

***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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of April 24 - 26, 2007

State of New York Court of Appeals

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To be argued Tuesday, April 24, 2007

No. 69 The Mayor of the City of New York v Council of the City of New York

The Mayor is challenging two amendments to the New York City Collective Bargaining Law, which provide that the Fire Department's emergency medical technicians and fire alarm dispatchers must be treated as members of the uniformed services in collective bargaining. Previously, as non-uniformed employees, EMTs and dispatchers were represented by their own unions in negotiations over wages, hours and other issues specific to their bargaining units, but negotiations over citywide issues, including overtime and time-and-leave rules, were negotiated on their behalf by the largest city union. This "citywide agreement" is binding on all non-uniformed workers, regardless of whether their union had a role in negotiating it, unless they obtain a special accommodation based on "considerations special and unique" to their unit. Unions for the uniformed services, including firefighters and police officers, negotiate all contract issues for their members.

The City Council initially passed the amendments, Local Laws 18 and 19 of 2001, over the objections of then-Mayor Rudolph Giuliani, who vetoed them. The Council overrode the vetoes in April 2001. The Mayor commenced this action four months later, contending the amendments violated the Taylor Law, which gives the Mayor exclusive authority to negotiate agreements with city employee unions. He also argued the laws are invalid under Municipal Home Rule Law § 23(2) and New York City Charter § 38(5), which require that measures curtailing the powers of an elected official be approved by referendum. Leaders of five unions representing EMTs, dispatchers and their supervisors intervened in the suit in support of the Council.

Supreme Court ruled the amendments were valid and the Appellate Division, First Department affirmed in a 3-2 decision. The majority ruled the amendments "represent valid exercises of the authority, expressly recognized by the Taylor Law, of a local government, 'acting through its legislative body, [to] adopt[] by local law ... its own provisions and procedures' relating to labor relations...." The court also held, "Local Laws 18 and 19 are not subject to the referendum requirement of Municipal Home Rule Law for two reasons: (1) ... the curtailment of mayoral authority they entail -- i.e., the requirement that the Mayor negotiate with the unions representing EMTs and [dispatchers] over all terms and conditions of employment -- is provided for by the Taylor Law, and (2) ... in enacting both local laws the City Council acted under the authority of the Taylor Law."

The dissenters agreed the Council did not violate the Taylor Law, but they argued the amendments were subject to a mandatory referendum. "The Local Laws would require the Mayor to negotiate directly with EMTs and [dispatchers] such issues as pensions, overtime, and time and leave rules, and deprive him of his former power under the Collective Bargaining Law to bind those two employee groups to the terms of a citywide agreement or negotiate with them the issue whether they might obtain a variation from the citywide agreement," they said. "That alteration 'curtails' a 'power' of the Mayor, thereby triggering the mandatory referendum provisions of Municipal Home Rule Law § 23(2)(f) and City Charter § 38(5)...."

For appellant Mayor: Assistant Corporation Counsel Mordecai Newman (212) 788-1025

For respondent Council: Alvin L. Bragg, Jr., Manhattan (212) 788-7017

For intervenor-respondent unions: Walter M. Meginniss, Jr., Manhattan (212) 228-7727

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To be argued Tuesday, April 24, 2007

No. 18 People v Cornell Louree

When Cornell Louree pleaded guilty to third degree criminal possession of a weapon in Supreme Court, Brooklyn, in 2003, the judge informed him of the rights he was waiving and told him he could be sentenced to as much as seven years in prison, but did not mention that he would face a mandatory period of post-release supervision. Louree was ultimately sentenced to seven years in prison and five years of post-release supervision. On appeal, he contended the trial court's failure to inform him that he would be subject to post-release supervision rendered his guilty plea invalid under People v Catu (4 NY3d 242).

The Appellate Division, Second Department affirmed the conviction, concluding that his claim was subject to a preservation requirement. "The defendant's contention that his plea was not knowingly, intelligently, and voluntarily entered because he was not informed that he would be subject to a mandatory period of post-release supervision is unpreserved for appellate review since he did not move either to withdraw his plea or vacate the judgment of conviction on that basis...", it said, "and we decline to review the issue in the exercise of our interest of justice jurisdiction. We are unpersuaded by the defendant's contention that People v Catu ... requires a different result..."

Louree argues preservation is not required for a Catu claim, and he cites decisions to that effect from the Appellate Division, First and Fourth Departments. He says, "The Court in Catu recognized that due process requires the trial court to inform the defendant of post-release supervision and placed the duty to do so squarely on it. Both the Court's mandatory language and the constitutional due process guarantee from which it springs suggest that a Catu issue need not be protested in the trial court in order to present an issue of law. That conclusion is also compelled by the fact that a guilty plea is, at heart, a waiver of the fundamental right to a jury trial, and the burden of establishing a defendant's waiver ... rests with the court."

For appellant Louree: Lynn W. L. Fahey, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Solomon Neubort (718) 250-2514

State of New York Court of Appeals

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To be argued Wednesday, April 25, 2007

No. 68 Matter of Worth Construction Co., Inc. v Hevesi

In November 2004, Connecticut-based Worth Construction Co., Inc. submitted the apparent low bid of \$46.1 million for a Thruway Authority contract for reconstruction of Interchange 17 and related facilities in Orange County. Based, in part, on an ongoing federal investigation in Connecticut into allegations of bribery and municipal corruption involving Worth's president, Joseph Pontoriero, and the former mayor of Waterbury, Phil Giordano, the Thruway Authority required Worth to hire an independent monitor as a condition for receiving the contract. After Worth agreed, the Authority determined that the company was the lowest responsible bidder and awarded it the contract in May 2005.

However, the contract provided that it would not be "valid, effective or binding" until it had been approved by the State Comptroller. This has been a standard provision of Thruway Authority contracts since 1950, when the Authority adopted a resolution asking the Comptroller "to audit the funds of the Authority in the same manner as funds of a regular State agency are audited." In November 2005, after a de novo review, the Comptroller issued a determination finding that Worth was not a responsible vendor and refusing to approve the contract.

Worth commenced this article 78 proceeding to vacate the determination, contending the Comptroller has no constitutional power or jurisdiction to approve the contracts of public authorities. Supreme Court dismissed the proceeding.

The Appellate Division, Third Department affirmed. "There is no dispute that the Comptroller's approval was an expressly agreed-upon condition precedent to the formation of this contract and, assuming that no law affirmatively precludes the Comptroller from performing that function, the failure to obtain it is a complete bar to petitioner's recovery....," the court said. "While petitioner contends that the Comptroller's clear power to supervise the accounts of public corporations (*see* NY Const, art X, § 5), and to audit and supervise the accounts of political subdivisions of the state (*see* NY Const, art V, § 1), does not include the power to approve or disapprove a public corporation's contract, we find nothing in either article of the NY Constitution which precludes his exercise of that power."

Worth contends the Comptroller exceeded his jurisdiction, arguing that contract approval is an administrative function and that the Comptroller's constitutional role with regard to the Thruway Authority is that of an auditor, not an administrator. Worth also contends the Thruway Authority could not legally invite the Comptroller to approve its contracts, saying, "It should be clear that if the Comptroller hasn't the constitutional authority to exercise a power, it cannot be conferred on him merely by including it in a contract."

For appellant Worth: Alvin Goldstein, Manhattan (212) 354-9600

For respondent Hevesi: Assistant Solicitor General Edward Lindner (518) 474-9755

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To be argued Wednesday, April 25, 2007

No. 64 Williamson v PricewaterhouseCoopers LLP

After the unexpected departure of its portfolio manager, Edward Strafaci, in January 2002, the management of Lipper Convertibles, L.P. found that he had materially overstated the value of the hedge fund's securities holdings. The overvaluation also affected another hedge fund, Lipper Fixed Income Fund, L.P., which was heavily invested in Lipper Convertibles. In February 2002, the funds announced to their limited partners that they had reduced the portfolio valuation of Lipper Convertibles by about 40 percent, or roughly \$400 million. Both hedge funds went into liquidation a month later, after many limited partners withdrew their investments.

In July 2004, liquidating trustee Richard A. Williamson commenced this action against PricewaterhouseCoopers LLP (PwC) for malpractice, among other claims, to recover damages allegedly caused by the accounting firm's improper audits of Lipper Convertibles' financial statements for 1995 through 2000. Williamson alleged that PwC ignored blatant and material errors in the valuation of the hedge fund's investments.

PwC moved to dismiss the malpractice claims relating to audits conducted for fiscal years 1995 through 1999 on the ground they were time-barred by the three year statute of limitations for non-medical malpractice. Williamson contended the statute of limitations should be tolled under the continuous representation doctrine, arguing that for each audit PwC had relied on the inflated values contained in prior years' audits, resulting in increasingly inflated statements of assets, capital and profits. He argued that each audit was part of a continuous and interrelated service that PwC provided to the Lipper funds until it was discharged in 2002.

Supreme Court granted PwC's motion to dismiss. "Taken together, plaintiff's claims underscore that the audits [PwC] performed constituted the continuation of a general professional relationship," the court said. "Those audits are insufficient to toll the statute of limitations under the continuous treatment doctrine."

The Appellate Division, First Department reversed in a 3-2 decision and reinstated the malpractice claims, saying the trial court "should have given plaintiff the opportunity to develop through discovery, and to establish, the asserted fact that each audit was merely a step in a continuous and interrelated service that PwC provided through the years in question...." The majority said, "When we accept as true [plaintiff's] assertions that [PwC] not only failed to take the appropriate action in the face of pricing discrepancies, but also began each year's audit by assuming the accuracy of, and adopting the conclusions of, its previous year's audit, rather than reviewing those prior statements for accuracy, it is inappropriate to conclude that, as a matter of law, each year's audit was necessarily a separate and discrete service.

The dissenters said, "Inasmuch as these were discrete audits conducted on a year-to-year basis, the continuous representation doctrine does not apply...."

For appellant PwC: J. Peter Coll, Jr., Manhattan (212) 506-5000

For respondent Williamson: Thomas A. Dubbs, Manhattan (212) 907-0700

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To be argued Thursday, April 26, 2007

No. 70 State of New York ex rel. Harkavy v Consilvio

This is the second habeas corpus proceeding brought by the Mental Hygiene Legal Service on behalf of sex offenders who were involuntarily committed to state psychiatric hospitals when they completed their terms of imprisonment in the fall of 2005. The transfers were made under Mental Hygiene Law § 9.27, which provides for the civil commitment of persons who are in need of involuntary treatment and who pose a danger to themselves or society. In each case, two Office of Mental Health (OMH) physicians certified the petitioner was mentally ill and would likely re-offend without inpatient psychiatric treatment, and a third OMH physician at the psychiatric center concurred at the time of admission. The first proceeding, Harkavy I, was brought on behalf of 12 offenders who were committed to the Manhattan Psychiatric Center, a non-secure facility. This appeal in Harkavy II involves 10 offenders who were committed to Kirby Forensic Psychiatric Center, a secure mental hospital.

Supreme Court granted the petitions in both cases, holding the petitioners were illegally detained under Mental Hygiene Law § 9.27. The court ruled that, because they were imprisoned at the time of their civil commitment, the petitioners were entitled to the enhanced due process protections of Correction Law § 402, which governs the transfer of inmates to mental hospitals. The Correction Law requires court approval of a commitment after the inmate is examined by two independent physicians appointed by the court and after the inmate is given notice and an opportunity to be heard. The Appellate Division, First Department reversed in both cases, ruling the petitioners were properly confined under Mental Hygiene Law § 9.27.

In November 2006, after the lower court rulings were issued in both cases, the Court of Appeals reversed the Appellate Division in Harkavy I, holding that the State must proceed under Correction Law § 402, not the Mental Hygiene Law, when it seeks the involuntary commitment of sex offenders prior to the expiration of their prison terms. Rather than ordering release of the petitioners, the Court directed that they be afforded immediate retention hearings. Because their prison sentences had by then expired, the Court ordered that the hearings be held pursuant to article 9 of the Mental Hygiene Law.

In Harkavy II, the petitioners contend that the remedy fashioned in Harkavy I cannot be used for them because, unlike their counterparts in Harkavy I, they were transferred directly to a secure facility "after unilaterally being designated as sexually violent predators ... under an ad hoc policy adopted by OMH at the behest of former Governor Pataki." They say there was no showing of heightened dangerousness to justify their secure placement, nor was there an opportunity to contest their designation as sexually violent predators under Kansas v Crane ((534 US 407). They argue that, if the Court finds they are similarly situated to the petitioners in Harkavy I, it should order their immediate transfer to a non-secure facility for further proceedings under Mental Hygiene Law article 9. "In the alternative," they say, "if this Court directs hearings on whether petitioners should remain at Kirby, the hearing must include a substantive legal standard for secure retention. The State argues that Harkavy I controls and that the petitioners are entitled to article 9 retention hearings, but no further relief.

For appellant Harkavy: Diane Goldstein Temkin, Manhattan (212) 779-1734

For respondent Consilvio: Deputy Solicitor General Benjamin N. Gutman (212) 416-8096

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To be argued Thursday, April 26, 2007

No. 71 People v Alfonso Washington

Alfonso Washington is appealing his conviction for conspiring to hire a hit man to kill a rival pimp, known to him as "Seven," who Washington believed had shot him in the head. The shooting occurred in December 2001, while Washington was sitting in his car after dropping off his girlfriend at her home in Harlem. When he got out of the hospital, Washington told police of his suspicion that Seven was responsible, but no arrest was made.

In March 2002, Washington was arrested on charges of promoting prostitution and endangering the welfare of a child based on the complaint of Alexis Hall, who had worked for him. While awaiting trial at Rikers Island, Washington became acquainted with Martin Mitchell, an inmate who was a government informant. Mitchell told his police contact that Washington had offered him \$5,000 to arrange the murder of Hall to prevent her from testifying against him. Mitchell subsequently brought an undercover officer, posing as a hit man named "G," to meet with Washington at Rikers. Conversations between the undercover officer and Washington focused on Seven, rather than Hall, and Washington said he wanted to wait until he got out of jail and "put my hands on the money before anything is done." He was charged with second degree conspiracy for the alleged plot against Seven and with second degree conspiracy and criminal solicitation for the alleged plot against Hall.

At his non-jury trial, Washington moved to dismiss on the ground, among others, that "there was no true agreement made between the parties." He argued that any "possible futuristic agreement" had been contingent on his getting out of jail and obtaining the money to pay the hit man. The trial court denied the motion, then acquitted Washington of the charges pertaining to Hall. The court found him guilty of the conspiracy count pertaining to Seven and sentenced him to 6 to 12 years in prison.

The Appellate Division, First Department affirmed, saying, "The evidence established that defendant and his coconspirators entered into an agreement to kill defendant's rival for a specific price, with the killing to take place after certain contingencies had occurred. Defendant expected these contingent events to take place within a short time, and the fact that he insisted the killing be deferred until after their occurrence neither negated the existence of a conspiracy ... nor established the defense of renunciation...."

Washington argues, in part, that there was insufficient evidence of an agreement to kill Seven because he never discussed the price of a hit with the undercover officer and because any purported agreement was conditioned on his release from jail, "a condition he could not control and that was not likely to occur in the foreseeable future." He urges the Court to hold that a conditional agreement of this kind cannot support a conspiracy charge until the conditions are met, saying this case "demonstrates the risk that someone who is a 'big talker' will improperly be convicted of a plan he never sought to put into action."

For appellant Washington: Sara Gurwitch, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Na Na Park (718) 590-6958

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To be argued Thursday, April 26, 2007

No. 67 Matter of Greene County Department of Social Services v Ward (papers sealed)

Dawn Ward, a single woman living in Greene County, took in a special needs child in May 2001 and adopted him in June 2002. The boy had been born in New Jersey in 1998, nearly two months prematurely, and tested positive for cocaine and syphilis at birth. He suffered from mild cerebral palsy and was hospitalized for the first five months of his life. When he was placed with Ward at age 3, he was fed by bottle and wore the clothing of an 18-month-old.

The boy initially showed improvement in his physical and psychological development, was weaned from the bottle and began to speak, but his behavior deteriorated markedly in the fall of 2002. He stopped talking and following directions, regressed in toileting and eating, and he became increasingly angry and physically aggressive, biting and kicking other children in daycare until the facility refused to allow him to return. Ward sought assistance from mental health and social services agencies, and finally sought in-patient treatment in a psychiatric hospital or placement in a residential program for special needs children, but nothing was available. On September 2, 2003, Ward surrendered her parental rights in Greene County Family Court. She also relinquished the \$1,000 monthly subsidy she had been receiving from New Jersey.

Nine months later, the Greene County Department of Social Services (DSS) commenced this proceeding against Ward for child support. The support magistrate rejected her argument that she was exempt from liability under Social Services Law § 398(6)(f), which provides that acceptance by DSS "of a surrender of a child born out of wedlock from the mother or father of such child shall relieve the parent executing such surrender from any and all liability for the support of such child." The magistrate ordered Ward to pay \$133.54 per week in support to DSS from the date of her surrender of parental rights. Family Court denied her objections to the order.

The Appellate Division, Third Department affirmed. "[E]ven accepting that [Ward] is the parent of a child who was born out of wedlock," it said, "the fact nonetheless remains that the child in question was not born out of wedlock to her and, accordingly, she cannot stand in the shoes of the child's biological mother in an effort to avoid the support obligation imposed upon her by Family Court Act § 413. As [Ward] is the child's adoptive parent, as opposed to his biological parent, she remains liable for the child's support ... until such time as he is subsequently adopted, and she cannot avail herself of the narrow exception set forth in Social Services Law § 398(6)(f). To the extent that it may be argued that the statute creates a disincentive for individuals to adopt children, particularly those with physical or emotional challenges, we need note only that the remedy for any perceived inequity in this regard lies with the Legislature."

Ward contends the lower courts erred in limiting the exception in Social Services Law § 398(6)(f) to biological parents, arguing that the statute makes no such distinction and that, under New York law, the "adoptive parent and adopted child stand in the same relation as a natural parent and child." She also argues the ruling is contrary to public policy, saying the statute "recognizes that it is more difficult for a single parent to successfully parent a child. That difficulty exists whether the child is biological or adoptive. If the benefits of Social Services Law § 398(6)(f) are not applicable to an adoptive parent, single parents will be less likely to adopt."

For appellant Dawn Ward: Anne Reynolds Copps, Albany (518) 436-4170

For respondent Greene County DSS: Heather Sheehan, Catskill (518) 719-3643