State of New York Court of Appeals

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SEPTEMBER 2014 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, September 9, 2014

No. 145 Davis v Boeheim

Robert Davis and his stepbrother, Michael Lang, both former ball boys for the Syracuse University basketball team, are asking the Court to reinstate their defamation suit against head coach James Boeheim and the University. The case arose in November 2011, when Davis and Lang accused Boeheim's longtime assistant coach and friend Bernie Fine of sexually abusing them in the 1980s and 1990s, and Boeheim responded in a public statement and media interviews that they were lying in an attempt to obtain a financial settlement. Among other statements, Boeheim said in an ESPN interview, "It is a bunch of a thousand lies that [Davis] has told.... He supplied four names to the university that would corroborate his story. None of them did.... [T]here is only one side to this story. He is lying." In an interview with a local newspaper, Boeheim alluded to the recent child sexual abuse scandal at Penn State University, which led to the criminal conviction of assistant football coach Jerry Sandusky and the firing of head coach Joe Paterno. "The Penn State thing came out and the kid behind this is trying to get money. He's tried before. And now he's trying again...," Boeheim said. "That's what this is about. Money."

Supreme Court dismissed the suit, finding Boeheim's statements were non-actionable expressions of opinion, not defamatory assertions of fact. "[T]he broader social context, the immediate context and the actual plain language of Defendant Boeheim's statements, all demonstrate that Boeheim's remarks were merely his opinion," the court said.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying, "We conclude that defendant's statements demonstrate his support for Fine ... and also constitute his reaction to plaintiff's implied allegation, made days after Penn State University fired its long-term football coach, that defendant knew or should have known of Fine's alleged improprieties. We therefore conclude that the content of the statements, together with the surrounding circumstances, "'are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact'" (Mann, 10 NY3d at 276)."

The dissenters argued that Boeheim's statements "constitute 'mixed opinion,' i.e., 'statement[s] of opinion that impl[y] a basis in facts which are not disclosed to the reader or listener'...." They said the libel complaint "sufficiently alleges false, defamatory representations of fact about plaintiffs, i.e., that Davis was lying about Bernie Fine, that Davis had previously tried to obtain money through similar allegations, and that Davis and plaintiff Michael Lang ... were doing so again through the instant allegations...."

For appellants Davis and Lang: Mariann Meier Wang, Manhattan (212) 620-2603
For respondents Boeheim and Syracuse Univ.: Helen V. Cantwell, Manhattan (212) 909-6000

State of New York Court of Appeals

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To be argued Tuesday, September 9, 2014

No. 146 Nguyen v Holder

Huyen N. Nguyen, a citizen of Vietnam, was admitted to this country as a conditional permanent resident in 2000 based on her marriage to a United States citizen, Vu Truong, in Rochester. Nguyen and her husband filed a petition to remove the conditions of her residency two years later. In 2007, the U.S. Customs and Immigration Service denied the petition after finding that Nguyen is Truong's half-niece and concluding that their marriage was incestuous and therefore void. The Department of Homeland Security then terminated Nguyen's conditional resident status and began a removal proceeding.

An Immigration Judge ordered Nguyen removed to Vietnam. The judge determined that Nguyen's maternal grandmother is the mother of Truong, making them half-blooded niece and uncle. The judge held that such a marriage is void under New York's Domestic Relations Law § 5, which states, "A Marriage is incestuous and void whether the relatives are legitimate or illegitimate between either: 1. An ancestor and a descendant; 2. A brother and sister of either the whole or the half blood; 3. An uncle and niece or an aunt and nephew." The Board of Immigration Appeals affirmed.

The U.S. Court of Appeals for the Second Circuit is asking this Court to determine whether Nguyen's marriage was void ab initio under Domestic Relations Law § 5(3), saying it had found no reported decisions of the New York Court of Appeals squarely holding that the statute "prohibits marriages between half-blooded nieces and uncles." The Second Circuit said, "Curiously, subsection (2), which regulates marriages between brothers and sisters, expressly applies to 'half blood' relationships, whereas subsection (3), which is the provision applied to the petitioner and her husband, omits the relevant language. The question presented, therefore, is whether subsection (3) should be read, like subsection (2), to also reach an uncle and niece 'of either the whole or the half blood.'"

For petitioner Nguyen: Michael E. Marszalkowski, Buffalo (716) 856-3023
For respondent Holder: Michael C. Heyse, Washington, D.C. (202) 305-7002

State of New York Court of Appeals

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To be argued Tuesday, September 9, 2014

No. 147 People v John Rossi
No. 148 People v Benjamin Jenkins

The primary issue raised by these appeals is whether exigent circumstances permit the police to search a suspect's home without a warrant after he is taken into custody, when members of his family are present and officers have reason to believe there is a gun at the home.

Nassau County police officers went to John Rossi's home in Wantagh in 2009, responding to his wife's report that he had shot himself in the hand. They frisked Rossi, but did not find the gun, and he said he did not know where it was. The last officer to arrive, Nicholas Alvarado, was told the weapon was missing and there were three children in the house. Other officers were searching the house, so Alvarado searched the backyard and found the gun in a plastic bag beside a shed. Supreme Court refused to suppress the gun. Rossi was convicted of second-degree weapon possession and sentenced to four years in prison.

The Appellate Division, Second Department affirmed on a 3-2 vote based on the emergency exception to the warrant requirement. It said "information available to the officers who initially responded, including the defendant's incoherence and evasive answers about the location of the gun and the presence of children on the premises, established an ongoing emergency and danger to life, justifying the search for and seizure of the gun...." At the time Alvarado began searching the backyard, "he was not aware that the children were secure and out of danger."

The dissenters said, "[O]nce the police frisked the defendant and knew that the children did not have the gun, the emergency abated. The actions of the police in checking the children for weapons and then keeping them under their watch effectively neutralized the emergency.... [T]he record established that prior to [Alvarado's] search, the children did not possess the gun and were being supervised by the police. The children, thus, were not in danger."

Benjamin Jenkins was charged with weapon possession in 2010 after police heard gunfire on a Brooklyn rooftop, then saw him with a gun in a hallway before he ran into his apartment with another man. The officers entered the apartment, encountered Jenkins' mother and sister in the living room, and found and handcuffed Jenkins and his friend in a bedroom. Then they began searching for the gun, which they found in a closed metal box in another bedroom.

Supreme Court granted Jenkins' motion to suppress the gun, saying, "While the warrantless entry was proper, once the defendant was secured and handcuffed, the exigency ceased to exist and the subsequent search of the closed box required a warrant and was thus improper...."

The Appellate Division, Second Department reversed. It said the warrantless search, as well as the entry, were justified by evidence "that the police saw and heard gunfire on the roof of an apartment building... and observed the defendant, holding a gun, run into the subject apartment with a second man." Regarding the search, it said, "The police knew that the gun was inside the apartment, which had occupants other than the defendant...."

No. 147 For appellant Rossi: Jillian S. Harrington, Manhattan (718) 490-3235
For respondent: Nassau County Asst. District Attorney Kevin C. King (516) 571-3800
No. 148 For appellant Jenkins: Allen Fallek, Manhattan (212) 577-3566
For respondent: Brooklyn Asst. District Attorney Sholom J. Twersky (718) 250-2537

State of New York Court of Appeals

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To be argued Tuesday, September 9, 2014

No. 149 Lawrence v Graubard Miller
Matter of Estate of Sylvan Lawrence

This dispute over the enforceability of a 40 percent contingent fee agreement arose after more than 20 years of litigation over the estate of New York City developer Sylvan Lawrence, who died in 1981 and left his estate to his wife, Alice Lawrence, and their three children. Sylvan's brother, Seymour Cohn, served as executor of the estate until his death in 2003.

In 1983, Alice Lawrence retained the Graubard Miller law firm on an hourly fee basis to represent her in litigation against Cohn concerning his administration of the estate, and over the next 21 years she paid Graubard about $22 million in legal fees. In 1998, she also paid bonuses or gifts totaling $5.05 million to three Graubard partners -- C. Daniel Chill, Elaine Reich and Steven Mallis -- and $400,000 to the firm.

In January 2005, hoping to reduce her legal costs, Lawrence entered into a revised retainer agreement with Graubard that capped her hourly fees at $1.2 million per year and provided for a contingency fee of 40 percent for any settlement of her claims. Less than five months later, in May 2005, Graubard obtained a settlement of more than $111 million from Cohen's estate and sought a $44 million contingency fee under the revised retainer. Lawrence refused to pay, Graubard sought to compel payment, and Lawrence sought to rescind the revised agreement as unconscionable. She also sought the return of the gifts she made in 1998.

Referee Howard A. Levine found the revised agreement was not procedurally unconscionable, but found the amount of the contingency fee was unreasonable and recommended that it be reduced to $15.8 million. He also found the 1998 gifts were valid. Surrogate's Court confirmed his report regarding the contingency fee and awarded Graubard $15.8 million. However, it ordered the individual partners to return the gifts they received in 1998 to Alice Lawrence's estate (she died in 2008), saying there was "a combination of dubious circumstances that emit an odor of overreaching too potent to be ignored."

The Appellate Division, First Department modified by reducing Graubard's award to the hourly fees due under the original retainer (which the Surrogate later determined to be $1.6 million plus interest of $1.3 million). Finding the revised agreement was "procedurally and substantively unconscionable," the Appellate Division said Graubard "failed to show that the widow fully knew and understood the terms of the retainer agreement -- an agreement she entered into in an effort to reduce her legal fees...." The court said "it seems highly unlikely that the firm undertook a significant risk of losing a substantial amount of fees as a result of the revised retainer agreement's contingency provision.... The amount the law firm seeks ($44 million) is also disproportionate to the value of the services rendered (approximately $1.7 million...." The claims for return of the gifts were timely because the limitations period was tolled under the doctrine of continuous representation, it said, and on the merits, the individual partners failed to show the gifts were made "willingly and knowingly."

For appellants Chill, Reich and Mallis: Michael A. Carvin, Manhattan (212) 326-3939
For appellant Graubard Miller: Brian J. Shoot, Manhattan (212) 732-9000
Mark C. Zauderer, Manhattan (212) 412-9500
For respondent executors of Alice Lawrence: Daniel J. Kornstein, Manhattan (212) 418-8600
For intervenor-respondent residuary legatees: Robert L. Berchem, Milford, CT (203) 783-1200
For intervenor-respondent Richard S. Lawrence: Norman A. Senior, Manhattan (212) 818-9600

State of New York Court of Appeals

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To be argued Wednesday, September 10, 2014

No. 150 Matter of Colin Realty Co., LLC v Town of North Hempstead

In 2011, Manhasset Pizza, LLC sought to convert a vacant storefront on Plandome Road in the Town of North Hempstead into a 45-seat full-service restaurant. The storefront, which most recently housed a gift shop, is in a nonconforming building that has no off-street parking or loading zones. Fradler Realty Corp. has owned the building since 1938. Restaurants are permitted in the relevant zoning district, but require a conditional use permit. Because the current Town Code would require the restaurant, as proposed, to have 24 off-street parking spaces and one loading zone, Manhasset Pizza and Fradler applied to the Town of North Hempstead Board of Zoning and Appeals (ZBA) for variances from the parking and loading-zone requirements and for a conditional use permit.

The ZBA treated the applications as seeking area variances, rather than use variances, and approved them along with the conditional use permit. It found the "benefit in granting the requested variances outweighs the detriment which would be imposed on the community." A use variance would require an applicant to make a stricter showing that zoning regulations have caused "unnecessary hardship." Colin Realty Co., LLC, the owner of an adjacent property, brought this suit against the Town and the ZBA to annul the determination and seeking a judgment declaring that the proposed restaurant required a use variance.

Supreme Court dismissed the suit, finding the ZBA "rationally engaged in the statutorily mandated balancing test by ... 'weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood ... if the variance is granted.'" It said a use variance was not required, since "the proposed restaurant was not a nonconforming and/or prohibited use within the meaning of the Town Code or otherwise.... Rather, restaurants are conditionally permitted in the zone, and therefore deemed presumptively consistent with the basic character of the surrounding community...."

The Appellate Division, Second Department affirmed, saying "the ZBA properly determined that the variances" sought by Manhasset Pizza "were to be treated as applications for area variances under the scheme of the Town Code...."

Colin Realty argues the decisions of the ZBA and lower courts to treat the variances as area variances, rather than use variances, "directly contradict" this Court's ruling in Matter of Off Shore Rest. Corp. v Linden (30 NY2d 160 [1972]). It says the Town Code "irrefutably treats parking and loading zone requirements as 'use' restrictions, given that ... it provides a parking requirement formula which increases the number of parking spaces mandated (and the loading zone mandates) explicitly based on the type of use and the extent of use. In the case of a restaurant..., the [Code] goes so far as to count the number of customer chairs at a table and employees to dictate the number of parking spaces required."

For appellant Colin Realty: Robert M. Calica, Garden City (516) 747-7400
For respondents Manhasset Pizza & Fradler: Bruce W. Migatz, Garden City (516) 248-7000
For respondent North Hempstead: Simone M. Freeman, Garden City (516) 227-6363

State of New York Court of Appeals

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To be argued Wednesday, September 10, 2014

No. 151 Matter of Town of North Hempstead v County of Nassau

This case hinges on whether a county which pays the Fashion Institute of Technology (FIT) for a county resident to attend the school may charge back that cost to the student's home town or city. Education Law § 6301(2) defines "community college" as a school "providing two year post secondary programs," and section 6305(2) provides that, when a community college accepts a student from a different county, the college may charge the student's home county a specified share of its operating costs. Section 6305(5) permits counties that have made such payments to community colleges in other counties to "charge back" those amounts to the cities and towns where the students reside. FIT was established as a community college in Manhattan in 1944 and initially offered only two-year degrees. It began offering four-year degrees in 1975 and added master's degree programs in 1979, greatly increasing the amount it charged to counties. In 1994, to address the financial burden on local governments paying for FIT students, the Legislature enacted Education Law § 6305(10), which requires the State to reimburse counties for their payments to FIT. However, the State has not appropriated funds in its budget for reimbursement of FIT charges since 2001.

In 2010, Nassau County sought for the first time to charge its towns and cities for its payments to FIT. It billed the Town of North Hempstead about $1.2 million for FIT charges and, when the Town refused to pay, it withheld the money from the Town's share of sales tax revenue. The Town brought this suit against the County, contending that FIT was no longer a two-year community college covered by the charge-back provision of section 6305(5).

Supreme Court declared FIT was a community college under the Education Law and the County was entitled to charge the Town the amount it paid for Town residents enrolled in two-year programs at FIT, but not for students in baccalaureate or master's programs. It also ruled the County could offset those charges from the Town's share of sales tax revenue.

The Appellate Division, Second Department modified by ruling the County may charge the Town for all of its FIT students, not just those in two-year programs, but cannot offset the amount from the Town's sales tax share. Because the State has not appropriated funds for its FIT payments since 2001, it said, the statute mandating State reimbursement to counties "has been superseded by the appropriation bills.... Contrary to the Town's contention, the doctrine of legislative equivalency is not implicated, as both Education Law § 6305(10) and the budgets were enacted by the same means." It said the cost of students in four-year and master's programs are covered because section 6302(3), which authorized those programs, provides that FIT "shall be financed and administered in the manner provided for community colleges."

The Town argues section 6305(10), mandating State reimbursement of FIT costs to counties, removed that obligation from towns and cities and "left counties with no alternative remedy" if the State refuses to pay. "While an appropriation bill can suspend the State's reimbursement obligation, it cannot restore county chargeback authority that was previously removed by an amendment to the Education Law, particularly where, as here, it expresses no intent to do so. Only a subsequent amendment ... can accomplish such reinstatement, and no such amendment has ever been adopted." The County argues that it may offset its FIT charges from a locality's sales tax share.

For appellant-respondent Town: Richard S. Finkel, Garden City (516) 267-6300
For respondent-appellant County: Robert F. Van der Waag, Mineola (516) 571-3056
For amicus curiae SUNY: Assistant Solicitor General Valerie Figueredo (212) 416-8019

State of New York Court of Appeals

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To be argued Wednesday, September 10, 2014

No. 152 People v Earl Coleman

In 2000, Earl Coleman was convicted in Sullivan County of two counts of criminal sale of a controlled substance in the third degree, a class B felony, and sentenced as a persistent felony offender to 15 years to life in prison. In 2009, he filed a motion for resentencing under the Drug Law Reform Act of 2009 (CPL 440.46). The statute generally permits a person who is serving a sentence for a class B drug felony to apply for a reduced sentence unless he falls within one of the exceptions in CPL 440.46(5), which excludes "any person who is serving a sentence on a conviction for ... an exclusion offense." The subdivision defines "exclusion offense" as a violent felony or "any other offense for which a merit time allowance is not available pursuant to [Correction Law § 803(1)(d)(ii)]." Correction Law § 803(1)(d)(ii) provides, in part, that a "merit time allowance shall not be available to any person serving an indeterminate sentence authorized for an A-1 felony offense."

County Court denied the motion, finding Coleman was ineligible for resentencing because he had been sentenced as a persistent felony offender and, thus, could not earn merit time. The court cited the Appellate Division, Second Department decision denying resentencing under similar circumstances in People v Gregory (80 AD3d 624 [2011]).

The Appellate Division, Third Department reversed in a 3-1 decision, ruling Coleman was eligible for resentencing and expressly rejecting Gregory. "Although defendant, having been sentenced pursuant to his drug offense convictions as a persistent felony offender, is serving a sentence that would preclude him from earning merit time pursuant to Correction Law § 803...," it said, "he was not convicted of an 'offense for which a merit time allowance is not available,'" as stated in CPL 440.46(5). The court said Coleman's "offense and his sentence are ... two separate components that we decline to conflate for purposes of depriving an otherwise eligible person of the benefits of the remedial legislation that we are tasked with interpreting here."

Citing Gregory, the dissenter said Coleman, "having been sentenced as a persistent felony offender upon his convictions for criminal sale of a controlled substance in the third degree, is serving indeterminate sentences authorized for an A-1 felony offense.... Accordingly, in my view, defendant is unquestionably serving a sentence on a conviction for an 'exclusion offense' -- that is, an offense for which a merit time allowance is not available (see CPL 440.46[5][a][ii] -- and is therefore ineligible for resentencing under the Drug Law Reform Act...." She said Correction Law § 803(1)(d)(ii) "broadly defines merit time eligibility in terms of the particular sentence imposed, regardless of the specific offense of which the defendant was convicted."

For appellant: Sullivan County District Attorney James R. Farrell (845) 794-3344
For respondent Coleman: Jane M. Bloom, Monticello (845) 791-8167

State of New York Court of Appeals

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To be argued Wednesday, September 10, 2014

No. 153 Powers v 31 E 31 LLC

In August 2008, Joseph W. Powers fell 25 feet from a narrow setback roof outside a friend's Manhattan apartment and suffered severe brain and spine injuries. He had been out drinking with several friends before they decided to go onto the roof, which was five feet wide, and his blood alcohol content was 0.15 percent an hour after the accident. There was no door, so they climbed through a window to reach the roof, which had gutters, but no railing. When his friends went back inside, they noticed Powers was not with them. No one saw him fall. His guardian brought this personal injury action against the building's owner, 31 E 31 LLC, and the managing agent, B & L Management Co., Inc., claiming they violated a common law duty and building codes by failing to install a railing, fence or parapet on the setback roof.

Supreme Court denied the defendants' motion for summary judgment, saying, "[T]here is a question of whether or not defendants were liable for the creation of a dangerous condition on the setback roof. There is a question of foreseeability. There is also an issue of plaintiff's comparative fault, should it be determined that the defendants had failed a duty to keep the premises in a reasonably safe condition. Defendants have not ... established prima facie on this motion that plaintiff's negligence was the sole proximate cause of his accident, despite his intoxicated state and familiarity with the setback roof. Nor have defendants established ... that plaintiff's actions were a 'superseding cause' of his injuries." The building was built in 1909, when the building code of 1895 did not require railings on a roof if it had gutters, but the court said there was insufficient proof the original building had gutters. It also said alterations to the building in 1979 might have required the owners to comply with the 1968 building code.

The Appellate Division, First Department reversed and dismissed the suit. "Given the nature and location of the setback, it was unforeseeable that individuals would choose to access it, and thus defendant had no duty to guard against such an occurrence...," it said. "Indeed, defendants' superintendent testified that he had never been on the setback, nor had he ever observed anyone using it. Regarding allegations of statutory violations, defendants demonstrated that the building, constructed as a loft in 1909 and converted to a multiple dwelling in 1979, was grandfathered out of the 1968 and 2008 Building Codes by submission of the 1979 Certificate of Occupancy.... Furthermore, the Certificate of Occupancy satisfied defendants' burden of showing that the Multiple Dwelling Law was not violated, since the 1979 certificate provided that the building 'conform[ed] substantially ... to the requirements of all applicable laws, rules and regulations for the uses and occupancies specified herein.'"

For appellant Powers: Alani Golanski, Manhattan (212) 558-5500
For respondents 31 E 31 LLC and B&L: Linda M. Brown, Manhattan (212) 471-8500

State of New York Court of Appeals

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To be argued Wednesday, September 10, 2014

No. 154 People v Samuel McLean

Samuel McLean was jailed on robbery charges in Schenectady in 2003 when his attorney, Steven Kouray, negotiated a plea deal that required his cooperation in an unrelated murder case. Kouray accompanied him to meetings with Schenectady Detective John Sims to discuss the 2002 murder of Leonder Goodwin -- consulting with McLean as he prepared his written statement, viewed photo arrays, drew diagrams of the murder scene, showed detectives where to look for the gun -- and was with him when he testified before the grand jury investigating the murder. In 2004, McLean was sentenced to 12 years in prison for robbery. In 2006, Sims and another detective re-interviewed McLean in prison about the Goodwin murder and, in the absence of counsel, obtained an incriminating statement from him. When his motion to suppress the statement as involuntary was denied, he pled guilty to second-degree murder and was sentenced to 21 years to life. The Appellate Division, Third Department rejected his claim that the 2006 police interview violated his indelible right to counsel, saying "the record is bereft of material evidence sufficient to permit appellate review of this claim." After this Court affirmed the murder conviction (15 NY3d 117), McLean filed a CPL 440.10 motion to vacate the judgment, claiming that his right to counsel was violated and that he was denied meaningful representation because his trial attorney did not raise the issue.

At a hearing in 2011 to develop a full record, Sims testified the district attorney told him in 2006 to re-question McLean, but to first ask Kouray if he still represented him. Sims said he told Kouray he wanted to talk to McLean about "the Goodwin case." He conceded he did not use the word "murder" at the meeting. Kouray testified he was unaware McLean had become a suspect in the murder and when Sims asked if he still represented McLean, he replied that he did not: "I said, 'He's been sentenced. The robbery case is over.'" Kouray said Sims did not ask if he represented McLean in the murder investigation. County Court denied McLean's motion.

The Appellate Division, Third Department affirmed on a 3-1 vote, saying the police "fulfilled their obligation to resolve the ambiguity [about whether McLean was represented by counsel in 2006] by determining that Kouray's representation of defendant had terminated prior to questioning him.... Having received an unequivocal answer from Kouray that he no longer represented defendant, we cannot conclude that the police had an obligation to inquire further.... Defendant's further argument that Kouray could not unilaterally withdraw from representing him on the homicide is similarly misplaced because it, too, presupposes that Kouray's representation of defendant on the homicide investigation was independent of his representation on the robbery. The hearing testimony does not support such a conclusion...."

The dissenter argued the police "did not meet their burden of resolving ambiguity regarding defendant's representation by counsel prior to questioning him, thereby violating his indelible right to counsel." He said McLean's "right to counsel with respect to the ... murder investigation indelibly attached in 2003" and was independent of the robbery case. "[G]iven the coy questioning and lack of candor by the investigators, the investigators acted in bad faith or without sufficient deference to defendant's rights when asking Kouray about his representation of defendant." He also argued that "an attorney's unilateral statement that he or she no longer represents a defendant does not allow the police to disregard that defendant's previously invoked right to counsel."

For appellant McLean: Danielle Neroni Reilly, Albany (518) 366-6933
For respondent: Schenectady County Asst. District Attorney Gerald A. Dwyer (518) 388-4364

State of New York Court of Appeals

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To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 155 People v Stanley R. Kims, II

Stanley R. Kims, II was on parole in 2010, when parole officers received reports that he was living and selling drugs at a Watertown address that had not been approved by the Division of Parole. The officers saw Kims and another man come out the front door of the apartment and climb into Kims' SUV. When they showed themselves, Kims locked the doors, rolled up the windows and tried to back away from them, but was blocked by the officers' vehicle. They handcuffed both men and, when they found crack cocaine on the ground and in the console of the SUV, they called detectives. During a sweep of the apartment, the officers found a man asleep on a couch and, on top of a kitchen counter, they found a bowl of powdered cocaine, a cutting agent for drugs, packaging materials and a digital scale. After obtaining a search warrant, they seized more than 12 ounces of cocaine and nearly 3 pounds of marijuana from the apartment. Kims was charged with criminal possession of a controlled substance in the first and third degrees and three lesser drug charges.

At trial, County Court charged the jury on the "room presumption" in Penal Law § 220.25(2), which states, "The presence of a narcotic drug ... in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully ... prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found...." Kims was convicted of all counts.

The Appellate Division, Fourth Department modified in a 4-1 decision by reversing his convictions on the top two possession counts, ruling Kims was not "in close proximity" to the drugs when they were discovered. The presumption was enacted to permit officers raiding a drug factory to arrest "persons who might, upon the sudden appearance of the police, hide in closets, bathrooms or other convenient recesses," it said. "Here, unlike the scenario envisioned by the Legislature, defendant walked out the 'front' of his apartment, entered his nearby vehicle and was apprehended almost immediately by parole officers who were investigating whether he resided at that location. Several minutes later, parole officers and police detectives" conducted a search and "found another person present" and drugs in the rear of the apartment. Distinguishing People v Alvarez (8 AD3d 58 [1st Dept]), which held the presumption applied where "defendant jumped out of the window as police approached,"the majority said Kims "was not in flight from the police; he was apprehended in the driveway ... several minutes after leaving the apartment...; and the apartment was occupied by another person."

The dissenter, citing Alvarez, argued Kims was in close proximity to the cocaine when it was found. "[A]pproximately five minutes before the cocaine was found by the police, defendant was observed leaving the apartment that he rented but may not have used as his residence, and he was in the company of a person who admitted that he had purchased cocaine from defendant." He said the presumption would not apply if Kims "had not been observed leaving the apartment less than five minutes before the cocaine was found."

For appellant-respondent: Jefferson Co. Asst. District Atty. Harmony A. Healy (315) 785-3053
For respondent-appellant Sims: Mark C. Davison, Canandaigua (585) 394-5222

State of New York Court of Appeals

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To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 156 Ellington v EMI Music Inc.

In 1961, big-band jazz composer and pianist Duke Ellington entered into a then-standard songwriter royalty agreement with a group of music publishers including Mills Music, Inc., a predecessor of EMI Mills Music, Inc. (EMI). The agreement designates Ellington and members of his family as the "First Parties," and it defines the "Second Party" as including the named music publishers and "any other affiliate of Mills Music, Inc." Regarding royalties for international sales, the agreement requires the Second Party to pay Ellington's family "a sum equal to fifty (50%) percent of the net revenue actually received by the Second Party from ... foreign publication" of his songs. Under such a "net receipts" arrangement, the foreign subpublisher retained 50 percent of the revenue from foreign sales and remitted the remaining 50 percent to EMI. EMI would then pay Ellington's family 50 percent of its net receipts, amounting to 25 percent of all revenue from foreign sales. At the time the agreement was executed, foreign subpublishers were typically not affiliated with American music publishers; but EMI subsequently acquired ownership of foreign subpublishers and, thus, fees that had been charged by independent foreign subpublishers are now charged by subpublishers owned by EMI.

In 2010, Ellington's grandson and heir, Paul Ellington, brought this breach of contract action against EMI, claiming EMI engaged in "double-dipping" by having its foreign subsidiaries retain 50 percent of revenue before splitting the remaining 50 percent with the Ellington family. He alleges this enabled EMI to inflate its share of foreign revenue to 75 percent, and reduce the family's share to 25 percent, in violation of its contractual agreement to pay the family 50 percent "of the net revenue actually received by the Second Party from ... foreign publication."

Supreme Court dismissed the suit, saying the parties "made no distinction in the royalty payment terms based on whether the foreign subpublishers are affiliated or unaffiliated with the United States publisher." The term 'Second Party' does not include EMI's new foreign affiliates, it said, because the definition "includes only those affiliates in existence at the time that the contract was executed."

The Appellate Division, Second Department affirmed, saying there is "no ambiguity in the agreement which, by its terms, requires [EMI] to pay Ellington's heirs 50% of the net revenue actually received from foreign publication of Ellington's compositions. 'Foreign publication' has one unmistakable meaning regardless of whether it is performed by independent or affiliated subpublishers." It said the definition of 'Second Party' includes only affiliates "that were in existence at the time the agreement was executed," not "foreign subpublishers that had no existence or affiliation with Mills Music at the time of contract."

Paul Ellington argues the agreement was intended to split foreign royalties 50/50 between EMI and his family, while allowing EMI to deduct a reasonable amount for foreign royalty collection costs, and EMI breached the contract by "diverting" half of the revenue to its own foreign subsidiaries. "Per the plain terms of the Agreement..., EMI is 'actually receiv[ing]' all the revenue, and it must, therefore, split it all equally with plaintiff." He argues the definition of Second Party includes affiliates EMI might acquire in the future, since there is no language limiting the term to affiliates then in existence. In any case, he says the language is ambiguous and cannot be resolved on a motion to dismiss.

For appellant Ellington: Richard J.J. Scarola, Manhattan (212) 757-0007
For respondent EMI: Donald S. Zakarin, Manhattan (212) 421-4100

State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 158 People v Andrew Blake

On December 31, 2006, during an altercation with four men near the Grant Houses in Manhattan, Andrew Blake's companion handed him a gun and Blake fired at his antagonists, wounding two of them and a bystander. Blake fled, but was arrested a week later at his apartment in Wilmington, Delaware. He told detectives he acted in self defense, saying the men had razors and "were going to kill me." At least two surveillance cameras recorded portions of the incident, but the police failed to secure one of the recordings before it was destroyed.

At trial, Supreme Court allowed defense counsel to argue the video recording was lost deliberately because it would have supported his claim of self defense. However, counsel did not request that the jury be given an adverse inference instruction. Blake was convicted of three counts of attempted murder in the second degree, among other charges, and was sentenced to 25 years in prison.

The Appellate Division, First Department affirmed, finding "trial counsel's failure to request the instruction did not deprive defendant of effective assistance under the state and federal standards." It said "the present unexpanded record is insufficient to determine whether counsel's failure to request an adverse inference charge fell below an objective standard of reasonableness. Counsel may have had strategic reasons for that course of action, including a concern that the language of such an instruction might undermine her summation argument." In any event, it said there was no reasonable possibility that lack of the instruction affected the outcome of the trial. "The jury was fully aware of the loss of the tape and its surrounding circumstances. Furthermore, the court permitted defense counsel to assert in summation that the missing tape would have actually supported defendant's claim of self defense, by showing the 'aggressors' attacking the 'terrified' defendant, who was 'defending himself' and trying to get away.... However, there was overwhelming evidence that directly refuted defendant's self-defense claim, including ... another videotape. In addition, there was extensive evidence of conduct by defendant that was inconsistent with that of a person who had acted in self-defense, including interstate flight, an attempt to destroy evidence, a false initial statement to the police, and a bribe offer."

Blake argues there was no strategic reason for his trial counsel's failure to request an adverse inference charge. "After the State's summation..., the charge was necessary to correct certain statements by the prosecutor, and the failure to request it constituted ineffective assistance. The prosecution used the State's own destruction of evidence against Mr. Blake, telling the jury to reject his self-defense claim because there was no objective evidence of it. The prosecution also told the jury that speculation was impermissible, even though the destruction of footage made it necessary." Citing People v Handy (20 NY3d 663), he says, "If anything, the dearth of evidence should have been held against the State, not Mr. Blake, given that the police destroyed crucial surveillance footage. And 'speculation' -- at least about the content of the footage -- was absolutely permissible, since it 'was State agents who, by destroying the video, created the need to speculate about its contents.'"

For appellant Blake: Rahul Sharma, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 42 People v Diane Wells

Diane Wells was charged with assaulting her wealthy mother in May 2005 in their Manhattan apartment. After a jury trial in Criminal Court, she was convicted of a misdemeanor count of third-degree assault and sentenced to 60 days in jail. In March 2010, the Appellate Term, First Department reversed the conviction and remanded the case for a new trial, finding the jury had been given improper instructions. The prosecution applied for leave to appeal to the Court of Appeals and, while the application was pending, Criminal Court adjourned the case. A Court of Appeals Judge denied leave to appeal on May 14, 2010. The case was not recalendared in Criminal Court until August 23, 2010. On that date, Wells moved to dismiss the assault charge pursuant to CPL 30.30 on the ground that, because more than 90 days had passed since the date of the Court of Appeals order denying leave to appeal, her statutory right to a speedy trial would be violated.

Criminal Court granted her motion to dismiss, finding the 101-day period from May 14 to August 23, 2010 should be charged to the prosecution. "Pursuant to CPL 30.30(5)(a), where a defendant is to be retried following an order for a new trial, the action is deemed to have commenced on [']the date the order occasioning a retrial becomes final.['] Here, the case law supports, and the parties concede, that the order remanding the matter for a new trial became final on May 14, 2010 when the Court of Appeals denied the People's application for leave to appeal." Therefore, it said, the 90-day speedy trial period began to run on that date and expired on August 12, 2010, without any statement of readiness by the prosecution.

The Appellate Term, First Department reversed and reinstated the assault charge. Relying on People v Vukel (263 AD2d 416 [1st Dept 1999]), it said that, because the case had been adjourned by the trial court while the application for leave to appeal was pending, the entire time from May 14 to August 23, 2010 should be excluded from the speedy trial period. In Vukel, the Appellate Division held that the time from denial of leave to appeal until the next adjourned court date is excludable as a "period of delay resulting from ... appeals" under CPL 30.30(4)(a).

Wells argues that Vukel "eviscerates the long-standing rule that the speedy trial clock starts on the date that this Court denies leave. In virtually every case, the trial court adjourns proceedings during the pendency of this Court's decision on a leave application.... Effectively, the 'Vukel exception' would turn on its head this Court's conclusion that CPL 30.30 was enacted to 'discourage prosecutorial inaction'.... Under Vukel, the People are able to wait through the duration of an adjournment in the trial court -- even after this court has denied leave, and the adjournment has no more legitimate purpose -- without advancing the case, and that inaction has no consequences under CPL 30.30. Such a result is contrary to this Court's jurisprudence, well-settled case law, and the spirit of the speedy trial statute."

For appellant Wells: Andrew C. Fine (212) 573-3440
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, September 16, 2014

People v Tyrone Sweat

Tyrone Sweat and his brother, Michael, were charged with possession of stolen property in Buffalo in 2011. Sweat was granted transactional immunity after testifying against Michael before the grand jury. When the prosecutor called him as a witness at his brother's trial in 2012, Sweat refused to testify. County Court explained that, since he had immunity, he had no Fifth Amendment right to remain silent, but he still refused. The prosecutor asked that Sweat "be cited for civil contempt and confined until he agrees to testify or until the end of the proceeding, and also we'll charge him with criminal contempt for refusing to be sworn and testify." The court found him in contempt, placed him in custody, and appointed counsel to represent him. After conferring with counsel, Sweat again refused to testify and refused to explain why. The court returned him to custody, saying, "I find you're in contempt in my immediate view and presence for engaging in conduct which has obstructed and threatened to obstruct these proceedings and impair ... my authority to preside over these proceedings and, therefore, I will issue a mandated commitment." Sweat was brought to court the next day and still refused to testify. His lawyer said he was "morally opposed to testifying against his brother." Sweat was held until the end of the two-day trial, when his brother was acquitted and the court ordered Sweat released.

Three weeks later, Sweat was arrested on two misdemeanor counts of criminal contempt. Buffalo City Court dismissed the charges, finding further prosecution was barred by double jeopardy.

Erie County Court affirmed. It said prosecution for criminal contempt would be barred by double jeopardy only if the prior contempt proceedings were criminal, rather than civil, in nature, and it found "the proceedings amounted to a hybrid combination of both criminal and civil characteristics." It held, "[A]lthough the court never formally pronounced sentence upon [Sweat], it clearly confined him pursuant to a Mandate of Commitment (Judiciary Law 752) upon a finding that his conduct obstructed the proceedings and impaired the court's authority to preside (Judiciary Law 750[1] ...). By the court's own language, then, the proceedings were perforce criminal in nature and under these circumstances, this court is compelled to conclude that the defendant's release at the conclusion of the trial was tantamount to a sentence of time served."

The District Attorney's Office argues that prosecution on the criminal contempt charges is not barred because the prior contempt proceedings were intended "to compel defendant's testimony rather than to punish him" and, therefore, "the contempt proceeding was not 'criminal' for double jeopardy purposes. The lack of an unconditional sentence (or any sentence for that matter) or a fine, combined with the court's returning defendant to court on three occasions and the release of defendant immediately when the opportunity to testify had passed, indicates that the purpose was remedial or coercive rather than punitive."

For appellant: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424
For respondent Sweat: David M. Abbatoy, Jr., Rochester (585) 348-8081

State of New York Court of Appeals

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To be argued Tuesday, September 16, 2014

No. 160 Ramos v SimplexGrinnell LP

In this federal case, Roberto Ramos and 14 other workers who installed, maintained, repaired, tested and inspected fire alarm and suppression systems for SimplexGrinnell LP brought a third-party breach of contract action against their employer to recover unpaid prevailing wages for their work on public works projects in New York. They claimed SimplexGrinnell violated Labor Law § 220 and its contracts with state and city agencies by failing to pay prevailing wages for testing and inspection work since at least February 2001. While the litigation was underway, SimplexGrinnell on its own sought clarification from the New York Department of Labor (DOL) regarding whether the prevailing wage law applied to testing and inspection work. On December 31, 2009, DOL issued an opinion letter stating that section 220 covered testing and inspection of alarm systems, requiring payment of prevailing wages. However, due to "much confusion" about its past position on the issue, DOL said it would apply its interpretation only to future test-and-inspect contracts put out for bid after January 1, 2010.

U.S. District Court for the Eastern District of New York granted summary judgment to SimplexGrinnell and dismissed the workers' claims based on the DOL's opinion letter. "[W]hen SimplexGrinnell took on public works projects, it knew it would be required to pay prevailing wage rates, and it at least implicitly agreed to do so when it entered into a contract to perform work at a public site," the court said. "According to the DOL, though, SimplexGrinnell did not have reason to believe it would be required to pay prevailing wages for testing and inspection work it contracted to perform. Thus, absent a provision in a particular contract explicitly requiring that testing and inspection work be compensated at prevailing wages, there simply is no basis for concluding that SimplexGrinnell agreed to pay prevailing wages for such work."

The U.S. Court of Appeals for the Second Circuit said it is unclear, under New York Law, "whether deference is due, or even appropriate, not only to the DOL's substantive construction" of what a statute covers, "but also to its administrative decision to apply that construction in its own enforcement prospectively only." And it is unclear "whether contracts committing parties to pay prevailing wages ... need to specify -- when the scope of the statute's coverage is unclear to the parties -- what particular work the prevailing wages will be paid for." The Second Circuit is asking this Court to resolve those issues in a pair of certified questions:

"1. What deference, if any, should a court pay to an agency's decision, made for its own enforcement purposes, to construe section 220 ... prospectively only, when the court is deciding the meaning of that section for a period of time arising before the agency's decision? 2. Does a party's commitment to pay prevailing wages ... bind it to pay those wages only for work activities that were clearly understood by the parties to be covered by section 220, or does it require the party to pay prevailing wages for all the work activities that are ultimately deemed by a court or agency to be 'covered' by that portion of the statute?"

For appellants Ramos et al: Raymond C. Fay, Washington, DC (202) 263-4604
For respondent SimplexGrinnell: Peter O. Hughes, Morristown, NJ (973) 656-1600

State of New York Court of Appeals

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To be argued Tuesday, September 16, 2014

No. 161 People v William O'Daniel *(papers sealed)*

William O'Daniel, found guilty of sexually abusing a five-year-old girl in Ausable Forks during a three-day period in 2005, contends he was denied his right to retained counsel of his own choosing. When he was indicted in 2009, O'Daniel retained James Martineau Jr. as his defense counsel. After a series of adjournments, two of which were necessitated by Martineau's health problems, Clinton County Court suggested that Martineau ask another attorney to serve as second chair for O'Daniel's trial in October 2010. Attorney Keith Bruno accepted the job about two weeks before the trial was to begin and was given O'Daniel's case file to review. When Martineau was hospitalized, Bruno agreed to serve as replacement counsel for the trial. At O'Daniel's request, Bruno moved for an adjournment at a pre-trial conference and on the first day of trial. He said O'Daniel "believes that the legal system ... is being unfair to him because of Mr. Martineau's health," but O'Daniel did not explicitly object in court to Bruno serving as trial counsel. County Court denied both motions. O'Daniel was convicted of first-degree rape, attempted rape, sexual abuse, and endangering the welfare of a child and was sentenced to 19½ years in prison.

The Appellate Division, Third Department affirmed, saying, "Bruno, who was no stranger to defendant, entered the case at Martineau's request and, ultimately, assumed the role of trial counsel due to Martineau's ongoing health issues. Although defendant now contends that this turn of events effectively denied him the right to be represented by counsel of his choosing, noticeably absent from the record is any indication that defendant was unwilling to proceed to trial with Bruno as counsel or, more to the point, that he sought further adjournment of the trial date for the express purpose of retaining another attorney.... Under these circumstances, we cannot say that County Court either interfered with an existing attorney-client relationship..., denied defendant a reasonable opportunity to retain counsel of his choosing ... or abused its discretion in denying defendant's request for further adjournments...."

O'Daniel argues, "The Third Department ignored the extensive evidence in the record showing that Bruno was not O'Daniel's choice of counsel, including (1) the court's initial letter 'suggesting' that Martineau get another attorney to take over in the event of his illness, (2) the agreement between Martineau and Bruno to which O'Daniel was not a party, (3) the statements by Bruno to the court that 'Martineau remains the attorney of record', and (4) O'Daniel's strenuous objection that 'the legal system ... [was] being unfair to him because of Mr. Martineau's health." This placed the trial court "under an affirmative duty to inquire into the complaint to assure that the defendant's constitutional right to choice of counsel is not being violated...," he says. "[T]he court should have asked O'Daniel what was his choice of counsel and whether he wished to proceed with Bruno. It did not. There was also no legitimate basis for the court to interfere in the attorney-client relationship between O'Daniel and Martineau in the name of trial management."

For appellant O'Daniel: Bruce R. Bryan, Syracuse (315) 476-1800
For respondent: Clinton County Assistant District Attorney Jaime A. Douthat (518) 565-4770

State of New York Court of Appeals

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To be argued Tuesday, September 16, 2014

No. 162 Motorola Credit Corporation v Standard Chartered Bank *(papers sealed)*

In 2003, U.S. District Court for the Southern District of New York awarded Motorola Credit Corporation compensatory damages of $2.1 billion against members of the Uzan family, based on its finding that the Uzans diverted loans Motorola made to a Turkish company they controlled. In 2006, the court awarded Motorola $1 billion in punitive damages. The Uzans have evaded payment of the judgments and Motorola has engaged in an international hunt for the Uzans and their assets. In February 2013, the District Court issued a restraining order, pursuant to CPLR 5222 and federal law, enjoining the Uzans, their agents, and any third-party receiving notice of the order from selling, assigning, or transferring their property until Motorola's judgments are paid. Motorola served the restraining order on the New York branch of Standard Chartered Bank, a British bank with branches in many countries. Standard Chartered found no Uzan assets in its New York branch, but found about $30 million in short-term deposits at its branches in the United Arab Emirates (UAE). When Standard Chartered sought to freeze the assets, regulatory authorities in the UAE and Jordan intervened; and when it refused demands by an Uzan entity for payment, the UAE Central Bank debited $30 million from Standard Chartered's account at the Central Bank to repay the Uzan entity. Standard Chartered then moved in U.S. District Court for relief from the restraining order.

District Court granted the motion, but stayed its order pending appeal. It found New York's "separate entity rule" -- which provides that all branches of a bank will be treated as separate entities for purposes of attachments, restraints and turnover orders, among other things -- precludes Motorola from restraining assets held by Standard Chartered's foreign branches. It rejected Motorola's argument that application of the separate entity rule in post-judgment enforcement proceedings is barred by Koehler v Bank of Bermuda (12 NY3d 533), which held that a court in New York with personal jurisdiction over a bank may order it to deliver assets in a foreign branch to a judgment creditor. The court said, since "Koehler had no reason to address the separate entity rule and ... it is unlikely that the New York Court of Appeals would silently overrule such an important policy and precedent, this court concludes that the Court of Appeals intended no such thing."

The U.S. Court of Appeals for the Second Circuit is asking this Court, in a certified question, to determine "whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank."

For appellant Motorola: Howard H. Stahl, Washington, DC (202) 639-7000
For respondent Standard Chartered Bank: Bruce E. Clark, Manhattan (212) 558-4000

State of New York Court of Appeals

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To be argued Tuesday, September 16, 2014

No. 163 People v Thomas Horton

In June 2010, members of the Wayne County Sheriff's Department made a video recording of a drug transaction involving Thomas Horton, his friend Clarence Jackson, and a confidential informant. In April 2011, Horton posted a photograph of the informant on his Facebook page, identifying her as a "snitch" and saying "snitches get stitches," among other things. He also posted a link to the surveillance video on YouTube, saying, "The video is up LOL." Horton was charged with a class A misdemeanor of tampering with a witness in the fourth degree under Penal Law 215.10(a), which provides, "A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding...." The misdemeanor complaint alleged that Horton posted the material while "knowing that [the informant] was or was about to be called as a witness" in the felony drug case against Jackson, and thereby "induced or attempted to induce" the informant not to testify. Horton was convicted of witness tampering in Galen Town Court and sentenced to one year in jail.

Wayne County Court affirmed, rejecting Horton's argument that there was insufficient evidence to support the guilty verdict. "As an initial matter, the court notes that any reliance by [Horton] on the argument that there was no evidence of any threats or intimidation of [the informant] is misplaced as same are not statutory requirements or elements of the crime herein. That is not to say that there was no evidence of such intimidation, merely that the court need not address something that is not an element of the crime before it." It concluded, "From the evidence it could reasonably be determined that the defendant's actions could induce [the informant] not to testify."

Horton argues the prosecutor failed to prove either element of the crime. "[N]one of the evidence indicates that Mr. Horton knew [the informant] was a witness in any pending matter -- rather the opposite, since Mr. Jackson had informed him that he was pleading guilty, which would obviate the need for any testimony from anyone...," he says. "There is nothing threatening directed at [the informant] if she testifies or appears at trial. Indeed..., by 'outing' [the informant] online by posting the video ... and talking about her on Facebook, Mr. Horton would have appeared to have exhausted his quiver of ammunition, and would have nothing left with which to threaten her." He also raises a free speech claim, saying, "The interpretation of the statute ... urged by the People -- ... that the conduct alleged need not be threatening [--] carries with it the implication that anything could be construed as a violation of the statute so long as someone is willing to state that they felt intimidated by it. This is far too broad a reading of the statute."

For appellant Horton: Tyson Blue, Macedon (585) 944-4825
For respondent: Wayne County Asst. District Attorney Christopher Bokelman (315) 946-5905

State of New York Court of Appeals

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To be argued Wednesday, September 17, 2014

No. 164 People v Genna Turner

Genna Turner was arrested in March 2010 for allegedly chasing another woman with a butcher knife in the Town of Greece, Monroe County. She offered to show the arresting officer where she left the knife. After recovering the weapon, the officer took her to the home of the complaining witness, who identified Turner as her assailant. Turner was given Miranda warnings at the police station, then made a videotaped confession. County Court suppressed the knife and Turner's initial statements to the arresting officer on the ground that the officer lacked probable cause for the arrest, but it refused to suppress the stationhouse confession, finding it was attenuated from the illegal arrest.

After the suppression ruling, Turner agreed to plead guilty to second-degree attempted murder, first-degree burglary, and criminal contempt with a promise that she would be sentenced to 15 years in prison. She also faced a mandatory term of post-release supervision (PRS), but there was no mention of PRS prior to her guilty plea or at any time during the plea allocution. When Turner appeared for sentencing two weeks later, the prosecutor told the court, "I can't recall if the post-release supervision period was discussed at the time of plea. I think we should probably make a record of that now so it is clear." The court said it would impose a five-year term of PRS. The prosecutor asked Turner if she "had a chance to talk about that with your attorney," and she said, "Yes." He asked, "Do you understand that[] that's part of your plea, at the end of your prison sentence you will be on parole supervision for a period of five years?" She said, "Correct." The prosecutor asked, "You still wish to go through with sentencing today?" She said, "Yes." The court imposed the promised sentence and five years of PRS.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying Turner failed to preserve her claim that her guilty plea was not knowing, voluntary and intelligent under People v Catu (4 NY3d 242) because she was not told she would face a term of PRS prior to the plea. Although, generally, preservation of a Catu error is not required, the court said preservation is required here because Turner was informed of the PRS component before the sentence was imposed. "In our view, the record is clear that 'defendant could have sought relief from the sentencing court in advance of the sentence's imposition,' and thus 'Louree's rationale for dispensing with the preservation requirement is not presently applicable'.... In any event, we conclude that defendant waived her right to assert the Catu error inasmuch as 'there is ample evidence in the record supporting the ... conclusion that defendant agreed to the bargain and did so voluntarily with a full appreciation of the consequences'...."

The dissenters said Turner's plea was not voluntary and she was not required to preserve the claim. "It is undisputed that there was no mention of PRS at the plea proceeding and, based on our review of the record, we conclude that defendant was not 'advised of what the sentence would be, including its PRS term, at the outset of the sentencing proceeding'.... Rather, defendant did not learn that PRS would be imposed until 'moments before imposi[tion of] the sentence'.... Significantly, the brief reference to PRS by the prosecutor at sentencing 'cannot substitute for [County Court's] duty to ensure, at the time the plea is entered, that the defendant is aware of the terms of the plea'...." They said Turner did not waive the claim. "The prosecutor told defendant incorrectly just before the court imposed sentence that PRS was 'part of [her] plea,' and she was offered no option other than to proceed to sentencing.... As a result, defendant said nothing ... that amounted to a waiver, i.e., 'an intentional relinquishment or abandonment of a known right or privilege'...."

For appellant Turner: Kimberly J. Czapranski, Rochester (585) 753-3491
For respondent: Monroe County Assistant District Attorney Matthew Dunham (585) 753-4627

State of New York Court of Appeals

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To be argued Wednesday, September 17, 2014

No. 165 Grace v Law

This legal malpractice case stems from medical malpractice claims that John W. Grace brought against the Veterans Administration Outpatient Clinic in Rochester. Grace retained Robert L. Brenna, Jr. and his firm, Brenna, Brenna & Boyce, and they filed an administrative tort claim with the Veterans Administration (VA) in August 2006. When the government did not respond, Grace retained Michael R. Law and his firm, Phillips Lytle, to pursue a federal suit. In January 2008, Law filed a medical malpractice complaint in U.S. District Court against the United States and the VA under the Federal Tort Claims Act, alleging that Grace lost the vision in his right eye because the VA failed to monitor and treat his eye condition in a proper and timely manner. Dr. Shobha Boghani, who treated Grace at the VA, was employed by the University of Rochester, and the government filed a third-party action against Dr. Boghani and the University in October 2008. In May 2009, Brenna filed an amended complaint in federal court naming Dr. Boghani and the University as defendants in Grace's medical malpractice suit. In November 2010, U.S. District Court dismissed the amended complaint against Dr. Boghani and the University as time-barred. The court also dismissed all claims against the government that were based on alleged negligence of Dr. Boghani, finding the doctor was an independent contractor and not an employee of the VA. This left only one claim against the government -- for negligence in failing to reschedule an appointment after a cancellation.

Rather than appeal, Grace directed the Brenna defendants to discontinue the federal action and commenced this legal malpractice action against them and the Law defendants in Supreme Court, alleging they were negligent in failing to name Dr. Boghani and the University in the initial complaint in federal court. Supreme Court denied the defendants' motions for summary judgment.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, refusing to adopt "a per se rule that a party who voluntarily discontinues an underlying action and forgoes an appeal thereby abandons his or her right to pursue a claim for legal malpractice." It said such a rule "would force parties to prosecute potentially meritless appeals to their judicial conclusion in order to preserve" a legal malpractice claim, "thereby increasing the costs of litigation and overburdening the court system.... The additional time spent to pursue an unlikely appellate remedy could also result in expiration of the statute of limitations on the legal malpractice claim...." It said the defendants "failed to establish that plaintiff was likely to succeed on an appeal from the November 2010 order and, therefore, that their alleged negligence was not a proximate cause of his damages...."

The dissenter said,"[I]n my view, plaintiff is precluded as a matter of law from bringing this legal malpractice action based upon his voluntary discontinuance of the underlying federal action and failure to pursue a nonfrivolous appeal." Had Grace appealed the federal order, he "would have had a meritorious argument ... based upon case law supporting defendants' position that [Dr. Boghani] was a government employee as opposed to an independent contractor." He said, "I cannot see the merit in allowing a litigant, who does not give his or her attorney an opportunity to pursue a potentially meritorious appeal, to abandon his or her underlying case as a strategic decision in order to pursue a legal malpractice claim against his or her attorney."

For appellants Law and Phillips Lytle: Michael J. Hutter, Albany (518) 465-5995
For appellants Brenna and Brenna, Brenna & Boyce: Kevin E. Hulslander, Syracuse (315) 474-2911
For respondent Grace: Brian J. Bogner, Buffalo (716) 855-3437

State of New York Court of Appeals

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To be argued Wednesday, September 17, 2014

No. 166 People v Daniel A. Ludwig *(papers sealed)*
No. 167 People v William Cullen *(papers sealed)*

The primary question in these appeals is whether hearsay testimony about a child abuse victim's prior consistent statements about her sexual abuse improperly bolstered the victim's own trial testimony.

Daniel Ludwig was charged with sexually abusing an 11-year-old girl in East Rochester in 2008 and 2009. About 14 months later, the girl disclosed the abuse to her brother, who then told her mother. At trial, Monroe County Court permitted the prosecutor to elicit testimony from the girl's mother and brother about her prior statements that she was sexually abused by Ludwig, rejecting defense counsel's objection that it was inadmissible hearsay. Ludwig was convicted of predatory sexual assault against a child and sentenced to 16 years to life in prison.

William Cullen was charged with sexually abusing a 13-year-old girl in Syracuse in 2006 and 2007. About four months later, the girl told her mother and a counselor that Cullen had abused her. Supreme Court admitted testimony by the mother and counselor that the girl had told them of sexual misconduct by Cullen. He was convicted of multiple counts of rape, incest and criminal sexual act in the second degree and was sentenced to an aggregate term of 15 years in prison.

The Appellate Division, Fourth Department affirmed both convictions, rejecting defense claims that hearsay testimony about the victims' prior statements was improperly used to bolster the victims' credibility. In Ludwig, it said the testimony "did not constitute improper bolstering inasmuch as the evidence was not admitted for its truth.... Rather, the evidence was admitted to explain how the victim eventually disclosed the abuse and how the investigation started...."

The defendants argue that the victim's credibility was a key issue at trial, as there was little or no physical evidence against them, and they were deprived of a fair trial when the prosecutor was permitted to use hearsay testimony of other witnesses to confirm the victim's own testimony. Ludwig says, "This Court's century old rule against the admission of prior consistent statements is fatally undermined if ... such testimony is admissible merely to establish how and why the investigation commenced, when that was never raised as an issue at trial.... [S]uch bolstering hearsay testimony will always be admissible in sexual offense cases, and this limitless investigation exception would swallow the rule."

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For appellant Cullen: Kristen N. McDermott, Syracuse (315) 422-8191 ext. 0138
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State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, September 17, 2014

No. 168 Matter of Smith v Brown

Eric Smith was charged with criminal possession of a weapon in December 2008, when police officers allegedly recovered a loaded handgun from his waistband during a traffic stop in Queens. During jury deliberations at his trial in 2010, after the alternate jurors had been dismissed, two jurors informed Supreme Court that juror 11 told the entire panel that he had spoken to an "attorney friend" about a "hypothetical gun case" and was advised that the only thing the jury should focus on was whether they believed a gun was present in the car. The jurors who reported the incident said they did not believe it would affect their ability to deliberate. Defense counsel and the prosecutor agreed juror 11 should be discharged for misconduct. The prosecutor would not consent to continuing the trial with the remaining 11 jurors. Defense counsel urged the court to continue, arguing that the taint had been removed and that Smith had a right to proceed with 11 jurors. The court declared a mistrial over defense objection, finding the absolute integrity of the jury process had been compromised. Defense counsel again objected and asked the court to conduct an inquiry of all the jurors to determine whether they had been improperly influenced. The court denied the request.

More than two years later, when his retrial was set to begin, Smith filed this article 78 petition to prohibit Queens District Attorney Richard A. Brown from retrying him for the offense on the ground of double jeopardy.

The Appellate Division, Second Department granted the petition and prohibited the retrial, saying, "When a mistrial is declared without the consent of or over the objection of a defendant, a retrial is precluded unless 'there was manifest necessity for the mistrial or the ends of public justice would be defeated'.... Here, the People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. While it is undisputed that juror number 11 was grossly unqualified to continue serving, the court abused its discretion in declaring a mistrial without considering other alternatives.... [I]t would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict.... Moreover, as the improper information imparted to the jurors did not significantly prejudice the People, the court should have considered whether a specific curative instruction could have clarified what constituted 'evidence' and whether such an instruction could have cured the impropriety...."

Brown argues the trial court "had no choice but to declare a mistrial and defendant had no right to proceed with a jury of eleven. The entire panel of twelve was tainted by its exposure to erroneous outside legal advice, delivered with the intent to influence the other jurors on the key issue in the case." Since the remaining jurors "failed to heed the court's instructions that they should promptly report any outside influence" and instead discussed the outside advice and sought clarification of the law before two of them reported the incident, he says the court "justifiably lacked faith in the deliberative process, including the juror's ability to follow instructions" if the trial continued. He says Smith waived his claim by consenting to a retrial if the jury could not continue as 12, when the alternates were excused, and then consenting to the discharge of juror 11. He also argues Smith's petition is time-barred.

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State of New York Court of Appeals

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To be argued Thursday, September 18, 2014

No. 169 People v Jermaine Dunbar
No. 170 People v Collin F. Lloyd-Douglas
No. 171 People v Eugene Polhill

The Queens County District Attorney's Office instituted a program whereby arrested individuals are interviewed just prior to arraignment, using a script which is read before the individuals are advised of their constitutional rights as required under Miranda v Arizona (384 US 436 [1966]). The primary question in each of these appeals is whether this pre-arraignment procedure is effective to secure the individuals' constitutional right to counsel and privilege against self -incrimination.

Jermaine Dunbar was convicted of attempted robbery in the second degree and criminal mischief in the fourth degree. Collin Lloyd-Douglas was convicted of attempted murder in the second degree and other crimes. Eugene Polhill was convicted of attempted robbery in the second degree. Each of the three defendants were interviewed, pre-arraignment, by an assistant district attorney using a script formulated by the Queens County District Attorney's Office, pursuant to which the defendants were told that they would be informed of their Miranda rights "in a few minutes," and they would be "given an opportunity to explain what [they] did and what happened." The defendants were instructed, among other things: "If there there is something you need us to investigate about this case you have to tell us now so we can look into it." The defendants were informed that if they have "already spoken to someone else," they were not required to speak to the ADA, but they were informed that "[t]his will be your only opportunity to speak with us before you go to court on these charges." After this "preamble," the defendants were informed that the interview was being recorded, advised of the right to be arraigned without further delay, and read Miranda warnings. Each of the defendants gave a statement, which was used against him at trial after Supreme Court denied each of the defendant's motion to suppress.

On appeal, the Appellate Division, Second Department, reversed in each case, concluding that the script followed in the pre-arraignment interview process was not effective to secure the privilege against self-incrimination. The court determined that the preamble suggested a "sense of immediacy and finality" that impaired suspects' "reflective consideration of their rights and the consequences of a waiver." The Appellate Division further determined that the admission of the statements was not harmless error.

The People argue that the Appellate Division erred in applying a "per se rule to automatically require suppression of [a] defendant's voluntary videotaped statement without regard to whether the interviewers' pre-Miranda remarks impacted the knowing, intelligent, and voluntary nature of th[e] particular defendant's waiver."

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For amicus curiae the Legal Aid Society: Steven B. Wasserman, Manhattan (212) 577-3300
For amicus curiae Legal Ethics Bureau at NYU: Barbara S. Gillers, Manhattan (917) 679-5757
For amicus curiae District Attys Assoc.: Erie County A.D.A. Morrie I. Kleinbart (716) 858-2467

State of New York Court of Appeals

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To be argued Thursday, September 18, 2014

No. 172 Matter of State of New York v Donald DD. *(papers sealed)*
No. 173 Matter of State of New York v Kenneth T. *(papers sealed)*

The primary common question in these appeals is whether a diagnosis of antisocial personality disorder is sufficient to support a finding that an individual is a dangerous sex offender requiring civil confinement under Mental Hygiene Law article 10.

Donald DD.'s criminal record include numerous sex-related convictions, including convictions for rape in the second degree and attempted rape as a result of sexual activity with two girls under the age of 14 and a conviction for sexual abuse in the second degree as a result of his rape of an adult acquaintance. He was released to parole supervision in 2008 and, shortly thereafter, detained and charged with violating the terms of his parole by failing to register as a sex offender, among other things.

As Donald DD.'s latest release from custody approached, the State commenced a proceeding pursuant to Mental Hygiene Law article 10 alleging that he is a sex offender requiring civil management. Following a jury trial, Donald DD. was determined to suffer a mental abnormality as defined by Mental Hygiene Law § 10.03 (i). After a dispositional hearing, Supreme Court found him to be a dangerous sex offender in need of confinement.

Kenneth T. was convicted of rape in the first degree in 1983 and, while on parole in 1999, committed an act that resulted in his conviction in 2001 of attempted rape in the first degree. The State petitioned for civil management of Kenneth T. in 2008 as he was again nearing an anticipated release date from incarceration. After a nonjury trial, Supreme Court found that Kenneth T. suffers from a mental abnormality within the meaning of Mental Hygiene Law
§ 10.03 (i). After a dispositional hearing, Supreme Court found him to be a dangerous sex offender requiring confinement.

The Appellate Division affirmed in both cases, finding clear and convincing evidence for the determinations that Donald DD. and Kenneth T. were dangerous sex offenders requiring confinement. The Third Department specifically rejected Donald DD.'s contention that antisocial personality disorder could not constitute a mental abnormality within the meaning of the Mental Hygiene Law because it does not necessarily have a sexual component.

Donald DD. and Kenneth T. argue primarily that antisocial personality disorder, which does not have a sexual diagnostic criteria, cannot serve as the basis for civil confinement under Mental Hygiene Law article 10. Kenneth T. further argues that the diagnosis of paraphilia not otherwise specified cannot serve as the basis for his civil confinement because it was based solely on his past crimes.

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