State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of April 23 - 25, 2013

State of New York Court of Appeals

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To be argued Tuesday, April 23, 2013

No. 87 James Square Associates LP v Mullen
No. 88 Matter of J-P Group, LLC v New York State Dept. of Economic Development
No. 89 Matter of Morris Builders, LP v Empire Zone Designation Board
No. 90 Matter of Hague Corporation v Empire Zone Designation Board
No. 91 Matter of WL, LLC v Department of Economic Development

These cases stem from changes New York made to eligibility criteria for its Empire Zones Program, which provides tax incentives to qualifying businesses that establish or expand operations in economically distressed areas. To reduce costs and curb abuses, the Legislature amended General Municipal Law § 959(a) in April 2009 to permit the Department of Economic Development to decertify businesses that transfer employees or property from one related entity to another to make it appear they have created new jobs or invested in their facilities, a practice known as "shirt-changing." It also adopted a cost-benefit standard, requiring a certified business "to provide economic returns to the state in the form of total remuneration to its employees (i.e. wages and benefits) and investments in its facility greater in value" than the tax benefits it received. The legislation also amended the Tax Law to bar carryover of tax credits by decertified businesses as of January 1, 2008. In August 2010, the Legislature amended the statute again "to clarify and confirm" that it intended the 2009 amendments to apply retroactively to January 1, 2008.

Nine businesses whose Empire Zones certifications were revoked in 2009 brought these actions against the State to challenge their decertification and the retroactive application of the new eligibility criteria. The primary issue here is whether the 2009 amendments can be applied retroactively to January 2008, although WL, LLC continues to challenge its decertification.

The Appellate Division, Fourth Department -- in James Square and J-P Group -- found the Legislature intended the 2009 amendments to apply retroactively, but ruled that would deprive plaintiffs of their property without due process. There was no indication the plaintiffs "had any warning that the criteria for certification ... were going to change ... prior to April 2009," it said. "Further, and most significantly, it is undisputed that plaintiffs maintained their eligibility for empire zones' tax credits throughout the tax year beginning January 1, 2008 pursuant to the criteria then in effect.... Under the circumstances, those tax credits 'have induced action in reliance thereon [and thus] ... may not be invalidated by subsequent legislation'...."

The Appellate Division, Third Department -- in WL, Morris Builders, and Hague -- agreed the 2009 amendments are prospective. It found the Legislature did not intend them to be retroactive at the time they were enacted and, in any case, it said retroactive decertification would be an unlawful taking of property. "Contrary to [the State's] contention, it is petitioner's certification as a participant in this program -- and not the attendant tax benefits and credits -- that are at issue in this proceeding and represent a property interest that is entitled to due process protection...."

The State argues that the Legislature intended the amendments to be retroactive and that "limited retroactive denial" of the tax incentives would not violate due process. "Both the Supreme Court ... and this Court have repeatedly upheld retroactive tax legislation against due process challenges, and this case fits squarely within the pattern the Courts have approved," it said, because "(1) petitioner was forewarned of the possibility of Program changes and thus could not reasonably rely on the continued availability of the tax credits, (2) the period of retroactivity, slightly more than 15 months..., has been routinely upheld and is not excessive, and (3) the amendments serve two legitimate public purposes by curing abuses of the Program and providing essential budget savings...."

For appellant State: Assistant Solicitor General Owen Demuth (518) 474-6639
For respondents James Square et al: Jonathan B. Fellows, Syracuse (315) 218-8000
For respondent J-P-Group: Jennifer C. Persico, Buffalo (716) 882-4890
For respondent Morris Builders: Philip M. Halpern, White Plains (914) 684-6800
For respondent Hague: Michelle L. Merola, Albany (518) 465-2333
For respondent-appellant WL: Robert K. Weiler, Syracuse (315) 422-1391

State of New York Court of Appeals

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To be argued Tuesday, April 23, 2013

No. 92 People v Grady Hampton

Grady Hampton was accused of killing Kareem Sapp in Uniondale (Nassau County) in December 2007, allegedly shooting him in the street in a fit of jealousy over a woman. His first trial ended in a hung jury. At his second trial, after the prosecution rested, Hampton moved to dismiss for failure to make out a prima facie case. Acting Supreme Court Justice Jerald S. Carter heard arguments on the motion and reserved decision. After the close of evidence, Hampton again moved for a trial order of dismissal. Justice Carter said he had "concerns" about "whether or not the People have met their burden," but again reserved decision. The jury found Hampton guilty of second-degree murder and criminal possession of a weapon.

After the verdict, and with the motions still unresolved, Justice Carter learned that a friend of his was Sapp 's uncle and decided to recuse himself due to the conflict. Hampton submitted a written motion to dismiss or set aside the verdict for lack of legally sufficient evidence. He also moved for a mistrial, arguing that Judiciary Law § 21 would prohibit a substitute judge from deciding the dismissal motions. The statute reads, "A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge."

The case was reassigned to Justice Daniel R. Palmieri, who denied the motion to dismiss and the motion for a mistrial under Judiciary Law § 21. He said, "Because a decision on a motion to set aside a verdict is based entirely on legal principles, and this court has read and become familiar with the entire record of the trial..., it finds that there are no grounds for a mistrial based upon a violation of Judiciary Law § 21."

The Appellate Division, Second Department affirmed, saying, "'Since purely legal questions were involved, all discussion was recorded in the minutes, and the successor Judge was not called upon to weigh conflicting testimony or assess credibility'..., Judiciary Law § 21 did not bar Justice Palmieri from determining the defendant's motion."

Hampton argues the substitute judge violated section 21 by deciding his dismissal motion. "If the initial judge has entertained argument or litigated a particular motion, regardless of whether or not it is a purely legal one or a motion which must analyze facts to legal elements, the statute is violated if a successor judge addresses the issue...," he says. "Further, the adjudication of a trial order of dismissal is, in fact, a circumstance where a trial court is reviewing the factual evidence to ascertain whether the People have established the legal elements of the crime in the particular case."

For appellant Hampton: Joseph A. Gentile, Mineola (516) 742-6590
For respondent: Nassau County Assistant District Attorney Barbara Kornblau (516) 571-3800

State of New York Court of Appeals

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To be argued Tuesday, April 23, 2013

No. 94 Galetta v Galetta *(papers sealed)*

Gary and Michelle Galetta signed a prenuptial agreement prior to their marriage in 1997. After the husband filed for divorce in 2010, the wife moved for summary judgment determining that the prenuptial agreement was invalid and unenforceable because the husband's signature was not properly acknowledged under Domestic Relations Law § 236(B)(3) and Real Property Law § 303, which require that the certificate of acknowledgment show the person witnessing the signing "knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument." The wife argued that the certificate of the notary public who witnessed the husband's signature did not state that he knew him or had evidence that he was Gary Galetta. In opposition, the husband submitted an affidavit from his notary, who said, "It was then, and has always been, my custom and practice ... to ask and confirm that the person signing the document was the same person named in the document.... I am confident I followed the same procedure" while witnessing the husband's signature. Supreme Court denied the wife's motion, finding there was "substantial compliance" with the statutes.

The Appellate Division, Fourth Department affirmed, on different grounds, in a 3-2 decision. It said the certificate of acknowledgment was not in substantial compliance, but ruled that defects in an acknowledgment may be cured and that the "subsequently-filed affidavit from the notary who took [the husband's] acknowledgment raises a triable issue of fact whether the prenuptial agreement was properly acknowledged." The majority said, "The statements of the notary ... 'constitute competent and admissible evidence concerning routine professional practice sufficient to raise a triable issue of fact'...."

The dissenters argued the prenuptial agreement was invalid because it was not properly acknowledged. They said the husband did not raise a claim that the notary's affidavit cured any defect in the acknowledgment and, in any case, they argued that such a defect is not subject to cure. Even if it could be cured, they said, the affidavit did not raise an issue of fact because "there was no 'identity of the person making the acknowledgment with the person described in the instrument and the person who executed the same'...."

For appellant Michelle Galetta: Francis C. Affronti, Rochester (585) 248-0142
For respondent Gary Galetta: Kathleen P. Reardon, Rochester (585) 230-4881

State of New York Court of Appeals

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To be argued Wednesday, April 24, 2013

No. 95 People v Ray Lam

This case arose in June 2010 in Union Square Park, where Ray Lam was selling tee shirts that bore graphic images of his own design. A plainclothes officer from the Manhattan South Peddler Task Force approached his folding table and asked the price of a shirt, and Lam replied $20. The officer then asked if he had a vendor's license, Lam said no, and the officer arrested him on a misdemeanor charge of unlicensed general vending under New York City Administrative Code § 20-453.

Before trial, Lam moved to dismiss the charge on the ground that his shirts were works of visual art and his selling them was protected speech under the First Amendment. He said he sold the same images as prints on canvas, and some customers who bought tee shirts had him sign the shirts and hung them in frames on the wall. Criminal Court said, "If you sell them as framed T-shirts, that will be a horse with a different color; but if you are selling them as T-shirts, then they have value as apparel." Applying the balancing test in Mastrovincenzo v City of New York (435 F3d 78), the court found the predominant use of the shirts would be as clothing, not art, and denied Lam's motion to dismiss. At his non-jury trial, a different judge again rejected Lam's argument that his shirts were constitutionally protected artwork. "The transferring of an artistic image to the T-shirt changed the art, the non-expressive purpose became dominant [--] clothing," the court said, finding him guilty as charged and fining him $250.

The Appellate Term, First Department affirmed. "On this record and considering, among other factors, the manner in which defendant displayed the tee shirts -- folded and in piles -- and the uniform, modest selling price ($20 each) quoted by defendant to the undercover police officer, Criminal Court was warranted in concluding that defendant's wares were mere commercial goods whose dominant purpose was utilitarian, and not expressive," it said, citing Mastrovincenzo.

Lam argues that his "vending of artistic tee shirts was constitutionally protected speech, immune from prosecution under the New York City General Vending Ordinance...." He asks the Court to overturn his conviction on state as well as federal constitutional grounds, saying, "The New York courts have taken an approach to free speech issues more protective than the Federal Constitution."

For appellant Lam: Martin M. Lucente, Manhattan (212) 577-3586
For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, April 24, 2013

No. 96 People v Isaac Diggins

Isaac Diggins was charged with pointing a gun at his wife in the street in front of their Manhattan apartment in August 2003, when she confronted him and his girlfriend about their relationship. No shots were fired and Diggins drove away in his car. He was arrested later that day at his girlfriend's apartment, where police recovered a loaded handgun. His defense counsel moved to suppress statements Diggins had made to police and a hearing was scheduled. Diggins, who was free on bail, did not appear.

Supreme Court found Diggins had voluntarily absented himself and ordered that the suppression hearing and trial would proceed in his absence. Defense counsel did not participate in the hearing and informed the court he would not participate in the trial, saying he could not conduct a defense "in a case that is heavily dependent on the personal relationships here" without his client present to assist him. The court denied counsel's motion to withdraw. Defense counsel did not participate in jury selection, did not make an opening or closing statement, did not call any witnesses or cross-examine prosecution witnesses, and did not file a notice of appeal. Diggins was convicted of criminal possession of a weapon in the second and third degrees and menacing. He was sentenced in absentia to an aggregate term of 12 years.

After he was returned to custody in 2005, Diggins filed a CPL 440 motion to vacate his convictions on the ground that his attorney's failure to participate in the trial deprived him of the effective assistance of counsel. Supreme Court denied the motion after a hearing, saying that after Diggins undermined his attorney's ability to raise a viable defense by absconding, defense counsel "made a conscious, strategic decision not to participate" in the proceedings and Diggins failed to show the strategy was unreasonable or prejudicial.

The Appellate Division, First Department affirmed. "The record demonstrates that defendant's counsel, whose ability to conduct a defense was impaired by his client's absence, pursued a 'protest strategy' (People v Aiken, 45 NY2d 394...) or 'strategy of silence' (United States v Sanchez, 790 F2d 245...). There is a presumption of prejudice where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing' (United States v Cronic, 466 US 648...). However, that presumption is inapplicable to the facts of this case," it said, citing Sanchez, in which the defendant had also absconded.

Diggins argues he was deprived of his state and federal rights to counsel when his attorney "refused to participate in any aspect of his trial." He says, "This case is one of those exceedingly rare instances where counsel completely refused to subject the prosecution's case ... to meaningful adversarial testing. As a result, Mr. Diggins' trial bore no resemblance to an adversarial proceeding. The narrow exception recognized by the United States Supreme Court in Cronic must be applied and, accordingly, prejudice must be presumed from the constructive denial of counsel."

For appellant Diggins: Roy L. Reardon, Manhattan (212) 455-2000
For respondent: Manhattan Assistant District Attorney Sheryl Feldman (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, April 24, 2013

No. 97 Wild v Catholic Health System

Eighty-three year old Marguerite Horn was transported to Mercy Hospital of Buffalo (operated by Catholic Health System) in June 2005, after her husband found her lying unconscious on the floor of their home. She appeared to have difficulty breathing and an emergency room physician, Dr. Raquel Martin, asked a third-year resident to insert a breathing tube in her trachea. After the resident failed twice, Dr. Martin made two unsuccessful attempts to intubate Horn, mistakenly inserting the tube in Horn's esophagus on the first try. A respiratory therapist then tried and failed to insert the tube. Dr. Martin then summoned an anesthesiologist, who successfully intubated Horn. During these procedures, Dr. Martin observed symptoms that Horn might have a perforated esophagus, but did not note this on her chart, order tests or contact a surgeon about her concern. When a surgeon discovered the perforation several days later, he was unable to repair the damage and doctors had to insert a permanent feeding tube into Horn's stomach. She was never again able to consume solid foods or liquids normally.

Horn and her husband brought this malpractice action against Dr. Martin and her practice group, Buffalo Emergency Associates LLP, as well as other defendants, alleging that Dr. Martin was negligent in her attempts to intubate Horn and perforated her esophagus. They also alleged Dr. Martin and others were negligent in failing to diagnose the esophageal tear in a timely manner and thus deprived Horn of a chance to avoid the permanent feeding tube through immediate surgery, a so-called "lost chance" theory. When Horn died of unrelated causes in 2008, her children, the co-executors of her estate, were substituted as plaintiffs.

Supreme Court gave the jury a "lost chance" instruction on proximate cause, saying, "The negligence of any of the defendants may be considered a cause of the injuries to Marguerite Horn if you find the defendant's actions or omissions deprived Mrs. Horn of a substantial possibility of avoiding the consequence of having a permanent feeding tube. The chance of avoiding a need for a permanent feeding tube to be substantial, does not have to be more likely than not and it does not have to be more than 50 percent, but it has to be more than slight." The jury found that only Dr. Martin was negligent and awarded damages against her and her partnership of $500,000 for pain and suffering and $500,000 for loss of consortium.

The Appellate Division, Fourth Department reduced the award for loss of consortium to $200,000 and otherwise affirmed. It said the lost chance instruction "was entirely appropriate for the omission theories," the claim that Dr. Martin failed to follow-up on the esophageal tear and thereby delayed its diagnosis; but "it was not an appropriate instruction for the commission theories," the claim that Dr. Martin's negligent intubation caused the tear. However, it said the error was harmless because a finding of negligence in the intubation "necessarily entailed a finding of proximate cause."

Dr. Martin argues that "the relaxed standard of causation" described in the lost chance instruction "represents a substantial departure from the long-established rules of proximate cause in the State of New York. This Court has never adopted the 'loss of chance' theory of causation, and no court in New York has adopted the radical version of the loss of chance theory charged by the trial court here." She says the court's instruction reduced the burden of proof for causation from "more probable than not" to "'more than a slight' chance."

For appellants Dr. Martin et al: Michael J. Willett, Buffalo (716) 856-5500
For respondents Wild et al: Debra A. Norton, Buffalo (716) 852-1000

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To be argued Wednesday, April 24, 2013

No. 98 Greater New York Taxi Association v The State of New York
No. 99 Taxicab Service Association v The State of New York
No. 100 Metropolitan Taxicab Board of Trade v Bloomberg

In January 2011, New York City Mayor Michael Bloomberg proposed amending the City's Administrative Code to allow livery car drivers to accept street hails from potential customers (i.e., a person on the street waving to be picked up). The Mayor's Office initially submitted the proposal to the City Council, but the medallioned taxicab industry opposed the plan and there was no quick agreement. The Mayor's Office then approached the State Legislature, which passed a bill in June 2011. The Governor signed it in December 2011 as Chapter 602 of the Laws of 2011. The Legislature and Governor amended the new law in February 2012 with Chapter 9 of the Laws of 2012. The resulting law, the "Street Hail Livery Law," allows liveries with the newly authorized "Hail licenses" to pick up street hails in all five boroughs, except for Manhattan's central business district and the two airports in Queens. It also enables the City to raise revenue by selling 18,000 Hail licenses to liveries and up to 2,000 new taxi medallions for yellow cabs, subject to quotas for wheelchair accessibility. The City Charter requires City Council approval to issue new taxi medallions, but the legislation gave that power to the Mayor's Office. The Legislature, in its findings, declared that improving access to "adequate and reliable transportation," particularly for the disabled, were "matters of substantial state concern." Three major trade associations representing the medallioned taxicab industry, with other plaintiffs, brought these actions to challenge the constitutionality of the law.

Supreme Court granted summary judgment to the plaintiffs, ruling the street hail law violates the home rule, double enactment, and exclusive privileges provisions of the State Constitution. Under the home rule provision, the State may enact a special law "in relation to the property, affairs or government of any local government only ... on request of" the local legislature, unless the special law serves "a substantial State interest." The court said the hail law violates home rule "for two independent reasons: (1) as a matter of history and common sense, New York City taxicab service is not a matter of substantial State interest or concern (and to deem it otherwise would largely eviscerate the concept of 'home rule'); and (2) a law that shifts power from the City's legislative branch to its executive branch, and micro-manages the exercise of that power, fails to bear a reasonable relationship to any such interest or concern."

On direct appeal, the City, the State, and an organization of livery companies argue the hail law did not require a home rule message because it furthers a substantial State interest. The State says the law, "on its face, is a police-power regulation designed to promote the welfare, health, and safety of both residents and visitors in New York City by ensuring their access to reliable and effective transportation to, from, and within the city. The Legislature enacted specific and detailed findings affirming that public health, safety, and welfare are currently impaired by lack of access to street-hail service in the outer boroughs and the lack of wheelchair-accessible vehicles available for street hails citywide."

For appellant City: Assistant Corporation Counsel Scott Shorr (212) 788-1089
For appellant State: Deputy Solicitor General Richard Dearing (212) 416-8022
For intervenor-appellant Livery Base Owners: Stephen L. Saxl, Manhattan (212) 801-9200
For respondent GNYTA (No. 98): Steven G. Mintz, Manhattan (212) 696-4848
For respondent TSA (No. 99): Randy M. Mastro, Manhattan (212) 351-4000
For respondent MTBOT (No. 100): Richard D. Emery, Manhattan (212) 763-5000
For intervenor-respondent Livery Roundtable (No. 100): Steven J. Shanker, Manhattan (646) 755-3338

State of New York Court of Appeals

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To be argued Wednesday, April 24, 2013

No. 101 Empire State Chapter of Associated Builders, Inc. v Smith

The plaintiffs in this action challenge recent amendments to the "Wicks Law," which applies to public works projects when their costs exceed a certain threshold. The law requires the State and local governments, when a project exceeds the threshold, to prepare separate bid specifications and award separate contracts for three categories of work: plumbing; heating, ventilating and air conditioning; and electrical work. The threshold was set at $1,000 for all projects when the Wicks Law was enacted in 1912. The uniform threshold was raised to $50,000 by 1964 and then left unchanged until 2008, when the State Legislature adopted a three-tiered threshold as part of a comprehensive reform of the Wicks Law. The 2008 amendments set the threshold at $3 million for the five boroughs of New York City; $1.5 million for the downstate counties of Nassau, Suffolk and Westchester; and $500,000 for all other counties. The amendments also allowed a government to opt out of the law's separate bidding provisions if it required its contractors to enter into a Project Labor Agreement (PLA) that complies with Labor Law § 222, which requires contractors to "participate" in approved apprentice training programs.

The plaintiffs -- including Erie County, two organizations representing public works contractors, and out-of-state, minority-owned, and women-owned contractors -- brought this action against the State Comptroller and Labor Commissioner, alleging the three differing cost thresholds set by the amendments constitute a "special law" that was enacted in violation of the "home rule" provision of the State Constitution. They also alleged the apprenticeship provisions violate the federal Privileges and Immunities Clause and dormant Commerce Clause. Supreme Court rejected all of the plaintiffs' challenges.

The Appellate Division, Fourth Department declared the amendments valid. It split 3-2 on the home rule issue, with the majority finding the three-tiered threshold "bears a reasonable relationship" to a substantial State concern. It said documents in the record "indicate that the 2008 amendments reflect the legislature's judgment that the monetary threshold in place since the 1960s had become out-of-date, and that raising that threshold would ease the burden that the Wicks Law imposes on local governments by eliminating smaller projects from the Wicks Law mandates. Those documents also support defendants' position that the three-tiered monetary threshold was devised to take into consideration geographically-based differences in the costs of construction."

The dissenters argued that "the three-tiered classification ... is arbitrary and not reasonably related to" the State's interests. "Notably absent from the record is any discussion of the basis for the monetary thresholds underlying the three-tiered classification...," they said. "[We] conclude that the threshold monetary amounts selected by the legislature must have some factual or evidentiary support beyond the general proposition that the cost of construction is higher in downstate counties than in their upstate counterparts.... A review of the legislative record clearly indicates that a key purpose of the 2008 amendments was to relieve New York City from much of the burden imposed by the Wicks Law, with the remainder of the State being somewhat of an afterthought."

For appellants Associated Builders et al: Timothy W. Hoover, Buffalo (716)847-8400
For respondents Smith and DiNapoli: Deputy Solicitor General Andrea Oser (518) 473-6948

State of New York Court of Appeals

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To be argued Thursday, April 25, 2013

No. 102 People v Jay J. Barboni *(papers sealed)*

Jay Barboni was charged with killing 15-month-old Nicholas Gage Taylor, the son of his girlfriend, in the apartment they shared in the City of Fulton, Oswego County, in August 2008. Barboni had been alone with the child for about three and a half hours when he called the mother at work and told her to come home because Nicholas was not breathing. The mother asked a co-worker to call 911 and rushed home, where she found Barboni in the kitchen and Nicholas upstairs in his crib. Emergency personnel were unable to revive the child.

At trial, medical experts testified that Nicholas suffered four skull fractures caused by blunt force trauma and hemorrhaging in his eyes consistent with shaken baby syndrome, among other injuries, and that he lived for about two hours after he was injured. Barboni was convicted of second-degree murder (under circumstances evincing a depraved indifference to human life) and first-degree manslaughter. He was sentenced to 25 years to life on the murder count.

The Appellate Division, Fourth Department affirmed, rejecting Barboni's claim that there was insufficient evidence that he acted with depraved indifference. The testimony of prosecution experts "demonstrates that the child sustained at least five traumatic blows to the head, which led to brain swelling that caused his death, and that he sustained other injuries that would have resulted in legal blindness had he survived," injuries that occurred while "he was in the sole care of defendant," the court said. "The record further establishes that the child's suffering yielded an apathetic response from defendant," who "did not seek medical attention" for the child. The court also rejected Barboni's claim that he was denied effective assistance of counsel during jury selection when his attorney failed to challenge a juror who said he was unsure that he would apply the same standard to the testimony of police officers and civilians. It said Barboni failed to show this was not a "strategic" decision.

Barboni argues that the evidence showed he "did care about the outcome of Nicholas' condition." The child vomited in the apartment, he says, and his "efforts to clean Nicholas, change his diaper, feed him and put him to bed, showed an attempt to remedy what had occurred. The fact that Mr. Barboni went upstairs later to check on him demonstrated his concern as well. The fact that he telephoned the mother showed that he was seeking help for Nicholas." He says there was no proof that Nicholas was subjected to prolonged abuse or that Barboni "recognized the extent of the injuries at the time he put Nicholas to bed. His failure to obtain immediate medical help should not be viewed as sufficient to support a finding of depravedly indifferent." He also argues he was denied effective assistance of counsel when his attorney failed to challenge a juror who could not promise to be fair.

For appellant Barboni: Mary P. Davison, Canandaigua (585) 905-0164
For respondent: Oswego County District Attorney Gregory S. Oakes (315) 349-3200

State of New York Court of Appeals

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To be argued Thursday, April 25, 2013

No. 103 People v James E. Guilford

James E. Guilford was convicted of murdering his former girlfriend Sharon Nugent, who was last seen leaving a party in Syracuse on Feb. 6, 2007. Guilford filed a missing person report two days later and moved with their three children to Georgia, where he was questioned by Syracuse detectives investigating the disappearance. Guilford returned to Syracuse on March 20, 2007, and was questioned by teams of detectives for about 49 hours, apparently without sleep. He did not directly implicate himself, but near the end of the interrogation he offered to make a deal to tell them where Nugent's body was if he was given an attorney. Counsel was appointed, and the prosecutor told him Guilford's sentence would be capped at 18 years to life if he revealed the location of the body. Guilford met with his attorney, was booked for murder, and placed in a holding cell for about eight hours. He was arraigned the next morning, March 23, and then, accompanied by his attorney, he spoke with the detectives. He told them, "I killed her" and left her body in a dumpster, which he later pointed out to them, but Nugent's body was not recovered.

County Court suppressed as involuntary the statements Guilford made during the 49 hour interrogation, but not those he made after the break and in the presence of counsel on March 23. He was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision. "[A]ny taint from the prior interrogation was dissipated by the break in the interrogation, by the assignment of an attorney and opportunities to consult with that attorney before the March 23, 2007 statements were made, by defendant's removal from the interrogation room and his opportunity to sleep the remainder of the night before being arraigned...," said two justices in the majority. "In particular, we note that, once an attorney was appointed for defendant and defendant had the opportunity to consult with the attorney before again speaking with the detectives, in the presence of his attorney, it cannot be said that the statements were involuntary or the 'product of compulsion'" under Miranda. The third concurring justice wrote separately to "clarify" that he viewed the March 23 statements as voluntary "not only because they were sufficiently attenuated from statements determined to be involuntary..., but also, independently of the attenuation, because they were made following consultation with his counsel and in the presence of his counsel."

The dissenters said, "[T]he relatively brief 'break' in interrogation, following a continuous 49½-hour interrogation, was not sufficient to return defendant to the status of one who is not under the influence of questioning. We consider not only the extraordinary and draconian length of the interrogation, but we also consider the fact that defendant may have believed himself 'so committed by a prior statement that he [felt] bound to make another'.... In our view, the police exploited defendant's lengthy detention in such a way that it can be said to have 'produced' his later inculpatory statements...." They said Guilford's confession was not made voluntary by the fact that his attorney was present. "First, although defendant was represented by counsel during his post-arraignment statements, defendant was given comparatively little time to speak to defense counsel and in fact testified that he was concerned that the attorney was a disguised police officer, a suspicion that, given the rotating teams of police interrogators during the 49½-hour period, appears somewhat reasonable.... In addition, the presence of counsel did nothing to improve defendant's cognitive functioning, which necessarily was adversely affected by the prolonged lack of food and sleep."

For appellant Guilford: Piotr Banasiak, Syracuse (315) 422-8191 ext. 0137
For respondent: Onondaga County Assistant District Attorney James P. Maxwell (315) 435-2470

State of New York Court of Appeals

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To be argued Thursday, April 25, 2013

No. 104 Matter of Chenango Forks Central School District v New York State Public Employment Relations Board

When the Chenango Forks Central School District notified employees in June 2003 that it would end its practice of reimbursing retirees' Medicare Part B premiums, the Chenango Forks Teachers Association filed a grievance under its Collective Bargaining Agreement (CBA). The union also filed an improper practice charge with the Public Employment Relations Board (PERB). Although the CBA did not explicitly require the District to make the reimbursements, it had done so since at least 1980, when reimbursement of Part B premiums was required by its health insurer. In 1990, the District changed its health coverage to Blue Cross/Blue Shield, which did not require reimbursement, but the District continued to make the payments.

In 2004, the arbitrator of the grievance found the District did not violate the CBA. The arbitrator said the District had no contractual obligation to reimburse the premiums and there was "not sufficient evidence of a mutual agreement to establish a binding past practice." In 2010, however, PERB sustained the union's improper practice charge, finding the District violated the Taylor Law (Civil Service Law § 209-a[1][d]) by unilaterally ending an enforceable past practice without negotiation. PERB found that the Teachers Association and its members had "a reasonable expectation" that the reimbursements would continue and that the prior arbitration award was not binding.

The Appellate Division, Third Department confirmed PERB's determination on a 3-2 vote, holding that reimbursement of the premiums is "a binding past practice" and PERB did not abuse its discretion in declining to defer to the arbitrator. "The issue before PERB was whether, irrespective of any contractual obligation in the parties' CBA, a past practice of reimbursing retirees for Medicare Part B premiums was established such that [the District] was barred from discontinuing that practice without prior negotiation.... In stark contrast, the specific issue before the arbitrator was whether [the District] was under a contractual obligation to make Medicare Part B reimbursement payments to retirees.... Thus, the arbitrator's statement in the award that there was no past practice [of reimbursement] was entirely dicta and ... was neither convincing nor binding upon it...." While PERB has a policy of deferring to an arbitrator's decision, the majority said, the arbitrator's decision here "was repugnant to the Civil Service Law" and PERB's refusal to defer "was neither arbitrary nor capricious."

The dissenters said, "[I]t has long been the policy, both of PERB and in national labor relations matters, to accord post-arbitral deference to an arbitrator's decision.... Here, the Association sought arbitration, it urged past practice as supporting its position..., there is no allegation that it did not have a full opportunity to advocate its position..., and the arbitrator's decision was not clearly repugnant to PERB's purpose.... Under these circumstances, PERB abused its discretion in disregarding its established post-arbitral deference policies Such arbitrary disregard resulted in a procedure that was unduly protracted, and a determination that is not free of constitutional concern...."

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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 Thursday, April 25, 2013

No. 105 People v George Oliveras *(papers sealed)*

George Oliveras was found guilty of fatally shooting Marvin Thompson in the Bronx in November 1999. No witness identified Oliveras as the shooter and there was no forensic evidence connecting him to the crime. The primary evidence against him consisted of incriminating statements he made to police after he waived his right to counsel and was subjected to a lengthy interrogation. Defense counsel argued the statements were involuntary and unreliable because Oliveras -- who has an IQ of 78, an eighth grade education, a history of psychiatric hospitalization and was receiving Social Security disability benefits -- was vulnerable to manipulation and his statements were the product of "coercion, subterfuge and trickery on the part of the police." Defense counsel did not raise a formal psychiatric defense, but elicited some lay testimony about Oliveras' background and disabilities from his mother. Oliveras was sentenced to 25 years to life for second-degree murder.

In 2007, he filed a CPL 440.10 motion to vacate his conviction on the ground, among others, that his trial attorney was ineffective in failing to obtain psychiatric, educational, and Social Security records to document his mental condition, failing to consult experts about how his mental and educational deficiencies could affect his ability to understand his Miranda rights and resist police pressure, and failing to file timely notice of intention to present psychiatric evidence. Supreme Court denied the motion, citing defense counsel's testimony at the motion hearing that Oliveras refused to allow him to pursue a psychiatric defense. Oliveras "clearly instructed [defense counsel] that he did not want to be portrayed as having a psychiatric illness or to spend time in a mental institution and, therefore, did not want a defense that could lead to such a result.... Counsel did the best that he could under the circumstances...."

The Appellate Division, First Department reversed in a 3-2 decision, granted the CPL 440 motion and ordered a new trial. The court said, "Defense counsel maintains that he thought there was enough in the record to make his case without resort to experts or to the medical records. However, defense counsel never consulted an expert or reviewed the medical records in arriving at this conclusion. His feeling that he was 'better off' not doing so cannot be deemed a reasonable trial strategy.... Defense counsel did not investigate the law or the facts, and in doing so deprived defendant of meaningful representation under both the New York and federal standards...."

The dissenters argued that "defense counsel's decision not to obtain the defendant's psychiatric records and his decision to rely on lay testimony to establish the defendant's mental deficiencies was a reasonable and legitimate defense strategy.... Given the constraints placed on defense counsel by the defendant and the potentially adverse consequences that might have resulted from pursuing a formal psychiatric defense, in my opinion the strategy that counsel adopted was reasonable under the circumstances. The jury heard testimony concerning the defendant's mental deficiencies, limited educational background, and psychiatric hospitalization," which "permitted counsel to advance a persuasive argument that the police exploited the defendant's deficiencies and that his confession and statements were not voluntary."

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State of New York Court of Appeals

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To be argued Thursday, April 25, 2013

No. 106 K2 Investment Group, LLC v American Guarantee & Liability Insurance Co.

K2 Investment Group and ATAS Management Group made loans totaling nearly $3 million to Goldan, LLC, a real estate company owned by New York attorney Jeffrey Daniels and a partner. When Goldan failed to repay the loans and declared bankruptcy in 2009, K2 and ATAS sued Goldan and its owners. Their claims against Daniels included legal malpractice, based on allegations that he agreed to represent them in the transactions and that he failed to record mortgages to secure the loans and failed to obtain title insurance. Among other claims, they also alleged that he breached his personal guarantees of the loans.

American Guarantee & Liability Insurance Company, Daniels' malpractice insurer, disclaimed coverage based on policy provisions stating that it would not cover "any Claim based upon or arising out of, in whole or in part: ... D. the Insured's capacity or status as ... an officer, director, partner ... or employee of a business enterprise" (the Insured's Status Exclusion), or "E. the alleged acts or omissions by any Insured ... for any business enterprise, whether for profit or not-for profit, in which any Insured has a Controlling Interest" (the Business Enterprise Exclusion). When Daniels forwarded a settlement offer of $450,000, American Guarantee again disclaimed coverage. Daniels failed to appear in the malpractice action and the court entered a default judgment awarding $2,404,378 to K2 and $688,716 to ATAS. The court also, upon the plaintiffs' application, discontinued their personal guarantee claims. Daniels then assigned all of his claims against American Guarantee, including claims of bad faith, to K2 and ATAS.

K2 and ATAS brought this action, as assignees of Daniels' rights under the malpractice policy, to recover the amount of the default judgment and to recover for American Guarantee's alleged bad faith refusal to defend or indemnify Daniels. Supreme Court granted summary judgment to the plaintiffs on their cause of action to enforce the default judgment, but dismissed their claims of bad faith.

The Appellate Division, First Department affirmed in a 3-2 decision, saying the policy exclusions "are patently inapplicable." It said this action "was based exclusively on [Daniels'] obligation to plaintiffs, not to Goldan.... His liability to plaintiffs is premised solely on the attorney-client relationship between him and plaintiffs, not on any interest that he had in Goldan.... That Daniels was an owner of Goldan or might have been acting in the interests of Goldan instead of those of his clients may explain why Daniels acted as he did, but it does not change the essence of the complaint, or the basis of liability, which is that Daniels committed legal malpractice in his representation of plaintiffs." The court unanimously upheld the dismissal of the bad faith claims.

The dissenters said, "Although the default judgment ... established Daniels's liability to plaintiffs, ... it does not foreclose a finding that Daniels represented both Goldan and plaintiffs in connection with the mortgage transactions and that his conduct falls within the ambit of either the Insured's Status Exclusion or the Business Enterprise Exclusion, or both, because his failure to record the mortgages and obtain title insurance was a business decision to benefit his company, Goldan." The majority's "interpretation of the exclusions is too narrow."

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