

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 Monday, March 18, 2013

No. 58 Commonwealth of the Northern Mariana Islands v Canadian Imperial Bank of Commerce

In this federal case, the Commonwealth of the Northern Mariana Islands is trying to enforce judgments for delinquent taxes it obtained in 1994 against William and Patricia Millard, former residents of the United States territory. The two judgments originally totaled \$36.6 million, but with interest have grown to more than \$118 million. After learning the Millards had renounced their U.S. citizenship and were residing in the Cayman Islands, the Commonwealth registered the judgments in the Southern District of New York in 2011 and moved for a turnover order under CPLR § 5225(b) against the Canadian Imperial Bank of Commerce (CIBC), alleging the Millards had accounts at CIBC's Caribbean subsidiaries. Section 5225(b) authorizes courts to order an entity that has "possession or custody" of a debtor's assets to turn the assets over to a judgment creditor. The Commonwealth alleged the Millards had accounts at CIBC FirstCaribbean International Bank (FirstCaribbean) or at FirstCaribbean's subsidiaries in the Caymans. CIBC owned 92 percent of FirstCaribbean, and the Commonwealth asserted that CIBC had the authority and control to order FirstCaribbean to turn over the Millards' assets.

U.S. District Court denied the Commonwealth's motion, holding that section 5225(b) limits turnover proceedings to entities that have actual possession or custody of a debtor's assets. Rejecting the Commonwealth's argument that constructive possession is sufficient, the court said CPLR provisions permitting discovery of documents in a party's constructive possession use the phrase "possession, custody or control," while provisions related to the disposition of property use the phrase "possession or custody." "Clearly, then, the Legislature persistently chose to set a higher standard for instances where property is at issue than for disputes involving discovery," it said, concluding the omission of the word "control" from section 5225(b) "was deliberate and meaningful." However, the court acknowledged "the paucity of state-law decisions" on the scope of the statute and said it "considers [the Commonwealth's] argument to have sufficient force amidst admittedly murky concepts to eventually have a fair chance of success on the merits." It issued an injunction to prevent dissolution of the Millards' assets pending appeal.

On appeal, the U.S. Court of Appeals for the Second Circuit is asking the New York Court of Appeals to resolve a pair of certified questions: "1. May a court issue a turnover order pursuant to [section] 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets.? 2. If the answer to the above question is in the affirmative, what factual considerations should a court take into account in determining whether the issuance of such an order is permissible?"

For appellant Commonwealth: Michael S. Kim, Manhattan (212) 488-1200
For respondent CIBC: Scott D. Musoff, Manhattan (212) 735-3000

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No. 84 People v Marvin Byer

(papers sealed)

Marvin Byer was charged with murdering Eleanor Jackson in the Bronx apartment of his estranged domestic partner, Phyllis Howard, in March 2005. Byer admitted to the police that he stabbed Jackson to death, dismembered her body, and disposed of her remains in garbage bags. At trial, however, he testified that Howard killed Jackson before he arrived and that he helped her dispose of the body in an effort to protect her. Howard succumbed to illness and died before the trial. Supreme Court allowed a detective to testify that, when Byer confessed to killing Jackson, he also said "this was not his first body." The detective asked how many and Byer answered "nine," then said he would tell the detective about them after the trial. Defense counsel had objected that all such testimony "serves to do is make my client look like a serial killer" and it would cause "tremendous prejudice," but the court ruled the testimony was relevant to proving that Byer's confession was voluntary. The court also admitted hearsay testimony by Jackson's nephew, who said Jackson told him days before the murder that Byer made "threats about cutting her up," and by a social worker who said Howard told her Byer had physically abused her. Byer was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, First Department affirmed. The testimony about Byer's allusion to nine other murders and the hearsay statements that he threatened Jackson and abused Howard were improperly admitted, the court said, but "the evidence of defendant's guilt was so overwhelming that these errors were harmless." Regarding the "nine" bodies testimony, it said, "[T]here is no reasonable probability that this error contributed to the conviction. In detailed oral, written and videotaped confessions, defendant described how he became enraged at the victim, stabbed her to death, and dismembered and disposed of her body. Moreover, defendant's trial testimony was more inculpatory than exculpatory. He testified that he dismembered and disposed of the body, but that he was not the killer. His explanation for this behavior was utterly implausible and had no hope of convincing the jury."

Byer argues, "Harmless error should not apply to the errors here because appellant was denied his self-standing right to a fundamentally fair trial," citing People v Crimmins (36 NY2d 230). "Moreover, even under non-constitutional analysis, the errors were not harmless. The jurors improperly heard evidence that appellant was a serial killer who had admitted to murdering ten people. They improperly heard that he had threatened to cut up the victim before the incident" and that he "had committed acts of domestic violence against his wife." He says, "All the People could firmly establish was that appellant had participated in the removal of the body.... Without the hearsay evidence, and the statements about nine other murders, the jury could have properly weighed appellant's defense that he had confessed only to protect the person he loved, who was very ill. The jury verdict could easily have been different...."

For appellant Byer: Bruce D. Austern, Manhattan (212) 577-2523 ext. 514

For respondent: Bronx Assistant District Attorney Justin J. Braun (718) 590-2000

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To be argued Monday, March 18, 2013

No. 59 People v Alex Echevarria

No. 60 People v Andrew Moss

No. 61 People v Martin Johnson

These three defendants were arrested for selling crack cocaine to undercover officers during unrelated buy-and-bust operations in Manhattan, and all were convicted of drug sale charges at separate trials. Alex Echevarria and Andrew Moss were sentenced to ten years in prison and Martin Johnson to three years. The common question in these appeals is whether the trial judge violated the defendant's right to a public trial by closing the courtroom to the general public during testimony of the undercover officer.

After holding Hinton hearings in each case, Supreme Court granted the prosecution's application to close the courtroom to the public during testimony of undercover officers on the ground that public testimony would compromise the officers' safety and effectiveness, but made an exception for admission of some of the defendant's close family members. The court in Moss said "the family should be here, as long as they're not living in the area" where the undercover officers were operating.

The Appellate Division, First Department affirmed all three convictions, ruling the trial courts complied with Waller v Georgia (467 US 39) and Presley v Georgia (558 US 209) by considering alternatives to full closure. In Echevarria, the First Department said, "By limiting courtroom closure solely to the duration of the trial testimony of two undercover police officers, and by noting that it would separately consider opening the proceeding to defendant's family members if any requested access to the courtroom during the period of closure, the trial court discharged its duty to consider reasonable alternatives to closing the proceeding...."

The defendants argue they were deprived of their constitutional right to a public trial when the judge closed the courtroom without considering alternatives to complete closure and without adequate proof that the safety and effectiveness of the undercover officers was likely to be jeopardized. Echevarria says, "[N]either limiting closure to the testimony of one or more witnesses, nor excluding family members from a general closure order, constitute prong-three 'alternatives' to closure. Rather, those actions go to Waller's second prong, the breadth of the closure," and so the trial court "never fulfilled Presley's mandate to consider 'all reasonable' alternatives to closure." Echevarria and Johnson also argue the trial court gave improper jury instructions on the agency defense.

(59) For appellant Echevarria: Robert S. Dean, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney David E.A. Crowley (212) 335-9000

(60) For appellant Moss: Justin M. Ross, Manhattan (212) 859-8000

For respondent: Manhattan Asst. District Attorney Christopher P. Marinelli (212) 335-9000

(61) For appellant Johnson: Lauren Stephens-Davidowitz, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney David P. Stomes (212) 335-9000

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No. 62 Roulan v County of Onondaga and the Assigned Counsel Program, Inc.

Timothy Roulan, a panel attorney of the Onondaga County Bar Association Assigned Counsel Program, Inc. (ACP), brought this action against Onondaga County and the ACP to challenge the validity of the assigned counsel plan as a whole and various specific provisions of the plan, claiming they violate right to counsel provisions of the state and federal constitutions, usurp the authority of the courts to assign and compensate counsel for indigent criminal defendants and violate the letter and spirit of County Law article 18-B, among other things. Supreme Court granted the defendants' motion for summary judgment dismissing the complaint in its entirety.

The Appellate Division, Fourth Department modified by reinstating Roulan's declaratory judgment cause of action and declaring unconstitutional one section of the plan, which "prohibits attorneys from representing nonincarcerated criminal defendants until there has been a determination of their eligibility [for assigned counsel], and thus it requires attorneys to violate the indelible right to counsel that attaches at arraignment...." The court upheld a provision that bases the eligibility of defendants under age 21 on their parents' finances, saying parents of unemancipated children "are responsible and chargeable for the support of those children..., including the payment of their legal fees...." On a 3-2 vote, it also upheld a provision prohibiting payment to an attorney who was previously retained or accepted any fee for representation in the same case. The majority said invalidating the provision "would allow 18-B plan attorneys to 'unfairly compete with private practitioners' inasmuch as they could accept lower-paying clients and later seek compensation from the county.... As a matter of public policy, previously retained attorneys should not be able to seek compensation in the event that their clients run out of money."

In a partial dissent, two justices argued the provision denying ACP compensation to retained attorneys is invalid. They said, "[R]estricting the authority of the court to assign an attorney who is otherwise eligible for assignment simply because that attorney was previously retained by the defendant, who has since become indigent and thus eligible for assigned counsel, circumvents article 18-B and unduly restricts the inherent power of the court to assign an attorney to indigent defendants.... The concerns of the majority with respect to article 18-B attorneys competing with private practitioners can and should be addressed by the trial court, which has the authority to assign and compensate counsel."

For appellant Roulan: Jeffrey Parry, Fayetteville (315) 424-6115

For respondents Onondaga County et al: Jonathan B. Fellows, Syracuse (315) 218-8000