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MEMORANDUM

To: Chief Defender & Colleague

From: Bob Dean

Date: March 15, 2022

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. Angelo Burgos

AD1 order dated January 25, 2021, affirming judgment of conviction. Decision below: 190 AD3d 431, 139 NYS3d 59. Rivera, J., granted leave May 4, 2021. Argued February 9, 2022.

ISSUES PRESENTED: (1) Whether defendant received ineffective assistance of counsel when trial counsel did not disclose that he was suspended in another jurisdiction (Second Circuit) for a pattern of misconduct in neglecting client matters in criminal case; and (2) whether counsel was constructively suspended from the practice of law at the time of trial when the Appellate Division later imposed reciprocal discipline nunc pro tunc to a date preceding trial.

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. Argued February 10, 2022.

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.)

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II. Cases Scheduled for Argument

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. Rescheduled for March 15, 2022.

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: Patricia Pazner, 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. Rescheduled for March 15, 2022.

ISSUES PRESENTED: (1) Whether the trial court’s Frye ruling was erroneous because defendant was not provided the opportunity to review 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. (Assigned counsel: Matthew C. Hug, 21 Everett Road Extension, Albany, N.Y. 12205.)

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. To be argued April 19, 2022.

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

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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. Marc Mitchell

AT1 order dated October 23, 2020, affirming judgment of conviction. Decision below: 69 Misc.3d 133(A). Rivera, J., granted leave January 26, 2021. To be argued April 20, 2022.

ISSUE PRESENTED: Whether the misdemeanor complaint provided reasonable cause to believe the defendant was guilty of fraudulent accosting (PL 165.30); the definition of “accost.” (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Dashawn Deverow

AD2 order dated February 26, 2020, modifying the sentence and otherwise affirming. Decision below: 180 AD3d 1064, 118 NYS3d 677. Wilson, J., granted leave July 13, 2020. To be argued April 21, 2022.

ISSUES PRESENTED: (1) Batson: Whether the defense made out a prima facie case at step one. (2) Excluding a defense witness who would have contradicted the sole eyewitness’ account and limiting cross of that eyewitness. (3) Excluding 911 call and DNA evidence. (4) Sandoval. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Quaniece S. Taylor

AD2 order dated July 8, 2020, modifying judgment of conviction by dismissing inculsory concurrent count, and otherwise affirming. Decision below: 185 AD3d 724, 127 NYS3d 555. Barros, J. (AD dissenter), granted leave November 9, 2020. To be argued April 21, 2022.

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ISSUE PRESENTED: Batson: Whether the People’s statement in response to a defense Batson challenge that the People were challenging “African-American” jurors, that a juror “was from Trinidad” and thus not “African-American,” satisfied their step two burden of giving a non-race-based reason for the strike; whether the issue was preserved when the court prevented defense counsel from immediately objecting and then summarily ruled that the reason was race-neutral. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

III. Cases Waiting to be Scheduled

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 Water Street, New York, NY 10038.)

People v. Hasahn D. Murray

AD1 order dated December 29, 2020, affirming judgment of conviction. Decision below: 189 AD3d 688, 138 NYS3d 33. Leave granted by Renwick, J. (AD dissenter), February 4, 2021. (Taken off SSM.)

ISSUE PRESENTED: Whether an alternate juror who had been discharged and gone home was still “available for service” (CPL 270.35[1]) to replace a seated juror who had to be discharged due to engaging in misconduct, or whether the court should have granted the defense motion for a mistrial rather than recalling and seating the alternate. (Assigned counsel: Abigail Everett and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Luis Rodriguez

AD2 order dated October 21, 2020, reversing judgment of conviction. Decision below: 187 AD3d 1063, 133 NYS3d 589. Rivera, J. (AD dissenter), granted leave to People December 28, 2020.

ISSUE PRESENTED: Whether screen-shots purporting to depict selected portions of a text message conversation between the defendant and the complainant were properly admitted into evidence, even though the text messages themselves did not establish the defendant as the author. (Assigned counsel for defendant: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Carlos Galindo

AT2 order dated June 12, 2020, reversing judgment of conviction and dismissing on CPL 30.30 grounds. Decision below: 70 Misc3d 16, 127 NYS3d 223. Wilson, J., granted leave to People February 28, 2021.

ISSUE PRESENTED: Whether the 2020 amendments to CPL 30.30 adding a subdivision stating that “the term offense shall include vehicle and traffic law infractions,” have retroactive application to cases pending on direct appeal at the time of the amendment. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

Matter of Luis Alvarez v. Annucci

AD2 order dated August 19, 2020, affirming dismissal of Article 78 petition. Decision below: 186 AD3d 704, 127 NYS3d 303. Court of Appeals granted leave May 4, 2021. (SSM.)

ISSUE PRESENTED: Whether SARA applies to people on PRS after serving through their maximum expiration date in prison. (Counsel for petitioner: Jan Hoth & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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People v. Tramel Cuencas

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.

ISSUES PRESENTED: Payton. (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; and (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. Ron Hill

AT1 order dated November 20, 2020, affirming judgment of conviction. Decision below: 69 Misc.3d 145(A), 133 NYS2d 719. DiFiore, Ch.J., granted leave June 4, 2021.

ISSUE PRESENTED: Whether the accusatory instrument charging seventh-degree drug possession for possession of an unspecified synthetic cannabinoid, was jurisdictionally defective, given that not all synthetic cannabinoids are illegal in this State. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Oscar Sanders

AD1 order dated May 27, 2021, affirming judgment of conviction. Decision below: 194 AD3d 652, 147 NYS3d 56. Rivera, J., granted leave September 27, 2021.

ISSUES PRESENTED: (1) Whether the trial court erred in ordering the defendant to be handcuffed during the rendition of the verdict and the polling of the jury and, if so, whether the error was harmless. (2) Whether the defendant was properly sentenced as a discretionary persistent felony offender. (3) The refusal to submit third-degree

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assault as a lesser included offense of second-degree assault. (Assigned counsel: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Rebecca Ruiz

AD4 order dated August 26, 2021, reversing judgment of conviction and granting a new trial. Decision below: 197 AD3d 915, 153 NYS3d 290. NeMoyer, J. (AD dissenter), granted leave to People September 15, 2021.

ISSUE PRESENTED: Whether the trial court erred in refusing to charge the defense of temporary innocent possession of a weapon, where the defendant did not possess the gun before using it—as the jury found—for self-defense. (Assigned counsel for defendant: David C. Schopp, Legal Aid Bureau of Buffalo, 237 Main Street, Suite 1602, Buffalo, N.Y. 14203.)

People v. Peter Carman

AD2 order dated May 5, 2021, affirming SORA risk-level assessment, with one dissent. Decision below: 194 AD3d 760, 147 NYS3d 119. Court of Appeals granted leave November 17, 2021.

ISSUES PRESENTED: (1) Whether counsel at the risk-level hearing was ineffective for failing to ask for a downward departure. (2) Whether that issue was raised in the Appellate Division in the defendant’s pro se supplemental brief.

People v. Christopher J. Weber

AD4 order dated June 17, 2021, affirming SORA risk-level assessment. Decision below: 195 AD3d 1544, 145 NYS3d 895. Court of Appeals granted leave November 18, 2021.

ISSUES PRESENTED: (1) Whether the Fourth Department should have, in an earlier decision, remanded for an upward departure determination, since the prosecutor had never asked for an upward departure during the original SORA proceeding. (2) Whether an

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upward departure was properly granted, on remand, for the same reason. (Counsel for defendant: Monroe County Public Defender, 10 N. Fitzhugh Street, Rochester, NY 14618.)

People v. Harold Tindal

AD2 order dated March 31, 2021, affirming judgment of conviction. Decision below: 192 AD3d 1146, 141 NYS3d 351. Wilson, J., granted leave November 12, 2021.

ISSUES PRESENTED: (1) Whether a defendant must join a Batson challenge of a jointly-tried co-defendant to preserve that claim for appellate review; (2) the sufficiency of the evidence of criminal trespass; and (3) ineffective assistance of counsel. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

IV. New Leave Grants

People v. Anthony Lagano

AT2 order dated July 30, 2021, reversing judgment of conviction for second-degree harassment and dismissing the accusatory instrument. Decision below: 72 Misc3d 138A, 150 NYS3d 495. Fahey, J., granted leave to People November 29, 2021.

ISSUE PRESENTED: Whether the defendant's outburst constituted a genuine threat of physical harm.

People ex rel Molinaro v. Warden

AD2 order dated June 16, 2021, reversing denial of State habeas corpus petition and granting the writ. Decision below: 195 AD3d 885, 150 NYS3d 123. Court of Appeals granted leave to People December 14, 2021.

ISSUE PRESENTED: Whether the criminal court judge was allowed to order the criminal defendant confined to jail during a CPL Article 730 competency examination when the defendant was otherwise entitled

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to pretrial release under CPL Articles 510 and 530. (Assigned counsel for relator: Lisa Schreibersdorf, Brooklyn Defenders Services, 177 Livingston Street, Brooklyn, NY 11201.)

People v. Rudolph Kaval

AD2 order dated May 5, 2021, reversing judgment of conviction sentencing the defendant as a persistent violent felony offender. Decision below: 194 AD3d 746, 148 NYS3d 214. Dillon (AD dissenter), J., granted leave to People December 13, 2021.

ISSUE PRESENTED: Whether, where the defendant was originally sentenced as a persistent violent felony offender, and on appeal the Second Department, upon the People's concession that one of the violent predicates fell outside the 10-year tolling period, had held that the defendant was not a persistent violent and remanded for resentencing, the resentencing court was permitted to sentence the defendant, once again, as a persistent violent based upon the People's new evidence as to tolling. (Assigned counsel for defendant: Janet E. Sabel, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)