

***State of New York
Court of Appeals***

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

**NEW YORK STATE COURT OF APPEALS
Background Summaries and Attorney Contacts**

Week of September 4 - 7, 2012

State of New York Court of Appeals

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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

State of New York Court of Appeals

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To be argued Tuesday, September 4, 2012

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

State of New York Court of Appeals

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To be argued Tuesday, September 4, 2012

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

State of New York Court of Appeals

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To be argued Tuesday, September 4, 2012

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

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To be argued Wednesday, September 5, 2012

No. 155 Matter of the New York County Lawyers' Association v Bloomberg

County bar associations from each of the five boroughs of New York City, joined by intervenor New York Criminal Bar Association (NYCBA), brought this article 78 proceeding to challenge revisions the City made to its Indigent Defense Plan in 2010. The City first established its plan in 1965 pursuant to County Law § 722, which required it to provide counsel to indigent criminal defendants through any of four options: (1) a public defender; (2) a legal aid society; (3) private counsel "furnished pursuant to a plan of a bar association;" or (4) any combination of those options. The City adopted a combination plan with the section 722(2) and (3) options, making the Legal Aid Society of New York the primary provider and, for cases where Legal Aid would have a conflict of interest, private attorneys appointed from assigned counsel panels created and screened by the County Bars. The Appellate Division assumed responsibility for the screening of attorneys in 1980. The revisions adopted in 2010 would retain the assigned counsel panels created by the City Bars, but would also permit assignment of conflict cases to Legal Aid and other institutional providers selected by the City's Criminal Justice Coordinator (CJC) through a bidding process. The County Bars argue the new system violates section 722 and the Municipal Home Rule Law because, among other things, conflict counsel would no longer be "furnished pursuant to a plan of a bar association" under section 722(3).

Supreme Court held that the City's 2010 revisions complied with County Law § 722 and dismissed the proceeding.

The Appellate Division, First Department affirmed in a 3-2 decision, saying section 722 gave the City, not the bar associations, authority to adopt an indigent defense plan. It said the revised plan "is not arbitrary and capricious or irrational..., does not require the consent of the county bar associations..., and does not violate section 722" or the Municipal Home Rule Law. It said the legal aid society option of section 722(2) "is not restricted to primary assignments, and the 'plan of a bar association' option of § 722(3), ... contrary to petitioners' contention, does not give the County Bars the exclusive right to provide 'conflict counsel.'" It said the revised plan "does not improperly usurp the role of the County Bars. Nor does the plan ... eliminate the judiciary's right under [section 722(4)] to assign counsel when a conflict of interest prevents assignment pursuant to the plan...."

The dissenters argued that the revised plan violates section 722 and the Home Rule Law because, among other things, the new role of the assigned counsel panels is no longer a "plan of a bar association." They said, "[N]o matter how we characterize the changes, the ineluctable reality is that a 'Bar Plan' that has not been adopted, but instead has been rejected by the bar associations, is not 'a plan of a bar association' as contemplated by County Law § 722(3)." They said that, in the absence of a valid bar plan under section 722(3), the new Indigent Defense Plan "falls under County Law § 722(2). In that circumstance, § 722(4) provides that a judge may appoint conflict counsel."

For appellant County Bars: Jonathan D. Pressment, Manhattan (212) 659-7300

For intervenors-appellants NYCBA et al: Zoë E. Jasper, Manhattan (212) 818-9200

For respondent City: Assistant Corporation Counsel Julian L. Kalkstein (212) 788-1030

For intervenor-respondent Legal Aid Society: Daniel F. Kolb, Manhattan (212) 450-4000

State of New York Court of Appeals

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To be argued Wednesday, September 5, 2012

No. 156 People v Western Express International, Inc.

(papers sealed)

In 2007, a Manhattan grand jury indicted Western Express International, a financial services company; its president, Vadim Vassilenko; and 16 other individuals on 173 counts of grand larceny, fraud, conspiracy and -- the focus of this appeal -- enterprise corruption under Penal Law § 460.20(1) of the Organized Crime Control Act. The defendants were accused of participating in an international "cyber-crime" operation that trafficked in stolen credit card information. Western Express allegedly acted as an intermediary by providing credit and facilitating anonymous transactions between buyers and sellers of the stolen information, earning a commission on each transaction. Defendants Douglas Latta, Lyndon Roach, and Angela Perez were identified as buyers of stolen credit card data, which they allegedly used to make fraudulent purchases and produce counterfeit credit cards.

Defendants moved to dismiss the top count of enterprise corruption for lack of evidence that they were engaged in a "criminal enterprise" as defined in Penal Law § 460.10(3): "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity...." Supreme Court granted the motion, saying, "Although the statute does not require any particular structure..., courts have consistently required some evidence of a system of authority or hierarchy binding the defendants together.... [N]owhere do the People allege that any of these individuals or entities made decisions or shared authority over each other."

The Appellate Division, First Department reversed in a 3-2 decision and reinstated the enterprise corruption count. "Given that the statute merely requires an 'ascertainable structure,' there is no reason to engraft on it that the structure be of the old-fashioned, hierarchical nature..., " it said. "Although the criminal enterprise here was not of a traditional hierarchical sort, the participants worked together, employing a repeating pattern in their transactions that served to maximize the profits of each while minimizing their exposure, with each participant playing a different role: buyers, sellers, and money movers."

The dissenters said, "[T]here is no evidence of any collective decision-making or coordination with respect to the purported enterprise's activities or of any overarching structure of authority or hierarchy in which defendants participated.... Western Express was in essence no more than the equivalent of a common fence, taking stolen property from independent thieves and selling it to buyers looking for an illicit deal. Although defendants may all have been in the same industry, [they] operated at arm's length for their own benefit, not as an enterprise with a shared purpose."

For appellant Vassilenko: Marianne Karas, Thornwood (914) 434-5935

For appellant Latta: Jan Hoth, Manhattan (212) 577-2523

For appellant Roach: Allen Fallek, Manhattan (212) 577-3566

For appellant Perez (aka Ciano): Matthew Galluzzo, Manhattan (212) 918-4661

For respondent: Manhattan Assistant District Attorney David M. Cohen (212) 335-9000

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To be argued Wednesday, September 5, 2012

No. 157 Matter of 677 New Loudon Corporation v NYS Tax Appeals Tribunal

677 New Loudon Corporation operates an adult entertainment club in the Town of Colonie under the name Nite Moves, which features exotic dancers. After an audit in 2005, the State Division of Taxation determined that the club's general admission charges and its "couch sales," the fees patrons pay for private dances, are subject to sales tax and assessed Nite Moves \$124,921.94 in taxes due plus interest for the period from December 2002 through August 2005.

Nite Moves challenged the assessment, saying it was exempt from sales tax on admission fees to "any place of amusement" under Tax Law § 1105(f)(1), which exempts "dramatic or musical arts performances." It also claimed exemption from sales tax on charges of a "cabaret or similar place" under Tax Law §§ 1105(f)(3) and 1101(d)(12), which exclude "a place where merely live dramatic or musical arts performances are offered." Nite Moves relied largely on an expert witness, a cultural anthropologist specializing in exotic dance, who testified that "the presentations at Nite Moves are unequivocally live dramatic choreographic performances."

An administrative law judge ruled for Nite Moves, crediting the club's expert and finding its admission and private dance fees qualified for the exemption for "dramatic or musical arts performances." The ALJ said, "The fact that the dancers remove all or part of their costume ... simply does not render such dance routines as something less than choreographed performances."

The Tax Appeals Tribunal reversed and reinstated the tax assessment. It gave little or no credence to Nite Move's expert, who admitted she did not observe any private dances, and ruled the club failed to prove its exotic dances were exempt performances. It said the expert's "view of choreographed performance is so broad as to include almost any planned movements done while playing canned music.... Further, the terminology [the witness] employs in her report and testimony at times appears designed to neatly fit into the statutory exemption language."

The Appellate Division, Third Department affirmed, saying the Tribunal's rejection of the expert testimony was not arbitrary and the club's remaining evidence failed to prove it is entitled to the exemption for choreographed performances. It said, "The record reflects that the club's dancers are not required to have any formal dance training and ... often rely upon videos or suggestions from other dancers to learn their craft." Rejecting the club's constitutional claims, it said, "[E]ach of the statutory provisions at issue is facially neutral and in no way seeks to levy a tax upon exotic dance as a form of expression.... [P]etitioner was denied the requested relief due not to the nature of its business but, rather, because of the inadequacy of its proof."

Nite Moves argues the Tribunal's ruling was arbitrary and capricious and "relied on legal error." It says the Tribunal "stretched and pulled at both the law and the facts to avoid what appears to Petitioner to be obvious: that this establishment qualifies as one which features 'choreographed' performances, and thus is excluded from the tax at issue.... [T]he Tribunal set itself up as a dance critic, despite claiming no expertise in the field. It determined that there was no merit to the expert opinion offered by petitioner, despite no attempts before the ALJ to impeach or undermine her." It also argues, "Nude dancing is protected expression, and not subject to a discriminatory tax."

For appellant Nite Moves: W. Andrew McCullough, Midvale, Utah (801) 565-1099

For respondent Tribunal et al: Assistant Solicitor General Robert M. Goldfarb (518) 473-6053

State of New York Court of Appeals

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To be argued Wednesday, September 5, 2012

No. 159 People v Jose Alfaro

Xiao Dong Jin was walking in midtown Manhattan in March 1999 when he was jumped from behind by men who punched him and knocked him to the sidewalk. They dragged him face-down into a freight elevator lobby and continued to beat him, then turned him on his back and rifled through his pockets, taking several documents. When they fled, Jin pursued them and with the help of bystanders detained Jose Alfaro for police. While arresting Alfaro, officers recovered novelty handcuffs with keys and a cigarette lighter shaped like a gun.

Before trial, defense counsel applied to preclude introduction of the toy handcuffs and gun-shaped lighter as irrelevant, because they were not used or mentioned during the robbery, and he argued their admission would be unduly prejudicial. He said, "It goes to propensity rather than any legitimate issue of identity or intent in this case." Supreme Court denied the application, saying, "This is part of the *res gestae*. It's exceedingly relevant.... It's part of the whole of the transaction." The court also denied Alfaro's request to instruct the jury that the handcuffs and lighter could not be considered as evidence of his propensity to commit the crime, saying the instruction was unnecessary and confusing. Alfaro fled on the eve of trial and was convicted in absentia of first and second-degree robbery, first-degree assault and second-degree gang assault. He began serving his 15-year sentence when he was apprehended in 2008.

The Appellate Division, First Department affirmed the conviction, saying, "The court properly admitted into evidence an imitation pistol, handcuffs and handcuff keys found in defendant's possession or vicinity immediately after the crime was committed. Although defendant was not charged with unlawful possession of an imitation pistol, his possession of those items provided circumstantial evidence of his intent to commit the crimes charged.... Furthermore, the probative value of this evidence outweighed its prejudicial effect. The lack of a limiting instruction does not warrant reversal under these circumstances."

Alfaro argues that admission of the handcuffs and imitation gun violated the Molineux rule, which limits the use of evidence of uncharged crimes. He says, "In this eyewitness identification case, where intent was not at issue, the trial court erred by: (1) permitting the prosecution to introduce evidence that Jose Alfaro possessed items that were not used, mentioned or displayed in the crime, but could, hypothetically, have been used to commit such a crime, and (2) refusing to instruct jurors that the items could not be considered as propensity evidence." He says, "The fake handcuffs and toy gun had no probative value beyond demonstrating a propensity for robbery and were, thus, inadmissible" under Molineux. "Where the only evidence presented was equivocal or contradictory witness testimony, the introduction of this highly inflammatory and prejudicial evidence denied Mr. Alfaro his right to a fair trial."

For appellant Alfaro: Anastasia B. Heeger, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney David P. Stromes (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, September 6, 2012

No. 160 Bentoria Holdings, Inc. v Travelers Indemnity Company

Bentoria Holdings, Inc., the owner of a building at 521 Court Street in Brooklyn, is seeking to compel its insurer, Travelers Indemnity Company, to cover property damage allegedly caused by improper excavation of soil for a construction project on an adjacent lot in 2008. Travelers disclaimed coverage based on the "earth movement" exclusion in its policy, which provided that it would not pay for loss or damage caused by earthquake, landslide, mine subsidence, or by "[e]arth sinking..., rising or shifting ... whether naturally occurring or due to manmade or other artificial causes." Bentoria brought this action against Travelers to compel it to provide coverage under the policy, along with claims against the owner and contractors involved in the construction next door.

Supreme Court denied Travelers' motion for summary judgement dismissing the complaint against it or, alternatively, to sever the insurance claims, without a written opinion.

The Appellate Division, Second Department affirmed, saying Travelers did not prove the earth movement exclusion applied to damage caused by excavation. It said, "Excavation was not expressly set forth in the exclusion, while other, less common causes of earth movement were.... Travelers failed to establish, prima facie, that the facts of this case, which allegedly involves the excavation of earth from a lot adjacent to the plaintiff's building, fall squarely within the language of the exclusion, which expressly defines earth movement as '[e]arth sinking, ... rising or shifting'.... Thus, notwithstanding the fact that the exclusion here refers to earth movement caused by 'man made' or 'artificial' causes, we conclude that Travelers failed to demonstrate, prima facie, that the express terms of the exclusion clearly and unambiguously establish that the loss at issue here was not covered by the policy."

Travelers argues, "The exclusion unambiguously bars coverage of any loss caused, in whole or in part, by the sinking, rising or shifting of earth -- regardless of what caused the earth movement (*e.g.*, even if precipitated by manmade events). There is no reasonable reading of this provision that would render it inapplicable to earth movement due to excavation." It says the phrase extending the exclusion to "manmade or other artificial causes" was added in response to a Court ruling that a prior version of the exclusion did not apply to excavation. Travelers says, "[T]he exclusion applies to the present loss even though it does not expressly reference 'excavation.' To hold otherwise rewrites the provision's plain language and, contrary to rules of construction, adopts an interpretation that renders it meaningless."

For appellant Travelers: Stephen M. Lazare, Manhattan (212) 758-9300

For respondent Bentoria: John V. Decolator, Garden City (516) 578-8212

State of New York Court of Appeals

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To be argued Thursday, September 6, 2012

No. 161 People v Delroy Colville

Delroy Colville was charged with second-degree murder for fatally stabbing Gregory Gardner in October 2004 during an altercation outside his apartment in a single room occupancy building in Brooklyn. Colville told police that Gardner struck him in the head repeatedly with a heavy glass ashtray and he picked up the knife to defend himself. After the evidence portion of the trial, Colville's attorney asked the court to submit first and second-degree manslaughter to the jury as lesser-included offenses of murder. He said he explained to Colville that this would give the jury "leeway" to reach a compromise verdict on manslaughter, which would carry much less prison time than murder. Defense counsel withdrew his request after further discussion with his client, saying Colville had decided -- against his advice -- that the manslaughter offenses should not be submitted to the jury because he believed the evidence showed he did not intend to kill Gardner. Colville was convicted of second-degree murder and sentenced to 22 years in prison.

The Appellate Division, Second Department affirmed, rejecting Colville's claim that he was deprived of effective assistance of counsel when his attorney acceded to his wish that he withdraw his request for lesser-included offenses. The court said he received effective assistance regardless of whether the decision is a fundamental one, which must be made by the defendant, or a strategic one that is left to counsel. "If fundamental, then [Colville] made the ultimate decision," it said. "If strategic, counsel's representation was not objectively unreasonable or less than meaningful merely because, after fully consulting with the defendant, he did not overrule the defendant's decision that lesser-included offenses should not be submitted to the jury.... Had there been no disagreement, counsel's decision to seek the submission of lesser-included offenses, or not, could be justified as a strategic decision of a reasonably competent attorney...." It said Colville "decided to disregard counsel's advice and pursue an all-or-nothing strategy, and counsel acceded to that decision. It is not for this court to pass upon the wisdom of the defendant's decision...."

Colville argues, "By deferring to appellant's desire to have no lesser included offenses submitted to the jury, despite defense counsel's clearly-stated professional opinion to the contrary, the court denied appellant the benefit of counsel's expert tactical judgment, and therefore his constitutional rights to counsel and due process." He says, "To find that appellant is stuck with the decision he made here out of inexperience, confusion, and apparent incomprehension of the tactical considerations involved would deny him the very protection to which he was entitled by the right to counsel and the related due process right to a fair trial." He also argues the trial court deprived him of a fair trial by refusing to instruct the jury that he had no duty to retreat from Gardner if it found Colville was in his "dwelling."

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

For respondent: Brooklyn Assistant District Attorney Anthea H. Bruffee (718) 250-2475

State of New York Court of Appeals

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To be argued Thursday, September 6, 2012

No. 162 Sigmund Strauss, Inc. v East 149th Corp.

In 2006, Sigmund Strauss, Inc. negotiated agreements with Robert and Teresa Rodriguez, sole owners of Windsor Brands, Ltd. and Twinkle Import Co. to merge their businesses and operate out of premises that Windsor had been leasing in the Bronx. The agreements provided for Strauss to purchase the assets of Windsor and Twinkle, which would then be dissolved, and for the Rodriguezes to purchase a one-third interest in Strauss, among other things. Although the agreements were never signed, the parties began performing pursuant to their terms: the Rodriguezes helped Strauss move into Windsor's building, Twinkle ceased operation, and the Rodriguezes and their employees became employees of Strauss. A dispute soon arose, the deal fell apart, and in June 2006 Strauss changed the locks on the building and removed the Rodriguezes from the payroll.

Strauss filed this action against the Rodriguezes and the landlord, seeking a declaration that it was entitled to sole possession of the premises. In their answer, the Rodriguezes counterclaimed against Strauss for fraud and conversion. Supreme Court dismissed the counterclaims in August 2007, saying the Rodriguezes' allegations "make out a claim only [for] breach of contract -- that the Strauss parties merely failed to perform their end of the bargain and pay the agreed-upon price," and thus were insufficient to support claims of fraud or conversion. The Rodriguezes moved for leave to amend their answer and to assert claims for breach of contract. The court denied the motion as untimely in February 2008. After a bench trial, Supreme Court ruled Strauss was the lawful tenant of the premises. The Rodriguezes appealed, seeking to review the August 2007 and February 2008 orders that dismissed their counterclaims and denied their motion to amend and assert claims for breach of contract.

The Appellate Division, First Department affirmed, saying that although the Rodriguezes "appear not to have received appropriate compensation for their business as a result of the failed merger, we conclude that the appeal from the judgment does not bring up for review the prior orders. Pursuant to CPLR 5501(a)(1), an appeal from a final judgment brings up for review 'any non-final judgment or order which necessarily affects the final judgment.'" It found the August 2007 and February 2008 orders did not "necessarily affect" the judgment in this case because, if they were reversed, the Rodriguezes' "claims would be reinstated and they would be permitted to pursue a claim for breach of contract. However, the judgment which declared that Strauss was entitled to possession of the leased premises would still stand." The court also denied the Rodriguezes' motion for enlargement of time to perfect their direct appeal of the February 2008 order. "The critical fact is that [their] right to appeal the prior order terminated when the final judgment was entered," it said, citing Matter of Aho (39 NY2d 241).

The Rodriguezes argue the August 2007 and February 2008 orders were reviewable because they necessarily affected the final judgment. They say, "As a consequence of these two interlocutory orders, the Rodriguezes were precluded from raising these breach of contract claims at trial and attaining an adjudication on the merits which would have been memorialized in the final judgment, but for the errors." They argue the Appellate Division's ruling that their right to direct appeal of the prior orders had terminated "is intellectually inconsistent, traps litigants in an inescapable web of circular reasoning and distorts the interrelationship between CPLR 5501" and Aho, leaving them without "any appellate review" of their breach of contract claims.

For appellant Rodriguezes et al: Scott T. Horn, Manhattan (212) 425-5191

For respondent Strauss: Barry A. Cozier, Manhattan (212) 446-5093

State of New York Court of Appeals

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To be argued Thursday, September 6, 2012

No. 163 Town of Oyster Bay v Kirkland

In 1993, the Town of Oyster Bay amended its Zoning Code to create a new "Golden Age District" for construction of below-market housing developments for senior citizens. Preference was given first to applicants who lived in the school district where the project was located, then to residents of the Town, to parents of school district and Town residents, and finally to Nassau County residents. In 2004, Oyster Bay created another zoning district for the development of below-market housing for first-time home buyers, called "Next Generation" housing. Preference for these homes was given to Town residents and their children.

In January 2009, the State Division of Human Rights (DHR) filed an administrative complaint against Oyster Bay and other parties, charging them with discrimination in housing on the basis of race, color and national origin. DHR alleged that, due to existing racial segregation in the Town, reserving housing for the children and parents of current residents would likely result in discrimination against potential minority purchasers. DHR alleged that, in adopting and administering housing programs with such residency preferences, the Town was aiding and abetting discrimination in violation of Executive Law § 296(6). Before DHR completed its investigation or issued any determination, the Town brought this action against DHR and its commissioner for a declaratory judgment that the agency was acting beyond its authority and for an injunction barring it from pursuing the complaint. The Town contended, among other things, that the complaint was void because it constituted reverse discrimination, that DHR lacked authority to file the complaint on its own initiative, and that the Town was not subject to the Human Rights Law provisions it was charged with violating. Supreme Court granted DHR's motion to dismiss the suit, in part for failure to exhaust administrative remedies.

The Appellate Division, Second Department affirmed. It said that, while constitutional challenges may be maintained without exhausting administrative remedies, the Town's reverse discrimination claim "does not facially challenge the constitutionality of the Human Rights Law or any specific provisions thereof, but challenges the possible application of the charged provisions to the housing programs at issue, and requires resolution of factual issues at the administrative level." It said DHR's authority to initiate complaints has "been upheld by statute and case law," and it ruled the Town's claim that it is not subject to the provisions it is charged with violating was properly dismissed for failure to exhaust administrative remedies because it "goes to the merits of any future finding that the Town's actions violated the charged provisions."

Oyster Bay argues, "[T]here are no questions of fact remaining in the instant case, as evidenced by the grant of summary judgment below; thus, the constitutional questions whether the DHR is engaged in reverse discrimination in violation of the Town's 'liberty' right to due process of law and its residents' right to 'equal protection' should be answered by this Court in the affirmative and, concomitantly, [the Court] should rule that the Town's argument constitutes an exception to the exhaustion doctrine."

For appellant Oyster Bay: Joseph D. Giaimo, Kew Gardens (718) 261-6200
For respondent DHR: Michael K. Swirsky, Bronx (718) 741-8398

State of New York Court of Appeals

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To be argued Thursday, September 6, 2012

No. 164 Custodi v Town of Amherst

Robin Custodi was injured in July 2007 while rollerblading on Countryside Lane in the Town of Amherst, Erie County. She testified at her deposition that an ice cream truck was stopped on her side of the street and she rollerbladed up a driveway and onto the sidewalk. After the truck pulled away, she tried to get back to the street by going down a driveway owned by Peter and Susan Muffoletto, but fell at the bottom and broke her hip. Custodi alleges that she tripped over a two-inch lip at the end of the driveway where it met the "C curb," a shallow gutter running along the side of the street. She and her husband brought this negligence suit against the Muffolettos, claiming the driveway lip was a dangerous condition that caused her accident.

Supreme Court granted the Muffolettos' motion for summary judgment dismissing the suit based on the doctrine of primary assumption of the risk. It said Custodi "was well aware of all of the risks associated with the activity of rollerblading on streets and sidewalks.... The lip which she may have struck was clearly open and obvious and there to be seen had she looked."

The Appellate Division, Fourth Department reversed and reinstated the complaint in a 3-2 decision. The evidence "established that plaintiff was an experienced rollerblader and that she was aware that tripping and falling are risks inherent in the activity, which are increased when rollerblading on uneven surfaces such as sidewalks," it said. However, the evidence also showed "that plaintiff had not rollerbladed on Countryside Lane prior to the date of the accident, that she did not observe the height differential between defendants' driveway apron and the curb prior to falling and that, in her prior rollerblading experience, she had not encountered a height differential of similar dimension. Thus, it cannot be said that the height differential between defendants' driveway apron and the curb was a 'known, apparent or reasonably foreseeable consequence []' of rollerblading on a paved roadway, sidewalk, or driveway..., nor can it be said 'that plaintiff was aware of the [height differential] and the resultant risk' presented thereby.... To the contrary, we conclude that the height differential ... 'created a dangerous condition over and above the usual dangers that are inherent in the sport' of rollerblading...."

The dissenters said, "Here, given plaintiff's advanced skill level with respect to rollerblading and the choice of plaintiff to rollerblade on a surface that she knew to be uneven and bumpy, we conclude that she 'assumed the risks inherent in the sport of roller[blading], as well as those arising from the open and obvious condition of the [sidewalk and driveway] on which [she] was traveling'...."

For appellant Muffoletto: Joel B. Schechter, Buffalo (716) 852-3540

For respondent Custodi: Robert J. Maranto, Jr., Buffalo (716) 842-2200

State of New York Court of Appeals

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To be argued Friday, September 7, 2012 (11 a.m.)

No. 165 People v Carlos Herring

Carlos Herring was charged with fatally shooting Donald Thompson and wounding another man during a dispute outside a nightclub in Spring Valley, Rockland County, in August 2006. At his trial, County Court questioned juror number 11 about her ability to serve, saying "you appear to be falling asleep an awful lot." The juror said she had been taking cough medicine that made her drowsy, said she would stop taking it during the day, and acknowledged that it was important for her to pay attention to the evidence. She was allowed to continue without objection. During the jury's deliberations, another juror reported that juror 11 was "just not participating ... at all" and was "just sleeping basically" during a "prolonged period of the deliberations." The court summoned juror 11 and again inquired about her ability to serve. She denied she had been sleeping and said she had no illness that would prevent her from serving. "I'm capable to do this," she said. "I don't know why I'm here." After the court sent her to rejoin the jury, defense counsel complained that its inquiry was made "with absolutely no regard" for how much of the testimony and deliberations she had slept through. He said, "I think that the inquiry that has been made, it's absolutely inadequate, insufficient, superficial. My client is now here being tried by a jury of 11." The court denied defense motions to discharge the juror or declare a mistrial, based on the juror's assurance that she was capable of fulfilling her duties. It said, "[W]ith that response I refuse to inquire any further as to who is participating in deliberations, as to how they are participating in deliberations.... I think it invades the privacy and the province of that jury and I will not do it, over your objection."

Herring was convicted of second-degree murder, second-degree assault, and second and third-degree criminal possession of a weapon. He was sentenced to 25 years to life for murder and a consecutive term of seven years on the third-degree weapon count.

The Appellate Division, Second Department affirmed, saying County Court "did not improvidently exercise its discretion in denying the defendant's motion to discharge a certain juror or for a mistrial based on the alleged inattentiveness of that juror, after making an inquiry of that juror...."

Herring argues that he "was deprived of his Constitutional right to a jury of twelve members when a sworn juror disregarded her fundamental duties and slept during trial and deliberations.... Since the juror's sleeping rendered her 'grossly unqualified,' the court improperly denied appellant's requests to strike her or grant a mistrial, and never afforded appellant the opportunity to consent in writing, during deliberations, to replace that juror with an available alternate (CPL 270.35[1] ...).

For appellant Herring: Diane E. Selker, Peekskill (914) 736-1738

For respondent: Rockland County Exec. Asst. District Attorney Itamar J. Yeager (845) 638-5001

State of New York Court of Appeals

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To be argued Friday, September 7, 2012 (11 a.m.)

No. 166 Matter of D'Angelo v Scoppetta

This case arises from a confrontation between two employees of the Fire Department of the City of New York (FDNY) -- firefighter Michael D'Angelo, who is white, and emergency medical technician Russell Harris, who is black -- at the scene of a Brooklyn automobile accident in 2006. Harris filed a complaint with the FDNY's Equal Employment Opportunity (EEO) Office, alleging D'Angelo shouted a racial slur at him. The Office opened an investigation. The FDNY's Bureau of Investigations and Trials also began an investigation, which it later closed without taking any action against D'Angelo. In May 2008, after interviewing D'Angelo, Harris, and other witnesses, the EEO Office submitted an investigative report to Fire Commissioner Nicholas Scoppetta which said Harris's complaint was substantiated and recommended EEO training for D'Angelo, among other things. Scoppetta approved the recommendation.

In June 2008, the EEO Office issued a letter to D'Angelo which said, in part, "After conducting a thorough investigation..., this office finds that the allegations that you exercised unprofessional conduct and made an offensive racial statement are Substantiated. The EEO Office determined that you exhibited conduct that violates the Fire Department's EEO Policy and Code of Conduct in that you made an inappropriate and offensive comment of a racial nature in the workplace to another Fire Department employee.... [I]t is the recommendation of the EEO Office that you receive an EEO Advisory Memorandum, which is enclosed for your review and signature ... [and] that you receive EEO Training.... This document serves as a formal Notice of Disposition of the filed Complaint." Copies of the letter and memorandum were placed in D'Angelo's EEO file, but not in his personnel file.

D'Angelo brought this article 78 proceeding against Scoppetta, the EEO Office and the City (collectively FDNY), seeking an order annulling the Commissioner's determination that he acted unprofessionally and made an offensive racial comment, and expunging the letter from his EEO file. He argued the determination and letter were disciplinary in nature and were issued in violation of Civil Service Law § 75, which requires municipal employers to provide a formal hearing and other due process protections to an employee before imposing discipline.

Supreme Court granted his petition to annul the determination and expunge the letter, saying, "The letter is a disciplinary reprimand and not a critical evaluation." The Appellate Division, Second Department affirmed. It said, "Contrary to the appellants' contentions, the subject letter ... cannot be properly characterized as a 'critical evaluation['] or '*Holt*' letter.... Moreover, the record does not substantiate the appellants' contention that there is 'ample evidence' that they comported with the requirements of due process."

The FDNY argues the letter "should not be deemed 'discipline,' and, rather, should be viewed as no more than an administrative review of an employee's conduct, in accordance with the Fire Department's EEO Policy. The Fire Department did not discipline petitioner, nor did the EEO Office, which has no authority to discipline employees, recommend discipline."

For appellant FDNY: Assistant Corporation Counsel Ellen Ravitch (212) 788-1040
For respondent D'Angelo: Michael N. Block, Manhattan (212) 732-9000

State of New York Court of Appeals

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To be argued Friday, September 7, 2012 (11 a.m.)

No. 167 People v Norman Cajigas

Norman Cajigas's former girlfriend, Maria Rodriguez, obtained orders of protection in 2007 that prohibited him from having any contact with her, based on allegations that he had physically abused and threatened her. He was later charged with criminal contempt for violating the orders on two occasions in July 2007, first by accosting Rodriguez at a Manhattan beauty salon and following her to her mother's apartment, and again by attempting to enter her apartment on East 13th Street. He was also charged with second-degree attempted burglary, the focus of this appeal, based on the second incident. Rodriguez's daughter was alone in the apartment when she heard Cajigas rattling the doorknob. He did not reply and walked away when she asked what he wanted. He returned in a few minutes and tried the knob and pushed at the door, then left without speaking when she asked again what he wanted.

At trial, Cajigas moved to dismiss the attempted burglary charge for failure to prove he intended to commit a crime after gaining entry to the apartment. He also asked the court to instruct the jury that his "intent to commit a crime therein" could not be satisfied by conduct that would not be criminal if the order of protection did not prohibit it. He cited People v Lewis (5 NY3d 546), which held that "the 'intent to commit a crime therein' element of burglary ... may be satisfied by a defendant's intent to engage in conduct prohibited by an order of protection while in the banned premises," but not "solely by a defendant's intent to violate an order of protection by entering the dwelling that the order of protection declares off limits." He also cited the Appellate Division, Fourth Department's ruling in People v VanDeWalle (46 AD3d 1351), which held "that the 'intent to commit a crime therein' element of burglary cannot be satisfied by intended conduct that would be innocuous if the order of protection did not prohibit it, and that such insufficient intended conduct would include the defendant's mere 'contact' or 'communication' with -- or proximity to -- the [person] named in the order of protection." Supreme Court denied the motion and requested jury charge and Cajigas was convicted of all counts. He was sentenced to 6½ to 8 years in prison, including 5 years for attempted burglary.

The Appellate Division, First Department affirmed, saying "the intent element will be satisfied if the defendant entered the premises with the intent to violate another provision of the order of protection, distinct from the trespass," including a provision "requiring that he stay away from the victim." It said, "The court correctly declined to charge that the criminal intent element could not be satisfied by an intent to commit an act that would be innocuous if the order of protection did not prohibit it. We find nothing in Lewis that would require such an instruction."

Cajigas argues the Fourth Department adopted "the proper reading" of Lewis. "[A]n unlawful entry coupled with the intent to conduct oneself in a manner that would be innocuous absent the order of protection is nothing more than a mere trespass into the apartment...", he says. "[T]he violations of the 'stay away' from the home provision and the 'stay away' from the person represented a single criminal act with a single criminal intent -- to violate the order of protection," and it cannot be used "to establish both the unlawful entry and the intent to commit a crime elements of burglary."

For appellant Cajigas: Jonathan M. Kirshbaum, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney Britta Gilmore (212) 335-9000

State of New York Court of Appeals

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To be argued Friday, September 7, 2012 (11 a.m.)

No. 168 People v Luis Alvarez

No. 169 People v William George

The common issue in these appeals is whether the trial courts' exclusion of the public, including members of the defendants' families, during the first round of jury selection violated their Sixth Amendment right to a public trial. Both judges said they excluded spectators due to lack of space. Another question is whether the issue must be preserved by objection at trial.

Luis Alvarez was tried on weapon possession charges in Supreme Court, Queens County, in 2008. After the first round of voir dire, defense counsel told the court he had just learned that Alvarez's parents were excluded from the courtroom and moved for a mistrial on the ground "that the right to a free and open trial was denied." The parents were allowed to attend subsequent rounds. The court denied the motion, saying the initial exclusion was "mitigated by the fact that because of the logistics we only have x amount of seating; every one [of] which was taken by the jury panel. So every trial we ask the family to step out and as soon as seats are available, they are [the] first ones offered seats." Alvarez was convicted of multiple charges, including two counts of second-degree possession of a weapon.

William George was tried for robbery in Supreme Court, Kings County, in 2008. Before jury selection began, the court asked George's mother and other family members to leave. It said George "has some people in the courtroom and they are certainly entitled to be here. The only thing I would ask, when we have potential jurors come in, there will not be enough seats for everybody. Within five minutes, I'll excuse people and in order to not have spectators and jurors sitting together I'll have the spectators leave." The defense did not object. The spectators were allowed to return before the first round was completed. George was convicted of first and second-degree robbery.

The Appellate Division, Second Department rejected the defendants' Sixth Amendment challenges in separate rulings, but identical language: "The defendant's claim that the Supreme Court deprived him of his right to a public trial is unpreserved for appellate review.... In any event, the defendant's contention is without merit...."

Both defendants, citing Presley v Georgia (130 S Ct 721 [2010]) and People v Martin (16 NY3d 607 [2011]), argue the trial courts violated their right to a public trial by excluding spectators without first finding that closure was required to protect an "overriding interest" or considering alternatives to ensure the closure was no broader than necessary. Alvarez argues his mistrial motion, made after the courtroom was reopened, properly preserved his claim for appeal. George argues preservation is not required. "[B]ecause under Presley a trial court is obligated to consider alternatives to closure on its own initiative..., a closure order is reviewable on appeal as a legal issue, even in the absence of an objection by counsel," he says.

No. 168 For appellant Alvarez: Kendra L. Hutchinson, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Danielle Hartman (718) 286-5939

No. 169 For appellant George: Denise A. Corsi, Manhattan (212) 693-0085

For respondent: Brooklyn Asst. District Attorney Sholom J. Twersky (718) 250-2537