

# CENTER FOR APPELLATE LITIGATION

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



*ATTORNEY-IN-CHARGE*  
ROBERT S. DEAN  
*ASSISTANT ATTORNEY-IN-CHARGE*  
MARK W. ZENO  
*SENIOR SUPERVISING ATTORNEYS*  
ABIGAIL EVERETT  
CLAUDIA S. TRUPP  
BARBARA ZOLOT  
*MANAGING ATTORNEY*  
DAVID J. KLEM  
*SUPERVISING ATTORNEY*  
MARISA K. CABRERA  
*ASSISTANT MANAGING ATTORNEY*  
KATHARINE SKOLNICK

*ATTORNEY-IN-CHARGE*  
ROBERT S. DEAN

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

## MEMORANDUM

**To:** Chief Defender & Colleague  
**From:** Bob Dean  
**Date:** November 15, 2016  
**Subject:** Attached

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Here is a list of significant criminal cases pending in the New York Court of Appeals and the issues presented. Cases that the Court has selected for SSM consideration are generally not included. Leave grants were to the defendant unless otherwise noted.

The Center does this update every two months for its own attorney staff. As a matter of professional courtesy, we also send it to Chief Defenders who do substantial appellate work. Feel free to distribute copies to any members of your staff. This update is also available on our web site ([www.appellate-litigation.org](http://www.appellate-litigation.org)).

Although every attempt has been made to ensure the accuracy of the summaries, no express or implied guarantees are made. If your office is handling one or more of these cases and wishes to share some insight not apparent from the intermediate appellate court decision or the Clerk's summary of issues, please feel free to contact me. Your input will be added to the next edition.

We offer a special feature to our online visitors. Our online "Eye on Eagle" section (NYCA link) includes pdf links to all decided cases, and, for selected cases, a short CAL blog flagging what we think is important or noteworthy about the cases.

Happy reading!

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

**I. Cases Awaiting Decision**

People v. Phillip Couser

AD4 order dated March 20, 2015, modifying one judgment of conviction and affirming the other. Decision below 126 AD3d 1419, 5 NYS3d 787. Stein, J., granted leave on June 24, 2015. Argued October 14, 2016.

ISSUES PRESENTED: (1) Where defendant threatened a group of five people and took a purse from one of them, whether the sentences on the conviction for robbery and on the convictions for attempted robbery had to run concurrently. (2) Whether a plea to one count was the product of the ineffective assistance of counsel, who misadvised the defendant about the possible sentence range if he went to trial. (3) The validity of the Alford plea. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Matthew A. Davis

AD4 order dated March 27, 2015, modifying judgment of conviction by reversing and dismissing the felony murder counts and otherwise affirming. Decision below: 126 AD3d 1516, 6 NYS3d 365. Lippman, Ch. J., granted leave (cross appeals) September 3, 2015. Argued October 14, 2016.

ISSUES PRESENTED: (1) Felony murder: whether the People failed to prove that defendant “caused” the death of the victim - - who was obese and had a heart attack during the robbery. (2) Whether the trial court erred in admitting into evidence surveillance video footage tending to corroborate the accomplice’s testimony.

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People v. John Gayden

AD4 order dated March 27, 2014, affirming judgment of conviction. Decision below: 126 AD3d 1518, 4 NYS3d 806. Lippman, Ch. J., granted leave December 28, 2015. Argued October 14, 2016.

ISSUE PRESENTED: Search & Seizure-whether a radio run based on an anonymous tip of “men with guns” constituted a level 2 predicate which justified pursuit when the defendant fled upon the police approach. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester NY 14614.)

People v. Harvert Stephens

AD4 order dated May 8, 2015, affirming judgment of conviction. Decision below: 128 AD3d 1497, 8 NYS3d 823. Rivera, J., granted leave October 5, 2015. Argued October 14, 2016.

ISSUE PRESENTED: Whether a City of Syracuse noise control ordinance, barring “unnecessary noise,” is unconstitutionally vague under People v. New York Trap Rock Corp. (57 NY2d 371 [1982]). (Assigned counsel: Philip Rothschild, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202.)

People v. Timothy Brewer

AD4 order dated June 19, 2015, affirming judgment of conviction. Decision below: 129 AD3d 1619, 12 NYS3d 453. Stein, J., granted leave to appeal September 25, 2015. Argued October 18, 2016.

ISSUE PRESENTED: The admissibility of Molineux evidence of defendant’s drug use and sexual proclivities to corroborate the testimony of two child sex abuse complainants. (Assigned counsel: Timothy P. Donaher, Monroe County P.D., 10 N. Fitzhugh Street, Rochester, N.Y. 14614.)

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People v. Earl Jones

AD1 order dated April 14, 2015, affirming judgment of conviction. Decision below: 127 AD3d 517, 5 NYS3d 725. Lippman, Ch.J., granted leave August 10, 2015. Argued October 19, 2016.

ISSUES PRESENTED: (1) Whether the trial court erred in admitting an out-of-court eyewitness' declaration to a police officer that Defendant-Appellant was attempting to burglarize a truck as an excited utterance or a present sense impression. And whether that error violated Defendant-Appellant's constitutional rights to confrontation. (2) Whether the burglary conviction was legally insufficient where the evidence that Defendant-Appellant intended to commit a crime in the FedEx truck's front seating area was that he climbed through an opened door with a tool and a duffel bag, stayed inside for five seconds, took some unelaborated action at the back of the truck, and then walked away with nothing other than his own possessions. (Assigned counsel: Jody Ratner & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Wilson Tardi

AD4 order dated November 14, 2014, affirming judgment of conviction. Decision below: 122 AD3d 1337, 996 NYS2d 832. Abdus-Salaam, J., granted leave July 28, 2015. Argued October 19, 2016.

ISSUE PRESENTED: The constitutionality of the Cheektowaga Police Department's policy of impounding and inventory-searching vehicles of arrestees that are in a public parking lot.

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People v. James Brown

AD1 order dated March 17, 2015, affirming judgment of conviction. Decision below: 126 AD3d 516, 7 NYS3d 19. Stein, J., granted leave June 17, 2015. Argued November 14, 2016.

ISSUE PRESENTED: CPL 30.30 & People v. Sibblies, 22 NY3d 1174 (2014); how to analyze the People's subsequent statement of unreadiness following an off-calendar certificate of readiness. The Sibblies Court was split 3-3 in two plurality opinions. (Leave was also granted in People v. Terrence Young, 2015 WL 824564, with a similar issue.) (Assigned counsel: Danielle Muscatello, c/o Robert Didio & Associates, 80-02 Kew Gardens Road, Suite 307, Kew Gardens, NY 11415.)

People v. Earl Canady

AT2 order dated December 31, 2015, affirming CPL 30.30 dismissal. Decision below: 50 Misc. 3d 132(A), 28 NYS3d 649, 2015 WL 9694121. Fahey, J., granted leave to People May 13, 2016. Argued November 14, 2016.

ISSUE PRESENTED: Whether the CPL 30.30 motion court, and the Appellate Term, correctly determined that one of the People's off-calendar statements of readiness was illusory.

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**II. Cases Scheduled for Argument**

People v. Immanuel Flowers

AD2 order dated October 22, 2014, affirming judgment of conviction upon resentencing after AD2 remittitur. Decision below: 121 A.D.3d 1014, 993 NYS2d 921. Pigott, J., granted leave May 14, 2015. To be argued November 15, 2016.

ISSUES PRESENTED: (1) Whether the “presumption of institutional vindictiveness” (People v. VanPelt, 76 N.Y.2d 156) in imposing a higher sentence after an appellate reversal, applies where AD2 sent the case back to the trial court for resentencing, where the court originally used improper factors at sentence, and the court then imposes the same sentence. (2) Whether counsel was ineffective for failing to object to the new sentence. (Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Robert Patterson

AD1 order dated March 5, 2015, affirming judgment of conviction. Decision below: 128 AD3d 424, 9 NYS3d 30. Fahey, J., granted leave July 13, 2015. To be argued November 15, 2016.

ISSUES PRESENTED: Whether it was proper to admit, as circumstantial evidence of defendant’s identity as the purchaser of the phone, authenticated records that the purchaser of the pre-paid cell phone, linked to the crime, supplied pedigree information linked the defendant. (Assigned counsel: Seymour James, Jr., Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Rodolfo Hernandez

AD2 order dated April 15, 2015, affirming judgment of conviction. Decision below: 127 AD3d 991, 6 NYS3d 634. Pigott, J., granted leave August 14, 2015. To be argued November 15, 2016.

ISSUES PRESENTED: Whether the child’s out-of-court communications, as testified to by her parents, were erroneously

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admitted into evidence as excited utterances; whether the statements were testimonial in nature. (Assigned counsel: Anna Pervukin & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Anthony Perkins

AD2 order dated January 28, 2015, affirming judgment of conviction. Decision below: 124 AD3d 915, 2 NYS3d 220. Read, J., granted leave July 2, 2015. To be argued November 16, 2016.

ISSUES PRESENTED: (1) Whether the lineup was unduly suggestive where only one lineup subject (defendant) had a dreadlock hairstyle, described by some but not all of the identifying witnesses; (2) the denial of an adverse inference charge where the People failed to preserve the tape of a 911 call; (3) the failure of the trial judge to make factual findings before denying the defense Batson challenge at step 3. (Assigned counsel: Paul Skip Laisure & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Brandon Warrington

AD3 order dated July 30, 2015, reversing judgment of conviction. Decision below: 130 AD3d 1368, 15 NYS3d 256. Devine (AD dissenter), J., granted leave to People September 22, 2015. To be argued November 16, 2016.

ISSUE PRESENTED: Whether the trial court committed reversible error in denying a defense challenge for cause to a prospective juror in a case involving the murder of a 5-year-old child. In response to voir dire, the juror had said that she “can’t” be fair given the nature of the case; when asked if she could acquit if guilt were not proven beyond a reasonable doubt, she answered, “I don’t know.” The majority decided that the juror was not sufficiently rehabilitated when she later stated that, if she had a reasonable doubt, she could acquit, and that she would follow the court’s instructions at the end of the case. The juror was never asked if she could set aside her previously-stated bias in making her determination whether guilt has been proven beyond a reasonable doubt. The dissenter believed that the rehabilitation was sufficient.

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People v. Patrick Morgan

AD1 order dated January 6, 2015, affirming judgment of conviction. Decision below: 124 AD3d 406, 1 NYS3d 39. Manzanet-Daniels (AD Dissenter), J., granted leave May 7, 2015. To be argued November 16, 2016.

ISSUES PRESENTED: (1) Whether, after the previously deadlocked jury rendered a defective verdict that revealed its numerical split and the identity of the two jurors in the minority, the court, when ordering the jury to resume deliberations and reminding it that the verdict had to be unanimous, wrongfully refused to include any language that jurors were not to surrender conscientious beliefs solely to achieve unanimity. (2) Whether, by refusing to grant the deliberating jury's request to rehear the defense summation simply because it was not "evidence," the court failed to exercise or at least abused its discretion; and whether defense counsel's endorsement of the court's refusal constituted ineffective assistance of counsel. (Assigned counsel: Susan H. Salomon & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Prince Clark

AD2 order dated April 29, 2015, affirming judgment of conviction, with two dissenters. Decision below: 129 AD3d 1, 9 NYS3d 277. Miller, J. (AD dissenter), granted leave June 29, 2015. To be argued November 16, 2016.

ISSUES PRESENTED: (1) Whether trial counsel was ineffective in not requesting a charge on justification when counsel refrained from exercising his own professional judgment as to trial strategy in the belief that he was bound by the defendant's wishes. (2) Where the evidence supported self-defense, whether the court erred in not sua sponte charging the deliberating jury on justification when they referenced that defense in a note. (Assigned counsel: DeNice Powell & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)



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People v. Steven Finkelstein

AD1 order dated October 30, 2014, affirming judgment of conviction. Decision below: 121 AD3d 615, 995 NYS2d 66. Rivera, J., granted leave September 9, 2015. To be argued November 17, 2016.

ISSUES PRESENTED: (1) Given the overlapping relationship between coercion in the first and second degrees, (a) whether defendant's conviction of the first-degree crime violates equal protection due process, (b) whether the indictment was duplicitous, and (c) whether the second-degree crime should have been submitted as a lesser included offense. (2) The trial court's allowing of evidence of the victim's knowledge of defendant's coercion of a former girlfriend. (3) Sufficiency of evidence. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Joseph Bridgeforth

AD2 order dated July 2, 2014, affirming judgment of conviction. Decision below: 119 AD3d 600, 987 NYS2d 869. Rivera, J., granted leave April 2, 2015. To be argued November 17, 2016.

ISSUES PRESENTED: (1) Batson: whether skin-color is a cognizable class. (2) Batson: whether the "mootness doctrine" precludes a trial or appellate judge from revisiting the adequacy of a prima facie showing (step one) when the nonmovant fails to provide a race-neutral reason (step two). (3) The "presumption of regularity" and the right to be present at Sandoval hearings. (Assigned counsel: Tammy Linn & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. James Miller

AD1 order dated November 18, 2014, affirming judgment of conviction. Decision below: 122 AD3d 492, 996 NYS3d 273. Adbus-Salaam, J., granted leave July 1, 2015. To be argued November 17, 2016.

ISSUES PRESENTED: (1) Whether the trial court erred in precluding defendant from questioning prospective jurors during voir dire regarding whether they could disregard a confession if they found it to be involuntary, where the People had not yet decided if they would introduce the confession at trial. (2) Whether defense counsel was ineffective for failing to object to the prosecutor's summation comments. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Cristian Morales

AT 9 & 10 order dated August 10, 2015, dismissing appeal. Pigott, J., granted leave November 30, 2015. To be argued November 17, 2016.

ISSUE PRESENTED: Whether the Appellate Term abused its discretion by dismissing the criminal appeal of an involuntarily deported defendant on the ground, in part, that he was unable to obey the mandate of the court. (Assigned counsel: Kent V. Moston, Nassau County Legal Aid Society, 40 Main Street, 3rd Floor, Hempstead, NY 11550.)

People v. Shawn J. Silvertson

AD4 order dated June 12, 2015, affirming judgment of conviction. Decision below: 129 AD3d 1467, 12 NYS 3d 402. Lippman, Ch. J., granted leave December 28, 2015. To be argued January 3, 2017.

ISSUES PRESENTED: (1) Search & Seizure: Whether the warrantless entry into defendant's apartment was justified by exigent circumstances where the subject weapon was a knife, not a gun. (2) Whether counsel was ineffective for failing to object to certain comments on the prosecutor's summation, including that defendant's silence upon arrest

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evidenced his guilt. (Assigned counsel: David C. Schopp, The Legal Aid Bureau of Buffalo, Inc., 237 Main St., Suite 1602, Buffalo, NY 14203.)

People v. Rafael Then

AD2 order dated May 13, 2015, affirming judgment of conviction: 128 AD3d 864, 10 NYS3d 135. Fahey, J., granted leave July 29, 2015. To be argued January 5, 2017. To be argued January 5, 2017.

ISSUES PRESENTED: (1) Whether defendant was deprived of a fair trial when he appeared wearing orange prison pants during the first day of jury selection. (2) Testimony that defendant possessed a gun during the month of the crime, to prove ID. (3) Prosecutorial misconduct on summation. (Assigned counsel: Patricia Pazner & Lynn W.L. Fahey, Appellate Advocates, 111 John Street, 9th Floor, NYC 10038.

People v. Zachary T. Guerin

Cattaraugus County Court order dated May 30, 2014, affirming judgment of conviction for trespassing in violation of ECL §11-2113(1). Pigott, J., granted leave April 8, 2015. To be argued January 10, 2017.

ISSUE PRESENTED: Whether the defendant could be guilty of trespassing on protected property where the posted no-trespass sign did not comply with ECL §11-2111(2)'s requirement that the sign state the name and address of the landowner.

People v. Hao Lin

AT2 order dated November 26, 2014, reversing judgment of conviction for DWI. Decision below: 46 Misc. 3d 20, 998 NYS2d 558. Abdus-Salaam, J., granted leave to People July 2, 2015. To be argued January 11, 2017.

ISSUE PRESENTED: Crawford v. Washington: Whether a police officer who observed the administration of a breathalyzer test by another officer, and who was also qualified to administer it, and who

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testified at trial because the testing officer was unavailable, satisfied the standards for qualifying as a substitute witness under Bullcoming v. New Mexico, 131 S.Ct. 2705. (Assigned counsel: Seymour James, Jr., Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Fernando Maldonado

AD2 order dated July 2, 2014, affirming judgment of conviction. Decision below: 119 AD3d 610, 988 NYS2d 693. Lippman, Ch. J., granted leave June 19, 2015. To be argued January 11, 2017.

ISSUES PRESENTED: (1) The sufficiency of the evidence of grand larceny of real property based upon executing and filing a “forged” deed. (2) The sufficiency of the evidence of value. (3) IAC of trial counsel. (Assigned counsel: Seymour W. James, Jr., The Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. William Flanagan

AD2 order dated October 7, 2015, affirming judgment of conviction. Decision below: 132 AD3d 693, 17 NYS3d 178. Stein, J., granted leave November 12, 2015. To be argued January 12, 2017.

ISSUES PRESENTED: Defendant, a police officer, was convicted of conspiracy and two counts of official misconduct, for trying to prevent the arrest of a teenager whose father had connections to the police department. (1) Whether an official misconduct charge for malfeasance can be premised on performing an otherwise authorized act. (2) Whether such a charge for nonfeasance can be premised on the failure to perform a discretionary duty. (3) Whether statements by co-conspirators are admissible only when made during the time periods involved in the conspiracy.

People v. Michael Pena

AD1 order dated March 26, 2015, affirming judgment of conviction. Decision below: 126 A.D.3d 618, 3 NYS3d 604. Pigott, J., granted leave November 4, 2015. To be argued January 12, 2017.

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**ISSUES PRESENTED:** (1) The legality of imposing sentences for three counts of predatory sexual assault consecutively, where the counts stemmed from a single transaction using the same dangerous instrument. (2) Whether the 75-year-to-life sentence was unconstitutional as applied.

**People v. Kevin Fisher**

AD1 order dated July 3, 2014, affirming judgment of conviction. Decision below: 119 AD3d 426, 988 NYS2d 187. Rivera, J., granted leave October 5, 2015. To be argued January 12, 2017.

**ISSUES PRESENTED:** (1) Whether defendant should have been permitted to withdraw, prior to sentencing, his guilty plea to hindering prosecution, where the person he admitted rendering criminal assistance to was acquitted of the underlying felony prior to trial. (2) Whether defendant's guilty plea was knowing and voluntary where the People did not disclose interview notes with their primary witness that undercut the People's case. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

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**III. Cases Waiting to be Scheduled**

People v. Leonard Williams

AD2 order dated December 31, 2014, affirming judgment of conviction. Decision below: 123 AD3d 1152, 997 NYS3d 499. Pigott, J., granted leave June 19, 2015.

ISSUES PRESENTED: (1) Whether the prosecutor's use of a slide show powerpoint presentation during summation deprived defendant of a fair trial. (2) Whether the prosecutor mischaracterized the trial evidence on summation. (3) Whether counsel was ineffective for failing to object to the prosecutor's summation comments. (Assigned counsel: Alex Donn and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. John Stone

AD1 order dated October 30, 2014, affirming judgment of conviction. Decision below: 121 AD3d 617, 995 NYS2d 68. Lippman, Ch. J., granted leave June 19, 2015.

ISSUES PRESENTED: (1) Whether inferential hearsay testimony from a detective, that he started looking for defendant, the named suspect, after speaking to a non-testifying eyewitness, violated Crawford. (2) Whether under CPL 330.30(2), the trial court erroneously denied the motion to set aside the verdict based on juror misconduct without a hearing, even though there were disputed issues of fact. (Assigned counsel: Lisa A. Packard & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Stanley Hardee

AD1 order dated January 22, 2013, affirming judgment of conviction. Decision below: 126 AD3d 626, 5 NYS3d 430. Acosta, J. (AD dissenter), granted leave June 18, 2015. (Taken off SSM.)

ISSUE PRESENTED: Whether, under People v. Torres - - which allows police to conduct a protective search of a car only where the officers (1) have reasonable suspicion to believe a crime has been committed and (2) have an articulable basis to fear for their own safety - - police may search a car when the driver has committed a traffic infraction - - not a crime, there by failing to meet prong one of the Torres rule. (Assigned counsel: Rachel T. Goldberg & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Ryan P. Brahney

AD4 order dated March 20, 2015, affirming judgment of conviction. Decision below: 126 AD3d 1286, 5 NYS3d 630. Lindley (AD dissenter), J., granted leave June 1, 2015.

ISSUES PRESENTED: (1) Consecutive versus concurrent sentences: Whether it was illegal to run defendant's intentional murder and first-degree burglary sentences to run consecutively. (2) Whether the defense of extreme emotional disturbance was made out. (3) Whether the admission into evidence of defendant's statement, for which no Huntley ruling was made or waived, was harmless error. (Assigned counsel: Kathryn Friedman, c/o The Sage Law Firm Group, PLLC, PO Box 200, 465 Grant Street, Buffalo, NY 14213.)

People v. Omar A. Smalling

AD2 order dated March 11, 2015, affirming judgment of conviction. Decision below: 126 AD3d 820, 4 NYS3d 307. Fahey, J., granted leave June 9, 2015.

ISSUE PRESENTED: Whether the trial court erred in giving a supplemental instruction regarding constructive possession of a weapon

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in response to a jury note. (Assigned counsel: Kathleen Whooley and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Chris Price

AD2 order dated April 15, 2015, affirming judgment of conviction. Decision below: 127 AD3d 995, 4 NYS3d 924. Fahey, J., granted leave July 28, 2015.

ISSUES PRESENTED: (1) Admitting into evidence a photograph posted on the defendant's web page four months prior to the robbery, showing him holding a gun similar to the one used in the robbery, even though the People did not establish that the photo was genuine, and the complainant did not confirm that the gun in the photo was the same one used in the robbery. (2) Sufficiency of the evidence as to ID. (Assigned counsel: Tammy Linn & Lynn W.L. Fahey, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Jose Aviles

AT1 order dated March 23, 2015, reversing criminal court's dismissal of accusatory instrument. Decision below: 47 Misc. 3d 126A, 13 NYS3d 851, 2015 WL 1295874. Pigott, J., granted leave July 29, 2015.

ISSUE PRESENTED: Due process and equal protection challenge to NYPD's policy of administering both breathalyzer and physical coordination tests to English-speaking DWI suspects, while offering only the breathalyzer test to non-English-speaking suspects such as the defendant. (Assigned counsel: V. Marika Meis, The Bronx Defenders, 360 East 161st St., Bronx, NY 10451.)

People v. Carlos Valentin

AD1 order dated May 7, 2015, reversing judgment of conviction. Decision below: 128 AD3d 428, 8 NYS3d 428. Saxe, J. (AD dissenter), granted leave to People October 15, 2015.



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ISSUES PRESENTED: (1) Whether there was any evidence that defendant, who raised a justification defense, had acted as an “initial aggressor,” so as to justify the trial court’s initial aggressor charge. (2) Whether any error was harmless. (Assigned counsel for defendant: Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. William Cook

AD2 order dated May 20, 2015, affirming a level three SORA designation. Decision below: 128 AD3d 927, 9 NYS3d 400. Court of Appeals granted leave October 20, 2015. (Cross-Appeals)

ISSUE PRESENTED: (A) Whether the SORA hearing court erred in assessing 20 points under risk factor 7 for establishing or promoting a relationship with the victims for the primary purpose of victimization where defendant was a long-time family friend. (B) Whether courts can hold multiple SORA hearings for one offender in different counties for the same “current offense” - he pled guilty in two counties for crimes committed against the same children in co-ordinated prosecutions. (Assigned counsel: Lisa Napoli & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Charles Smith

AD2 order dated January 28, 2015, affirming judgment of conviction. Decision below: 124 AD3d 918, 998 NYS2d 906. Pigott, J., granted leave November 9, 2015.

ISSUE PRESENTED: Whether there was sufficient evidence of first-degree robbery - - did defendant “display” what appeared to be a firearm. During the robbery, the defendant kept one of his hands at his waist under a sweatshirt, but made no other action or gesture. (Assigned counsel: Skip Laisure & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. Jamar Bethune

AD2 order dated July 22, 2015, affirming judgment of conviction. Decision below: 130 A.D.3d 937, 12 NYS 3d 902. Fahey, J., granted leave November 13, 2015.

ISSUE PRESENTED: Whether the trial judge erred in failing to conduct a reconstruction hearing prior to settling the trial transcript by cleaning up the court's supplemental charge to the jury, without any explanation or basis for the change.

People v. Yusuf Sparks

AD1 order dated October 15, 2015, affirming judgment of conviction. Decision below: 132 AD3d 513, 17 NYS3d 423. Pigott, J., granted leave December 23, 2015.

ISSUES PRESENTED: (1) Whether the trial court erred in refusing to submit defendant's justification defense to the jury on the grounds of no "reasonable view." (2) The court's mid-trial change in its Sandoval ruling. (Assigned counsel: Andrew Dalack & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Norman Whitehead, Jr.

AD3 order dated July 9, 2015, modifying judgment of conviction. Decision below: 130 AD3d 1142, 13 NYS3d 642. Pigott, J., granted leave November 24, 2015.

ISSUES PRESENTED: (1) Sufficiency of evidence of cocaine sale where the cocaine was unavailable for testing. (2) Duplicious counts. (3) Prosecutorial misconduct during opening and summation. (4) Refusal to give a circumstantial evidence charge.

People v. Everett B. McMillan

AD2 order dated July 1, 2015 affirming judgment of conviction. Decision below: 130 AD3d 651, 12 NYS3d 301. Stein, J., granted leave December 2, 2015.

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**ISSUES PRESENTED:** (1) Search & Seizure: After defendant was arrested inside a building on a parole warrant, whether the police properly searched his car based upon a tip received earlier in the day about a gun in the car; the defendant had signed an agreement when released on parole that any of his property could be searched. (2) Reverse-**Batson**: whether the trial court properly determined that defense counsel's reason for his peremptory strike, that he had no information about the juror, was non-race-neutral and, if it was race-neutral, that it was pretextual. (Assigned counsel: Alex Donn & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

**People v. Miguel Viruet**

AD2 order dated August 26, 2015, affirming judgment of conviction. Decision below: 131 AD3d 714, 15 NYS3d 447. Fahey, J., granted leave December 15, 2015.

**ISSUE PRESENTED:** The trial court's refusal to give defense an adverse inference charge with respect to a missing surveillance videotape. (Assigned counsel: Leila Hull & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

**People v. Ross Campbell**

AD1 order dated September 29, 2015, affirming judgment of conviction. Decision below: 131 A.D.3d 882, 16 NYS3d 548. Fahey, J., granted leave January 26, 2016.

**ISSUE PRESENTED:** In this sexual assault prosecution, whether trial counsel was ineffective in failing to challenge a juror who was the victim of sexual violence and acknowledged that she would find it difficult to serve. Counsel's **voir dire** comments made it clear that both he and the court were confused about the juror's reasons for seeking to be excused from the jury. (Assigned counsel: Abigail Everett & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. John Andujar

AD1 order dated August 4, 2015, reversing dismissal of accusatory instrument. Decision below: 49 Misc.3d 36, 18 NYS3d 259. Fahey, J., granted leave December 16, 2015.

ISSUE PRESENTED: Whether VTL §397, prohibiting “equip[ing] a motor vehicle” with a radio receiver capable of receiving frequencies allocated for police, applies when such a device is carried in the driver’s clothing. (Assigned counsel: Seymour W. James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Michael E. Prindle

AD4 order dated June 12, 2015, affirming judgment of conviction. Decision below: 129 AD3d 1506, 11 NYS3d 383. Lippman, Ch. J., granted leave December 28, 2015.

ISSUE PRESENTED: Whether defendant’s sentence as a discretionary persistent felony offender violated Apprendi v. New Jersey (530 U.S. 466) and Alleyne v. U.S. (133 S.Ct. 2151). (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester NY 14614.)

People v. Sean Garvin

AD2 order dated July 1, 2015 affirming judgment of conviction. Decision below: 130 A.D.3d 644, 13 N.Y.S. 3d 215. Hall, J. (AD dissenter), granted leave December 9, 2015. (Taken off SSM.)

ISSUES PRESENTED: (1) Payton v. New York (445 U.S. 573); whether defendant was arrested inside his home without a warrant. (2) Whether defendant’s sentence as a discretionary persistent felony offender violates Apprendi. (Assigned counsel: Tammy Linn and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. Phillip Wright

AD2 order dated December 23, 2015, affirming judgment of conviction. Decision below: 134 AD3d 1059, 22 NYS3d 522. Fahey, J., granted leave April 5, 2016.

ISSUES PRESENTED: (1) Whether the discretionary persistent felony offender adjudication violated Apprendi v. New Jersey. (2) The denial of for-cause challenges to three jurors. (Assigned counsel: Mark Vorkink & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038)

People v. Otis Boone

AD2 order dated June 24, 2015, affirming the judgment of conviction as modified. Decision below: 129 AD3d 1099, 11 NYS3d 687. Rivera, J., granted leave December 22, 2015.

ISSUE PRESENTED: The court's denial of the defense request to charge on cross-racial identification. (Assigned counsel: Leila Hull & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Thomas Jackson

AD3 order dated May 14, 2015, affirming judgment of conviction. Decision below: 128 AD3d 1181, 9 NYS3d 458, Lippman, Ch., J., granted leave December 28, 2015.

ISSUES PRESENTED: (1) Whether the court's erroneous Sandoval ruling that defendant could be cross-examined about a juvenile delinquency adjudication, which kept him off the stand, was harmless in light of the overwhelming proof of guilt. (2) The validity of the defendant's Antommarchi waiver. (Assigned counsel: Mitch Kessler, 63 Pike Creek Drive, Cohoes, NY 12047.)

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People v. Richard M. Leonard

AD4 orders dated June 19, 2015 affirming judgment of conviction and denying 440 motion. Decision below: 129 AD3d 1592, 12 NYS3d 446. Lippman, Ch. J., granted leave December 29, 2015.

ISSUES PRESENTED: (1) Whether the IAC 440.10 motion should have been denied without a hearing because the trial counsel was deceased. (2) Whether counsel was ineffective because he failed to utilize prior inconsistent statements on cross, and failed to request a limiting instruction on Molineux evidence. (3) Whether the trial court improperly allowed evidence of defendant's prior uncharged sexual abuse of the victim, to establish intent and motive.

People v. Gregory Vining

AD1 order dated March 26, 2015, affirming, as modified, a judgment of conviction. Decision below: 126 AD3d 623, 6 NYS3d 244. Lippman, Ch. J., granted leave December 29, 2015.

ISSUE PRESENTED: Whether the court erred in allowing into evidence, as an adopted admission, a recording of defendant's phone call to the complainant while he was incarcerated, during which defendant was silent in the face of the complainant's accusation of physical abuse. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601 NYC 10007.)

People v. Peter Austin

AD1 order dated December 22, 2015, affirming judgment of conviction. Decision below: 134 AD3d 559, 23 NYS3d 17. Gische, J. (AD dissenter), granted leave February 9, 2016.

ISSUE PRESENTED: Whether a court must provide a permissive adverse inference instruction when important evidence that was promptly requested by the defense and is in the custody of the People is destroyed as a result of a natural disaster or otherwise, and whether a court may sua sponte forbid defense counsel from commenting on the missing evidence in summation. (Assigned counsel: Mark W. Zeno &

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Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. James L. Carr

AD4 order dated May 1, 2015, affirming denial of CPL 440.10 motion. Decision below: 128 AD3d 1402, 8 NYS3d 527. Lippman, Ch. J., granted leave December 28, 2015.

ISSUE PRESENTED: Whether the 440 motion, based on lack of jurisdiction, was improperly denied, in that the People failed to seek leave to represent murder charges to a second grand jury in violation of CPL 190.75(3). (Assigned counsel: Evan M. Lumley, Cornell Mansion, 484 Delaware Ave., Buffalo, NY 14202.)

People v. Andrew R. Bushey

Erie County Court order dated October 15, 2015, reversing City Court's granting of motion to suppress and dismissing of the accusatory instrument. Pigott, J., granted leave January 25, 2016.

ISSUE PRESENTED: Search & Seizure: Whether County Court erred in determining that the plate check of defendant's vehicle and ensuing stop were lawful.

People v. Darrell Spencer

AD1 order dated January 26, 2016, affirming judgment of conviction. Decision below: 135 A.D.3d 608, 24 NYS2d 48. Tom (AD dissenter), J., granted leave March 3, 2016.

ISSUES PRESENTED: (1) Whether the court violated the controlling statute and appellant's jury rights by refusing to discharge, as grossly unqualified, a deliberating juror who unequivocally declared her inability to set aside her emotions and decide the case solely on the facts and the law. (2) Whether the court's denial of an intoxication charge lacked a lawful basis and requires reversal. (3) Whether appellant's warrantless arrest violated Payton v. New York. (Assigned

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counsel: Susan H. Salomon & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Jose Valentin

AD1 order dated October 15, 2015, affirming judgment of conviction. Decision below: 132 AD3d 499, 17 NYS3d 424. Fahey, J., granted leave February 23, 2015.

ISSUES PRESENTED: (1) Whether the People are allowed to introduce prior-drug-conviction evidence when a defendant asserts an agency defense by adopting portions of the People's case, rather than testifying or putting in defense evidence. (2) IAC for failing to object to the People's summation. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Lanze Mason

AD2 order dated October 14, 2015, affirming judgment of conviction. Decision below: 132 AD3d 777, 17 NYS3d 768. Fahey, J., granted leave February 24, 2016.

ISSUES PRESENTED: (1) Whether the trial court properly refused to charge justification by ruling, as a matter of law, that defendant's use of a glass bottle to strike the complainant in the face constituted deadly physical force. (2) Whether the court's comment to the prospective jurors that, if any juror were to be excused on the basis of difficulty with the English language they would be required to take a course in English, was a mode-of-proceedings error. (Assigned counsel: Shanda Sibley & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Trevor Anderson

AD2 order dated July 29, 2015, affirming judgment of conviction. Decision below: 130 AD3d 1055, 15 NYS3d 103. Pigott, J., granted leave February 25, 2016.



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**ISSUES PRESENTED:** (1) The trial court's Sandoval ruling allowing cross-examination about a gun possession conviction. (2) IAC for failing to object to the prosecutor's powerpoint presentation during summation. (Assigned counsel: Kathleen Whooley & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

**People v. Matthew A. Slocum**

AD3 order dated November 12, 2015, reversing judgment of conviction. Decision below: 133 AD3d 972, 20 NYS3d 440. Fahey, J., granted leave to People March 2, 2016.

**ISSUES PRESENTED:** (1) Where the Public Defender's Office wrote a letter to the District Attorney, Sheriff's Office, and State Police stating that they represented the defendant, whether defendant unequivocally invoked his right to counsel prior to the commencement of formal proceedings by answering, "yeah, probably," to the question whether he thought he should have an attorney represent him prior to questioning. (2) Harmless error.

**People v. Nirun Honghirun**

AD2 order dated November 25, 2015, affirming judgment of conviction. Decision below: 133 AD3d 882, 20 NYS3d 409. Fahey, J., granted leave March 3, 2016.

**ISSUE PRESENTED:** Whether trial counsel was ineffective for not only failing to object to alleged "prompt outcry" testimony, but also eliciting that same damaging testimony on cross-examination. (Assigned counsel: Patricia Pazner & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

**People v. Lawrence P. Frumusa**

AD4 order dated December 31, 2015, affirming judgment of conviction. Decision below: 134 AD3d 1503, 22 NYS3d 737. Lindley, J. (AD dissenter), granted leave March 18, 2016.

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**ISSUES PRESENTED:** (1) The introduction into evidence under Molineux of a civil contempt order against defendant for non-criminal actions occurring after the charged crime, but relating to the crime at issue. (2) Limitation on cross-examination. (3) IAC. (4) Denial of request to adjourn sentencing to give newly retained counsel time to prepare. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614)

People v. Mark Nonni

AD1 order dated November 5, 2015, affirming judgment of conviction. Decision below: 135 AD3d 52, 20 NYS3d 345. Manzanet-Daniels, J. (AD dissenter), granted leave March 17, 2016. (SSM.)

**ISSUES PRESENTED:** (1) Did the court violate O’Rama when it failed to alert counsel to the contents of the substantive jury notes, either prior to bringing the jury in, or after. (2) Did the police, who were investigating a burglary report which contained no description of the suspect, have a “founded suspicion” that the defendant was involved in the burglary based merely on his presence near the burglary scene? Alternatively, did the police constitutionally search inside the defendant’s pocket after detaining him? (Assigned counsel: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.) (Leave also granted to co-defendant, Lawrence Parker.)

People v. Kevin M. Minemier

AD4 order dated December 31, 2015, affirming judgment of conviction. Decision below: 134 AD3d 1551, 23 NYS3d 786. Stein, J., granted leave April 12, 2016.

**ISSUES PRESENTED:** (1) Whether CPL §720.20(1) requires the sentencing court to not only expressly consider YO status for an eligible defendant, but also state its reasons for denying YO status. (2) Whether, under CPL §390.50, defendant was not entitled to disclosure of information contained in the last page of the PSR, on the ground that it was marked “confidential.”

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People v. Vilma Bautista

AD1 order dated October 20, 2015, modifying a judgment of conviction. Decision below: 132 AD3d 523, 18 NYS3d 47. Pigott, J., granted leave April 5, 2016.

ISSUES PRESENTED: (1) Prosecutorial misconduct on summation by misstating evidence. (2) Whether the notes of an interview with an alleged co-conspirator constituted Brady material. (3) Whether the trial court's error in reading to the jury findings of fact of a foreign country was harmless error.

People v. Roberto Estremera

AD1 order dated December 29, 2015, affirming PRS resentence. Decision below: 134 A.D. 3d 655, 21 N.Y.S.3d 622. Fahey, J., granted leave April 6, 2016.

ISSUE PRESENTED: Whether the court erred in conducting a PRS Garner/Sparber resentencing in defendant's absence, even though the court let the original determinate sentence stand with no PRS. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Jeffrey Bryant

AD1 order dated March 1, 2016, modifying judgment by reducing sentence as excessive. Decision below: 137 A.D.3d 401, 26 N.Y.S.3d 58. Tom, J. (AD dissenter), granted leave to People May 10, 2016. (SSM.)

ISSUE PRESENTED: Whether the Appellate Division correctly found the appeal waiver invalid, where the plea court merely explained that "as part of the guilty plea," defendant was waiving his right to appeal. (Assigned counsel for defendant: David Klem & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. David Lofton

AD4 order dated October 2, 2015, modifying the judgment of conviction. Decision below: 132 AD3d 1242, 17 NYS 3d 523. Abdus-Salaam, J., granted leave May 16, 2016.

ISSUE PRESENTED: Whether the sentencing court's statements satisfied the requirement (People v. Middlebrooks, 25 NY3d 516) that the court consider YO treatment.

People v. Brian Degraffenreid

AD1 order dated April 7, 2016, affirming judgment of conviction. Decision below: 138 AD3d 456, 29 NYS3d 301. Tom, J. (AD dissenter), granted leave May 31, 2016. (SSM.)

ISSUES PRESENTED: (1) Whether defense counsel was ineffective for formulating the defense around videotape footage that he did not carefully review, and which, when viewed by the deliberating jury, fatally undercut the defense. (2) Whether the court's jury instructions on causation, by conflating distinct CJI instructions for homicide and assault, allowed the jury to find appellant guilty of first-degree manslaughter merely by finding that he caused physical or serious physical injury. (Assigned counsel: Barbara Zolot & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.) (Leave also granted to co-defendant Elmer Castillo.)

People v. Brian Novak

Schenectady County Court order dated January 23, 2015, affirming judgment of conviction. Rivera, J., granted leave May 16, 2016

ISSUES PRESENTED: (1) Whether the judge who presided over the defendant's bench trial may sit on the panel that decides his appeal. (2) Whether a prosecutor's information may supercede a simplified traffic information. (3) More.

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People v. Robert Perry

AD2 order dated April 6, 2016, affirming denial of CPL 440.30 motion for DNA testing without a hearing. Decision below: 138 AD3d 763, 27 NYS3d 888. DiFiore, Ch. J., granted leave June 16, 2016.

ISSUES PRESENTED: (1) Whether defendant met the “reasonable probability” standard for DNA testing (CPL 440.30 [1-a]). (2) Whether the motion court may consider evidence outside of the trial record. (Assigned counsel: Seymour W. James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Natalio Pastor

AD1 order dated February 11, 2016, affirming judgment of conviction. Decision below: 136 A.D.3d 493, 25 NYS3d 160. Manzanet-Daniels, J. (AD dissenter), granted leave July 28, 2016.

ISSUES PRESENTED: (1) Whether defense counsel’s statement during the plea colloquy that immigration-concerns were irrelevant to the defendant (an undocumented alien), rendered his plea unknowing and involuntary. (2) The sentencing court’s failure to ask defendant about a possible justification defense mentioned in the presentence report. (Assigned counsel: Robin Nichinsky & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Mario Arjune

AD2 order dated April 13, 2016, denying writ of error coram nobis to reinstate dismissed appeal based upon ineffective assistance of trial counsel. Decision below: 138 AD3d 877, 28 NYS3d 329. Fahey, J., granted leave July 13, 2016.

ISSUE PRESENTED: Whether a writ of error coram nobis, alleging ineffective assistance of counsel depriving a defendant of his right to appeal, lies against trial counsel for - - after filing a notice of appeal - - failing to advise his client about his right to appeal or explain how to get appellate counsel assigned, thus resulting in the eventual dismissal of the appeal for failure to prosecute. (Here, retained counsel filed a

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notice of appeal on behalf of his intellectually disabled and now-indigent client, but did nothing more - he did not advise his client of his right to poor person relief or to counsel, nor explain how to go about obtaining either, and he did not advise him of the benefits of appealing and consequences of failing to do so. When the People moved to dismiss for failure to perfect, counsel neglected to take any action although he had been served with their motion and thus must have known the appeal would likely be dismissed.) (Assigned counsel for petitioner: Jenin Younes & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Albert Edward

AT1 order dated March 22, 2016, affirming judgment of conviction. Decision below: 51 Misc. 3d 36, 29 NYS3d 82. DiFiore, Ch. J., granted leave July 13, 2016.

ISSUE PRESENTED: Whether the allegations in the accusatory instrument charging defendant with fourth-degree weapon possession (PL 265.01 [2]) (possession of a “dangerous knife” with intent to use unlawfully) were legally insufficient where defendant possessed a “box cutter” that he said he used on the train for protection. (Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Mary Ann Grady Flores

Onondaga County Court order dated January 8, 2016, modifying judgment by reducing the sentence and otherwise affirming the judgment of conviction. Fahey, J., granted leave June 23, 2016.

ISSUES PRESENTED: (1) The order of protection (to stay away from a base commander) as predicate for criminal contempt charge against an anti-drone protestor on a driveway outside an air base, a training center for drone pilots. (2) Whether the court erred in responding to a jury question.

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People v. Douglas McCain

AT2 order dated December 31, 2015, affirming judgment of conviction. Decision below: 50 Misc. 3d 132(A), 2015 WL 9694118. Stein, J., granted leave August 5, 2016.

ISSUE PRESENTED: Whether the misdemeanor complaint was jurisdictionally defective, in charging PL 265.01 (2) (possession of a dangerous knife with intent to use unlawfully), when it alleged that defendant possessed a “razor knife” clipped to his pants pocket and told the arresting officer he possessed the knife “for protection”; the Appellate Term’s use of the presumption in PL 265.15 (4) to sustain the count.

People v. Michael Johnson

AD2 order dated May 18, 2016, affirming judgment of conviction. Decision below: 139 AD3d 967, 34 NYS3d 62. Hall, J. (AD dissenter), granted leave August 5, 2016.

ISSUES PRESENTED: (1) Whether the defendant’s post-arrest statements were voluntary, even though there was a 33-hour delay between arrest and arraignment, where the People produced no evidence that defendant was provided with food, water, or bathroom access during this period. (2) The denial of a missing witness charge as to the complainant’s son, an eyewitness. (3) The denial of a mistrial in response to improper testimony. (4) Delayed disclosure of Rosario material. (Assigned counsel: De Nice Powell & Lynn W.L. Fahey, Appellate Advocates, 111 John Street, 9<sup>th</sup> Floor, NYC 10038.)

People v. Dennis O’Kane

Albany County Court order dated September 14, 2015, reversing judgment of conviction. Abdus-Salaam, J., granted leave August 1, 2016.

ISSUES PRESENTED: (1) Whether trial counsel was ineffective for consenting to annotations on the verdict sheet, resulting in reversible error. (2) Whether County Court properly reached the issue sua sponte.

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**IV. New Leave Grants**

People v. Marlo S. Helms

AD4 order dated July 8, 2016, modifying judgment by striking down defendant's sentence as a second felony offender and otherwise affirming. Decision below: 141 A.D.3d 1138, 35 NYS3d 817. Curran, J. (AD dissenter), granted leave to People August 10, 2016.

ISSUE PRESENTED: Whether the Appellate Division correctly held that defendant was not a second felony offender based upon a predicate Georgia burglary conviction in that the Georgia statute did not have the "knowing" scienter element in it. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Dwight Smith

AD1 order dated August 25, 2016, reversing judgment of conviction and dismissing the indictment with leave to re-present. Decision below: 143 AD3d 31, 37 NYS3d 4. Kapnick, J. (AD dissenter), granted leave to People September 29, 2016.

ISSUES PRESENTED: (1) The validity of the appeal waiver; (2) Whether the complete denial of the defendant's requests for a lawyer during pretrial proceedings concerning a DNA test violated defendant's right to counsel; (3) Dismissal of the indictment as the proper remedy. (Assigned counsel for defendant: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)