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.

MARCH 23 - 26, 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, March 23, 2015

No. 53 Matter of State of New York v Robert F. *(papers sealed)*

Robert F. was convicted of first-degree sexual abuse and sentenced to five years in prison in 2005. He had a lengthy criminal history including convictions for rape and other sex offenses stretching back to 1974, when he was convicted of first-degree sexual abuse as a youthful offender at the age of 17. In 2009, as he drew near the end of his most recent prison term, the State brought this proceeding for his civil confinement under Mental Hygiene Law article 10.

After a jury found that he suffered from a mental abnormality that predisposed him to commit sex crimes, Supreme Court held a non-jury dispositional hearing to determine whether he should be confined. The State's expert witness testified in person that she had diagnosed him with pedophilia, antisocial personality disorder and alcohol dependence, and she opined that he was a dangerous sex offender requiring confinement. After the State rested, Robert F. took the stand and under cross-examination disclosed that the victim in his 1974 sexual abuse case had been a stranger to him. On rebuttal, the court allowed the State to recall its expert witness to testify by two-way video conference that she would have increased his recidivism risk score by one point if she had been aware the 1974 victim was a stranger. The court found Robert F. was a dangerous sex offender and committed him to a secure treatment facility. On appeal, Robert F. argued the court erred in allowing the State's expert to provide rebuttal testimony by video conference rather than in person.

The Appellate Division, Second Department affirmed. "[I]n the absence of an explicit prohibition, the trial court has the discretion to utilize live video testimony pursuant to its inherent power to employ innovative procedures where 'necessary to carry into effect the powers and jurisdiction possessed by it,'" the court said, citing Judiciary Law § 2-b(3) and People v Wrotten (14 NY3d 33). "The limited use of that power in the instant case was not an improvident exercise of discretion. In addition, it did not violate any constitutional right of the defendant..., especially since the proceeding was civil in nature...."

Robert F. argues that article 10 does not permit video testimony at dispositional hearings. Because the Legislature amended article 10 in 2012 to provide that psychiatric examiners "may be permitted, upon good cause shown, to testify by electronic appearance" at pre-trial probable cause hearings, but made no similar amendment for trials or dispositional hearings, "the Legislature's intent to exclude electronic appearances from the trial and dispositional hearing is evident..., and no further exceptions can legally be inferred." Even if video testimony is authorized upon a showing of good cause, he says, "the State never argued, let alone proved, that there were exceptional circumstances justifying the electronic appearance" in his case.

For appellant Robert F.: Timothy M. Riselvato, Mineola (516) 746-4373
For respondent State: Assistant Solicitor General Jason Harrow (212) 416-8025

State of New York Court of Appeals

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To be argued Monday, March 23, 2015

No. 70 Matter of Soares v Carter

In June 2012, during an Occupy Albany march on Lark Street, Albany police arrested four marchers for disorderly conduct, a violation, and charged one of them, Colin Donnaruma, with a misdemeanor count of resisting arrest. At their arraignments before Albany City Court Judge William A. Carter, the Albany County District Attorney's Office filed superseding informations and declared readiness for trial. At an appearance in August 2012, after plea negotiations, the prosecutor recommended that the charges be adjourned for six months in contemplation of dismissal. Judge Carter refused to accept the pleas unless community service was required, a condition the defendants rejected. The defendants moved to dismiss the charges. District Attorney P. David Soares did not oppose the motions and informed Judge Carter by letter that he declined to prosecute the cases and would not participate in future proceedings.

In November 2012, Judge Carter denied the motions and said, if a prosecutor failed to appear at the next court date, "this Court may be forced to utilize one of the few available options left to it under these circumstances, including, but not limited to, its contempt powers." In a second letter, Soares told the judge his office would appear at all court dates, but "the People will not be going forward or calling any witnesses at any hearings or trials ... and are, accordingly, not ready for trial." At a May 2013 suppression hearing, when the prosecutor said no witnesses would be called or proof presented, Judge Carter said a willful refusal to participate could result in contempt. The judge agreed the District Attorney has discretion to decide which cases to prosecute, but said, "You have already proceeded. You have already started. You simply can't walk away from this case.... That is nowhere in the law and its not the same thing as exercising your discretion." Soares brought this article 78 proceeding to prohibit the judge from ordering him to call witnesses under threat of contempt. The defendants also commenced a proceeding to require the judge to dismiss the charges and bar him from compelling Soares to prosecute. Supreme Court denied the defendants' petition, but granted Soares' petition to the extent of prohibiting Judge Carter from requiring him to call witnesses or submit proof at the suppression hearings.

The Appellate Division, Third Department affirmed, finding the order did not infringe on Judge Carter's contempt powers or his authority to require compliance with the Criminal Procedure Law (CPL). "[S]ince the CPL does not require [Soares] to call witnesses or put on proof at the suppression hearing, and given a district attorney's broad discretion -- implicating separation of powers -- in determining the manner to proceed in a criminal case..., [Judge Carter] cannot mandate such action under threat of contempt. It is a simple, narrow, potentially ultra vires action that is being prohibited by Supreme Court's judgment." While district attorneys may not unilaterally dismiss criminal cases, it said these charges could be resolved with a motion to dismiss in the interest of justice under CPL 170.40, especially where the prosecutor and defendants agree on dismissal.

Judge Carter argues he did not direct Soares to call witnesses at a hearing, but required him to resolve the cases in compliance with the CPL by pursuing prosecution, entering a plea agreement, or moving to dismiss, and Supreme Court's order improperly diminished his contempt powers. "[A] deliberate attempt by a district attorney to avoid the strictures of the [CPL], when done in contradiction to the repeated orders of a judge, amounts to contempt, and a city court judge has the lawful power to hold such a district attorney in contempt." He says the Appellate Division decision gives district attorneys the power to unilaterally terminate criminal actions by refusing to continue prosecutions and "has the effect of reallocating the ultimate power to approve or disapprove of certain dispositions from the judicial branch to the executive branch."

For appellant Carter: James C. Knox, Troy (518) 274-5820
For respondent Soares: Albany County Asst. District Atty. Christopher D. Horn (518) 487-5460
For respondents Donnaruma et al: Mark S. Mishler, Albany (518) 462-6753

State of New York Court of Appeals

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To be argued Monday, March 23, 2015

No. 55 People v Sergio Rodriguez

Rodney Paige was walking home to the Baruch Houses in Manhattan in May 2007 when he was accosted by three men on bicycles. One of them produced a gun and demanded that Paige hand over his gold chain. As Paige tried to remove it, the gunman shot him three times. An accomplice took Paige's chain and cell phone, and the three men fled. Paige later identified Sergio Rodriguez as the shooter.

Rodriguez was convicted of second-degree attempted murder, first-degree assault, first-degree robbery (two counts), and second-degree robbery. Supreme Court originally sentenced him to 40 years in prison, imposing consecutive terms of 25 years for attempted murder and 15 years for assault, and concurrent terms of 25 and 15 years for the robbery convictions.

The Appellate Division, First Department held the consecutive terms for attempted murder and assault violated Penal Law § 70.25(2) "because there is no basis for finding that these crimes were committed through separate acts." It remitted the case so the trial court "may restructure the sentences to arrive lawfully at the aggregate sentence which it clearly intended to impose," suggesting that one of the robbery sentences could be made consecutive to the sentence for attempted murder or assault to maintain the 40-year term. It said this would not violate CPL 430.10 because "the People seek resentencing only to realign which sentences are to run consecutively, not to disturb any of the individual sentences." CPL 430.10 provides that "when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced."

This Court affirmed in People v Rodriguez (18 NY3d 667), saying, "[W]hile it is premature for us to take a position on whether the trial court may sentence defendant other than to make all sentences run concurrently, it is clear that CPL 430.10 does not preclude the Appellate Division remitting for resentence."

At resentencing, the trial court made the 25-year term for first-degree robbery run consecutively to the 15-year term for first-degree assault. The Appellate Division affirmed, saying, "[T]he fact that those sentences had originally been imposed concurrently did not result in a violation of CPL 430.10, even though defendant's sentences had already commenced. Furthermore, the consecutive terms did not violate Penal Law § 70.25(2), because the robbery conviction was based on defendant's display of something appearing to be a firearm (which proved to be an actual firearm), and the assault count was based on defendant's separate act of shooting the victim...."

Rodriguez argues that his "newly imposed consecutive sentences run afoul of [Penal Law] § 70.25(21), as would any consecutive sentencing in his case. In essence, ... the assault -- whose *actus reus* was the shooting -- was part of a single, aggravated robbery, and thus did not allow for cumulative punishment. He also argues that CPL 430.10 "barred the trial court from changing his previously -- and lawfully -- imposed sentences to his detriment" once they had commenced. "Neither the Appellate Division's remand authority, under [CPL] 470.20, nor the exceptions to § 430.10 itself ... permitted this adverse change."

For appellant Rodriguez: Susan H. Salomon, Manhattan (212) 577-2523 ext. 518
For respondent: Manhattan Assistant District Attorney Eleanor J. Ostrow (212) 335-9000

State of New York Court of Appeals

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To be argued Monday, March 23, 2015

No. 56 Matter of Kasckarow v Board of Examiners of Sex Offenders of the State of New York *(papers sealed)*

Daniel Kasckarow was 18 years old and living in Florida in 1998 when he was charged with the felony crime of sexual battery on a child under the age of 16. He entered a plea of nolo contendere. The Florida court withheld adjudication and placed him on "sex offender probation" for four years. Florida law gives criminal courts discretion to "either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt" where they find that a defendant "is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." The court granted him early termination of his probation in 2001, but he was required to register as a sex offender in Florida for the rest of his life.

After Kasckarow notified New York authorities that he was a registered sex offender in Florida and he intended to move to New York, the Board of Examiners of Sex Offenders determined that he was required to register as a sex offender under New York's Sex Offender Registration Act (SORA). On the Board's recommendation, Supreme Court designated him risk level one. Kasckarow brought this article 78 proceeding to challenge the determination, arguing his Florida plea was not a "conviction" under New York law.

Supreme Court dismissed the proceeding, holding that "a nolo contendere plea is sufficiently akin to a guilty plea to be deemed a conviction" for SORA purposes. "There is also nothing fundamentally unfair about [this] ... since, as [Kasckarow] concedes, [his] nolo contendere plea with adjudication withheld ... constitutes a conviction for purposes of Florida's sex [offender] registration requirements...." Rejecting his assertion that a nolo contendere plea with adjudication withheld is equivalent to a youthful offender adjudication, it said the argument "ignores the fact that Florida has its own youthful offender statute ... and that [Kasckarow] was not adjudicated as a youthful offender...."

The Appellate Division, Second Department affirmed, saying Kasckarow's "nolo contendere plea was similar to an Alford plea..., in which a defendant may plead guilty to a crime without admitting culpability.... The Court of Appeals has held that 'a conviction premised upon an Alford plea may generally be used for the same purposes as any other conviction'...."

Kasckarow argues his nolo contendere plea is not a conviction under SORA, since it "reflects a defendant's choice to 'not plead either guilty or not guilty'.... SORA does not define the word 'conviction'..., but under the [CPL 1.20(13) definition of the word, there was never a 'conviction' in this case because there was no guilty plea or guilty verdict." Coupled with the Florida court's decision to withhold adjudication, he says his plea "cannot be treated as a conviction because he is, by virtue of the adjudication being withheld, 'not a convicted person'...." He says his nolo contendere plea with adjudication withheld is comparable to a youthful offender adjudication in New York.

For appellant Kasckarow: Anna Pervukhin, Manhattan (212) 693-0085
For respondent Board: Assistant Solicitor General Claude S. Platton (212) 416-6511

State of New York Court of Appeals

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To be argued Monday, March 23, 2015

No. 57 People v Anthony N. Pacherille

In April 2010, Anthony Pacherille came upon Wesley Lippitt, an African American classmate at Cooperstown High School, in a park and chased him into the village police station. Pacherille fired twice at him with a .22 caliber rifle, striking the victim once in the arm. Pacherille then attempted suicide by shooting himself under the chin. Both survived. Pacherille left a lengthy suicide note in which he expressed racist views. He was charged with several hate crimes, including first-degree attempted murder.

Pacherille pled guilty to second-degree attempted murder as a non-hate crime, in satisfaction of all charges, and waived his right to appeal. At sentencing Pacherille, who was 16 at the time of the crime, asked to be sentenced as a youthful offender. County Court denied the request and sentenced him as an adult to the promised term of 11 years in prison. The court said, in part, "Today he asks the court to vacate, that is essentially erase his conviction, and sentence him to little or no additional jail time as a youthful offender.... Due to the violent nature of his crime and its resulting harm and his admission during the plea allocution his actions were racially motivated, the court cannot say the interests of justice would be served by granting youthful offender status or by not imposing the agreed upon sentence."

Pacherille filed a CPL 440.20 motion to set aside his sentence. The sentencing judge recused himself and a different judge denied the motion, saying that any "lenient deviation from the agreed upon sentence" would require the consent of the prosecutor. "That the sentencing judge took pains ... to articulate why ... a youthful offender adjudication would be inappropriate, should not be mistaken for the proposition that a youthful offender sentence was indeed a potential outcome in this case. In point of fact, absent the consent of the People, there is no circumstance under which this defendant, under the circumstances of this plea, was going to be adjudicated a youthful offender...."

The Appellate Division, Third Department affirmed the sentence and the denial of the motion to vacate.

Pacherille argues that his sentencing violated CPL 720.20(1) and People v Rudolph (21 NY3d 497). CPL 720.20(1) provides that, where a convicted defendant is eligible for youthful offender status, the sentencing court "must determine whether or not the eligible youth is a youthful offender." In Rudolph, this Court said, "We read the legislature's use of the word 'must' in this context to reflect a policy choice that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain." He also argues that the sentencing court abused its discretion in refusing to treat him as a youthful offender and that his sentence amounted to cruel and unusual punishment.

For appellant Pacherille: Frank Policelli, Utica (315) 793-0020
For respondent: Otsego County District Attorney John M. Muehl (607) 547-4249

State of New York Court of Appeals

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To be argued Tuesday, March 24, 2015

No. 48 Matter of Natural Resources Defense Council, Inc. v New York State Department of Environmental Conservation

The Natural Resources Defense Council, Riverkeeper and six other environmental groups filed this suit against the Department of Environmental Conservation (DEC) in 2010, claiming certain provisions of a state pollutant discharge elimination system (SPDES) permit regulating stormwater discharges by more than 500 small municipalities in New York do not comply with the federal Clean Water Act and state Environmental Conservation Law. Among other things, they argued that DEC, in drafting the statewide permit, improperly created a self-regulatory system allowing municipalities to choose their own stormwater pollution controls without DEC oversight or public participation, and that it did not require municipalities to reduce discharges to the "maximum extent practicable" or conduct monitoring of their discharges as required by state and federal law.

Supreme Court, Westchester County granted the NRDC petition in part, finding the SPDES permit "creates an impermissible self-regulatory system" that fails to ensure discharges are reduced to the maximum extent practicable. "[N]othing in the .. Permit requires DEC to review the control measures which any given [municipal] operator allegedly plans to develop to ensure that such measures will in fact reduce pollutant discharge to the [maximum extent practicable]. In effect..., each operator that submits a complete [notice of intent to discharge] is authorized to discharge stormwater while it decides for itself what reduction in pollutant discharge would meet the [maximum extent practicable] standard, what control measures should be utilized, and whether that standard will in fact be met." The court also found the permit failed to provide for federally-required public hearings on the discharge reduction targets and pollution control plans of municipalities, but it rejected most of the plaintiffs' other claims.

The Appellate Division, Second Department dismissed the NRDC petition and upheld the SPDES permit in its entirety, except for one now-uncontested issue regarding compliance schedules. It said the permit "is consistent with the scheme for general permits envisioned by the [Environmental Protection Agency]" and "requires entities seeking coverage to 'develop, implement and enforce' a stormwater management plan designed to address pollutants of concern and 'reduce the discharge of pollutants ...' to the maximum extent practicable...." The permit "does include a variety of enforcement measures that are sufficient to comply with" state and federal law, it said "Under the General Permit itself and state implementing regulations in general, the DEC is vested with sufficient authority to enforce the statutory mandates ... to reduce pollution discharge to the maximum extent practicable." Regarding hearings, it said DEC's "determination to provide for public participation in the establishment of effluent limitations at the general permit issuance and renewal stages, but not after the issuance of the general permit, is not contrary to 33 USC § 1251(e).

For appellants NRDC et al: Lawrence M. Levine, Manhattan (212) 727-2700
For respondent DEC: Solicitor General Barbara D. Underwood (212) 416-6184

State of New York Court of Appeals

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To be argued Tuesday, March 24, 2015

No. 58 People v Jarrod Brown

This appeal turns on whether a parolee is in the "custody" of the Department of Corrections and Community Supervision (DOCCS) within the meaning of CPL 440.46(1), which allows certain drug offenders who were sentenced under the Rockefeller Drug Laws to apply for resentencing under the Drug Law Reform Act of 2009. As enacted in 2009, the statute applied to offenders "in the custody of the department of correctional services." Parolees, who were then in the "legal custody" of the Division of Parole pursuant to Executive Law § 259-i, were not eligible for resentencing. In 2011, a state budget bill merged Correctional Services and Parole into a single agency, DOCCS, and the statutes were amended to reflect the change, so that "[a]ny person in the custody of the department of corrections and community supervision" could apply for resentencing under CPL 440.46(1).

In 2002, Jarrod Brown pled guilty to third-degree criminal sale of a controlled substance in Queens and was sentenced to 6 to 12 years in prison. After serving nearly eight years, Brown was released on parole in April 2011, about two weeks after the merger amendments took effect, and he moved for resentencing under CPL 440.46(1). The District Attorney opposed the motion, arguing Brown was ineligible because he was on parole, not incarcerated, and thus was not in the "custody" of DOCCS.

Supreme Court granted Brown's motion and resentenced him to a seven-year prison term, saying the language of CPL 440.46(1), "as amended, does not distinguish between defendants who are incarcerated and those who are on parole." On the merits, it said Brown "appears to be a low-level drug dealer and user, and not a major participant in the illegal trafficking of drugs.... [S]ubstantial justice does not require that [his] application for resentence be denied."

The Appellate Division, Second Department affirmed. "The plain language of CPL 440.46(1) encompasses '[a]ny person in the custody of [DOCCS].' According to Executive Law § 259-i(2)(b), a nonincarcerated parolee is within the legal custody of DOCCS. Thus, a plain reading of the statute leads to the conclusion that a nonincarcerated parolee is eligible to apply for resentencing...." It said this is "entirely consistent" with the legislative history. "The Legislature clearly intended that lengthy sentences be replaced by shorter ones as a matter of course and that only in exceptional cases ... should [defendants] be deprived of the ameliorative effect of the statute."

The District Attorney's Office argues the 2011 amendments "were technical in nature, doing nothing more than conforming section 440.46 to reflect the new name of the Department of Correctional Services after it was merged with the Division of Parole. Because the operative language of the statute was not changed and because nothing in the legislative history evinces any intent to change the eligibility requirements of the statute, the amendment should have had no effect on the pool of eligible defendants." It says "the original intent behind the enactment of [CPL 440.46] was to shorten the harsh sentences of imprisonment under the Rockefeller drug laws..., not to truncate defendants' supervised transition back into society through parole."

For appellant: Queens Assistant District Attorney Danielle S. Fenn (718) 286-5838
For respondent Brown: David Crow, Manhattan (212) 577-3282§

State of New York Court of Appeals

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To be argued Tuesday, March 24, 2015

No. 59 Matter of Dempsey v New York City Department of Education

Luther Dempsey applied to the New York City Board of Education (DOE) in 2006 for certification as a school bus driver, which would permit him to drive DOE buses. He disclosed that he had two felony drug convictions in 1990 and three theft-related misdemeanors, the most recent in 1993. He explained that he had been addicted to heroin until 1994, when he entered a treatment program, but said he has been drug free since then. He obtained a commercial driver's license in 1996 and has been steadily employed, primarily as a private school bus driver. Supreme Court issued him a certificate of relief from disabilities for his crimes in 2002.

DOE denied his application based largely on the seriousness of his offenses and his "mature age ... at the time of some of the offenses," which made him "unsuitable ... for school bus service and the resultant close supervision of school children in the relative[ly] unsupervised environment of a school bus." Dempsey brought this proceeding to challenge the determination arguing, in part, that DOE violated Correction Law §§ 752 and 753, which prohibit agencies from denying a license based on an applicant's prior convictions unless there is "a direct relationship" between the license sought and the prior offenses or granting the license "would involve an unreasonable risk to property or to the safety or welfare" of the public.

Supreme Court annulled the determination as arbitrary and capricious and ordered DOE to approve Dempsey's application, saying DOE "failed to consider all eight factors" in Correction Law § 753. "A review of the papers demonstrates that [DOE] only considered petitioner's criminal history ... and failed to consider his extensive evidence of rehabilitation. Petitioner's last conviction was eighteen years ago and he obtained a certificate of relief from disabilities."

The Appellate Division, First Department reversed and denied the petition on a 3-1 vote. It said DOE's "2011 determination that petitioner's prior drug-related convictions as an adult bore on his fitness and/or ability to perform his school bus duties was rationally based, and it shows DOE gave due consideration to the relevant factors under Correction Law § 753 before denying his application. Although petitioner avers he has been drug free since 1994, and his crimes were directly related to his drug addiction at the time, the offenses were not youthful indiscretions (he was 41 years old), but were of a serious nature since each involved narcotics." The certification he sought "would place him in direct daily contact with school aged children and require him to closely monitor and supervise them...." It said the trial court "improperly reweighed the factors set forth in the Correction Law and substituted its own judgment...."

The dissenter argued the determination was arbitrary and capricious and violated the Correction Law and the state and city Human Rights Laws. DOE's review "did not properly consider the eight factors" in section 753 and was "based on inaccurate in formation," she said. "It made no reference to the time that had elapsed since the last conviction (now 20 years), petitioner's lengthy experience successfully driving school buses with the ... type of children he would be driving and supervising were the license granted, or the extensive evidence of complete rehabilitation that petitioner furnished."

For appellant Dempsey: Nicole Salk, Brooklyn (718) 237-5500
For respondent DOE: Assistant Corporation Counsel Karen M. Griffin (212) 356-0845

State of New York Court of Appeals

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To be argued Tuesday, March 24, 2015

No. 60 Matter of Banos v Rhea
No. 61 Matter of Dial v Rhea

Tayinha Banos and Viola Dial filed these article 78 proceedings to challenge the termination of their Section 8 rent subsidies by the New York City Housing Authority (NYCHA). The defendants included NYCHA Chairman John Rhea and Dial's landlord, 690 Gates, LP. Banos and Dial argued their benefits were improperly denied because NYCHA did not comply with the notice requirements of the first partial consent judgment in Williams v New York City Hous. Auth. (US Dist Ct, SD NY, 81 Civ 1801, Ward, J., 1984). NYCHA moved to dismiss both proceedings, which were commenced more than a year after they received NYCHA's notice of default, on the ground that the four-month statute of limitations had expired.

Supreme Court denied NYCHA's motions. It said NYCHA failed to show that it followed the three-stage notice procedure specified in the Williams consent decree, which requires the Authority to first send a warning letter stating the basis for termination of benefits, followed by a notice of termination informing tenants of their right to a hearing and stating specific grounds for termination, and finally, if the tenant does not respond. a notice of default advising the tenant that the subsidy will be terminated in 45 days.

The Appellate Division, Second Department affirmed on a 3-1 vote in Banos and 4-0 in Dial, ruling the limitations period was never triggered because NYCHA did not send the warning letter or notice of termination before mailing the notice of default. "Relying on contract principles ... and reading the Williams first partial consent judgment as a whole, we conclude that the NYCHA has the burden of satisfying the condition precedent of serving all three notices ... before its determination to terminate a participant's subsidy can be considered final and binding...," it said in Dial, rejecting the First Department's contrary ruling in M/O Lopez v New York City Hous. Auth. (93 AD3d 448). Without proof that NYCHA "complied with all of the required notice procedures..., it failed to demonstrate that the statute of limitations had even begun to run. To permit the statute of limitations to depend solely upon the mailing of the [default] letter shifts the burden from the NYCHA to comply with the detailed provisions of the Williams [decree], to which it agreed to be bound, to the participants in the Section 8 program."

The dissenter in Banos rejected the argument that the limitations period was "indefinitely 'tolled'" because NYCHA failed to show it complied with the notice requirements. "The ... consent judgment itself provides that the ... determination to terminate Section 8 benefits becomes final and binding upon receipt of the [default] letter.... The fact that an agency may or may not have followed proper procedure ... relates to the merits of the underlying petition. It does not affect the finality of the agency's determination for statute of limitations purposes.... [Banos'] failure to commence this proceeding within the applicable limitations period barred the Supreme Court from considering the merits of her claims."

For appellants NYCHA and Rhea (No. 60): Andrew M. Lupin, Manhattan (212) 776-5183
For appellant Rhea (No. 61): Melissa R. Renwick, Manhattan (212) 776-5010
For respondent Banos: Kathleen Brennan, Brooklyn (718) 422-2851
For respondent Dial: Michael Weisberg, Brooklyn (718) 237-5500
For respondent 690 Gates: Robert H. Gordon, Manhattan (646) 374-0100

State of New York Court of Appeals

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To be argued Tuesday, March 24, 2015

No. 20 People v David Rivera *(papers sealed)*

David Rivera checked himself into the psychiatric ward of Columbia Presbyterian Medical Center (CPMC) in 2007, complaining he was having suicidal thoughts. He told a psychiatrist, Dr. Anna Gross, that he believed the thoughts were connected to his sexual abuse of two nieces, who were then 11 and 13 years old. He told the psychiatrist that he had been unable to stop molesting the younger girl, who had just reported the abuse to the New York City Administration for Children's Services (ACS), and he said he expected there would be legal and familial consequences. Dr. Gross reported his statements to an ACS investigator. After Rivera was charged, the prosecutor sought to call Dr. Gross to testify about his admissions at trial. Rivera opposed the application, contending his statements to the psychiatrist were protected by physician-patient privilege under CPLR 4504.

Supreme Court granted the application in part, ruling the "full extent" of his admissions were privileged because they were necessary "to determine the appropriate diagnosis and treatment," but it allowed Dr. Gross to testify, without details, that Rivera told her he had sexually abused a niece and she reported that information to ACS. The court said People v Bierenbaum (301 AD2d 626 [1st Dept 2002]) "recognized a limited exception to the physician-patient privilege, based on Tarasoff [v Regents of Univ. of Cal. (17 Cal3d 425 [1976])] ... 'when the patient demonstrates that he poses a clear and present danger to a third party....'" Rivera's "admission to a doctor that he molested his nieces required the doctor to disclose the abuse [to ACS].... No reasonable physician ... could ignore the potential of a serious and continuing danger to the children." It said, "Allowing disclosure of admissions made in this context would have little negative effect on the goals of the privilege. And, even if it did, the societal interest in protecting children from sexual abuse clearly outweighs any interest furthered by the privilege."

Rivera was convicted of predatory sexual assault against a child and sentenced to 13 years to life in prison.

The Appellate Division, First Department reversed and remanded for a new trial. "The court should not have permitted the psychiatrist who treated defendant to testify about defendant's admissions of sexual abuse. Although the psychiatrist made a proper disclosure of the abuse," it said, citing Tarasoff and Bierenbaum, "the Tarasoff disclosure did not operate as a waiver of the physician-patient privilege.... This privilege (see CPLR 4504) is broadly construed, and it does not contain a general public interest exception.... In this case, the psychiatrist's testimony was arguably the most damaging evidence against defendant, and we do not find its admission to be harmless."

For appellant: Manhattan Assistant District Attorney David P. Stromes (212) 335-9000
For respondent Rivera: Lloyd Epstein, Manhattan (212) 732-4888

State of New York Court of Appeals

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To be argued Wednesday, March 25, 2015 (in Syracuse; arguments begin at noon)

No. 62 Malay v City of Syracuse

Eileen Malay was in her Syracuse apartment in March 2007, when her landlord shot his wife and held his son and other relatives hostage inside the building. During a 24-hour stand-off, Syracuse Police Department learned Malay rented the first-floor apartment, but were unable to determine whether she was in it at the time. The police fired canisters of CS gas, a form of tear gas, into the building, including Malay's apartment. She called 911 and was evacuated, but her car was damaged and her apartment contaminated, and she was never allowed to return.

Malay brought an action in U.S. District Court for the Northern District of New York in June 2008, asserting claims for federal and state constitutional violations and common law negligence. On September 30, 2011, the court dismissed her federal claims and declined to exercise jurisdiction over her state law claims. She moved for reconsideration, which the court denied, then filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. Malay participated in a May 2012 pre-brief conference, but later decided to pursue her state law claims in state Supreme Court and she never perfected her federal appeal. She commenced this action in Supreme Court, Onondaga County on June 25, 2012. The Second Circuit dismissed her federal appeal effective July 10, 2012.

The Syracuse defendants moved to dismiss the state action as untimely, arguing the three-year statute of limitations had expired. Malay responded that the limitations period was tolled by CPLR 205(a), which generally allows a plaintiff six months to file a new action after a prior action is terminated. She argued the tolling period was not triggered until the Second Circuit dismissed her federal appeal, which did not occur until after she filed her state action.

Supreme Court granted the defense motion to dismiss the suit as untimely, saying "... the district court's summary judgment order of September 30, 2011 constituted a final decision on the merits. At that point, plaintiff's federal action was terminated and plaintiff had the option to commence a state action within six months." Rejecting Malay's argument that the six-month toll provided by CPLR 205(a) did not begin to run until her federal appeal was dismissed, the court said, "[P]laintiff's appeal from the district court's order was not dismissed on the merits but was instead dismissed because of plaintiff's default.... When an appeal is abandoned and dismissed on account of a default, the CPLR 205 grace period begins to run from the date the original order of [dismissal] was entered. In this case, the September 2011 order." The Appellate Division, Fourth Department affirmed without opinion.

Malay argues she was not required to pursue her federal appeal to a determination on the merits in order to invoke the CPLR 205(a) grace period. The statute has "long stood for the principle that a plaintiff should not be forced to bring concurrent causes of action in two judicial forums simultaneously solely to preserve a claim from being barred by the statute of limitations. Rather, judicial economy and the interests of justice logically and reasonably hold that a plaintiff is free to bring a cause of action at the termination of an appeal, whether the termination is due to a decision on the appeal against the plaintiff or by way of the plaintiff discontinuing the appeal voluntarily. This ... preserves the time and resources of all parties..., as well as the judiciary."

For appellant Malay: Frank S. Gattuso, Fayetteville (315) 451-3810
For respondents Syracuse et al: Asst. Corporation Counsel Ann M. Alexander (315) 448-8400

State of New York Court of Appeals

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To be argued Wednesday, March 25, 2015 (in Syracuse; arguments begin at noon)

No. 63 People v Clifford Graham

Syracuse police arrested Clifford Graham in August 2008 for allegedly passing counterfeit $20 bills at a motel and a convenience store. Detectives read his Miranda rights, which he waived, and asked about the source of the bills. Graham denied knowing the money was counterfeit. He was arraigned and jailed to await trial. Three weeks later, in September 2008, his assigned counsel arranged for him to speak with the detectives again in the hope that his cooperation would result in a better plea offer. The detectives did not administer Miranda warnings prior to this interview. Defense counsel was present for the first 20 minutes of the meeting, then left for another appointment. According to a statement written by the detectives, Graham told them a man he knew as "Taz" had offered to sell him $1000 in counterfeit currency for $100, but he declined the offer. Graham refused to sign the statement. He later moved to suppress his statements at the September interview on the ground they were involuntary and obtained in violation of his Miranda rights.

Supreme Court denied the motion to suppress. "[T]he defendant was in custody on the matter, represented by counsel on the matter and therefore he could not waive counsel on the matter unless counsel was present, which did occur," it said. "Once a counsel waiver occurred in counsel's presence and the client agreed to submit to the interview on the topic at hand, to wit: counterfeit bills, counsel's presence thereafter is not required." Graham was convicted of first-degree criminal possession of a forged instrument and petit larceny and sentenced to three to six years in prison.

The Appellate Division, Fourth Department affirmed, saying, "Inasmuch as defendant's counsel was present during the first 20 minutes of the interview and informed the detectives that defendant was willing to cooperate, it was permissible for the officers to infer from defendant's conduct and his attorney's assurances that defendant's waiver of his Miranda rights was made on the advice of counsel...."

Graham argues he is entitled to suppression of his September statements because the police did not advise him at that time of his right to remain silent and the consequences of foregoing that right and, therefore, he could not validly waive his rights. "Miranda created a bright-line rule that does not include a 'presence of counsel' exception," he says, and the lower courts "erred in holding that a valid waiver of Miranda could be assumed or inferred merely from counsel's presence.... While the presence of counsel may mitigate the coercive effect of custodial interrogation and help a suspect make a voluntary choice, it is the explicit warning of the right to remain silent that allows a suspect to make a knowing and intelligent decision to waive this fundamental right...."

For appellant Graham: Piotr Banasiak, Syracuse (315) 422-8191 ext. 0137
For respondent: Onondaga County Chief Asst. District Atty. James P. Maxwell (315) 435-2470

State of New York Court of Appeals

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To be argued Wednesday, March 25, 2015 (in Syracuse; arguments begin at noon)

No. 64 Matter of the Estate of Lewis

Robyn Lewis was living in Texas in 1996, when she executed a will naming her then-husband as her sole beneficiary and executor. In the event he predeceased her, the will named her husband's father, James Robert Simmons, as alternate beneficiary. Lewis and her husband later bought property in Clayton, New York, which had been in her family for generations. When they divorced in 2007, Lewis was awarded the Clayton property, which she made her permanent residence until she died in March 2010. She was survived by her parents, Meredith Stewart and Ronald Lewis, and three adult siblings. No will was found among her belongings.

In December 2010, Simmons filed a petition in Jefferson County Surrogate's Court to probate the 1996 will. He argued the testamentary disposition to his son, decedent's ex-husband, was revoked by the divorce, making him the sole beneficiary of the will. Decedent's family filed objections to probate including, among other things, an assertion that she executed a "second and lost will" in 2007 that revoked the 1996 will, thus requiring the estate to pass through intestacy to them. At the hearing, a neighbor testified that in late 2007 decedent gave her a will with an attorney's cover letter for safekeeping and they reviewed the documents together. The neighbor said the will revoked all previous wills and codicils, appointed decedent's mother as executrix, and distributed the Clayton property to her brothers. She said the document was signed by decedent and two witnesses and was notarized. The neighbor said she returned the lost will and other papers to decedent when she moved away in 2009.

Surrogate's Court dismissed the objections and admitted the 1996 will to probate. While it found the neighbor a "highly credible witness," it said her testimony did not establish due execution of the lost will, and so the lost will could not serve to revoke the 1996 will.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, saying that under New York law, "a divorce operates to revoke testamentary distributions to former spouses only" and the nomination of Simmons as sole beneficiary remains valid. The neighbor's testimony about the lost will was insufficient to prove it was duly executed under the laws of New York or Texas and, thus, was insufficient to prove the 1996 will was revoked. Even if it found the decedent intended to change her will "in accord with a natural desire" to benefit her own relatives, it said, "it is not for the courts to circumvent the statutory requirements regarding the revocation of a will," which "must be effected with the same formality with which a will is executed or by some act of mutilation or destruction." It said the decedent's relatives failed to preserve their claim that the 1996 will was revoked by destruction.

The dissenter said, "[T]he record clearly establishes that decedent intended to, and did in fact, revoke her will dated July 15, 1996, both by execution of a subsequent testamentary instrument and by the presumption of physical destruction arising from the absence of the will among her personal possessions at the time of her death." Even if decedent's family failed to prove due execution of the lost will, "I conclude that the neighbor's testimony is sufficient to establish decedent's revocation of the 1996 Will.... I further conclude that admitting the 1996 will to probate is manifestly unjust and inequitable under the unique circumstances of this case inasmuch as it would defeat the purpose and spirit of EPTL 5-1.4 and contravene decedent's clear and unequivocal intent to revoke the 1996 will and to leave her limited estate to her own family."

For appellants Stewart et al: John A. Cirando, Syracuse (315) 474-1285
For respondent Simmons: Julian B. Modesti, Syracuse (315) 474-7541

State of New York Court of Appeals

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To be argued Wednesday, March 25, 2015 (in Syracuse; arguments begin at noon)

No. 65 People v Pernell A. Flanders

Pernell Flanders was charged with shooting John Thorington during a street fight in Utica in June 2010. Flanders allegedly struck Thorington on the head with a .380 caliber handgun and fired the weapon repeatedly at Thorington, who was accompanied by his fiancée. Witnesses said Flanders then retrieved a .22 caliber rifle from his car, which he also used to shoot at Thorington and in the vicinity of his fiancée. Thorington was wounded in his leg, abdomen, shoulder and neck. Flanders was indicted on charges of second-degree attempted murder, first-degree assault and, regarding shots fired near the fiancée, first-degree reckless endangerment.

The indictment alleged that Flanders committed the assault and reckless endangerment offenses with "a .380 semi-automatic pistol and a .22 rifle," and County Court instructed the jury at his trial that he was charged with firing the pistol "and" the rifle at the victims. During deliberations, the jury sent a note asking, as to those counts, "must we believe both guns were involved and fired by the defendant...?" Defense counsel argued that "the plain reading is both," but the court said, "I don't think there's any requirement that the District Attorney has to prove both guns were involved." Responding to the jury, the court said, "What must be proven to your satisfaction beyond a reasonable doubt, that either of the weapons were involved or both, as long as you find that there was a deadly weapon involved." Flanders was found guilty on all counts. He was sentenced to concurrent terms of 22 years for assault and attempted murder and a consecutive term of 2⅓ to 7 years for reckless endangerment.

The Appellate Division, Fourth Department affirmed in a 3-1 decision, rejecting Flanders' claim that the court's response to the jury constructively amended the indictment and rendered it duplicitous. "[T]he evidence established that defendant assaulted the victim and his fiancée in an attempt to seek revenge for the fiancée's alleged assault on defendant's sister. There was one motive and one impulse: to seek revenge. We see no distinction between a situation in which an assaulting defendant takes the time to reload one weapon and one in which the assaulting defendant takes the time to obtain a second weapon with the single impulse of continuing the ongoing assault.... [T]he fact that the multiple shots were fired from two separate firearms did not transform this continuing offense into two separate offenses."

The dissenter argued the assault and reckless endangerment counts were rendered duplicitous by the trial court's response to the jury note. She said Flanders engaged in "two distinct shooting incidents.... [D]efendant used the pistol during the course of a fist fight ... after the victim began to get the upper hand.... Following that initial altercation, after any perceived threat posed by the victim had seemingly subsided..., defendant returned to his vehicle, retrieved a rifle from the back seat, and began firing in an apparent attempt to end the victim's life.... Defendant acted on those separate impulses with an 'abeyance' between them.... Given the court's response to the jury note, it is not possible to know whether the jurors, individually or collectively, based their verdict upon the use of the pistol, the rifle, or both."

For appellant Flanders: John J. Raspante, Utica (315) 223-4122
For respondent: Oneida County Assistant District Attorney Steven G. Cox (315) 798-5766

State of New York Court of Appeals

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To be argued Thursday, March 26, 2015

No. 49 ACA Financial Guaranty Corp. v Goldman, Sachs & Co.

ACA Financial Guaranty Corp. alleges that Goldman, Sachs & Co. fraudulently induced it to provide financial guaranty insurance for an investment, a collateralized debt obligation called ABACUS, in 2007 by misrepresenting that Goldman's client, the hedge fund Paulson & Co., would be an equity investor taking a "long" position in ABACUS, which would align its interests with those of the insurer. Instead, ACA claims Goldman knew that Paulson, which had a role in selecting the portfolio of securities underlying ABACUS, was actually a short seller that would profit if the portfolio performed poorly and knew that ABACUS was designed to fail.

Supreme Court denied Goldman's motion to dismiss ACA's claims for fraudulent inducement and fraudulent concealment. Among other things, the court rejected Goldman's argument that ACA failed to adequately plead that it reasonably relied on Goldman's alleged misrepresentations about Paulson's role in ABACUS and about the investment position Paulson intended to take. It said, in part, that even if the disclaimers in the offering circular addressed the specific misrepresentations alleged by ACA, "'a purchaser may not be precluded from claiming reliance on misrepresentations of fact peculiarly within the seller's knowledge, notwithstanding the execution of a specific disclaimer.'"

The Appellate Division, First Department reversed in a 3-2 decision and dismissed the fraud claims. "While we agree that plaintiff adequately pleaded all of the requisite elements comprising a fraud claim..., plaintiff's amended complaint nevertheless fails to establish justifiable reliance as a matter of law. Indeed, plaintiff fails to plead that it exercised due diligence by inquiring about the nonpublic information regarding the hedge fund with which it was in contact prior to issuing the financial guaranty, or that it inserted the appropriate prophylactic provision [in their agreement] to ensure against the possibility of misrepresentation...."

The dissenters argued that ACA's "duty to perform due diligence was fulfilled, when ... plaintiff asked defendant about Paulson's position, defendant made specific and detailed representations that conformed with the industry standard for a similarly situated transaction, and defendant's misrepresentation was not discoverable through any public source of information." They said "there is no general release or similar agreement" between the parties and the relationship between plaintiff, a monoline bond insurance company..., and defendant, an investment bank, is not an adversarial one.... Thus..., plaintiff's fraud claim does not fall within the purview of cases holding that such a claim is barred where the parties failed to insert an appropriate prophylactic provision in their agreement...."

For appellant ACA: Marc E. Kasowitz, Manhattan (212) 506-1700
For respondent Goldman Sachs: Richard H. Klapper, Manhattan (212) 558-4000

State of New York Court of Appeals

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To be argued Thursday, March 26, 2015

No. 17 Doerr v Goldsmith
No. 66 Dobinski v Lockhart

The primary issue in these appeals is whether a plaintiff, injured in an accident caused by a dog or other household pet interfering with traffic, may recover from the animal's owner for ordinary negligence. The plaintiffs in both cases cite this Court's ruling in Hastings v Suave (21 NY3d 122 [2013]), which held that "a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal ... is negligently allowed to stray from the property on which the animal is kept." The Court did not address whether the same rule applies to household pets, saying "that question must await a different case."

Case no. 17 arose in May 2009, as Wolfgang Doerr was riding his bicycle on the Central Park loop road in Manhattan. Dog owner Julie Smith was on one side of the road and her boyfriend was on the other side, holding her dog. When Smith called the dog to her, it ran into the road and Doerr collided with it, landing on the pavement and injuring his face. Smith moved to dismiss Doerr's personal injury suit on the ground she could not be held liable without proof she was aware her dog had a propensity to interfere with traffic. Supreme Court denied her motion, saying Doerr did not claim his injuries "were caused by the misconduct of the animal," but instead by "the conduct of Smith in directing the dog's movement in an unsafe manner that posed a foreseeable risk of harm to others."

The Appellate Division, First Department affirmed in a 3-2 decision, saying the case is not governed by Hastings. "[T]his case is different from the cases addressing the issue of injury claims arising out of animal behavior, because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that most proximately caused the accident." The dissenters argued that, unless the Court of Appeals extends Hastings to injuries caused by domestic pets, "the sole viable claim is for strict liability, and here there is no evidence that the defendant had knowledge that her dog had a propensity to interfere with traffic."

In case no. 66, Cheryl Dobinski and her husband were riding their bicycles on Salamanca Road in the Town of Franklinville in May 2012. As they rode past the farm of George and Milagros Lockhart, two of the Lockharts' German shepherds ran into the road and she collided with one of them, flipped over the handlebars and landed on her back. She sued, asserting claims for ordinary negligence and strict liability.

Supreme Court denied a defense motion to dismiss, holding that "ordinary negligence principles apply." It quoted Hastings, which said barring negligence claims for wandering farm animals "would be to immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property," and it cited Doerr. It said, "Here, in addition to the developing case law, there are questions of fact as to the negligence of the owners in containing, controlling and training of their dogs in regards to chasing or pursuing vehicles both on and off the property." The Appellate Division, Fourth Department reversed and dismissed the suit without discussing the ordinary negligence claim. It said the Lockharts established that "they lacked actual or constructive knowledge that the dog had a propensity to interfere with traffic."

No. 17 For appellant Smith: Scott T. Horn, Manhattan (212) 425-5191
For respondent Doerr: Dara L. Warren, Brewster (845) 279-7000
No. 66 For appellant Dobinski: Dennis J. Bischof, Williamsville (716) 630-6500
For respondents Lockhart: Mark P. Della Posta, Buffalo (716) 856-1636

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To be argued Thursday, March 26, 2015

No. 67 Walton v Strong Memorial Hospital

Adam Walton was three years old in 1986, when he had cardiac surgery at Strong Memorial Hospital or another division of the University of Rochester Medical Center. At the end of the procedure, polyvinyl catheters were placed in his heart to record atrial pressure. The catheters were removed three days later, although a nurse recorded that the catheter in his left atrium "possibly broke off with a portion remaining" in the patient. In December 2008, when Walton was 25, an echocardiogram revealed a "linear density" in his heart. Doctors performed exploratory surgery and removed a 13-centimeter loop of plastic tubing from his left atrium.

In November 2009, Walton brought this medical malpractice action against the doctors and medical facilities involved in his 1986 surgery, alleging they negligently left a "foreign body" in his heart, which he "could not have reasonably discovered ... prior to December 2008." The defendants moved to dismiss on the ground that the statute of limitations had expired long before. Walton argued his suit was timely under CPLR 214-a, which provides that a malpractice action based on the discovery of a "foreign object" left in the body of a patient "may be commenced within one year of the date of such discovery...." Defendants argued the catheter was a "fixation device," which the statute excludes from the foreign object discovery rule.

Supreme Court granted the motion to dismiss, although it found the catheter was not a fixation device. A suture is a fixation device, it said. "It makes no sense, however, to refer to the catheter here as a 'fixation device' because it served no such purpose and was never intended to do so." Instead, holding that Walton was not entitled to the foreign object exception in CPLR 214-a, the court said "the catheter here is not a 'foreign object' because, in the first instance, it was left in the plaintiff's body deliberately with a continuing medical purpose."

The Appellate Division, Fourth Department affirmed the dismissal, but on the ground that the catheter was a fixation device excluded from the discovery rule of CPLR 214-a. "Fixation devices are 'placed in the patient with the intention that they will remain to serve some continuing treatment purpose' (Rockefeller v Moront, 81 NY2d 560 ...), while foreign objects are 'negligently left in the patient's body without any intended continuing treatment purpose' (LaBarbera v New York Eye & Ear Infirmary, 91 NY2d 207 ...). The polyvinyl catheter here was a fixation device and was not a foreign object because it was intentionally placed inside plaintiff's body to monitor atrial pressure for a few days after the surgery, i.e., it was placed for a continuing treatment purpose."

For appellant Walton: Edward J. Markarian, Buffalo (716) 856-3500
For respondents Strong Memorial et al: Barbara D. Goldberg, Manhattan (212) 697-3122

State of New York Court of Appeals

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To be argued Thursday, March 26, 2015

No. 68 People v Jafari Lamont

In November 2008, a worker preparing to open a Wendy's restaurant in Rochester heard knocking at the back door, which was not a public entrance. He checked a security camera and saw two men "banging" on the door. They wore masks and each held what appeared to be a handgun. When a police officer arrived, he saw two men hiding behind crates at the rear of the restaurant, and they fled in different directions. The officer chased and apprehended Jafari Lamont, who had a backpack but no gun. The other man was never found. The police recovered a black BB gun behind the restaurant and a pellet gun from Lamont's car, which was parked nearby. Lamont was charged with attempted robbery and attempted burglary.

At a non-jury trial, defense counsel moved to dismiss the charges after the prosecutor rested, arguing there was insufficient proof of Lamont's intent to commit robbery or any other particular crime. He said, "The People have the burden of proving not only that there was an attempt to commit a crime, but the attempt to commit what crime.... What's to say that defendant wasn't there to murder somebody, burn the place down, rape somebody?" County Court denied the motion. Lamont was convicted of two counts of second-degree attempted robbery and sentenced to seven years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, finding there was sufficient circumstantial evidence of intent to commit a robbery. There was no "reasonable possibility" that Lamont intended to commit some other crime, it said. "Because the only weapons possessed by defendant and his accomplice were BB guns, it is not reasonable to infer that they intended to murder anyone inside the restaurant. Similarly, in the absence of evidence that defendant or his accomplice knew any of the Wendy's employees, it is not reasonable to infer that they intended to assault one or more of the employees.... The only reasonable inference to be drawn is that defendant was attempting to gain entry to the restaurant so that he could rob someone."

The dissenters argued, "[T]he evidence is legally insufficient to establish beyond a reasonable doubt that defendant specifically intended to ... 'forcibly steal property from an employee of the Wendy's restaurant,' as opposed to any number of other crimes or misdeeds.... [T]he evidence established only that defendant and a companion knocked on the back door to Wendy's, and that they possessed what appeared to be handguns. There is no evidence of preparation or prior coordination on the part of defendant and his companion, no statements by defendant or his companion that evidence an intent to steal property, and no actions by either individual that specifically reflect a larcenous intent as opposed to general criminal intent...."

For appellant Lamont: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Erin Tubbs (585) 753-4535