d 1030, 180 NYS3d 292. Troutman, J., granted leave on July 18, 2023.

ISSUES PRESENTED: (1) Whether defendant's Sixth Amendment right to self-representation was violated by the People monitoring his trial-preparation calls from jail and using the communication for trial; (2) whether defendant's decision to waive his right to counsel and proceed pro se was unequivocal, knowing, voluntary, and intelligent; (3) whether defendant's pro se status should have been revoked at trial. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Mitchell Hernandez

AD1 order dated February 2, 2023, affirming judgment. Decision below: 213 AD3d 425, 182 NYS3d 119. Wilson, C.J., granted leave on July 25, 2023.

ISSUE PRESENTED: Whether the courts below correctly adjudicated defendant a persistent violent felony offender under Penal Law 70.04(1)(b)(iv)-(v) when more than ten years without incarceration elapsed between his sentencing on the first predicate felony conviction and the

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

incident underlying this case but the period of pre-sentencing incarceration on the predicate felony was subtracted from that ten-year period. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007, *amicus* briefs filed by Ethan J. Leib and the Bronx Defenders.)

People v. Jason Brisman (taken off SSM)

AD3 order dated December 9, 2021, affirming judgment. Decision below: 200 AD3d 1219, 157 NYS3d 599. Wilson, C.J., granted leave on July 19, 2023.

ISSUES PRESENTED: (1) Whether Appellate Division erred in requiring a showing of extraordinary circumstances or an abuse of discretion to invoke its interest of justice jurisdiction to reduce a sentence; (2) whether the Appellate Division properly held that defendant failed to preserve his claim that the sentence imposed served to punish him for exercising his right to a trial; (3) whether the evidence at trial was legally sufficient to establish that defendant committed the crime of promoting prison contraband in the first degree. (Assigned counsel: Clea Weiss Esq., 10 North Fitzhugh Street, Rochester, NY 14614.)

People v. Randall K. McGovern

AD4 order dated March 17, 2023, affirming judgment. Decision below: 214 AD3d 1339, 183 NYS3d 917. Wilson, C.J., granted leave on August 2, 2023.

ISSUE PRESENTED: Whether the defendant was improperly sentenced to consecutive terms of imprisonment for forgery in the second degree and grand larceny in the third degree when the act of forgery was the method by which the larceny was committed. (Counsel: Jeremy D. Schwartz Esq., 561 Ridge Road, Lackawanna, NY 14218).

People v. Alvin King (People's appeal)

AD4 order dated May 5, 2023, reversing judgment of conviction and dismissing indictment pursuant to CPL 30.30. Decision below: 216 AD3d 1400, 188 NYS3d 312. Dissenter below (Ogden, J.) granted leave to People on August 1, 2023.

ISSUE PRESENTED: Whether CPL article 245, the provisions of which tied

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

the People's declaration of readiness for trial to a certificate of compliance with the article's discovery requirements, invalidate a statement of readiness which was made prior to the effective date of the article. (Assigned counsel: Philip Rothschild, Esq., Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202-2057.)

People v. Kevin Cleveland (taken off SSM)

AD4 order dated June 30, 2023 affirming judgment of conviction. Decision below: 217 A.D.3d 1515, 193 N.Y.S.3d 476. Dissenter below (Ogden, J.) granted leave on August 14, 2023.

ISSUE PRESENTED: Whether the police pursuit of defendant was supported by a reasonable suspicion of criminality. (Assigned counsel: Julie A. Cinca, Esq., Monroe County Public Defender, 10 N. Fitzhugh Street, Rochester, NY 14614.)

People v. Eric D. Sharp

AD4 order dated March 24, 2023 affirming judgment of conviction. Decision below: 214 A.D.3d 1428, 185 N.Y.S.3d 868. Dissenter below (Curran, J.) granted leave on July 5, 2023.

ISSUES PRESENTED: (1) Whether defendant was denied his right to be present at a material stage of the trial when Supreme Court conducted an in-chambers and off-the-record conference in his absence at which there was a discussion on the People's Sandoval application; (2) whether the loss of certain video exhibits admitted in evidence at trial deprived defendant of effective appellate review; (3) whether the statutes under which defendant was convicted are unconstitutional in light of the United States Supreme Court's decision in Bruen; (4) whether defendant's claim that the statutes under which he was convicted are unconstitutional is preserved. (Assigned counsel: Julie A. Cinca, Esq., Monroe County Public Defender, 10 N. Fitzhugh Street, Rochester, NY 14614.)

People v. Hu Sin

AD4 order dated June 9, 2023 affirming judgment of conviction. Decision below: 217 A.D. 3d 1439, 190 N.Y.S.3d 777. Dissenter below (Ogden, J.) granted leave on August 1, 2023.

ISSUE PRESENTED: Whether defendant was deprived of a fair trial by County Court's Molineux ruling, admitting testimony about defendant's

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

prior uncharged acts of abuse against two of the victim's other family members. (Counsel: Thomas J. Eoannou, Esq., 484 Delaware Ave., Buffalo, NY 14202-1304.)

People v. Christopher Farrell

Ulster County Court order dated November 17, 2022 reversing dismissal of accusatory instrument and reinstating. Cannataro, J. granted leave on August 24, 2023.

ISSUE PRESENTED: Whether Agriculture and Markets Law § 353 is void for vagueness as applied to veterinary neglect. (Counsel: Mitchell H. Spinac, Esq., 325 Wall Street, P.O. Box 3748, Kingston, NY 12401.)

People v. Cleveland Lawson a/k/a Emanuel Marks

AT1 order dated April 17, 2023, affirming judgment of conviction. Decision below: 78 Misc. 3d 131(A), 186 N.Y.S.3d 498. Singas, J., granted leave on September 22, 2023.

ISSUE PRESENTED: Whether the trial court has the authority to revisit its suppression ruling and deny suppression based on a new legal theory that was not litigated at the suppression hearing. (Assigned counsel: Twyla Carter, Esq., Legal Aid Society, 199 Water Street, New York, NY 10038.)

People v. David Vaughn

AD2 order dated June 14, 2023, affirming judgment of conviction. Decision below: 217 A.D.3d 781, 191 N.Y.S.3d 162. Rivera, J., granted leave on September 28, 2023.

ISSUES PRESENTED: (1) Whether Supreme Court abused its discretion by limiting the defense expert's testimony regarding certain factors affecting the reliability of eyewitness identifications; (2) whether the People presented sufficient corroborating evidence connecting the defendant to the crime to obviate the need for an additional inquiry. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Divine Fredericks

AD1 order dated June 22, 2023, affirming judgment of conviction. Decision

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

below: 217 A.D.3d 582, 191 N.Y.S.3d 630. Rivera, J., granted leave on November 29, 2023.

ISSUES PRESENTED: (1) Whether the trial court properly denied defendant's request for new counsel; (2) whether the trial court was required to inquire further concerning defendant's request; (3) whether counsel improperly took a position adverse to his client in opposing defendant's request; (4) whether defendant's CPL 440.10 motion was properly denied without a hearing; (5) whether defendant received effective assistance of counsel. (Assigned counsel: V. Marika Meis and Jenay Nurse Guilford, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Parris J. Rufus

AD4 order dated October 6, 2023, affirming judgment of conviction. Decision below: 220 A.D.3d 1162, 197 N.Y.S.3d 639. Dissenter below (Curran, J.) granted leave on November 16, 2023.

ISSUES PRESENTED: (1) Whether the police officer lawfully stopped defendant's car for crossing the white fog line; (2) whether the evidence was legally sufficient to establish that defendant was intoxicated. (Counsel: Fiandach & Fiandach, The Parks at Allens Creek, 100 Allens Creek Road, Suite 110, Rochester, NY 14618-3303.)

People v. Laquan Lewis

AD2 order dated July 5, 2023, affirming judgment of conviction. Decision below: 218 A.D.3d 493, 194 N.Y.S.3d 227. Wilson, C.J., granted leave on December 7, 2023.

ISSUE PRESENTED: Whether defendant's requests to proceed pro se were unequivocal. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

IV. New Leave Grants

People v. Edward Mero

AD3 order dated November 11, 2023, affirming judgment of conviction. Decision below 221 A.D.3d 1242, 201 N.Y.S.3d 258. Dissenter below (Reynolds Fitzgerald, J.) granted leave on January 11, 2024.

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

ISSUES PRESENTED: (1) Whether the courts below abused their discretion in denying defendant's motion to sever the counts related to each victim; (2) whether defendant was denied a fair trial by the court's denial of his motion to sever; (3) whether defendant was denied his right to counsel and his right to a fair trial when the courts below denied defendant's motion to vacate the judgment of conviction based on a conflict of interest founded on an undisclosed business relationship between defendant counsel and one of the assistant district attorneys. (Counsel: Hug Law, PLLC, 21 Everett Road Extension, Albany, NY 12205).

People v. Timothy Shader

AD3 order dated June 1, 2023, affirming reclassification of SORA defendant as risk level two rather than risk level one. Decision below: 217 A.D.3d 1040, 191 N.Y.S.3d 194. Court of Appeals granted leave on January 11, 2024.

ISSUE PRESENTED: Whether the courts below abused their discretion or otherwise erred when they declined to grant a further modification to a level one classification. (Counsel: Pappalardo & Pappalardo, LLP, 222 Bloomingdale Road, Suite 301, White Plains, NY 10605-1511).

People v. Juan M. Silva Santos

AD1 order dated October 19, 2023, affirming judgment of conviction. Decision below: 220 A.D.3d 547, 197 N.Y.S.3d 50. Wilson, C.J., granted leave on February 21, 2024.

ISSUE PRESENTED: Are litigants permitted to bargain away the Department of Correction and Community Supervision (DOCCS)'s Shock program in contravention of the statutory authority, see Corrections Law § 867, the separation of powers doctrine, and public policy?(Assigned counsel: Elizabeth Vasily and Jenay Nurse Guilford, Center for Appellate Litigation, 120 Wall St., 28th Floor, NYC 10005.)