

**Practical Ethical Implications of
New York Court of Appeals Decisions:
What Just Happened, What's Happening Now,
and What's About to Happen**

Robert S. Dean, Esq.

Center for Appellate Litigation, NYC

**PRACTICAL ETHICAL IMPLICATIONS OF NY COURT OF APPEALS
DECISIONS: WHAT JUST HAPPENED, WHAT'S HAPPENING NOW, AND
WHAT'S ABOUT TO HAPPEN**

I. Decided Cases With Ethical Implications

People v. Marcus D. Hogan

Decided February 18, 2016, 26 N.Y.3d 779

ISSUE PRESENTED: Whether a defense lawyer's refusal to timely facilitate a defendant's appearance before the grand jury is, per se, ineffective assistance of counsel.

HOLDING: No. The decision regarding whether to testify before the grand jury is not fundamental but, rather, is a strategic one requiring the expert assistance of counsel. So the decision whether the client should testify in the grand jury belongs to the lawyer, not the defendant. (Even if the lawyer failed to effectuate his client's grand jury testimony due to a screw-up rather than deliberate strategy choice, it would not constitute IAC absent a showing of prejudice, e.g., the defendant would not have been indicted had he testified.)

TAKEAWAY: The Court reasoned that, while there might be advantages to testifying in the grand jury, there are potential serious downsides, as any seasoned criminal defense lawyer knows. But the same is true as to the four classic fundamental decisions that do belong to the defendant, not the attorney: (1) whether to plead guilty or go to trial; (2) whether to waive a jury; (3) whether to testify at trial; and (4) whether to take an appeal. (Although merely filing a notice of appeal has no downside.) The Court thus falls back on labeling the right to testify in the grand jury a "limited statutory right." The Court notes, for what it's worth, that "the better practice may be for counsel to consult with his or her client" about testifying in the grand jury, but he or she does not have to do even that.

People v. Mario Arjune

Decided November 20, 2017, __N.Y.3d__, 2017 WL 5557924

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.)

HOLDING: By a 5 to 2 vote, there is no right to counsel under the 6th Amendment or the State Constitution, to assist an indigent defendant in preparing a poor person application to get counsel assigned to represent him on appeal. Once a notice of appeal is filed, retained or assigned trial counsel has no constitutional obligation to assist the defendant, and may constitutionally do nothing. In dissent, Judge Rivera pointed out, correctly, that the representation fell below what was required by Appellate Division rules in every department and relevant bar association standards. Counsel was thus ineffective, in the dissent's view. Judge Wilson joined that opinion and also separately dissented on the ground that, in his view, counsel is required under current United States Supreme Court case law to assist the defendant in this regard.

TAKEAWAY: Although a lawyer who abandons a client this way has committed malpractice, violated Appellate Division rules, and violated every relevant bar association standard – and may be subject to disciplinary action – he has not violated State or Federal right-to-counsel provisions, according to the majority. The defendant thus has no recourse on a writ of error coram nobis to revive his appeal. The tenor of this decision is consistent with the dismissive posture that the Court has historically taken with regard to the right to effective assistance of counsel on a criminal appeal.

People v. Howard S. Wright

Decided July 1, 2015, 25 N.Y.3d 769

ISSUE PRESENTED: Whether defense counsel was ineffective for failing to object to the prosecutor's summation, in which the prosecutor repeatedly suggested that DNA evidence directly linked defendant to the murder, when it did not.

HOLDING: Yes. Because the prosecutor’s summation misrepresentations are part of a pattern “far afield from acceptable argument,” the People’s case is circumstantial, the damage to the defense substantial, and there is no possible explanation for not objecting. Although the DNA linkage to the defendant was weak, the prosecutor aggressively and repeatedly argued that the linkage was “conclusive.”

TAKEAWAY: This result is an outlier, based upon an unusual confluence of circumstances. Almost invariably, the Court deems the failure to object as non-IAC, as the Court’s opinion acknowledges. Excusable reasons for not objecting are a reluctance to bring attention to “one slightly off comment,” or where the comments “had little or no impact on the defense.” See also, People v. Anderson, 29 N.Y.3d 69 (2017) (failure to object to prosecutor’s PowerPoint summation not IAC as the PowerPoint was not improper); People v. King, 27 N.Y.3d 147 (2016) (failure to object to inflammatory comments could have been part of a reasonable strategy to allow the prosecutor to alienate the jury with his “boorish” comments); People v. Nicholson, 26 N.Y.3d 813 (2016) (failure to object not IAC since prosecutor’s comments, while arguably inappropriate, were not “sufficiently egregious”); People v. Gross, 26 N.Y.3d 689 (2016) (non-objection to prosecutor’s summation may have been strategic). Nonetheless, the volume of such cases decided by the Court, and the number of dissents from affirmances suggest that trial defense counsel should take the obligation to object to bad summations seriously. And many bad prosecutor summations would generate a reversal in the Appellate Division if the issue were preserved.

People v. Leroy Savage Smith

Decided November 20, 2017, __N.Y.3d__, 2017 WL 5574395

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. Although its opinion did not include the defendant’s specific allegations, defendant said his Onondaga County 18-B 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.”

HOLDING: The Court simply “agree[d] with the defendant that the trial court failed to adequately inquire into his “seemingly serious request[.]” to substitute counsel.” Without mentioning any of the facts, it thus held that the trial court abused its discretion in conducting no inquiry.

TAKEAWAY: Neither the Fourth Department nor the Court of Appeals mentioned any of the defendant’s specific allegations in coming to opposite conclusions, thus providing future litigants with no insight as to what specific complaints a defendant might make to trigger the need for an inquiry. Both courts did this on purpose (see the Webcast or Transcript of the October 12, 2017, oral argument on the Court’s website).

People v. Prince Clark

Decided December 20, 2016, 28 N.Y.3d 556

ISSUE PRESENTED: Was trial counsel ineffective for pursuing an ID defense per his client’s instructions, rather than a justification defense, even though counsel believed the evidence supported justification.

HOLDING: No, because each defense theory had problems with it, and at least the ID defense aimed for an acquittal on all counts. Objectively, therefore, going with an ID defense was a reasonable strategic decision.

TAKEAWAY: This decision seemingly conflicts with People v. Colville, 20 N.Y.3d 20 (2012), also an allocation-of-decision-making case, which held that whether to ask for a lesser included offense was a strategic decision for counsel, not a decision that is left to the client. In both Clark and Colville, the recitation of facts makes clear that counsel ceded the decision to the client. In Clark, however, the claim is not that counsel was ineffective pursuing an ID defense, but

for not also pursuing a justification defense that he believed the evidence warranted. Since a successful justification defense would have left the defendant with a second-degree assault conviction, the wisdom of raising it in the alternative was not clear. The Clark case is probably an outlier; counsel would be well-advised to adhere to Colville.

II. All Criminal NYCA Cases Pending Decision

NOTE: Cases With Ethical Implications Are In Bold

People v. Otis Boone

AD2 order dated June 24, 2015, affirming the judgment of conviction as modified. Decision below: 129 AD3d 1099, 11 NYS3d 687. Rivera, J., granted leave December 22, 2015. Reargued October 17, 2017.

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

AD1 order dated August 25, 2016, reversing judgment of conviction and dismissing the indictment with leave to re-present. Decision below: 143 AD3d 31, 37 NYS3d 4. Kapnick, J. (AD dissenter), granted leave to People September 29, 2016. Argued November 14, 2017.

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.)

People v. Jude Francis

AD1 order dated January 27, 2016, affirming SORA risk-level adjudication. Decision below: 137 AD3d 91, 25 NYS 3d 221. Court of Appeals granted leave June 9, 2016. Argued January 2, 2018.

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. Casimiro Reyes

AD2 order dated March 16, 2016, modifying judgment of conviction. Decision below: 137 AD3d 1060, 27 NYS3d 220. Garcia, J., granted leave to People January 25, 2017. Argued January 3, 2018.

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. Douglas McCain

AT2 order dated December 31, 2015, affirming judgment of conviction. Decision below: 50 Misc. 3d 132(A), 2015 WL 9694118. Stein, J., granted leave August 5, 2016. Argued January 4, 2018.

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. Albert Edward

AT1 order dated March 22, 2016, affirming judgment of conviction. Decision below: 51 Misc. 3d 36, 29 NYS3d 82. DiFiore, Ch. J., granted leave July 13, 2016. Argued January 4, 2018.

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. Reginald Wiggins

AD1 order dated October 6, 2016, affirming judgment of conviction. Decision below: 143 AD3d 451, 39 NYS3d 395. Moskowitz, J. (AD dissenter), granted leave January 3, 2017. Argued January 9, 2018.

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. Dennis O’Kane

Albany County Court order dated September 14, 2015, reversing judgment of conviction. Abdus-Salaam, J., granted leave August 1, 2016. Argued January 10, 2018.

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

People v. Joseph Sposito

AD3 order dated June 9, 2016, affirming judgment of conviction and denial of CPL 440.30 motion for DNA testing, but reversing denial of IAC-440.10 without a hearing. Decision below: 140 A.D.3d 1308, 32 NYS3d 736. Pigott, J., granted leave November 10, 2016. Argued January 10, 2018.

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. Michael Johnson

AD2 order dated May 18, 2016, affirming judgment of conviction. Decision below: 139 AD3d 967, 34 NYS3d 62. Hall, J. (AD dissenter), granted leave August 5, 2016. To be argued February 6, 2018.

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. Nicolas Brooks

AD1 order dated December 22, 2015, affirming judgment of conviction. Decision below: 134 AD3d 574, 23 NYS3d 26. Pigott, J., granted leave July 1, 2016. To be argued February 7, 2018.

ISSUES PRESENTED: (1) Whether the trial court erred in granting the People's motion for a Frye hearing to challenge the defense expert witness, where the proposed testimony did not involve novel science. (2) Whether the trial court erred in restricting the defense expert's opinion as to cause of death. (3) Testimony by friends of the victim as to her hearsay statements about what a bad boyfriend the defendant was.

People v. Raymond Crespo

AD1 order dated November 10, 2016, reversing judgment of conviction. Decision below: 144 AD3d 461, 40 NYS3d 423. Stein, J., granted leave to People March 6, 2017. To be argued February 8, 2018.

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. Spence Silburn

AD2 order dated December 14, 2016, affirming judgment of conviction. Decision below: 145 AD3d 799, 43 NYS3d 461. Stein, J., granted leave March 20, 2017. To be argued February 8, 2018.

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. Rafael Perez

AD1 order dated August 4, 2016, modifying judgment of conviction by remanding for a YO determination, and otherwise affirming the judgment of conviction. Decision below: 142 AD3d 410, 37 NYS3d 243. Gische, J. (AD dissenter), granted leave November 29, 2016. (Taken off SSM.) To be argued February 13, 2018.

ISSUES PRESENTED: (1) Whether police officers on a vertical patrol in a NYCHA building were justified in stopping and ultimately frisking a man who merely sought to avoid contact with them. (2) Whether a Rudolph resentencing unsequences a defendant for predicate felony adjudication purposes. (Assigned counsel: Seymour James, Jr., Legal Aid Society Criminal Appeals Bureau, 199 Water Street, NYC 10038.)

People v. Teri W.

AD1 order dated September 29, 2017, affirming judgment of conviction. Decision below: 142 AD3d 924, 37 NYS3d 890. DiFiore, Ch. J., granted leave December 30, 2016. To be argued February 14, 2018.

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. Mark Nonni

AD1 order dated November 5, 2015, affirming judgment of conviction. Decision below: 135 AD3d 52, 20 NYS3d 345.

Manzanet-Daniels, J. (AD dissenter), granted leave March 17, 2016.

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. 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

AD4 order dated March 24, 2017, affirming judgment of conviction. Decision below: 148 AD3d 1601, 51 NYS3d 290. Stein, J., granted leave August 7, 2017. (New leave grant.)

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. Matthew Kuzdzal

AD4 order dated November 18, 2016, reversing judgment of conviction. Decision below: 144 AD3d 1618, 42 NYS3d 507. Peradotto, J. (AD dissenter), granted leave to People February 16, 2017.

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

AD1 order dated December 8, 2016, affirming judgment of conviction. Decision below: 145 AD3d 490, 43 NYS3d 293. Fahey, J., granted leave March 31, 2017.

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

AT2 order dated November 28, 2016, affirming judgment of conviction. Decision below: 53 Misc.3d 153 (A), 2016 WL 7164870. Fahey, J., granted leave March 13, 2017.

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. Akeem Wallace

AD4 order dated February 10, 2017, affirming judgment of conviction. Decision below: 147 AD3d 1494, 47 NYS3d 603. Lindley, J. (AD dissenter), granted leave February 10, 2017.

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

AD1 order dated January 24, 2017, reversing order setting aside the guilty verdict for the unlawful use of scientific material (PL §165.07). Decision below: 148 AD3d 77, 48 NYS3d 9. Fahey, J., granted leave April 20, 2017.

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

AD1 order dated January 3, 2017, affirming judgment of conviction. Decision below: 146 AD3d 423, 45 NYS3d 31. DiFiore, Ch.J., granted leave June 15, 2017.

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

AD3 order dated October 20, 2016, reversing probation revocation, and remanding. Decision below: 143 AD3d 1054, 39 NYS3d 299. DiFiore, Ch.J., granted leave to People April 21, 2017.

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. Frederick Diaz

AD1 order dated April 13, 2017, reversing SORA level-three risk adjudication and annulling the sex-offender adjudication. Decision below: 150 AD3d 60, 50 NYS3d 388. Court of Appeals granted leave to People June 27, 2017.

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

AT1 order dated December 23, 2016, affirming suppression of evidence of refusal to take a breathalyzer test and the subsequent test results. Decision below: 54 Misc. 3d 128(A); 2016 WL 7434671. Fahey, J., granted leave to People June 13, 2017.

ISSUE PRESENTED: Whether the defendant's consent to take the breathalyzer 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

AD3 order dated March 23, 2017, reversing, in part, dismissal of Article 78 petition brought by sex offender kept in prison beyond his CR date, based on SARA restrictions. Decision below: 149 AD3d 256, 50 NYS3d 597. Cross-appeals. Court of Appeals granted leave to petitioner June 22, 2017; appeal taken as of right by respondent Annucci, by virtue of two-judge dissent.

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

AD2 order dated February 1, 2017, affirming judgment of conviction. Decision below: 147 AD3d 793, 45 NYS3d 800. Rivera, J., granted leave June 20, 2017.

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.)

People v. Princesam Bailey

AD1 order dated March 21, 2017, affirming judgment of conviction. Decision below: 148 AD3d 547, 50 NYS3d 53. Fahey, J., granted leave June 29, 2017.

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

AD1 order dated April 6, 2017, affirming judgment of conviction. Decision below: 149 AD3d 435, 53 NYS3d 614. Fahey, J., granted leave August 23, 2017. (SSM.)

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

AD2 order dated April 19, 2017, affirming judgment of conviction. Decision below 149 AD3d 974, 53 NYS3d 94. Hall, J. (AD dissenter), granted leave August 3, 2017. (SSM.)

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

AD4 order dated December 23, 2016, affirming judgment of conviction. Decision below: 145 AD3d 1596, 45 NYS3d 745. Rivera, J., granted leave July 28, 2017.

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. (Assigned counsel: John A. Cirando, 101 South Salina St., Suite 1010, Syracuse, NY 13202.)

People v. Damian Jones

AD1 order dated April 4, 2017, affirming judgment of conviction. Decision below: 149 AD3d 407, 52 NYS3d 83. Garcia, J., granted leave August 14, 2017.

ISSUE PRESENTED: Whether, under New York's enterprise corruption statute, a "criminal enterprise" must have a governing system of authority or leadership structure (Penal Law Article 460). (Assigned counsel: Christina Swarns, Office of the Appellate Defender, 11 Park Place, Suite 1601, NYC 10007.)

People v. Jakin Grimes

AD4 order dated March 24, 2017, denying writ of error coram nobis. Decision below: 148 AD3d 1724, 49 NYS3d 326. Wilson, J., granted leave August 17, 2017.

ISSUE PRESENTED: Whether an attorney's failure to file a criminal leave application to the New York Court of Appeals from an adverse decision of the intermediate appellate court constitutes ineffective assistance of counsel under the State constitution. (Assigned counsel on coram: Joseph C. Perry, C/O Baker Botts LLP, 30 Rockefeller Plaza, NYC 10122.)

People v. Rohan Manragh Jr.

AD2 order dated May 3, 2017, affirming judgment of conviction. Decision below: 150 AD3d 762, 51 NYS3d 431. Fahey, J., granted leave August 23, 2017.

ISSUE PRESENTED: Whether, by pleading guilty, the defendant forfeited his claim on appeal that the prosecutor failed to inform the grand jury of defendant's request to call a witness to testify. (Assigned counsel: Thomas E. Scott, 115 Broadhollow Road, Suite 250, Melville, NY 11747.

People v. Rodney Watts

AD1 order dated March 23, 2017, affirming judgment of conviction. Decision below: 148 AD3d 678, 48 NYS3d 602. Wilson, J., granted leave October 6, 2017.

ISSUE PRESENTED: Scope of Penal Law §170.10(1). Whether a ticket to a concert or basketball game constitutes a "deed, will, codicil, contract, assignment, commercial instrument, credit card or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." The People argued below that such tickets were subsumed by the secondary "or other instrument," clause, and alternatively, that the tickets represented a contract. The Appellate Division adopted the former position in its decision, holding that event tickets are instruments which purport to "evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status." (Assigned counsel: Arielle Reid & Robert S. Dean Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Steven Baisley

AT 9 & 10 order dated May 23, 2017, reversing justice court order dismissing the accusatory instrument. Decision below: 55 Misc. 3d 148(A), 58 NYS3d 875, 2017 WL 2380728. Stein, J., granted leave September 11, 2017.

ISSUE PRESENTED: Whether the Family Court Act sections 156 and 411 are jurisdictional bars to the criminal prosecution of the charges of non-support of a child in the second degree (PL 260.05[2]) and criminal contempt in the second degree (PL 215.30[3]), where the lawful mandate of the court allegedly being resisted or disobeyed involves a Family Court order of child support. (Assigned counsel: Richard L. Herzfeld, 112 Madison Avenue, 8th Floor, NYC 10016)

People v. Timothy Martin

AD1 order dated February 21, 2017, affirming judgment of conviction. Decision below: 147 AD3d 587, 48 NYS3d 54. Rivera, J., granted leave September 28, 2017.

ISSUE PRESENTED: Whether the defendant's admission to the police that he lived in the apartment that was the subject of a search warrant for drugs was admissible at trial under the pedigree exception to the Miranda requirement, even though it was the product of custodial interrogation that was likely to elicit an incriminating response. (Assigned counsel: Samuel Steinbock-Pratt & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Roque Silvagnoli

AD1 order dated June 6, 2017, reversing judgment of conviction. 151 AD3d 443, 57 NYS3d 127. Mazzarelli, J. (AD dissenter), granted leave to People August 29, 2017.

ISSUE PRESENTED: The propriety of a detective questioning a defendant in a homicide investigation (in which he was not represented by counsel) about a drug charge in which he was represented by counsel. The majority reversed and suppressed the statement, since the questioning about the drug case, although "brief and flippant," was not "discrete and fairly separable" from the homicide investigation. (Assigned counsel for defendant: Seymour W. James, The Legal Aid Society, 199 Water Street, NY, NY 10005.)

People v. Natascha Tiger

AD2 order dated March 1, 2017, reversing denial of CPL 440.10 motion and remanding for a hearing on the motion. Garcia, J., granted leave to People August 15, 2017.

ISSUES PRESENTED: (1) Whether a freestanding claim of actual innocence is cognizable under CPL 440.10 (1)(h). (2) Whether a defendant who has pleaded guilty may assert a freestanding actual innocence claim.

People v. Domingo Ricart

AD1 order dated August 1, 2017, reversing judgment of conviction and dismissing the indictment. Decision below: 153 AD3d 421, 60 NYS3d 30. Webber, J. (AD dissenter), granted leave to People October 3, 2017. (SSM.)

ISSUE PRESENTED: CPL §30.30. Whether an adjournment was excludable as an “exceptional circumstance,” when the People failed to exercise due diligence by not co-ordinating with their witness before he went on vacation to the Dominican Republic. (Assigned counsel for the defendant: Jan Hoth & Robert S. Dean Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

People v. Steven Berrezueta

AT1 order dated May 12, 2017, affirming judgment of conviction. Decision below: 53 Misc.3d 143(A), 57 NYS3d 676, 2017 WL 2101804. DiFiore, Ch. J., granted leave October 25, 2017. (SSM.)

ISSUES PRESENTED: (1) Whether the evidence was insufficient to convict defendant of attempted fourth-degree weapon possession (PL 110/265.01(1); PL 265.00(4) (defining a switchblade as “any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife”)) where the device used to open the knife was located on the blade, not the handle; (2) whether the accusatory instrument was facially insufficient to charge defendant with switchblade possession where it described the device used to the open the knife as on a “portion of the blade of the knife protruding from the handle of the knife.” (Assigned counsel: Siobhan C. Atkins & Robert S. Dean, Center for Appellate Litigation, 120 Wall Street, 28th Floor, NYC 10005.)

ETHICAL SCENARIOS (NYSBA)**PROBLEM # 1**

You are assigned to represent the defendant at the time of his arraignment on a felony complaint. The DA serves grand jury notice, and as per your invariable practice, you serve cross grand jury notice. After the arraignment, your client tells you he does want to testify in the grand jury. However, when the DA later notifies you of the date and time of the grand jury presentation, you tell her, without consulting your client, that the client will not be testifying in the grand jury after all; you have decided that it is not in the client's best interests. At the arraignment on the indictment, your client is furious with you.

Did you do anything wrong?

PROBLEM # 2

As retained counsel, you arrange an extremely good plea bargain for your client-10 years flat. As part of the bargain, your client has to waive his right to appeal, which he does.

A week later, the client calls you from Downstate Correctional Facility and asks you to file a notice of appeal on his behalf. Although the client never completely paid you and you were retained for the trial only, you file a notice of appeal on his behalf and send a copy to the client. A few months later, the client, now at Attica, calls again and says he cannot afford to hire a lawyer to do the appeal, and asks what he should do.

What do you do?

PROBLEM # 3

You are retained to represent a defendant on an appeal to the Appellate Division, First Department, from a second-degree murder conviction. After your opening brief is filed, the client informs you that he has run out of money and cannot pay you the rest of the retainer. Nonetheless, after the prosecutor files their brief, you put in a reply brief and then orally argue the case. When the affirmance comes down, you send the decision to the client and tell him that your services are now at an end. Thirty-five days after the date of the decision, the client calls you from prison and asks that you file an application with the New York Court of Appeals for permission to appeal to that court. Your retainer agreement specifically excluded appeals to the Court of Appeals.

What do you do?

PROBLEM # 4

You have just sat down after summing up to the jury. The trial assistant is now summing up, and her summation is flamboyant and hard-hitting. Although many of her comments appear to be over-the-top, you do not object at any point.

Which, if any, of the following are legitimate reasons not to have objected:

1. You were so relieved to be done with your own summation that you were not really listening.

2. The trial assistant did not object to your summation, so you thought you would return the favor.

3. You believe it is discourteous to object to an adversary's summation.

4. Having tried many cases before this judge, you know she does not appreciate it when lawyers object to their adversary's summations.

5. You could clearly see that the trial assistant's verbiage was alienating the jury, so why stop a good thing?

6. You did not want to legitimize these particular arguments in the jury's mind by registering objections.

7. You thought that, in the context of this case, the comments were not actually improper.

PROBLEM # 5

Your client, a lawful permanent resident, is charged in New York City Criminal Court with a third-degree assault, a Class A misdemeanor. You correctly advise the client that a conviction after trial would result in deportation, and that, moreover, even a plea down to the crime offered by the People, attempted first-degree assault, would result in deportation. The client elects to go to trial. Just prior to trial, the People, as they commonly do, reduce the count to attempted third-degree assault, thus depriving your client of his statutory right to a jury trial. (In New York City, there is no statutory right to a jury trial for a Class B misdemeanor.)

You would much rather try the case before a jury. What do you do?

Ultimately, you proceed to a bench trial. After the conclusion of the evidence, and the denial of your motion for a trial order of dismissal, you ask to sum up, but the trial judge

tells you that she is "waiving summation" and proceeding right to verdict.

What do you do?

PROBLEM # 6

The defendant is charged with committing first-degree assault in Onondaga County. He is represented by an attorney from the Assigned Counsel Plan. After a number of adjournments, the case is finally on for trial. A panel of jurors is on their way for the start of jury selection, and prosecution witnesses have been flown in from out of state. The defendant, who has never previously complained about his lawyer, now tells the judge that he wants a different lawyer assigned, because this lawyer had not done any investigation into his claim of self-defense, had not interviewed any of the numerous witnesses to the event, and had told him that there was no money available to hire investigators.

How should the judge respond?

PROBLEM # 7

You represent the defendant at trial as retained counsel. There is a guilty verdict, and the client is sentenced to State prison. The client's family never finished paying you the last \$10,000 that they owe you, as they've run out of money.

A year later, you get a call from an appellate public defender now representing your client on appeal, asking you for a copy of your file, and even volunteering to pick it up, do the photocopying himself, and return it to you. Your trial file is in storage, and it will cost you a \$75 fee to retrieve it.

What do you tell him?