

***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.

OCTOBER 2004 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 Tuesday, October 12, 2004

No. 141 McGrath v Toys “R” Us, Inc.

The plaintiffs in this case, three pre-operative transsexuals, claimed they were verbally harassed by several Toys “R” Us employees while shopping at the company’s store on Bay Parkway in Brooklyn on December 13 and 20, 2000. They filed suit in federal court for compensatory and punitive damages, alleging that Toys “R” Us, through its employees, had denied them the privileges and facilities of a public accommodation based on their gender and sexual orientation, in violation of the New York City human rights law (Administrative Code § 8-107.4). After a ten-day trial, the jury returned a verdict finding the plaintiffs had been subjected to illegal discrimination, but awarding each of them just \$1 in nominal damages.

The plaintiffs then petitioned for attorneys fees under Administrative Code § 8-502(f), which provides that in any civil action commenced under the City’s human rights law “the court, in its discretion, may award the prevailing party costs and reasonable attorney’s fees.” Toys “R” Us conceded the plaintiffs were prevailing parties, but argued no award of attorney’s fees would be reasonable in view of the nominal damages awarded by the jury. The store relied on the U.S. Supreme Court decision in Farrar v Hobby (506 US 103), which held that “when a plaintiff recovers only nominal damages ... the only reasonable fee is usually no fee at all.” The District Court ruled the plaintiffs were entitled to attorney’s fees, despite their nominal recovery, because their lawsuit served a significant public purpose as “the first public accommodations case to go to trial under the Code, as well as the first case in which the rights of transsexuals were asserted and vindicated” and because it would deter “similar misconduct in the future.” The judge awarded them \$193,551 in attorney’s fees.

Toys “R” Us appealed to the U.S. Court of Appeals for the Second Circuit, which is asking the New York Court of Appeals to resolve several key questions of New York law. The Second Circuit asks whether New York has adopted the Farrar standard for determining reasonable attorney’s fees and, if not, it asks what standard should apply to a prevailing party who recovers only nominal damages. If Farrar is the standard, the court asks if New York recognizes a public interest exception that would allow a fee award to a plaintiff who recovers nominal damages if their lawsuit served a significant public purpose; and it asks if this case would qualify for such an exception.

For appellant Toys “R” Us: H. Nicholas Goodman, Manhattan (212) 319-1000

For respondents McGrath et al: Thomas D. Shanahan, Manhattan (212) 867-1100

State of New York Court of Appeals

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To be argued Tuesday, October 12, 2004

No. 143 Mason v Central Suffolk Hospital

Dr. Roger Mason, a member of the medical staff at Central Suffolk Hospital in Riverhead, was granted privileges to perform advanced laparoscopic surgery in May 1997. After hospital staff and an outside expert conducted reviews of Mason's performance, the hospital summarily suspended his laparoscopic privileges in February 1998, informing him in a letter that the suspension was based "upon our belief that the safety and welfare of hospital patients are in immediate jeopardy"

After exhausting his hearing and appeal rights through the hospital, and after the State Health Department's Public Health Council rejected his complaint that he had been improperly suspended, Mason commenced this action for money damages against Central Suffolk Hospital and a staff physician, Dr. Jon Zelen, alleging breach of contract and tortious interference claims. Mason contended that the hospital's bylaws constituted an express and implied contract between Central Suffolk and its medical staff, that the hospital had violated its bylaws in suspending him and that Zelen had wrongfully exercised control over the suspension process.

The hospital and Zelen moved to dismiss the suit, arguing it was actually an action for wrongful suspension of privileges for which money damages are unavailable. They argued Public Health Law §§ 2801-b and 2801-c provide the exclusive remedy for such a claim – an injunction to restore privileges. Supreme Court denied the motion, finding Mason had sufficiently pleaded his breach of contract and tortious interference claims. It said, "While Public Health Law § 2801-b bars common law claims of wrongful or improper denial of any privileges which would be governed by the statute, simple claims of breach of contract or bylaws, and not on the termination, are still viable; as are claims premised upon tortious interference with a contract."

The Appellate Division, Second Department reversed and dismissed the suit, finding that Mason "was damaged by the revocation of his privilege to perform laparoscopic procedures, not by the alleged violation of one or more of the hospital's unspecified bylaws." The court said that, because there is no common law right to recover damages for suspension of staff privileges, "where the claim of a violation of the bylaws is secondary and the gravamen of the plaintiff's grievance is the suspension of his privileges, his causes of action alleging breach of contract and tortious interference with that contract are barred" and his remedy is limited to an action for an injunction to restore the privileges.

In an amicus curiae brief, the Healthcare Association of New York State argues that imposing liability on the defendants would discourage participation in peer review programs.

For appellant Mason: Robert G. Spevack, Manhattan (212) 587-9663

For respondents hospital and Zelen: Michael S. Cohen, Garden City (516) 832-7500

State of New York Court of Appeals

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To be argued Tuesday, October 12, 2004

No. 144 Lang v Hanover Insurance Company

David Lang was injured in April 2000, while visiting the home of John and Elizabeth Durbin in the Village of Moravia, Cayuga County, when he was struck in the eye by a paintball fired by Richard Bachman, who was residing in the Durbins' home. Hanover Insurance Company, the Durbins' homeowners' insurance carrier, disclaimed coverage on the ground that Bachman was not an insured under the policy. Lang brought a personal injury suit against Bachman, who then filed for bankruptcy.

Lang brought this action for a declaration that Hanover is required to defend and indemnify Bachman under the terms of the Durbins' policy. Supreme Court denied Hanover's motion to dismiss for lack of standing and failure to name Bachman as a party to the action.

The Appellate Division, Third Department reversed the order and dismissed the suit. Because Lang "is a stranger to the subject insurance policy," the court said, citing case law from the First and Fourth Departments, "...Insurance Law § 3420(a)(2) authorizes an action by plaintiff against Hanover only after he obtains a judgment against Bachman that has gone unpaid for 30 days." Since Lang had no judgment against Bachman, it said, "this action must be dismissed as premature."

Lang relies on precedent from the Second Department, which holds that an interested party – including a plaintiff in a personal injury suit – is not required to obtain a judgment on damages before bringing a declaratory judgment action to determine whether an insurer must provide coverage. The Second Department has interpreted section 3420 as governing only direct actions against insurers to recover money damages, not declaratory judgment actions.

For appellant Lang: Jeffrey G. Pomeroy, Syracuse (315) 492-9665

For respondent Hanover: Frederick F. Shantz, Liverpool (315) 461-1400

State of New York Court of Appeals

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To be argued Tuesday, October 12, 2004

No. 142 Rubeis v The Aqua Club, Inc.

To be argued with: **No. 185 Largo-Chicaiza v Westchester Scaffold Equipment Corp.**

No. 186 Knauer v Anderson

Aldo Rubeis, a 50-year-old ironworker employed by Venezia Iron Works, suffered severe brain damage and other injuries in May 1997 when he fell from the top of an 18-foot ladder while installing a cupola on The Aqua Club's building in New Rochelle. Rubeis filed a personal injury suit against The Aqua Club, and the club filed a third-party action against Venezia for indemnification, contending Rubeis's employer was responsible for the accident.

Expert witnesses for Rubeis testified that he experienced softening of his brain, blindness in one eye, loss of his sense of smell, dizziness, forgetfulness, decreased mobility and balance, "and an overall grave impact on his brain function," as summarized by the Appellate Division. "Though capable of performing simple tasks, he could never be gainfully employed with any degree of responsibility and certainly not as an ironworker. His brain injury also severely restricts his physical activities, although he can carry up to 35 pounds for short periods of time, including packages from the grocery store, but excluding any tasks requiring accuracy."

Venezia moved to dismiss the third-party claim on the ground that Aqua Club failed to prove Rubeis had sustained a "grave injury" as required by Workers Compensation Law § 11. The statute, as amended by the Omnibus Workers' Compensation Reform Act of 1996, provides that employers cannot be held liable for workplace injuries unless their employee suffers a "grave injury," which it defines as including "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." Section 11 does not define "permanent total disability."

Supreme Court denied Venezia's motion to dismiss Aqua Club's third-party claim, concluding the jury should decide whether Rubeis had suffered a grave injury. The jury awarded Rubeis \$3.2 million against Aqua Club and, regarding Venezia's liability, it found Rubeis had sustained a grave injury as defined by section 11. Accordingly, Supreme Court ordered Venezia to indemnify Aqua Club for the judgment.

The Appellate Division, Second Department reversed the indemnification order and dismissed Aqua Club's complaint against Venezia. It applied a strict standard for determining whether a brain injury results in a "permanent total disability," a standard that does not focus "on the re-employability of the injured plaintiff, but rather, on the ability to engage in day-to-day functions." It said Rubeis's injuries, which allowed him to clothe, feed and care for himself, were not grave under section 11.

Aqua Club urges the Court of Appeals to adopt the standard applied by the Third Department in Way v Grantling (289 AD2d 790), which said, "we believe that the 'permanent total disability' envisioned by the Legislature relates to the injured party's employability and not his or her ability to otherwise care for himself or herself and function in a modern society." It said injuries that "'permanently disabled [a plaintiff] from competitive employment' in even the most menial tasks" could qualify as grave.

The appeals in No. 185 and No. 186 present similar issues.

- No. 142 For appellant Aqua Club: Steven J. Ahmuty, Lake Success (516) 488-3300
For respondent Venezia Iron Works: Michael J. Hutter, Albany (518) 445-2360
- No. 185 For appellant McCaffrey: Jayne F. Monahan, Pearl River (845) 620-1441
For respondent Sanzo: Robert C. Baxter, White Plains (516) 997-7330
- No. 186 For appellant Ronald Knauer: Michael J. Hutter, Albany (518) 445-2360
For respondent Thomas Knauer: Terrence M. Connors, Buffalo (716) 852-5533
For respondent B.T.S. Services: Norman B. Viti, Jr., Buffalo (716) 856-4200

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To be argued Wednesday, October 13, 2004

No. 145 Lyles v State of New York

Artemus Lyles is asking the Court of Appeals to reinstate his claims against New York State for alleged violations of his constitutional rights during a pair of traffic stops on March 27, 1999, while he was driving home to Manhattan from Westchester County in a 1986 Cadillac he had bought at a recent auction. Lyles, who is black, contends State Troopers violated state and federal equal protection and search and seizure provisions during the stops. The State contends Lyles was limited to common-law tort remedies, which are now time-barred.

Lyles alleges he was stopped shortly after midnight by two troopers who told him smoke was coming from his tailpipe. He was given a ticket for the offense and says he was detained for more than an hour and 20 minutes while he was searched, with his consent, and his car was searched, without his consent. He was allowed to leave, but alleges he was stopped again within three minutes by the same troopers for another violation – an air freshener hanging from the rear-view mirror obstructed the windshield. He was not ticketed a second time, but claims he was detained for another hour while the troopers searched his car again, without consent, allegedly damaging the driver's door and dashboard. Lyles claims a third trooper arrived and searched him again for weapons or contraband, without his consent, and then handcuffed him until he agreed to open his trunk for inspection. He says he was then allowed to drive away.

Nearly three years later, Lyles filed his constitutional tort claim based on the 1996 Court of Appeals ruling in Brown v State of New York (89 NY2d 172), which held for the first time that government could be held liable for civil damages for violations of the state Equal Protection and Search and Seizure Clauses. The Brown decision reinstated claims by 300 black men who were stopped and questioned during a 1992 police sweep in Oneonta.

The Court of Claims dismissed his state constitutional claims, relying largely on the 2001 Court of Appeals ruling in Martinez v City of Schenectady (97 NY2d 78). The Court of Claims concluded that constitutional tort damages are unavailable where common-law damages could have provided an adequate remedy for the same alleged misconduct. The court also ruled there was no authority for it to hear the federal constitutional claims.

The Appellate Division, Second Department affirmed, saying "...the recognition of [Lyles's] state constitutional claims was neither necessary nor appropriate to ensure the full realization of his rights, because the alleged wrongs could have been redressed by an alternative remedy, namely, timely interposed common-law tort claims for assault and battery, false imprisonment, and the intentional and negligent injury to his property."

Lyles contends the lower courts misinterpreted Brown and Martinez, which "did not even address the question of whether state constitutional claims should be dismissed upon a finding of adequate common-law tort claims. Instead, in Martinez, the constitutional claims were dismissed because this Court found that the plaintiff had already vindicated her constitutional rights in a previous proceeding." He argues the available common-law claims are not analogous to his state constitutional claims. He also contends he can pursue his federal claims directly under the Fourth Amendment.

For appellant Lyles: Arthur N. Eisenberg, Manhattan (212) 344-3005

For respondent State: Assistant Solicitor General Denise A. Hartman (518) 473-6085

State of New York Court of Appeals

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To be argued Wednesday, October 13, 2004

No. 146 *Graziano v County of Albany*

This case, focusing on the authority exercised by county election commissioners, arose in Albany County in 2003, when both members of its Board of Elections jointly determined to hire two election specialists. Albany County has operated under a hiring freeze since 1992 and has created a Committee to Fill Vacancies to determine which positions are essential and which are not. Although the Board of Elections had funds in its appropriated budget for both staff positions, the Committee to Fill Vacancies rejected the appointments as nonessential.

John A. Graziano, the Republican election commissioner, commenced this action seeking a declaration “that the Board has unilateral discretion to appoint and dismiss staff, [and] spend funds in furtherance of its legal responsibilities,” and seeking to enjoin county officials from interfering with Board appointments. Graziano’s Democratic counterpart, who had also objected to the County’s rejection of the two appointments, did not join in this litigation.

The County argued Graziano lacked standing to bring the action unilaterally because Election Law § 3-212(2) requires a majority vote for actions of the Board. Supreme Court rejected the argument, saying the majority vote requirement applies “to the exercise of the Board’s enumerated ministerial powers and duties ..., not the protection of those powers and duties against alleged unconstitutional infringement by other governmental entities. To do otherwise, would frustrate the electoral process and seriously jeopardize the bipartisan system.” On the merits, the judge held the County’s action was “an unconstitutional infringement on the Board’s unfettered right to staff as it deems appropriate within the confines of its budget.”

The Appellate Division, Third Department reversed, agreeing with the County that Graziano lacked standing to bring the action without approval of his fellow election commissioner. “Election Law § 3-212(2) provides that ‘[a]ll actions of the board shall require a majority vote of the commissioners prescribed by law for such board,’” the court said. “Albany county has two election commissioners and both are necessary parties While we agree with Supreme Court that the hiring of personnel is a discretionary, as opposed to a ministerial act, such discretion, except for the appointment of a deputy, cannot be exercised unilaterally.”

For appellant Graziano: Paul DerOhannesian II, Albany (518) 465-6420

For respondent County: Michael C. Lynch, Albany (518) 447-7110

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To be argued Wednesday, October 13, 2004

No. 147 Excess Insurance Company Ltd. v Factory Mutual Insurance Company

Factory Mutual Insurance Company, a Rhode Island company, provided property insurance to Bull Data Systems for a warehouse storing personal computers in Seclin, France, in 1991. Factory Mutual then obtained reinsurance from a group of London-based reinsurers to cover a portion of the risk. The reinsurance agreement contained a "Limit" clause which limited the reinsurance coverage to \$7 million for any one occurrence. After the "Limit" clause came a list of "Conditions," including one that read, "Reinsurers agree to follow the settlements of the Reassured [Factory Mutual] in all respects and to bear their proportion of any expenses incurred, whether legal or otherwise, in the investigation and defence of any claim hereunder."

When the warehouse burned down in June 1991, Factory Mutual contested Bull Data's claim on the ground of arson. After spending \$35 million in unsuccessful litigation against the claim, Factory Mutual settled with Bull Data for nearly \$100 million. Factory Mutual then sought payment from its London reinsurers of the \$7 million coverage limit for the fire loss settlement and payment of another \$5 million as their proportionate share of the litigation expenses. The reinsurers brought this action for a declaration that the reinsurance agreements were null and void; Factory Mutual counterclaimed for payment of its litigation expenses.

Supreme Court granted partial summary judgment to Factory Mutual, declaring that the reinsurers' obligation to pay a share of expenses incurred in the investigation and defense of claims was not subject to the \$7 million coverage limit. The court said "... the limitation clause has to do not with expenses incurred, but with the payment of the claim."

The Appellate Division, First Department reversed, holding that the limitation clause placed a \$7 million cap on the reinsurers' total liability for litigation costs as well as property loss. It said, "As we read the reinsurance agreement, while plaintiff reinsurers are required by the policy to 'follow the settlements of the Reassured in all respects and to bear their proportion of any expenses incurred ...,' this provision does not supercede or supplant the 'limit' of the overall contract."

For appellant Factory Mutual: Bernard London, Manhattan (212) 972-1000

For respondent reinsurers: Richard A. Walker, Chicago, Ill. (312) 345-3000

State of New York Court of Appeals

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To be argued Wednesday, October 13, 2004

No. 148 City Council of the City of Watervliet v Town Board of the Town of Colonie

A central question in this case is whether the State Environmental Quality Review Act (SEQRA) applies to municipal annexation proceedings. The case arose in October 2002, when East-West Realty Corp. petitioned the City of Watervliet and the Town of Colonie for annexation by Watervliet of 43 acres of vacant land in Colonie bordering the city line. East-West owns 37 acres of the property and had been considering construction of a senior citizen assisted living facility, and it expressed concern that zoning restrictions and community opposition within Colonie would pose serious obstacles to the project.

After a joint public hearing by city and town officials in December 2002, the Colonie Town Board passed a resolution rejecting the annexation petition on the grounds that East-West failed to comply with SEQRA and that annexation was not “in the over-all public interest.” The Watervliet City Council passed a resolution approving the annexation, finding it was in the public interest.

With the municipalities split, Watervliet petitioned the Appellate Division, Third Department to approve the annexation. East-West intervened in support of annexation. Colonie moved to dismiss the petition, arguing that Watervliet had failed to comply with SEQRA by conducting an environmental review before passing its resolution.

The Appellate Division dismissed Watervliet’s petition, agreeing with Colonie that annexation requires SEQRA review under Department of Environmental Conservation (DEC) regulations, regulations the court found were valid. It said, “Interpreting SEQRA ‘actions’ to include annexation is not unreasonable or irrational, but instead ‘is consistent with SEQRA’s goal to incorporate environmental considerations into the decision-making process at the earliest opportunity’ To hold otherwise would in effect allow rezoning of a parcel without any environmental review” The court said, “While an environmental impact statement is generally ‘not required until a specific project plan [has been] formulated and proposed,’ ... an appropriate form of SEQRA review of an annexation ‘action’ is required”

Watervliet and East-West argue that “the mere holding of a joint hearing” on an annexation petition, when no specific development plans have been proposed, is not an “action” subject to SEQRA review. “Public hearings do not commit agencies to a ‘definite course of future decisions,’ especially ones which are as cantankerous and divided as the one in this case” they argue. “Public discussion of community issues in a public hearing setting should not be held hostage to the bureaucratic regulation of the type imposed by SEQRA until there is ‘action.’” They also argue that annexation procedures established by the State Legislature cannot be materially changed by DEC regulations.

For appellants Watervliet and East-West: Eugene Van Voorhis, Rochester (585) 232-2550

For respondent Colonie: Danielle M. DeMers, Colonie (518) 783-2704

For amici curiae State and DEC: Assistant Attorney General Philip M. Bein (518) 474-7178

State of New York Court of Appeals

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To be argued Thursday, October 14, 2004

No. 130 Hyman v Queens County Bancorp, Inc.

Allen Hyman was injured in February 1999 when he slipped on the top step and fell down a stairway in the Queens County Savings Bank on Northern Boulevard in Queens. There was just one handrail on the stairs, which were 48 inches wide, and Hyman said he was not able to reach the rail sufficiently to stop his fall.

Queens Savings moved to dismiss Hyman's personal injury suit, arguing the plaintiff failed to identify any defect on the stairway that could have caused him to slip. Hyman argued the bank's failure to install handrails on both sides of the stairway violated the City Building Code and State Uniform Fire Prevention and Building Code, which require handrails on both sides of stairs that exceed 44 inches in width. In reply, the bank contended the certificate of occupancy it received in 1978, after the building was renovated in 1977, demonstrated that the premises complied with all applicable building code requirements as of that date.

Supreme Court granted the bank's motion for summary judgment dismissing the complaint. The Appellate Division, Second Department affirmed in a 3-2 decision.

The majority said the 1978 certificate of occupancy "certified that the premises 'conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules and regulations of the uses and occupancies specified herein.' Accordingly, the plaintiffs failed to raise a triable issue of fact as to whether the failure to provide a second handrail violated either the city or state building code." Even if a code violation were established, the court said, "we do not agree with the dissent's view that an issue of fact exists as to whether the lack of a second handrail was a proximate cause of the injured plaintiff's fall Under these circumstances, it would be sheer speculation for a jury to find that the presence of a second handrail would have prevented the injured plaintiff from falling"

The dissenters, observing that the State and City building codes in effect in 1977 required two handrails, said the bank failed to meet its burden of establishing as a matter of law that the code provisions did not apply to its building. "Contrary to the defendant's contention," they said, "issuance of a certificate of occupancy does not preclude a finding of negligence based upon the existence of building code violations." Regarding proximate cause, the dissenters said Hyman's testimony "that he reached out for a handrail constituted proof in admissible form that the failure to provide handrails on both sides of the stairway may have been a proximate cause of the accident Since the plaintiff was carrying nothing in his hands, there was nothing to prevent him from grasping a handrail if one had been present on the side of the stairway closest to him."

For appellant Hyman: David P. Kownacki, Manhattan (212) 557-4190

For respondent Queens Savings: James F. Furey, Uniondale (516) 745-8310

State of New York Court of Appeals

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To be argued Thursday, October 14, 2004

No. 150 People v Simeon Duggins

Simeon Duggins was 18 years old in July 1999, when he was arrested for the murder of Wayne Flowers and Franklin Dennis at the Vandever Estates housing project in Brooklyn on July 4. Among other crimes, he was charged with two counts of first degree murder for allegedly killing the men “as part of the same criminal transaction.” The victims were shot to death in separate incidents about a block apart, Flowers at about 1:40 a.m. and Dennis at 3:10 a.m. Duggins told police in oral, written and videotaped statements that he shot the men, both members of the Crips gang, because he feared they were going to carry out a decree calling for him to be killed.

In a pre-trial Sandoval ruling, Supreme Court precluded the prosecution from inquiring into the facts underlying a 1998 assault conviction unless Duggins opened the door by claiming on the stand that he did not understand the Miranda warnings that preceded his confessions in the murder case. However, when Duggins testified at trial that he had great faith in the attorney who defended him in the assault case, the trial judge revised her Sandoval ruling to allow the prosecutor to ask Duggins if he had threatened a girl at knifepoint and injured her when she rejected his sexual advances. Duggins was ultimately acquitted of the murder of Flowers, but convicted of first degree murder in the death of Dennis. He is serving 25 years to life in prison.

The Appellate Division, Second Department affirmed the conviction in a 3-2 decision, although the court was unanimous in finding the trial judge erred when she modified her Sandoval ruling.

The majority ruled the error was harmless because the evidence of guilt “was overwhelming.” It said, “There is no significant probability that the jury would have acquitted the defendant but for the Supreme Court’s error in modifying its Sandoval ruling. The fact that the jury acquitted the defendant of one of the murders does not, as the dissent suggests, indicate that the jury accepted at least part of his testimony disavowing his postarrest statements.... Based on the defendant’s statements, the jury could have concluded that he only intended to injure the first victim, while he intended to kill the second victim, resulting in his acquittal with respect to the first shooting and conviction as to the second.”

The dissenters argued the evidence against Duggins “was far from overwhelming” and, therefore, there was no need to decide whether there was a significant probability the jury would have acquitted him but for the error. However, they went on to conclude that “complete acquittal was probable” if not for the Sandoval error, which they argued could have “distorted” the jury’s view of a central issue in the trial: the defendant’s claim that his confessions were coerced. The dissenters said, “The jury clearly accepted the defendant’s version in part because it acquitted him of the charges as to Flowers. Take away the defendant’s statements and the possibility of acquittal of all the charges becomes significant.”

For appellant Duggins: Warren S. Landau, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Victor Barall (718) 250-2000

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To be argued Thursday, October 14, 2004

No. 151 People v Jose Marrero

Under a negotiated plea agreement, Jose Marrero pled guilty to two counts of first degree robbery and three other robbery and drug sale charges in April 1999 and was sentenced as a second felony offender to an aggregate term of 15 years in prison. The basis for Marrero's second felony offender adjudication was his 1992 federal conviction for postal theft. In October 2002, new counsel filed a CPL § 440.20 motion challenging the legality of his sentence, arguing that the prior federal conviction did not qualify as a felony in New York. Supreme Court denied the motion, holding that Marrero waived the issue by failing to raise it at his sentencing.

On appeal, the prosecution conceded the federal conviction was not a valid predicate for the second felony offender sentence. The Appellate Division, First Department modified the judgment, in the interest of justice, by vacating Marrero's second felony offender adjudication and sentence and remanding the matter for resentencing. The court allowed the prosecution an opportunity to "allege a different prior felony conviction as the basis for a second felony offender adjudication." However, it rejected the prosecutors' argument that they should be permitted to withdraw their consent to the plea if it proved impossible to resentence Marrero as a second felony offender, citing Matter of Kisloff v Covington (73 NY2d 445 [1989]).

The prosecution, relying on People v Dickerson (85 NY2d 870 [1995]), argues that "where the law requires that a trial court re-sentence a defendant and that defendant will no longer receive the mutually agreed upon plea or sentence, fairness dictates that the People and/or defendant be allowed to withdraw their consent to the plea."

For appellant: Bronx Assistant District Attorney Christopher J. Blira-Koessler (718) 590-2140
For respondent Marrero: Richard Joselson, Manhattan (212) 577-3688

State of New York Court of Appeals

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To be argued Tuesday, October 19, 2004

No. 152 People v Franklin Rodriguez

Franklin Rodriguez, charged with wounding three men in a drive-by shooting in the Bronx in the pre-dawn hours of August 28, 1997, served a notice of alibi in November 1998 stating that he was at an uncle's birthday party at the time of the incident. Rodriguez obtained new counsel in June 1999 and, shortly before the trial began in January 2000, the new defender gave another copy of the notice to the prosecutor, who had misplaced the original.

In the midst of the trial, defense counsel disavowed the alibi notice and offered a different alibi that Rodriguez had been with his girlfriend at her apartment when the shooting occurred. The defender explained that he did not learn, until Rodriguez's uncle returned from the Dominican Republic to testify at the trial, that the birthday party took place on the night of August 28, while the shooting occurred in the early morning. Rodriguez was allowed to present the new alibi defense through testimony of his girlfriend and her mother. The trial court then allowed the prosecutor to use the withdrawn alibi notice to impeach the credibility of the two alibi witnesses. Rodriguez was convicted of attempted murder in the second degree and sentenced to 8 to 16 years in prison.

The Appellate Division, First Department affirmed the conviction, rejecting the defense claim that admission of the withdrawn alibi notice was reversible error. "While the Court of Appeals has held that 'the prosecution should not be permitted to impeach a defendant who has elected *not to present an alibi defense at trial* with statements contained in a notice of alibi *withdrawn before trial*' (People v Burgos-Santos, 98 NY2d 226, 235 [2002] [emphasis added]), the Burgos-Santos rule does not ... apply to the facts of this case," the Appellate Division said. It observed that Rodriguez did not disavow the birthday party alibi until mid-trial and that, unlike Burgos-Santos, he did present an alibi defense, "albeit one entirely different from" the notice. The court said Rodriguez "failed to act in the manner such rule is intended to encourage – that is to say, he did not timely withdraw his inaccurate alibi notice. On the other hand, he did, by raising a new, 'eleventh-hour' alibi defense for the first time at trial ... engage in precisely the conduct that the notice-of-alibi statute (CPL 250.20) is intended to prevent."

Rodriguez argues the "reasoning and policies" of the Burgos-Santos rule apply regardless of whether an alibi notice is withdrawn before or during trial. "Allowing use of a withdrawn notice might impede a defendant from abandoning a factually inaccurate defense posture, thereby subverting the trial's truth-seeking function and raising constitutional concerns about compelled testimony," he says. "These same concerns apply to tardily-withdrawn notices. Defendants must be free to change defense course up until the point they present their defense, but a rule permitting the use of a tardily-withdrawn alibi notice might inhibit them from doing so." He also argues there is "no sound reason" to limit the rule to cases where no alibi defense is raised at trial because judges have authority to prevent unfair surprise by precluding unnoticed alibi testimony or granting the prosecution time to investigate it.

For appellant Rodriguez: Barbara Zolot, Manhattan (212) 577-2523

For respondent: Bronx Assistant District Attorney Yael V. Levy (718) 590-2000

State of New York Court of Appeals

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To be argued Tuesday, October 19, 2004

No. 153 Matter of Felix v NYC Department of Citywide Administrative Services

Francisco Felix was given a permanent civil service appointment to the position of high pressure plant tender in the New York City Department of Citywide Administrative Services in 1993. His employment was subject to a residency requirement and he acknowledged in a sworn statement that he would forfeit his job if he moved out of the City.

Nine years later, when the City learned Felix might actually be living in Nassau County, it directed him to attend a meeting on January 23, 2002 with documentation of his residency. He appeared at the meeting, but without documentation, and the City gave him a two-day extension. Felix appeared at the January 25 meeting with a union representative and several documents, including a letter from his sister stating that he lived with her in Queens and a voter registration card, temporary driver's license, vehicle registration, insurance card and statement of delinquency from his dentist, all bearing the Queens address and all dated after the January 23 meeting. Felix also submitted his tax return and W2 form, which listed the Nassau County address as his residence. The City determined that he had violated the residency requirement and terminated his employment.

Felix filed this article 78 proceeding to challenge his dismissal, arguing he was entitled to a pre-termination hearing under Civil Service Law § 75(1). The section states that a tenured employee "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." The City argued no hearing was required because the dismissal was not a disciplinary penalty, but was instead a forfeiture resulting from Felix's disqualification for his job when he moved out of the City. The residency law, Administrative Code § 12-120, states, "Failure to establish or maintain city residence ... shall constitute a forfeiture of employment; provided, however, that prior to dismissal ... an employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the city."

Supreme Court ruled Felix was entitled to a hearing and ordered him reinstated. The Appellate Division, First Department affirmed based on the Second Department's decision in M/O Tanner v County of Nassau (88 AD2d 661), which said Civil Service Law § 75(1) "prohibits termination of a tenured employee except for misconduct or incompetency shown after a hearing upon stated charges. Although a municipality may enact a local ordinance requiring its employees to reside within its boundaries ..., it may not, without a hearing pursuant to section 75, terminate tenured employees who establish outside residence."

The City relies on the Fourth Department ruling in Mandelkern v City of Buffalo (64 AD2d 279), which said residency requirements define "eligibility for employment," not "misconduct" to which civil service protections would apply. It said residency laws have "the legitimate purpose of encouraging city employees to maintain a commitment and involvement with the government which employs them by living within the city.... When so viewed, it is clear that residence is a consideration unrelated to job performance, misconduct or incompetency. It is a qualification of employment."

For appellant City: Assistant Corporation Counsel Sharyn Rootenberg (212) 788-1049

For respondent Felix: Stuart Lichten, Manhattan (212) 358-1500

State of New York Court of Appeals

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To be argued Tuesday, October 19, 2004

No. 154 M/O Malta Town Centre I, Ltd. v Town of Malta Board of Assessment Review

Malta Town Centre I, the owner of a 94,000 square foot shopping center in the Town of Malta, and the Town settled prior tax certiorari proceedings over the value of the property with a stipulation that the shopping center would be assessed at \$7.8 million for the 1998, 1999, 2000 and 2001 tax years. The stipulation also stated the reductions and revisions in the assessment “are subject to the provision of Real Property Tax Law § 727 ... [and] shall not be changed, subject to the provision of RPTL § 727(2) ... for the next three succeeding assessment rolls.”

RPTL 727 provides for a three-year respite after a court-ordered assessment, during which a municipality generally may not change an assessed value and an owner may not challenge an assessed value. However, RPTL § 727(2) provides several exceptions, including one that allows a municipality to change a court-ordered assessment when “[t]here is a revaluation or update of all real property on the assessment roll.” RPTL § 102(12-a) defines a “revaluation or update” as a “systematic review of the assessments of all locally assessed properties” to attain a uniform percentage of value.

For the 2002 tax year, the Town increased the assessment on the shopping center to \$9.75 million. When Malta Town Centre challenged the assessment and moved for summary judgment to reduce it to the court-approved figure of \$7.8 million, the Town responded that its participation in a state aid program under RPTL § 1573 for the 2002 tax year qualified for the town-wide reassessment exception in RPTL § 727(2). The section 1573 program requires municipalities to conduct “a systematic analysis of all locally assessed properties” and annually “revise assessments as necessary to maintain the stated uniform percentage of value.”

Supreme Court ruled for Malta Town Centre and ordered the Town to reduce the shopping center’s 2002 assessment to \$7.8 million, holding that participation in the section 1573 program did not, as a matter of law, constitute a town-wide reassessment under RPTL § 727(2). The court also held the Town failed to raise an issue of fact regarding the town-wide reassessment exception, saying in part, “The Assessor offers that she analyzed, within the context of the state aid program, the market date and the assessed values of all commercial properties which, at least by inference, means that she did not do the same for noncommercial properties. The Assessor by her own testimony concedes that she did not undertake a revaluation or update of all properties within the Town.” The Appellate Division, Third Department affirmed.

The Town contends that successful completion of an annual reassessment under the section 1573 program satisfies the requirements for the town-wide reassessment exception and voids the three-year respite period, arguing that “‘revaluation’ ... has the same meaning under RPTL § 727 as it does under RPTL § 1573.” The Town argues that, at minimum, it raised a triable issue of fact regarding the town-wide reassessment exception.

For appellant Town of Malta: Daniel G. Vincelette, Albany (518) 465-9500

For respondent Malta Town Centre: Laurence Naviasky, Schenectady (518) 374-7779

State of New York Court of Appeals

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To be argued Tuesday, October 19, 2004

No. 155 Tonking v The Port Authority of New York and New Jersey

David Tonking, a steamfitter and foreman employed by V.P.H. Mechanical Corp. (VPH), was injured when he fell from a ladder during a renovation project at One World Trade Center in February 2000. Tonking filed a personal injury action against The Port Authority of New York and New Jersey, the Trade Center's owner, and against Bovis Lend Lease LMB, Inc, the construction manager for the project. Bovis then brought this third-party action for contractual indemnification against VPH.

Although there was no contract between Bovis and VPH, Bovis based its claim on the contract between VPH and the Port Authority, which contained a clause requiring VPH to indemnify the Port Authority for specified types of losses. The clause stated that its indemnification provisions "shall also be for the benefit of the Commissioners, officers, agents and employees of the Authority." Bovis argued that, as construction manager, it was an agent of the Port Authority and was, therefore, a beneficiary of the indemnification clause.

Supreme Court dismissed Bovis's complaint against VPH, observing that "construction manager" was not mentioned among the beneficiaries of the clause.

The Appellate Division, First Department affirmed in a 3-2 decision. The majority cited Hooper Assoc. v AGS Computers (74 NY2d 487), which said an indemnification agreement must be strictly construed "to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement" The Appellate Division said, "Here, the contracting parties did not, by using the term 'agent,' clearly manifest an intention to impose upon VPH the obligation to indemnify Bovis, a subsequently retained construction manager." Had they meant to do so, the court said, "they would have manifested their intention in unmistakable terms instead of using the general, often referentially treacherous term 'agent'"

The dissenters argued that a promise by VPH to indemnify Bovis "can be clearly implied from the language and purpose" of the contract between VPH and the Port Authority, as required by Hooper. "[A]lthough the term 'agents' is not defined in the contract, the designation of the construction manager as the Port Authority's representative defines the construction manager as its agent," they said.

For appellant Bovis: Michael H. Zhu, Manhattan (212) 619-4350

For respondent V.P.H. Mechanical: Michael P. Kandler, Manhattan (212) 248-8800

State of New York Court of Appeals

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To be argued Wednesday, October 20, 2004

No. 156 Matter of Word of Life Ministries v Nassau County

Word of Life Ministries, a not-for-profit religious corporation and church, submitted applications to the Village of Freeport Assessor's Office in July 2000 for tax exemptions on four properties that it used as parsonages for assistant pastors. The assessor denied the applications in November 2000, based on the church's statement that each of the properties was "used for purposes other than as a residence of the officiating clergy." Word of Life failed to file administrative complaints with the Village Board of Assessment Review by the deadline, and the board rejected the letter of complaint the church filed a week later.

Meanwhile, Word of Life commenced this court proceeding to annul the assessor's determination. Supreme Court rejected the village's argument that the article 78 proceeding should be dismissed for failure to exhaust administrative remedies. The court ruled in favor of the church on the merits, directing the village to remove the four properties from its tax rolls and to refund \$11,707.10 in taxes the church had paid for the 2001 tax year.

The Appellate Division, Second Department affirmed, saying "... the Supreme Court properly found that the assistant pastors were 'officiating clergymen' under RPTL 462 since the petitioners presented evidence establishing that the pastors were full-time ordained clergy with no outside secular employment who officiated at communions, weddings, and funerals, took part in church services, and shared preaching assignments."

The Village of Freeport argues that, because the church missed the deadline for an administrative appeal to the Board of Assessment Review, its court challenge should be dismissed for failure to exhaust administrative remedies. It also argues that "the parsonage exemption" should apply only to residences provided to the "spiritual leaders" of religious institutions, saying, "In New Jersey, the courts have held that the term 'officiating clergymen' encompasses only the spiritual and settled leaders installed over the church or synagogue and not [] every clergyman who participates in religious services and is employed full time by the religious institution"

For appellant Village of Freeport: Richard A. Blumberg, Mineola (516) 248-1700

For respondent Word of Life Ministries: Joseph P. Infranco, Mineola (516) 747-2330

State of New York Court of Appeals

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To be argued Wednesday, October 20, 2004

No. 157 Matter of Michael M.

In April 2001, 14-year old Michael M. was charged in Bronx Criminal Court with felony counts of first degree robbery and second degree assault, among other crimes, for an alleged attack on a 13-year-old boy near Yankee Stadium. The victim, who suffered a broken leg, told police that Michael and two other youths demanded that he give them his bicycle and knocked him down with a punch to the face when he refused. The victim said the youths continued to punch and kick him, but finally ran away without the bike when a passerby intervened.

Bronx Criminal Court ordered the case removed to Family Court for a juvenile delinquency proceeding, finding there was reasonable cause to believe the defendant committed the acts alleged in the complaint. The removal petition was based largely on statements by the police officer who interviewed the victim, and the City did not file a non-hearsay supporting deposition in the Family Court proceeding. After a fact-finding hearing, Family Court found Michael had committed acts which, if committed by an adult, would constitute crimes including first and second degree attempted robbery and second degree assault. The court adjudicated him a juvenile delinquent and placed him on probation for two years.

Michael's attorney argued for the first time on appeal that the removal petition was jurisdictionally defective and must be dismissed because it did not contain non-hearsay allegations establishing every element of the crimes charged, as required by Family Court Act § 311.2(3).

The Appellate Division, First Department affirmed the Family Court order, holding that "jurisdiction was sufficiently established."

Michael's attorney argues that failure to meet the requirements of section 311.2(3) is a nonwaivable defect that is subject to challenge for the first time on appeal. "[I]t is uncontroverted that at no point in the Family Court proceedings did the prosecution file a supporting deposition containing non-hearsay allegations supporting the charges," she says. "Furthermore, during the criminal court proceedings that preceded the transfer of the action to Family Court, no hearings were conducted, and no Grand Jury proceedings took place to test the reliability of the charges."

The City argues the issue was not preserved for appellate review because it was not raised in Family Court. It also argues the removal petition was jurisdictionally sound because it complied with Family Court Act § 311.1(7), which governs the removal of cases from Criminal Court to Family Court.

For appellant Michael M.: Susan Clement, Manhattan (212) 577-3634

For respondent: Assistant Corporation Counsel Sharyn Rootenberg (212) 788-1049

State of New York Court of Appeals

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To be argued Wednesday, October 20, 2004

No. 163 Kazel v Kazel

Sandra and Robert Kazel were divorced in 1991, after 28 years of marriage, and as part of the judgment Sandra was awarded half of Robert's retirement benefits from the Niagara Mohawk Power Corp. accumulated during the marriage. The pension plan distribution was provided for in a qualified domestic relations order (QDRO) issued in conjunction with the divorce judgment. Robert Kazel, who subsequently married Susanna Corsello, was still working for Niagara Mohawk when he died in 2001, before reaching retirement age. The company rejected Sandra Kazel's claim to a share of the pension plan death benefits on the ground that the QDRO granted her an interest only in her former husband's retirement annuity, not the death benefits. Sandra then commenced this proceeding against her former husband's estate.

Supreme Court denied Sandra Kazel's application to modify the QDRO to award her a share of the death benefits. The Appellate Division, Fourth Department affirmed on a 4-1 vote.

The majority said neither the amended divorce decision nor the judgment of divorce refer to death benefits, but instead state only that the "pension plan" was a marital asset that would be divided according to the formula adopted in Majauskas v Majauskas (61 NY2d 481). The court said the QDRO provided, "At such time as [Robert Kazel]... has retired from and is actually receiving a monthly allowance from his ... Pension Plan ..., the Plan is directed to pay to [Sandra Kazel] ... fifty percent (50%) of a fraction of [Robert's] monthly allowance." The majority said Sandra was not entitled to any share of death benefits because she "did not seek to establish the value of the preretirement death benefits in the divorce action, and the court did not grant her a share in those benefits"

The dissenter said the divorce decision "recites that Robert's 'pension plan' is, without exception or limitation, a 'marital asset[]' to be 'distribut[ed]' by the court, and it further recites that the court had 'heard proof as to the value of the pension interests'" The dissenter said, "Clearly, the death benefit was a component of Robert's 'pension plan' or 'pension interests,' concerning which the court had heard proof and which it manifestly intended to distribute at the time of the divorce. The original QDRO was thus in error insofar as it failed to award plaintiff a share of Robert's preretirement death benefits under Majauskas."

For appellant Sandra Kazel: Anthony P. Adorante, Camillus (315) 487-0210

For respondent Susanna Corsello Kazel: Timothy J. Perry, Syracuse (315) 474-2943

State of New York Court of Appeals

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To be argued Wednesday, October 20, 2004

No. 159 Matter of 427 West 51st Street Owners Corp. v Division of Housing and Community Renewal

This rent dispute arose in October 1996, when 51 tenants of 427 West 51st Street filed a complaint with the State Division of Housing and Community Renewal (DHCR) seeking reduced rents due to reductions in building services by the landlord. DHCR initially rejected the complaint. One of the tenants, Gail Turner, filed a petition for administrative review (PAR) with the agency in September 1997. Six other tenants signed a statement authorizing Turner to act as their representative; and photocopied signature pages from the 1996 complaint, containing the names of all 51 tenants who participated in the original filing, were attached to the PAR.

In the administrative appeal, DHCR granted rent reductions to all 51 tenants. The landlord then filed its own petition for review, arguing the reduced rents should be limited to the seven tenants who actually signed onto the 1997 PAR. DHCR initially agreed with the landlord, but after further litigation changed its position and, in late 2001, allowed all tenants who were party to the original 1996 complaint to sign an affirmation retroactively authorizing their representation in the 1997 PAR. In January 2002, DHCR issued an order granting rent reductions to all 51 tenants and explaining its action on the failure by 44 of them to supply original signatures: "DHCR precedent has established that, for such a defect, the proper procedure is for DHCR to inform the tenants of the defect and allow time for them to correct it."

Supreme Court dismissed the landlord's article 78 challenge to DHCR's ruling, and the Appellate Division, First Department affirmed in a 3-2 decision.

The majority said, "Under the circumstances, we consider the filing of the PAR to be in substantial compliance with the Rent Stabilization Code ..., and any deficiency was appropriately deemed to be correctable error. The filing of the PAR represents a good faith attempt to pursue an administrative appeal on behalf of all of the complaining tenants, and DHCR appropriately provided an opportunity to remedy the defect in the petition. That authorizations were given long after the PAR was filed does not preclude relief."

The dissent argued the 44 tenants who did not sign the 1997 PAR cannot retroactively correct the defect because the Rent Stabilization Code allows corrections only to a "timely filed" PAR. They said, "This is not, as [DHCR] would have it, a mere 'technical defect' in filing; it was, rather, as to those tenants, a failure to file within the 35-day period mandated by Rent Stabilization Code § 2529.2." Observing that authorizations were not solicited from the non-signing tenants until at least four years after the filing period had expired, the dissenters said, "The filing requirements with respect to PARs have been strictly enforced."

For appellant landlord: Patrick K. Munson, Manhattan (212) 869-5030

For respondent DHCR: Caroline M. Sullivan, Manhattan (212) 480-7449

State of New York Court of Appeals

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To be argued Thursday, October 21, 2004

No. 160 People v John Waver

John Waver was charged with third degree sale of a controlled substance in May 2002, after allegedly making a \$10 crack cocaine sale to an undercover officer in a buy-and-bust operation on Fifth Avenue in Harlem. At the nonjury trial, the buying officer was allowed to testify anonymously, identifying himself only by his shield number and command at the direction of a court officer. After direct examination by the prosecutor was completed, defense counsel moved for disclosure of the officer's identity.

Defense counsel said, "Your honor, on direct, I noticed the prosecutor identified the undercover officer by his undercover shield and his present shield number but not by his name. My client has a constitutional right to confront his accuser. There has been no motion made by the People to withhold this information. I don't see any reason why it should be withheld."

The court replied, "Okay, that application is denied. It's incumbent upon you under the case law to show that some prejudice will ensue. Having made your application, having failed to demonstrate any prejudice, I'll permit this officer and the others to testify under their undercover number."

Waver was convicted of the drug sale charge and was sentenced to 4½ to 9 years in prison. He argued on appeal that the trial court violated the 1977 Court of Appeals decision in People v Stanard (42 NY2d 74), which requires the prosecution to make some showing of why a police witness should be allowed to testify anonymously before the defendant must show why the witness's identity is material to the defense.

The Appellate Division, First Department affirmed the conviction, although it agreed the trial court had erred. "The court should have required a showing by the People that safety concerns warranted maintaining the undercover officers' anonymity before it directed that these officers be identified only by their shield numbers during their testimony..." the Appellate Division said. "However, there was no prejudice to defendant's right of confrontation, particularly since the direct testimony provided the necessary predicate to allow" the anonymous testimony. It said, "There is no reason to believe that defendant could have derived any practical benefit from knowledge of the officers' names."

Waver contends the Appellate Division erred in requiring him to show he was prejudiced by the trial court's violation of Stanard, arguing that prejudice must be presumed under Smith v Illinois (390 US 129). He argues, "[T]he value to a defense attorney of knowing the officer's name cannot be measured in a vacuum, and a defense attorney cannot know if the name would be of any practical benefit unless she first knew what that name was. That is why actual prejudice can rarely be shown, but must – in the absence of any step one showing [by the prosecutor] – be presumed." Waver argues that upholding the Appellate Division's prejudice requirement "would mean that appellant had a constitutional right without any remedy for its violation."

For appellant Waver: Robert S. Dean, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney Sheryl Feldman (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, October 21, 2004

No. 161 People v Peter Inserra

In November 2001, Peter Inserra was accused in a misdemeanor complaint of violating an order of protection by banging on the door of a woman's apartment in Douglaston, Queens and screaming "Let me in." The order required Inserra to stay at least 100 yards away from her and forbade him to contact her in any manner. Among other statements provided in the complaint, the arresting officer said that "he has examined a copy of said order of protection and that the defendant's name appears on the line for the defendant's signature." The complaint charging Inserra with second degree criminal contempt was converted to an information at his arraignment the next day. Inserra was ultimately convicted of the contempt charge by a jury and he was sentenced to a year in jail, a term he completed before his conviction was reversed by the Appellate Term for the 2nd and 11th Judicial Districts.

The Appellate Term agreed with Inserra that the prosecutor's information was jurisdictionally defective because it failed to allege that the defendant knew of the provisions of the protective order he was charged with violating, an essential element of the crime of criminal contempt. "The information in the present case states only that defendant's 'name' appears on the order, which is insufficient, as a matter of law, to establish that defendant had knowledge of its provisions," the court said. "This defect is jurisdictionally fatal, and the accusatory instrument must therefore be dismissed." It said the prosecution's claim that a copy of the order of protection was annexed to the information "cannot rectify the information's complete failure to plead the element of defendant's knowledge of the order."

The prosecution argues that the arresting officer's statement in the criminal complaint that Inserra's name appeared on the signature line of the order, "along with the attached copy of the Order of Protection that showed defendant's signature and had the boxes 'Defendant Present in Court' and 'Defendant Advised in Court of Issuance of Order' both checked, provided more than reasonable cause to believe that defendant had knowledge of the Order of Protection." Contending the allegations of the underlying criminal complaint and its supporting documents must be read together, the prosecution argues the Appellate Term's ruling is "overly technical" under New York case law.

For appellant: Queens Assistant District Attorney Jennifer Hagan (718) 286-7038

For respondent Inserra: Amy Donner, Manhattan (212) 577-3487

State of New York Court of Appeals

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To be argued Thursday, October 21, 2004

No. 162 People v Ederick Fabricio

Ederick Fabricio and three confederates were accused of murdering drug dealer Jose Alberto Hernandez during a June 1995 robbery in Manhattan. Two female accomplices, who knew the victim, allegedly entered Hernandez's apartment on upper Broadway and then, while one distracted him, the other let Fabricio and a male accomplice through the door, according to a statement Fabricio gave police. Fabricio pointed a fake gun at Hernandez and made him lie face down on the bed, and then Hernandez asked Evelyn Reyes, "Ellie, why are you doing this to me?" Reyes drew a pistol and fired three times at his back and the four confederates ran from the apartment with a box of cash, according to the statement.

Fabricio was convicted at trial of second degree murder and first and second degree robbery and was sentenced to an aggregate prison term of 25 years to life. Among other issues on appeal, he argued the trial court violated his due process right to participate in a material stage of his trial when it held a sidebar conference with the prosecutor and defense attorney while Fabricio waited on the witness stand for cross-examination to resume. The conference was held to discuss the prosecutor's request to question Fabricio about a statement he made regarding a prior, uncharged robbery.

The Appellate Division, First Department affirmed the conviction in a 4-1 decision. The majority said, "The record is insufficient to establish defendant's inability to hear and participate in the sidebar.... In any event, the conference concerned a pure issue of law as to whether the prosecutor had a good-faith basis for questioning defendant about a prior inconsistent statement."

The dissenter argued Fabricio is entitled to a new trial because he was not allowed to participate in what constituted a Sandoval hearing to determine whether he could be cross-examined about a prior crime. The dissenter said the prosecutor described Fabricio's prior statements "while defendant sat on the witness chair, away from the discussion" and even if he could have heard the discussion, "it was unlikely he could understand it since it was conducted in English," while "defendant spoke only Spanish." Since the jury was present, he said, Fabricio "had no opportunity to challenge ... the prosecution's assertions about the alleged uncharged robbery."

For appellant Fabricio: Michael Pinard, Manhattan (212) 719-0766

For respondent: Manhattan Assistant District Attorney Patrick J. Hynes (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, October 21, 2004

No. 149 People v Rene Resek

Rene Resek was arrested in October 1997 after two police officers saw him drive away in a stolen car they had been monitoring at West 175th Street and Amsterdam Avenue in Manhattan. Police found 9 glassine envelopes of heroin during an inventory search of the car and 14 more when Resek was searched. A grand jury refused to indict him for possession of the stolen car, but did indict him for possession of heroin with intent to sell. Now serving 5 to 10 years in prison for third degree criminal possession of a controlled substance, Resek argues the trial court committed two reversible errors.

When the prosecutor sought to have the arresting officer testify that Resek was arrested in a stolen car, Resek (who was defending himself at the time) objected, "This is a crime that was – that I was charged with, but I was acquitted of in the grand jury. I believe it's going to be prejudiced to me if this is brought up." The court ruled, "The People are entitled to introduce evidence of the stolen car as an explanation of the actions that the police thereafter took."

The trial court also allowed a police officer to testify as an expert about whether the amount of heroin found was "consistent with selling." Over objection, the officer testified that possession of 23 envelopes of heroin "would mean that this person was probably a dealer."

The Appellate Division, First Department affirmed the conviction on a 3-2 vote. The majority said testimony about the stolen car "was necessary to complete the narrative of the case, to explain how defendant came to be arrested, searched and found to be in possession of narcotics, and to dispel speculation by the jury.... Since this evidence was offered to prove that the police believed the car to be stolen, and not that defendant was actually guilty of criminal possession of stolen property, the fact that the grand jury did not indict defendant for that crime is irrelevant."

The dissenters said the stolen car testimony was not "admissible to provide 'background' information or to 'complete the narrative,' both because such 'background' was unnecessary and because it had absolutely no relevance to any element of the crime for which defendant was being charged. Evidence related to the stolen vehicle was not only utterly unconnected to the drug possession charge, it dealt with a charge that the grand jury had specifically rejected." They said no "background" on the arrest was required "in the absence of any suggestion that defendant intended to challenge the lawfulness of the police conduct in effectuating his arrest...."

The majority also said the trial court properly allowed the police expert to testify about whether the amount of heroin involved was "consistent with selling." It said, "To the extent that the officer's response could be viewed as going beyond that question, it could not have caused any prejudice" in view of the court's "thorough instructions on the subject of expert testimony" and "the strong evidence that defendant possessed the drugs with intent to sell."

The dissenters said, "[T]he testimony that an individual who possessed 23 envelopes of heroin 'would mean that this person was probably a dealer' clearly exceeded the allowable and impermissibly intruded upon the jury's ultimate fact-finding responsibility," an error that "cannot be viewed as harmless."

For appellant Resek: Richard M. Greenberg, Manhattan (212) 719-0766

For respondent: Manhattan Assistant District Attorney Walter J. Storey (212) 335-9000