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.

JUNE 1 - 4, 2015 CALENDAR

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, June 1, 2015

No. 104 Commonwealth of Pennsylvania Public School Employees' Retirement System v Morgan Stanley & Co., Incorporated

Morgan Stanley & Co. assembled and marketed a structured investment vehicle (SIV) named the Cheyne SIV beginning in 2004. The Cheyne SIV, managed by Cheyne Capital Management, contained assets with a variety of risk profiles, including subprime residential mortgage-backed securities, but received an overall triple-A rating from credit rating agencies. When the housing market collapsed in 2007, so did the Cheyne SIV, declaring bankruptcy in the fall of 2007. Commerzbank AG, a German bank, was among 15 large institutional investors that brought this federal action for fraud and negligent misrepresentation against Morgan Stanley, the rating agencies and other defendants involved in the SIV. The plaintiffs alleged that Morgan Stanley pressured the rating agencies to provide fraudulently high ratings on notes issued by the Cheyne SIV, which it included in promotional documents distributed to investors.

In response to a defense motion for summary judgment, Commerzbank said it acquired some of its Cheyne SIV notes in its 2009 merger with Dresdner Bank AG. It said Dresdner had purchased those notes from the original purchaser, Allianz Dresdner Daily Asset Fund (DAF) at face value in 2007, after which DAF was "wound down." DAF could not have retained any interest in the notes, including the right to sue, when the notes were sold to Dresdner, it said; and under German law, "all of Dresdner's assets, liabilities, rights and obligations passed automatically by operation of law to Commerzbank" in the 2009 merger.

U.S. District Court dismissed Commerzbank's claims, finding it lacked standing to sue under New York law on the notes acquired from DAF. For a subsequent holder of a note to have standing to sue for fraud, it said, the prior holder must assign its tort claims at the time of transfer -- a simple transfer of the note will not suffice. While Commerzbank offered evidence that it acquired any rights of action possessed by Dredner, it "provided no evidence that DAF assigned its rights of action to Dresdner." The court also dismissed fraud claims against Morgan Stanley on the ground that the only alleged misstatements were made by the rating agencies and were not attributable to Morgan Stanley. It said the company could not be held liable for fraud based on third-party misstatements under New York law.

The U.S. Court of Appeals for the Second Circuit found the question of Commerzbank's standing to sue and the question of Morgan Stanley's liability for the allegedly fraudulent ratings turn on unresolved issues of New York law. "It is unclear whether the intent of parties to transfer a whole interest [in a note], combined with the absence of limiting language, suffices to transfer an assignor's tort claims, or whether an additional, more specific statement of an intent to transfer tort claims is required," it said. Also unclear is whether Morgan Stanley may be held liable for false ratings it influenced and disseminated. The Second Circuit is asking this Court to resolve both issues in a pair of certified questions.

For appellant Commerzbank: Joseph D. Daley, San Diego, CA (619) 231-1058
For respondents Morgan Stanley et al: James P. Rouhandeh, Manhattan (212) 450-4000

State of New York Court of Appeals

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To be argued Monday, June 1, 2015

No. 105 Amalgamated Bank v Helmsley-Spear, Inc., and Schneider & Schneider, Inc.

Amalgamated Bank retained Helmsley-Spear, Inc. in 2006 to appraise a Yonkers office building before it approved a mortgage. Lynn C. Schneider was president of Helmsley-Spear at the time and owned 99 percent of Helmsley's shares. In 2009, after its borrower defaulted on the mortgage, the bank brought a negligence action against Helmsley and its appraiser, claiming the Yonkers building was worth substantially less than the value determined by the appraisal. Helmsley never answered the complaint or appeared in the action and in 2011 Supreme Court entered a default judgment for $2,289,600 plus interest against Helmsley.

During post-judgment discovery, Amalgamated Bank learned Helmsley had transferred its assets to Schneider and her company, Schneider & Schneider, Inc., for no consideration in October 2007, and Schneider sold the bulk of those assets to a real estate developer for $3,205,000. Amalgamated Bank commenced this supplemental proceeding in 2012 to enforce its default judgment by collecting the proceeds of the 2007 sale of Helmsley's assets from Schneider, alleging the sale was a fraudulent transfer that left Helmsley judgment-proof. Schneider and her company moved to intervene in the Helmsley action and to vacate the default judgment.

Supreme Court permitted Schneider to intervene and vacated the judgment. Citing Oppenheimer v Westcott (47 NY2d 595), the court said she had a sufficient interest to intervene because Amalgamated Bank "is using the default judgment against Helmsley as a predicate for liability against [Schneider and her company] in the Supplemental Proceeding." It said they "established that they are capable of putting forth a meritorious defense without the need to delay the trial.... Consequently, plaintiff will not be prejudiced by further discovery or delay."

The Appellate Division, First Department reversed and reinstated the judgment, saying Amalgamated Bank "did not obtain the default judgment through fraud or through any other wrongdoing.... Rather..., the default judgment resulted from Helmsley's decision not to answer the complaint or otherwise appear in the action because it apparently believed itself to be judgment-proof.... Accordingly, intervenors cannot show that Helmsley had a reasonable excuse for the default...." It said Oppenheimer allowed intervention based on the intervenors' interest in vacating a default judgment, but did not vacate the judgment on that basis alone. "[T]he Oppenheimer Court also found that plaintiff had obtained the default judgment through fraud or wrongdoing, and indeed, the fraud or wrongdoing was the reason for the vacatur.... By contrast..., no wrongful acts precipitated the default judgment in this case."

Schneider argues, "It is the well-settled policy of the New York courts 'to allow matters to proceed to trial on the merits.' In overturning the trial court's decision which permitted Appellants to intervene, vacate a default judgment, and defend the underlying action on the merits, the First Department has undermined this established principle." She says the decision "artificially limits the application of Oppenheimer to circumstances of fraud or other wrongdoing," and permits the bank to pursue "its efforts to obtain a windfall in excess of $2 million without ever having to prove the merits of its claim."

For appellants Schneider et al: Christopher J. Sullivan, Manhattan (212) 592-1400
For respondent Amalgamated Bank: Tyler J. Kandel, Manhattan (212) 238-3000

State of New York Court of Appeals

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To be argued Monday, June 1, 2015

No. 106 People v William Henderson

William Henderson was charged with fatally stabbing Duncan Chambers in Glens Falls in September 2005. Witnesses testified Henderson, while searching for crack cocaine and cash that had been stolen from his cousin, kicked in the door of Chambers' apartment and began fighting with him. Henderson retreated to the nearby apartment of a friend, told her he was "going to kill him" and grabbed a large kitchen knife, then returned to Chambers' apartment. Witnesses said Henderson struck Chambers on the head with a bottle and stabbed him in the back.

Henderson was convicted of felony murder, based on the theory that he killed Chambers while in the course of committing a burglary. The burglary charge was based on Henderson"s intent to commit a crime -- assault or murder -- when he reentered the apartment. He was also convicted of first-degree manslaughter, second-degree assault and second-degree burglary, and was sentenced to an aggregate prison term of 30 years to life. Henderson argued on appeal that his felony murder conviction was improper under People v Cahill (2 NY3d 14 [2003]) because the predicate burglary was based on his conceded intent to commit an assault.

The Appellate Division, Third Department affirmed. "The Court of Appeals took care to point out that its analysis in Cahill was confined to the capital murder statute.... A felony murder conviction, on the other hand, may properly be based on a burglary as the predicate felony where the intent at the time of entry is to commit an assault or murder," the court said, citing People v Miller (32 NY2d 157 [1973]). "Here, the trial evidence supports the conclusion that defendant entered the apartment the second time with the intent to assault or murder the victim. Accordingly, there is no basis to disturb the verdict finding defendant guilty of felony murder."

Henderson, citing Cahill, argues that the prosecution's proof "improperly uses the same *mens rea* (i.e., intent to commit a homicide) to elevate trespass to burglary and also to elevate manslaughter to felony murder. This 'double counting' of the intent to kill is impermissible and is inconsistent with the purpose of the felony murder statute and its legislative history." He also argues there was insufficient evidence to support the felony murder conviction because "the prosecutor failed to prove that the homicide was 'in furtherance of' the burglary. Indeed, the prosecutor ended up proving the inverse: the burglary was committed to accomplish the homicide."

For appellant Henderson: David M. Abbatoy, Jr., Rochester (585) 348-8081
For respondent: Warren County Assistant District Attorney Jason M. Carusone (518) 761-6405

State of New York Court of Appeals

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To be argued Monday, June 1, 2015

No. 15 People v Matthew Keschner
No. 16 People v Aron Goldman

Matthew Keschner and Aron Goldman were charged with participating in a no-fault insurance fraud scheme in Manhattan from 2002 to 2006. The operation was devised and controlled by Gregory Vinarsky, who employed runners to solicit patients at the scenes of car accidents and employed medical professionals -- including Goldman, an internist, and Keschner, a chiropractor -- to provide diagnosis and treatment. Prosecutors presented evidence that Vinarsky and his alleged accomplices used medical clinics to fraudulently bill no-fault insurers for reimbursement of unnecessary medical tests, procedures and equipment on behalf of accident victims. Most of the tests and procedures were performed at a clinic on St. Nicholas Avenue in Washington Heights rented by Vinarsky, although Goldman was listed as owner of the clinic.

Goldman and Keschner were tried jointly, with Vinarsky testifying against them under a cooperation agreement, and they were convicted of enterprise corruption (Penal Law art 460) and related offenses. Goldman was sentenced to 2½ to 7½ years in prison and an $800,000 fine, Keschner to 1½ to 4½ years and a $750,000 fine. Among other arguments on appeal, they contended there was insufficient evidence to establish the "continuity of existence" element of enterprise corruption (Penal Law § 460.10[3]) because the criminal enterprise could not continue to function without Vinarsky.

The Appellate Division, First Department affirmed. It said a "criminal enterprise" as defined in Penal Law § 460.10(3) need not be "so structured as to permit it to continue its existence without the involvement of one or more key participants" because "the statute expressly requires only 'a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents'..., not criminal 'participants'...." It said Vinarsky's enterprise "embraced more than one clinic, extended over a period of years, and involved a succession of patients" who were used "to facilitate the fraudulent billing of insurers, which paid some $6 million for services allegedly provided by the St. Nicholas clinic. Thus, the jury was warranted in concluding that the criminal enterprise had a continuity that extended beyond any individual patient or transaction."

The defendants argue, in part, that prosecutors failed to prove the "continuity of existence" element of enterprise corruption because Vinarsky was indispensable to the scheme. "Logic dictates that an enterprise devised and controlled by one individual -- who alone possesses the wherewithal to run it -- also does not come within [the statute's] purview," Keschner says. "Regardless of the minions who may also participate under the individual's direction, the entity effectively constitutes an enterprise of one -- rendered a nullity without its all-controlling leader." Goldman says the Appellate Division "rejected the thoughtful decisions of a host of justices and neutered one of the statute's main protections -- the requirement that an enterprise have a 'continuity of existence,' which this Court has described as 'constancy and capacity exceeding the individual crimes committed under the association's auspices."

For appellant Keschner: Susan H. Salomon, Manhattan (212) 577-2523 ext. 518
For appellant Goldman: Matthew S. Hellman, Washington, DC (202) 639-6000
For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, June 2, 2015

No. 119 Matter of State Farm Mutual Automobile Insurance Company v Fitzgerald

New York City Police Officer Patrick Fitzgerald was riding in a Police Department vehicle driven by fellow officer Michael Knauss in January 2011, when an underinsured motorist collided with it, injuring Fitzgerald. He sought benefits under the supplementary uninsured/underinsured motorist (SUM) endorsement of Knauss's personal automobile policy from State Farm Mutual Automobile Insurance Company. The SUM endorsement defined an "insured" to include the policy's named insured, Knauss, and "any other person while occupying ... any other motor vehicle while being operated by [Knauss]." Fitzgerald demanded arbitration. State Farm refused to pay his claim and commenced this proceeding to stay arbitration, arguing he was not an "insured" for SUM coverage because a police vehicle is not a "motor vehicle" under the Vehicle and Traffic Law.

Supreme Court granted State Farm's petition to permanently stay arbitration, ruling Fitzgerald was not an "insured" within the meaning of the SUM endorsement of Knauss's policy. "Since a police vehicle is specifically excluded from the definition of motor vehicle as it appears in Vehicle and Traffic Law section 388(2), [Fitzgerald] is not an insured under the Knauss policy (see Matter of State Farm Mut. Auto. Ins. Co. v Amato (72 NY2d 288 [1988])," the court said.

The Appellate Division, Second Department reversed, ruling Fitzgerald was entitled to coverage "because he was a person occupying a 'motor vehicle' being operated by Knauss." It distinguished Amato and said that case did not require it to apply the definition of "motor vehicle" in Vehicle and Traffic Law § 388(2), which excludes police vehicles. Instead, it used Vehicle and Traffic Law § 125 to define "motor vehicle" as it appears in the SUM endorsement because the statute "is a general provision that defines the relevant terminology for the entire Vehicle and Traffic Law.... Police vehicles fall within the definition of a 'motor vehicle' under Vehicle and Traffic Law § 125 because they constitute a 'vehicle operated or driven upon a public highway which is propelled by any power other than muscular power'.... [T]his interpretation is consistent with common experience and the reasonable expectations of the average policyholder...."

State Farm argues Fitzgerald is not entitled to SUM benefits under Knauss's policy because a police vehicle is not a "motor vehicle" within the meaning of the endorsement. "Although the SUM endorsement does not define the term 'motor vehicle,' 'the neutral sources that brought [the SUM endorsement] into being' -- the text of the statute mandating the SUM endorsement (Insurance Law § 3420[f]), the statutory scheme, the statutory purpose of Insurance Law § 3420(f) -- all indicate that the Legislature intended to exclude police vehicles from the definition of 'motor vehicle.'"

For appellant State Farm: Henry Mascia, Uniondale (516) 357-3000
For respondent Fitzgerald: Frank Braunstein, Plainview (516) 937-1010

State of New York Court of Appeals

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To be argued Tuesday, June 2, 2015

No. 107 Matter of Glick v Harvey

In 2012, New York City approved New York University's plan for a major expansion of its Washington Square campus into two "super blocks" in Greenwich Village, including construction of academic buildings and housing for students and faculty. The super blocks were created as part of a slum clearance program in the 1950s and the City designated certain parcels it owned as streets to accommodate future road widening, although the parcels have remained open space since that time. Opponents of the NYU project -- including Assemblywoman Deborah Glick and other local leaders, neighborhood associations, historic preservation groups, and an NYU faculty association -- brought this article 78 proceeding to challenge the City's approval. Among other claims, they contended the City violated the public trust doctrine by authorizing NYU to build or encroach on four of the City-owned parcels of open space -- the Mercer Playground, LaGuardia Park, LaGuardia Corner Gardens, and Mercer-Houston Dog Run -- without approval from the State Legislature. They argued the parcels, all mapped as streets, had become protected parkland through long and continuous public use.

Supreme Court found the City had "impliedly dedicated as parkland" three of the parcels, all but the dog run, and thus had violated the public trust doctrine. It enjoined NYU from proceeding with construction involving those parcels "unless and until the State Legislature authorizes alienation of any parkland to be impacted by the project." The court said that "long-continued use of the land for park purposes may be sufficient to establish dedication by implication, despite the fact that the property is still mapped for long-abandoned street use. To rule otherwise would effectively eliminate the distinction between express and implied dedication of parkland. Here, petitioners have certainly shown long continuous use of the ... parcels as parks.... [T]here is extensive use of signage indicating some amount of management of the properties by the [Department of Parks and Recreation], and at least some intention of the City to identify the parcels as parks and encourage members of the public to consider and utilize them as parks."

The Appellate Division, First Department reversed the order and dismissed the suit, saying the petitioners "failed to meet their burden of showing that the City's acts and declarations manifested a present, fixed, and unequivocal intent to dedicate any of the parcels at issue as public parkland. While the City has allowed for the long-term continuous use of parts of the parcels for park-like purposes, such use was not exclusive, as some of the parcels (like LaGuardia Park) have also been used as pedestrian thoroughfares.... Further, any management of the parcels by the Department of Parks and Recreation was understood to be temporary and provisional, pursuant to revocable permits or licenses.... Moreover, the parcels have been mapped as streets since they were acquired by the City, and the City has refused various requests to have the streets de-mapped and re-dedicated as parkland...."

For appellants Glick et al: Caitlin J. Halligan, Manhattan (212) 351-4000
For New York City respondents: Asst. Corporation Counsel Michael J. Pastor (212) 356-0838
For respondent NYU: Seth P. Waxman, Washington, DC (202) 663-6000

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To be argued Tuesday, June 2, 2015

No. 108 Matter of Greater Jamaica Development Corporation v New York City Tax Commission

Greater Jamaica Development Corporation (GJDC) was formed in 1967 as a charitable, not-for-profit corporation to promote business growth in Jamaica, Queens. It is exempt from federal taxation and is registered as a charitable organization in New York. In 1998, GJDC formed Jamaica First Parking, LLC (JFP) to own and operate public parking facilities in the community "on a nonprofit basis ... in furtherance of the charitable purposes of [GJDC]." JFP acquired four parking garages that had been owned by New York City and built a fifth on land purchased from the City. JFP provides below-market parking for local stores, residents and government employees. The Internal Revenue Service determined JFP's activities would not effect GJDC's federal tax exempt status because the parking operation was "substantially related to [GJDC's] charitable exempt purposes" and would "lessen the burdens of government."

In 2007, the City's Department of Finance [DOF] granted JFP a property tax exemption under Real Property Tax Law § 420-a, which exempts "property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes ... and used exclusively for carrying out thereupon one or more of such purposes." DOF revoked JFP's exemption in 2011, saying parking "does not fall into one of the enumerated uses set forth in 420-a.... Here, the parking lots are not incidental to another recognized charitable purpose but are the very purpose for which the property is being used." It said GJDC's exempt status under federal law "is not determinative of the issue of charitable use of the property as defined by 420-a." GJDC and JFP brought this proceeding to challenge the determination.

Supreme Court dismissed the suit. It said DOF had a rational basis for its action, including "case law that draws a distinction between public benefit and charitable purposes, as well as legislative history indicating the legislature's intent to construe the categories formed by section 420-a narrowly. On these facts this court cannot find that the DOF determination was made without a reasonable basis and therefore is without power to overrule that determination."

The Appellate Division, Second Department reversed and restored JFP's tax exemption, finding the revocation was arbitrary and capricious. "Absent a precise statutory definition of 'charitable purpose,' courts have interpreted this category to include relief of poverty, advancement of governmental and municipal purposes, and other objectives that are beneficial to the community.... Furthermore, a property owner ... which demonstrates that it is a not-for-profit entity "'whose tax-exempt status has been recognized by the [IRS] and whose property is used solely for [charitable] purposes has made a presumptive showing of entitlement to exemption'"...," it said. "Given that the petitioners' charitable purpose was to improve Jamaica's business district through further economic development, offering convenient and inexpensive public parking to attract visitors and businesses was central to their aim."

The City argues, "The Appellate Division's decision ignores the precedent of this Court which states that IRC 501(c)(3) [federal tax exempt] status has no bearing on eligibility for an RPTL 420-a real property tax exemption.... The ... decision is also contrary to both the mandate of the Legislature to narrow the categories eligible for mandatory tax exemptions and the well-established standard requiring that eligibility for tax exemptions under RPTL 420-a be strictly construed."

For appellant City: Assistant Corporation Counsel Vincent D'Orazio (212) 356-2133
For respondents GJDC and JFP: Ronald G. Blum, Manhattan (212) 790-4500

State of New York Court of Appeals

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To be argued Tuesday, June 2, 2015

No. 113 People v Curtis Basile

Responding to a complaint in 2007, an agent of the American Society for the Prevention of Cruelty to Animals (ASPCA) found a starving dog in the backyard of Curtis Basile's home in Queens. Basile admitted the dog, a long-haired mixed-breed named Danger, belonged to him. Basile, 19 years old, said he had lost his job and could not afford dog food or veterinary care, and he surrendered the dog to the agent. He was charged with animal abuse under Agriculture and Markets Law § 353, which states, "A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal..., or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink ... is guilty of a class A misdemeanor...."

An ASPCA veterinarian testified that the dog was severely emaciated and dehydrated, a result of being deprived of proper nutrition for weeks or possibly months, and was "a step away" from death. Basile testified that he had tried unsuccessfully to find someone to take his dog and that he fed danger scraps from his plate whenever he had food to eat himself, sometimes only once a day. Criminal Court rejected his argument that the prosecutor was required to prove that he acted with a culpable mental state. It said the Legislature "intended that section 353 ... be a strict liability statute and that no intent or any mens rea need be proved by the People." Basile was convicted and sentenced to 3 years of probation and 45 days of community service.

Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed, saying section 353 requires no proof of a culpable mental state "insofar as it relates to the charge of failing to provide proper sustenance to an animal." It said, "Moreover, section 43 of the Agriculture and Markets Law provides ... that "[t]he intent of any person doing or omitting to do any ... act is immaterial in any prosecution for a violation of the provisions of this chapter'... [W]e do not read the word 'unjustifiably' in section 353 to relate to the words 'deprives any animal of necessary sustenance, food or drink....'"

Basile argues that, in view of "New York's strong presumption against strict liability" statutes, "the only interpretation of § 353 that is consistent with logic, fairness and the Legislature's intent is one that defines a crime of mental culpability. In particular, we submit that requiring proof that Mr. Basile acted 'knowingly' -- the same mental state that must be proved to convict a defendant of endangering the welfare of a child -- is properly reflective of the Legislature's intent." He says the court also erred by refusing to instruct the jury to consider whether his financial circumstances "could support a defense to the charge of 'unjustifiably injur[ing]' his dog."

For appellant Basile: Ben A. Schatz, Manhattan (212) 701-3000
For respondent: Queens Assistant District Attorney Nicoletta J. Caferri (718) 286-5859

State of New York Court of Appeals

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To be argued Tuesday, June 2, 2015

No. 109 People v Howard S. Wright *(papers sealed)*

Patricia Daggett was raped and murdered in Rochester in 1995. She had been strangled with a shoelace and her body, with hands tied behind her back, was left in a driveway. The case remained unsolved until 2006, when Howard Wright and an alleged accomplice were charged. The evidence against them was circumstantial, including testimony of witnesses who saw them with the victim in her car several hours before the murder and saw them without the victim, but with her car after the murder. One witness said Wright took him to the victim's car the next morning. There was also DNA evidence. Because the samples were a mixture contributed by several individuals, including the victim's husband, DNA analysis could not be used to identify a suspect with any degree of statistical certainty, but the prosecution's forensic expert testified that Wright could not be excluded as a contributor to samples collected from the victim's vagina, underwear and from the ligature that bound her hands.

The prosecutor argued in summation, without objection, that Wright and his co-defendant "left their DNA all over the crime.... We have Howard Wright's sperm in [the victim's] vagina. We have Howard Wright's sperm on [her] underwear, and we have Howard Wright's DNA profile included on the ligature that bound her hands together, the same identical ligature that is around her neck and strangled her to death.... This is a case of common sense and science.... The defendant's DNA is inside her, on her underwear, on the ligature that binds her hands." Wright was acquitted of rape, but convicted of second-degree murder and sentenced to 25 years to life.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, finding legally sufficient evidence to support the conviction. "Here, several witnesses testified ... that defendant was with the victim in her vehicle before she was killed. The People also presented evidence that the victim was raped in her vehicle, and defendant's DNA could not be excluded from various pieces of evidence recovered therefrom.... [T]he People presented testimony establishing that defendant was seen with the victim's vehicle on the night she was killed" and that he took a witness to the vehicle the next day. The court said Wright did not preserve his prosecutorial misconduct claim and declined to review it as a matter of discretion in the interest of justice.

The dissenters said the claim should be reviewed, and argued Wright should get a new trial due to prosecutorial misconduct and ineffective assistance of counsel. "[W]e cannot conclude that the jury would have reached the same result had not the prosecutor both mischaracterized and emphasized the DNA evidence on summation.... Here, the testimony of the People's forensic expert put defendant in only a statistically-undefined ... class of people that could have contributed to the DNA, but the prosecutor argued to the jury that the analysis of the DNA established defendant as the DNA's contributor." They said defense counsel's "failure to object to the prosecutor's baseless transformation of evidence that defendant was in a group or class of people that could have contributed to the ... DNA samples to evidence that defendant was the sole possible contributor to those samples was so egregious and prejudicial that defendant did not receive a fair trial."

For appellant Wright: David M. Kaplan, Penfield (585) 330-2222
For respondent: Monroe County Sr. Asst. District Attorney Geoffrey Kaeuper (585) 753-4674

State of New York Court of Appeals

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To be argued Wednesday, June 3, 2015

No. 120 Greater New York Taxi Association v New York City Taxi and Limousine Commission

The New York City Taxi and Limousine Commission (TLC) has regulated the City's taxi industry since 1971, including periodically adopting standards and specifications for new vehicles approved for use as medallion taxicabs. These specifications might match a particular car model, but the TLC allowed medallion owners to purchase and alter other vehicles to meet its specifications, a process called "hacking up." The TLC took a new approach beginning in 2008 with its "Taxi of Tomorrow" program, in which it would work with a single manufacturer to design a vehicle meeting all of its specifications. The City received proposals from seven manufacturers and the TLC chose three finalists in 2010. After further evaluation, including a public opinion poll, the TLC chose the Nissan NV200 as the Taxi of Tomorrow. In 2012, the TLC adopted new "Taxi of Tomorrow Rules" requiring medallion owners to buy the Nissan vehicle beginning in October 2013, and the City entered into a 10-year contract granting Nissan the exclusive right to manufacture taxicabs and parts. The rules were struck down in a prior lawsuit because they did not allow owners to use hybrid electric cars as taxis, as required by a 2005 law enacted by the City Council. In 2013, the TLC adopted Revised Taxi of Tomorrow Rules giving owners the option to buy the Nissan NV200 or an approved hybrid. The Greater New York Taxi Association and a fleet owner brought this action to challenge the revised rules.

Supreme Court declared the Revised Taxi of Tomorrow Rules invalid, finding the TLC exceeded its authority. "[T]he power to contract and compel medallion owners to purchase the Nissan NV200 ... does not exist in the City Charter. This is not a form of regulation, but a binding and enforceable obligation" imposed on owners "without input or direct negotiations from the medallion owners in the terms of the agreement." The court also found the rules violate the separation of powers doctrine. "The notion that New York City should have one exclusive 'iconic' New York City taxicab is a policy decision that is reserved for the City Council."

The Appellate Division, First Department reversed on a 3-1 vote and declared the rules valid, saying they were "a legally appropriate response to the agency's statutory obligation to produce a twenty-first century taxicab consistent with the broad interests and perspectives that the agency is charged with protecting.... The agency's selection ... of a specific, specially designed model as the exclusive model for New York City taxis was well within the agency's purview of establishing the policy governing taxi service." Regarding separation of powers, it said "the Legislature had clearly articulated its policy regarding the TLC's assigned task, namely, the goal of ensuring ... the comfort of riders, while protecting the public, the environment, the drivers, and the rights of medallion owners." Even if adoption of the rules was policy-making, "the parameters of that policy-making were set by the City Council in the City Charter."

The dissenter said, "[D]espite the delegation to TLC of broad policy-making powers ... to regulate and supervise the taxi industry, in issuing the ... rules, TLC exceeded its statutory authority in a manner that infringed on the City Council's legislative domain.... TLC's authority under the Charter to make rules with respect to vehicle design is limited to rules regulating 'standards' of design, and this does not include the power to issue rules mandating the exclusive use of one purpose-built vehicle manufactured by a single company."

For appellants Taxi Association et al: Mitchell Berns, Manhattan (212) 878-7900
For respondent TLC: Assistant Corporation Counsel Elizabeth I. Freedman (212) 356-0836
For intervenor-respondent Nissan: Peter J. Brennan, Chicago (312) 222-9350

State of New York Court of Appeals

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To be argued Wednesday, June 3, 2015

No. 110 People v Kareem Washington
No. 111 People v Cleveland Lovett

The common question in these unrelated appeals is whether a trial court, in reviewing a defendant's pro se motion for assignment of new counsel, must assign new counsel on the motion if the current defense attorney denies the defendant's allegations of ineffective assistance. The defendants argue their attorneys became advocates against them, in violation of their right to conflict-free counsel, so new attorneys must be appointed to represent them on their motions.

Kareem Washington, charged with first-degree robbery in the Bronx, filed a pro se pre-trial motion for assignment of new counsel, complaining his appointed attorney failed to consult with him on possible legal strategies, inform him of developments, provide him with copies of documents or investigate his witnesses. Supreme Court did not decide the motion until after he was convicted, when his motion papers were found prior to sentencing. After hearing from Washington and his attorney, the court denied the motion as untimely and on the merits, saying defense counsel "tells me he would not have adopted the motion and it's evident to me from what I've heard from you and [defense counsel], that I would not have granted the motion. The things that you say ... about [defense counsel] and what he did and did not do are not true. I accept what [defense counsel] says."

Cleveland Lovett was convicted in Manhattan of criminal possession of a controlled substance in the first and third degrees and reckless endangerment, then made a pro se motion to vacate the conviction on the ground of ineffective assistance of counsel, including failure to object to jury instructions. His assigned counsel submitted an affirmation in which he defended his performance at trial. Supreme Court denied the motion, saying, "I am completely confident in the truthfulness and the accuracy of what [defense counsel] says.... I have some ... experience prior to this motion with you, Mr. Lovett, and some prior experience and subsequent experience with [defense counsel]. I credit entirely what [defense counsel] has told me."

The Appellate Division, First Department affirmed both convictions. In Washington, it said defense counsel's statements in response to the motion for new counsel did not deprive him of his right to conflict-free representation. "'Counsel's remarks outlining his efforts on his client's behalf cannot be compared to a situation where an attorney becomes a witness against his client,'" it said, citing People v Nelson (7 NY3d 883).

The defendants argue that, because a conflict of interest arose when their trial attorneys actively disputed their allegations of ineffective assistance of counsel, they are entitled to new hearings on their motions with new counsel to represent them. They say their attorneys became adverse witnesses and the trial courts, in denying their motions, credited their attorneys' statements over their own, depriving them of their constitutional right to conflict-free counsel.

(110) For appellant Washington: Kami Lizarraga, Manhattan (212) 310-8000
For respondent: Bronx Assistant District Attorney Marc I. Eida (718) 838-6144
(111) For appellant Lovett: Margaret E. Knight, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Nicole Coviello (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, June 3, 2015

No. 112 JF Capital Advisors, LLC v The Lightstone Group, LLC

JF Capital Advisors, an investment consulting firm, brought this action against The Lightstone Group and affiliated real estate investment companies to recover $480,175 in compensation for financial advisory services it allegedly provided under an oral contract from November 2010 to May 2011. JF Capital claimed it provided financial analysis and modeling, market research, data analysis, due diligence, property tours, site visits and other services to Lightstone in connection with eight potential acquisitions or investments. It asserted causes of action for quantum meruit and unjust enrichment.

Lightstone moved to dismiss on the ground the claims were barred by the statute of frauds, General Obligations Law § 5-701(a)(10), which provides that a contract for "negotiating the purchase, sale, exchange, renting or leasing of any real estate or ... of a business opportunity" is void unless it is in writing. The statute states, "'Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction."

Supreme Court dismissed JF Capital's claims relating to three of the investment projects for which it acknowledged assisting in negotiations or preparing bidding documents, finding they were barred by the statute of frauds. It allowed claims relating to the five other projects to go forward "[t]o the extent that [JF Capital's] information was not later used to assist in the negotiation or consummation" of the deals. It said section 5-701(a)(10) "applies to situations where the plaintiff assists in the negotiation or consummation of a business transaction, not to situations where negotiations do not occur at all or where business transactions are not pursued."

The Appellate Division, First Department modified by dismissing the remaining claims. It said the lower court properly dismissed the claims relating to three projects where JF Capital "plainly acted as an intermediary as the statute of frauds contemplates.... That plaintiff provided other services in addition to negotiating deals is not dispositive here. On the contrary, plaintiff undertook those other services to assist defendants' negotiations, largely by determining the value to defendants of pursuing the deal...." As for the investment analysis JF Capital provided for the five remaining projects, the court said, "At the very least, plaintiff's services in this context amount to 'assisting in the negotiation or consummation of the transaction'.... Indeed, investment analyses and financial advice regarding the possible acquisition of investment opportunities 'clearly fall within' General Obligations Law § 5-701(a)(10)...."

JF Capital argues the Appellate Division ruling "extends the Statute of Frauds well beyond the intent of the Legislature ... to prevent claims for brokerage and finder's fees based on oral testimony" and "beyond the scope of any prior decision of this Court," creating "a per se category of services subject to the Statute of Frauds in violation of this Court's admonitions against such 'sweeping generalizations'...." "It is undisputed that JF Capital provided over 1,400 hours of financial advisory services to and exchanged over 7,000 e-mails with Lightstone...," it says, and "the parties had agreed that JF Capital would be paid for such work, independent of whether Lightstone pursued any such Project...."

For appellant JF Capital: Jason Stern, Melville (631) 549-2000
For respondents Lightstone et al: Elizabeth S. Saylor, Manhattan (212) 763-5000

State of New York Court of Appeals

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To be argued Wednesday, June 3, 2015

No. 114 Eric M. Berman, P.C. v City of New York

New York City has regulated debt collection agencies by local law since 1984 and requires all such agencies to obtain a license from the Department of Consumer Affairs (DCA). The original statute exempted "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." The City Council amended the law to strengthen its consumer protections in 2009 by enacting Local Law 15, which also revised the definition of "debt collection agencies" to exclude "any attorney-at-law or law firm collecting a debt in such capacity on behalf of and in the name of a client solely through activities that may only be performed by a licensed attorney, but not any attorney-at-law or law firm or part thereof who regularly engages in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt or other activities as determined by rule of the commissioner." Local Law 15 also expanded the definition of collection agency to "include a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt." Two debt-collection law firms -- Eric M. Berman, P.C., and Lacy Katzen, LLP -- filed this federal action in the Eastern District of New York to challenge Local Law 15 on several grounds, including preemption by the New York Judiciary Law.

U.S. District Court ruled "Local Law 15 is in direct conflict with ... Judiciary Law §§ 53 and 90 and, thus, is preempted to the extent it seeks to regulate attorney conduct. Section 53 authorizes the New York Court of Appeals to adopt rules for the admission of attorneys, and section 90 gives the Supreme Court and its appellate Division the power to regulate the practice of law and to discipline attorneys for misconduct. "Under Local Law 15, no attorney or law firm may regularly represent creditors seeking to recover on consumer debts without first obtaining a DCA license and ... complying with DCA licensing requirements," it said. "But it is simply not within the DCA's power to license attorneys or regulate their professional conduct.... Rather, when an attorney contacts a debtor on behalf of a client, she acts as an officer of the court, and is subject to the supervision and control of the New York judiciary." It found the local law also violates City Charter § 2203(c), which gives the DCA commissioner the power to grant and revoke "all licenses and permits, except in the cases with respect to which and to the extent to which any of said powers are conferred on other persons or agency by laws."

The U.S. Court of Appeals for the Second Circuit said Local Law 15 "does not, on its face, appear to regulate an attorney who is collecting a debt in her representative capacity as a licensed attorney, in the name of a client, and through activities that only a licensed attorney can perform," but "appears to cover attorney conduct, such as calling a debtor on the telephone, when it is not performed in the name of a client and in a manner reserved solely for licensed attorneys." The Second Circuit said it is not "entirely clear" how the law applies to attorneys and it is asking this Court, in a pair of certified questions, to determine whether Local Law 15 conflicts with the Judiciary Law and encroaches on the state's authority to regulate attorneys and, if it is not preempted by state law, whether it violates the City Charter.

For appellant City: Assistant Corporation Counsel Janet L. Zaleon (212) 356-0860
For amicus curiae State: Assistant Solicitor General Karen W. Lin (212) 416-6197
For respondent Law Firms: Max S. Gershenoff, Uniondale (516) 357-3000

State of New York Court of Appeals

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 115 Burton v New York State Department of Taxation and Finance

Robert Burton and 14 other investors, all residents of Tennessee, sold all of their stock in JBS Sports, Inc., a Tennessee corporation, to Yahoo! Inc. for more than $80 million in 2007. JBS was organized as an S corporation for federal and New York tax purposes. The JBS shareholders and Yahoo made an election under Internal Revenue Code (26 USC) § 338(h)(10) to treat the 2007 transaction as a "deemed asset sale" for tax purposes. The shareholders reported their gains from the sale for federal income taxes, but did not report the gains as New York source income for state income taxes.

After a 2011 audit, the state Department of Taxation and Finance (DTF) ruled any gain from the deemed asset sale was New York source income taxable by New York and it assessed the shareholders $167,000 in income taxes. DTF's determination was based on a retroactive amendment enacted in 2010, Tax Law § 632(a)(2), which provides, in part, "[I]f the shareholders of the S corporation have made an election under section 338(h)(10) of the Internal Revenue Code, then any gain recognized on the deemed asset sale for federal income tax purposes will be treated as New York source income...." The shareholders brought this action to challenge the tax assessment, claiming the application of Tax Law § 632(a)(2) to them violated article XVI, § 3 of the New York Constitution, which provides, "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation."

Supreme Court declared the amended tax law provision constitutional and dismissed the suit, finding the shareholders' election to treat the stock sale as a deemed asset sale under the Internal Revenue Code changed the nature of the transaction for New York tax purposes from a nontaxable stock sale to a taxable asset sale. Rejecting their claim that Tax Law § 632(a)(2) violates the constitutional bar against taxing the sale of intangible property of a nonresident, the court said their argument "ignores their direct election to treat the transaction as an asset sale.... [T]he effect of [Tax Law § 632(a)(2)] is simply to conform the characterization of the transaction on both the Federal and New York State returns. In doing so, treating an 'asset sale' as New York source income does not run afoul of the constitutional prohibition against taxing a nonresident's intangible personal property."

On direct appeal to this Court, the shareholders argue the constitution "is clear that unless the nonresident shareholder of a corporation uses his ownership interest in the entity in some other trade or business carried on in New York State, the intangible property is 'deemed located at the domicile of the owner' and the gain from the sale thereof is not New York source income.... Nor does the rule change because the sale of stock relates to ... an S corporation that made an election to treat the sale as a fictitious sale of assets under" federal law. They say their "federal election may not be treated as a waiver of the constitutional restriction on taxing nonresidents.... [T]he constitutional provision is a matter of public policy and not merely a matter of private rights. Further, there was no specific, voluntary and knowing[] waiver.... The 2010 legislative amendment was enacted three years after the sale of the stock which the State now seeks to tax."

For appellants Burton et al: Kenneth I. Moore, Manhattan (212) 682-5702
For respondent DTF: Assistant Solicitor General Judith N. Vale (212) 416-6274

State of New York Court of Appeals

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 116 Caprio v New York State Department of Taxation and Finance

Philip and Phyllis Caprio are residents of Florida and former sole shareholders of Tri-Maintenance & Contractors, Inc. (TMC), a New Jersey S corporation that conducted some of its business in New York. On February 1, 2007, they sold their TMC stock to Sanitors Services, Inc. for a base price of about $20 million plus additional contingent payments based on TMC's performance. Sanitors agreed to pay the base price in two installments -- a payment of $19.5 million on March 1, 2007, and the remaining $500,000 on February 1, 2008 -- and gave the Caprios promissory notes for the installment obligations. The parties made an election under Internal Revenue Code (26 USC) § 338(h)(10) to treat the stock sale as a deemed sale of TMC's assets, followed by liquidation of TMC. TMC distributed the installment obligations to the Caprios and, pursuant to IRC 453(h)(1)(A), the Caprios reported and paid federal income taxes on their gains from the sale as they received the installment and contingent payments, but they did not pay New York taxes on the gains.

In 2010, the Legislature amended the Tax Law by enacting section 632(a)(2). It states, if an S corporation has distributed an installment obligation to a nonresident shareholder under IRC 453(h)(1)(A), "then any gain recognized on the receipt of payments from the installment obligation for federal income tax purposes will be treated as New York source income." It also provides, if S corporation shareholders make an election under IRC 338(h)(10), "then any gain recognized on the deemed asset sale for federal income tax purposes will be treated as New York source income." The amendments apply retroactively to tax years beginning on or after January 1, 2007. In 2011, after an audit, the state Department of Taxation and Finance (DTF) assessed the Caprios $775,000 in taxes and interest due on the TMC deal. The Caprios filed this action, claiming retroactive application of the amendments violate due process.

Supreme Court granted summary judgment to the State and dismissed the suit, saying the 2010 amendments did not create a "wholly new tax," but were meant to correct and clarify two 2009 determinations by the Division of Tax Appeals, Matter of Mintz and Matter of Baum, which altered the taxation of transactions by nonresident shareholders of S corporations. It said the Caprios could not have relied on the 2009 decisions in structuring their 2007 stock sale, and retroactivity was a rational legislative response to the "aberrational" rulings in Mintz and Baum.

The Appellate Division, First Department reversed on a 4-1 vote and ruled retroactive application of the amendments to the Caprios violated due process. It said the State failed to show it "had a long-standing practice of taxing S corporations for transactions like the TMC sale" prior to Mintz and Baum, and the Caprios structured their sale "in reasonable reliance on the previous law." It said the amendments were not "a curative measure," but were meant to raise $30 million for the 2010-11 state budget, which "is not a particularly compelling justification." It also found the length of the retroactive period was excessive.

The dissenter agreed with Supreme Court that the amendments were a "curative" response to Mintz and Baum and that their retroactive application was "rationally related to the legislative goal of minimizing the negative impact" of those decisions. "Due process does not prohibit the legislature from making the equitable choice to deny plaintiffs the windfall of tax immunity, rather than inflict costs and burdens on other, innocent taxpayers," he said.

For appellants DTF et al: Assistant Solicitor General Judith N. Vale (212) 416-6274
For respondent Caprios: John G. Nicolich, Manhattan (212) 907-9600

State of New York Court of Appeals

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 117 People v Stanley A. Brown *(papers sealed)*

Stanley Brown was charged in Jefferson County with sexually abusing a young girl over a six-year period, beginning when she was three years old, and engaging in forcible oral sexual conduct with a 12-year old boy. In 2007, he entered a guilty plea to attempted course of sexual conduct against a child in the first degree and an Alford plea to attempted sodomy in the first degree. Brown, who had a prior felony conviction for driving while intoxicated, was sentenced as a second felony offender to concurrent terms of 6½ years in prison.

Prior to his release in 2012, the Board of Examiners of Sex Offenders recommended he be assessed 135 points in his risk assessment under the Sex Offender Registration Act (SORA) based on the nature of his crimes and his record, which would presumptively classify him a level three sex offender. At his County Court hearing, Brown sought a downward departure from his presumptive risk level. He also objected to the assessment of 15 points based on his prior felony DWI conviction, for which he had obtained a certificate of relief from disabilities.

County Court held that clear and convincing evidence supported the assessment of 135 points and that a downward departure was not warranted. It told him "the level of the information that you have provided indicates to me that there is not sufficient evidence for a departure, so that I will rank you a Level Three."

On appeal to the Appellate Division, Fourth Department, Brown argued he had proved a downward departure was warranted by clear and convincing evidence, the level of proof then required by the Fourth Department. He also pointed out the Second Department required proof by a preponderance of the evidence, a less stringent standard. The Fourth Department affirmed, without opinion, the order designating Brown a level three sex offender.

Brown observes that, after the Fourth Department decided his appeal, this Court resolved the departmental conflict over the standard of proof in People v Gillotti and People v Fazio (23 NY3d 841 [2014]), holding that SORA defendants must prove mitigating factors supporting a downward departure by a preponderance of the evidence, not clear and convincing evidence. He argues that he "is at least entitled to have his case remitted to the Appellate Division for application of the correct standard of proof to his downward departure request, along with a review of the discretionary aspect of the SORA court's departure decision."

For appellant Brown: Mark C. Davison, Canandaigua (585) 394-5222
For respondent: Jefferson County District Attorney Cindy F. Intschert (315) 785-3053

State of New York Court of Appeals

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 118 People v Dean Pacquette

In the early morning hours of May 17, 2007, Dean Pacquette was arrested in a buy-and-bust operation near Washington Square Park in Manhattan. Detective James Vanacore, acting as a "ghost" officer, watched from across the street as an undercover officer interacted with a drug seller, a tall black male wearing a gray hooded sweatshirt and a dark baseball cap, and signaled that he had bought drugs. The undercover officer then walked away with another suspect and the seller left in the opposite direction. Vanacore followed the undercover officer, losing sight of the seller for a time. Another officer pursued and arrested Pacquette, who he said was the only person in the area matching the description. About 10 or 15 minutes after the drug sale, Vanacore and the undercover officer returned to the scene and identified Pacquette as the seller. Officers found the prerecorded buy money in his pocket.

The prosecutor gave pre-trial notice, pursuant to CPL 710.30(1)(b), that he intended to present testimony of one officer who made a confirmatory identification of Pacquette. After a hearing, Supreme Court ruled the undercover officer's testimony was admissible. At trial, the prosecutor said in his opening statement that he would call the undercover officer and Detective Vanacore to testify about their identifications of Pacquette. Defense counsel objected that he had been given no notice of a second identification witness and moved to preclude Vanacore's testimony. The court denied the motion after a hearing, finding Vanacore's identification was confirmatory and so not subject to the notice requirement. Pacquette was convicted of third-degree criminal sale of a controlled substance and sentenced to five years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly determined that an identification made by an officer other than the purchasing undercover officer was confirmatory and thus did not require CPL 710.30(1)(b) notice (see People v Wharton, 74 NY2d 921 [1989]). The requirements of a police confirmatory identification were met, in that the officer at issue carefully observed defendant at close range throughout the drug transaction and made a prompt identification as part of a planned procedure.... The officer also transmitted a detailed and accurate description of defendant." It also said any error was harmless.

Pacquette argues notice was required under People v Boyer (6 NY3d 427 [2006]), which said the Wharton exception applies only where the "officer's observation of defendant is so clear that the identification could not be mistaken." He says Vanacore "did not engage in a careful face-to-face transaction with the seller, or anything equivalent to it, which might have carried the bullet-proof assurance that his subsequent identification 'could not be' the product of undue suggestiveness.... [H]is initial observation of the fleeting drug transaction ... was made from a distance across the street, on a slight diagonal, past midnight, in a crowded West Village neighborhood. Then ... Vanacore promptly lost sight of the suspect for 10 or 15 minutes as he tailed the undercover purchasing officer off the set."

For appellant Pacquette: Carl S. Kaplan, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Brian R. Pouliot (212) 335-9000