

CENTER FOR APPELLATE LITIGATION

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MEMORANDUM

To: Chief Defenders & Colleagues

From: Barbara Zolot

Date: March 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.

Happy reading!

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

I. Cases Awaiting Decision

People v. Santino Guerra

AD1 order dated March 23, 2021, affirming judgment of conviction. Decision below: 192 AD3d 563, 143 NYS3d 355. Rivera, J., granted leave August 16, 2021. Argued 2/7/23.

ISSUE PRESENTED: Whether People v. Miller (39 NY2d 543) should be overruled, allowing admission of a complainant’s prior violent acts for the purposes of proving the complainant was the initial aggressor in support of a justification defense, even if the defendant did not know about the acts. (Assigned counsel: Tina M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Dakota W. Baldwin

AD3 order dated September 23, 2021, affirming judgment of conviction. Decision below: 197 AD3d 1442, 151 NYS3d 918. Wilson, J., granted leave January 22, 2022. Argued 2/8/23.

ISSUE PRESENTED: Whether the Third Department erred in requiring a showing of “extraordinary circumstances” or an “abuse of discretion” in order to invoke its interests of justice jurisdiction to reduce a sentence.

People v. Mamadou Ba

AT1 order dated January 7, 2022, modifying judgment of conviction to correct an illegally high surcharge and otherwise affirming. Decision below: 73 Misc.3d 148(A); 157 NYS3d 661. Rivera, J., granted leave March 24, 2022. Argued 2/8/23.

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ISSUE PRESENTED: Whether the Appellate Term improperly rejected a request to reduce a sentence in the interest of justice because the sentence was not illegally high and was the result of a negotiated plea. Assigned counsel: Tina M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

People v. Mark A. Hartle

AD3 order dated March 4, 2021, affirming summary denial of 440.10 motion. Decision below: 192 A.D.3d 1199; 142 N.Y.S.3d 660. Wilson, J. granted leave on September 3, 2021. Argued 2/9/23.

ISSUES PRESENTED: (1) IAC based on potential conflict of interest where one of defendant's trial attorneys had previously represented the St. Lawrence County District Attorney; (2) Whether text messages and photographs deleted by defendant but recovered after trial due to technological advances were newly discovered evidence.

People v. Andrew J. Regan

AD3 order affirming conviction and denial of 440.10 motion. Decision below: 196 A.D.3d 735, 150 N.Y.S.3d 820. Leave granted by dissenting judge. Argued 2/9/23.

ISSUE PRESENTED: (1) denial of constitutional speedy trial where more than three years elapsed before People sought an order for defendant's DNA; (2) cross-examination of defendant with prior failure to assert that sexual contact with victim was consensual.

II. Cases Scheduled for Argument

People v. Yermia Solomon AKA Jeremy Solomon

AD3 order dated March 31, 2022, reversing judgment and dismissing the SCI. Decision below: 203 AD3d 1468, 166 NYS3d 282. Rivera,

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J., granted leave to People July 21, 2022. Scheduled for argument March 15, 2023 at 2 pm.

ISSUE PRESENTED: Whether an SCI is jurisdictionally defective when it misstates the victim's date of birth and the age of the victim is an element of the charged offense.

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 March 16, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether trial defense counsel was ineffective for conceding guilt of weapons 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.)

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 March 16, 2023 at 2 pm.

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

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People v. Tyquan Johnson

AD4 order dated June 10, 2022, affirming judgment of conviction. Decision below: 206 AD3d 1702, 169 NYS3d 773. Wilson, J., granted leave August 24, 2022. Scheduled for argument April 18, 2023 at 2 pm.

ISSUE PRESENTED: Whether the arresting officer had the requisite predicate under *DeBour* (40 NY2d 210) at each level of the encounter with the defendant. (Assigned counsel: Paul D. Watkins, 115 North Main Street, Fairport, NY 14450.)

People v. Michael Saenger

AD2 order dated February 16, 2022, modifying judgment of conviction by dismissing an inclusory concurrent count and otherwise affirming. Decision below: 202 AD3d 1001, 159 NYS3d 720. Troutman, J., granted leave July 1, 2022. Scheduled for argument April 19, 2023 at 2 pm.

ISSUE PRESENTED: Whether an indictment for aggravated family offense (PL 240.75) is jurisdictionally defective if it fails to specify any particular penal law offense as the “present” misdemeanor underlying the charge. In this case, the indictment read that the defendant “committed an offense specified in subdivision 2 of 240.75,” and failed to specify which of those 50 offenses he “presently” committed. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Dwight Reid

AD1 order dated March 8, 2022, modifying judgment of conviction by making the sentences concurrent, and otherwise affirming.. Decision below: 203 AD3d 474, 163 NYS3d 70. DiFiore, Ch.J., granted leave August 8, 2022. Scheduled for argument April 20, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether defendant was denied his right to a public trial when the trial court closed the courtroom midtrial to all spectators based on alleged intimidating behavior by certain spectators.

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(2) Whether trial counsel was ineffective for failing to request replacement of a sworn juror, deferring to his client's decision on whether to keep the juror.

People v. Hanza Muhammad

AD4 order dated June 3, 2022, affirming judgment of conviction. Decision below: 206 A.D.3d 1580 (4th Dep't 2022). Rivera, J. granted leave on October 5, 2022. Scheduled for argument April 20, 2023 at 2 pm.

ISSUES PRESENTED: (1) Whether defendant was denied his right to a public trial when court officers prevented spectators from entering the courtroom during the testimony of a key witness pursuant to court's standing policy preventing anyone from entering or exiting during testimony, and counsel's ineffectiveness for failing to object to this policy; (2) IAC for counsel's failure to impeach an identification witness with a prior statement; (3) consecutive sentencing for murder 2 and CPW2. (Assigned Counsel: Philip Rothschild, Hiscock Legal Aid society, 351 South Warren Street, Syracuse, NY 13202.)

III. Cases Waiting to be Scheduled

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. Argued November 16, 2022. Reargument ordered for a future date.

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. 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. Argued September 14, 2022. Reargument ordered for a future session.

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. 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, 2022. Reargument ordered for a future session.

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 May 19, 2022. Ordered to be reargued in a later session.

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.

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

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.) (On September 13, 2022, the Court granted leave in People v. Albert Cotto, with a similar issue.)

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.

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

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10005.)

People v. Jayquaine Seignious

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 ex rel Rivera v. Superintendent

AD3 order dated December 16, 2021, reversing Supreme Court's grant of a State habeas petition that ordered a State prisoner released on parole. Decision below: 200 AD3d 1370, 160 NYS3d 411. Court of Appeals granted leave May 24, 2022.

ISSUE PRESENTED: Whether the application of SARA's school-grounds residency restriction, enacted after petitioner's conviction, violated the Ex Post Fact Clause. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

Matter of Stevens v. NYSDCJS

AD1 order dated May 5, 2022, reversing dismissal of Article 78 proceeding to annul the Familial DNA Search Regulations promulgated by DCJS, granting the petition, and vacating the Regulations. Decision below: 169 NYS3d 1. Case has gone up to the Court of Appeals on a two-judge dissent,

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ISSUE PRESENTED: Whether petitioners, relatives of persons whose genetic profiles are in the New York State DNA database, have standing to challenge regulations adopted by DCJS governing familial DNA searches.

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.

ISSUES PRESENTED: (1) Confrontation Clause: 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) Right to present a defense and DA misconduct on summation: 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 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. Michael Worley

AD2 order dated February 16, 2022, affirming an order designating the defendant as a level three sex offender. Decision below: 202 AD3d 1008, 159 NYS3d 717. Court of Appeals granted leave July 21, 2022.

ISSUE PRESENTED: Whether, or under what circumstances, a SORA hearing court can *sua sponte* upwardly depart without giving notice to the defendant. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Marcus Brown

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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.

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. Herman Anthony

AD2 order dated March 23, 2022, affirming an order designating the defendant as a level three sex offender. Decision below: 203 AD3d 1084, 162 NYS3d 787. Court of Appeals granted leave July 21, 2022. (SSM.)

ISSUES PRESENTED: Downward departure: (1) What constitutes the difference between the absence of an aggravating factor and the presence of a mitigating factor? (2) whether the SORA court abused its discretion as a matter of law in denying a downward departure. (Assigned counsel: Justine M. Luongo, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, New York, NY 10038.)

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.

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

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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. 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 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. Noe Zapata

AD2 order dated May 4, 2022, affirming judgment of conviction. Decision below: 205 AD3d 740, 165 NYS3d 737. Wilson, J., granted leave July 29, 2022.

ISSUES PRESENTED: (1) Whether CPL 420.35(2-a), which allows courts to waive fees and surcharges for defendants who were less than 21 years old at the time of the offense, applies to cases pending on direct appeal at the time of the statute's enactment. (2) Whether a

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fee/surcharge waiver issue could be considered “unpreserved” when the right to seek such a waiver did not exist until well after the date of sentencing. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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 September 8, 2022.

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. 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

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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 v. Stanley Holmes

AD1 order dated May 1, 2022, affirming judgment of conviction.. Decision below: 205 AD3d 653, 167 NYS3d 392. Singas, J., granted leave September 28, 2022. (SSM).

ISSUE PRESENTED: Whether *People v. LaFontaine* precludes a trial court from revisiting whether a timely *pro se* request was unequivocal where the trial court clearly understood it as such at the time. (Assigned counsel: Megan Byrne and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

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.

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. Vladimir Krull

AD1 order dated August 2, 2022, modifying SORA risk level from level 2 to level 1 and otherwise affirming. Decision below: 208 AD3d 163, 172 NYS3d 439. (SSD.)

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ISSUE PRESENTED: Whether, when determining the risk level under SORA, the hearing court erred in assessing 10 points for refusal to accept responsibility when defendant invoked his Fifth Amendment right against self-incrimination and was tried and convicted but his appeal was pending. (Assigned counsel: Lexie Mitter and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC.)

People ex rel. Rankin v. Brann

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.

People v. Melvin Baez

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

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Decision below: 203 A.D.3d 965 (2d Dep't 2022). 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. Jose M. Rivera

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.

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. 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 N.Y.S.3d 660. Wilson, J. granted leave to the People on October 11, 2022.

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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 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 A.D.3d 413 (1st Dep’t 2022). 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. Jorge Espinosa (SSM)

AD2 order dated July 20, 2022 affirming judgment of conviction.

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Decision below: 207 A.D.3d 655 (2d Dep't 2022). Rivera J. granted leave on November 3, 2022.

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. 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. 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.

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. Jean Dufresne (SSM)

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AD1 order dated October 18, 2022 affirming an order designating the defendant as a level 3 sexually violent predicate sex offender. 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. Matthew Corr

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

ISSUE PRESENTED: SORA- 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.)

People v. Bryan McDonald

AD2 order dated July 20, 2022 affirming an order designating the defendant as a level one sex offender. 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.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

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. (Assigned counsel: Clea Weiss, Esq., 10 North Fitzhugh Street, Rochester, NY 14614).

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.

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).

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.

IV. New Leave Grants

Alcantara v. Annucci

AD3 order dated March 31, 2022, reversing partial denial of defendants' motion for summary judgment, granting summary judgment to defendants upon search of the record, and dismissing the complaint, and, as modified, affirmed. Decision below: 203 A.D.3d 1483 (3rd Dep't 2022). Court of Appeals granted leave on January 10, 2023. (Counsel: Willkie Farr & Gallagher LLP, New York City.)

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

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.

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

AD2 order dated July 6, 2022, reversing judgment of conviction. Decision below: 207 A.D.3d 476 (2d Dep’t 2022). Singas, J., granted leave to People on December 30, 2022. (Assigned counsel: Patricia Pazner, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

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.

People v. Anthony Blue

AD1 order dated February 15, 2022, affirming judgment of conviction. Decision below: 202 A.D.3d 546 (1st Dep’t 2022). Wilson, J., granted leave on December 21, 2022.(Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

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.

**COURT OF APPEALS UPDATE -
Center for Appellate Litigation**

People v. Danny Novas

AD1 order dated April 28, 2022, reversing order granting 330.30 and reinstating indictment and verdict. Decision below: 204 A.D.3d 613 (1st Dep't 2022). Wilson, J., granted leave on December 21, 2022. (Assigned counsel: Caprice R. Jenerson, Office of the Appellate Defender, 11 Park Place, New York, NY 10007.)

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).