

# CENTER FOR APPELLATE LITIGATION

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## MEMORANDUM

**To:** Chief Defender & Colleague

**From:** Bob Dean

**Date:** July 15, 2015

**Subject:** Attached

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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 to 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](http://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 are excited to offer a new feature to our online visitors. Our online Court of Appeals Update (resources link) now 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 Scheduled for Argument**

People v. Anthony Barksdale

AD1 order dated October 15, 2013, affirming judgment of conviction. Decision below: 110 AD3d 498, 974 NYS2d 347. Read, J., granted leave July 8, 2014. To be argued September 8, 2015.

ISSUE PRESENTED: Whether a person's innocuous presence in the lobby of a "trespass affidavit program" building creates an "objective credible reason" for the police to conduct a DeBour level-one inquiry. (Assigned counsel: Jan Hoth & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10006.)

People v. Jennifer Jorgensen

AD2 order dated January 22, 2014, affirming judgment of conviction. Decision below: 113 AD3d 793, 978 NYS2d 361. Smith, J., granted leave August 5, 2014. To be argued September 8, 2015.

ISSUES PRESENTED: (1) The sufficiency of the evidence of second-degree manslaughter of the defendant's child, born days after an emergency C-section triggered by a traffic accident caused by the defendant. (2) The admissibility of the defendant's prescription drug history. (3) Prosecutorial misconduct on summation.

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People v. Jose Martinez Baxin

AD1 order dated April 29, 2014, affirming SORA adjudication of defendant as a level two offender. Decision below: 116 AD3d 628, 984 NYS2d 63. Court of Appeals granted leave September 18, 2014. To be argued September 8, 2015.

ISSUE PRESENTED: Whether the SORA hearing court erred by considering grand jury minutes that it refused to make available to the defense. (Assigned counsel: Julia Buseti & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. James R. Poleun

AD4 order dated July 3, 2014, affirming level three SORA risk adjudication. Decision below: 119 AD3d 1378, 988 NYS2d 827. Court of Appeals granted leave September 23, 2014. To be argued September 9, 2015.

ISSUE PRESENTED: Whether defendant was denied due process when the SORA hearing court accepted his waiver of appearance and held the risk-level hearing in his absence, although he expressed a desire to be present at the hearing and proffered an excuse for his inability to attend.

People v. Raymond Denson

AD1 order dated February 18, 2014, affirming judgment of conviction. Decision below: 114 AD3d 543, 980 NYS2d 434. Saxe, J. (AD dissenter), granted leave July 24, 2014. To be argued September 9, 2015.

ISSUES PRESENTED: (1) The sufficiency of the evidence of attempted second-degree kidnapping of a child under 16, where the defendant merely offered the victim the keys to his apartment. (2) The admission under Molineux of a 20-year-old prior sex offense against a child. (3) The merger doctrine. (4) The admissibility of

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defendant's statements. (5) Ineffective assistance of counsel. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Terrance L. Mack

AD4 order dated May 2, 2014, reversing judgment of conviction. Decision below: 117 AD3d 1450, 984 NYS2d 768. Lindley, J. (AD dissenter), granted leave to People June 30, 2014. To be argued September 10, 2015.

ISSUE PRESENTED: Whether the trial court's acceptance of a jury verdict without first responding to three jury notes was a mode-of-proceedings error requiring reversal despite the lack of an objection. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Kenneth Nealon

AD2 order dated April 16, 2014, reversing judgment of conviction and ordering a new trial. Decision below: 116 AD3d 886, 985 NYS2d 91. Graffeo, J., granted leave to People August 15, 2014. To be argued September 10, 2015.

ISSUES PRESENTED: (1) O'Rama; whether the trial court committed a mode of proceedings error when, according to the original trial record, it read the contents of three jury notes requesting charge clarifications for the first time in front of the jury and immediately responded. (2) Whether the Appellate Division properly refused to consider the People's "resettled" trial record. (Assigned counsel: Kendra Hutchinson and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. Rhian Taylor

AD2 order dated August 28, 2014, affirming judgment of conviction. Decision below: 120 AD3d 842, 992 NYS2d 99. Smith, J., granted leave December 23, 2014. To be argued September 10, 2015.

**ISSUES PRESENTED:** (1) Where the parties agreed that the court provide the deliberating jury with any requested exhibits without following the O’Rama protocol, whether the court erred in not consulting counsel when the jury asked “to see the benefits offered” to the People’s two cooperating witnesses, and instead sent in a cooperation-agreement-exhibit as to only one of the witnesses, where the only evidence of the other cooperator’s benefits was in the testimony. (2) Whether counsel opened the door to a photo array. (3) Whether a detective was erroneously allowed to testify that defense counsel was present at a pretrial lineup. (Assigned counsel: Joel B. Rudin, 600 5<sup>th</sup> Avenue, 10<sup>th</sup> Floor, NYC 10020.)

People v. Dupree Harris

AD2 order dated May 14, 2014, affirming judgment of conviction. Decision below: 117 AD3d 847, 985 NYS2d 643. Miller, J. (AD dissenter), granted leave July 8, 2014. To be argued September 11, 2015.

**ISSUE PRESENTED:** Where the defendant was on trial for bribing and tampering with three witnesses to a homicide, did the trial court err in admitting evidence that a different witness to the homicide was murdered shortly before the homicide trial, and that the defendant had sought to contact him. (Assigned counsel: Mark Vorkink & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. Vincent Izzo

AD3 order dated August 7, 2014, affirming classification of defendant as a level two sex offender, with two dissents. Decision below: 120 AD3d 860, 990 NYS2d 736. Case is in Court of Appeals due to two dissents. To be argued September 11, 2015.

ISSUES PRESENTED: (1) Risk factor 3; whether the evidence established that there were three as opposed to two victims. (2) Risk factor 7; whether the evidence established that the defendant “groomed” his victims. (3) Whether the SORA court’s failure to expressly reference the defendant’s request for a downward departure required remittal to the lower court for further findings.

People v. Michael Sans

AT2 order dated August 30, 2013, affirming judgment of conviction. Decision below: 40 Misc.3d 141(A), 977 NYS2d 669, 2013 WL 4766514. Read, J., granted leave July 8, 2014. To be argued September 16, 2015.

ISSUE PRESENTED: The factual sufficiency of the allegations in the misdemeanor complaint charging fourth-degree criminal possession of a weapon based upon possession of a gravity knife, in that there was no allegation that the blade was “released from the handle or sheath” or that it locked into place “by means of a button, spring, lever or other device.”. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Thomas Barnes

AT1 order dated July 31, 2013, affirming judgment of conviction. Decision below: 40 Misc.3d 133(A), 977 NYS2d 668, 2013 WL 3942917. Read, J., granted leave July 8, 2014. To be argued September 16, 2015.

ISSUE PRESENTED: Whether an individual may be prosecuted for second-degree criminal trespass (PL §140.15[1]) based upon

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presence in the lobby of a public housing apartment building, or whether, instead, such conduct can only be prosecuted as third-degree criminal trespass under PL §140.10(e) and (f). (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Christopher Walker

AD4 order dated February 7, 2014, affirming judgment of conviction. Decision below: 114 AD3d 1134,980 NYS2d 181. Lippman, Ch. J., granted leave July 30, 2014. To be argued September 17, 2015.

ISSUE PRESENTED: Whether the CJJ “initial aggressor” justification charge misstated the applicable law where the defendant claimed he used force to shield another person from attack in an ongoing altercation. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Matthew P.

AT1 order dated October 15, 2013, affirming judgment of conviction. Decision below: 41 Misc.3d 128(A), 980 NYS2d 277, 2013 WL 5629948. Lippman, Ch. J., granted leave June 5, 2014. To be argued October 13, 2015.

ISSUES PRESENTED: (1) The sufficiency of the factual allegations in an accusatory instrument charging petit larceny – i.e., that defendant improperly used a key not belonging to him to let two undercover police officers (and himself) into the subway through an exit gate, for money. (2) The sufficiency of the factual allegations charging theft of services – i.e., that defendant was observed entering the subway “beyond the turnstiles” and without “paying the required fare” by “walking through an exit gate.” (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

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People v. Willie L. Wragg

AD4 order dated March 28, 2014, affirming judgment of conviction. Decision below: 115 AD3d 1281, 982 NYS2d 654. Lippman, Ch. J., granted leave August 7, 2014. To be argued October 13, 2015.

**ISSUES PRESENTED:** (1) Whether the People are permitted to seek a sentencing enhancement pursuant to PL §70.07 by filing a CPL §400.19 second child sexual assault felony offender statement after the commencement of trial. (2) Whether trial counsel was ineffective for failing to object to a police officer's "passing reference" to the victim's pre-arrest ID of the defendant. (Assigned counsel: Shirley A. Gorman, PO Box 629, 19 Market St., Brockport, NY 14420.)

People v. Alfred Gary

AD2 order dated March 12, 2014, affirming judgment of conviction. Decision below: 115 AD3d 760, 981 NYS2d 602. Pigott, J., granted leave September 5, 2014. To be argued October 13, 2015.

**ISSUES PRESENTED:** (1) Whether hearsay evidence mistakenly stipulated into evidence as part of a large number of documents should not have been admitted into evidence. (2) Sufficiency of evidence as to conspiracy count. (3) Repugnant verdicts.

People v. Antonio Martinez

AD1 order dated November 12, 2013, affirming judgment of conviction. Decision below: 111 AD3d 430, 975 NYS2d 5. Andrias, J. (AD dissenter), granted leave January 16, 2014. To be argued October 14, 2015.

**ISSUE PRESENTED:** Whether the imposition after trial of the maximum sentence of imprisonment where the People made a pre-trial offer of probation unconstitutionally penalized the defendant for going to trial. (Assigned counsel: David Klem & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)



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People v. Pettis Hardy

AD1 order dated March 13, 2014, affirming judgment of conviction. Decision below: 115 AD3d 511, 981 NYS2d 722. Lippman, Ch. J., granted leave July 28, 2014. To be argued October 14, 2015.

ISSUES PRESENTED: (1) Whether the trial court erred in refusing to give a circumstantial evidence charge on the ground that there was both direct and circumstantial evidence of guilt. (2) The propriety of the court's giving two Allen-type charges. (3) Whether the court erred in allowing two lay witnesses to give opinion testimony as to the meaning of events depicted in surveillance videotapes, where the witnesses had not personally observed the events described. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Frankie Hatton

AT2 order dated February 7, 2014, reversing judgment of conviction and dismissing the accusatory instrument. Decision below: 42 Misc.3d 141(A), 990 NYS2d 439, 2014 WL 683880. Rivera, J., granted leave to People August 4, 2014. To be argued October 14, 2015.

ISSUES PRESENTED: (1) Whether the failure of the factual portion of an information to contain allegations which if true, establish each and every element is a jurisdictional defect which may be raised on appeal despite lack of preservation or a guilty plea. (2) Whether such claim may be waived if defendant's attorney waived the right to prosecution by information by a blanket waiver of the reading of that right in the context of an unrelated case and outside defendant's presence. (3) Whether the information failed to mention various elements of forcible touching. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

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Matter of Margulis v. Gentil

AD 2 order dated September 24, 2014, granting writ of prohibition barring the People from retrying the petitioner on double jeopardy grounds. Decision below: 120 AD3d 1414, 993 NYS2d 115. To be argued October 14, 2015.

ISSUE PRESENTED: Where the trial court declared a mistrial rather than accept a partial verdict, was there manifest necessity for the mistrial declaration or is re-prosecution barred by double jeopardy?

People v. Alma Caldavado

AD2 order dated April 16, 2014, affirming denial of 440.10 motion without a hearing. Decision below: 116 AD3d 877, 983 NYS2d 410. Graffeo, J., granted leave August 7, 2014. To be argued October 15, 2015.

ISSUE PRESENTED: Whether defendant was entitled to an evidentiary hearing on her CPL §440.10 motion alleging ineffective assistance of trial counsel for not presenting expert testimony in light of a growing body of medical evidence, not introduced at trial, suggesting that “shaken baby syndrome” can be explained by a medical condition unrelated to the physical treatment of the child.

People v. Davon Harris

AD2 order dated March 19, 2014, affirming judgment of conviction. Decision below: 115 AD3d 872, 982 NYS2d 330. Rivera, J., granted leave August 4, 2014. To be argued October 15, 2015.

ISSUES PRESENTED: (1) Whether trial counsel was ineffective for failing to raise a statute of limitations defense to one of two charged crimes. (2) Sufficiency of evidence of intent to steal property when defendant entered the dwelling. (3) Failure to grant a for-cause challenge. (4) Due process violations. (Assigned counsel: Patricia Pazner & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. Nugene Ambers

AD2 order dated March 5, 2014, affirming judgment of conviction. Decision below: 115 AD3d 671, 981 NYS2d 554. Abdus-Salaam, J., granted leave August 25, 2014. To be argued October 15, 2015.

ISSUE PRESENTED: Ineffective assistance of trial counsel for failing, inter alia, to raise a statute of limitations objection to a misdemeanor count, to object to comments by the prosecutor on summation, or to request a mistrial or curative instructions. (Assigned counsel: Mark Vorkink and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Everett M. Durant

AD4 order dated December 27, 2013, affirming judgment of conviction. Decision below: 112 AD3d 1366,977 NYS2d 535. Pigott, J., granted leave to May 12, 2014. To be argued October 20,2015.

ISSUE PRESENTED: Whether the trial court erroneously denied defendant's request for an adverse inference charge because the police, although capable of doing so, failed to videotape defendant's confession. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Federico Perez

AD1 order dated April 10, 2014, affirming judgment of conviction. Decision below: 116 AD3d 511, 983 NYS2d 269. Smith, J., granted leave October 10, 2014. To be argued October 20, 2015.

ISSUE PRESENTED: Whether the guilty plea allocution was sufficient under People v. Tyrell (22 NY3d 359), even though no Boykin rights were discussed, since the plea was only to a violation and a \$100 fine. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.) (See also People v. Joseph Conceicao, to be argued the same day.)

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People v. Abdelouahad Afilal

AT1 order dated June 4, 2014, affirming judgment of conviction. Decision below: 43 Misc.3d 142(A), 933 NYS2d 645, 2014 WL 2504530. Read, J., granted leave February 6, 2015. To be argued October 20, 2015.

ISSUES PRESENTED: (1) The validity of the misdemeanor guilty plea where defendant waived “formal allocution,” stated that he was guilty, confirmed that he was giving up his right to a trial, and acknowledged that he “had a chance to fully discuss his plea and all the possible consequences with [his] lawyer.” (2) The sufficiency of the factual allegations in the accusatory instrument. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Waters St. NYC 10038.)

People v. Daniel Israel

AD1 order dated November 7, 2013, affirming judgment of conviction. Decision below: 111 AD3d 413, 973 NYS2d 647. Lippman, Ch. J., granted leave June 12, 2014. To be argued October 21, 2015.

ISSUE PRESENTED: Whether the trial court erroneously allowed evidence of an uncharged crime (destroying an inmate telephone) to rebut the defendant’s EED defense, where there was no evidence establishing the events which led up to the destruction of the inmate telephone. (Assigned counsel: Jan Hoth & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Julio Negrón

AD2 order dated December 11, 2013, affirming order denying CPL 440.10 motion without a hearing. Decision below: 112 AD3d 741, 976 NYS2d 220. Smith, J., granted leave August 20, 2014. To be argued October 21, 2015.

ISSUES PRESENTED: (1) Ineffective assistance of trial counsel for, inter alia, failure to preserve issues or present relevant

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evidence. (2) Whether the People committed Brady violations for failure to turn over exculpatory evidence. (Assigned counsel: Joel B. Rudin, 600 Fifth Ave., 10<sup>th</sup> Floor, NYC 10020.)

People v. Ally Golo

AD2 order dated February 7, 2014, affirming denial of DLRA-3 resentencing without first holding a hearing. Decision below: 109 AD3d 623, 970 NYS2d 604. Read J., granted leave July 8, 2014. To be argued October 22, 2015.

ISSUE PRESENTED: Whether it is improper to deny DLRA-3 resentencing based upon “substantial justice” without first holding a hearing on the motion. (Assigned counsel: David P. Greenberg and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Mark Jurgins

AD1 order dated June 25, 2013, modifying judgment of conviction by reducing the sentence as excessive in the interest of justice and otherwise affirming the judgment and the order denying CPL 440.20 relief. Decision below: 107 AD3d 595, 968 NYS2d 56. Rivera, J., granted leave June 24, 2014. To be argued October 22, 2015.

ISSUES PRESENTED: (1) Does People v. Smith (73 NY2d 961) bar an unpreserved direct-appeal challenge to an out-of-state predicate, where the out-of-state statute is, on its face, not the equivalent of a New York felony. (2) Alternatively, if Smith is a bar to an unpreserved direct-appeal challenge, is the issue cognizable on a CPL 440.20 motion challenging the legality of the predicate conviction, and (3) would it matter whether trial counsel was ineffective in failing to challenge the predicate. (Assigned counsel: Lisa A. Packard & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Samuel Small

AD2 order dated December 18, 2013, affirming judgment of conviction. Decision below: 112 AD3d 857, 976 NYS2d 575. Smith, J., granted leave August 8, 2014. To be argued October 22, 2015.

ISSUES PRESENTED: (1) While the defendant was in police custody after being arraigned on a felony complaint charging burglary, the People filed a felony complaint charging him with an earlier burglary but did not have him “arrested” or arraigned on it. Rather the People presented both burglaries to the grand jury and secured an indictment on both; was the defendant entitled to notice that the earlier burglary would be presented to the grand jury? (2) Whether the predicate felony offense was beyond the 10 year period because of tolling of a 14-month period, during which the defendant was incarcerated on a parole violation later voided on a State habeas writ. (Assigned counsel: William Loeb and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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**II. Cases Waiting to be Scheduled**

People v. Luciano Rosario

AD1 order dated March 13, 2014, denying application for a writ of error coram nobis. Graffeo, J., granted leave September 4, 2014.

ISSUE PRESENTED: Whether a writ of error coram nobis will lie when a defendant does not appeal because trial counsel failed to inform him about the appellate process and defendant did not know to ask. This issue was left open in People v. Andrews, 23 NY3d 605. (Assigned counsel: Robin Nichinsky & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Jesse Roberites

AD4 order dated March 28, 2014, reversing judgment of conviction. Decision below: 115 AD3d 1291, 983 NYS2d 377. Smith, J. (AD dissenter), granted leave to the People July 17, 2014.

ISSUE PRESENTED: Whether the trial court's failure to notify a pro se defendant of a jury note requesting exhibits (CPL §310.20[1]) is a mode-of-proceedings error requiring reversal, even in the absence of preservation. (Assigned counsel: William J. Comiskey, 677 Broadway, Suite 301, Albany, NY 12207.)

People v. John Gibson

AD3 order dated May 29, 2014, affirming judgment of conviction. Decision below: 117 AD3d 1317, 986 NYS2d 660. Rose, J. (AD dissenter), granted leave July 24, 2014.

ISSUES PRESENTED: (1) Whether the police established the existence of emergency circumstances justifying the warrantless entry into defendant's apartment; although the police had reason to believe a weapon was inside the apartment, the defendant was already under arrest outside the apartment, which was unoccupied at the time. (2) Probable cause to arrest. (3) The sufficiency of the indictment as to third-degree weapon possession, where the language

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failed to specify whether the indictment was for an imitation pistol (PL §265.01[2]) or a dangerous weapon (PL §265.02[1]). (Assigned counsel: John P.M. Wappett, Warren County P.D., 1340 State Route 9, Lake George, NY 12845.)

People v. Todd Holley

AD2 order dated April 3, 2014, affirming judgment of conviction. Decision below: 116 AD3d 442, 982 NYS2d 761. Lippman, Ch. J., granted leave July 31, 2014.

ISSUES PRESENTED: (1) The impact the police failure to preserve the photo array should have on the Wade determination. (2) Whether the lineup was unduly suggestive. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Urselina King

AD2 order dated October 23, 2013, affirming judgment of conviction. Decision below: 110 AD3d 1005, 973 NYS2d 353. Lippman, Ch. J., granted leave June 27, 2014.

ISSUES PRESENTED: (1) Whether the trial court committed a mode-of-proceedings error by discharging potential jurors based upon hardship without conducting a sufficient inquiry. (2) The preclusion of evidence of third-party culpability. (3) Ineffective assistance of counsel based on counsel's failure to object to the prosecutor's misconduct on summation. (Assigned counsel: Kendra L. Hutchinson & David P. Greenberg and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Kenneth Moore

AT1 order dated February 22, 2012, affirming judgment of conviction after a guilty plea in Criminal Court. Decision below: 34 Misc.3d 151(A), 951 NYS2d 88, 2012 WL 575007. Read, J., granted leave June 9, 2014.



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ISSUE PRESENTED: Where the defendant did not move to withdraw his guilty plea, whether the guilty plea was invalid under People v. Tyrell, 22 NY3d 359 (2013). (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Jin Cheng Lin

AD2 order dated April 3, 2013, modifying judgment of conviction. Decision below: 105 AD3d 761, 963 NYS2d 131. Hall, J. (AD dissenter), granted leave June 13, 2013.

ISSUES PRESENTED: (1) Whether the defendant was improperly precluded, at trial, from introducing a pre-arraignment videotaped statement to an ADA, to show defendant's emotional demeanor and thus the involuntariness of his preceding statements to the police. (2) The voluntariness of the statements due to the length of time he was questioned by police. (3) Whether the delay in arraignment was strategically designed so that defendant could be questioned outside the presence of counsel, thus rendering the statement involuntary. (4) The court's instructions directing the jury to continue deliberating after refusing to accept a repugnant verdict. (5) The court's refusal to direct the jury to reconsider the verdict in its entirety. (Assigned counsel: De Nice Powell & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Natanael Sagastumeal Varenga

AD2 order dated March 5, 2014, reversing denial of CPL §440.10 motion and remanding for a hearing. Decision below: 115 AD3d 684, 981 NYS2d 750. Rivera, J., granted leave to People on August 6, 2014.

ISSUE PRESENTED: For Padilla retroactivity purposes, did defendant's conviction not become final until the date by which he would have been permitted to file a late notice of appeal (i.e., one year and 30 days from date of sentence)?

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People v. Kaity Marshall

AT2 order dated February 7, 2014, affirming judgment of conviction. Decision below: 42 Misc.3d 141(A), 990 NYS2d 439, 2014 WL 683893. Pigott, J., granted leave July 21, 2014.

ISSUES PRESENTED: Whether a trial court correctly determined, after a limited hearing, that the single photo ID procedure that the trial assistant conducted with the complainant one year after the incident was permissible as proper “trial preparation,” as opposed to impermissibly suggestive. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Dennis P. Smalls

AD1 order dated April 8, 2014, affirming judgment of conviction. Decision below: 116 AD3d 474, 982 NYS2d 886. Graffeo, J., granted leave August 11, 2014.

ISSUE PRESENTED: The sufficiency of a misdemeanor information charging seventh-degree drug possession based upon residue in a crack pipe (“a tar-like substance”), absent confirmatory scientific testing. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Christopher A. Nicholson

AD4 order dated June 20, 2014, modifying judgment of conviction. Decision below: 118 AD3d 1423, 988 NYS2d 765. Lindley (AD dissenter), J., granted leave August 12, 2014.

ISSUES PRESENTED: (1) Improper rebuttal evidence to impeach the sole defense witness on a collateral matter. (2) The admissibility of expert testimony on child sex abuse accommodation syndrome to explain the victim’s delayed disclosure. (3) Ineffective assistance of counsel. (Assigned counsel: Mary P. Davison, PO Box 652, 61 North Main Street, Suite C, Canandaigua, NY 14424.)

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People v. Assad Cedeno

AD2 order dated January 15, 2014, affirming judgment of conviction. Decision below: 113 AD3d 695, 978 NYS2d 328. Smith, J., granted leave September 3, 2014.

ISSUES PRESENTED: (1) Whether the trial court violated the Bruton rule by allowing in the codefendant’s redacted confession; whether the redaction would not have caused the jury to realize that the confession referred specifically to the defendant. (2) The admission of other-crimes evidence. (Assigned counsel: De Nice Powell and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Rashid Bilal

AD1 order dated June 5, 2014, affirming judgment of conviction. Decision below: 118 AD3d 448, 987 NYS2d 364. Rivera, J., granted leave September 25, 2014.

ISSUE PRESENTED: Where defense counsel unjustifiably failed to request a suppression hearing, whether: (a) the merits of the suppression issue were “close” enough after People v. Clermont, 22 NY3d 931 (2013) to warrant a hearing, where police pursued defendant despite only having a generic description of a “black male” in a jacket and where defendant fled from individuals he did not know were police officers, and (b) the reviewing court erred in limiting its assessment of prejudice to the potential outcome of the suppression hearing. (Assigned counsel: Rachel T. Goldberg & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Ronald D. Rossborough

AD4 order dated January 3, 2014, affirming judgment of conviction. Decision below: 101 AD3d 1775, 956 NYS2d 389. Smith, J., granted leave September 24, 2014.

ISSUES PRESENTED: (1) The validity of defendant's waiver of his right to be present at sentencing. (2) Whether defendant's waiver of his right to appeal forfeits his claim that the court erred in sentencing him in absentia.

People v. Anthony Pavone

AD3 order dated May 29, 2014, affirming judgment of conviction. Decision below: 117 AD3d 1329, 986 NYS2d 674. Pigott, J., granted leave September 24, 2014.

ISSUES PRESENTED: (1) Whether the People's introduction into evidence of defendant's post-Miranda-right silence on their direct case, in violation of his 5<sup>th</sup> Amendment rights, was harmless beyond a reasonable doubt. (2) Whether trial defense counsel was ineffective for, inter alia, failing to object to most of the above testimony. (Assigned counsel: Paul J. Connolly, 2 Wedge Road, Delmar, NY 12054.)

People v. Scott Barden

AD1 order dated April 10, 2014, modifying judgment of conviction. Decision below: 117 AD3d 216, 983 NYS2d 534. Pigott, J., granted leave September 23, 2014.

ISSUES PRESENTED: (1) Whether a defendant may be guilty of fourth-degree criminal possession of stolen property for possessing intangible property, i.e., a credit card number, where the rightful owner retains physical possession of the card. (2) CPL §30.30 violation. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

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People v. Glenn S. Smith

AT 9&10 order dated March 10, 2014, reversing judgment of conviction and dismissing the accusatory instrument. Rivera, J., granted leave to People October 6, 2014.

ISSUE PRESENTED: Whether defendant was required to submit an affidavit of errors upon taking an appeal to the Appellate Term, where defendant provided an electronic recording of the underlying proceeding instead of a stenographic transcription as specified in CPL 460.10(3). (Assigned counsel for Respondent: Richard N. Lentino, 138 West Main Street, Middletown, NY 10940.)

People v. Gordon Gross

AD4 order dated June 20, 2014, affirming denial of CPL 440.10 motion based on ineffective assistance of trial counsel. Decision below: 118 AD3d 1383, 988 NYS2d 733. Lindley, J. (AD dissenter), granted leave September 18, 2014.

ISSUES PRESENTED: Whether trial counsel was ineffective for failing to (a) object to testimony regarding numerous prior consistent statements by the sexual assault child victim; and (b) consult with a medical expert.

People v. Javier Sanchez

AD1 order dated March 12, 2015, reversing judgment of conviction, after a guilty plea, for DUI. Decision below: 126 AD3d 482, 6 NYS3d 25. Stein, J., granted leave to People May 13, 2015. (New Leave Grant.)

ISSUE PRESENTED: Whether the guilty plea was knowing and voluntary (People v. Tyrell, 22 NY3d 359), despite the absence of any Boykin rights or an effective allocution, where the plea was to a misdemeanor, not a petty offense. (Assigned counsel for respondent: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

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People v. Marcos Llibre

AD1 order dated June 3, 2014, denying application for a writ of error coram nobis. Rivera, J., granted leave December 3, 2014.

ISSUE PRESENTED: Whether a writ of error coram nobis will lie when a defendant does not appeal because trial counsel failed to inform him about the appellate process and defendant did not know to ask; additionally, the ostensible appeal waiver was patently invalid. This issue was left open in People v. Andrews, 23 NY3d 605. (Assigned counsel: Robin Nichinsky & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Shane Morris

AD2 order dated August 27, 2014, reversing judgment of conviction and ordering a new trial. Decision below: 120 AD3d 835, 991 NYS2d 454. Graffeo, J., granted leave to People November 25, 2014.

ISSUE PRESENTED: Whether the O’Rama holding (78 NY2d 270) should be overruled to the extent that it designates a violation a “mode of proceedings” error. (Assigned counsel for respondent: David P. Greenberg and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Victor Soto

AD1 order dated December 10, 2013, reversing judgment of conviction and ordering a new trial. Decision below: 113 AD3d 153, 976 NYS2d 87. Clark, J. (AD dissenter), granted leave to People February 11, 2014.

ISSUE PRESENTED: The trial court did not allow the defense to introduce a third-party witness’s statement as a declaration against penal interest. Query: is it a declaration against penal interest if the declarant knows her conduct may have been illegal, but does not know whether it is or not. (Assigned counsel for respondent: Mark

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W. Zeno & Robert S. Dean, Center for Appellate Litigation, 120  
Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Oliver Berry

AD2 order dated October 23, 2013, affirming judgment of conviction. Decision below: 110 AD3d 1002, 973 NYS2d 338. Lippman, Ch.J., granted leave November 24, 2014.

ISSUES PRESENTED: (1) Whether a prosecution witness's invocation of the 5<sup>th</sup> amendment in front of the jury added critical weight to the People's case. (2) Whether the court properly precluded expert identification testimony about the effects of stress on the accuracy of identification. (Assigned counsel for respondent: Erica Horwitz and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Bobby Wallace

AD1 order dated January 7, 2014, affirming judgment of conviction. Decision below: 113 AD3d 413, 978 NYS2d 145. Lippman, Ch.J., granted leave November 25, 2014.

ISSUES PRESENTED: (1) Whether defendant was "in custody" so that Miranda warnings were required. (2) Whether the "public safety" exception to the Miranda rule applies where the weapon in question was not an inherently dangerous object. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Wayne Henderson

AD2 order dated June 25, 2014, reversing judgment of conviction and ordering a new trial. Decision below: 118 AD3d 1020, 990 NYS2d 214. Smith, J., granted leave to People December 16, 2014.

ISSUE PRESENTED: Whether trial counsel's deficient preparation of an expert witness in forensic psychiatry constituted ineffective assistant of counsel. (Assigned counsel for defendant: Leila Hull &

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Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Freddie Thompson

AD2 order dated June 11, 2014, modifying judgment of conviction by reducing the sentence in the interest of justice and otherwise affirming. Decision below: 118 AD3d 822, 987 NYS2d 189. Smith, J., granted leave December 18, 2014.

ISSUE PRESENTED: 10-year look-back period for adjudication as a second violent felony offender: where defendant originally received probation on the predicate offense and was later violated on probation and resentenced, whether the operative sentencing date for the predicate is the original sentencing date or the date of the resentencing on the VOP. (Assigned counsel: Alex Donn & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Luis Ortiz

AD1 order dated February 4, 2014, modifying judgment of conviction by remanding for resentencing but otherwise affirming the conviction. Decision below: 114 AD3d 430, 980 NYS2d 43. Smith, J., granted leave December 22, 2014.

ISSUE PRESENTED: Whether the People should have been collaterally estopped from presenting at defendant's retrial evidence that he held a razor to the victim's neck: defendant was acquitted of first-degree burglary at the first trial but convicted of second-degree robbery, and the only difference between the two offenses was whether defendant used or threatened the use of a dangerous instrument. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)



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People v. Anthony DiPippo

AD2 order dated May 28, 2014, affirming judgment of conviction. Decision below: 117 AD3d 1076, 986 NYS2d 243. Smith, J., granted leave December 23, 2014.

ISSUES PRESENTED: (1) Whether the trial court erred in barring defense evidence of third-party culpability. (2) Ineffective assistance of counsel.

People v. Andre Harrison

AD2 order dated March 26, 2014, dismissing an appeal by permission from a 440.10 motion denial. Decision below: 115 AD3d 980, 982 NYS2d 544. Lippman, Ch.J., granted leave December 29, 2014.

ISSUE PRESENTED: Whether the Appellate Division erred in dismissing the appeal of a defendant who had been involuntarily deported after receiving permission to appeal his 440.10 denial, on the ground that it was a permissive appeal rather than a direct-judgment appeal as of right. (Assigned counsel: Allegra Glashausser & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Oscar Sanders

AD2 order dated July 23, 2014, affirming judgment of conviction. Decision below: 119 AD3d 878, 991 NYS2d 66. Lippman, Ch.J., granted leave December 30, 2014.

ISSUES PRESENTED: (1) Whether the police properly seized, without a warrant, defendant's clothes, which were lying on the floor of his hospital room in a clear plastic bag, under the theory there was probable cause to believe that the defendant was a victim. (2) Whether reversal based upon defendant's absence from the Sandoval hearing was obviated because the court's precluding inquiry into the underlying facts of his convictions rendered the defendant's presence superfluous. (Assigned counsel: Shanda

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Sibley & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Joel Joseph

AD1 order dated October 7, 2014, affirming judgment of conviction. Decision below: 121 AD3d 445, 994 NYS2d 85. Lippman, Ch.J., granted leave December 31, 2014.

ISSUE PRESENTED: Whether the police had probable cause to arrest defendant for ongoing drug activity when some of the information upon which the police relied came from a confidential informant several months earlier. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Roy Gray

AD1 order dated April 8, 2014, affirming judgment of conviction and denial of 440.10 motion. Decision below: 116 AD3d 480, 983 NYS2d 262. Smith, J., granted leave December 18, 2014.

ISSUES PRESENTED: (1) Whether counsel was ineffective for not moving to reopen the Huntley hearing during trial when favorable information as to attenuation came out, since (the Appellate Division determined) defendant would have lost a reopened hearing. (2) The admission into evidence of live ammunition found when defendant's half-brother was arrested; whether probative value outweighed prejudice. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Jonathan J. Connolly

AD4 order dated June 20, 2014, affirming judgment of conviction. Decision below: 118 AD3d 1449, 988 NYS2d 791. Read, J., granted leave January 6, 2015.

ISSUES PRESENTED: (1) Whether, at a restitution hearing, the court properly relied on a hearing transcript created by a JHO

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unauthorized to hold the hearing. (2) Whether the delay in holding the restitution hearing divested the court of jurisdiction. (3) Ineffective assistance of counsel. (Assigned Counsel: David C. Schopp, The Legal Aid Bureau of Buffalo, Inc., 237 Main Street, Suite 1602, Buffalo, N.Y. 14203.)

People v. Charles Smith

AD1 order dated November 13, 2014, affirming judgment of conviction. Decision below: 122 AD3d 456, 996 NYS2d 37. Pigott, J., granted leave January 27, 2015.

ISSUES PRESENTED: (1) In an observation-sale case, whether the court improperly precluded defense counsel from cross-examining the observing officers about civil lawsuits filed against them in cases with facts similar to the ones in defendant's case, where the lawsuits were merely pending or had been settled. (2) The denial of a circumstantial evidence charge, where no drugs were observed exchanged, but a glassine was found upon the alleged buyer. (Assigned counsel: Claudia Flores & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Keith Johnson

AD1 order dated December 16, 2014, reversing judgment of conviction and ordering a new trial. Decision below: 123 AD3d 573, 999 NYS2d 46. DeGrasse, J. (AD dissenter), granted leave to People February 17, 2015.

ISSUE PRESENTED: Whether the admission, at the joint trial of the defendant and his non-testifying co-defendant, of the co-defendant's Grand Jury testimony denying any knowledge of criminal activity, violated the Bruton rule; whether the Grand Jury testimony was "facially incriminating" to defendant. (Assigned counsel for respondent: David Klem & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Nelson Miranda

AT1 order dated August 22, 2014, affirming judgment of conviction. Decision below: 44 Misc.3d 140(A), 999 NYS2d 798, 2014 WL 4168509. Lippman, Ch.J., granted leave January 14, 2015.

ISSUES PRESENTED: (1) The warrantless search of defendant's backpack as incident to a lawful arrest. (2) Whether the accusatory instrument was jurisdictionally defective.

Matter of Kenneth S.

AD1 order dated October 28, 2014, affirming juvenile delinquency adjudication. Decision below: 121 AD3d 593, 995 NYS2d 48. Court of Appeals granted leave January 20, 2015.

ISSUES PRESENTED: (1) The warrantless search of the juvenile's backpack while he was handcuffed and seated in police car. (2) Whether the juvenile was lawfully taken into police custody as a suspected truant.

People v. Anthony Parson, Jr

AD4 order dated November 21, 2014, affirming judgment of conviction. Decision below: 122 AD3d 1441, 997 NYS2d 198. Fahey (AD dissenter), J., granted leave January 21, 2015.

ISSUE PRESENTED: Whether counsel was ineffective at the suppression hearing for failure to mount a more vigorous challenge to the propriety of the car stop. (Assigned counsel: David C. Schopp, The Legal Aid Bureau of Buffalo, Inc., 237 Main St., Suite 1602, Buffalo, NY 14203.)

People v. Sparkle Daniel

AD1 order dated November 6, 2014, reversing judgment of conviction. Decision below: 122 AD3d 401, 996 NYS2d 16.

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Clark (AD dissenter), J., granted leave to People January 22, 2015.

ISSUE PRESENTED: Whether the defendant's post-Miranda - waiver statements should have been suppressed, since the police gave the warnings only after the interrogation was underway and the defendant had already responded by giving incriminatory statements. (Assigned counsel for Respondent: Seymour James, Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Nadine Panton

AD1 order dated February 6, 2014, modifying judgment of conviction. Decision below: 114 AD3d 450, 979 NYS2d 579. Lippman, Ch.J., granted leave (upon reconsideration) April 8, 2015.

ISSUE PRESENTED: Whether defense counsel was ineffective for failing to preserve a Miranda issue even though counsel for the co-defendant (Sparkle Daniel) preserved the same issue at the joint hearing. (Assigned counsel: Robin Nichinsky and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Perry C. Griggs

AD4 order dated May 9, 2014, affirming judgment of conviction. Decision below: 117 AD3d 1523, 985 NYS2d 369. Pigott, J., granted leave January 27, 2015.

ISSUES PRESENTED: (1) The sufficiency of the trial evidence that the defendant forcibly stole property from the victim while using a gun. (2) Whether defendant's sentence was properly enhanced pursuant to PL §60.07 (attack on for-hire vehicle operator). (3) Whether the grand jury proceeding was defective because defendant was shackled during his testimony, or because the prosecutor failed to inform the grand jury of the defendant's request to have another witness testify. (Assigned counsel: David

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C. Schopp, The Legal Aid Bureau of Buffalo, Inc., 237 Main Street, Suite 1602, Buffalo, N.Y. 14203.)

People v. Lawrence Watson

AD1 order dated December 2, 2014, reversing judgment of conviction. Decision below: 124 AD3d 95, 998 NYS2d 27. Tom (AD dissenter), J., granted leave to People February 2, 2015.

ISSUE PRESENTED: Whether the trial court violated defendant's right to counsel by disqualifying defense counsel even though defendant waived any potential conflict. The disqualified attorney was a staff attorney with an institutional defender and a potential witness had been represented by a different staff attorney from the same office in charges arising out of the same incident. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601 NYC 10007.)

People v. Christian Williams

AD1 order dated October 30, 2014, reversing judgment of conviction. Decision below: 123 AD3d 240, 995 NYS 2d 559. Tom (AD dissenter), J., granted leave to People January 29, 2015.

ISSUE PRESENTED: Whether the Appellate Division correctly held that defendant's guilty plea was involuntary, where the agreed-upon sentence - - unbeknownst to the parties - - was illegally low. (Assigned counsel for Respondent: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Raymond Leach

AD2 order dated March 5, 2014, affirming judgment of conviction. Decision below: 115 AD3d 677, 981 NYS2d 445. Pigott, J., granted leave February 3, 2015.

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**ISSUES PRESENTED:** (1) The mental competency of the defendant. (2) The validity of defendant's plea to a reduced charge where the People did not file a reduced indictment or elect any other option pursuant to CPL 201.20 (6). (Assigned counsel: Steven A. Feldman, 626 Reckson Plaza, West Tower, 6<sup>th</sup> Floor, Uniondale, NY 11556.)

**People v. Marcus D. Hogan**

AD4 order dated June 13, 2014, affirming judgment of conviction. Decision below: 118 AD3d 1263, 986 NYS2d 907. Lippman, Ch.J., granted leave February 3, 2014.

**ISSUES PRESENTED:** (1) Whether the "drug factory" presumption (PL 220.25 [2]) is applicable where the suspect is not in the same room as the drugs. (2) Whether counsel was ineffective for failing to move to dismiss the indictment based on a CPL 190.50 (5) (a) violation. (Assigned counsel: Shirley A. Gorman, PO Box 629, 19 Market St., Brockport, NY 14420.)

**People v. Dennis J. Sincerbeaux**

AD4 order dated October 3, 2014, affirming level 3 SORA adjudication. Decision below: 121 AD3d 1577, 993 NYS2d 855. Court of Appeals granted leave February 17, 2015.

**ISSUES PRESENTED:** (1) Whether points were improperly assessed under risk factor 9 because the defendant's conviction for endangering the welfare of a child was nonsexual in nature. (2) Sufficiency of evidence to support imposition of points under risk factors 1 and 5.

**People v. Antonio Aragon**

AD1 order dated July 29, 2014, affirming a judgment of conviction. Decision below: 44 Misc.3d 140(A), 999 NYS2d 797, 2014 WL 4099352. Read, J., granted leave February 24, 2015.

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**ISSUE PRESENTED:** Whether the accusatory instrument was facially sufficient where it alleged that police recovered from defendant “one set of brass metal knuckles.”

**People v. Louis Speaks**

AD2 order dated January 14, 2015, affirming judgment of conviction. Decision below: 124 AD3d 689, 1 NYS3d 257. Hall, J. (AD dissenter), granted leave February 26, 2015.

**ISSUES PRESENTED:** (1) The admission of hearsay police testimony of a non-testifying witness’ description of the perpetrator, and of a testifying witness’ description. (2) Ineffective assistance of counsel for failure to object to improper comments during the prosecutor’s summation. (Assigned counsel: Nao Terai & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

**People v. Anthony Berry**

AD1 order dated November 6, 2014, affirming judgment of conviction. Decision below: 122 AD3d 414, 995 NYS2d 70. Rivera, J., granted leave April 2, 2015.

**ISSUE PRESENTED:** Whether a conviction for unlawful dealing with a child under Penal Law 260.20 (1) can stand when culpability is based solely on the defendant’s failure to act, and the defendant has no legal duty to the child. (Assigned counsel: Barbara Zolot and Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

**People v. Marcellus Johnson**

AD1 order dated September 30, 2014, affirming judgment of conviction. Decision below: 120 AD3d 1154, 992 NYS2d 884. Pigott, J., granted leave March 19, 2015.

**ISSUE PRESENTED:** Whether the court properly admitted Rikers telephone calls made by the defendant, routinely recorded



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by the Department of Correction, even though defendant's right to counsel had attached. (Assigned counsel: Stanley Neustadter, c/o Cardozo Law School Appeals Clinic, 55 Fifth Avenue, 11th Floor, NYC 10003.)

People v. Leroy Carver

AD4 order dated January 2, 2015, affirming judgment of conviction. Decision below: 124 AD3d 1276, 999 NYS2d 632. Whalen, J. (AD dissenter), granted leave March 17, 2015.

ISSUE PRESENTED: Whether counsel was ineffective for failing to make a suppression motion in a traffic-stop case. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Tyrone D. Manor

AD4 order dated October 3, 2014, affirming judgment of conviction. Decision below: 121 AD3d 1581, 993 NYS2d 424. Piggott, J., granted leave March 19, 2015.

ISSUES PRESENTED: (1) The sufficiency of the plea allocution. (2) Whether defendant's motion to withdraw his guilty plea was properly denied without a hearing. (Assigned counsel: Timothy P. Donaher, Monroe County Public Defender, 10 N. Fitzhugh St., Rochester, NY 14614.)

People v. Steven Henderson

AD2 order dated September 10, 2014, affirming judgment of conviction. Decision below: 120 AD3d 1258, 992 NYS2d 140. Lippman, Ch. J., granted leave March 25, 2015.

ISSUES PRESENTED: (1) CPL 30.30: Whether the People's delay in seeking DNA testing is an exceptional circumstance and thus excludable time. (2) Whether defendant failed to preserve this issue by not doing a reply affirmation. (Assigned counsel:

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Leila Hull & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Glenford C. Hull

AD3 order dated February 19, 2015, affirming judgment of conviction. Decision below: 125 AD3d 1099, 4 NYS3d 623. Lynch (AD dissenter), J., granted leave March 26, 2015.

ISSUES PRESENTED: (1) Whether first-degree manslaughter was properly charged, over defense objection, as a lesser included offense to second-degree murder; whether there was a reasonable view of the evidence that defendant intended to seriously injure, rather than kill, the deceased. (2) Sufficiency of inquiry into juror misconduct. (3) The People's use of prior testimony to impeach their own witness. (4) Refusal to give a circumstantial evidence charge. (Assigned counsel: Jonathan I. Edelstein, c/o Edelstein & Grossman, 501 Fifth Avenue, Suite 514, NYC 10017.)

People v. Joel Nelson

AD2 order dated December 24, 2014, affirming judgment of conviction. Decision below: 125 AD3d 58, 998 NYS2d 216. Dickerson (AD dissenter), J., granted leave March 27, 2015.

ISSUES PRESENTED: (1) Whether defendant was deprived of a fair trial when members of the victim's family were allowed to appear in court wearing t-shirts depicting the victim's photograph along with the words "Remember" or "Remembering." (2) Ineffective assistance of counsel. (3) Sentencing court's violation of defendant's due process rights. (Assigned counsel: Alexis A. Ascher & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9th Floor, NYC 10038.)

People v. Marino Serrano

AT2 order dated September 29, 2014, dismissing defendant's appeal. Decision below: 45 Misc. 3d 69, 997 NYS2d 213. Lippman, Ch. J., granted leave March 27, 2015.

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ISSUE PRESENTED: Whether the Appellate Term erred in dismissing defendant’s appeal based upon his involuntary deportation; the court reasoned that the defendant was raising a plea-withdrawal - - as opposed to a sufficiency or weight-of-the-evidence - - claim. (Assigned counsel: Seymour James, Legal Aid Society, Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Anthony Badalamenti

AD2 order dated January 14, 2015, affirming judgment of conviction. Decision below: 124 AD3d 672, 1 NYS3d 242. Fahey, J., granted leave March 31, 2015.

ISSUE PRESENTED: (1) Whether there is a “vicarious consent” exception to PL 250.05 (no eavesdropping without the consent of at least one party to the conversation) where a child’s parent records a conversation between the child and a third party. (2) Variance between court’s charge and indictment allegations. (3) Prosecutorial misconduct. (4) Admissibility of testimony of a child’s teacher. (5) Imposition of sentence as punishment for going to trial. (Assigned counsel: Marianne Karas, 980 Broadway, Suite 324, Thornwood, NY 10594.)

People v. Joseph Bridgeforth

AD2 order dated July 2, 2014, affirming judgment of conviction. Decision below: 119 AD3d 600, 987 NYS2d 869. Rivera, J., granted leave April 2, 2015.

ISSUES PRESENTED: (1) Batson: whether skin-color is a cognizable class. (2) Batson: whether the “mootness doctrine” precludes a trial or appellate judge from revisiting the adequacy of a prima facie showing (step one) when the nonmovant fails to provide a race-neutral reason (step two). (3) The “presumption of regularity” and the right to be present at Sandoval hearings. (Assigned counsel: Tammy Linn & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

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People v. Baasil Reynolds

AD1 order dated May 8, 2014, affirming judgment of conviction. Decision below: 117 AD3d 478, 985 NYS2d 83. Rivera, J., granted leave April 2, 2015.

ISSUES PRESENTED: (1) The legality of a plea agreement whereby defendant agreed to a further 6-month incarceration prior to sentencing. (2) The sufficiency of the Outley hearing. (Assigned counsel: Richard M. Greenberg, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Patrick Morgan

AD1 order dated January 6, 2015, affirming judgment of conviction. Decision below: 124 AD3d 406, 1 NYS3d 39. Manzanet-Daniels (AD Dissenter), J., granted leave May 7, 2015. (SSM.)

ISSUES PRESENTED: (1) Whether, after the previously deadlocked jury rendered a defective verdict that revealed its numerical split and the identity of the two jurors in the minority, the court, when ordering the jury to resume deliberations and reminding it that the verdict had to be unanimous, wrongfully refused to include any language that jurors were not to surrender conscientious beliefs solely to achieve unanimity. (2) Whether, by refusing to grant the deliberating jury's request to rehear the defense summation simply because it was not "evidence," the court failed to exercise or at least abused its discretion; and whether defense counsel's endorsement of the court's refusal constituted ineffective assistance of counsel. (Assigned counsel: Susan H. Salomon & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Nnamdi Clarke

AD2 order dated November 12, 2014, reversing judgment of conviction and dismissing indictment. Decision below: 122 AD3d 765, 995 NYS2d 727. Lippman, Ch. J., granted leave to People March 25, 2015.

ISSUE PRESENTED: CPL §30.30. Whether the People’s lack of due diligence in seeking testing of DNA evidence rebutted their claim that the delay was due to “exceptional circumstances” (CPL §30.30 [4] [g]). (Assigned counsel for Respondent: Bill Kastin & Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Daviel McCummings

AD1 order dated January 22, 2015, reversing judgment of conviction. Decision below: 124 AD3d 502, 1 NYS3d 97. Saxe, J. (AD dissenter), granted leave to People April 23, 2015.

ISSUE PRESENTED: Whether the Appellate Division correctly concluded that defendant was entitled to a new trial because the trial court improperly denied his request for substitution of counsel without conducting any inquiry. (Assigned counsel for Respondent: Lisa A. Packard & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

People v. Charles K. Wilson

AD4 order dated September 26, 2014, modifying a judgment of conviction. Decision below: 120 AD3d 1531, 993 NYS2d 200. Pigott, J., granted leave April 23, 2015.

ISSUES PRESENTED: (1) Whether the People should have been precluded from cross-examining defendant with statements taken after he had invoked Miranda, where the police deliberately kept interrogating him to gain impeachment material. (2) Whether the photo identification was rendered suggestive by the inclusion of defendant’s photograph in successive arrays.

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**III. New Leave Grants**

People v. Zachary T. Guerin

Cattaraugus County Court order dated May 30, 2014, affirming judgment of conviction for trespassing in violation of ECL §11-2113(1). Pigott, J., granted leave April 8, 2015.

ISSUE PRESENTED: Whether the defendant could be guilty of trespassing on protected property where the posted no-trespass sign did not comply with ECL §11-2111(2)'s requirement that the sign state the name and address of the landowner.

People v. Quanaparker Howard

AD4 order dated February 6, 2015, affirming level 3 SORA risk-level designation. Decision below: 125 AD3d 1331, 999 NYS2d 783. Court of Appeals granted leave May 12, 2015.

ISSUE PRESENTED: SORA-Whether the county court erred in declining to depart from the serious physical injury override's presumptive level-3 risk designation.

People v. John Stone

AD1 order dated October 30, 2014, affirming judgment of conviction. Decision below: 121 AD3d 617, 995 NYS2d 68. Lippman, Ch. J., granted leave June 19, 2015.

ISSUES PRESENTED: (1) Whether inferential hearsay testimony from a detective, that he started looking for defendant, the named suspect, after speaking to a non-testifying eyewitness, violated Crawford. (2) Whether under CPL 330.30(2), the trial court erroneously denied the motion to set aside the verdict based on juror misconduct without a hearing, even though there were disputed issues of fact. (Assigned counsel: Lisa A. Packard & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28<sup>th</sup> Floor, NYC 10005.)

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People v. Stanley Hardee

AD1 order dated January 22, 2013, affirming judgment of conviction. Decision below: 126 AD3d 626, 5 NYS3d 430. Acosta, J. (AD dissenter), granted leave June 18, 2015.

**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, 28<sup>th</sup> Floor, NYC 10005.)

People v. Immanuel Flowers

AD2 order dated October 22, 2014, affirming judgment of conviction upon resentence after AD2 remittitur. Decision below: 121 A.D.3d 1014, 993 NYS2d 921. Pigott, J., granted leave May 14, 2015.

**ISSUES PRESENTED:** (1) Whether the “presumption of institutional vindictiveness” (People v. VanPelt, 76 N.Y.2d 156) in imposing a higher sentence after an appellate reversal, applies where AD2 sent the case back to the trial court for resentencing, where the court originally used improper factors at sentence, and the court then imposes the same sentence. (2) Whether counsel was ineffective for failing to object to the new sentence. (Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

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People v. Reginald Powell

AD2 order dated February 25, 2015, affirming judgment of conviction. Decision below: 125 AD3d 1010, 5 NYS3d 445. Lippman, Ch. J., granted leave March 19, 2015.

ISSUES PRESENTED: (1) The trial court's barring evidence of third-party culpability (victim's \$500,000 life insurance policy naming defendant's brother as the primary beneficiary). (2) Whether there was a reasonable view of evidence requiring the court to charge first-degree manslaughter as a lesser included offense of first-degree murder. (3) Attenuation of post-Miranda statements from inadmissible pre-Miranda ones. (4) Sufficiency of evidence of intent to remain unlawfully in victim's home, to support second-degree burglary. (5) et al.

People v. Lennie Frankline

AD1 order dated December 11, 2014, affirming judgment of conviction. Decision below: 123 A.D.3d 504, 1 NYS3d 23. Pigott, J., granted leave May 22, 2015.

ISSUE PRESENTED: Evidence of prior assault by defendant on victim to "complete the narrative" and as probative of "motive": whether the attempted murder victim's detailed narrative of the prior assault deprived defendant of a fair trial. (Assigned counsel: Seymour James, Jr., Legal Aid Society, Criminal Appeals Bureau, 199 Water St. NYC 10038.)

People v. Ryan P. Brahney

AD4 order dated March 20, 2015, affirming judgment of conviction. Decision below: 126 AD3d 1286, 5 NYS3d 630. Lindley (AD dissenter), J., granted leave June 1, 2015.

ISSUES PRESENTED: (1) Consecutive versus concurrent sentences: Whether it was illegal to run defendant's intentional murder and first-degree burglary sentences to run consecutively. (2) Whether the defense of extreme emotional disturbance was made



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out. (3) Whether the admission into evidence of defendant's statement, for which no Huntley ruling was made or waived, was harmless error.

People v. Omar A. Smalling

AD2 order dated March 11, 2015, affirming judgment of conviction. Decision below: 126 AD3d 820, 4 NYS3d 307. Fahey, J., granted leave June 9, 2015.

ISSUE PRESENTED: Whether the trial court erred in giving a supplemental instruction regarding constructive possession of a weapon in response to a jury note. (Assigned counsel: Kathleen Whooley and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)

People v. Harold L. Petke

AD3 order dated February 19, 2015, reversing judgment of conviction. Decision below: 125 AD3d 1103, 5 NYS3d 532. Read, J., granted leave to People May 11, 2015.

ISSUE PRESENTED: Whether the concededly improper denial of a challenge for cause, followed by counsel's exercise of a peremptory challenge and the exhaustion of defense peremptories, was harmless because (1) the one additional juror selected after the exhaustion did not end up deliberating due to a medical condition, (2) defendant had been given additional peremptory challenges when selecting alternates, and (3) defendant chose not to exercise a peremptory on the alternate who replaced the ill juror.

People v. Jamell R. McCullough

AD4 order dated March 27, 2015, reversing judgment of conviction. Decision below: 126 AD3d 1452, 5 NYS3d 665. Scudder (AD dissenter), J., granted leave to People May 21, 2015.

ISSUES PRESENTED: (1) Whether the trial court abused its discretion in refusing to allow the defense to call an expert on the

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reliability of identification testimony. (2) Whether the Appellate Division erred in reversing and granting a new trial rather than remitting for a Frye hearing.

People v. Leonard Williams

AD2 order dated December 31, 2014, affirming judgment of conviction. Decision below: 123 AD3d 1152, 997 NYS3d 499. Pigott, J., granted leave June 19, 2015.

ISSUES PRESENTED: (1) Whether the prosecutor's use of a slide show powerpoint presentation during summation deprived defendant of a fair trial. (2) Whether the prosecutor mischaracterized the trial evidence on summation. (3) Whether counsel was ineffective for failing to object to the prosecutor's summation comments. (Assigned counsel: Alex Donn and Lynn W.L. Fahey, Appellate Advocates, 111 John St., 9<sup>th</sup> Floor, NYC 10038.)