

# CENTER FOR APPELLATE LITIGATION

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## MEMORANDUM

**To:** Chief Defender & Colleague

**From:** Bob Dean

**Date:** May 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 are excited to offer a new feature to our online visitors. Our online Court of Appeals Update (resources link) now 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. Anthony Parson, Jr

AD4 order dated November 21, 2014, affirming judgment of conviction. Decision below: 122 AD3d 1441, 997 NYS2d 198. Fahey (AD dissenter), J., granted leave January 21, 2015. Argued April 26, 2016.

ISSUE PRESENTED: Whether counsel was ineffective at the suppression hearing for failure to mount a more vigorous challenge to the propriety of the car stop. (Assigned counsel: David C. Schopp, The Legal Aid Bureau of Buffalo, Inc., 237 Main St., Suite 1602, Buffalo, NY 14203.)

People v. Terrance L. Mack

AD4 order dated May 2, 2014, reversing judgment of conviction. Decision below: 117 AD3d 1450, 984 NYS2d 768. Lindley, J. (AD dissenter), granted leave to People June 30, 2014. Argued April 26, 2016 (reargument).

ISSUE PRESENTED: Whether the trial court's acceptance of a jury verdict without first responding to three jury notes was a mode-of-proceedings error requiring reversal despite the lack of an objection. (Assigned counsel for defendant: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Ronald D. Rossborough

AD4 order dated January 3, 2014, affirming judgment of conviction. Decision below: 101 AD3d 1775, 956 NYS2d 389. Smith, J., granted leave September 24, 2014. Argued April 26, 2016.

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ISSUES PRESENTED: (1) The validity of defendant's waiver of his right to be present at sentencing. (2) Whether defendant's waiver of his right to appeal forfeits his claim that the court erred in sentencing him in absentia.

People v. Martesha Davidson

Tompkins County Court order dated March 10, 2015, reversing dismissal of accusatory instrument. Read, J., granted leave June 10, 2015. Argued April 26, 2016.

ISSUE PRESENTED: Whether the special prosecutor of the NYS Justice Center (Exec. Law §552) is authorized to prosecute cases of abuse and neglect of vulnerable persons by their caregivers in NY's local criminal courts.

People v. Leroy Carver

AD4 order dated January 2, 2015, affirming judgment of conviction. Decision below: 124 AD3d 1276, 999 NYS2d 632. Whalen, J. (AD dissenter), granted leave March 17, 2015. Argued April 26, 2016.

ISSUE PRESENTED: Whether counsel was ineffective for failing to make a suppression motion in a traffic-stop case. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Scott Barden

AD1 order dated April 10, 2014, modifying judgment of conviction. Decision below: 117 AD3d 216, 983 NYS2d 534. Pigott, J., granted leave September 23, 2014. Argued April 27, 2016 (reargument).

ISSUES PRESENTED: (1) Whether a defendant may be guilty of fourth-degree criminal possession of stolen property for possessing intangible property, i.e., a credit card number, where the rightful owner retains physical possession of the card. (2) CPL §30.30: When the prosecutor states they are not ready and asks for an adjournment, does defense counsel "consent" to the adjournment by proposing an alternate date.

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(Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Baasil Reynolds

AD1 order dated May 8, 2014, affirming judgment of conviction. Decision below: 117 AD3d 478, 985 NYS2d 83. Rivera, J., granted leave April 2, 2015. Argued April 27, 2016.

ISSUES PRESENTED: (1) The legality of a plea agreement whereby defendant agreed to a further 6-month incarceration prior to sentencing. (2) The sufficiency of the Outley hearing. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Glenford C. Hull

AD3 order dated February 19, 2015, affirming judgment of conviction. Decision below: 125 AD3d 1099, 4 NYS3d 623. Lynch (AD dissenter), J., granted leave March 26, 2015. Argued April 28, 2016.

ISSUES PRESENTED: (1) Whether first-degree manslaughter was properly charged, over defense objection, as a lesser included offense to second-degree murder; whether there was a reasonable view of the evidence that defendant intended to seriously injure, rather than kill, the deceased. (2) Sufficiency of inquiry into juror misconduct. (3) The People's use of prior testimony to impeach their own witness. (4) Refusal to give a circumstantial evidence charge. (Assigned counsel: Jonathan I. Edelstein, c/o Edelstein & Grossman, 501 Fifth Avenue, Suite 514, NYC 10017.)

People v. Perry C. Griggs

AD4 order dated May 9, 2014, affirming judgment of conviction. Decision below: 117 AD3d 1523, 985 NYS2d 369. Pigott, J., granted leave January 27, 2015. Argued May 3, 2016.

ISSUES PRESENTED: (1) The sufficiency of the trial evidence that the defendant forcibly stole property from the victim while using a gun. (2)

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Whether defendant's sentence was properly enhanced pursuant to PL §60.07 (attack on for-hire vehicle operator). (3) Whether the grand jury proceeding was defective because defendant was shackled during his testimony, or because the prosecutor failed to inform the grand jury of the defendant's request to have another witness testify. (Assigned counsel: David C. Schopp, The Legal Aid Bureau of Buffalo, Inc., 237 Main Street, Suite 1602, Buffalo, N.Y. 14203.)

People v. Gary Wright

AD3 order dated June 11, 2015, affirming denial of CPL 440.10 motion without a hearing. Decision below: 129 AD3d 1217, 13 NYS3d 578. Fahey, J., granted leave November 4, 2015. Argued May 4, 2016.

ISSUES PRESENTED: Defendant alleged in a CPL 440.10 motion that one of his trial attorneys was conflicted, and thus ineffective, because he was also representing the District Attorney in an election-law matter. (1) Whether there was evidence that the attorney was representing the District Attorney at the same time he was representing defendant, and, (2) if so, did the conflict "operate" since the attorney's representation ended two months before the start of defendant's trial. (3) Whether the 440 motion court was required to disqualify the District Attorney's Office with regard to the motion.

People v. Lennie Frankline

AD1 order dated December 11, 2014, affirming judgment of conviction. Decision below: 123 A.D.3d 504, 1 NYS3d 23. Pigott, J., granted leave May 22, 2015. Argued May 4, 2016.

ISSUE PRESENTED: Evidence of prior assault by defendant on victim to "complete the narrative" and as probative of "motive": whether the attempted murder victim's overly-detailed narrative of the prior assault deprived defendant of a fair trial. (Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

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People v. Anthony Berry

AD1 order dated November 6, 2014, affirming judgment of conviction. Decision below: 122 AD3d 414, 995 NYS2d 70. Rivera, J., granted leave April 2, 2015. Argued May 5, 2016.

ISSUE PRESENTED: Whether a conviction for unlawful dealing with a child under Penal Law 260.20 (1) can stand when culpability is based solely on the defendant's failure to act, and the defendant has no legal duty to the child. (Assigned counsel: Barbara Zolot and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

**II. Cases Scheduled for Argument**

People v. Glenn S. Smith

AT 9&10 order dated March 10, 2014, reversing judgment of conviction and dismissing the accusatory instrument. Rivera, J., granted leave to People October 6, 2014. To be argued May 31, 2016.

ISSUE PRESENTED: Whether defendant was required to submit an affidavit of errors upon taking an appeal to the Appellate Term, where defendant provided an electronic recording of the underlying proceeding instead of a stenographic transcription as specified in CPL 460.10(3). (Assigned counsel for Respondent: Richard N. Lentino, 138 West Main Street, Middletown, NY 10940.)

People v. Norman E. Ramsey

Washington County Court order dated May 27, 2015, dismissing appeal from judgment of conviction in Village Court. Rivera, J., granted leave October 16, 2015. To be argued May 31, 2016.

ISSUE PRESENTED: Whether, under CPL 460.10(3), defendant was required to submit an affidavit of errors upon taking an appeal to the County Court, where he provided a transcript of the proceeding derived from an audio recording instead of a transcription by a court stenographer.

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(Assigned counsel: Robert N. Gregor, 3 Lake Ave., Lake George, NY 12845.)

People v. Jamell R. McCullough

AD4 order dated March 27, 2015, reversing judgment of conviction. Decision below: 126 AD3d 1452, 5 NYS3d 665. Scudder (AD dissenter), J., granted leave to People May 21, 2015. To be argued May 31, 2016.

ISSUES PRESENTED: (1) Whether the trial court abused its discretion in refusing to allow the defense to call an expert on the reliability of identification testimony. (2) Whether the Appellate Division erred in reversing and granting a new trial rather than remitting for a Frye hearing.

People v. Charles Smith

AD1 order dated November 13, 2014, affirming judgment of conviction. Decision below: 122 AD3d 456, 996 NYS2d 37. Pigott, J., granted leave January 27, 2015. To be argued June 1, 2016.

ISSUES PRESENTED: (1) In an observation-sale case, whether the court improperly precluded defense counsel from cross-examining the observing officers about civil lawsuits filed against them in cases with facts similar to the ones in defendant's case, where the lawsuits were merely pending or had been settled. (2) The denial of a circumstantial evidence charge, where no drugs were observed exchanged, but a glassine was found upon the alleged buyer. (Assigned counsel: Claudia Flores & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Tyrell Ingram

AD1 order dated February 24, 2015, affirming judgment of conviction. Decision below: 125 AD3d 558, 5 NYS3d 376. Read, J., granted leave August 14, 2015. To be argued June 1, 2016.

ISSUE PRESENTED: Whether the trial court correctly precluded defense counsel from cross-examining a police officer witness about unrelated federal civil rights lawsuits in which the officer was named as a defendant.

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(Assigned counsel: Stanley E. Neustadter, Cardozo Law School, Criminal Appeals Clinic, 55 Fifth Avenue, NYC 10003.)

People v. Isma McGhee

AD1 order dated February 24, 2015, affirming judgment of conviction. Decision below: 125 AD3d 537, 4 NYS3d 186. Abdus-Salaam, J., granted leave September 4, 2015. To be argued June 1, 2016.

ISSUES PRESENTED: (1) The court's erroneous ruling deprived appellant of a fair opportunity to test the credibility of the lead investigating detective and the accuracy of his account, by (a) prohibiting defense counsel from cross-examining the detective about the facts underlying three federal false arrest lawsuits brought against him; and (b) ruling that, by impeaching the detective with his sworn statement that it was appellant's brother, not appellant, that had committed two of the sales, the door was opened to evidence of two uncharged sales. (2) Appellant was incorrectly sentenced as a second felony drug offender whose prior conviction was a violent felony, because his prior conviction for criminal possession of a weapon in the third degree, under Penal Law § 265.02(4), is not a violent predicate felony under Penal Law § 70.02(1). (Assigned counsel: Mark W. Zeno & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10006.)

People v. Dennis J. Sincerbeaux

AD4 order dated October 3, 2014, affirming level 3 SORA adjudication. Decision below: 121 AD3d 1577, 993 NYS2d 855. Court of Appeals granted leave February 17, 2015. To be argued June 1, 2016.

ISSUES PRESENTED: (1) Whether points were improperly assessed under risk factor 9 because the defendant's conviction for endangering the welfare of a child was nonsexual in nature. (2) Sufficiency of evidence to support imposition of points under risk factors 1 and 5.



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People v. Dayshawn Crooks

AD3 order dated June 11, 2015, affirming judgment of conviction. Decision below: 129 AD3d 1207, 11 NYS3d 709. Fahey, J., granted leave September 28, 2015. To be argued June 2, 2016.

ISSUE PRESENTED: Whether the motion court correctly decided that a Darden hearing was unnecessary because police surveillance of the two controlled drug transactions provided probable cause for a search warrant independent of any statements made by the CI to the police. (Assigned counsel: Matthew C. Hug, Rensselaer Technology Park, 105 Jordan Road, Troy, NY 12180.)

People v. Sparkle Daniel

AD1 order dated November 6, 2014, reversing judgment of conviction. Decision below: 122 AD3d 401, 996 NYS2d 16. Clark (AD dissenter), J., granted leave to People January 22, 2015. To be argued June 2, 2016.

ISSUE PRESENTED: Whether the defendant's post-Miranda - waiver statements should have been suppressed, since the police gave the warnings only after the interrogation was underway and the defendant had already responded by giving incriminatory statements. (Assigned counsel for Respondent: Seymour James, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Nadine Pantan

AD1 order dated February 6, 2014, modifying judgment of conviction. Decision below: 114 AD3d 450, 979 NYS2d 579. Lippman, Ch.J., granted leave (upon reconsideration) April 8, 2015. To be argued June 2, 2016.

ISSUES PRESENTED: (1) Whether the defendant was interrogated without first being Mirandized. (2) Whether defense counsel was ineffective for failing to preserve a Miranda issue even though counsel for the co-defendant (Sparkle Daniel) preserved the same issue at the joint hearing. (Assigned counsel: Robin Nichinsky and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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**III. Cases Waiting to be Scheduled**

People v. Louis Speaks

AD2 order dated January 14, 2015, affirming judgment of conviction. Decision below: 124 AD3d 689, 1 NYS3d 257. Hall, J. (AD dissenter), granted leave February 26, 2015.

ISSUES PRESENTED: (1) The admission of hearsay police testimony of a non-testifying witness' description of the perpetrator, and of a testifying witness' description. (2) Ineffective assistance of counsel for failure to object to improper comments during the prosecutor's summation. (Assigned counsel: Nao Terai & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Shane Morris

AD2 order dated August 27, 2014, reversing judgment of conviction and ordering a new trial. Decision below: 120 AD3d 835, 991 NYS2d 454. Graffeo, J., granted leave to People November 25, 2014. (SSM.)

ISSUE PRESENTED: Whether the O'Rama holding (78 NY2d 270) should be overruled to the extent that it designates a violation a "mode of proceedings" error. (Assigned counsel for respondent: David P. Greenberg and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Antonio Aragon

AD1 order dated July 29, 2014, affirming a judgment of conviction. Decision below: 44 Misc.3d 140(A), 999 NYS2d 797, 2014 WL 4 099352. Read, J., granted leave February 24, 2015.

ISSUE PRESENTED: Whether the accusatory instrument was facially sufficient where it alleged that police recovered from defendant "one set of brass metal knuckles."

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People v. Steven Henderson

AD2 order dated September 10, 2014, affirming judgment of conviction. Decision below: 120 AD3d 1258, 992 NYS2d 140. Lippman, Ch. J., granted leave March 25, 2015.

ISSUES PRESENTED: (1) CPL 30.30: Whether the People's delay in seeking DNA testing is an exceptional circumstance and thus excludable time. (2) Whether defendant failed to preserve this issue by not doing a reply affirmation. (Assigned counsel: Leila Hull & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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.

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.)

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. (Taken off SSM.)

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)

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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. Nnamdi Clarke

AD2 order dated November 12, 2014, reversing judgment of conviction and dismissing indictment. Decision below: 122 AD3d 765, 995 NYS2d 727. Lippman, Ch. J., granted leave to People March 25, 2015.

ISSUE PRESENTED: CPL §30.30. Whether the People's lack of due diligence in seeking testing of DNA evidence rebutted their claim that the delay was due to "exceptional circumstances" (CPL §30.30 [4] [g]). (Assigned counsel for Respondent: Bill Kastin & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Charles K. Wilson

AD4 order dated September 26, 2014, modifying a judgment of conviction. Decision below: 120 AD3d 1531, 993 NYS2d 200. Pigott, J., granted leave April 23, 2015.

ISSUES PRESENTED: (1) Whether the People should have been precluded from cross-examining defendant with statements taken after he had invoked Miranda, where the police deliberately kept interrogating him to gain impeachment material. (2) Whether the photo identification was rendered suggestive by the inclusion of defendant's photograph in successive arrays.

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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.

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. 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.)

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:

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

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.

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. 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.)

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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 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. Harold L. Petke

AD3 order dated February 19, 2015, reversing judgment of conviction. Decision below: 125 AD3d 1103, 5 NYS3d 532. Read, J., granted leave to People May 11, 2015.

ISSUE PRESENTED: Whether the concededly improper denial of a challenge for cause, followed by counsel's exercise of a peremptory challenge and the exhaustion of defense peremptories, was harmless because (1) the one additional juror selected after the exhaustion did not end up deliberating due to a medical condition, (2) defendant had been given additional peremptory challenges when selecting alternates, and (3) defendant chose not to exercise a peremptory on the alternate who replaced the ill juror.

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.)

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People v. Lyxon Chery

AD1 order dated April 16, 2015, affirming judgment of conviction. Decision below: 127 AD3d 533, 6 NYS3d 252. Fahey, J., granted leave July 13, 2015.

ISSUE PRESENTED: Whether the trial court erred in allowing the People to impeach defendant with omissions from the defendant's spontaneous post-arrest, pre-Miranda statement. (Assigned counsel: Marisa Cabrera & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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.

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.)



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People v. Luis A. Pabon

AD4 order dated March 27, 2015, affirming judgment of conviction. Decision below: 126 AD3d 1447, 7 NYS3d 743. DeJoseph, J. (AD dissenter), granted leave June 10, 2015.

ISSUES PRESENTED: (1) The tolling of the statute of limitations period for sexual offenses against minors. (2) Whether the court's error in allowing a detective to testify that defendant lied to him was harmless. (3) Extrinsic evidence to impeach on a collateral matter. (4) Prosecutorial misconduct on summation. (5) In a bench trial, the court's refusal to "sequester" certain trial "evidence" so as to permit appellate review of his mistrial motion.

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.

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. 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.

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.)

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People v. Herman Bank

AD4 order dated January 2, 2015, affirming judgment of conviction. Decision below: 124 AD3d 1376, 1 NYS3d 687. Lippman, Ch. J., granted leave June 22, 2015.

ISSUE PRESENTED: Whether defendant was deprived of the effective assistance of counsel at the plea negotiations, where counsel misunderstood the law regarding concurrent versus consecutive sentencing and gave incorrect legal advice.

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.

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) Where the Appellate Division modified downward the aggregate sentence on the trial conviction, whether the defendant was entitled to his plea back on a subsequent guilty plea where the promise of concurrent time no longer had the same benefit. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Roy S. Kangas

Oneida County Court order dated February 25, 2015, affirming judgment of conviction. Stein, J., granted leave June 25, 2015.

ISSUE PRESENTED: Whether the trial court erroneously admitted breath test documents into evidence under the business records exception to the rule against hearsay.

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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.

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.)

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.

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. 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.

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

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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. 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.

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 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. Lerio Guerrero

ADI order dated March 24, 2015, affirming judgement of conviction. Decision below: 126 AD3d 613, 3 NYS3d 613. Lippman, Ch. J., granted leave July 24, 2015.

ISSUES PRESENTED: (1) Validity of the DNA indictment and its amendment to add the defendant's name once he was identified 13 years later as the source of the DNA. (2) Whether defendant forfeited this issue by operation of the guilty plea or his appeal waiver.

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

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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., 9th Floor, NYC 10038.)

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.

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.

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. 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.

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.

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(Assigned counsel: Patricia Pazner & Lynn W.L. Fahey, Appellate Advocates, 111 John Street, 9th Floor, 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.

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: Seymor 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.

ISSUES PRESENTED: Whether the child's out-of-court communications, as testified to by her parents, were erroneously 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. Herman H. Bank

AD4 order dated June 12, 2015, modifying judgment of conviction. Decision below: 129 A.D.3d 1445, 12 NYS3d 673. Lippman, Ch. J., granted leave August 13, 2015.

ISSUE PRESENTED: Whether trial counsel provided IAC by (a) raising a hopeless mental-disease-or-defect defense, and then (b) relying on a pharmacological expert witness rather than a psychologist or psychiatrist. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

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People v. Dru Allard

AD2 order dated May 27, 2015, reversing the judgment and dismissing the indictment on CPL 30.30 grounds. Decision below: 128 AD3d 1081, 11 NYS3d 190. Fahey, J., granted leave to People September 3, 2015.

ISSUE PRESENTED: Whether the Appellate Division correctly held that defendant's 30.30 claim was preserved for appellate review, even though the defense failed to submit a reply 30.30 affirmation, since the 30.30 court expressly decided the issue. (Assigned counsel: Joshua Levine & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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.

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.

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.

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.)

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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.

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. 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.

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.)

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



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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. 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.

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. 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.

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.

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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., 9th Floor, 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.

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. 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.

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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) Duplicitous counts. (3) Prosecutorial misconduct during opening and summation. (4) Refusal to give a circumstantial evidence charge.

People v. Larry Brown

ADI order dated April 9, 2015, affirming judgment of conviction. Decision below: 127 AD3d 498, 8 NYS 3d 49. Lippman, Ch. J., granted leave December 29, 2015. (SSM.)

ISSUES PRESENTED: (1) Whether the plea was involuntary when defendant was promised diversion but was rejected through no fault of his own. (2) Whether the Appellate Division can let a guilty plea and sentence stand, even though the plea was premised on the promise of an illegally low sentence, simply by letting the illegally low sentence stand. (Assigned counsel: Claudia Flores & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Cristian Morales

AT 9 & 10 order dated August 10, 2015, dismissing appeal. Pigott, J., granted leave November 30, 2015.

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. 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.

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.)

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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.)

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. 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.

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.)

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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. 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. 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.

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 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. 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

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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 & 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.



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People v. Roni Smith

AD1 order dated October 15, 2015, affirming, on the People's appeal, the granting of defendant's CPL § 440.20 motion. Decision below: 132 AD3d 511, 17 NYS3d 701. Stein, J., granted leave to People February 1, 2016.

ISSUES PRESENTED: (1) Whether a defendant can challenge the People's use of a predicate felony where the conviction violated solely the State, rather than the Federal Constitution. (2) Whether People v. Catu (4 N.Y.3d 242) is grounded in not just the State, but also the Federal, Constitution. (3) Whether Catu should be applied retroactively to invalidate, for use as a predicate, a conviction obtained prior to the Catu decision in 2005. (Assigned counsel for defendant: David J. Klem & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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

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**IV. New Leave Grants**

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.)

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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.

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.)

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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.

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.

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.)

ISSUE PRESENTED: 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. 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)

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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.”

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. Keith Fagan

AD1 order dated December 1, 2015, affirming, on the People’s appeal, the granting of defendant’s CPL § 440.20 motion. Decision below: 134 AD3d 411, 23 NYS3d 3. Pigott, J., granted leave to People April 12, 2016.

ISSUE PRESENTED: Whether Catu should be applied retroactively to invalidate, for use as a predicate, a conviction obtained prior to the Catu decision in 2005. (Assigned counsel for defendant: Barbara Zolot & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)