

# CENTER FOR APPELLATE LITIGATION

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## MEMORANDUM

**To:** Chief Defender & Colleague  
**From:** Bob Dean  
**Date:** September 15, 2017  
**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!

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

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

**I. Cases Awaiting Decision**

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. Argued September 5, 2017.

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. Brian Novak

Schenectady County Court order dated January 23, 2015, affirming judgment of conviction. Rivera, J., granted leave May 16, 2016. Argued September 6, 2017.

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, under CPL 100.50, a prosecutor’s information may supercede a simplified traffic information.

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. Argued September 6, 2017.

ISSUE PRESENTED: Whether the 440 motion, based on lack of jurisdiction, was improperly denied, in that the People failed to seek

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

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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. 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. Argued September 7, 2017.

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. 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. Argued September 12, 2017.

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.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

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. Argued September 12, 2017.

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. 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. Argued September 13, 2017.

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.)

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. Argued September 13, 2017.

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)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

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**II. Cases Scheduled for Argument**

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. To be argued October 10, 2017.

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. 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. Originally argued March 27, 2017. Reargument ordered for October 11, 2017.

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. 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. To be argued October 11, 2017.

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

**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.

**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. To be argued October 12, 2017.

**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 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. Leroy Savage Smith**

AD4 order dated June 10, 2016, affirming judgment of conviction. Decision below: 140 AD3d 1699, 32 NYS3d 538. DiFiore, Ch. J., granted leave September 6, 2016. To be argued October 12, 2017.

**ISSUE PRESENTED:** Whether a trial court may summarily deny a request for new counsel on the eve of trial, or must make a minimal inquiry under *People v Sides* (75 NY2d 822), where defendant alleges

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

ineffective assistance of counsel as the basis for the substitution. Defendant said his attorney failed to contact any of the exculpatory witnesses he named or do any investigation into the assault where he claimed self-defense. Defendant also said that his attorney told him that there was no money to hire and investigator to do so, thus implicating *Hinton v Alabama* (571 US \_\_; 134 S Ct 1081 [2014]). Despite such allegations, the Fourth Department, citing *People v Porto* (16 NY3d 93) found that Mr. Smith “failed to proffer specific allegations of a seemingly serious request that would require the court to engage in a minimal inquiry.” (Assigned counsel: Philip Rothschild, Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202.)

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. To be argued October 12, 2017.

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. 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. Argued April 25, 2017. To be reargued October 17, 2017.

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.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

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. To be argued November 14, 2017.

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.)



**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

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**III. Cases Waiting to be Scheduled**

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.

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. 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.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

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.

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

People v. Jude Francis

AD1 order dated January 27, 2016, affirming SORA risk-level adjudication. Decision below: 137 AD3d 91, 25 NYS 3d 221. Court of Appeals granted leave June 9, 2016.

ISSUE PRESENTED: Whether a defendant's prior YO adjudication may be considered in determining the defendant's SORA risk-level designation. (Assigned counsel: Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Kerri Roberts

AD1 order dated April 7, 2016, modifying judgment of conviction by vacating and dismissing identity theft conviction and otherwise affirming. Decision below: 138 AD3d 461, 29 NYS3d 305. Pigott, J., granted leave to People November 1, 2016.

ISSUE PRESENTED: The sufficiency of the evidence of identity theft, where the defendant used the victim's personal information, but did not assume her identity. (Assigned counsel for defendant: John Vang and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Terri J. Rush

AD4 order dated March 24, 2017, affirming judgment of conviction. Decision below: 148 AD3d 1601, 51 NYS3d 290. Stein, J., granted leave August 7, 2017. (New leave grant.)

ISSUES PRESENTED: (1) Whether the phrase "assumes the identity of another person" is a discrete element of identity theft. (2) Whether the deprivation of a public trial during the seating of the first 21 prospective jurors for voir dire was too trivial to warrant reversal. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

People v. Joseph Sposito

AD3 order dated June 9, 2016, affirming judgment of conviction and denial of CPL 440.30 motion for DNA testing, but reversing denial of IAC-440.10 without a hearing. Decision below: 140 A.D.3d 1308, 32 NYS3d 736. Pigott, J., granted leave November 10, 2016.

ISSUES PRESENTED: (1) Whether trial counsel was ineffective for, inter alia, waiving a Huntley hearing without reviewing the confession. (2) Whether the motion for DNA testing was properly denied.

People v. Reginald Wiggins

AD1 order dated October 6, 2016, affirming judgment of conviction. Decision below: 143 AD3d 451, 39 NYS3d 395. Moskowitz, J. (AD dissenter), granted leave January 3, 2017.

ISSUE PRESENTED: Whether the six-year pre-trial delay deprived the defendant, a teenager incarcerated since age 16 at Rikers Island, of his constitutional right to a speedy trial. (Assigned counsel: Ben Schatz & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Teri W.

AD1 order dated September 29, 2017, affirming judgment of conviction. Decision below: 142 AD3d 924, 37 NYS3d 890. DiFiore, Ch. J., granted leave December 30, 2016.

ISSUE PRESENTED: The defendant was adjudicated a youthful offender for first-degree sexual abuse. Whether the court properly imposed a 10-year term of probation rather than a 5-year term (see People v. Gray, 2 AD3d 275). (Assigned counsel: Seymour James, Jr., Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

People v. Casimiro Reyes

AD2 order dated March 16, 2016, modifying judgment of conviction. Decision below: 137 AD3d 1060, 27 NYS3d 220. Garcia, J., granted leave to People January 25, 2017.

ISSUE PRESENTED: The sufficiency of the evidence of second-degree conspiracy. The Second Department held the evidence insufficient, even though the defendant was present at gang meetings where the plan to commit arson was discussed and knew the details of the plan. (Assigned counsel for the defendant: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Raymond Crespo

AD1 order dated November 10, 2016, reversing judgment of conviction. Decision below: 144 AD3d 461, 40 NYS3d 423. Stein, J., granted leave to People March 6, 2017.

ISSUE PRESENTED: Whether the trial court erred in summarily denying the defendant's unequivocal requests to go pro se, just because they were made after the start of jury selection. (Assigned counsel for defendant: Ben Schatz and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Matthew Kuzdzal

AD4 order dated November 18, 2016, reversing judgment of conviction. Decision below: 144 AD3d 1618, 42 NYS3d 507. Peradotto, J. (AD dissenter), granted leave to People February 16, 2017.

ISSUE PRESENTED: Whether the trial court erred in summarily refusing to make inquiry of two jurors overheard making disparaging comments about the defendant during a court recess.

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

People v. Twanek Cummings

AD1 order dated December 8, 2016, affirming judgment of conviction. Decision below: 145 AD3d 490, 43 NYS3d 293. Fahey, J., granted leave March 31, 2017.

ISSUE PRESENTED: Whether the substituted trial judge not only lacked the power to overrule his predecessor in admitting a hearsay accusation against appellant, but whether the substituted judge's ruling that the hearsay qualified as an excited utterance constituted error - which, in the context of this circumstantial case on the perpetrator's identity, warrants reversal of the judgment. (Assigned counsel: Susan Salomon and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. William Harris

AT2 order dated November 28, 2016, affirming judgment of conviction. Decision below: 53 Misc.3d 153 (A), 2016 WL 7164870. Fahey, J., granted leave March 13, 2017.

ISSUE PRESENTED: Whether the court's refusal to allow summations at the conclusion of a bench trial in a local criminal court (CPL §350.10 (3)(c)) violated the defendant's right to the effective assistance of counsel and the right to present a defense.

People v. Spence Silburn

AD2 order dated December 14, 2016, affirming judgment of conviction. Decision below: 145 AD3d 799, 43 NYS3d 461. Stein, J., granted leave March 20, 2017.

ISSUES PRESENTED: (1) Whether the trial court violated defendant's right to self-representation by denying his request to proceed pro se with standby counsel. (2) Whether the trial court properly denied the admission of defendant's psychiatric history into evidence, on the ground that no notice of his intent to present psychiatric evidence had been filed (CPL §250.10), even though defendant sought to introduce such evidence solely to show that defendant's statements to the police

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

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were not knowing and voluntary. (Assigned counsel: Alexis A. Ascher & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Akeem Wallace

AD4 order dated February 10, 2017, affirming judgment of conviction. Decision below: 147 AD3d 1494, 47 NYS3d 603. Lindley, J. (AD dissenter), granted leave February 10, 2017.

ISSUE PRESENTED: Whether the “place of business” exception of PL §265.03(3) should apply to a McDonald’s restaurant manager who brought an unlicensed handgun to work and accidentally shot himself in the leg, in a situation where employees were prohibited from bringing firearms to work.

People v. Bryan Henry

AD2 order dated November 16, 2016, modifying judgment of conviction by reversing conviction for murder and related counts, suppressing statements to law enforcement related to the murder, and ordering a new trial on those counts, while affirming on a fifth-degree marijuana possession count. Decision below: 144 AD3d 940, 41 NYS3d 527. Stein, J., granted leave to People April 13, 2017.

ISSUES PRESENTED: (1) Where defendant was represented by counsel on a marijuana possession charge, whether the suppression of a subsequent statement to police when he was later arrested on a related matter (robbery) could be reviewed by the Appellate Division. (It said no, citing People v. Concepcion, 17 NY3d 192.) And (2), whether, since the uncounseled interrogation of defendant about the robbery was improper, the interrogation about a murder related to the robbery must be suppressed. (The Appellate Division yes, citing People v. Grant, 91 NY2d 989.) (Assigned counsel for defendant: Judah Maltz, 125-10 Queens Blvd., Suite 12, Kew Gardens, NY 11415.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

People v. Sergey Aleynikov

AD1 order dated January 24, 2017, reversing order setting aside the guilty verdict for the unlawful use of scientific material (PL §165.07). Decision below: 148 AD3d 77, 48 NYS3d 9. Fahey, J., granted leave April 20, 2017.

ISSUE PRESENTED: Sufficiency of the evidence. Defendant created a digital copy of his employer’s secret high frequency source code and saved it to a German server, and shared it with a new employer, a potential competitor. Did he make a “tangible reproduction or representation” of the code, despite the fact that the reproduction remained digital and was not reduced to paper? The Appellate Division said yes. Did he intend to “appropriate” the property by “permanently” exercising control over it, as opposed to merely borrowing it? The Appellate Division said yes.

People v. Saylor Suazo

AD1 order dated January 3, 2017, affirming judgment of conviction. Decision below: 146 AD3d 423, 45 NYS3d 31. DiFiore, Ch.J., granted leave June 15, 2017.

ISSUE PRESENTED: Whether defendant was entitled to jury trial, under the 6th Amendment and the New York State Constitution, even though charged with a Class B misdemeanor, since conviction would result in deportation, making the charge a “serious” one. (Assigned counsel: Mark Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Brian Hakes

AD3 order dated October 20, 2016, reversing probation revocation, and remanding. Decision below: 143 AD3d 1054, 39 NYS3d 299. DiFiore, Ch.J., granted leave to People April 21, 2017.

ISSUE PRESENTED: Whether County Court had the authority to require defendant to pay for an electronic monitoring program (SCRAM bracelet) as a condition of his probation. (Assigned counsel for



**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

defendant: Kathryn Friedman, C/O The Sage Law Firm Group, P.O. Box 200, 465 Grant Street, Buffalo, N.Y. 14213).

People v. John Simmons

AD4 order dated April 28, 2017, affirming judgment of conviction. Decision below: 149 AD3d 1464, 52 NYS3d 762. Lindley, J. (AD dissenter), granted leave May 23, 2017.

ISSUE PRESENTED: Search & Seizure: Does grabbing one's waistband alone, without any other evidence that there is an object in the waistband, provide a "founded suspicion that criminal activity is afoot" so as to justify a level-two DeBour intrusion? (Assigned counsel: David C. Schopp, Legal Aid Bureau of Buffalo, Inc., 290 Main Street, Suite 350, Buffalo, NY 14204.)

People v. Frederick Diaz

AD1 order dated April 13, 2017, reversing SORA level-three risk adjudication and annulling the sex-offender adjudication. Decision below: 150 AD3d 60, 50 NYS3d 388. Court of Appeals granted leave to People June 27, 2017.

ISSUES PRESENTED: Defendant had a 1989 Virginia murder conviction for killing his 13 year old sister, a crime for which there was no sexual component. After being paroled, he was required to register in Virginia under its "Sex Crimes & Crimes Against Minors Registry Act." Upon his move to New York, where only sex offenders have to register, was he required to be adjudicated a sex offender? (Assigned counsel for defendant: Abigail Everett & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Donald Odum

AT1 order dated December 23, 2016, affirming suppression of evidence of refusal to take a breathalyser test and the subsequent test results. Decision below: 54 Misc. 3d 128(A); 2016 WL 7434671. Fahey, J., granted leave to People June 13, 2017.

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

**ISSUE PRESENTED:** Whether the defendant's consent to take the breathalyzer test was involuntary, where the officer inaccurately told the defendant that if he refused to take the test, then his license would be suspended and his refusal would be used against him in court; more than two hours has passed since the defendant's arrest when this warning was given. (Assigned counsel: V. Marika Meis, The Bronx Defenders, 360 East 161st Street, Bronx, N.Y. 10451).

**Matter of Gonzalez v. Annucci**

AD3 order dated March 23, 2017, reversing, in part, dismissal of Article 78 petition brought by sex offender kept in prison beyond his CR date, based on SARA restrictions. Decision below: 149 AD3d 256, 50 NYS3d 597. Cross-appeals. Court of Appeals granted leave to petitioner June 22, 2017; appeal taken as of right by respondent Annucci, by virtue of two-judge dissent.

**ISSUES PRESENTED:** (1) Whether DOCCS has a responsibility to substantially assist inmate, prior to release to the community, in obtaining SARA-compliant RTF housing. (2) Whether the question was mooted out by inmate's ultimate release. (Assigned counsel for Gonzalez: Abigail Everett & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

**People v. Theodore Wilson**

AD2 order dated February 1, 2017, affirming judgment of conviction. Decision below: 147 AD3d 793, 45 NYS3d 800. Rivera, J., granted leave June 20, 2017.

**ISSUES PRESENTED:** (1) The sufficiency of the evidence of depraved indifference. (2) The court's response to a jury note. (Assigned counsel: Mark W. Vorkink & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

---

**IV. New Leave Grants**

People v. Princesam Bailey

AD1 order dated March 21, 2017, affirming judgment of conviction. Decision below: 148 AD3d 547, 50 NYS3d 53. Fahey, J., granted leave June 29, 2017.

ISSUES PRESENTED: (1) Whether a juror who yelled at defense counsel for using a racial epithet as a strategy in cross-examination rendered the juror “grossly unqualified,” and whether the court should have made an individual inquiry of the juror. (2) The admission of extensive gang-related testimony. (Assigned counsel: Christina Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Ali Cisse

AD1 order dated April 6, 2017, affirming judgment of conviction. Decision below: 149 AD3d 435, 53 NYS3d 614. Fahey, J., granted leave August 23, 2017.

ISSUES PRESENTED: Rikers Island phone calls: (1) Did the introduction of wiretapped Rikers calls violate state and federal wiretapping laws [18 USC 2511, PL 250.05] because (a) notice of wiretapping does not equal “consent” to wiretapping, and (b) a person does not “consent” to wiretapping if he is not informed that the calls will be turned over to the prosecutor. (2) Did the Rikers statement constitute “interrogation” since the defendant, isolated on the island, had only one communication option with family and friends - - a “tapped” call, or was it “involuntary” (CPL 60.45[2]) since his ability to make a choice whether to speak was undermined by lack of alternatives (3) Was the trial court allowed to accept a partial verdict absent a “declaration” from the jury that it had reached one (CPL 310.70 [1]). (Assigned counsel: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

**COURT OF APPEALS UPDATE - September 15, 2017**  
**Center for Appellate Litigation**

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People v. Emmanuel Diaz

AD2 order dated April 19, 2017, affirming judgment of conviction. Decision below 149 AD3d 974, 53 NYS3d 94. Hall, J. (AD dissenter), granted leave August 3, 2017. (SSM.)

ISSUES PRESENTED: (1) Rikers calls- Whether defendant's calls from Rikers Island were improperly admitted into evidence in the absence of his consent to release the recordings to the prosecution. (2) IAC on the grounds that defense counsel failed to request the affirmative defense to first-degree robbery. (Assigned counsel: Dina Zloczower & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Steven Myers

AD4 order dated December 23, 2016, affirming judgment of conviction. Decision below: 145 AD3d 1596, 45 NYS3d 745. Rivera, J., granted leave July 28, 2017.

ISSUE PRESENTED: Whether the waiver of indictment was valid in the absence of an on-the-record colloquy in open court, since the court's written order approving the waiver stated that defendant had executed it in open court.