State of New York Court of Appeals

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WEEK OF FEBRUARY 17 - 19, 2015

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, February 17, 2015 (arguments begin at 2:30 p.m.)

No. 39 Schoenefeld v State of New York

Ekaterina Schoenefeld, a sole practitioner who resides and maintains her law office in Princeton, New Jersey, is also licensed to practice law in New York and California. She brought this federal action to challenge the constitutionality of Judiciary Law § 470, which requires nonresident attorneys who are admitted to practice in New York to maintain an "office for the transaction of law business" within the state in order to practice in New York courts. Among other claims, she argued that the statute violates the Privileges and Immunities Clause of the U.S. Constitution, which provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

U.S. District Court for the Northern District of New York granted summary judgment to Schoenefeld and declared section 470 unconstitutional, saying "the practice of law is plainly a fundamental right under the Privileges and Immunities Clause.... Section 470 places an additional threshold cost on all nonresidents wishing to practice law in New York -- an additional threshold cost that resident attorneys are not required to incur. A resident attorney of New York may operate an office for the practice of law out of his home or residence," while "a nonresident attorney must maintain, at minimum, both her residence in another state and an office in New York." The court said the state defendants "failed to establish either a substantial state interest advanced by section 470, or a substantial relationship between the statute and that interest."

The U.S. Court of Appeals for the Second Circuit, saying "this appeal turns on the meaning of 'office for the transaction of law business' as used in N.Y. Judiciary Law § 470," is asking this Court to resolve the issue in a certified question. It was skeptical of defense arguments that the phrase need not be read "to require a physical office space with a desk, a telephone, and staff," but may instead be read "to require merely an address at which a nonresident attorney may be served legal papers" or even "the designation of an agent in New York to receive service of papers." The court said State Supreme Court and the Appellate Division "have never interpreted section 470's office requirement to be satisfied by something less than the maintenance of physical office space in New York state.... We also note that the term 'office,' by itself, although not exactly pellucid, implies more than just an address or an agent appointed to receive process."

For appellant state defendants: Assistant Solicitor General Laura Etlinger (518) 474-2256
For respondent Schoenefeld: Ekaterina Schoenefeld (pro se), Princeton, NJ (609) 688-1776

State of New York Court of Appeals

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To be argued Tuesday, February 17, 2015 (arguments begin at 2:30 p.m.)

No. 40 People v Richard Garcia
No. 41 People v Joshue DeJesus

The common question in these unrelated homicide cases is whether the trial courts erred in admitting police testimony that non-testifying witnesses had implicated the appellants in fatal shootings, hearsay testimony that prosecutors said was necessary to explain why the police focused their investigations on the appellants. The appellants argue that admission of the hearsay testimony violated their rights to due process and to confront the witnesses against them.

Prosecutors called only one eyewitness at each trial to identify the defendants; and the judges gave jurors no limiting instruction that they were not to consider the police officers' "background" testimony for its truth. Richard Garcia was convicted of first-degree manslaughter for fatally shooting Michael Colon during an argument over money on East 145th Street in the Bronx in 2005. He was sentenced to 20 years in prison. Joshue DeJesus was convicted of second-degree murder for fatally shooting Julio Montes in 2006, during a confrontation outside a bar at 135th Street and Broadway in Manhattan. He is serving 20 years to life.

The Appellate Division, First Department affirmed both convictions. In Garcia, it said, "The court properly permitted the People to introduce evidence that the victim's nontestifying sister told a detective that the victim had been having an unspecified 'problem' with [Garcia], who was the victim's long-term acquaintance. This testimony was presented not for the truth of the matter asserted, but to explain why the police focused on [Garcia] and spent [two] years attempting to locate him...." It said the trial court should have given the jury a limiting instruction, but found the error was harmless.

In DeJesus, the First Department said, "A detective's brief, limited testimony that [DeJesus] was already a suspect at the time the People's main witness was interviewed did not violate the Confrontation Clause. This evidence was not offered for its truth..., but for the legitimate nonhearsay purposes of completing the narrative, explaining police actions, providing the context of the interview, correcting a misimpression created by defendant on cross-examination and preventing jury speculation...." It said DeJesus failed to preserve his claim that a limiting instruction was necessary and, in any event, any error was harmless.

Both appellants argue that the police officers' "background" testimony was inadmissible hearsay that violated their right to confront witnesses. They also argue that, in a single-witness identification case, the failure to give jurors a limiting instruction was not harmless, but highly prejudicial. DeJesus says police testimony that they had identified him as the shooter, hours before they spoke with the witness they called at trial, "clearly signaled" to the jury that other, non-testifying witnesses had implicated him in the crime. Garcia says testimony that the victim's sister told a detective he had been in a dispute with Garcia, "which the jury must have considered for its truth, amounted to additional, seemingly credible inculpatory evidence."

No. 40 For appellant Garcia: Amanda Rolat, Manhattan (212) 577-2523
For respondent: Bronx Assistant District Attorney David P. Johnson (718) 838-7123
No. 41 For appellant DeJesus: Abigail Everett, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Alice Wiseman (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, February 17, 2015 (arguments begin at 2:30 p.m.)

No. 43 People v Boris Shaulov *(papers sealed)*

Boris Shaulov was 23 years old in 2009, when he was accused of engaging in sexual intercourse and other sexual activities with a 16-year-old girl in Borough Park, Brooklyn. Shaulov was charged with multiple counts of third-degree rape and related charges, both statutory crimes based on the girl's age and forcible crimes alleging lack of consent. Prior to trial, the prosecutor told Supreme Court and defense counsel that the complainant did not report the incident to anyone for more than six months, when she told a family member and the principal of her school. The prosecutor sought permission, if the defense tried to use the girl's delayed outcry to undermine her credibility, to call an expert on rape trauma to explain why a rape victim might delay reporting it.

In their opening statements, both the prosecutor and defense counsel told jurors there was a long delay before the complainant reported the incident to anyone. However, when the complainant took the stand, she testified that she called a friend while on her way home after the incident and told her "what happened," but did not tell her friend she had not consented. Defense counsel moved for a mistrial and to strike the testimony on the ground of unfair surprise, arguing the complainant's unexpected statement that she promptly disclosed the encounter to her friend undermined his trial strategy and his approach to jury selection. The court denied the motions, finding the defense was not "unduly" prejudiced. Shaulov was convicted of statutory rape and other counts based on the complainant's age, but was acquitted of the charges alleging lack of consent. He was sentenced to an aggregate term of two years in prison.

The Appellate Division, Second Department affirmed, saying the trial court "did not improvidently exercise its discretion in denying the defendant's motion for a mistrial on the ground of unfair surprise."

Shaulov argues the trial court abused its discretion by not granting a mistrial and by admitting the complainant's prompt outcry testimony in view of "the patently prejudicial nature" of the evidence. "The record is clear that [defense] counsel was sandbagged into delivering his opening statement," in which he said the complainant did not report the incident for months. "When complainant debunked counsel's opening statement within minutes ... he lost all credibility with the jury." He also argues his trial counsel, after the complainant testified that she promptly reported the incident to her friend, provided ineffective assistance by failing to object to testimony by a prosecution expert that sex crime victims commonly delay reporting the crimes.

For appellant Shaulov: Stuart D. Rubin, Brooklyn (718) 802-0778
For respondent: Brooklyn Assistant District Attorney Amy Appelbaum (718) 250-2139

State of New York Court of Appeals

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To be argued Wednesday, February 18, 2015

No. 44 Beardslee v Inflection Energy, LLC

Beginning in 2001, Walter and Elizabeth Beardslee and more than 30 other Tioga County landowners signed oil and gas leases now held by Inflection Energy, LLC, Victory Energy Corporation and MegaEnergy, Inc. For a nominal annual fee, and a right to royalties on the sale of any gas or oil extracted from their properties, the Energy Companies acquired rights to explore and drill for gas and oil. Each of the leases contains an identical "habendum clause" governing duration, which states, "It is agreed that this lease shall remain in force for a primary term of FIVE (5) years ... and as long thereafter as the said land is operated by Lessee in the production of oil or gas." Each lease also contains a "*force majeure* clause," which states, "If and when drilling ... [is] delayed or interrupted ... as a result of some order, rule, regulation ... or necessity of the government, or as the result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding."

In 2008, the Governor directed the Department of Environmental Conservation to update its generic environmental impact statement on conventional drilling to consider the potential impacts of new techniques, particulary high-volume hydraulic fracturing (HVHF or fracking) and horizontal drilling. The state has not issued any fracking permits since that time.

The Landowners filed this federal action in the Northern District of New York in 2012, complaining the leases rendered their properties unmarketable and seeking a declaration that the leases had expired. They moved for summary judgment, arguing the Energy Companies drilled no wells on their land and, therefore, the leases expired after five years. The Companies cross-moved for summary judgment, arguing the Governor's 2008 order was a de facto moratorium on fracking that prevented them from using the only "commercially viable" method of drilling. They said this was a *force majeure* event that extends the leases until the moratorium is lifted, whenever that might be.

U.S. District Court granted summary judgment to the Landowners and declared the leases expired, finding the *force majeure* clause was not triggered by the moratorium and did not extend the leases. Although the Companies could not use fracking techniques, the moratorium did not "frustrate the purpose of the leases" because they could drill with conventional methods, the court said, and "mere impracticality" was not enough to trigger the *force majeure* clause.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues in a pair of certified questions: "1. Under New York Law, and in the context of an oil and gas lease, did the State's Moratorium amount to a *force majeure* event? 2. If so, does the *force majeure* clause modify the habendum clause and extend the primary terms of the leases?"

For appellant Energy Companies (Inflection et al): Thomas S. West, Albany (518) 641-0500
For respondent Landowners (Beardslee et al): Peter H. Bouman, Binghamton (607) 723-9511

State of New York Court of Appeals

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To be argued Wednesday, February 18, 2015

No. 45 People v Clemon Jones

Charged with possessing counterfeit currency in Monroe County, Clemon Jones was convicted in 2007 of two counts of criminal possession of a forged instrument in the second degree. The prosecution sought to have him adjudicated a persistent felony offender under Penal Law § 70.10 based on two sets of convictions: his 1995 conviction in New York on felony drug sale and possession charges; and his 1991 conviction in Florida on federal felony charges of making a false statement on a Bureau of Alcohol, Tobacco and Firearms form and of being a convicted felon possessing a firearm. Jones had been sentenced to 18 months in prison in the federal firearms case. County Court found he was a persistent felony offender based, in part, on the prior federal convictions and sentenced him to 15 years to life in prison.

In 2009, Jones filed a CPL 440.20 motion to vacate his sentence as a persistent felony offender, arguing the federal convictions did not qualify as predicate felonies under the statute because those crimes would not have been felonies under New York Law. County Court denied the motion.

The Appellate Division, Fourth Department affirmed, holding that Jones was properly adjudicated a persistent felony offender. Penal Law § 70.10(1)(b) defines "a previous felony conviction" as "a conviction of a felony in this state, or of a crime in any other jurisdiction, provided ... that a sentence to a term of imprisonment in excess of one year, or a sentence to death, was imposed therefor...." Since Jones was sentenced to a term of 18 months in the federal case, the court said, "under the plain language of the statute, the federal convictions qualify as 'previous felony conviction[s]," under section 70.10. It rejected his argument that the statute should be read to require that foreign felonies must have a New York equivalent, as the second felony offender law (Penal Law § 70.06) requires. "The persistent felony offender statute ... contains no language requiring that the underlying out-of-state conviction be for a crime that would constitute a felony in New York.... Further, the legislative history ... reflects that the drafters specifically considered and rejected the contention advanced by defendant...."

Jones argues, "The anomaly that exists in the definition of a predicate felony in Penal Law § 70.06, which mandates that a predicate criminal conviction have a New York equivalent, and Penal Law § 70.10, which does not, is arbitrary, capricious, and can create the unfair and nonsensical result of an individual being eligible for Persistent Felony Offender status..., but not being eligible for Second Felony Offender status. While the enhancement of a sentence [for repeat offenders] is a legitimate State purpose, the difference between the statutes does not, and only serves to breed inequality...." He cites rulings from other Appellate Division departments that foreign felonies must have New York equivalents in order to be used as predicate offenses under section 70.10.

For appellant Jones: John A. Cirando, Syracuse (315) 474-1285
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Wednesday, February 18, 2015

No. 46 Faison v Lewis

This case stems from a family dispute over ownership of a house at 1900 Bergen Street in Brooklyn. Dorothy Lewis and her brother, Percy Lee Gogins, Jr., each inherited a one-half interest in the property as tenants in common when their mother died in 1996. In May 2000, Dorothy Lewis conveyed her one-half interest to her daughter Tonya Lewis by quitclaim deed. In December 2000, a correction deed was executed, purportedly adding Gogins to the quitclaim deed as an additional grantor and conveying his one-half interest in the property to Tonya Lewis. Gogins died in 2001 and his wife was appointed administrator of his estate. In 2002, Gogins's daughter Dorothy Faison brought an action on behalf of his estate against Dorothy and Tonya Lewis, alleging they had forged the correction deed. The suit was dismissed for lack of capacity to maintain the action because Faison was not the estate administrator. In 2009, Tonya Lewis borrowed $269,332 from Bank of America, which she secured with a mortgage on the disputed property.

In July 2010, Faison was appointed administrator of her father's estate. A month later, she brought this action against the Bank of America and others, including the Lewises, alleging the correction deed was a forgery. She sought an order declaring the 2000 correction deed and the Bank's 2009 mortgage null and void. Supreme Court granted the Bank's motion to dismiss the suit as time-barred.

The Appellate Division, Second Department affirmed so much of the order as dismissed the complaint against the Bank of America as untimely. The court ruled the statute of limitations for a fraud cause of action, which requires that the action be commenced within six years after the fraudulent act or within two years after its discovery, applies to a cause of action alleging forgery. "Here, the forgery allegedly occurred in 2000, and the plaintiff's own filing in an earlier action showed that she knew of the alleged fraud by 2003," it said. "Thus, she was required to commence an action by 2006 at the latest, whereas this action was commenced in 2010."

Faison argues that "a deed to real property, void from inception for forgery, cannot become effective against the true owner of the property through the mere passage of time; and ... therefore, the statute of limitations cannot bar an action to declare the nullity of a forged deed." She says, "In giving effect to the Forged Deed, the [Appellate Division] Order is inconsistent with the long-settled principle that a forged instrument is void and entirely without effect from inception. It is also in direct conflict with this Court's holding in Riverside Syndicate, Inc. v Munroe [10 NY3d 18 (2008)] that a statute of limitation can never operate to give effect to a void instrument by barring actions for a declaration of its nullity."

For appellant Faison: David Gordon, Harrison (914) 381-4848
For respondent Bank of America: Liezl Irene Pangilinan, Manhattan (212) 594-8515

State of New York Court of Appeals

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To be argued Wednesday, February 18, 2015

No. 47 People v Dennis Ford *(papers sealed)*

Dennis Ford was charged with robbing and sexually abusing a female cab driver in Brooklyn in 2009. He pled guilty to first-degree sexual abuse and was sentenced to three years in prison. While in prison, Ford was charged with about 20 disciplinary violations and was placed in the Special Housing Unit, which prevented him from attending recommended programs including sex offender treatment. As he neared his release date, the New York Board of Examiners of Sex Offenders prepared a risk level recommendation and assessed 100 points against him based on the nature of his offense, criminal history and his misconduct while confined, among other things. This would make him a presumptive level two offender, with a moderate risk of reoffending, under the Sex Offender Registration Act (SORA).

Supreme Court designated Ford a level three (high risk) sex offender after assessing an additional 15 points against him under risk factor 12, "acceptance of responsibility: not accepted responsibility/refused or expelled from treatment." It said, "[W]ith respect to acceptance of responsibility, in fact I am going to assess him the 15 points for that as well. And I'm not double counting. I know he got assessed for his conduct [in prison], but ... I am basing this upon him putting himself into a situation where he ends up in special housing and, therefore, cannot receive treatment.... At the time he's being released from prison, he hasn't had one minute of sex counseling as a result of his conduct in prison. So, therefore ... I am making the determination that the spirit of risk factor 12 is that he received treatment and if he does something to prevent that from happening, then he should ... accept the consequence of it."

The Appellate Division, Second Department affirmed, saying, "The Supreme Court properly considered the defendant's lengthy disciplinary record while incarcerated, which prevented him from participating in a sex offender treatment program, as evidence of a refusal of treatment...."

Ford argues Supreme Court erred in assessing points under risk factor 12 because he never refused nor was expelled from sex offender treatment and, therefore, he should be reclassified as a level two offender. He says the court's analysis was "in direct contradiction to the purpose of these points as explained ... in the Risk Assessment Guidelines -- the Board assesses these points only for the *refusal* to take sex offender treatment or the *expulsion* from treatment, because such behavior is evidence of 'the offender's continued denial and his unwillingness to alter his behavior'.... [A]ssessing these points, not for the refusal of sex offender treatment but for the inability to be scheduled for it was unwarranted, particularly because appellant had already been punished for that same prison misconduct by losing his 'good time' and by receiving points under risk factor 13" for his disciplinary violations.

For appellant Ford: Michael C. Taglieri, Manhattan (212) 330-4139
For respondent: Brooklyn Assistant District Attorney Anthea H. Bruffee (718) 250-2475

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To be argued Thursday, February 19, 2015

No. 50 People v Rebecca Guthrie

A police officer for the Village of Newark saw Rebecca Guthrie drive past a stop sign without stopping as she left a supermarket parking lot in September 2009. After the officer pulled her over for the apparent traffic violation, he determined that Guthrie was intoxicated and charged her with failure to stop at a stop sign and driving while intoxicated.

In Newark Village Court, Guthrie moved to suppress the evidence and dismiss the charges due to lack of probable cause for the traffic stop. She argued the stop sign was not legally valid because it had not been authorized by the Newark Village Board, as required by Vehicle and Traffic Law § 1100(b). The court granted her motion, saying that because the stop sign was not properly registered, there was no violation for failing to stop and the resulting DWI evidence must also be suppressed.

On appeal, Wayne County Court affirmed, ruling that the officer's reasonable belief that Guthrie violated a traffic law did not provide probable cause for stopping her because the stop sign was unauthorized. "Certainly, the police officer here was acting in good faith.... Nevertheless, as he is acting for the state, his good faith can not be used to blink away any irregularities in the laws he is attempting to enforce.... [A]part from the failure to abide the unauthorized stop sign, there is nothing in the record to suggest that the circumstances observed by the officer before he stopped defendant's vehicle implicated issues of public safety or other legal violations warranting further inquiry." Since the stop was unjustified, it said, the exclusionary rule required suppression of the DWI evidence.

The prosecution argues the officer's reasonable belief that Guthrie ran the stop sign was enough to justify the stop. "An officer is justified in stopping an automobile where the vehicle does not stop at a stop sign.... The officer observed what he reasonably believed to be a violation of the vehicle and traffic law. Even though the defendant could not be prosecuted for the alleged stop sign violation..., it did not make a permissible stop of the defendant's vehicle invalid." The prosecution says the officer was entitled to rely on the presumption in VTL § 1110(d) that "official traffic-control devices" have been "placed by the official act or direction of lawful authority."

For appellant: Wayne County Assistant District Attorney Bruce Rosekrans (315) 946-5905
For respondent Guthrie: Andrew D. Correia, Lyons (315) 946-7472

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To be argued Thursday, February 19, 2015

No 34 People v Paul Williams *(papers sealed)*

Paul Williams's former girlfriend, the mother of his two children, accused him of sexually assaulting her when he visited her apartment in the Town of Salina in August 2008. Williams testified before an Onondaga County grand jury that the sexual activity was consensual.

At trial, the prosecutor elicited testimony from a detective who questioned Williams after his arrest that Williams refused to answer or remained silent when asked if he had forced his way in to the complainant's apartment, if he had sexual contact with her, and similar questions. The prosecutor commented on his post-arrest silence in her opening and closing statements. In its jury charge on sexual abuse, County Court told jurors they could find the element of "forcible compulsion" based on evidence of either physical force or an express or implied threat. Williams was convicted of first-degree sexual abuse and third-degree rape and was sentenced to seven years in prison.

The Appellate Division, Fourth Department affirmed the convictions. It agreed with Williams that the prosecutor's comments on his post-arrest silence were improper and that "the court erred in admitting testimony that he refused to answer certain questions and remained silent with respect to others," but it found that "any such errors were 'harmless beyond a reasonable doubt' inasmuch as there is 'no reasonable possibility that the error[s] might have contributed to defendant's conviction'...." It also found the trial court erred in instructing the jury on sexual abuse because the indictment and bill of particulars charged him with committing the crime by physical force, while the instructions permitted to jury to convict him if it found he used express or implied threats. However, because there was no evidence that Williams used threats to carry out the assault, the court found there was no significant risk the jury convicted him on that uncharged theory. It rejected his claim that the trial court erred in denying his request to use a peremptory challenge to strike a prospective juror after both sides had accepted the juror and the court declared jury selection complete.

Williams argues the trial court erred by allowing the prosecutor to question a police witness about his post-arrest silence and to comment on his silence, and further erred by refusing to provide a limiting instruction. "This case effectively came down to the jury deciding whether Mr. Williams or complainant was more credible," he says. The testimony and comments "bore directly ... upon Mr. Williams' credibility with respect to the central issue of whether the sexual encounter was consensual.... The evidence in this case cannot fairly be called overwhelming, and ... it cannot be said that there was no reasonable possibility that the error affected the jury's verdict." He argues the improper jury charge on sexual abuse requires reversal because "there was ample evidence from which the jury could have found that forcible compulsion was effectuated through the use of an implied threat." He also says the denial of his request to use a peremptory challenge was reversible error.

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

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To be argued Thursday, February 19, 2015

No. 52 People v Kharye Jarvis

Charged with the 1991 shooting deaths of Sherrill Prather and Robert Horn, Jr. in Rochester, Kharye Jarvis was convicted after a jury trial of two counts of second-degree murder and sentenced to consecutive terms of 25 years to life in prison. The Appellate Division, Fourth Department affirmed the judgment on direct appeal. In 2012, Jarvis moved for a writ of error coram nobis, claiming his appellate counsel had been ineffective in failing to argue on direct appeal that he received ineffective assistance of trial counsel. The Fourth Department granted the writ, vacated its prior order, and considered his appeal de novo.

In 2014, the Appellate Division reversed Jarvis' convictions and granted a new trial in a 3-2 decision, finding his trial counsel "committed two serious errors that rendered his representation ineffective. The first error, which was sufficiently egregious by itself to deny defendant a fair trial, was defense counsel's inexplicable failure to object to testimony that he had successfully sought to preclude. Defense counsel obtained a ruling from County Court precluding the People ... from questioning a certain prosecution witness about an alleged threat by defendant to shoot her" if she implicated him in the murders. "Nevertheless, defense counsel failed to object or move for a mistrial when the prosecutor ... elicited that very testimony from the witness. We conclude that 'defendant has demonstrated the absence of any strategic or other legitimate explanation for his attorney's failure to object... "Compounding the ... error was defense counsel's use of a flawed alibi defense," in which Jarvis's girlfriend and her mother testified that he was at their apartment at the time of the murder -- late on a Monday night and early Tuesday morning. The prosecutor asked the mother about a television show she was watching, which he then proved aired on Fridays, not Mondays. "We conclude that presenting an alibi defense for the wrong day of the week ... constitutes ineffective assistance of counsel...."

The dissenters said Jarvis failed to show there was no "strategic or other legitimate explanation" for his attorney's failure to object to precluded testimony by a prosecution witness who said Jarvis threatened her or for the alibi he presented. "For instance, defense counsel may have decided not to object in order to avoid focusing the jury's attention on the testimony of the witness.... [H]e may have sought to use the testimony of the witness to defendant's advantage by calling attention to her inability to recall the threat...; or, he may have made a tactical decision to allow the prosecutor to elicit testimony concerning the threat on direct examination rather than on rebuttal, if defense counsel suspected that he might be forced to open the door to the testimony on cross-examination of the witness." Regarding the alibi, they said three witnesses testified Jarvis was with them at the time of the crime and "the prosecutor showed a single discrepancy..., i.e., that the television show that defendant was purportedly watching, according to ... one of the three alibi witnesses, was not airing at the time that the witness specified.... [T]he remaining two alibi witnesses did not tie their testimony to the television show. Thus..., the prosecutor did not conclusively establish that the alibi was false; rather, that was an issue for the jury to resolve."

For appellant: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674
For respondent Jarvis: William Pixley, Rochester (585) 410-8022