MEMORANDUM

To:     Chief Defender & Colleague

From:  Bob Dean

Date:   September 15, 2017

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!
I. **Cases Awaiting Decision**

**People v. John Andujar**


**ISSUE PRESENTED:** Whether VTL §397, prohibiting “equip[ing] a motor vehicle” with a radio receiver capable of receiving frequencies allocated for police, applies when such a device is carried in the driver’s clothing. (Assigned counsel: Seymour W. James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

**People v. Brian Novak**


**ISSUES PRESENTED:** (1) Whether the judge who presided over the defendant’s bench trial may sit on the panel that decides his appeal. (2) Whether, under CPL 100.50, a prosecutor’s information may supercede a simplified traffic information.

**People v. James L. Carr**


**ISSUE PRESENTED:** Whether the 440 motion, based on lack of jurisdiction, was improperly denied, in that the People failed to seek
leave to represent murder charges to a second grand jury in violation of CPL 190.75(3). (Assigned counsel: Evan M. Lumley, Cornell Mansion, 484 Delaware Ave., Buffalo, NY 14202.)

People v. Peter Austin


ISSUE PRESENTED: Whether a court must provide a permissive adverse inference instruction when important evidence that was promptly requested by the defense and is in the custody of the People is destroyed as a result of a natural disaster or otherwise, and whether a court may sua sponte forbid defense counsel from commenting on the missing evidence in summation. (Assigned counsel: Mark W. Zeno & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Ross Campbell


ISSUE PRESENTED: In this sexual assault prosecution, whether trial counsel was ineffective in failing to challenge a juror who was the victim of sexual violence and acknowledged that she would find it difficult to serve. Counsel’s voir dire comments made it clear that both he and the court were confused about the juror’s reasons for seeking to be excused from the jury. (Assigned counsel: Abigail Everett & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)
People v. Vilma Bautista


ISSUES PRESENTED: (1) Prosecutorial misconduct on summation by misstating evidence. (2) Whether the notes of an interview with an alleged co-conspirator constituted Brady material. (3) Whether the trial court’s error in reading to the jury findings of fact of a foreign country was harmless error.

People v. Sean Garvin


ISSUES PRESENTED: (1) Payton v. New York (445 U.S. 573); whether defendant was arrested inside his home without a warrant. (2) Whether defendant’s sentence as a discretionary persistent felony offender violates Apprendi. (Assigned counsel: Tammy Linn and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Phillip Wright


ISSUES PRESENTED: (1) Whether the discretionary persistent felony offender adjudication violated Apprendi v. New Jersey. (2) The denial of for-cause challenges to three jurors. (Assigned counsel: Mark Vorkink & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038)
II. Cases Scheduled for Argument

People v. Roberto Estremera


ISSUE PRESENTED: Whether the court erred in conducting a PRS Garner/Sparber resentencing in defendant’s absence, even though the court let the original determinate sentence stand with no PRS. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Stanley Hardee


ISSUE PRESENTED: Whether, under People v. Torres - - which allows police to conduct a protective search of a car only where the officers (1) have reasonable suspicion to believe a crime has been committed and (2) have an articulable basis to fear for their own safety - - police may search a car when the driver has committed a traffic infraction - - not a crime, there by failing to meet prong one of the Torres rule. (Assigned counsel: Rachel T. Goldberg & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Mary Ann Grady Flores

ISSUES PRESENTED: (1) The order of protection (to stay away from a base commander) as predicate for criminal contempt charge against an anti-drone protestors on a driveway outside an air base, a training center for drone pilots. (2) Whether the court erred in responding to a jury question.

People v. Mario Arjune


ISSUE PRESENTED: Whether a writ of error coram nobis, alleging ineffective assistance of counsel depriving a defendant of his right to appeal, lies against trial counsel for - - after filing a notice of appeal - - failing to advise his client about his right to appeal or explain how to get appellate counsel assigned, thus resulting in the eventual dismissal of the appeal for failure to prosecute. (Here, retained counsel filed a notice of appeal on behalf of his intellectually disabled and now-indigent client, but did nothing more - he did not advise his client of his right to poor person relief or to counsel, nor explain how to go about obtaining either, and he did not advise him of the benefits of appealing and consequences of failing to do so. When the People moved to dismiss for failure to perfect, counsel neglected to take any action although he had been served with their motion and thus must have known the appeal would likely be dismissed.) (Assigned counsel for petitioner: Jenin Younes & Lynn W.L. Fahey, Appellate Advocates,111 John St., 9th Floor, NYC 10038.)

People v. Leroy Savage Smith


ISSUE PRESENTED: Whether a trial court may summarily deny a request for new counsel on the eve of trial, or must make a minimal inquiry under People v Sides (75 NY2d 822), where defendant alleges
ineffective assistance of counsel as the basis for the substitution. Defendant said his attorney failed to contact any of the exculpatory witnesses he named or do any investigation into the assault where he claimed self-defense. Defendant also said that his attorney told him that there was no money to hire and investigator to do so, thus implicating *Hinton v Alabama* (571 US __; 134 S Ct 1081 [2014]). Despite such allegations, the Fourth Department, citing *People v Porto* (16 NY3d 93) found that Mr. Smith “failed to proffer specific allegations of a seemingly serious request that would require the court to engage in a minimal inquiry.” (Assigned counsel: Philip Rothschild, Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202.)

**People v. Marlo S. Helms**


**ISSUE PRESENTED:** Whether the Appellate Division correctly held that defendant was not a second felony offender based upon a predicate Georgia burglary conviction in that the Georgia statute did not have the “knowing” scienter element in it. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

**People v. Otis Boone**


**ISSUE PRESENTED:** The court’s denial of the defense request to charge on cross-racial identification. (Assigned counsel: Leila Hull & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)
People v. Dwight Smith


ISSUES PRESENTED: (1) The validity of the appeal waiver; (2) Whether the complete denial of the defendant’s requests for a lawyer during pretrial proceedings concerning a DNA test violated defendant’s right to counsel; (3) Dismissal of the indictment as the proper remedy.

(Assigned counsel for defendant: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)
III. Cases Waiting to be Scheduled

People v. Mark Nonni


ISSUES PRESENTED: (1) Did the court violate O’Rama when it failed to alert counsel to the contents of the substantive jury notes, either prior to bringing the jury in, or after. (2) Did the police, who were investigating a burglary report which contained no description of the suspect, have a “founded suspicion” that the defendant was involved in the burglary based merely on his presence near the burglary scene? Alternatively, did the police constitutionally search inside the defendant’s pocket after detaining him? (Assigned counsel: Matthew Bova & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.) (Leave also granted to co-defendant, Lawrence Parker.

People v. Albert Edward


ISSUE PRESENTED: Whether the allegations in the accusatory instrument charging defendant with fourth-degree weapon possession (PL 265.01 [2]) (possession of a “dangerous knife” with intent to use unlawfully) were legally insufficient where defendant possessed a “box cutter” that he said he used on the train for protection. (Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)
People v. Douglas McCain


ISSUE PRESENTED: Whether the misdemeanor complaint was jurisdictionally defective, in charging PL 265.01 (2) (possession of a dangerous knife with intent to use unlawfully), when it alleged that defendant possessed a “razor knife” clipped to his pants pocket and told the arresting officer he possessed the knife “for protection”; the Appellate Term’s use of the presumption in PL 265.15 (4) to sustain the count.

People v. Michael Johnson


ISSUES PRESENTED: (1) Whether the defendant’s post-arrest statements were voluntary, even though there was a 33-hour delay between arrest and arraignment, where the People produced no evidence that defendant was provided with food, water, or bathroom access during this period. (2) The denial of a missing witness charge as to the complainant’s son, an eyewitness. (3) The denial of a mistrial in response to improper testimony. (4) Delayed disclosure of Rosario material. (Assigned counsel: De Nice Powell & Lynn W.L. Fahey, Appellate Advocates, 111 John Street, 9th Floor, NYC 10038.)

People v. Dennis O’Kane


ISSUES PRESENTED: (1) Whether trial counsel was ineffective for consenting to annotations on the verdict sheet, resulting in reversible error. (2) Whether County Court properly reached the issue sua sponte.
People v. Jude Francis


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

People v. Kerri Roberts

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

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

People v. Terri J. Rush


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


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

People v. Reginald Wiggins


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

People v. Teri W.


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


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

People v. Raymond Crespo


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

People v. Matthew Kuzdzal


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


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

People v. William Harris


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

People v. Spence Silburn


ISSUES PRESENTED: (1) Whether the trial court violated defendant’s right to self-representation by denying his request to proceed pro se with standby counsel. (2) Whether the trial court properly denied the admission of defendant’s psychiatric history into evidence, on the ground that no notice of his intent to present psychiatric evidence had been filed (CPL §250.10), even though defendant sought to introduce such evidence solely to show that defendant’s statements to the police
were not knowing and voluntary. (Assigned counsel: Alexis A. Ascher & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Akeem Wallace


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

People v. Bryan Henry

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

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


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

People v. Saylor Suazo


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

People v. Brian Hakes


ISSUE PRESENTED: Whether County Court had the authority to require defendant to pay for an electronic monitoring program (SCRAM bracelet) as a condition of his probation. (Assigned counsel for
defendant: Kathryn Friedman, C/O The Sage Law Firm Group, P.O. Box 200, 465 Grant Street, Buffalo, N.Y. 14213).

People v. John Simmons


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

People v. Frederick Diaz


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

People v. Donald Odum

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

Matter of Gonzalez v. Annucci


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

People v. Theodore Wilson


ISSUES PRESENTED: (1) The sufficiency of the evidence of depraved indifference. (2) The court’s response to a jury note. (Assigned counsel: Mark W. Vorkink & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)
IV. New Leave Grants

People v. Princesam Bailey


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

People v. Ali Cisse


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


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

People v. Steven Myers


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