

CENTER FOR APPELLATE LITIGATION

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MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: January 15, 2021

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.

Happy reading!

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

I. Cases Awaiting Decision

People v. Frederic Badji

AD1 order dated April 9, 2019, affirming judgment of conviction. Decision below: 171 AD3d 499, 95 NYS3d 808. Garcia, J., granted leave June 19, 2019. Argued January 6, 2021.

ISSUE PRESENTED: The sufficiency of proof of larceny of the victim's credit card where there was no proof that defendant possessed a physical credit card when he used intangible credit card information to make purchases. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Tyrone D. Gordon

AD2 order dated February 6, 2019, affirming granting of motion to suppress physical evidence. Decision below: 169 AD3d 714, 91 NYS3d 716. Wilson, J., granted leave to People April 22, 2019. Argued January 7, 2021.

ISSUE PRESENTED: Whether a search warrant of a particular house at a certain address also covered two vehicles not described in the warrant but located on the property.

People v. Drury Duval

AD1 order dated November 26, 2019, affirming judgment of conviction. Decision below: 179 AD3d 62, 114 NYS3d 310. Gesmer, J. (AD dissenter), granted leave February 4, 2020. Argued January 7, 2021.

ISSUE PRESENTED: Whether the search warrant authorizing the search of defendant's home was sufficiently specific, as to the place to be searched, to allow for the search of the entire residence. The search warrant just had the address on it and characterized it solely as a "private

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residence,” whereas it was a three unit building. In *Groh v. Ramirez*, 540 US 551 (2004), the Supreme Court held that deficiencies in the search warrant cannot be cured by reference to materials that were not incorporated into the warrant. The majority distinguished *Groh* as a *Bivens* civil case. (Assigned counsel: Hunter Haney and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

II. Cases Scheduled For Argument

People v. Nicole Hodgdon

AD3 order dated July 11, 2019, reversing the motion court’s grant of dismissal of the indictment. Decision below: 175 AD3d 65, 106 NYS3d 198. Fahey, J., granted leave October 18, 2019. To be argued February 10, 2021.

ISSUE PRESENTED: Whether Executive Law § 522 allows a special prosecutor to prosecute individuals accused of crimes against vulnerable persons where the special prosecutor obtains the written consent of the district attorney to do so and the district attorney retains ultimate responsibility for the prosecution. Leave was also granted in People v. Justin Hope and People v. Maria Y. Viviani on the same issue.

People v. Daria N. Epakchi

AT9&10 order dated June 6, 2019 dismissing simplified traffic information. Decision below: 63 Misc.3d 161(A), 2019 WL 2454910. DiFiore, Ch. J., granted leave to People November 27, 2019 . To be argued February 11, 2021.

ISSUE PRESENTED: Whether the Appellate Term properly reversed a traffic conviction for the refile of a simplified traffic information charging the same offense that was earlier dismissed for failure to timely provide a supporting deposition.

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People v. Leslie K. Olds

Niagara County Court order dated July 31, 2018, affirming judgment of conviction for endangering the welfare of a child. Wilson, J., granted leave August 28, 2019. To be argued February 11, 2021.

ISSUE PRESENTED: Whether the sentence imposed was vindictive.

III. Cases Waiting to be Scheduled

People v. Cesar Garcia

AT1 order dated June 3, 2019, affirming judgment of conviction. Decision below: 63 Misc.3d 158(A), 2019 WL 2347176. Wilson, J., granted leave August 29, 2019.

ISSUE PRESENTED: Whether the defendant was denied his right to trial by jury under People v. Suazo, where he was (as it turned out) acquitted after a bench trial of those counts which would have resulted in automatic deportation and convicted only of a count which would not have. (Assigned counsel: Mark W. Zeno and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Howard Powell

AD2 order dated November 7, 2018, affirming judgment of conviction. Decision below: 166 AD3d 660, 87 NYS3d 31. Rivera, J., granted leave April 26, 2019.

ISSUE PRESENTED: Whether the trial court erred in denying, after a Frye hearing that demonstrated the proffered testimony's relevance to the specific circumstances of the case, defendant's motion to present expert testimony on the topic of false confessions. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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People v. Tyrone Wortham

AD1 order dated April 5, 2018, affirming judgment of conviction. Decision below: 160 AD3d 431, 75 NYS3d 570. Stein, J., granted leave August 15, 2019.

ISSUES PRESENTED:(1) Whether admissions made in response to routine pedigree questions during the execution of a search warrant are admissible under the pedigree exception to the Miranda requirement if, although the question was not designed to elicit an incriminating response, the answer was nonetheless reasonably likely to be incriminating. (2) Whether defendant was entitled to a Frye hearing on the reliability of FST DNA evidence. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Charo N. Allen

AT2 order dated May 30, 2019, affirming District Court dismissal of the accusatory instrument. Decision below: 63 Misc.3d 159 (A), 2019WL2364339. Wilson, J., granted leave to People October 9, 2019.

ISSUE PRESENTED: Whether the District Court correctly dismissed the accusatory instrument for facial insufficiency because the factual allegations it contained were solely based upon the written English statement, which had been translated into Spanish for the complainant without a certificate of translation attesting to the accuracy of the translation. (Assigned counsel for defendant: Laurette D. Mulry and Edward E. Smith, Suffolk County Legal Aid Society, Appeals Bureau, 300 Center Drive, 1st Floor, Riverhead, NY 11901.)

People v. Kenneth Slade

AT1 order dated June 6, 2019, affirming judgment of conviction. Decision below: 63 Misc.3d 161 (A), 2019WL2402155. Wilson, J., granted leave October 9, 2019.

ISSUE PRESENTED: Whether the court erred in denying Mr. Slade's motion to dismiss under C.P.L § 30.30 where the prosecution failed to file a certificate of translation to convert the accusatory instrument for two-

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and-a-half years after arraignment. (Assigned counsel: John Palmer and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Kieth Brooks

AT1 order dated June 3, 2019, affirming CPL 30.30 dismissal. Decision below: 63 Misc.3d 158 (A), 2019WL2347138. Wilson, J., granted leave to People October 9, 2019.

ISSUE PRESENTED: Whether a certificate of translation was required to convert the accusatory instrument to an information, and whether the People's failure to file one within the CPL 30.30 time period required dismissal. (Assigned counsel for respondent: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Eric Iverson

AT9 &10 order dated June 6, 2019, reversing judgment of conviction of traffic offenses. Decision below: 63 Misc.3d 163(A), 2019WL2454999. Fahey, J., granted leave to People October 3, 2019.

ISSUE PRESENTED: Whether the hearing officer at the Traffic and Parking Violations Agency properly entered default judgments against defendant when he had pleaded not guilty to VTL violations but then failed to appear for trial and no trial was held. (Leave to appeal was also granted in People v. Jack J. Cucceraldo on the same issue.)

People v. Richard B. Gaworecki

AD3 order dated July 18, 2019, modifying order which partially granted motion to dismiss counts of an indictment. Decision below: 174 AD3d 1143, 104 NYS3d 418. Mulvey (AD dissenter), J., granted leave August 29, 2019.

ISSUE PRESENTED: Whether the evidence before the grand jury was sufficient to make out second-degree manslaughter or criminally negligent homicide, where the indictment alleged that the defendant sold the victim

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heroin, which resulted in the victim's subsequent overdose and death.

People v. Eric Ibarguen

AD2 order dated June 26, 2019, affirming judgment of conviction. Decision below: 173 AD3d 1207, 101 NYS3d 616. Stein, J., granted leave November 7, 2019.

ISSUES PRESENTED: Whether the court erred in summarily denying defendant's motion to suppress evidence where defendant alleged standing in the premises by virtue of being a social guest. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Darrin McGhee

AD1 order dated December 19, 2019, reversing judgment of conviction. Decision below: 180 AD3d 26, 2019 WL 6902810. Tom, J. (AD dissenter), granted leave to People December 26, 2019. (SSM.)

ISSUE PRESENTED: Whether the People violated Brady by not turning over to trial defense counsel the statement of a second eyewitness who provided exonerating information. (Assigned counsel for defendant: Ben A. Schatz and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Bradford L. Shanks

AD3 order dated July 18, 2019, affirming judgment of conviction. Decision below: 174 AD3d 1142, 104 NYS3d 791. Wilson, J., granted leave December 10, 2019.

ISSUE PRESENTED: Defendant, convicted after trial, filed post-verdict motions. Prior to sentence, defendant was offered a sentence of time served if he withdrew his motions and waived his right to appeal. Defendant accepted the offer. Whether the Appellate Division correctly held that defendant's appellate claim of pervasive judicial bias was forfeited by the appeal waiver.

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People v. Carlos Torres

AT1 order dated September 23, 2019, affirming judgment of conviction. Decision below: 65 Misc.3d 19, 108 NYS3d 269. Feinman, J., granted leave February 10, 2020.

ISSUE PRESENTED: New York City Administrative Code § 19-190(b), failure to exercise due care to avoid collision with a pedestrian. (1) Whether the statute is unconstitutional because it criminalizes an act committed without due care, a civil negligence standard; (2) whether it is pre-empted by the Penal Law and the VTL. (Assigned counsel: Katharine Skolnick and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.) (See also People v. Dave Lewis with the same issue.)

People v. George Brown

AD1 order dated November 26, 2019, affirming judgment of conviction. Decision below: 177 AD3d 575, 110 NYS3d 849. Wilson, J., granted leave February 20, 2020. (SSM.)

ISSUE PRESENTED: Whether an otherwise valid appeal waiver forecloses review of the defendant's claim that the trial court violated his right to make a statement on his own behalf prior to sentencing pursuant to CPL § 380.50(1), a violation that could not have been anticipated at the execution of the waiver; and whether, following the imposition of sentence, the defendant's query whether he would get a chance to speak preserved the issue for appeal. (Assigned counsel: Jody Ratner and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Joseph Schneider

AD2 order dated October 16, 2019, affirming judgment of conviction. Decision below: 176 AD3d 979, 112 NYS3d 248. Leave granted by Fahey, J., January 15, 2020.

ISSUE PRESENTED: Whether Supreme Court in Kings County lacked jurisdiction to issue eavesdropping warrants to intercept cellular telephone

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calls and electronic messages that were made and received outside of New York State.

People v. Sharon Lashley

AD1 order dated December 12, 2019, affirming judgment of conviction. Decision below: 178 AD3d 506, 111 NYS3d 851. Leave granted to the People by Rivera, J., March 27, 2020.

ISSUE PRESENTED: Whether the People's failure to allege tolling in a predicate felony statement is something to which the defendant must object. (Assigned counsel: Allison Kahl and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. William A. Wilkins

AD4 order dated August 22, 2019, modifying judgment of conviction. Decision below: 175 AD3d 867, 107 NYS3d 521. Curran, J. (AD dissenter), granted leave October 8, 2019. (Taken off SSM).

ISSUES PRESENTED: (1) Whether the Antommarchi violation requires reversal or was, instead, obviated. (2) Whether a trial court's error in giving a no-adverse-inference charge regarding the defendant's not testifying, over objection, is subject to harmless error analysis. (3) Whether reversal is required because the court sua sponte and over objection explained to the jury that the third person at defendant's table was a deputy guarding the defendant. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Manuel Morales

AD2 order dated October 30, 2019, affirming judgment of conviction. Decision below: 176 AD3d 1235, 109 NYS3d 650. Wilson, J., granted leave April 9, 2020.

ISSUE PRESENTED: Whether the trial court properly permitted a witness to make a first-time, in-court identification during trial. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199

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Water Street, New York, NY 10038.)

People v. Donovan Buyund

AD2 order dated November 13, 2019, modifying judgment of conviction. Decision below: 179 AD3d 161, 112 NYS3d 179. Stein, J., granted leave to People July 15, 2020.

ISSUES PRESENTED: (1) Whether a sentencing court's certification of defendant as a sex offender pursuant to SORA is part of the sentence component of a judgment of conviction and sentence, and thus reviewable on direct appeal of the judgment. (2) Whether a conviction for burglary as a sexually motivated felony is a registerable sex offense under Corr. Law 168-a(2)(a). (Assigned counsel for defendant: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Kathon Anderson

AD2 order dated February 19, 2020, affirming judgment of conviction. Decision below: 180 AD3d 923, 120 NYS3d 63. Fahey, J., granted leave August 4, 2020.

ISSUE PRESENTED: The denial of the 14-year-old defendant's request to present expert testimony on the topic of adolescent brain development—on the grounds that the impulsiveness of adolescents is not a matter beyond the ken of the average juror. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John Street, 9th Floor, NYC 10038.)

Matter of Pedro Endara-Caicedo v. NYS DMV

AD1 order dated February 13, 2020, affirming dismissal of Article 78 petition. Decision below: 180 AD3d 499, 115 NYS3d 880. Court of Appeals granted leave September 10, 2020.

ISSUE PRESENTED: Whether VTL 1194(2) permits the refusal of a motorist arrested for DUI to submit to a chemical test to be used in an administrative license revocation hearing even if the test is offered, and the refusal occurs, more than two hours after arrest. (Counsel for

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petitioner: Marika Meis & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Don Williams

AD4 order dated June 12, 2020, affirming judgment of conviction. Decision below: 184 AD3d 1125, 125 NYS3d 811. Fahey, J., granted leave September 1, 2020.

ISSUES PRESENTED: (1) Whether the trial court erred when, in response to a jury note, it projected a portion of the court's final instructions on a screen for the jury as it simultaneously reread that portion of the charge to the jury; (2) Whether the defendant was deprived of a fair trial by a remark made by the court and comments by the prosecutor on cross and on summation; (3) The denial of a defense challenge for cause. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Levan Easley

AD2 order dated April 3, 2019, affirming judgment of conviction. Decision below: 171 AD3d 785, 96 NYS3d 320. Stein, J., granted leave September 21, 2020.

ISSUES PRESENTED: (1) Whether the trial court acted within its discretion in denying a Frye hearing to challenge DNA evidence based on the use of FST. (2) Whether materials underlying the FST – the source code, algorithm, and validation studies – had to be turned over to the defense as Brady material. (Assigned counsel: Paul Skip Laisure, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. John Wakefield

AD3 order dated August 15, 2019, affirming judgment of conviction. Decision below: 175 AD3d 158, 107 NYS3d 487. Fahey, J., granted leave September 29, 2020.

ISSUES PRESENTED: (1) Whether the trial court's Frye ruling was erroneous because defendant was not provided the opportunity to review

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the source code underlying the software program (TrueAllele) used to arrive at the DNA analysis. (2) Whether the defendant was deprived of his right to confrontation, at trial, by being denied access to the source code.

IV. New Leave Grants

People v. Jeffrey Bush

AD2 order dated July 29, 2020, affirming judgment of conviction. Decision below: 185 AD3d 1048, 126 NYS3d 405. Rivera, J., granted leave November 9, 2020.

ISSUE PRESENTED: Whether the defendant was required to preserve his claim that his guilty plea was not knowing, voluntary, and intelligent where he was not made aware, until sentence was pronounced, that he would be subject to a one-year period of conditional discharge. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)