# *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 9, 2015

**No. 127 People of the State of New York v Sprint Nextel Corp.**

This tax enforcement action arises from a qui tam suit brought in 2011 by Empire State Ventures, LLC against Sprint Nextel Corp. and three subsidiaries, alleging that Sprint was evading New York sales taxes on some revenue from sales of its flat-rate mobile telephone plans. Attorney General Eric T. Schneiderman intervened and filed a superseding complaint in 2012, alleging that Sprint knowingly filed false tax returns and failed to collect and remit more than $100 million in sales taxes in order to gain an advantage over its competitors by reducing the cost of its fixed-rate plans. He is seeking treble damages from Sprint under New York's False Claims Act (Finance Law § 189[1][g]) for making false statements on tax forms; he also asserts claims under Executive Law § 63(12) for fraudulent conduct and Tax Law article 28 for failure to pay the taxes. The Attorney General alleges that, beginning in 2005, Sprint began treating "an arbitrary and fluctuating percentage" of its monthly flat-rate bills as charges for tax-exempt interstate calls, although its invoices to customers did not distinguish between interstate and intrastate calls. He says this violates Tax Law § 1105(b)(2), which was enacted in 2002 to conform with a new federal law, the Mobile Telecommunications Sourcing Act (MTSA), by imposing sales tax on the entire monthly charge for flat-rate mobile voice services when the cost of interstate calls is aggregated with taxable charges. An August 2010 amendment applies the False Claims Act to knowing violations of the Tax Law.

Supreme Court denied Sprint's motion to dismiss the action, finding the allegations in the Attorney General's complaint were sufficient to state claims under the False Claims Act, Executive Law and Tax Law. Rejecting Sprint's claim that Tax Law § 1105(b)(2) permits it to exclude from sales taxes the portion of its flat-rate charge attributable to interstate calls, the court said its interpretation "is inconsistent with the plain language used" in the statute. The court said the Tax Law does not conflict with the MTSA, which was enacted "to address jurisdictions that, unlike New York, do not subject aggregated mobile telecommunications charges to taxation." It also held that application of the False Claims Act to statements made prior to its amendment in August 2010 does not violate the federal Ex Post Facto Clause.

The Appellate Division, First Department affirmed, finding no conflict with the MTSA and no obstacle to retroactive application of the False Claims Act. "Defendants fail to show that the Act's sanction of civil penalties, including treble damages, is so punitive in nature and effect as to have its retroactive effect barred by the Ex Post Facto Clause," it said.

Sprint argues that the Attorney General's claims fail "for two independent reasons. *First*, section 1105(b) does not tax interstate voice services, even when they are sold as part of a fixed monthly charge. *Second*, if the Attorney General's interpretation of section 1105(b) were correct, it would flatly conflict with, and therefore be preempted by, the 'unbundling' provision of the federal MTSA." Sprint also argues that it "cannot be held liable for knowingly violating the Tax Law because its interpretation of the relevant statute was objectively reasonable. And at the very least, the Ex Post Facto Clause of the federal Constitution bars application of the False Claims Act to statements made before August 13, 2010.

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For respondent State: Deputy Solicitor General Steven C. Wu (212) 416-6312

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To be argued Wednesday, September 9, 2015

**No. 128 People v James R. Poleun** *(papers sealed)*

James Poleun pled guilty to a felony count of possession of a sexual performance by a child in 2009, after the State Police executed a search warrant at his Niagara County home and found two child pornography images on his computer. He was sentenced to 1 1/3 to 4 years in prison. Prior to his release in 2013, the Board of Examiners of Sex Offenders assessed him 100 points on the risk assessment scale, which would classify him as a level two offender under the Sex Offender Registration Act (SORA), but it recommended an upward departure to risk level three based on his disciplinary infractions in prison, lack of supervision upon release, three prior arrests for sexual misconduct with young girls, and his admitted searching for child pornography on the internet, among other things.

Prior to his SORA hearing, Poleun wrote two letters to Niagara County Court saying he did not wish to appear because he would be transferred to Attica Correctional Facility for the hearing and he feared for his safety. In the first letter, he said, "With all respect to the court, I do not wish to appear. There is a lot I wish to say, but, I truly fear for my life having to sit at Attica for 2-3 weeks. Like I wrote before I seen IG twice there, and was beat up by COs 3 times.... I hope it will not be held against me for not coming. Believe me I want to. There are many wrong things wrote in that report. And I hope my lawyer will speak up on them. My parents will also be there. I do hope for a fair outcome." In the second, he asked the court to "revoke the order to have me brought there" and added, "It would be nice if I could appear via web-cam, but, my lawyer will speak on my behalf."

At the hearing, Poleun's attorney consented to proceeding in his client's absence and submitted a waiver of appearance signed by Poleun. After the hearing, County Court granted the prosecutor's request to designate Poleun a level three sex offender.

The Appellate Division, Fourth Department affirmed, saying Poleun failed to preserve his claim that County Court violated due process by accepting his waiver of appearance. On the merits, it said there was no due process violation because he "waived his right to be present at the SORA hearing when he informed the court in writing that he did not wish to appear. Defendant also signed a written waiver of that right, in which he '"was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his ... absence"'...."

Poleun argues his waiver of appearance was invalid because it was involuntary. "It is fundamentally unfair and a deprivation of due process for an incarcerated defendant to be forced to forego his constitutional right to be present at a hearing because he fears harm to himself resulting from his transportation and housing attendant to that hearing.... The defendant expressly stated to the court in his letters that the only reason that he would waive his right to be present ... was his fear of injury or death if transferred for purposes of that hearing. At a minimum, the SORA court should have made some attempt to ascertain whether those statements had any basis in fact." He also argues an upward departure to risk level three was not warranted.

For appellant Poleun: Joseph G. Frazier, Lockport (716) 439-7071
For respondent: Niagara County Assistant District Attorney Laura T. Bittner (716) 439-7085

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To be argued Wednesday, September 9, 2015

**No. 129 Remet Corporation v Estate of Pyne**

James R. Pyne sold Remet Corp. to a holding company for about $28 million in March 1999. The sale included an industrial facility on Turner Street in Utica and the "Erie Canal Site" in the Town of Frankfort. To address the buyer's concerns about potential liability for contamination of the properties, Pyne agreed in the Purchase and Sale Agreement to indemnify the buyer, for a period of ten years, for any environmental costs that "arise out of or result from actions ... that [the buyer] *is required to take* under or in connection with any Environmental Law or Environmental Permit" (emphasis added). When Remet was re-sold, the new owners acquired the indemnification rights.

In October 2002, the Department of Environmental Conservation (DEC) sent a notice letter to Remet identifying it as a "potentially responsible party" (PRP), along with four other entities, for hazardous waste on the Erie Canal Site because it "was a generator of wastes which it disposed at the site." DEC "requested" that Remet "develop, implement and finance a Remedial Program for this site" and said if Remet did not sign a consent order within 30 days, DEC would perform the work itself and seek recovery from Remet as a PRP, in which case "this Notice also serves as a demand for payment of all monies the Department may expend...." Remet did not sign the consent order, but began its own investigation of DEC's claims. Pyne died in 2003. In 2010, DEC issued its final remediation plan, which it estimated would cost in excess of $12.5 million, and identified Remet as a PRP that could be liable for the cost. When the Estate of Pyne refused to indemnify Remet for this cost and an additional $550,000 of its own expenses, Remet brought this action seeking a declaration that it was entitled to indemnification.

Supreme Court granted partial summary judgment to Remet on liability and declared it was entitled to indemnification, rejecting the Estate's argument that the DEC's October 2002 letter did not "require" Remet to take action. "Central to the message of the DEC letter is that an environmental clean up would take place, one way or another, with the cost paid voluntarily by Remet under a consent order, or by judgment if the DEC successfully proceeded against it, as it says it was required to do.... Faced with these 'options,' the letter clearly required some action by the plaintiff."

The Appellate Division, Fourth Department reversed and declared that Remet was not entitled to indemnification, since the purchase agreement limits that obligation to losses resulting from actions Remet "is required to take" in connection with environmental laws. "Because the DEC's letter 'merely informed ... plaintiff[] of [its] potential liability and sought voluntary action on [its] part'..., we conclude that it did not require plaintiff to take action," the court said.

For appellant Remet: Scott A. Chesin, Manhattan (212) 506-2500
For respondent Estate et al: Neil M. Gingold, Fayetteville (315) 445-0060

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**No. 130 People v Raymond Denson** *(papers sealed)*

Raymond Denson was 54 years old in 1998, when he was questioned by police about his conduct toward a 10-year-old girl who lived in the Manhattan building where he worked. Denson, who had a 20-year-old sodomy conviction for molesting a minor, repeatedly asked the girl to go out with him for ice cream or to go ice skating or to the movies, offers she always rejected or ignored. When he appeared at her apartment door and asked if she was "ready to go to the movies," she said no, she would be busy all week, and closed the door. Five days later, Denson greeted her and said, "Here's the keys to my apartment." When she refused to take them, he asked three times if she was sure, then offered to take her for ice cream. She told her mother, who called the police. Denson told them he and the girl were friends and he had asked her out on dates a number of times. He said he had offered her his keys and "suggested that she stay at his apartment until he got off of work, [and] that she could play with his cats." He was charged with a top count of attempted kidnapping in the second degree.

At his bench trial, Supreme Court allowed evidence and expert testimony about his prior sex offense "to show his intent in the present case." The court said the evidence, "potentially, demonstrates more than criminal propensity, but purports to show an actual link between the two offenses. For example, pictures of the two children show them to so closely resemble each other ... as to be virtual twins. Certain distinctive patterns of behavior employed by the Defendant on each occasion match to an extraordinary degree. The People now offer expert testimony to prove a theory" that Denson "has transferred his fixation and fantasy from victim number one to victim number two and is now re-living the previous sexual encounter." Denson was convicted and sentenced to 10 years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, finding there was sufficient proof of attempted kidnapping. "The evidence left no doubt that the victim was unlikely to be found had she succumbed to defendant's pressure to take his keys and go to the apartment. Similarly, the evidence left no doubt that defendant, a 'highly-fixated' pedophile, attempted to restrain the victim, i.e., to move her to a different location without the permission of her mother." No proof of force was required because "the definition of restraint, with respect to a child less than 16 years of age, encompasses movement or confinement by 'any means whatever,' including the acquiescence of the child.... His insistence that she go to his apartment, and his offer of keys, were steps that came 'dangerously near' to accomplishing his objective...." The court said, "There was extensive evidence to support the conclusion that defendant's motive was to sexually molest the victim, which ... was highly probative of his intent to abduct her."

The dissenters said, "Even a convicted sexual predator like defendant ... is entitled to protection from an overcharged prosecution," and argued there was insufficient proof of attempted kidnapping. "To successfully prove that defendant came dangerously near to completing a kidnapping of the child in this particular situation, the evidence would have had to show either that he was near forcibly taking her ... or that he came close to taking her with her acquiescence." But he made no use of force and "the evidence establishes that there was essentially no possibility that the child was going to comply with defendant's request." They said, "The majority makes an unreasonable leap in logic, and embraces fuzzy psychology, when it infers the intent to abduct based on" Denson's motive to sexually molest the girl. "Defendant's sexual interest in the complainant did not justify an inference that he harbored the intent to abduct her ... nor did his actual conduct toward her justify any such inference."

For appellant Denson: Kerry S. Jamieson, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Christopher P. Marinelli (212) 335-9000