State of New York
Court of Appeals

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NEW YORK STATE
COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of June 5 thru 7, 2018

State of New York
Court of Appeals

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To be argued Tuesday, June 5, 2018
No. 58 Matter of People v Conrado Juarez; Frances Robles

In 1991, highway workers found the body of a four-year-old girl in a picnic cooler near the Henry Hudson Parkway in Manhattan. She had been sexually abused and suffocated. Police investigators, who were unable to identify the girl for 22 years, called her Baby Hope. The victim was finally identified in 2013 and the police questioned her cousin, Conrado Juarez, as a suspect. After several hours of interrogation, Juarez said in a videotaped statement that he had smothered the girl with a pillow during a sexual encounter and disposed of her body in the cooler with his sister's help. He was charged with murder. Two days later, New York Times reporter Frances Robles interviewed Juarez at Rikers Island. In a story published the next day, Robles reported that Juarez said the girl had died after falling down the stairs and he had only helped his sister dispose of the body. He recounted his statements to the police, but said his confession to killing her was false and had been coerced, according to the story.

Juarez moved to suppress his confession as involuntary, and the prosecution subpoenaed Robles to testify at the hearing and to turn over her notes on the interview for in camera review. Robles moved to quash the subpoenas based on New York's Shield Law (Civil Rights Law § 79-h[c]). Supreme Court quashed the subpoenas. The court ultimately denied Juarez's motion to suppress his confession, finding it was voluntary. The prosecution then sought to enforce the subpoenas to compel Robles to testify and produce her notes at trial; and Robles again moved to quash based on the Shield Law.

Supreme Court denied her motions to quash the subpoenas, saying Juarez's "statements to law enforcement and Ms. Robles are the only evidence linking him to the crime. Since voluntariness may be raised before the jury regardless of the pretrial decision, it is critical that the People present all possible evidence corroborative of his statements to the police in their efforts to prove beyond a reasonable doubt that the statements were voluntary and truthful.... The testimony and notes are material, relevant and critical to the People's case."

The Appellate Division, First Department reversed and granted Robles's motions to quash, saying "the People have a videotaped confession by the defendant that has been found admissible at trial and that includes statements consistent with other evidence in the case. Under the circumstances, and in keeping with 'the consistent tradition in this State of providing the broadest possible protection to "the sensitive role of gathering and disseminating news of public events"'..., we find that the People have not made a 'clear and specific showing' that the disclosure sought from Robles (her testimony and interview notes) is 'critical or necessary' to the People's proof of a material issue so as to overcome the qualified protection for the journalist's nonconfidential material (Civil Rights Law § 79-h[c])."

Addressing a threshold issue, the prosecution argues that this Court lacks jurisdiction because the trial court's order denying a nonparty's motion to quash subpoenas in a criminal action is not appealable. It says, "Since no [Criminal Procedure Law] provision authorizes an appeal from such an order, the appeal should be dismissed, and the matter remitted to the Appellate Division ... with directions to dismiss the appeal taken to that court," which would leave in place the trial court's denial of the motion to quash. Robles argues that "the determination of a motion to quash, as it relates to a non-party to a criminal proceeding, has been appealable in this state for 80 years and that rule should not be changed.... In sum, as this Court and the Appellate Division have repeatedly held, and the District Attorney and other prosecutors' offices have acknowledged to this Court, because the determination of a motion to quash a subpoena brought by a non-party is a final order on the civil side of the Supreme Court, which is vested with both criminal and civil jurisdiction, it is an appealable order in a criminal action."

For appellant: Manhattan Assistant District Attorney Diane N. Princ (212) 335-9000
For nonparty respondent Robles: Katherine M. Bolger, Manhattan (212) 850-6100

State of New York
Court of Appeals

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To be argued Tuesday, June 5, 2018
No. 35 People v Lawrence Parker
No. 36 People v Mark Nonni

Six police officers responded to a radio report of a burglary in progress at the Westchester Country Club in the Bronx in January 2008. They arrived at the private, gated facility five minutes later and saw two men walking down the driveway from the clubhouse toward a public road. When an officer called out "please, stop, we want to ask you a question," one of the men, Mark Nonni, ran away with three officers in pursuit. They tackled and handcuffed Nonni, after a struggle, and recovered a foot-long knife, a smaller butcher knife, and duct tape from his backpack, and found $1000 in cash in his pocket. An officer said the other man, Lawrence Parker, "briskly walked" across the street and, despite being told to stop, continued to walk away. After officers handcuffed Parker, they found a sledgehammer and crow bar in his backpack and a steak knife in his coat pocket. The club's caretaker, who had been robbed of $3000 at knife point and left bound with duct tape, identified Parker and Nonni as the perpetrators.

Supreme Court denied motions to suppress evidence obtained at the scene, finding the officers' conduct justified under People v De Bour (40 NY2d 210), and the defendants proceeded to a joint trial. On the second day of deliberations, the jury sent out three notes before the lunch recess. The court read the first note into the record, responded to it, and told the jury "we'll leave the other two for after lunch." As soon as it returned from lunch, the jury announced it had reached a verdict. The court took the verdict without addressing the two remaining notes. Parker and Nonni were each convicted of second-degree robbery and sentenced to 20 years to life.

The Appellate Division, First Department affirmed in a 3-2 decision, saying Parker and Nonni "were first seen on private property where a burglary had just been reported, in a suburban area, with nobody else visible anywhere in the vicinity. This gave rise to a founded suspicion of criminality, justifying a level-two common-law inquiry under the De Bour analysis. The police did not exceed the bounds of a common-law inquiry when they requested defendants to stop so that the police could 'ask them a question,' because such a direction does not constitute a seizure." Since Nonni "immediately ran, and ... Parker immediately made what officers described as a 'hurried' and 'evasive' departure..., the record supports the conclusion that both defendants 'actively fled from the police'.... Defendants' flight elevated the existing level of suspicion to reasonable suspicion, justifying pursuit and an investigative detention...."

The dissenters said, when the officers arrived at the club, they "had no description of the alleged suspects and no information concerning the 911 caller. Defendants were observed ... leaving the driveway of the club and walking down the street at an unhurried pace. The entry and exit of individuals from a commercial establishment during normal business hours cannot be deemed out of the ordinary.... Given the limited information conveyed by the radio run, the officers had, at best, sufficient cause to conduct a level-one request for information.... They said the police were unjustified in pursuing Nonni, who ran away, and Parker, "who did not even flee but merely walked at a 'hurried pace'.... The majority's conclusion that the police were justified in pursuing defendants is based on the faulty premise that the circumstances gave rise to a founded suspicion of criminality."

Parker and Nonni, in addition to arguing the police pursuit and detention were illegal, contend their convictions must be reversed because the trial court committed a mode of proceedings error by failing to give defense counsel meaningful notice of the contents of two substantive notes from the jury.

For appellant Parker: Lorraine Maddalo, Manhattan (212) 577-3343
For appellant Nonni: Matthew Bova, Manhattan (212) 577-2523 ext. 543
For respondent: Bronx Assistant District Attorney Ryan P. Mansell (718) 838-6239

State of New York
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To be argued Tuesday, June 5, 2018
No. 37 People v William Morrison

William Morrison was charged in 2006 with raping a 90-year-old dementia patient in the nursing home section of Rome Memorial Hospital, where he worked as a certified nurse's aid. At his trial in Oneida County Court, late on the second day of jury deliberations, the jurors sent out a note saying they had reached agreement on two lesser counts, but not on the top count of first-degree rape. The note said, "We have arrived on decision on [counts] 2 and 3, but we have a lot of work to do on #1. I don[']t see it being quick. Not sure what to do. We ar[e] starting to make way." The trial judge marked the note as court exhibit 9, but did not read it into the record. The court instructed the jury to continue working to try to reach a unanimous verdict, then at the juror's request sent them home for the night. The following day, the jury returned a verdict convicting Morrison of rape and sexual abuse in the first degree and endangering the welfare of a vulnerable elderly person in the second degree. He was sentenced to 25 years in prison.

The Appellate Division, Fourth Department initially affirmed the judgment, but subsequently granted Morrison's motion for a writ of error coram nobis based on his claim that he was deprived of effective assistance when his appellate counsel failed to challenge the trial court's handling of jury notes.

The Appellate Division ultimately reversed and ordered a new trial in a 4-1 decision, finding the trial court "violated a core requirement of CPL 310.30" and committed a mode of proceedings error "in failing to advise counsel on the record of the contents of a substantive jury note" marked court exhibit 9. "Our dissenting colleague concludes that the jury's statement, '[n]ot sure what to do,' was a ministerial inquiry concerning the logistics of the jury's deliberations, i.e., the jury was asking whether it should continue deliberating that evening considering the late hour. We agree that the note could be interpreted that way, but we conclude that it also could be interpreted as it was interpreted by the court, i.e., the jury was having difficulty reaching a unanimous verdict and was making a substantive inquiry for guidance concerning further deliberations. In response to the note, the court issued an Allen-type charge. Quite simply, even if we consider all the surrounding circumstances, the jury note was ambiguous, and we must resolve that ambiguity in defendant's favor...."

The dissenter argued the jury note "was ministerial in nature, and defendant was therefore required to preserve his challenge to County Court's handling of that jury note.... [C]onsidering the full text of court exhibit 9 and all of the surrounding circumstances, 'the only reasonable interpretation' ... of the jury's statement that it was '[n]ot sure what to do' is that the inquiry concerned the logistics of the jury's deliberations.... Consistent with the late hour and the court's practice of giving the jury a choice of whether to break for the evening or continue deliberating based on the status of the jury's deliberations, the record establishes that the jury raised a question of scheduling when it indicated that it was '[n]ot sure what to do'.... To the extent that the court provided a more robust response to the jury note than was required, I agree with the People that the court could not transform a ministerial inquiry regarding the logistics of a productive, continuing deliberation into a substantive deadlock announcement by merely exercising caution and reiterating the jury's deliberative obligations. Nor is the court's prudence indicative of an ambiguity."

For appellant: Assistant Attorney General Hannah Stith Long (212) 416-8729
For respondent Morrison: Mary R. Humphrey, New Hartford (315) 732-4055

State of New York
Court of Appeals

To be argued Wednesday, June 6, 2018
No. 78 People v Steven Myers

Steven Myers was charged with committing a burglary in the Town of Salina, Onondaga County, in April 2012. He pled guilty to third-degree burglary three months later under a plea bargain that would permit him, if he successfully completed a court-supervised drug treatment program, to plead instead to a misdemeanor and receive a conditional discharge. Prior to entering his plea, when Myers waived his right to indictment by grand jury, County Court said, "The application for grand jury waiver meets the requirements of the statute so I'm going to sign the order approving the waiver and order the information filed." The record does not reflect whether the court explained the rights he was waiving or inquired into his understanding of the waiver. Myers failed to complete the treatment program and was ultimately sentenced to two and one-third to seven years in prison.

On appeal, Myers claimed his grand jury waiver was invalid because the court did not engage in any colloquy about the waiver and there was no record evidence that he signed the waiver in open court. New York Constitution article I, section 6, which permits defendants to waive their right to indictment by grand jury, provides that "such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel." CPL 195.20, which governs waivers of indictment, similarly provides, "The written waiver shall be signed by the defendant in open court in the presence of his attorney." Neither provision addresses what steps, if any, a judge must take to ensure that a defendant understands the waiver.

The Appellate Division, Fourth Department affirmed his conviction, saying, "[W]e reject defendant's contentions that his waiver of indictment is invalid because there was no colloquy on that subject and no evidence in the record that his waiver was executed in 'open court' (CPL 195.20). A colloquy is not required in connection with a waiver of indictment ... and, 'even [when] the plea minutes are silent,' the 'open court' execution requirement of CPL 195.20 is satisfied where, as here, the court's order approving the indictment waiver 'expressly found that defendant had executed the waiver in open court'...."

Myers argues his indictment waiver is invalid because, as for a waiver of any "substantial right," it must be knowing, intelligent and voluntary, and the trial court offered no explanation and made no inquiry to ensure he understood the rights he was waiving. He says he "was never orally informed that he was giving up his right to appear before the Grand Jury; his right to attack the evidence that was presented to the Grand Jury; and his right to attack other potential defects in the Grand Jury proceedings. Just as this Court would not permit a knowing, intelligent, and voluntary Waiver of Right to Trial by Jury or Waiver of Right to Appeal to be exclusively based on a Form, it should not permit the Waiver of Indictment to be based strictly on a Form...."

For appellant Myers: John A. Cirando, Syracuse (315) 474-1285
For respondent: Onondaga Assistant District Attorney Nicole K. Intschert (315) 435-2470

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To be argued Wednesday, June 6, 2018
No. 64 Garcia v New York City Department of Health and Mental Hygiene

In December 2013, the New York City Board of Heath amended Health Code article 43 and 47 to require that children between the ages of 6 and 59 months who attend child care and school-based programs under the jurisdiction of the City Department of Health and Mental Hygiene (DHMH) be vaccinated against the flu each year. The amendments include exemptions for cases where "the vaccine may be detrimental to the child's health" or a parent objects on religious grounds. A school or child care provider "may," but is not required to, refuse to allow an unvaccinated child to attend, but they would be subject to fines of $200 to $2,000 for each unvaccinated child they admit. In 2015, Magdalena Garcia and four other mothers of young children enrolled in New York City child care or preschool programs brought this suit against the Board of Health and DHMH to enjoin them from enforcing the flu vaccination amendments, claiming they were preempted by state law or, alternatively, that the Board exceeded its regulatory authority under Boreali v Axelrod (71 NY2d 1 [1987]).

Supreme Court granted the plaintiffs' motion for a permanent injunction, finding the amendments were preempted by the state's Public Health Law.

The Appellate Division, First Department affirmed on different grounds. It said there was no state preemption because, under the Public Health Law, "local governments have the authority to adopt local health regulations subject only to minimum statewide standards;" but the regulations "are nevertheless invalid because the particular scheme adopted by the Board ... exceeded the scope of its regulatory authority." Under the first Boreali factor, it said the Board "did not merely balance costs and benefits, but instead improperly made value judgments by creating a regulatory scheme with exceptions not grounded in promoting public health.... [T]he challenged amendments do not prohibit [an unvaccinated child] from attending child care or school.... Instead, the provider or school can, in effect, opt out of the vaccination requirement ... upon payment of a monetary fine.... That the Board of Health made improper policy choices is further evidenced by the fact that the flu shot requirement applies only to the 2,283 larger licensed child care facilities in New York City that the Board regulates, and does not cover the 9,241 providers that fall under state regulation." It said the fourth Boreali factor also favored the plaintiffs "because no special expertise was relied upon to develop the unique scheme that was adopted here."

The Board and DHMH say the First Department "acknowledged that a targeted enactment of the State Legislature vests the Board with authority to adopt vaccination rules and recognized the Board's long history of doing so. Nor did the court dispute that the Board could adopt a rule requiring flu vaccination for children attending day care. Its objections went only to the particulars of this rule. That approach conflicts with the core of Boreali. The court faulted the Board for limiting its rule to larger and more formal day care facilities that it directly regulates and that represent more significant congregate settings for the spread of disease than smaller, home-based programs. The court also criticized the Board's selection of an escalating monetary fine, not a strict bar on attendance, as the penalty for violations. But those subsidiary choices are precisely the type that regulatory agencies are empowered to make. And using regulatory restraint as a sword to strike down agency action makes no sense, since Boreali analysis is meant to discern when an agency has gone too far."

For appellants Board of Health et al: Asst. Corporation Counsel Richard Dearing (212) 356-0823
For respondents Garcia et al: Aaron Siri, Manhattan (212) 532-1091

State of New York
Court of Appeals

To be argued Wednesday, June 6, 2018
No. 79 Ambac Assurance Corporation v Countrywide Home Loans, Inc.

From 2004 to 2006, Countrywide Home Loans, Inc. sponsored 17 residential mortgage-backed securities (RMBS) transactions by pooling more than 375,000 residential mortgage loans, with a total principal balance of about $25 billion, and then selling the securities to investors. Countrywide obtained unconditional and irrevocable insurance policies for the transactions from Ambac Assurance Corporation, after providing the insurer with representations and warranties about the quality of the underlying mortgage loans and about its own business practices. Ambac's policies guaranteed payment of principal and interest owed to the investors, in the event borrowers of the underlying loans missed payments. If there were a breach of the representations and warranties that "materially and adversely affects the interests of" Ambac, the insurance and indemnity agreements required Countrywide to repurchase or substitute non-conforming mortgage loans. When a severe recession struck in 2007 and 2008, the RMBSs performed poorly as the underlying borrowers began to default, and Ambac was required to pay claims from a growing number of investors. In 2010, Ambac filed this suit to recover its claim payments from Countrywide, alleging that Countrywide breached its contractual representations and warranties and that it fraudulently induced Ambac to issue the insurance policies by making false statements about the quality of the underlying loans and Countrywide's operations.

Supreme Court ruled Ambac was not required to show that it justifiably relied on Countrywide's warranties or that its losses were caused by breaches of those warranties in order to establish its fraudulent inducement claim. In insurance cases, it said, Insurance Law § 3105 does not require such proof. It said Ambac could not recover for all claims paid under its policy, but only losses it could attribute to non-conforming loans. The court said the repurchase provision in one section of the insurance agreements was Ambac's sole remedy only for breaches of warranties in that section, but did not limit its remedies for breaches of other sections to the repurchase of non-conforming loans. It dismissed Ambac's claim for attorneys' fees, saying the parties did not make "unmistakably clear" they intended to permit such recovery.

The Appellate Division, First Department modified, saying Ambac must show both that it justifiably relied on the warranties and that its losses were a direct result of their breach. Justifiable reliance and loss causation are "essential" elements of any fraud claim, it said. Insurance Law § 3105 does not apply here and, in any case, it "contains no language suggesting that the legislature intended to relax the well-settled elements of a common-law fraud cause of action." It agreed with the lower court that Ambac was not entitled to recover all of its payments on claims, which would amount to "rescissory damages.... Ruling otherwise would inequitably allow Ambac to recoup the money it paid out for loans that complied with all warranties..., but which resulted in default due to the housing market collapse or other risks Ambac insured against." However, it said the lower court erred on the issue of remedies because, under the "plain language" of the agreements, Ambac's "sole remedy" for any breach is Countrywide's obligation to repurchase non-conforming loans. It affirmed the denial of attorneys' fees.

For appellant Ambac: Philippe Z. Selendy, Manhattan (212) 849-7000
For respondent Countrywide: Joseph M. McLaughlin, Manhattan (212) 455-2000

State of New York
Court of Appeals

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To be argued Wednesday, June 6, 2018
No. 80 Stega v New York Downtown Hospital

Dr. Jeanetta Stega was a medical researcher at New York Downtown Hospital (NYDH) and chair of its Institutional Review Board (IRB), which approves and oversees the hospital's biomedical research involving human subjects, when, in 2011, she wrote the patent application and research protocol for a clinical trial of a new drug developed by Luminant Bio-Sciences, LLC to treat metastatic cancer. Luminant paid her $50,000 for the work. She says she recused herself from the IRB's deliberations when it later approved the Luminant study. In 2012, after NYDH learned of the payment from Luminant, officials accused Stega of taking money from a research sponsor that actually belonged to the hospital and they placed her on administrative leave. After an investigation, NYDH's counsel concluded Stega had a conflict of interest due to her role as chair of the IRB when it approved Luminant's study, and she was fired. A month later, Stega filed a formal complaint with the U.S. Food and Drug Administration (FDA), which regulates the work of IRBs, expressing concern that patients in clinical trials overseen by the NYDH IRB would not be properly supervised. An FDA investigator conducted an inspection of NYDH and said in his report that Dr. Stephen Friedman, the hospital's acting chief medical officer, told him that Stega had "channeled" funds from Luminant to her own research group, that she claimed to another researcher that she could use her IRB position to get a patient into his study against his wishes, and that all of the IRB's approval's made while she was chair were "tainted." Stega brought this defamation action against NYDH and Friedman, claiming Friedman's statements were false, impugned her professional integrity, and undermined her standing with the FDA as a medical researcher.

Supreme Court denied the defendants' motion to dismiss the claim, finding Friedman's statements were not protected by an absolute privilege because the FDA investigation was not part of a quasi-judicial proceeding.

The Appellate Division, First Department reversed and dismissed the suit on a 3-1 vote, saying, "Given both the nature of an FDA investigation into the propriety of the hospital's research protocols and the importance of the unimpeded flow of thoughts and information in this investigative context, as a matter of law and public policy, statements to such an investigator must be protected by an absolute privilege...." It said FDA compliance proceedings for IRBs, "which include the possibilities of an adversarial regulatory hearing before the FDA ... and subsequent judicial review..., qualify as a quasi-judicial process by an administrative agency.... Therefore, statements made to an investigator in the course of the initial investigation by the FDA ... are protected by an absolute privilege.... Furthermore, there is a strong public interest in ensuring that those with information about research protocols for newly developed drugs are encouraged to speak fully and candidly, without any need for self-censorship."

The dissenter said the FDA investigation was not a quasi-judicial proceeding and, thus, Friedman's statements were entitled only to a qualified privilege and could be actionable if made with malice. The investigation "could lead to a hearing on whether the IRB would be disqualified; however, such a hearing would ultimately involve the IRB and NYDH, but not Stega.... Further, while the FDA regulatory scheme ... provides for subsequent judicial review, it does not afford Stega, the subject of the investigation, due process protections. Therefore, regardless of the nature of the FDA's proceeding, it would not be adversarial to Stega and would not provide a forum for her to challenge the alleged defamatory statements.... [A] finding of qualified privilege offers ample protection to the speaker, because malice must be proven, and, as with any defamation claim, truth is a complete defense."

For appellant Stega: John A. Beranbaum, Manhattan (212) 509-1616
For respondents NYDH and Friedman: Christopher J. Porzio, Jericho (516) 832-7500

State of New York
Court of Appeals

To be argued Thursday, June 7, 2018

No. 81 West Midtown Management Group, Inc. v State of New York, Department of Health, Office of the Medicaid Inspector General

West Midtown Management Group, Inc. operates two drug and alcohol treatment clinics in Manhattan, where many of its patients are covered by Medicaid. In 2010, the State Office of the Medicaid Inspector General (OMIG) issued a final audit report finding that, based on a sampling of claims, West Midtown had received an estimated $1,857,401 in overpayments from 2003 through 2007. Based on the same sample, the report estimated that the "lower confidence limit," the probable lower limit of the overpayment, was $1,469,914, and it said West Midtown could settle its repayment obligation for the lower limit if it agreed to a repayment plan within 20 days. If there was no settlement, the audit report said OMIG would begin withholding from claims "to recover payment and liquidate the lower confidence amount, interest, and/or penalty, not barring any other remedy at law." If West Midtown challenged the audit at a hearing, it said OMIG would seek to recover the full amount of $1,857,401. West Midtown sought to challenge the findings, but failed to file a timely request for a hearing and none was held. After the 20-day settlement deadline passed, OMIG sent notice to West Midtown than it had begun withholding to recoup "the lower confidence limit," noting that "an overpayment totaling $1,460,914.00 was identified," and saying the withholding "will continue until such time as the balance due is recovered." When OMIG informed West Midtown in 2013 that it would continue withholding Medicaid payments until it recouped the full $1,857,401, the provider brought this proceeding to prohibit OMIG from recouping more than $1,460,914. West Midtown said OMIG failed to provide adequate notice that it intended to recoup the higher estimate of $1,857,401.

Supreme Court dismissed the suit. Due to West Midtown's failure to challenge the audit findings at a hearing, it said, "the amount of the overpayment ... became fixed at the higher $1.8 million point estimate. This is consistent with the language of the [audit report] which advised that OMIG would establish a withhold to recover ... the lower confidence limit amount..., but that this withhold did not bar 'any other remedy allowed by law'...."

The Appellate Division, First Department reversed in a 3-2 decision, saying, "The plain meaning of the [withholding] notice is that withholding will cease once the identified overpayment figure of $1,460,914, plus interest, has been recouped.... [T]he dissent ... fails to address the dispositive issue, whether or not OMIG delivered the statutorily required notice. A fair reading of both the [audit report] and OMIG's formal notice of withholding leads to the inescapable conclusion that OMIG informed petitioner that it was withholding to recoup the lower confidence amount of $1,460,914, and failed to deliver written notice ... that it would continue withholding to liquidate the higher point estimate of $1,857,401."

The dissenters said West Midtown "neither agreed to the proposed settlement of the lower confidence limit within the indicated time frame, nor properly requested a hearing to challenge OMIG's findings. Importantly, in the absence of either a settlement or a determination at a hearing of some other overpayment amount, the final audit report becomes a final, enforceable determination of the agency, and its filing with the County Clerks gives it the 'full force and effect of a judgment' (see Social Services Law § 145-a[2]).... The final audit report sufficiently informed petitioner that if it did not settle or obtain a different result at a hearing, the full assessed overpayment would be due and owing."

For appellant State: Assistant Solicitor General Caroline A. Olsen (212) 416-6167
For respondent West Midtown: Jonathan M. Goidel, Manhattan (212) 840-3737

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To be argued Thursday, June 7, 2018
No. 82 Matter of Waite v Town of Champion

This case arose under General Municipal Law article 17-a, "The New NY Government Reorganization and Citizen Empowerment Act," which was enacted in 2009 to provide a simpler means for citizens and local officials to dissolve or consolidate outdated and inefficient government entities. In August 2014, residents of the Champion Fire Protection District (CFPD) in the Town of Champion, Jefferson County, initiated a proceeding to dissolve the district by filing a petition to hold a referendum on the issue. Supporters apparently wanted to replace the "fire protection district," which is controlled by the Town Board and financed with taxes imposed by the Board, with a "fire district," which is a separate political subdivision governed by an independently elected fire commission. The referendum was held in December 2014 and a majority of residents voted for dissolution, triggering the Town's duty under the statute to prepare an "elector initiated dissolution plan."

Under the plan the Town Board adopted in August 2015, the CFPD would be dissolved and replaced with two newly created fire protection districts, which together covered the same geographic area as the CFPD. Five residents brought this proceeding to void the Town's plan, arguing that it had failed to dissolve the CFPD as required by the statute and instead merely divided the CFPD into two new fire protection districts, which the Town would continue to control. They also sought an order directing the Town to adopt a new dissolution plan that "does not involve the existence of a fire protection district."

Supreme Court dismissed the suit, saying the Town "followed the appropriate steps here. I won't say it's the appropriate action or not. Maybe the best way to provide fire protection is through a fire district, not a fire protection district, but that's the job of the elected officials to decide and that's what they did. And, obviously, the petitioners disagree with that, but the procedures that they had to follow were followed, so the court is going to dismiss the petition."

The Appellate Division, Fourth Department affirmed, saying the Town "complied with the statute.... The majority of electors voted for dissolution of the [CFPD], and [the Town] consequently fulfilled its duty of devising a dissolution plan.... Petitioners failed either to attain the requisite number of signatures to challenge the dissolution plan by referendum..., or to petition for the establishment of a fire district...."

The petitioners argue that "mere compliance with the process of dissolution cannot excuse an illegal and ineffective plan;" and they contend the Town's plan "is unlawful as it did not accomplish and complete the dissolution of the Fire Protection District." They say, "The Legislature did not intend to permit [the Town's] Elector Initiated Dissolution Plan to recreate the same type of local government entity that the residents just voted to dissolve.... A true dissolution would remove [the Town's] control over the fire protection district and form a different type of local government entity over which the town has no control, such as a fire district or joint fire district. A true dissolution would remove the town's liability for the negligence of the Department which provides fire protection within such area."

For appellants Waite et al: Bradley M. Pinsky, Syracuse (315) 428-8345
For respondent Town: Robert J. Slye, Watertown (315) 786-0266

State of New York
Court of Appeals

To be argued Thursday, June 7, 2018
No. 83 People v William Harris

William Harris was arrested at his Brooklyn apartment after he fought with his girlfriend in 2013. Officers found two crack pipes in his pockets. He was tried on various misdemeanor charges at a bench trial in Criminal Court. At the close of proof, the trial judge announced that he would not hear closing arguments from the attorneys. Defense counsel did not object. The court immediately rendered a verdict finding Harris guilty of attempted criminal possession of a controlled substance in the seventh degree, not guilty of the remaining counts, and sentenced him to three months in jail.

On appeal, Harris argued that the trial court's refusal to allow summations violated his constitutional right to the assistance of counsel. He relied on Herring v New York (422 US 853 [1975]), which held that the "right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and applicable law in his favor" and ruled that CPL 320.20, governing bench trials in superior court, was unconstitutional to the extent it provided that a court "may in its discretion" allow summations. The State Legislature responded by amending the statute to state that superior courts "must permit the parties to deliver summations." However, the Legislature did not adopt a similar amendment to CPL 350.10, which governs bench trials in local criminal courts such as this one, and it still provides that a court "may in its discretion permit the parties to deliver summations."

The Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed, ruling Harris's claim was unpreserved for appellate review because his attorney was present when the court refused to allow summations and did not object. "[T]o the extent that defendant's claim can be considered an implicit constitutional challenge to CPL 350.10..., that contention is likewise unpreserved," it said.

Harris argues that, under Herring, "Complete deprivation of the right to summation ... is a 'structural error' that requires reversal without any inquiry into whether the error was harmless." To the extent that CPL 350.10 "continues to grant discretion to deny the opportunity to present a closing argument in criminal trials, it is unconstitutional." As for preservation, he says, "The right to summation is a core component of the Sixth Amendment right to counsel, and it should not lightly be deemed waived. Where ... the court, contrary to its previous statements, unexpectedly declared it would not hear summations and then immediately rendered a verdict, the defense did not have a meaningful opportunity to object. Under the circumstances, preservation was neither realistic nor required."

The prosecution says, "Before rendering a verdict, the trial court stated that it had decided not to hear summations, and the court thereby afforded defense counsel a meaningful opportunity to object if she wanted to present a summation. Because counsel did not register a protest at that time, defendant's claim ... is unpreserved for appellate review and beyond the review of this Court. Moreover, under the circumstances, counsel's silence constituted an implicit waiver of the opportunity to give a summation."

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State of New York
Court of Appeals

To be argued Thursday, June 7, 2018
No. 77 Matter of Anonymous v Molik

The anonymous petitioner operates a 12-bed intermediate care facility in St. Lawrence County, which is licensed by the state to provide services to people with cognitive and physical disabilities. In 2013, a staff aide briefly left a common living room where residents were gathered to tend to laundry in an adjacent room. When she returned, she found a male resident engaged in unwanted sexual contact with a female resident. After an investigation, the State Justice Center for the Protection of People with Special Needs found that a neglect allegation against the aide and her supervisor was unsubstantiated because the facility had no policies in place to prohibit staff from leaving residents unattended in the living room. However, because this was the third time in six months that the same male resident had engaged in improper sexual contact with other residents, the Justice Center substantiated a report of neglect against the facility for failing to provide clear protocols for staff supervision in the living room and failing to alter the male resident's care plan to increase supervision of him. An administrative law judge upheld the findings. The Justice Center's director of administrative hearings, David Molik, adopted the ALJ's conclusions and directed the facility to implement a remedial plan.

The facility brought this suit to annul the determination, saying the Center exceeded its statutory authority in making a finding of neglect against it. The Justice Center was created in 2012 to respond to allegations of abuse or neglect of vulnerable people receiving care from human service agencies. Under Social Services Law § 493(3)(a), an allegation is substantiated if the Justice Center finds "the incident occurred and the subject of the report was responsible or, if no subject can be identified..., that the facility or provider agency was responsible." Section 493(3)(b) provides that, "In conjunction with the possible findings" under section 493(3)(a), "a concurrent finding may be made that a systemic problem caused or contributed to the occurrence of the incident."

The Appellate Division, Third Department granted the facility's petition, annulled the determination, and directed the Justice Center to seal its report. Pursuant to section 493(3)(a), it said, "the only circumstance under which the Justice Center could substantiate a report of neglect against a facility ... is where an incident of neglect has occurred but the subject cannot be identified -- a situation that is plainly not present here." While section 493(3)(b) permits the Center to make a "concurrent finding," its does not authorize a finding of neglect against the facility. "By its terms, the only 'concurrent finding' that may be made is 'that a systemic problem caused or contributed to the occurrence of the incident'.... While the Legislature may not have contemplated a scenario where, as here, the Justice Center would find the subject of a report fully absolved from responsibility while determining that the facility engaged in conduct amounting to neglect, 'the plain language of a statute may not be overridden to avoid an undesirable result....'"

The Justice Center says section 493(3)(b) "specifically empowers [it] to make a 'concurrent finding' of neglect against a provider when a systemic problem 'caused or contributed to' an incident of neglect to a service recipient.... And having this power ensures the Justice Center's ability to order the provider to correct any systemic problems, as it is required to do. The Third Department's construction ... is not compelled by the statute's plain language, renders parts of the statute superfluous, and undermines the statute's purpose, as confirmed by its legislative history. By limiting the Justice Center's authority to those rare cases in which no perpetrator can be identified, the ... decision undermines the Justice Center's oversight authority and impedes its ability to require providers to remedy defective conditions that have caused an incident of neglect."

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