

CENTER FOR APPELLATE LITIGATION

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MEMORANDUM

To: Chief Defenders & Colleagues
From: Barbara Zolot
Date: September 15, 2023
Subject: Attached

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

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

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

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

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CRIMINAL CASES CURRENTLY PENDING IN
THE NEW YORK COURT OF APPEALS

I. Cases Awaiting Decision

People v. Pablo Pastrana

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

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

People v. Sebastian Telfair (taken off SSM)

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

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

People v. Jose M. Rivera

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

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

People v. Ramon Cabrera

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

ISSUES PRESENTED: (1) Whether, upon seizing the defendant and handcuffing him purportedly for their safety, the police were required to administer *Miranda* warnings before asking whether he had firearms in his car. Bruen issues: (2) Whether, in light of *Bruen*, the police lacked reasonable suspicion to seize and arrest the defendant where he had an out-of-State license for the guns in his trunk. (3) Whether the defendant's conviction must be reversed and dismissed as unconstitutional in light of *Bruen*. (4) Whether, in light of *Bruen*'s holding placing in-home possession on the same constitutional footing as public carry, the sentencing disparities the Penal Law draws between in-home possession and public carry are unconstitutional and render the sentence for possession of a loaded firearm outside home or place of business illegal. (Assigned counsel: Barbara Zolot and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. George Garcia

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

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

People v. Carlos L. David

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

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

People v. Rakeem Douglas

AD1 order dated April 27, 2021, affirming judgment of conviction. Decision below: 193 AD3d 622, 142 NYS3d 813. Fahey, J., granted leave August 24, 2021. Argued September 14, 2023 (previously argued September 14, 2022; reargument ordered).

ISSUE PRESENTED: Whether the police conducted a valid inventory search of the defendant's car, in that the search was made pursuant to an NYPD procedure that did not sufficiently cabin the officer's discretion. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Sergio Cerda

AD2 order dated March 24, 2021, affirming judgment of conviction. Decision below: 192 AD3d 1041, 141 NYS3d 319. Rivera, J., granted leave July 13, 2021. Argued September 14, 2023 (previously argued May 19, 2022; reargument ordered).

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ISSUE PRESENTED: Whether the trial court erred in applying the Rape Shield Law (PL 60.42) to exclude evidence (portions of a lab report) supporting an alternative explanation for the complainant's injuries.

Matter of Stevens v. NYSDCJS

AD1 order dated May 5, 2022, reversing denial of Article 78 petition. Decision below: 206 A.D.3d 88, 169 NYS3d 1. COA jurisdiction based on two-judge dissent.

ISSUES PRESENTED: (1) Whether petitioners, relatives of persons whose genetic profiles are in the New York State DNS database, have standing to challenge regulations adopted by respondents governing familial DNA searches; (2) whether respondents exceeded their authority in promulgating familial DNA search regulations. (Counsel: Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166-0193.)

II. Cases Scheduled for Argument

People v. Yoselyn Ortega

AD1 order dated February 8, 2022, affirming judgment of conviction. Decision below: 202 AD3d 489, 162 NYS3d 347. Garcia, J., granted leave June 1, 2022. Scheduled for argument October 17, 2023 at 2 pm.

ISSUE PRESENTED: Whether the introduction of the non-testifying medical examiner's autopsy reports and testimony of an expert witness based upon those reports, violated the defendant's constitutional right to confrontation. (Assigned counsel: Abby Everett and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Donna Jordan

AD2 order dated January 26, 2022, affirming judgment of conviction. Decision below: 201 AD3d 946, 160 NYS3d 117. Troutman, J., granted leave July 21, 2022. Scheduled for argument October 17, 2023 at 2 pm.

ISSUES PRESENTED: (1) What must the People elicit from a testifying criminalist to satisfy their burden of establishing that the criminalist conducted an independent analysis of the raw DNA testing data? (2) After successfully keeping out evidence that the defendant had consistently said prior to trial that a certain third party was the actual perpetrator, the ADA argued on summation

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that this person was “created” by the defendant and did not exist, and that the defendant tailored her trial testimony about this third person to what she had heard over the course of the trial. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Jorge Espinosa

AD2 order dated July 20, 2022 affirming judgment of conviction. Decision below: 207 A.D.3d 655 (2d Dep’t 2022). Rivera J. granted leave on November 3, 2022. Scheduled for argument October 17, 2023 at 2 pm.

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

People v. Lance Rodriguez

AD2 order dated May 19, 2021, affirming judgment of conviction. Decision below: 194 AD3d 968, 147 NYS3d 678. Fahey, J., granted leave May 19, 2021. Scheduled for argument October 18, 2023 at 2 pm (previously argued November 16, 2022; reargument ordered).

ISSUE PRESENTED: Whether a police investigative stop of a moving bicyclist on a public road is a *De Bour* level 3 seizure requiring reasonable suspicion. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Marcus Brown

AD2 order dated March 30, 2022, affirming an order designating the defendant as a level one sex offender. Decision below: 203 AD3d 1183, 163 NYS3d 440. Court of Appeals granted leave July 21, 2022. Scheduled for argument October 19, 2023 at 2 pm.

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

People v. Tramel Cuencas

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AD2 order dated December 30, 2021, affirming judgment of conviction. Decision below: 192 AD3d 109, 138 NYS3d 584. Chambers, J. (AD decision author), granted leave May 7, 2021. Scheduled for argument October 19, 2023 at 2 pm (previously argued September 14, 2022; reargument ordered).

ISSUES PRESENTED: (1) Whether officers violated defendant's right to counsel by going to his residence for the sole purpose of making a warrantless arrest, absent exigent circumstances, so as to avoid triggering defendant's right to counsel; (2) whether the second-floor-apartment resident of a two-family residence tacitly consented to the police entry into the residence so that defendant could be arrested inside his first-floor apartment. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Anthony Debellis

AD1 order dated May 19, 2022, affirming judgment of conviction.. Decision below: 205 AD3d 555, 166 NYS3d 535. Rivera, J., granted leave August 8, 2022. Scheduled for argument October 19, 2023 at 2 pm (previously argued March 16, 2023; reargument ordered).

ISSUES PRESENTED: (1) Whether trial defense counsel was ineffective for conceding guilt of weapon possession while pursuing a baseless defense of temporary innocent possession of a weapon and failing to pursue the only applicable defense of voluntary surrender. (2) Whether counsel was conflicted at sentencing due to his taking a position adverse to his client's pro se CPL 330.30 motion alleging ineffective assistance of counsel. (Assigned counsel: Matt Bova and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

November Term arguments will be held in Buffalo, at Old County Hall, 92 Franklin Street. Note also that starting times of arguments differ from the usual 2 pm.

People v. Thomas J. Perdue

AD4 order dated March 11, 2022, affirming judgment of conviction. Decision below: 203 AD3d 1638, 163 NYS3d 737. Rivera, J., granted leave June 17, 2022. Scheduled for argument November 14, 2023 at noon (previously argued March 16, 2023; reargument ordered).

ISSUES PRESENTED: (1) Whether the court properly allowed the People's witness to identify the defendant at trial for the first time, where there had been no pretrial identification procedure. (2) Whether the trial court properly ruled that the defendant "opened the door" to the People's witness's redirect

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testimony. (Assigned counsel: Mark Funk, Monroe County Conflict Defender, 80 West Main Street, Suite 300, Rochester, N.Y. 14614.)

People v. Michael Bay

Cortland County Court order dated March 15, 2022, affirming judgment of conviction. Decision below: 2022 WL 19331926 (Cortland Co. 2022). Troutman, J., granted leave on February 15, 2023. Scheduled for argument November 15 at 1 pm.

ISSUES PRESENTED: (1) Whether the People’s certificate of compliance was invalid under CPL 30.30(1) because it was filed before disclosure of all of the discovery required under CPL 245.50; (2) whether CPL 245.50 precludes finding an illusory statement under CPL 30.30(1) based on a discovery violation; (3) whether, in response to a CPL 30.30(1) motion to dismiss based on a discovery violation, the court may issue a discovery sanction under CPL 245.80 in lieu of dismissal. (Assigned counsel: Cortland County Public Defender, 60 Central Avenue, Cortland, NY 13045.)

People v. Kevin Sullivan

Erie County Court order dated February 6, 2023, reversing dismissal of charges on 30.30 grounds and reinstating charges. Decision below: not officially reported. Troutman, J., granted leave on July 5, 2023. Scheduled for argument November 15 at 1 pm.

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

In the Matter of Appellate Advocates v. DOCCS (taken off SSM)

AD3 order dated March 3, 2022, affirming an order of the Supreme Court, Albany County, denying petitioner Appellate Advocates’ article 78 petition. Decision below: 203 A.D.3d 1244, 163 NYS 3d 314. COA jurisdiction based on two-justice dissent. Scheduled for argument November 15 at 1 pm.

ISSUE PRESENTED: Whether certain documents requested by petitioner under the Freedom of Information Law that relate to how the Board of Parole determined applications for parole release were properly withheld as protected under the attorney-client privilege. (Counsel: Ron Lazebnik, Lincoln Square Legal Services, Inc., 150 West 62nd Street, 9th Floor, New York, NY 10023.)

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

AD1 order dated May 20, 2021 affirming judgment of conviction. Decision below: 196 A.D.3d 28 (3rd Dep't 2021). Leave granted by dissenting judge. Scheduled for argument November 16, 2023 at 1 pm.

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

People v. Joshua Messano

AD4 order dated February 10, 2023, affirming judgment of conviction. Decision below, 213 A.D.3d 1307, 183 NYS3d 217. Leave granted by dissenting judge. Scheduled for argument November 16 at 1 pm.

ISSUES PRESENTED: (1) Whether police officers had reasonable suspicion to detain defendant; (2) whether there was probable cause to arrest defendant for drug possession. (Assigned counsel: Philip Rothschild, Esq., Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202-2057.)

III. Cases Waiting to be Scheduled

People v. Nathaniel Boone

AD1 order dated February 3, 2022. Decision below: 202 AD3d 449, 158 NYS3d 579. Court of Appeals granted leave May 24, 2022.

ISSUE PRESENTED: Whether the SORA hearing court lacked subject matter jurisdiction to conduct a risk-level hearing where the defendant was no longer scheduled to be released to the community due to the commencement of civil commitment proceedings against him. (Assigned counsel: Nicole Geoglis and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.) (See also People v. Albert Cotto and People v. Jean Dufresne, raising similar issues).

People v. Albert Cotto

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

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ISSUE PRESENTED: Whether the SORA hearing court abused its discretion or otherwise erred as a matter of law when it denied defendant's request for an adjournment of the SORA hearing pending the outcome of an evaluation by a case review team under Mental Hygiene Law 10.05(e) as to whether he is a sex offender requiring civil management pursuant to Mental Hygiene Law article 10. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Jean Dufresne (SSM)

AD1 order dated October 18, 2022 affirming an order designating the defendant as a level 3 sexually violent predicate sex offender. Decision below: 209 AD3d 541. Court of Appeals granted leave on December 13, 2022.

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

People v. Jayquaine Seignious (People's appeal)

AD1 order dated February 10, 2022, modifying judgment of conviction by dismissing one count and otherwise affirming. Decision below: 202 AD3d 511, 162 NYS3d 358. Singas, J., granted leave to People May 31, 2022.

ISSUE PRESENTED: Whether the Appellate Division properly held that the trial court erroneously submitted, at the People's request, second-degree burglary as a lesser-included-offense of second-degree burglary as a sexually motivated felony. The Appellate Division held that, although second-degree burglary is a lesser-included offense, its submission to the jury reflected a change in the People's theory of the case. (Assigned counsel for Respondent: John Vang and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Harvey Weinstein

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

ISSUES PRESENTED: (1) Whether *Molineux* evidence (numerous witnesses and more than seven instances of uncharged sexual misconduct) was

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admitted for any material non-propensity purposes and whether the *Sandoval* ruling (allowing in 28 prior acts of brutish behavior and aggressiveness) deprived the defendant of his right to testify on his own behalf. (2) Whether the tolling provisions of CPL 30.10 are applicable to defendant, a New York resident who, during intermittent travel, was neither subject to arrest nor even under investigation and whose whereabouts were known at all times. (Counsel: Barry Kamins, Aidala, Bertuna, and Kamins, 546 Fifth Avenue - 6th Floor, NY, NY 10036.

People v. Gonzalo Aguilar

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

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

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

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

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

People v. Melvin Baez

AD2 order dated February 23, 2022, affirming judgment of conviction..

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Decision below: 202 AD3d 1102, 159 NYS3d 878. Wilson, J., granted leave September 29, 2022.

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

People v. Freddie T. Wright

AD2 order dated March 16, 2022 affirming judgment of conviction. Decision below: 203 AD3d 965. Wilson, J. granted leave on September 29, 2022.

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

People v. Patrick Labate (People's appeal)

AT2 order dated April 8, 2022, dismissing reckless driving count of accusatory instrument. Decision below: 74 Misc.3d 138(A), 165 NYS3d 660. Wilson, J. granted leave to the People on October 11, 2022.

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

People v. Jason Bohn

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

ISSUES PRESENTED: (1) Whether the evidence was legally sufficient to support a first-degree murder conviction based on infliction of torture upon the victim; (2) denial of for-cause challenges; (3) Whether the trial court

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erred in qualifying a witness to testify for the prosecution as an expert on the issue of EED (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Steven Sidbury

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

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

People v. David Williams

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

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

People v. Matthew Corr

AD1 order dated June 29, 2022 affirming an order designating defendant as a level one sex offender. Decision below: 208 AD3d 136. Court of Appeals granted leave on January 5, 2023.

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

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People v. Bryan McDonald

AD2 order dated July 20, 2022 affirming an order designating the defendant as a level one sex offender. Decision below: 207 AD3d 669. Court of Appeals granted leave on January 5, 2023.

ISSUE PRESENTED: Whether the hearing court's failure to credit Mr. McDonald's initial registration date in Delaware towards New York's 2- year SORA registration period contradicts well-established principles of statutory interpretation and violates the Equal Protection guarantee under the state and federal Constitutions.(Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

Alcantara v. Annucci

AD3 order dated March 31, 2022 on cross-appeals, modifying judgment by reversing partial denial of defendants' motion for summary judgment and partial grant of summary judgment to plaintiffs; defendants' motion granted in its entirety and complaint dismissed, and, as modified, affirmed. Decision below: 203 AD3d 1483. Court of Appeals granted leave on January 10, 2023.

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

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

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

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

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St., 9th Floor, NYC 10038.)

People v. Anthony Blue

AD1 order dated February 15, 2022, affirming judgment of conviction. Decision below: 202 AD3d 546. Wilson, J., granted leave on December 21, 2022.

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

People v. Danny Novas

AD1 order dated April 28, 2022, reversing order granting 330.30 and reinstating indictment and verdict. Decision below: 204 AD3d 613. Wilson, J., granted leave on December 21, 2022.

ISSUE PRESENTED: Sufficiency of evidence that defendant had "cause to know" that personal injury had been caused to the victim in conviction for leaving the scene of an incident without reporting under VTL § 600(2)(a). (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Fernando Ramirez

AD2 order dated August 31, 2022, affirming judgment of conviction. Decision below: 208 AD3d 897. Cannataro, ACJ, granted leave on January 26, 2023.

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

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(Assigned counsel: Laurette D. Mulry, Suffolk County Legal Aid, Riverhead, New York.)

People v. Kevin L. Thomas

AD3 order dated December 22, 2022, affirming judgment of conviction. Decision below: 211 AD3d 1326 (3rd Dept. 2022). Leave granted by dissenting judge (Aarons, J.) on February 2, 2023.

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

People v. Yasif Sims (SSM)

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

ISSUES PRESENTED: Whether County Court failed to conduct a sufficient inquiry into whether defendant violated the terms of the plea agreement prior to imposing an enhanced sentence; whether the court was required to conduct a hearing under People v. Outley (80 NY2d 702 [1993]); whether the court improperly imposed an enhanced sentence; whether the sentence was improperly based on hearsay; whether defendant was denied effective assistance of counsel. (Counsel: Noreen McCarthy, Esq., P.O. Box 756, Keene Valley 12943.)

People v. Juan Padilla-Zuniga (SSM)

AD2 order dated October 12, 2022, affirming judgment of conviction. Decision below: 208 AD3d 770. Cannataro, ACJ, granted leave on February 10, 2023.

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

People v. Jorge Baque

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

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

People v. Dwane Estwick

AD2 order dated August 24, 2022, affirming judgment of conviction. Decision below: 208 AD3d 799. Cannataro, ACJ., granted leave on February 23, 2023.

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

People v. Jairo Castillo

AD1 order dated November 1, 2022, affirming judgment of conviction. Decision below: 210 AD3d 414. Wilson, J., granted leave on March 16, 2023.

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

People v. Brandon Williams

AD2 order dated April 6, 2022 affirming judgment of conviction. Decision

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below: 204 AD3d 704. Wilson, J., granted leave on February 24, 2023.

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

Matter of Prisoners' Legal Services of NY v. DOCCS

AD3 order dated October 27, 2022, affirming lower court's order dismissing claims raised in a combined proceeding pursuant to CLPR article 78 and action for declaratory relief. Decision below: 209 AD3d 1028. Court of Appeals granted leave on March 21, 2023.

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

People v. Tyrone Peters

AD2 order dated October 27, 2021 denying application for writ of error coram nobis to vacate a prior decision and order of the Appellate Division, dated August 8, 2012 [98 AD3d 687]. Decision below: 198 AD3d 987 (2d Dep't 2021). Wilson, C.J., granted leave on March 3, 2023.

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

People v. Corey Dunton (People's appeal)

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

ISSUE PRESENTED: Whether the Appellate Division erred in granting defendant's coram nobis application based on appellate counsel's failure to

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argue that the court's removal of defendant from the courtroom during the reading of the verdict on the last charge and jury polling, without first issuing a warning, violated defendant's constitutional right to be present. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Darryl Watts

AD1 order dated November 29, 2022 affirming an order designating the defendant as a level two sexually violent offender. Decision below: 210 AD3d 595. Appeal as of right.

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

People v. Kenneth Fisher

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

ISSUES PRESENTED: (1) Whether the trial court properly denied defendant's motion for a mistrial under CPL 270.35 when a juror indicated she believed defendant may have followed her home during jury selection and other jurors feared for their safety; (2) whether the court conducted a sufficient inquiry of the juror under People v. Buford (69 NY2d 290 [1987]). (Assigned counsel: Lisa A. Burgess, Esq., P.O. Box 440, Indian Lake, NY 12842.)

People v. Samuel Nektalov

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

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

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People v. Kenneth Garcia

AD2 order dated November 16, 2022 affirming judgment of conviction. Decision below: 210 AD3d 906. Wilson, C.J., granted leave on May 31, 2023.

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

Matter of NYCLU v. Rochester

AD4 order dated November 10, 2022 modifying lower court’s order denying Article 78 seeking disclosure of certain law enforcement disciplinary records. Decision below: 210 AD3d 1400. Court of Appeals granted leave to Rochester Corporation Counsel on June 13, 2023.

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

People v. Mark Watkins

AD1 order dated June 9, 2022 affirming judgment. Decision below: 206 AD3d 452. Troutman, J., granted leave on June 22, 2023.

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

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IV. New Leave Grants

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

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

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

People ex rel. Neville v. Toulon

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

ISSUE PRESENTED: Whether provision of Mental Hygiene Law § 10.11(d)(4) that directed Supreme Court to determine whether there was probable cause to believe that respondent was a dangerous sex offender requiring confinement based only upon the allegations of the petition for confinement and any accompanying papers, with no opportunity for him to be heard, was unconstitutional on its face and as applied to him. (Assigned Counsel: Michael D. Neville, Director, Mental Hygiene Legal Service, Second Judicial Department, Special Litigation and Appeals Unit, 600 Old Country Road, Suite 224, Garden City, NY 11530.)

Matter of Sell v. Yehl

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

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

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People v. Codie Hayward

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

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

People v. Dominic Spirito

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

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

People v. Fabian Greene (SSM)

AD1 order dated February 2, 2023, affirming judgment. Decision below: 213 AD3d 418, 183 NYS3d 33. Troutman, J., granted leave on June 20, 2023

ISSUES PRESENTED: (1) Whether the Appellate Division properly held that no corrective action was warranted for multiplicitous convictions because the sentences were imposed to run concurrently; (2) whether the trial court improperly allowed a bureau chief in the prosecutor's office to testify about historical cell site data; whether the court improperly allowed the bureau chief to instruct the jury on the law; whether the prosecutor's summation exceeded the bounds of legitimate advocacy. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New

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York, NY 10007.)

People v. Eddie Robles

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

ISSUES PRESENTED: (1) whether police had reasonable suspicion to detain and frisk defendant; (2) where Appellate Division determined that Supreme Court erred in refusing to suppress defendant's statement to police, whether Appellate Division properly applied harmless error doctrine to defendant's guilty plea. (Counsel: Cambareri & Brenneck, 300 South State Street, First Floor, Syracuse, NY 13202.)

People v. Raymond Williams (SSM)

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

ISSUE PRESENTED: Whether the evidence was legally sufficient to establish that defendant committed third-degree burglary. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Kerbet Dixon

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

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

People v. Jonaiki Martinez Estrella (People's appeal)

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

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

People v. Mitchell Hernandez

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

ISSUE PRESENTED: Whether the courts below correctly adjudicated defendant a persistent violent felony offender under Penal Law 70.04(1)(b)(iv)-(v) when more than ten years without incarceration elapsed between his sentencing on the first predicate felony conviction and the incident underlying this case but the period of pre-sentencing incarceration on the predicate felony was subtracted from that ten-year period. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

People v. Jason Brisman (SSM)

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

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

People v. Randall K. McGovern

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

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

People v. Alvin King (People’s appeal)

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

ISSUE PRESENTED: Whether CPL article 245, the provisions of which tied the People’s declaration of readiness for trial to a certificate of compliance with the article’s discovery requirements, invalidate a statement of readiness which was made prior to the effective date of the article. (Assigned counsel: Philip Rothschild, Esq., Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202-2057.)