2019 JUDICIAL SEMINAR COURT OF APPEALS CRIMINAL CASE SUMMARIES

	2013	2014	2015	2016	2017	2018
Total Applications Assigned	2044	2100	2338	2211	2275	
Total Defendants' Applications Decided	1923	2090	2201	2497	2244	
Granted	74 **(3.85%)**	81 **(3.88%)**	91 **(4.13%)**	33 **(1.32%)**	25 **(1.11%)**	
Denied	1692 **(87.99%)**	1843 **(88.18%)**	1868 **(84.87%)**	2230 **(89.31%)**	2042 **(91%)**	
Dismissed	145 **(7.54%)**	154 **(7.37%)**	231 **(10.5%)**	221 **(8.85%)**	172 **(7.66%)**	
Withdrawn	12 **(.62%)**	12 **(.57%)**	11 **(.5%)**	13 **(.52%)**	5 **(.22%)**	

	2013	2014	2015	2016	2017	2018
Total Applications	2044	2100	2338	2211	2275	
Total Applications by People	63	47	51	66	65	
Granted	14 **(22.22%)**	11 **(23.4%)**	7 **(13.73%)**	10 **(15.15%)**	7 **(10.77%)**	
Denied	39 **(61.9%)**	29 **(61.7%)**	25 **(49.02%)**	48 **(72.73%)**	52 **(80%)**	
Dismissed	3 **(4.76%)**	2 **(4.26%)**	2 (**3.92%)**	2 **(3.03%)**	5 **(7.69%)**	
Withdrawn	7 **(11.11%)**	5 **(10.64%)**	7 **(13.73%)**	6 **(9.09%)**	1 **(1.54%)**	
Average Number of Applications Assigned to Each Judge	324	325	391	358	374	
Average Number of	11	12	13	5	4	

Assistance of Counsel

People v Alvarez, 2019 NY Slip Op 02383 – Decided March 28, 2019

Stein, J.

The Court affirmed the Appellate Division's denial of defendant's petition for a writ of error coram nobis, alleging ineffective assistance of appellate counsel. Defendant's allegation that his counsel failed to communicate with him during the pendency of his appeal was unsupported. Although the brief counsel filed was "somewhat terse, could have been better drafted, and is not a model to be emulated," the Court concluded that it demonstrated counsel's grasp of the facts and the law and raised four reviewable issues. Further, counsel's failure to file a criminal leave application does not, on its own, constitute ineffective assistance of counsel (see People v Grimes, 32 NY3d 302 [2018]; People v

Assistance of Counsel

People v Alvarez, 2019 NY Slip Op 02383 – Decided March 28, 2019

Rivera, J., dissenting (Wilson, J., joining)

Judge Rivera would have granted defendant's petition since he did not receive "meaningful representation" as required under the state constitution. The brief that counsel eventually filed has substantial failings and does not meet basic criteria fundamental to meaningful appellate advocacy: the brief is only 20 pages long, there is no citation in the two-page facts section to the record on appeal, two of the four points raised do not have a single citation to legal authority, and the brief is riddled with grammatical and typographical errors. Judge Rivera included a link to the brief in her dissent: http://www.nycourts.gov/ctapps/reference/Alvarez%20Brief.pdf.

Sixth Amendment

People v Suazo, 32 NY3d 491 (2018)

Stein, J.

As a matter of first impression, the Court held that a noncitizen defendant who demonstrates that a charged crime carries a maximum possible sentence of three months in jail and also the potential penalty of deportation—i.e., removal from the country—is entitled to a jury trial under the Sixth Amendment. Although crimes carrying a maximum possible term of imprisonment of less than six months are presumptively considered "petty offenses," the penalty of deportation is sufficiently severe to rebut the presumption and make the offense "serious."

Sixth Amendment

People v Suazo, 32 NY3d 491 (2018)

Note: After the Court's ruling on this issue, State Senator Brad Hoylman sponsored legislation which would close the gap in New York's criminal procedure law that prohibits jury trials for low-level charges in New York City, but not the rest of the state. That right is already guaranteed to defendants regardless of immigration status outside New York City. The proposed bill recently passed the Codes Committee in the New York State Senate.

Sixth Amendment

People v Suazo, 32 NY3d 491 (2018)

Garcia, J., dissenting
Judge Garcia's dissent argues that the potential consequence of deportation for certain convictions does not transform a "petty" offense into a "serious" one for purposes of the right to a jury trial under the Sixth Amendment. Federal immigration law should not override the New York State Legislature's view of the seriousness of the charged offense, as expressed by the maximum penalty authorized. The U.S. Supreme Court has the ultimate authority to settle the question.

Wilson, J., dissenting
Judge Wilson wrote separately and argued that the majority's decision ignores that the "penalty" for violation of immigration laws is deportation, but deportation proceedings have never entitled a noncitizen to a jury trial. Furthermore, this problem could be resolved if the State Legislature extends the right to a jury trial to all New York City residents who are charged with a

Fourth Amendment

People v Xochimitl, 32 NY3d 1026 (2018)

Memorandum

At issue was whether the police received voluntary consent to enter the apartment from defendant's elderly mother when she did not say a single word but "stepped away from the door." The officers did not confirm that she understood English and understood their request. The Court held that the determination as to whether the police received voluntary consent to enter the apartment was a mixed question of law and fact unreviewable by the Court. Furthermore, the finding of the trial court was supported by the record and the Court was precluded from disturbing it. The Court pointed out that defendant did not contend at any point that his arrest was unlawful because the police went to his apartment with the intent of making a warrantless arrest.

Fourth Amendment

People v Xochimitl, 32 NY3d 1026 (2018)

Rivera, J., concurring (Wilson, J., joining)

Judge Rivera concurred because there was "just barely enough record support" on the mixed question of law and fact for the lower courts to find that the police officer received consent to enter the defendant's home. Judge Rivera reiterated her position, previously explained in People v Garvin, 30 NY3d 174, 205-210 [2017, Rivera, J, dissenting], that home visits by law enforcement for the sole purpose of making a warrantless arrest, resulting in a defendant's involuntary consent to the arrest and absent any exception to the warrant requirement, violates a defendant's constitutionally protected right to counsel. This type of police interaction is intended to avoid the warrant requirement and it undermines the Court's constitutional obligations. Judge Rivera noted that the issue was not preserved because defendant did not challenge his arrest on those grounds.

Fourth Amendment

People v Xochimitl, 32 NY3d 1026 (2018)

Wilson, J., concurring (Rivera, J., joining)
Judge Wilson concurred for the same reason as Judge Rivera but wrote separately to explain that the facts here demonstrated why, absent exigent circumstances, the police should be required to obtain a warrant when they intend to arrest someone at home for the reasons set forth in his dissenting opinion in Garvin.

Fourth Amendment

People v. Emmanuel Diaz, 33 NY3d 92 (2019)

Feinman, J.
The Court rejected defendant's argument that while the Department of Correction's (DOC) interception of his telephone calls may have been lawful, the release of the recordings to the prosecution without notice was an additional search that violates the Fourth Amendment. The Court held that detainees lose all reasonable expectation of privacy in the contents of their non-privileged phone calls where they receive notice that their phone calls are being monitored and recorded. In agreement with the 8th Circuit, the Court held that "there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" (United States v Eggleston, 165 F3d 624, 626 [8th Cir 1999]).

Fourth Amendment

People v Emmanuel Diaz, 33 NY3d 92 (2019)

Wilson, J., dissenting

Since the Fourth Amendment requires law enforcement to obtain a warrant to monitor a defendant's calls when they are out on bail, Judge Wilson argued that defendants who cannot make bail are entitled to the same level of constitutional protection. Judge Wilson rejects the view that defendant impliedly consented to a search because it disregards the limits of DOC's institutional authority, which if left unchecked undermines the Fourth Amendment's protection against unwarranted government intrusions. Furthermore, he made the broader point that the fact that information is known to someone other than its owner does not divest the owner of all privacy interests in that information, especially in the digital age.

Fourth Amendment

People v Cisse, 32 NY3d 1198 (2019)

Memorandum

Defendant was convicted of robbery after the People introduced recorded phone calls he had made while detained on Rikers Island. At issue was whether the conditions of defendant's confinement rendered his statements involuntary and thus recorded in violation of state and federal wiretapping statutes. Based on federal precedent, the Court affirmed the Appellate Division's decision that defendant impliedly consented to the monitoring and recording of his telephone calls. As a result, the recording of those phone calls did not violate the wiretapping statutes, and the calls were admissible. Further, the recording of defendant's nonprivileged phone calls did not violate his right to counsel under the New York State Constitution to the extent it guards against violations of privileged attorney-client communications as opposed to telephone conversations with others involving non-privileged matters such as discussion of the case.

Past Recollection Recorded and Grand Jury Testimony

People v Carlos Tapia, 2019 NY Slip Op 02442 – Decided April 2, 2019

DiFiore, C.J.

The Court held that the testifying police officer's previous grand jury testimony was properly admitted as a past recollection recorded, when the officer could remember neither the incident nor his grand jury testimony. The trial court did not abuse its discretion in finding that the foundational requirements were met where the witness testified that he could not remember his testimony before the grand jury, but that he testified truthfully. Further, the Court held that the admission of the grand jury testimony did not violate CPL 670.10 nor did it violate defendant's right to confrontation. The Court concluded that CPL 670.10 did not apply to bar the testimony because the officer was not unable to attend trial and that, although the witness had memory failure, his presence at trial and ability to be subjected to cross-examination satisfied the

Past Recollection Recorded and Grand Jury Testimony

People v Carlos Tapia, 2019 NY Slip Op 02442 – Decided April 2, 2019

Wilson, J., dissenting (Rivera, J., and Fahey, J., joining)
Judge Wilson dissented on the basis that the introduction of the grand jury testimony violated CPL 670.10 and the Court's prior decision in People v Green, 78 NY2d 1029 (1991). In Green, the Court held that the admission of the grand jury testimony from a witness who experienced memory failure violated CPL 670.10 since the statute's three enumerated exceptions for when prior testimony may be admitted are exclusive. The witness in Green was present at trial, examined by the People, and cross-examined by defendant's counsel in the judge's chambers, with the testimony then read into the record. The dissent found no meaningful distinction between Green and the present case. Under CPL 670.10, the unavailability of the witness to testify at trial is a prerequisite to using the witness's prior testimony as a substitute for live

Sentencing (Cooperation Agreements)

People v Alexis Rodriguez, 2019 NY Slip Op 12444 – Decided April 2, 2019

Memorandum

The Court affirmed defendant's conviction and sentence that was imposed after County Court found that defendant violated a written cooperation agreement and thus sentenced him to consecutive, rather than concurrent, terms. The Court concluded that the agreement was "objectively susceptible to but one interpretation" and therefore County Court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea.

Sentencing (Cooperation Agreements)

People v Alexis Rodriguez, 2019 NY Slip Op 12444 – Decided April 2, 2019

Rivera, J., dissenting (Wilson, J., joining)
Judge Rivera dissented on the basis that the appeal presented "an open question that th[e] Court has never addressed: what interpretive standards apply to the terms of a cooperation agreement when…a defendant claims to have neither intended nor understood the agreement to include the People's demand for assistance with an unspecified criminal investigation or prosecution." Judge Rivera concluded that the cooperation agreement was limited in scope to the crimes for which defendant pleaded guilty and therefore, he did not violate the agreement when he refused to testify against an individual who was charged with a different, prior crime against defendant and his family.

Fourteenth Amendment

<u>People v Towns</u>, 2019 NY Slip Op 03527 – Decided May 7, 2019
Stein, J.
The Court held that defendant was denied the right to a fair trial when the trial judge negotiated and entered into a cooperation agreement with the codefendant requiring him to testify against defendant in exchange for a more favorable sentence. The Court concluded that the trial court abandoned the role of neutral arbiter and assumed the function of an interested party, creating a specter of bias. The Court remitted the case for trial before a different judge.

Rivera, J., concurring
Judge Rivera wrote separately to stress that the trial judge assumed the role of the prosecutor by securing identification testimony against defendant and then ruled on the presentation of that testimony. While the law is well settled that even an appearance of bias offends the constitution, Judge Rivera departed "from the majority analysis to the

Justification

People v Vega, 2019 NY Slip Op 03530 – Decided May 7, 2019

Memorandum

The Court did not rule out the possibility that a defendant may be entitled to a jury instruction on the justified use of non-deadly (or "ordinary") physical force, even though charged with a crime containing a dangerous instrument element. There is no per se rule based solely on the fact that a defendant has been charged with second-degree assault with a dangerous instrument. In this particular case, the Court concluded the jury instruction did not require reversal because there was no reasonable view of the evidence that defendant merely "attempted" or "threatened" to use the instrument in a manner readily capable of causing death or serious physical injury but that he did not "use" it in that manner.

Justification

People v Vega, 2019 NY Slip Op 03530 – Decided May 7, 2019

Garcia, J., concurring

Judge Garcia agreed that the jury instruction did not require reversal in this case but wrote separately since he does not "endorse the majority's suggestion that a jury may convict a defendant of second-degree assault by means of a dangerous instrument while simultaneously concluding that the defendant used less than deadly physical force." Judge Garcia believed it would be a "rare case" and would "not foreclose the possibility that, in reality" such case may never arise.

Justification

People v Rkein, 2019 NY Slip Op 03528 – Decided May 7, 2019

Memorandum

Citing to its decision in People v Vega, the Court held that, on the record before it, the trial court appropriately determined that, if the jury convicted defendant of second-degree assault by means of a dangerous instrument, it necessarily determined that defendant employed deadly, rather than ordinary, physical force when he struck the complainant on the head with a pint glass. Additionally, no reasonable view of the evidence supported a deadly force justification charge.

Justification

People v Darryl Brown, 2019 NY Slip Op 03529 - Decided May 7, 2019

Wilson, J.
Defendant shot and killed the victim in the lobby of defendant's building after an argument. The Court concluded that there was no reasonable view of the evidence that warranted a justification charge. The victim was unarmed and swiped at defendant's gun only after defendant pulled out the gun. The Court held that the trial court's refusal to charge justification was not error because defendant was the initial aggressor as a matter of law.

Assistance of Counsel

People v Boris Brown, 2019 NY Slip Op 03404 – Decided May 2, 2019

Memorandum

Defendant was charged with murder based on a shooting that occurred in a crowded courtyard. Defendant's attorney also represented another person who was present at the shooting in an unrelated case while defendant's case was pending. During the court's Gomberg inquiry, defendant waived the conflict of interest posed by his attorney's representation of the other individual. Following his conviction, defendant moved to vacate per CPL 440.10, arguing that his counsel operated under an unwaivable conflict: counsel was paid by the other individual to represent defendant. Supreme Court summarily denied the motion. Although a court may deny a CPL 440.10 motion without a hearing, Supreme Court abused its discretion in doing so here. Defendant's motion raised issues of fact that could suggest an actual conflict of

Assistance of Counsel

People v Boris Brown, 2019 NY Slip Op 03404 – Decided May 2, 2019

Stein, J., dissenting

Judge Stein dissented, concluding there were no material issues of fact and Supreme Court did not abuse its discretion in denying defendant's motion without a hearing. When deciding whether a hearing is necessary to determine a CPL 440.10 motion, a court must presume the conviction is valid and must only grant a hearing if the defendant presents allegations sufficient to create an issue of fact. Here, the only issue of fact not present in the record was that another person present at the shooting allegedly paid defendant's attorney. However, this issue was resolved as defendant stated, at the Gomberg inquiry, that his family had hired his attorney.

Sentencing

People v Hakes, 32 NY3d 624 (2018)

Feinman, J.

The Court held that sentencing courts can require a defendant to pay for a Secure Continuous Remote Alcohol Monitoring bracelet that measures alcohol intake as a condition of probation. The Court reasoned that Penal Law § 65.10 authorizes a variety of conditions of probation that may require defendants to pay certain implicit costs or recurring fees necessary to satisfy the condition itself. To the extent the costs associated with electronic monitoring could be considered to have a punitive or deterrent effect, that effect is dwarfed by the goals to protect the public from alcohol-related offenses while assisting a defendant's rehabilitation during the probationary term. Importantly, the sentencing courts are able to determine if the defendant has demonstrated an inability to pay the costs associated with a particular condition, or if the defendant willfully refuses to pay and can take reasonable alternative

Sentencing

People v Hakes, 32 NY3d 624 (2018)

Rivera, J., dissenting

Judge Rivera disagreed and argued that Penal Law § 65.10 does not authorize judicial imposition of costs for an electronic monitoring device. The history of the relevant provisions does not demonstrate a legislative intent to empower courts to condition a defendant's probation on payment for an electronic monitoring device, without guidance on how to exercise such discretion. Whether such authorization is a good idea requires balancing various social and economic policies and concerns—a task solely for the Legislature. A review of the Legislature's detailed statutory scheme for imposing costs, fees, and fines demonstrates that it explicitly imposes a financial burden on a defendant when it intends to.

Sentencing

People v Thomas, 2019 NY Slip Op 01167 – Decided February 19, 2019

Stein, J.

At issue was whether a resentence on a prior conviction—imposed after the original sentence is vacated as illegal—resets the date of sentencing for purposes of determining a defendant's predicate felony status. The Court rejected defendant's interpretation because the statutory text referenced a defendant's prior "sentence," not "resentence." Accordingly, the Court held that the date on which sentence was first imposed upon a prior conviction—not the date of any subsequent re-sentencings on that same conviction—is the relevant date for purposes of determining when "[s]entence upon such prior conviction [was] imposed" under Penal Law § 70.06 [1] [b] [ii]. Therefore, because the original sentences on defendant's 1989 convictions were imposed before the commission of the 1993 felony, the sequentiality requirement of the predicate felony statute was satisfied, and defendant was properly sentenced as a

Sentencing

People v Thomas, 2019 NY Slip Op 01167– Decided February 19, 2019

Fahey, J., dissenting (Rivera, J., and Wilson, J., joining)
In allowing the dates of the original, vacated sentences to control, Judge Fahey argued that the majority gave operative legal effect to illegal sentences. According to the dissent, the Court must look to the first legal sentence, as opposed to the original sentence because "legality should prevail over chronology." When the sentences on defendant's 1989 convictions were vacated in their entirety, they ceased to exist or have legal effect. Accordingly, the legal sentences imposed in 2009 and 2012 are the only sentences on defendant's 1989 convictions and cannot be prior predicate convictions for purposes of defendant's 1993 felony under Penal Law § 70.06 [1] [b] [ii].