

# *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.

To be argued Tuesday, September 4, 2012

**No. 151 Matter of State of New York v Daniel F.**

*(papers sealed)*

Daniel F. (anonymous), a sex offender who has completed his prison term, is appealing an Appellate Division ruling that he is a dangerous sex offender requiring confinement under Mental Hygiene Law article 10.

Daniel F. was 16 years old in 1989, when he pleaded guilty to first-degree sexual abuse involving a 2½-year-old girl. He served a year in jail. A month after his release in 1990, he was charged with breaking into a house and raping a 17-year-old woman at knife-point. He pleaded guilty to first-degree rape and was sentenced to 6 to 12 years in prison. He was transferred to the Central New York Psychiatric Center in 2006 and, after enactment of article 10 in 2007, the State filed a petition to confine him as a dangerous sex offender in 2008. A jury found that he suffered from a "mental abnormality" as required for confinement, but Supreme Court ruled he was not dangerous within the meaning of the statute and released him pursuant to a "strict and intensive supervision and treatment" (SIST) order. The Appellate Division, Fourth Department affirmed.

Daniel F. repeatedly violated the terms and conditions of his SIST order in 2008 and 2009 by using alcohol and drugs, viewing pornography and disregarding the directions of parole officers, among other things, and the State filed a series of petitions for his confinement under Mental Hygiene Law § 10.11(d). After hearings, Supreme Court denied the petitions and released Daniel subject to SIST conditions in April 2010, saying a written decision would follow.

In the written decision, dated September 30, 2010, Supreme Court said Daniel's conduct "does not demonstrate that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility. He has not been involved in any physical attacks, assaults, or verbal aggression. He actively participates in all individual and group clinical therapy. Moreover, the State has proffered no evidence that [he] has committed any sex offenses as defined by Article 10 or that he has engaged in any sexually inappropriate behavior. [Daniel] has made some poor choices, but this court will not convert [his] stupidity (and/or dependence on substances) into grounds for his confinement under Article 10. The statute requires much more."

One day later, the Fourth Department reversed without reviewing the written decision, which was not in the record on appeal, saying the State "established by clear and convincing evidence that [Daniel] is a dangerous sex offender requiring confinement." The Appellate Division said, "Based on the fact that [he] continued to engage in high risk behavior and failed to complete any treatment, [the State's] psychiatric expert concluded that [he] posed a high risk for sexual recidivism and that he was a dangerous sex offender requiring confinement. Although [he] did not engage in any sexually inappropriate conduct when he violated the conditions of his SIST regimen, we conclude that the evidence ... established that [he] could not 'be adequately controlled by modifying the conditions of [that] regimen'.... Despite the fact that alcohol and pornography were identified as triggers for [his] prior sexual offenses, [he] continued to consume alcohol and to view pornography on a regular basis. 'Thus, although [his] SIST violations were not sexual in nature, they remain highly relevant regarding the level of danger that [he] poses to the community with respect to his risk of recidivism!....'"

For appellant Daniel F.: Lisa L. Paine, Rochester (585) 530-3050

For respondent State: Assistant Solicitor General Kathleen M. Treasure (518) 473-7712

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**No. 152 Coleman v Daines**

*(appendix sealed)*

Barbara Coleman, 65 years old and suffering from dementia, diabetes and other ailments, applied to the New York City Human Resources Administration (HRA) for Medicaid benefits in November 2007 and January 2008 and requested around-the-clock, in-home personal care attendants. She was not informed that temporary Medicaid assistance could be available under Social Services Law § 133 pending investigation of her application. On May 22, 2008, after receiving no response, Coleman asserted an "immediate need" for personal care services and requested temporary Medicaid under section 133 while her application was processed. A week later, HRA notified her that she was eligible for Medicaid retroactive to March 1, 2008, but the letter did not specify how many hours of personal care services she would be allowed.

On June 17, 2008, Coleman brought this putative class action against the commissioners of HRA and the State Department of Health (DOH) pursuant to 42 USC § 1983 and CPLR article 78. She sought an injunction requiring HRA and DOH to notify class members that temporary Medicaid assistance is available and to render timely determinations of the hours of personal care services that applicants are entitled to receive, a declaration that the agencies' policy of not informing applicants about temporary Medicaid assistance violates section 133 and their due process rights, and nominal damages. In response to a court order for an expedited decision, HRA approved Coleman's request for around-the-clock personal care services on June 26, 2008.

Supreme Court subsequently dismissed Coleman's suit for mootness, because her application for Medicaid benefits was approved, and for failure to exhaust administrative remedies, because she did not request a fair hearing from HRA.

The Appellate Division, First Department reversed on a 3-2 vote, reinstated the case and remitted it to Supreme Court for further proceedings. The majority applied the exception to the mootness doctrine for issues that are likely to recur and to evade review, saying that because the challenged policy "applies to other similarly situated Medicaid applicants and recipients, it is 'likely to recur.'" The issues are substantial and "are capable of evading review since applicants may receive the determination on their ultimate eligibility for Medicaid ... before the issue of temporary eligibility comes before a court," it said. The suit should not have been dismissed for failure to exhaust administrative remedies "because this dispute turns on the construction of the relevant constitutional, statutory and regulatory framework, rather than a substantive factual dispute ... relating to the extent of personal care that [Coleman] requires or is entitled to."

The dissenters argued Coleman's claims were rendered moot by the approval of her application for full-time home care services. They also argued that her failure to request a fair hearing rendered her petition defective, in part because "the absence of an administrative record in this matter precludes assessment of whether the constitutional claim is substantial...."

DOH and HRA argue the suit should be dismissed as moot because Social Services Law § 133 was amended in 2010 and any ruling in this case would not address the current statute or future Medicaid applicants.

For appellant State DOH: Assistant Solicitor General Simon Heller (212) 416-8025

For appellant City HRA: Senior Assistant Corporation Counsel Jane L. Gordon (212) 788-1043

For respondent Coleman: Aytan Y. Bellin, White Plains (914) 358-5345

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**No. 153 People v Michael J. Solomon**

*(papers sealed)*

Michael Solomon is serving 32 years in prison after his conviction of numerous sex crimes involving a young girl in North Tonawanda. The crimes -- including first and second-degree rape, first and second-degree course of sexual conduct against a child, and use of a child in a sexual performance -- allegedly occurred between August 1999 and March 2004, beginning when the girl was 10 years old. The evidence included incriminating statements Solomon made during his interrogation by police and in two recorded telephone calls the victim made to him at the request of police.

Solomon's defense attorney, Michelle Bergevin, disclosed at a pre-trial suppression hearing that she would also be representing a key prosecution witness, North Tonawanda Detective Lawrence Kuebler, as a client in an unrelated civil matter. Kuebler was one of the two detectives who conducted the interrogation of Solomon. Bergevin told County Court, "Mr. Solomon respects the nature of my representation of Detective Kuebler in the unrelated matter and my client has agreed to waive any conflict in that regard." The court asked, "Is that correct, Mr. Solomon?" Solomon responded, "Yes, sir."

The Appellate Division, Fourth Department affirmed the conviction. It found the trial court failed to conduct a meaningful inquiry to ensure that Solomon was aware of the possible risks posed by his counsel's simultaneous representation of a key prosecution witness and failed to elicit his informed consent, but it held that he was not denied effective assistance of counsel. "Although defense counsel disclosed the potential conflict to the court and defendant purported to waive any conflict, we conclude that defendant's waiver was invalid. We agree with defendant that the inquiry by the court was insufficient, and a '[w]aiver occurs when a defendant intentionally relinquishes or abandons a known right'....," it said. "Nevertheless, we conclude that defendant was not thereby denied effective assistance of counsel because he failed to establish that any 'conflict affected the conduct of the defense'.... Indeed..., defense counsel's representation, viewed in its entirety and as of the time of the representation, was meaningful...."

Solomon argues, "In the absence of a sufficient inquiry by the court, and waiver by the accused, defense counsel's conflict of interest requires a new trial -- regardless of prejudice." Citing People v Macerola (47 NY2d 257), he says, "It has been settled by this Court that, under these circumstances, prejudice *is presumed* and a new trial is required without regard to any evidence of an effect of the conflict upon the representation." Solomon also argues that he was prejudiced by the conflict, saying his attorney "failed to attack the police interrogation techniques" that elicited his incriminating statements, "steered away from confronting the police themselves," and "abandoned the defendant on the critical issue" that the police treated him unfairly and obtained a false confession.

For appellant Solomon: Mark J. Mahoney, Buffalo (716) 853-3700

For respondent: Assistant Niagara County District Attorney Thomas H. Brandt (716) 439-7085

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## **No. 154 Hudson Valley Federal Credit Union v NYS Department of Taxation and Finance**

Hudson Valley Federal Credit Union brought this action against New York State and its tax department seeking a declaration that Hudson Valley and other federal credit unions are exempt from New York's mortgage recording tax, Tax Law § 253, which imposes a tax of 50 cents for each \$100 of the principal amount of the loan. The tax must be paid when the mortgage is recorded. If it is not paid, the mortgage will not be recorded and the lender may not enforce or foreclose on the mortgage, among other consequences.

Hudson Valley argues it is exempt from the mortgage recording tax (MRT) under the Federal Credit Union Act of 1934 (FCUA) and the Supremacy Clause of the U.S. Constitution. The exemption provision of the FCUA states that "Federal credit unions organized hereunder, their property, their franchises, capitol, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed" (12 USC § 1768).

Supreme Court dismissed the complaint, ruling that federal credit unions are not exempt from the MRT. It relied largely on Court of Appeals rulings in Franklin Society v Bennett (282 NY 79 [1939]), which characterized the MRT as an excise tax, and Matter of S.S. Silberblatt, Inc. v Tax Commission of State of N.Y. (5 NY2d 635 [1959]), which said the MRT "is not a tax on property, but a tax upon the privilege of recording a mortgage."

The Appellate Division, First Department affirmed, citing the same precedents for its conclusion that the MRT is an excise or privilege tax, not a tax on property that would be subject to the FCUA exemption. Hudson Valley argued it should apply U.S. Supreme Court rulings that MRTs are property taxes, but the Appellate Division said the federal statutes the Court construed in those cases "expressly exempted the 'mortgages,' 'loans,' or 'advances' in question from the particular state MRTs at issue" and, thus, "have no bearing on whether the term 'property' in the FCUA extends to mortgages held by federal credit unions or the right to record such mortgages." The court said it did not consider implied immunity under the Supremacy Clause because "Congress has spoken on the issue of federal credit unions' exemption from state taxation."

Hudson Valley, supported by the United States as amicus curiae, argues that the FCUA "affords to federal credit unions complete immunity from all forms of taxation of any kind, subject only to two specific exceptions having no application to intangible personal property such as mortgages or the recording of mortgages.... This conclusion is compelled by the plain language of 12 USC § 1768, its interpretation by the courts, and United States Supreme Court precedent which long ago established that such general, all-encompassing tax exemptions provide federally-chartered lenders with the widest immunity that Congress may confer...." It says the exemption applies because the MRT "operates as a tax on mortgages, tantamount to a tax on federal credit unions themselves." It also argues the credit unions "are federal instrumentalities and thus immune from state taxation under the Supremacy Clause."

For appellant Hudson Valley: Eli R. Mattioli, Manhattan (212) 536-3900

For respondent State: Assistant Solicitor General Brian A. Sutherland (212) 416-6279