# State of New York
# Court of Appeals



To be argued Wednesday, October 23, 2019

**No. 87 People v Victor Thomas**
**No. 88 People v Nicole Green**
**No. 89 People v Storm U. Lang** *(papers sealed in No. 89)*

These defendants all pled guilty in unrelated cases and each signed a waiver of their right to appeal. The common question raised in these cases is whether an appeal waiver that overstates the rights the defendant is surrendering renders the waiver unenforceable.

Victor Thomas pled guilty in Bronx Supreme Court to attempted assault in the first degree in exchange for a promised sentence of five years in prison. Prior to entering his plea, Thomas signed an appeal waiver which provided that he was waiving "the right to file a notice of appeal." The written form did advise him that there were exceptions to the waiver, including any constitutional speedy trial claim, the legality of his sentence, his competency to stand trial, and the voluntariness of his waiver and plea.

Nicole Green and Storm U. Lang pled guilty in separate cases in Genesee County Court, with Green receiving six years in prison for attempted burglary in the second degree and Lang receiving three years for sexual abuse in the first and second degrees. Both signed appeal waivers after the judge explained the rights they were giving up in nearly identical language. The court told Green, "Do you understand that the waiver goes to almost all issues of conviction and sentence, including the terms and length of your sentence, whether your sentence was excessive, you won't be able to hire an attorney to file an appeal for you, you won't get an assigned attorney to file an appeal for you, you won't be able to file your own appeal, you won't get waived filing fees. There is just going to be no review in any other court." The judge noted the same exceptions to the waiver as in Thomas.

The Appellate Division ruled the waivers were valid, the First Department in Thomas and the Fourth Department in Green and Lang. The First Department said the waiver Thomas signed "did not contain any language this court has previously found to be unenforceable.... There was no language that 'discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself,'" citing its 2014 ruling in People v Santiago (119 AD3d 484). It said the waiver form did not "suggest that the filing of a notice of appeal could be deemed a motion to vacate, or that it would have any other unwanted consequences (see Santiago ...)." The Fourth Department said in Lang, "While we agree with defendant that the colloquy and written waiver contain improperly overbroad language concerning the rights waived by defendant, '[a]ny nonwaivable issues purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable'...."

The defendants argue, in part, that defendants cannot knowingly and voluntarily execute and courts cannot enforce an appeal waiver that purports to waive rights that cannot be waived under the Constitution, such as these waivers that they say required them to surrender any right to file an appeal. Thomas says, "New York's Constitution guarantees every criminal defendant a first appeal as-of-right to the intermediate appellate court, and no one is empowered to bargain away the filing of a notice of appeal." The defendants also argue the waivers violated their right to counsel, among other things.

For appellant Thomas: Louis O'Neill, Manhattan (212) 819-8200
For respondent in No. 87: Bronx Assistant District Attorney Justin J. Braun (718) 838-6135
For appellant Green: James. M. Specyal, Buffalo (716) 853-9555 ext.520
For respondent in No. 88: Genesee County Asst. Dist. Atty. Shirley A. Gorman (585) 344-2550
For appellant Lang: Susan C. Ministero, Buffalo (716) 853-9555 ext. 263
For respondent in No. 89: Genesee County Asst. Dist. Atty. Shirley A. Gorman (585) 344-2550

# 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 or gspencer@nycourts.gov.**

To be argued Wednesday, October 23, 2019

**No. 90 People ex rel. Prieston o/b/o Beaubrun v Nassau County Sheriff's Department**

This habeas corpus proceeding stems from a dispute over the sufficiency of the collateral pledged for an insurance company bail bond posted by Kenel Beaubrun, who was indicted in Nassau County in September 2017 on a charge of second-degree conspiracy to possess and distribute narcotics. He was indicted again four months later on a charge of first-degree criminal possession of a controlled substance, an A-1 felony, and multiple felony counts of drug and weapon possession. Supreme Court set bail for both indictments at $500,000 insurance bond or $250,000 cash.

After Beaubrun posted a $500,000 bond through I.C. Bail Bonds, Inc., the court held a bail sufficiency hearing under CPL 520.30, which permits a court to "conduct an inquiry for the purpose of determining the reliability of the obligors or person posting cash bail, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy." It authorizes a court to consider, among other things, the source of any money or property offered as collateral, including whether the collateral "constitutes the fruits of criminal or unlawful conduct," and the "background, character and reputation of any person who has ... agreed to indemnify an obligor upon the bond." A representative of the bonding company testified the collateral consisted of three houses put up by relatives and friends of Beaubrun, four automobiles, and 20 promissory notes from "close family members and/or family friends who are gainfully employed."

Supreme Court disapproved the bond, saying, "It's not my job to question the wisdom of the bail bondsman in issuing the bond, but I do have to be convinced there is sufficient collateral being posted to incenti[vise] the defendant to return to court.... [T]he collateral that is being pledged is virtually nonexistent and provides the defendant with no incentive to return to court." It said one of the houses was in foreclosure; there was only $8,000 in equity in another; and the owner of the third house was a co-defendant in the conspiracy case who claimed he was eligible for assigned counsel because he was indigent. It also expressed concern that the third house "may have been acquired at least in part by unlawful means." As for the people providing promissory notes, the court said "it doesn't seem like most of them really have the means to indemnify on the bond so I don't see that they would really have much to worry about if the defendant flees, and the defendant would really not be putting them at risk."

Evans D. Prieston, an attorney for Beaubrun, filed a petition for a writ of habeas corpus at the Appellate Division, Second Department. The court granted the petition and ordered Beaubrun released on bail, saying, "While CPL 520.30 allows a court to conduct an inquiry into the source of collateral pledged to secure issuance of an insurance company bail bond, the court cannot question the business judgment of the issuing company with regards to the amount of collateral it requires to secure the bond.... Here, the Supreme Court erred in disapproving the bail on the ground that the amount of collateral posted to secure the bond was insufficient...."

The County argues that courts have the statutory authority to examine the collateral securing a bail bond, "not to reassess its commercial value, but to confirm ... that the undertaking serves the State's interest in ensuring that a defendant returns to court. Ensuring that bail will induce a defendant's return to court is the paramount policy underlying bail in New York.... Section 520.30 expressly authorizes a bail-setting court to examine the sufficiency of a proposed bail bond to determine, *inter alia*, 'the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy.'"

For appellant County: Nassau County Asst. District Atty. Sarah S. Rabinowitz (516) 571-3800
For respondent Prieston: Evans D. Prieston (pro se), Long Island City (718) 424-2444