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.

Week of September 9 - 12, 2013

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 Monday, September 9, 2013

No. 152 Romanello v Intesa Sanpaola S.p.A.

Giuseppe Romanello was an executive in the New York office of an Italian bank, Intesa Sanpaola S.p.A., when he became ill and left work in early January 2008. The illness caused visual disturbances, an inability to read or concentrate, and a feeling that he would pass out. He made an unsuccessful attempt to return to work two weeks later. Romanello was eventually diagnosed as suffering from major depression, syncope and collapse, neurasthenia, and anxiety. After four months, Intesa informed his attorney, by letter dated May 29, 2008, that Romanello's leave under the Family and Medical Leave Act "expires on June 3, 2008 and the bank would appreciate knowing whether he intends to return to work or to abandon his position." His lawyer replied on June 2 that Romanello "remains unable to return to work in any capacity because of his disabling conditions.... [He has] an uncertain prognosis and a return to work date that is indeterminate at this time. Accordingly, if there is to be any severance of the employment relationship..., it will be of the Bank's volition only and not an 'abandonment of position' by Mr. Romanello; and the Bank will bear any related consequences and liabilities for its termination of Mr. Romanello's employment in such circumstances." Intesa terminated him as of June 4, 2008.

Romanello brought this suit against Intesa and its head of personnel, Ann Stefan, claiming they violated the New York State and New York City Human Rights Laws by refusing to make a reasonable accommodation for his disability. Supreme Court granted the bank's motion to dismiss the claims.

The Appellate Division, First Department affirmed in a 3-2 decision. It said Intesa met its obligation to "initiate a good faith interactive process" to identify a reasonable accommodation with its May 29 letter, "which asked plaintiff 'whether he intend[ed] to return to work,' a question that, by necessary implication, also sought the time frame within which plaintiff expected to be able to resume working, if that was his intention.... [T]he allegations of the complaint and the undisputed documentary evidence establish, as a matter of law, that it was plaintiff who abruptly cut off the interactive process that Intesa tried to initiate." It said the "demand" by Romanello's counsel "that Intesa either grant indefinite leave or face litigation excused Intesa from further efforts to seek agreement with plaintiff on a reasonable accommodation."

The dissenters argued that the evidence, particularly the exchange of letters, "does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law" to his claim that Intesa failed to offer him a reasonable accommodation. They said the majority was "internally inconsistent" in finding that Intesa "did engage in an interactive process, albeit 'by ... implication'..., when it asked plaintiff 'whether [he] intend[ed] to return to work or to abandon his position,' and also finding that Intesa was excused from further efforts by the response of Romanello's counsel. The majority "can only maintain these contradictory positions by treating the employer's letter in a light most favorable to the employer and paradoxically treating plaintiff's counsel's letter in a light least favorable to the employee. Of course, this may be a reasonable position for the jury to take at trial, but not for this court to take when evaluating a motion to dismiss based on documentary evidence that is subject to reasonable interpretations."

For appellant Romanello: Maury B. Josephson, Manhattan (646) 504-1830
For respondents Intesa and Stefan: Michael C. Lambert, Manhattan (212) 425-3220

State of New York Court of Appeals

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To be argued Monday, September 9, 2013

No. 153 Matter of Koch v Sheehan

The State Department of Health received reports that Dr. Eric J. Koch provided negligent medical care at two Buffalo hospitals, Sisters of Charity and Kenmore Mercy, in 2006. After an investigation, the Office of Professional Medical Conduct (OPMC) charged him with nine specifications of professional misconduct in caring for two patients. None of the charges involved Medicaid fraud or treatment of Medicaid recipients. In June 2009, Koch pled no contest to the charges in exchange for permission to continue practicing medicine, entering into a consent order in which he agreed to be placed on probation for 36 months and to comply with various conditions.

In March 2010, the Office of the Medicaid Inspector General (OMIG) adopted a determination excluding Koch from the Medicaid program under 18 NYCRR § 515.7(e), based solely on the OPMC consent order. OMIG did not conduct its own investigation. Koch filed this article 78 proceeding against OMIG, arguing the determination was arbitrary and capricious. Supreme Court granted the petition, vacated OMIG's determination, and ordered it to reinstate Koch to the Medicaid program retroactive to March 10, 2010.

The Appellate Division, Fourth Department affirmed, ruling that OMIG's determination was arbitrary and capricious. "The penalty imposed [in the OPMC consent order] did not include any suspension, but rather was akin to censure or reprimand with conditions. To adopt [OMIG's] view would create an irrational result that would allow [Koch] to continue to treat non-Medicaid patients, but be prohibited from treating Medicaid patients. Additionally..., it seems unlikely that [Koch] would have agreed to the consent order had he known that he effectively would not be allowed to continue to practice medicine, because the charges to which he pleaded no contest would be used against him factually to exclude him from the Medicaid program." When OPMC has determined whether a physician is fit to practice, the court said, the Legislature "did not likely intend that [OMIG] in such a case might second-guess the Department by also investigating or evaluating whether the physician in question would present a potential danger to a subset of the patient population, i.e., Medicaid recipients."

OMIG argues the Appellate Division decision "is mistaken and undermines OMIG's authority to exclude providers who, in OMIG's judgment, are not qualified to provide medical care and services to Medicaid recipients. This is so even where [OPMC] has determined that a provider may continue to practice medicine generally. OMIG may properly determine that when the government is paying for medical care for its disadvantaged citizens, it may insist that providers possess more than the minimum level of competence necessary to avoid license suspension." It says, "Although OMIG and [OPMC] are nominally under the umbrella of the same department, they operate under distinct grants of legislative authority, and their decisions serve distinct purposes. OMIG, in excluding a provider from the Medicaid program, does not duplicate or intrude on any authority exercised by the [OPMC]."

For appellant OMIG: Assistant Solicitor General Victor Paladino (518) 473-4321
For respondent Koch: Susan A. Eberle, Buffalo (716) 849-6500

State of New York Court of Appeals

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To be argued Monday, September 9, 2013

No. 154 People v Daryl H. *(papers sealed)*

In October 2008, Daryl H. was voluntarily admitted to the psychiatric ward of Erie County Medical Center, where he was treated with anti-psychotic medication. The following night, he became involved in a violent altercation with another psychiatric patient. Staff members responding to the commotion saw Daryl follow the patient out of a lounge, saying, "He shouldn't have hit me." They saw Daryl knock the patient to the floor and repeatedly kick him in the head, causing serious brain injuries. The next morning, Dr. Dori Marshall, the psychiatrist who supervised the unit, spoke with staff members who had been on duty and with Daryl to assess his mental status and "make a decision about his safety and the safety of the other people on the unit." In her discharge summary, Dr. Marshall described the assault as unprovoked, which differed from the trial testimony of eyewitnesses. She concluded that Daryl had the capacity to know right from wrong and that he should be arrested.

At Daryl's bench trial, Dr. Marshall did not testify about the assault itself, which she did not witness, but she testified as a prosecution witness about her interview with Daryl the day after the assault and her conclusion that he should be arrested. Supreme Court precluded defense counsel from cross-examining her about the sources of her report that the assault was unprovoked on the ground that her prior report was not inconsistent with her testimony. The court acquitted Daryl of attempted murder, but found him guilty of first-degree assault and sentenced him to 25 years in prison.

The Appellate Division, Fourth Department affirmed. It said the trial court did not "improperly curtail the cross-examination of [Dr. Marshall] with respect to the sworn statement made by her the day after the assault. That statement was not inconsistent with her trial testimony, and thus there was no basis for impeachment of her trial testimony based on that statement."

Daryl argues that his trial counsel properly sought "to undermine Dr. Marshall's testimony by demonstrating that second-hand facts upon which she relied in forming her opinion that appellant should be arrested for the assault conflicted with other evidence adduced at trial." He say's the court refusal to allow the questioning deprived him of his rights to present a defense, to confront witnesses, and to a fair trial. "Dr. Marshall's testimony -- particularly her opinion that appellant knew right from wrong and should be arrested for the assault -- was extremely important to the prosecution's case ... and the defense had every right to explore all of the facts upon which her testimony was based."

For appellant Daryl H.: Kristin M. Preve, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney Matthew B. Powers (716) 858-7922

State of New York Court of Appeals

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To be argued Monday, September 9, 2013

No. 155 People v John G. Glynn *(papers sealed)*

John G. Glynn was arrested on drug charges in August 2008 after allegedly selling marijuana on three occasions -- first two grams, then five ounces, and finally two pounds -- to an undercover state trooper in Oswego County. At a Huntley hearing, Oswego County Court Judge Walter Hafner, Jr. told the parties that he might have represented or prosecuted Glynn before becoming a judge and asked if there were any objections to his remaining on the case. Glynn said, "Yes, you represented me," but no objections were raised.

Seven weeks later, at an appearance to discuss a four-year sentence offer for a possible plea, Glynn asked Judge Hafner to recuse himself. The court refused, saying, "Mr. Glynn[,] because you've been arrested 39 times..., you've had a large majority of the defense bar at some point representing you. This court feels it has no reason at all to disqualify itself from handling this matter. I don't even recall what I represented you on other than I know that I have represented you previously. I've also prosecuted you as an assistant district attorney previously...." The court then raised several issues noted in the pre-sentence report, including Glynn's daily marijuana use for 32 years and his extensive criminal history. "You have never had a job on the books," the court continued. "You have ten different children from I don't know how many different women..." and "...you owe $789,000.00 in back child support for these ten children. That's over three quarters of a million dollars." Glynn said, "All I got to say to that is so what?" The court responded, "Well really it is irrelevant I suppose...." In other pre-trial rulings, the court suppressed two of three statements Glynn made to police and granted his request for new counsel. Glynn rejected the plea offer and went to trial, was convicted of criminal sale and possession of marijuana in the second and fourth degrees, and was sentenced to an aggregate term of six years.

The Appellate Division, Fourth Department affirmed, saying County Court "was not required to recuse itself based on the fact that Judge Hafner had previously represented defendant on an unrelated matter and may have previously prosecuted him on another unrelated matter.... 'Moreover, none of [the c]ourt's remarks ... was indicative of bias against defendant and, therefore, recusal was not warranted on [that] basis'...."

Glynn says the fact that Judge Hafner previously prosecuted and represented him on unrelated matters would not, by itself, require recusal. "In this case, however, there were 'additional or special circumstances' that warranted disqualification, specifically, Judge Hafner's bias and prejudice against Mr. Glynn, as demonstrated by the many inappropriate comments he made about Mr. Glynn on the record." He also argues that he received ineffective assistance of counsel from both of his attorneys.

For appellant Glynn: Paul V. Mullin, Syracuse (315) 474-2943
For respondent: Oswego County Assistant District Attorney Mark Moody (315) 349-3200

State of New York Court of Appeals

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To be argued Monday, September 9, 2013

No. 145 Matter of Hroncich v Con Edison

Antonio Hroncich, a long-time employee of Consolidated Edison, was diagnosed in 1993 as having asbestosis and asbestos-related pleural disease. The Workers' Compensation Board found he was permanently partially disabled as a result of occupational lung disease and awarded him disability benefits in proportion to his lost earning capacity. He later developed thyroid cancer, which spread to his lungs.

Hroncich died in 2007 and his wife, Gaudenzia Hroncich, filed this claim for death benefits under Workers' Compensation Law § 16. Her medical expert testified that her husband's death was attributable 20 percent to his work-related illnesses and 80 percent to thyroid cancer. The Workers' Compensation Law Judge held that Hroncich's death was causally related to his occupational lung disease and that liability for benefits may not be apportioned between work-related and non-work-related causes of death. The Workers' Compensation Board upheld the determination.

The Appellate Division, Third Department affirmed, rejecting Con Edison's argument that the claimant's death benefits should be apportioned to reflect the degree to which thyroid cancer was the primary cause of her husband's death. The court cited its 2009 decision in Matter of Webb v Cooper Crouse Hinds Co. (62 AD3d 57), which held that apportionment between work-related and non-work-related causes of death is not available based, in part, on "the absence of any indication in Workers' Compensation Law § 16 that death benefits are to be apportioned in the same manner as disability benefits" under Workers' Compensation Law § 15(7).

Con Edison argues, "The plain language of section 15(7) expressly provides that a previous disability will not preclude compensation for a later injury or 'death resulting therefrom,' and that compensation for death will be determined on the basis of the decedent's 'earning capacity at the time of the later injury' causing death. This section clearly authorizes apportionment in death benefit claims. The Legislature used the term 'death' twice in section 15(7) and did so to apply the apportionment provisions to death benefit claims." It says "apportionment appropriately confines compensation to the injury caused by employment" and "prevents a windfall to claimants at the expense of employers for injuries that were not related to employment."

For appellants Con Edison et al: David W. Faber, Carle Place (516) 486-4640
For respondent Special Disability Fund: Jill B. Singer, Albany (518) 438-3585
For respondent Workers' Compensation Bd.: Asst. Solicitor Gen'l Laura Etlinger (518) 474-2256

State of New York Court of Appeals

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To be argued Tuesday, September 10, 2013

No. 156 Georgitsi Realty, LLC v Penn-Star Insurance Company

In this federal case, Georgitsi Realty is seeking to reinstate its lawsuit against its insurer, Penn-Star Insurance Company, for coverage of damage to its apartment building on Eighth Avenue in Brooklyn. The damage was caused by excavation work on an adjacent parcel for construction of an underground parking garage in 2007. Georgitsi had notified the owner of the parcel and the excavators of the damage the work was causing. Georgitsi also notified the City Department of Buildings, which issued numerous stop work orders and summonses, and obtained a temporary restraining order in State Supreme Court enjoining the excavators from proceeding with the work, but the excavators continued with their project.

Georgitsi notified Penn-Star of its claim for damage caused by the adjacent excavation under the policy's coverage for "vandalism," which the policy defines as "willful and malicious damage to, or destruction of, the described property," i.e., Georgitsi's building. Penn-Star refused on the ground that the excavation damage did not meet the policy's definition of "vandalism." Georgitsi brought this suit against the insurer to compel coverage, and Penn-Star moved for summary judgment to dismiss.

A magistrate judge found that the excavators had not committed vandalism within the meaning of the policy because their actions were directed only to the adjacent parcel, not Georgitsi's building, and that proof of recklessness would not satisfy the malice requirement of the policy as a matter of law. U.S. District Court for the Eastern District of New York adopted the magistrate's recommended ruling and granted summary judgment dismissing the suit.

The U.S. Court of Appeals for the Second Circuit said, "[T]his appeal turns on the unsettled and important question of New York law of whether 'malicious damage' within the meaning of an insurance policy covering vandalism may be found to result from an act not directed at the policyholder's property but causing damage thereto and undertaken with knowing disregard for the policyholder's rights." It is asking this Court to resolve the issue in a certified question: "For purposes of construing a property insurance policy covering acts of vandalism, may malicious damage be found to result from an act not directed specifically at the covered property? If so, what state of mind is required?" The Second Circuit said, "[B]ecause the answer to this question will likely have broad implications for insurance disputes under New York law, we believe that the New York Court of Appeals should have the opportunity to address it."

For appellant Georgitsi: Jack S. Dweck, Manhattan (212) 687-8200
For respondent Penn-Star: Steven Verveniotis, Mineola (516) 741-7676

State of New York Court of Appeals

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To be argued Tuesday, September 10, 2013

No. 157 Sandiford v City of New York Department of Education *(papers sealed)*

This human rights case arose in 2005, when Ayodele Sandiford was a school aide at a Brooklyn public school. Sandiford, a lesbian, says the principal, Lowell Coleman, repeatedly made derogatory remarks about gays and lesbians in front of herself, students and teachers, and told her "his church can change people like us for the better." A high school student and a college student who worked with Sandiford in an after-school program complained to Coleman that she had asked the high school student to "hook her up" with the college student and, when the younger woman refused, asked the college student directly for a date. Sandiford denies the incident occurred. Coleman reported the matter to the Department of Education (DOE) and, in March 2005, suspended her without pay pending a determination by DOE's Office of Special Investigation (OSI). Sandiford later complained to various DOE offices about Coleman's treatment of her. In late June 2005, she claims Coleman "berated, belittled and reprimanded" her for making complaints about his conduct. He also told her OSI had substantiated the allegations of misconduct and recommended that she be terminated, which he had decided to do. She filed a grievance with DOE, which reinstated her with loss of two weeks of back pay in a decision that said, "Although inappropriate, the grievant's conduct in this matter did not warrant discharge." The decision was not appealed.

Sandiford brought this action against DOE and Coleman under the New York City and New York State Human Rights Laws, alleging that she was unlawfully discharged because of her sexual orientation and in retaliation for complaining about the principal's conduct. Supreme Court granted DOE's summary judgment motion to dismiss her retaliation claim, but not her discrimination claims.

The Appellate Division, First Department modified the order by reinstating the retaliation claim in a 3-2 decision. It said DOE's "argument that the claims are precluded by the doctrine of collateral estoppel based on implicit findings by the DOE is improperly raised for the first time on appeal.... In any event, the argument is without merit. The record shows that plaintiff did not have a full and fair opportunity to litigate her claims of discrimination in the grievance process. Indeed, her testimony suggests that she had little involvement in the proceedings.... Moreover, plaintiff did not have an opportunity to appeal the grievance decision, as it was the Union's decision whether to proceed further...." It said, "[I]n light of plaintiff's testimony regarding Coleman's comments and conduct, the record did not conclusively establish that defendants would have made the same decision to terminate plaintiff's employment had they not considered plaintiff's sexual orientation."

The dissenters argued the discrimination claims should be dismissed as well as the retaliation claim. They said Sandiford "did not challenge a grievance decision which concluded that she had engaged in inappropriate conduct with a 16-year-old female student, yet now argues that her termination was based on her sexual orientation.... [W]ell-established precedent upholds termination of educators for sexually inappropriate behavior towards a student -- regardless of their sexual orientation. In focusing on the principal's alleged defamatory remarks, the majority gives no weight to the fact that the misconduct charges ... were investigated and substantiated by" DOE, which "then recommended that the principal terminate plaintiff."

For appellants BOE et al: Assistant Corporation Counsel Mordecai Newman (212) 788-1025
For respondent Sandiford: Colleen M. Meenan, Manhattan (212) 226-7334

State of New York Court of Appeals

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To be argued Tuesday, September 10, 2013

No. 158 People v Patrick A. Asaro

Patrick Asaro was arrested in November 2008 after a fatal collision on Guymard Turnpike in Orange County. The prosecution alleged that he was driving at a high rate of speed, crossed the center line on a curve, and struck an oncoming car driven by Brian Stevens, who was killed. Five passengers in the cars were seriously injured, as was Asaro. Although witnesses said Asaro had been drinking at a party earlier in the evening, a State Police lab test found no alcohol in his blood. It found a trace amount of the active ingredient in marijuana, but a follow-up test by another lab found none. A State Police accident reconstruction expert concluded that Asaro was traveling at least 94 miles per hour at the time of the collision, but he was unable to produce his notes and calculations because they were lost before the trial.

The jury acquitted Asaro of driving while ability impaired, but convicted him of second-degree manslaughter under Penal Law § 125.15(1) (recklessly causes the death of another person), second- and third-degree assault, reckless endangerment and reckless driving. County Court denied his motion to set aside the verdict as repugnant and not supported by sufficient evidence. "Since the crime of Manslaughter in the Second Degree and Driving While Ability Impaired have no essential elements in common, an acquittal of one is not repugnant to a conviction on the other...," it said. "The court finds that the jury verdict was not repugnant inasmuch as the jury concluded that defendant's reckless conduct was not based on his intoxication but on other facts relating to the manner in which he operated the vehicle." Asaro was sentenced to three to ten years on the manslaughter count.

The Appellate Division, Second Department affirmed, finding the verdict was not repugnant and was supported by legally sufficient evidence. It said, "The defendant was aware of, and consciously disregarded, a substantial and unjustifiable risk that his actions would cause the death of another, such that his conduct was reckless, and not merely negligent, or the result of carelessness, lack of foresight, or skill...." Regarding the accident reconstruction expert's lost notes and calculations, it said the trial court's "determination to give an adverse witness charge, rather than striking the expert's testimony, was a provident exercise of discretion...."

Asaro says the prosecution's theory, as stated in the bill of particulars, was that he was speeding and crossed over the center line while impaired. "The failure of the People to prove each of the elements set forth in their bill of particulars ... rendered the proof of recklessness insufficient to sustain the charges of manslaughter and reckless assault. The verdict was also rendered repugnant as the defendant was found not guilty of the charge of driving while impaired and the 'impairment' was one of three indicia of recklessness set forth in the bill of particulars ..., which identified impairment as an element to be proven to sustain the manslaughter and reckless assault charges upon which the defendant was found guilty by the jury." Among other things, he also argues the accident expert's testimony was improperly admitted "in the absence of disclosure of underlying scientific computations of speed."

For appellant Asaro: Benjamin Ostrer, Chester (845) 469-7577
For respondent: Orange County Asst. District Attorney Robert H. Middlemiss (845) 291-2050

State of New York Court of Appeals

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To be argued Tuesday, September 10, 2013

No. 159 People v Carlos Santiago, Jr. *(papers sealed)*

Carlos Santiago, Jr. was convicted of first-degree sexual abuse and second-degree unlawful imprisonment after a jury trial, at which the victim testified he had restrained her in his basement in Rochester and subjected her to sexual contact by forcible compulsion on September 30, 2007. The prosecution sought to have him sentenced as a second felony offender under Penal Law § 70.06(1)(b)(i), based on his prior conviction in Pennsylvania of third-degree murder. Santiago committed the Pennsylvania crime in January 1992, when he was 15 years old.

Defense counsel argued that the Pennsylvania murder could not be used as a predicate felony because of Santiago's age at the time it occurred. "He was a minor," she said. "Had he been in New York, he would have been entitled, I believe, to a YO [youthful offender adjudication], which, of course, he didn't get in Pennsylvania." The prosecutor responded that YO status "is not mandatory, especially given the nature of the previous conviction." County Court sentenced Santiago as a second felony offender to seven years in prison.

The Appellate Division, Fourth Department rejected his challenge to the sentence as unpreserved, saying he failed to contend before the sentencing court that the Pennsylvania conviction would not constitute a conviction in New York because "a 15-year-old could not be convicted in New York of manslaughter in the second degree, one of the offenses encompassed by the Pennsylvania conviction of murder in the third degree."

Contending his sentence is illegal, Santiago argues that the Pennsylvania murder may not be used as a predicate offense because, if he had committed it in New York, he would not have been convicted of a crime at all due to his age. "While a defendant may be convicted of Pennsylvania's murder in the third degree for an act he committed as a fifteen year old, a defendant may not, by reason of infancy, be convicted in New York of manslaughter in the second degree or criminally negligent homicide for conduct committed as a fifteen year old." He says his claim "is reviewable as a question of law, either as preserved or under the illegal sentence preservation exception."

For appellant Santiago: Drew R. DuBrin, Rochester (585) 753-4947
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

State of New York Court of Appeals

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To be argued Tuesday, September 10, 2013

No. 160 Merrill Lynch, Pierce, Fenner & Smith Incorporated v Global Strat, Inc.

After the collapse of Bear Stearns in March 2008, Merrill Lynch, Pierce, Fenner & Smith brought this action for fraudulent conveyance, breach of contract, and breach of fiduciary duty against four foreign investors -- Ezequiel, Raymond, Albert and Scarlett Nasser -- and five corporate entities the Nassers used to carry out their investments. Merrill Lynch alleged that the Nassers lost heavily on Bear Stearns, running up a deficit of more than $68 million in Merrill Lynch accounts held in the names of their corporate entities, and then wrongfully transferred funds out of those accounts to avoid paying down the deficit. The individual Nasser defendants moved to dismiss for lack of personal jurisdiction. In September 2008, Merrill Lynch began serving notices of discovery. In December 2008, Supreme Court stayed discovery relating to claims against the Nassers individually, pending resolution of their motion to dismiss, but required them to comply with discovery relating to claims against their corporations.

Merrill Lynch complained at a series of conferences in January and February 2009 that the defendants were not complying with their discovery obligations. The court told defense counsel, "If there is not a full and accurate and detailed response [to discovery demands], that will be it. I will ... enter a judgment in this case, I am telling you that right now.... [T]his case will be over as far as the liability aspect of the case, we'll take an inquest on damages and it will be over." The court later referred the issue to a special referee. In March 2010, the referee issued a report finding that the Nassers failed to comply with discovery demands related to claims against their corporations. Supreme Court confirmed the report and, after an inquest, entered a $99 million default judgment against the Nassers. The same court subsequently dismissed the claims against Albert Nasser for lack of personal jurisdiction.

The Appellate Division, First Department reinstated the claims against Albert Nasser and otherwise affirmed. "The Nassers' repeated failure to comply with discovery deadlines or offer a reasonable excuse for their noncompliance with discovery requests, as well as their counsel's misrepresentations in open court as to the cause of one of their violations, give rise to an inference of willful and contumacious conduct warranting the entry of judgment against them..." it said. "The Nassers were appropriately warned that judgment would be entered against them if their discovery responses were found by the Special Referee to be noncompliant with plaintiffs' requests...."

The Nassers argue that Merrill Lynch failed to demonstrate that any noncompliance with discovery was willful, that they "in fact complied" with the discovery demands, and that the "record does not support the Appellate Division's inference of willful, contumacious and bad faith conduct sufficient to warrant [CPLR] § 3126(3) sanctions and entry of judgment." Even if some sanction were warranted, they say, "a $99 million default judgment was grossly excessive." They also argue that Albert Nasser is not subject to New York jurisdiction.

For Nasser appellants: Charles B. Manuel, Jr., Manhattan (212) 244-4111
For respondent Merrill Lynch: Kenneth I. Schacter, Manhattan (212) 705-7000

State of New York Court of Appeals

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To be argued Wednesday, September 11, 2013

No. 161 Brightonian Nursing Home v Daines

Five for-profit nursing homes and the New York State Health Facilities Association brought this action to challenge Public Health Law § 2808(5)(c), which requires private nursing home owners and operators to obtain prior approval from the state health commissioner before withdrawing equity or assets that in the aggregate would exceed 3 percent of the facility's total revenue for the prior year. In reviewing such requests, the statute provides that the commissioner "shall consider the facility's overall financial condition, any indications of financial distress, whether the facility is delinquent in any payment owed to the department, whether the facility has been cited for immediate jeopardy or substandard quality of care, and such other factors as the commissioner deems appropriate." The statute was enacted to protect the financial solvency of nursing homes and their ability to provide adequate patient care.

Supreme Court declared section 2808(5)(c) unconstitutional, saying the provision that allows the commissioner to consider "such other factors as the commissioner deems appropriate" is an improper delegation of legislative authority and is void for vagueness. The language "is so broad as to have no limits at all," the court said. It also found the statute violates the plaintiffs' due process rights.

The Appellate Division, Fourth Department affirmed, holding that the provision "permitting the Commissioner to consider 'such other factors as [he or she] deems appropriate' ... constitutes an unconstitutional delegation of legislative authority because it grants the Commissioner unfettered discretion in assessing equity withdrawal requests. The statute provides no standards to guide the Commissioner in determining what factors are 'appropriate'...." It said the same language is unconstitutionally vague because it "does not adequately apprise nursing home owners and operators of the standards used to assess their equity withdrawal requests and precludes meaningful judicial review...." It ruled the entire statute violates substantive due process. While "ensuring the financial viability of nursing homes and protecting the welfare of their vulnerable residents constitutes a legitimate governmental purpose," the court said, the statute "is not reasonably related to the governmental purpose and thus ... violates due process" because it applies to all facilities "regardless of financial viability.... We conclude that it is manifestly unfair and unreasonable to freeze the equity of all nursing homes in excess of 3% of their respective annual revenues...."

The State argues the plaintiffs "failed to carry their heavy burden of demonstrating that the statute is unconstitutional on its face. In addition, the clause authorizing the Commissioner to consider other appropriate factors in addition to the financial and quality of care factors specified in the statute is neither an unconstitutional delegation nor void for vagueness. Instead..., the clause merely authorizes the Commissioner to consider unenumerated factors of the same general kind or class as those specifically mentioned." It says section 2808(5)(c) "satisfies the rationality requirement of substantive due process" because it "furthers the goals of ensuring the facility's continued financial viability and quality of care by mandating that the Commissioner review and approve significant withdrawals of assets from the business." If the Court finds any part of the statute unconstitutional, "it should sever that part and uphold the remainder of the statute."

For appellant State: Assistant Solicitor General Victor Paladino (518) 473-4321
For respondent nursing homes: Thomas G. Smith, Rochester (585) 232-6500

State of New York Court of Appeals

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To be argued Wednesday, September 11, 2013

No. 162 Soto v J. Crew, Inc.

Jose A. Soto was employed by a commercial cleaning company that contracted with J. Crew, Inc. to provide general cleaning services at its store in lower Manhattan. In November 2008, he climbed an A-frame ladder, provided by J. Crew, to dust the top of a display shelf. Soto was injured when the ladder tipped and he fell. He brought this personal injury action under Labor Law § 240(1) against J. Crew and the building's owner, The Mercer I LLC.

Supreme Court granted the defendants summary judgment dismissing the suit, finding that a cleaner performing routine dusting is not engaged in a protected activity under the statute.

The Appellate Division, First Department affirmed. "The dusting of the shelf constituted routine maintenance and was not the type of activity that is protected under the statute...," it said. "The term 'cleaning' as used under the statute is not to be as broadly applied as plaintiff suggests (see Dahar v Holland Ladder & Mfg. Co., 18 NY3d 521, 526 [2012])."

One member of the panel concurred "because I am constrained by" Dahar, which he asserted "cannot be reconciled with extensive recent precedent of the Court or the plain wording of Labor Law § 240(1)." He said, "In Dahar, the focus has shifted from i) that 'cleaning' is a protected activity and ii) the application of gravity to that activity, to an analysis based solely on the locus of the activity and the nature of the object being cleaned."

Soto argues the Appellate Division misread the Court of Appeals decision. Dahar did not preclude section 240(1) coverage of "routine maintenance cleaning," he says, but rather held "that a 'manufactured product' was not a 'structure' within the meaning of [section] 240(1)." He says Dahar did not turn on the nature of the cleaning performed by the injured worker, but instead held that the statute's protection "does not extend to 'an injury suffered while cleaning a product in the course of a manufacturing process' [18 NY3d at 526]."

For appellant Soto: Fred R. Profeta, Jr., Manhattan (212) 577-6500
For respondents J. Crew and Mercer: Anthony F. DeStefano, Woodbury (516) 487-5800

State of New York Court of Appeals

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To be argued Wednesday, September 11, 2013

No. 163 People v Juan Jose Peque, a/k/a Juan Jose Peque Sicajian *(papers sealed)*
No. 164 People v Richard Diaz
No. 165 People v Michael Thomas, a/k/a Neil Adams
No. 211 People v Felix Hernandez *(papers sealed)*

These appeals address the obligations of trial courts and defense attorneys to inform defendants, before they plead guilty, of the potential immigration consequences of a guilty plea.

The primary issue in three of them -- Peque, Diaz, and Thomas -- is whether the courts' failure to explain that they could or would be deported rendered their pleas invalid. In exchange for reduced sentences, Juan Jose Peque pled guilty to first-degree rape, and Richard Diaz and Michael Thomas pled guilty to felony drug charges. They later sought to withdraw their pleas, arguing they were not knowing, intelligent and voluntary because the judges who took the pleas did not adequately advise them of the possible immigration consequences. Peque and Thomas also claimed their attorneys' failure to explain those consequences deprived them of effective assistance of counsel.

The Appellate Division affirmed all three convictions based on People v Ford (86 NY2d 397 [1995]), which held that "deportation is a collateral consequence of conviction" and a court's failure to inform the defendant does not affect the voluntariness of the plea. In Diaz, the First Department said, "[T]he duties of a trial court upon accepting a guilty plea are not expanded by Padilla v Kentucky [559 US 356 (2010)], which deals exclusively with the duty of defense counsel to advise a defendant of the consequences of pleading guilty when it is clear that deportation is mandated."

Defendants argue that deportation must be considered a direct consequence of conviction in the wake of Padilla, which said "deportation is an integral part -- indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Diaz argues, "It is impossible to reconcile Padilla's recognition that deportation is now an 'integral' part of the 'penalty' imposed on noncitizens convicted of specified crimes with Ford's characterization of deportation as merely a 'collateral consequence.'"

Felix Hernandez pled guilty to first-degree sexual abuse and was sentenced to five years. He moved under CPL 440.10 to vacate the judgment, claiming his attorney's failure to tell him the plea would lead to automatic deportation deprived him of effective assistance of counsel. Supreme Court denied the motion and the First Department affirmed in a 3-2 decision. Noting Hernandez would have faced up to 14 years at trial, it said the record showed he "decided to accept the plea, not because he was defectively advised on the immigration issue, but rather because pleading guilty was the course most advantageous to him." The dissenters said he demonstrated he was prejudiced by his counsel's failure when he testified that "he took the plea because he thought doing so was the best way to minimize his separation from his six children" and that "if he had known that his plea would automatically cause him to be deported and indefinitely separated from his family, he would have proceeded to trial."

For appellant Peque: Melissa A. Latino, Albany (518) 209-0104
For respondent: Chemung County Asst. District Attorney Susan Rider-Ulacco (607) 737-2944
For appellant Diaz: Rosemary Herbert, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000
For appellant Thomas: Lynn W.L. Fahey, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Jennifer Hagan (718) 286-5902
For appellant Hernandez: Bonnie C. Brennan, Manhattan (212) 577-3262
For respondent: Manhattan Assistant District Attorney Hope Korenstein (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, September 11, 2013

No. 166 People v Jocelyn Clermont

Jocelyn Clermont was arrested for weapon possession in Jamaica, Queens in October 2006. His assigned counsel moved to suppress the handgun on the ground that it was the product of an illegal police stop. Defense counsel moved to be relieved prior to the suppression hearing, saying he had "an overwhelming amount of work" and was not able "to competently represent" all of his clients, but he agreed to conduct the hearing at the court's request.

At the hearing, the detective who made the arrest testified that he and his partner were patrolling an area known for gang activity when they saw Clermont walking down the street with another man and adjusting the waistband of his pants. When the officers approached them, displayed their shields, and identified themselves as police, Clermont fled and the detective chased after him. He said Clermont removed a handgun from his waistband and threw it down during the chase. Supreme Court denied the motion to suppress, saying the officers' initial approach was reasonable based on their "observation of defendant continuously adjusting his waist band area while walking in a known gang location. Once the detective observed the defendant throw the gun on the ground he was justified in chasing the defendant and subsequently arresting him and recovering the gun." The court also granted defense counsel's request to be relieved. Clermont was ultimately convicted of criminal possession of a weapon in the second and third degrees and was sentenced to eight years in prison.

The Appellate Division, Second Department affirmed in a 3-1 decision, rejecting Clermont's claim that he was deprived of effective assistance of counsel at the suppression hearing. "Notwithstanding the absence of an opening or closing statement and the suppression court's mistaken factual finding as to when the defendant dropped the weapon, we find that the evidence, the law, and the particular circumstances of this case, viewed in totality, reveal that defense counsel provided meaningful representation.... Defense counsel moved for, and obtained, a suppression hearing.... [D]efense counsel's cross-examination of the detective was reasonably competent and thorough. In lieu of a closing argument, both the prosecutor and defense counsel relied upon the record."

The dissenter argued Clermont "was not provided with 'meaningful representation' at the suppression hearing." He said, "Assigned counsel's written motion was based on the wrong facts and he admitted that he was unable to adequately prepare. Although counsel acknowledged that the submission of post-hearing arguments was necessary, such submissions were never presented to the hearing court.... Although the hearing court's decision was premised on an incorrect version of the underlying facts [that the gun was discarded before, rather than during the chase], this flawed premise was never questioned, and the defendant's motion to suppress was never decided on the facts actually adduced at the hearing."

For appellant Clermont: Allegra Glashausser, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Suzanne H. Sullivan (718) 286-5848

State of New York Court of Appeals

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To be argued Thursday, September 12, 2013

No. 167 Osterweil v Bartlett

In this federal case challenging the constitutionality of New York State's gun licensing law, the U.S. Court of Appeals for the Second Circuit is asking this Court to resolve a "predicate" question: "Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?"

In May 2008, Alfred G. Osterweil applied for a handgun license in Schoharie County, where he had his primary home. A short time later, he informed the sheriff that he had changed his primary residence to Louisiana, while keeping his Schoharie County house as a part-time vacation residence, and asked whether this would make him ineligible for the license. Penal Law § 400.00(3)(a) requires that license applications be made "in the city or county ... where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper." While the application was pending, the U.S. Supreme Court ruled in District of Columbia v Heller (554 US 570 [2008]) that the Second Amendment protects an individual right to bear arms and that the core of this right is the right to self-defense in the home.

Schoharie County Court Judge George Bartlett, III interpreted Penal Law § 400.00(3)(a) as imposing a domicile requirement and denied Osterweil's application because New York "is not his primary residence and, thus, not his domicile." The judge relied on the Appellate Division, Third Department's ruling in Mahoney v Lewis (199 AD2d 734 [1993]), which said, "as used in this statute, the term residence is equivalent to domicile and requires something more than mere ownership of land."

Rather than appeal the ruling in state court, Osterweil filed a federal suit in the Northern District of New York alleging that a domicile requirement violates the Second and Fourteenth Amendments. U.S. District Court granted summary judgment to the State and dismissed the suit. It ruled a domicile requirement does not violate the Second Amendment because it "allows the government to monitor its licensees more closely and better ensure the public safety" and, thus, is substantially related to a significant state interest.

The Second Circuit, in an opinion by retired U.S. Supreme Court Justice Sandra Day O'Connor, said the question of whether the statute requires domicile in New York or merely residence "is a predicate to a serious constitutional question" and should be answered first, since a holding that only residence is required would resolve the litigation without having to confront a "very difficult" constitutional controversy. It said the State Court of Appeals should decide the meaning of "resides" because the answer "requires interpretation of the value and policy judgments of the state legislature" and involves an important state concern. "The regulation of firearms is a paramount issue of public safety, and recent events in this circuit are a sad reminder that firearms are dangerous in the wrong hands."

For appellant Osterweil: Paul D. Clement, Washington, DC (202) 234-0090
For respondent Bartlett: Assistant Solicitor General Simon Heller (212) 416-8025

State of New York Court of Appeals

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To be argued Thursday, September 12, 2013

No. 168 Matter of State of New York v Enrique D. *(papers sealed)*

In this Mental Hygiene Law article 10 proceeding, Enrique D. is appealing a determination that he is a dangerous sex offender requiring confinement in a secure treatment facility. He is a 37-year-old blind man whose record includes convictions for sexual misconduct in 2001 and first-degree sexual abuse in 2002. His most recent offense occurred in 2006, when he sexually assaulted a good Samaritan who helped guide him to his Bronx apartment building. Enrique pled guilty to first-degree attempted sexual abuse and was sentenced to two to four years in prison.

As Enrique neared release from prison in 2009, the State petitioned for civil management under Mental Hygiene Law article 10. At the jury trial to determine whether he suffers from a mental abnormality, he sought to call a former girlfriend to testify that he exercised self-control over his sexual desires. The State opposed the request, arguing that lay testimony is not relevant to the issue of mental abnormality and only expert testimony should be allowed. Supreme Court precluded the witness on the ground that her testimony would not be relevant, but said Enrique's psychiatric expert could testify about anything the girlfriend told him that affected his diagnosis. The State's expert diagnosed Enrique as having "paraphilia, not otherwise specified (NOS), non-consent," testifying that Enrique was sexually aroused by forcing non-consenting women to engage in sexual behavior and that he had "great difficulty" controlling his sexual impulses. Enrique's expert found that he did not suffer from paraphilia NOS, and testified that the "non-consent" diagnosis is controversial and "is simply not accepted" in the psychiatric community. The jury found that Enrique suffers from a mental abnormality and, after a dispositional hearing, Supreme Court determined that he is a dangerous sex offender requiring confinement.

The Appellate Division, First Department affirmed, rejecting his claim that the preclusion of his former girlfriend's testimony as irrelevant violated his statutory and constitutional rights to call witnesses. "Under [Enrique's] offer of proof, that he may not have sexually abused one former girlfriend -- and there was evidence in the proceeding that he had at least 26 sexual partners -- does not tend to disprove that his behavior manifested a pattern of sexually abusing nonconsenting women."

Enrique argues that his former girlfriend's testimony was relevant because it "would have assisted the jury in evaluating the credibility of the two expert witnesses, who presented competing theories as to whether [he] was properly diagnosed with paraphilia NOS non-consent and whether he had serious difficulty in controlling his sexual behavior." He says, "... the State has repeatedly been permitted to call ... lay witnesses to testify *against* respondents" on the issue of mental abnormality in article 10 proceedings, and such testimony on behalf of respondents should be no less relevant.

For appellant Enrique D.: Sadie Zea Ishee, Manhattan (646) 386-5891
For respondent State: Assistant Solicitor General Valerie Figueredo (212) 416-8019

State of New York Court of Appeals

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To be argued Thursday, September 12, 2013

No. 169 People v Reyes Rodriguez

Reyes Rodriguez and sixteen others were charged with committing a series of burglaries in New York City in 2005. At trial, the primary witnesses against Rodriguez were two accomplices in the burglary ring, Joseph Hernandez and Eulalia Rodriguez (no relation to defendant), who appeared pursuant to cooperation agreements. They testified that Reyes Rodriguez went by the nickname Rumba. Hernandez also testified that defendant's telephone number was listed in his cell phone directory under the name Rumba. According to telephone records, the number listed for Rumba was registered in the name of Hankook Binoon, not Reyes Rodriguez, and the cell phone seized from Rodriguez at the time of his arrest was not associated with the number registered to Binoon.

A police sergeant testified that Rumba's phone number in Hernandez's directory belonged to Rodriguez. When the sergeant attributed another number in the directory to a codefendant, based on his nickname, the trial judge asked, "How did you know what the nickname was of the person, how did you figure that out?" The sergeant replied, "Through the cooperator." The court barred defense counsel from cross-examining the sergeant about the identity of the cooperator. Defense counsel learned at the charge conference that the sergeant's cooperator was an accomplice who did not testify at the trial. Rodriguez moved for a mistrial, citing Crawford v Washington (541 US 36 [2004]) and arguing that the sergeant's testimony about information provided by the cooperator deprived him of his right to confront witnesses. Supreme Court denied the motion. Rodriguez was convicted of first-degree robbery and second and fourth-degree conspiracy. He was sentenced to an aggregate term of 12 to 18 years.

The Appellate Division, First Department affirmed. It said the sergeant's testimony about how he learned defendant's nickname "did not violate Crawford, because the officer did not directly place before the jury any testimonial statement by a nontestifying declarant, and this portion of the officer's testimony was not offered for its truth. In any event, were we to find any error, we would find it to be harmless."

Rodriguez argues that his constitutional right "to confront and cross-examine the witnesses against him was violated when the trial court permitted a police witness to testify concerning information he learned from a non-testifying cooperator that incriminated" him. He says the sergeant's testimony identifying him as Rumba and Binoon "did 'directly place before the jury' a testimonial statement by a non-testifying declarant," and the testimony had no relevance if it was not offered for its truth. Among other things, he also contends the accomplice testimony of Hernandez and Eulalia Rodriguez was not sufficiently corroborated and the prosecution failed to disclose Rosario material relating to the sergeant's gathering of information from the non-testifying cooperator.

For appellant Rodriguez: Arnold J. Levine, Manhattan (212) 732-5800
For respondent: Manhattan Assistant District Attorney Christopher P. Marinelli (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, September 12, 2013

No. 170 Ramkumar v Grand Style Transportation Enterprises, Inc.

In April 2007, Nandkumar Ramkumar was riding in a car driven by Danish Bissessar when it collided in Queens with a vehicle owned by Grand Style Transportation Enterprises. Ramkumar was taken by ambulance to a nearby hospital where he was diagnosed with soft tissue injury, prescribed ibuprofen, and released. The next day, he went to a medical clinic where he was ultimately diagnosed as having herniation of his cervical and lumbar spine and a tear in his right meniscus. He underwent arthroscopic surgery on his knee in June 2007 and was prescribed physical therapy.

Ramkumar brought this personal injury action against the owners and drivers of the vehicles. Supreme Court granted the defendants' motions for summary judgment dismissing the suit on the ground that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

The Appellate Division, First Department affirmed in a 3-2 decision, saying the defendants made a prima facie showing of entitlement to summary judgment and, in opposition, Ramkumar "failed to offer a reasonable explanation for a significant gap in his medical treatment." He testified at his deposition that no-fault coverage of his physical therapy was "cut off" in February 2008, it said, and "the record gives no indication that plaintiff received any medical treatment during the 24-month period before he submitted answering papers to defendants' motions.... A bare assertion that insurance coverage for medically required treatment was exhausted is unavailing without any documentary evidence of such or, at least, an indication as to whether an injured claimant can afford to pay for the treatment out of his or her own funds.... Plaintiff, who was employed and living with his parents, gave no such indication."

The dissenters said Ramkumar offered the necessary explanation for ceasing treatment "when he said, perhaps inartfully, that his benefits were 'cut off' at some point," and they said the majority's requirement that he offer documentary evidence or some indication of whether he could afford to pay for the treatment himself "would engraft onto section 5102(d) an unfair and unreasonable standard of proof. Anyone who has ever dealt with no-fault carriers would understand the likely futility of obtaining the suggested letter from them.... The fact of the matter is that for most people, when insurance coverage ends, treatment ends.... The right to sue for a serious injury cannot be predicated on the plaintiff paying those substantial fees out of pocket, assuming that the funds exist."

For appellant Ramkumar: Judah Z. Cohen, Woodmere (646) 580-3440
For respondents Bissessar: Ashley E. Sproat, White Plains (914) 997-8100
For respondents Grand Style et al: Matthew W. Naparty, Woodbury (516) 487-5800

State of New York Court of Appeals

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To be argued Thursday, September 12, 2013

No. 182 Matter of State of New York v Floyd Y. *(papers sealed)*

Floyd Y. was convicted in 2001 of first-degree sexual abuse and endangering the welfare of a child for molesting two children. He was sentenced to four to eight years in prison. In 2007, after his sentence expired, the State filed a civil management petition under Mental Hygiene Law article 10, alleging that he is a dangerous sex offender who should be confined in a secure treatment facility.

At the article 10 jury trial, the State called psychologist Catherine Mortiere to testify that she had diagnosed Floyd with pedophilia and antisocial personality disorder and that she believed he had a high risk of reoffending. She also testified about the reports and records that formed the basis of her opinion, including hearsay statements from seven other victims of alleged sex offenses that were contained in affidavits or police records. Floyd pled guilty in three of those prior cases, but four others did not result in a charge or conviction. Dr. Mortiere testified that such documents are heavily relied upon in her profession and are necessary to form an opinion as to whether a respondent suffers from a mental abnormality. The jury found that Floyd suffers from a mental abnormality and, after a dispositional hearing, Supreme Court determined that he is a dangerous sex offender requiring confinement.

The Appellate Division, First Department affirmed, ruling that most of Dr. Mortiere's testimony was properly admitted under the "professional reliability" exception to the hearsay rule. Article 10, "in effect, requires an expert to review the very material Mortiere considered in order to evaluate and reach a prognosis," it said, and barring an expert from discussing those materials in court "would significantly hinder the jury's ability to assess the expert's testimony.... The information Mortiere relied upon was not limited to victim's affidavits, but rather came from police reports, plea documents and conviction certificates, all of which established the reliability of the out-of-court material and are 'specifically deemed reliable' by the statute...." Two of the unproven offenses should have been excluded, "due to reliability issues and a need to put some limit on the hearsay information put before the factfinder," because Floyd was acquitted in one case and was not charged in the other, but it said the error was harmless because the jury was told the allegations were unproven and they "represented only a small fraction of the evidence considered by the expert."

Floyd argues that "the unproven accusations from non-present declarants, gleaned mostly from a collection of unspecified affidavits, lacked adequate indicia of reliability to satisfy the requirements of the professional reliability exception. Moreover, because the experts were allowed to testify to the contents of the unproven accusations without limitation -- and, indeed, to vouch for the accuracy of those accusations -- they effectively became conduits for the hearsay claims of the out-of-court witnesses. The introduction of these accusations violated Floyd Y.'s due process right to a fair trial." He also argues that the testimony of Dr. Mortiere violated psychologist-patient privilege under CPLR 4507 because she treated him while he was being held at the Kirby Forensic Psychiatric Center.

For appellant Floyd Y.: Deborah P. Mantell, Manhattan (646) 386-5891
For respondent State: Assistant Solicitor General Matthew W. Grieco (212) 416-8014