# *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.**

**Week of October 15 - 17, 2013**

## NEW YORK STATE COURT OF APPEALS

## Background Summaries and Attorney Contacts

# *State of New York Court of Appeals*

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To be argued Tuesday, October 15, 2013

**No. 191 Cruz v TD Bank, N.A.**
**Martinez v Capital One Bank, N.A.**

These federal cases arose in 2009 and 2010, when TD Bank and Capital One Bank notified four of their account holders -- the plaintiffs here -- that their accounts had been frozen pursuant to restraints served by third-party creditors. The plaintiffs, whose accounts ranged in size from about $340 to about $3,800, filed these putative class actions alleging the banks restrained their accounts and charged them fees in violation of CPLR Article 52, as amended by enactment of the Exempt Income Protection Act (EIPA) in 2008.

CPLR Article 52 governs the enforcement and collection of money judgments in New York. EIPA permits judgment debtors to retain access to certain exempt funds in their bank accounts. According to the State Senate sponsor's memorandum, the purpose of EIPA was to protect a baseline amount of income to "ensure that money judgments do not render working New Yorkers unable to care for their or their families' most basic needs." EIPA prohibits the restraint of a specified minimum amount of funds in a debtor's account; requires banks to provide account holders with copies of restraining notices, disclosures of exempt funds and forms for claiming exemptions; and prohibits banks from charging fees to debtors whose accounts are exempt from restraint.

The plaintiffs claim the banks failed to provide them with the required notices and forms, improperly restrained exempt funds in their accounts, and charged them fees -- including overdraft fees for checks that bounced after their accounts were frozen, all in violation of EIPA. In separate proceedings, U.S. District Court for the Southern District of New York dismissed both suits, concluding that EIPA does not provide judgment debtors with a private right of action against their banks for violations of the statute's procedural requirements.

The U.S. Court of Appeals for the Second Circuit said the appeals "turn on unsettled and important questions of New York law.... EIPA does not explicitly state that judgment debtors have a private right of action against their banks, and no New York court has decided whether judgment debtors have such a right against banks that fail to comply with EIPA's procedural guarantees." It is asking this Court to resolve the issue in a pair of certified questions: "*first*, whether judgment debtors have a private right of action for money damages and injunctive relief against banks that violate EIPA's procedural requirements; and *second*, whether judgment debtors can seek money damages and injunctive relief against banks that violate EIPA in special proceedings prescribed by CPLR Article 52 and, if so, whether those special proceedings are the exclusive mechanism for such relief or whether judgment debtors may also seek relief in a plenary action."

For appellants Cruz and Martinez et al: G. Oliver Koppell, Manhattan (212) 867-3838
For respondent TD Bank: Alexander D. Bono, Philadelphia, PA (215) 979-1000
For respondent Capital One Bank: Robert Plotkin, Manhattan (212) 548-7098

# *State of New York Court of Appeals*

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To be argued Tuesday, October 15, 2013

**No. 192 People v Akiva Daniel Abraham**

In April 2009, about two weeks after Akiva Daniel Abraham acquired an abandoned nightclub called Saratoga Winners in the Albany County town of Colonie, the building was destroyed by fire. He had insured the building for $475,000, the amount of a mortgage he had taken out through a limited liability company controlled by Abraham and his father, although the company did not provide any funds for the purchase. Abraham said he did not know the cause of the fire when he notified his insurer of the loss. Investigators learned that he had purchased substantial quantities of an accelerant found at the scene and they discovered empty containers for the accelerant at his home.

Abraham was indicted on charges of third-degree arson, second-degree insurance fraud, and first-degree reckless endangerment. His first trial ended with a hung jury. At his second trial, the jury acquitted him of arson and reckless endangerment, but convicted him of insurance fraud. He was sentenced to 4 to 12 years in prison.

The Appellate Division, Third Department affirmed, finding that "the jury could have rationally concluded from this evidence that defendant committed insurance fraud by concealing the cause of the fire...." It rejected Abraham's argument that, because the prosecution relied on the theory that he acted alone in starting the fire, his acquittal on the arson count rendered the guilty verdict on insurance fraud repugnant. "Insurance fraud ... requires only a showing 'that defendant intentionally concealed the cause of the fire on [his] insurance claim,' not that he was personally responsible for starting the blaze...," the court said. "Supreme Court's jury charge reflected this distinction, and a 'repugnancy analysis requires that we review the elements of the offenses as charged to the jury without regard to the proof that was actually presented at trial'.... Inasmuch as 'there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant'...."

Abraham argues the evidence was legally insufficient to establish that he knowingly submitted a false statement to his insurer concealing that the fire was intentionally set. "Here, the only evidence of Appellant committing a fraudulent act (knowing with the intent to defraud) would have been evidence that he intentionally damaged the property with fire or knew that the fire was caused by arson. Since the jury here was unwilling to find that Appellant intentionally damaged the property with fire, and no other theory was presented by the Prosecution, nor charged in the indictment, the conviction for insurance fraud in the second degree must, accordingly, be reversed."

For appellant Abraham: Jonathan S. Fishbein, Delmar (518) 439-1480
For respondent: Albany County Assistant District Attorney Christopher D. Horn (518) 487-5460

# *State of New York Court of Appeals*

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To be argued Tuesday, October 15, 2013

**No. 178 Matter of Flamenbaum, Deceased**

The estate of Holocaust survivor Riven Flamenbaum is appealing an order requiring it to return an ancient gold tablet to the Vorderasiatisches Museum in Berlin. The small inscribed tablet was excavated before World War I by German archaeologists, who found it in the foundation of the Ishtar Temple, a ziggurat in the Assyrian city of Ashtur, in what is now northern Iraq. The tablet, which describes the construction of the temple more than 3,200 years ago, was put on display in the Vorderasiatisches Museum in 1934. At the outbreak of World War II in 1939, the tablet was placed in storage along with other antiquities and works of art for safekeeping. In 1945, when the museum's artifacts were inventoried at the end of the war, the tablet was missing.

Flamenbaum. a resident of Great Neck, died in 2003. The executor of the estate, his daughter Hannah Flamenbaum, made no specific mention of the tablet in her accounting filed in 2006. A son, Israel Flamenbaum, filed objections to the accounting and informed the museum that the tablet was in the possession of the estate. The museum filed a notice of appearance and claim with the Surrogate's Court seeking to recover the tablet.

Surrogate's Court found the museum established that it had a superior right of possession to the tablet, but held that its claim was barred by the doctrine of laches. It said the museum failed to "investigate or attempt to recover the tablet from the time it was discovered absent from the museum in 1945 until the present action was commenced in 2006" and it found this "lack of due diligence was unreasonable" and was prejudicial to the estate. "As a result of the museum's inexplicable failure to report the tablet as stolen, or take any other steps toward recovery, diligent good faith purchasers over the course of more than 60 years were not given notice of a blemish in the title. That, coupled with the fact that Riven Flamenbaum's death has forever foreclosed his ability to testify as to when and where he obtained the tablet, has severely prejudiced the estate's ability to defend the museum's related claim to the tablet."

The Appellate Division, Second Department reversed, ruling the museum established that it had legal title and a superior right to possession of the tablet, and the executor failed to establish an affirmative defense based on laches. When Israel Flamenbaum told the museum the estate had the tablet in 2006, the court said, it "was the first time since 1945 the museum had direct knowledge of the tablet's whereabouts." It said, "The executor's contention that the museum failed to exercise reasonable diligence by not reporting the tablet stolen to law enforcement authorities or listing it on an international stolen art registry is not ... dispositive. The executor's argument that, had the museum taken such steps, the tablet would have surfaced earlier, is mere conjecture and, moreover, is not supported by expert or other evidence."

For appellant Flamenbaum: Steven R. Schlesinger, Garden City (516) 746-8000
For respondent Vorderasiatisches Museum: Raymond J. Dowd, Manhattan (212) 682-8811

# *State of New York Court of Appeals*

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To be argued Tuesday, October 15, 2013

**No. 194 Matter of State of New York v Nelson D.** *(papers sealed)*

Nelson D., a mentally retarded sex offender, was convicted in 2002 of first-degree sexual abuse and sentenced to three years in prison. Shortly after his release, he violated the conditions of his post-release supervision and was returned to prison based on his guilty plea to public lewdness. In October 2007, as he was nearing release from custody, the Attorney General filed a petition for civil management under Mental Hygiene Law article 10.

A jury found Nelson D. suffers from a "mental abnormality," and Supreme Court held a hearing to determine the appropriate form of civil management. The State sought a finding that Nelson D. is a "dangerous sex offender requiring confinement" at a secure treatment facility. Nelson D. sought a finding that he is "a sex offender requiring strict and intensive supervision and treatment" (SIST), and assignment to a group home. The court found that "the State has failed to establish by clear and convincing evidence that [Nelson D.] is a dangerous sex offender requiring confinement," instead ruled that he is "a sex offender requiring a regimen" of SIST pursuant to Mental Hygiene Law § 10.11, and placed him in the care of the Office for People with Developmental Disorders (OPWDD). The State sought inpatient placement of Nelson D. at Valley Ridge Center for Intensive Treatment. Nelson D. filed a motion to compel the State to find a community placement, contending placement at Valley Ridge would constitute "confinement" in a secure facility and would be illegal under the SIST statute.

Supreme Court denied the motion based on section 10.11(a)(1), which provides that a court shall determine the conditions of SIST, "including 'specification of residence or type of residence'.... Thus, as the statute expressly states, the court may specify where [Nelson D.] resides as a condition of SIST." The court said, "While respondent will have restrictions placed on his personal liberty, he would, no doubt, suffer some restraints on liberty even if placed in a community group home."

The Appellate Division, First Department affirmed, saying the order placing Nelson D. in residential treatment at Valley Ridge "was permissible under Mental Hygiene Law § 10.11, which prescribes conditions of supervision, including specification of residence and type of residence, that may be imposed as part of SIST. Because the SIST regimen imposed was authorized under Mental Hygiene Law article 10, [Nelson D.'s] substantive due process rights were not offended...."

Nelson D. argues the lower courts "improperly conflated the two dispositions under Article 10 -- confinement and SIST in the community -- and misconstrued 'residence or type of residence' to permit confinement, even when the State failed to meet its burden to prove confinement. By confining Nelson D. under the auspices of Article 10, notwithstanding its own determination that Nelson D. was *not* a 'dangerous sex offender requiring confinement,' the trial court violated Nelson D.'s due process rights." He says, "By authorizing OPWDD confinement as a SIST condition, the trial court created a new mechanism of involuntary commitment that bypasses all of New York's civil commitment statutes, thereby depriving Nelson D. of the constitutional safeguards contained in those inpatient statutes."

For appellant Nelson D.: Diane Goldstein Temkin, Manhattan (646) 386-5891
For respondent State: Assistant Solicitor General Leslie B. Dubeck (212) 416-6390

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To be argued Tuesday, October 15, 2013

**No. 195 DeVito v Feliciano**

In February 2006, Theresa DeVito was riding in a car in Manhattan when it was struck by a van owned by Paragon Cable Manhattan and driven by Dennis Feliciano. DeVito sued Feliciano and Paragon, alleging that she had suffered a compression fracture of a vertebra and a nasal fracture. After the defendants were found to be negligent as a matter of law, a jury trial was held on proximate cause and damages.

DeVito called two physicians as expert witnesses, both of whom testified that they believed the 2006 accident was the cause of her injuries. Defense counsel, contending the fractures did not result from the accident, cross-examined both of the plaintiff's experts. Although the defendants had two physicians conduct independent medical examinations of DeVito prior to trial, they did not call either physician to testify. DeVito asked Supreme Court to deliver a missing witness charge based on the defendants' failure to call their examining physicians to the stand, which would permit the jury to infer that their testimony would have been unfavorable to the defendants.

Supreme Court denied the request, concluding that the testimony of the defendants' physicians would have been cumulative to that of DeVito's expert witnesses. The jury found that the 2006 accident was not a substantial factor in causing DeVito's injuries, and Supreme Court dismissed the complaint. The Appellate Division, First Department affirmed, saying the trial court did not "err in declining to provide a missing witness charge since plaintiff did not satisfy the elements that are a prerequisite for receiving the charge," which include a showing that the testimony of the missing witness would have been material and noncumulative.

DeVito argues that, "since lack of proximate cause was the defendants' only substantive defense, and plaintiff's experts testified that the accident was a cause of the injuries," she was entitled to have the jury "advised that it could draw an inference against defendants" based on their failure to call their own experts to the stand. She says the "testimony of defendants' physicians would not have been cumulative because in that event plaintiff would be entitled to a directed verdict on the issue of causation."

For appellant DeVito: Brian J. Isaac, Manhattan (212) 233-8100
For respondents Feliciano and Paragon Cable: Michael H. Gottlieb, Bronx (718) 665-1700

# *State of New York Court of Appeals*

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To be argued Wednesday, October 16, 2013

**No. 196 JFK Holding Company LLC v City of New York**

In 2002, the Salvation Army began operating a homeless shelter in the Carlton House Hotel in Queens on behalf of the New York City Department of Homeless Services (DHS). The Salvation Army leased the hotel from JFK Holding Company and J.F.K. Acquisition Group (collectively, JFK), and the Salvation Army's obligations under the lease, including rent, were funded through its parallel services agreement with DHS and the City. The lease acknowledged that the Salvation Army entered into it "solely in order to enable Tenant to fulfill its obligations to [DHS] under the Services Agreement," and it limited the Salvation Army's liability for breaches of the lease to the amounts it received from DHS for operation of the shelter. The same paragraph of the lease provided that, if DHS failed to pay amounts it owed under the services agreement, the Salvation Army would "use commercially reasonable efforts to enforce its rights" against DHS. The lease could be terminated if the City terminated the services agreement, provided that the Salvation Army paid JFK a $10 million early termination fee and restored the hotel to its pre-lease condition. Conditions at the shelter deteriorated rapidly and the City closed it in 2005, terminating the services agreement and paying the $10 million termination fee to the Salvation Army, which paid it over to JFK.

JFK brought this breach of contract action against the Salvation Army and the City based largely on their failure to restore the hotel to pre-lease condition. Supreme Court dismissed the suit. Regarding the claims against the Salvation Army, the court said its liability "is specifically limited by the Lease to any amounts paid to it from the City," a limitation that it said applies to the Salvation Army's alleged failure to "use commercially reasonable efforts to enforce its rights" against DHS to obtain funds to restore the hotel.

The Appellate Division, First Department reinstated that claim against the Salvation Army in a 3-2 decision, finding JFK "sufficiently pleaded a cause of action for breach of the lease." It said, "The parties' intent, as reflected in the lease, was to impose on the Salvation Army the obligation to take all commercially reasonable steps, including seeking funds to which it was entitled under the services agreement..., to satisfy its obligation to restore the property to pre-lease condition." Regarding the provision limiting the Salvation Army's liability to amounts paid to it by the City, the court said, "The contractual limitation on liability was obviously predicated upon the Salvation Army's having fulfilled its contractual duty to use commercially reasonable efforts to secure payments from DHS pursuant to the services agreement." There are triable questions of fact as to whether the Salvation Army made such efforts, it said.

The dissenters argued that the plaintiffs "could not recover more for damages than the $10 million termination fee plaintiffs had already received because of the explicit limitation on damages contained in the lease. Moreover, the Salvation Army cannot be held liable for not trying to obtain the cost of restoring the hotel from DHS." The provision requiring it to use commercially reasonable efforts to enforce its rights "does not apply here because the Salvation Army did not have any right to recover posttermination restoration costs from DHS."

For appellant Salvation Army: Kathy H. Chin, Manhattan (212) 504-6000
For respondent JFK: Michael J. Bowe, Manhattan (212) 506-1700

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To be argued Wednesday, October 16, 2013

**No. 197 Rocky Point Drive-In, L.P. v Town of Brookhaven**

In February 2000, the Town of Brookhaven announced it would hold a March hearing to consider rezoning a 17.5-acre parcel, the site of a former drive-in movie theater and golf driving range, from "J Business 2" (J-2) to a more restrictive "Commercial Recreation" (CR) zone. The property owner at that time, Sans Argent, Inc., applied in March 2000 for site plan approval for construction of a 4-acre retail center anchored by a Lowe's home improvement store. Among other developments in this matter, the Town Board voted after the public hearing to rezone the property to CR. Sans Argent protested the rezoning, triggering a super majority requirement (approval of six of the seven Town Board members). The Board voted five to one, with one recusal, to rezone the parcel. It declared the property rezoned to CR and stopped processing the site plan application. Sans Argent challenged the action in Supreme Court, which declared the rezoning resolution null and void. The Board again voted 5-1 to rezone the property, Sans Agent sued, and the court again ruled the rezoning null and void. In June 2002, the Town Board amended the Town Code to allow a simple majority vote in such cases, and in October 2002, it approved the CR rezoning. Meanwhile, the Town designated the Zoning Board of Appeals (ZBA), instead of the Planning Board, as lead agency to review the Lowe's project under the State Environmental Quality Review Act (SEQRA) in April 2000, but did not send it the environmental assessment form until November 2000. The ZBA issued a positive declaration in January 2001 and completed the SEQRA review in October 2002.

Rocky Point Drive-In, L.P., which acquired the property in 2002, brought this action in November 2002 for a judgment declaring that the site plan application must be reviewed under the J-2 zoning that was in effect when it was filed. It argued the "special facts exception" applied because the Town intentionally delayed the processing of the application and SEQRA review.

Supreme Court granted the declaratory judgment to Rocky Point, finding the Town's repeated attempts to rezone the property and its handling of the SEQRA review caused "significant delays" that "prevented the plaintiff from having the opportunity to have its application reviewed in a timely manner." It also said Rocky Point "demonstrated that it was treated differently from other applicants and therefore the special facts exception is applicable."

The Appellate Division, Second Department reversed and declared Rocky Point was not entitled to have its application reviewed under the J-2 zoning rules. It said, "The record does not support the determinations of undue delay and bad faith on the part of the defendants..., or that the defendants selectively enforced the prohibition against commercial centers in J-2 zoning districts, targeting the plaintiff's application with animus...."

Rocky Point argues the Appellate Division applied the wrong standard by requiring it "to prove that the defendant's delays and roadblocks were motivated by malice or bad faith.... special facts relief is available whether the governmental delays were the product of bad faith or malice, or were merely negligent." In any event, it says the evidence proves the Town's delays and selective enforcement "were willful and deliberate, thus clearly satisfying even the Appellate Division's incorrect test."

For appellant Rocky Point: Linda U. Margolin, Islandia (631) 234-8585
For respondent Brookhaven: Maureen T. Liccione (516) 746-8000

# *State of New York Court of Appeals*

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To be argued Wednesday, October 16, 2013

**No. 198 People v Julio Velez**

In December 2004, Julio Velez was sentenced to 20 years to life in prison for two burglaries committed in Yonkers in November 2003. Eleven days after the sentencing, the Yonker's Police Department matched his fingerprint to a latent print that had been found at the scene of a prior burglary in October 2003. The Westchester County District Attorney's Office initially chose not to charge Velez with that crime, but prosecutors reversed course in February 2007 after learning the Appellate Division, Second Department had granted him a new suppression hearing in his appeal stemming from the November 2003 burglaries. Fearing that Velez's life sentence was in jeopardy, prosecutors reopened his case and, in May 2007, indicted him for the October 2003 burglary. Velez moved to dismiss the indictment due to prosecutorial delay.

County Court denied the motion based largely on a prosecutor's testimony that her office initially chose not to indict Velez in order to conserve prosecutorial, judicial and police resources, and to avoid inconvenience to civilian witnesses, since he was already serving a life sentence. The court attributed the first 14 months of delay to the Police Department's inability to process the latent print, a period in which it was attempting to replace its retired fingerprint analyst. As for the remaining 29 months of delay, it said, "The People have put forth several logical reasons why they chose not to seek an indictment after the defendant received a life sentence on another case. These reasons amount to a good faith exercise of prosecutorial discretion. Once prosecutors felt the defendant's life sentence was in jeopardy, they promptly sought and obtained the instant indictment." After a jury trial, Velez was convicted of second-degree burglary and lesser crimes and was sentenced to a concurrent term of 21 years to life.

The Appellate Division, Second Department affirmed. "County Court properly denied the defendant's motion to dismiss the indictment because of a delay between the burglary and his indictment," it said. "The prosecution established good cause for the delay and, therefore, the defendant's right to due process was not violated.... In any event, the delay did not prejudice the defendant."

Velez argues that "excessive and inexcusable pre-arrest and pre-indictment delays deprived [him] of due process and violated the public's right to timely prosecution." He says, "[W]hether or not [he] was or was not serving a prison sentence in another matter is irrelevant to his due process and speedy trial rights to timely arrest and timely indictment in the case on appeal. Unless the prosecutor had a reasonable excuse..., her intentional decision not to arrest and indict him for ... 3½ years constituted unreasonable delay."

For appellant Velez: Mark Diamond, Manhattan (917) 660-8758
For respondent: Westchester County Asst. District Attorney Steven A. Bender (914) 995-3497

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To be argued Wednesday, October 16, 2013

**No. 199 People v Thomas Brown**
**No. 200 People v Joseph Harris**
**No. 201 People v Darnell Carter**

A shared issue here is whether consecutive sentences may be imposed for murder and criminal possession of a weapon when the possession charge does not require proof of intent to use the weapon unlawfully against another. These three defendants, convicted of simple possession of a loaded gun outside their home or place of business and of using that gun to shoot the victim, argue their sentences must be concurrent because the offenses were committed through a single act.

Thomas Brown was found guilty of fatally shooting Jarvis Bradford after a verbal altercation outside of a Manhattan nightclub in June 2005. He was sentenced to consecutive terms of 25 years to life for second-degree murder and 3 years for third-degree weapon possession, for an aggregate term of 28 years to life. Joseph Harris was found guilty of wounding Leonard Lewis in a Manhattan shooting in September 2008. He was sentenced to consecutive terms of 25 years to life for second-degree attempted murder and 20 years to life for second-degree weapon possession, for an aggregate term of 45 years to life. Darnell Carter was found guilty of shooting Robert Biggs to death during a robbery in Niagara Falls in March 2009. He was sentenced to consecutive terms of 25 years to life for second-degree murder and 15 years for second-degree weapon possession, for an aggregate term of 40 years to life.

The Appellate Division affirmed -- the First Department in Brown and Harris, the Fourth Department in Carter -- holding that consecutive sentences were permissible. In Harris, the First Department said the weapon charge "has no intent element; accordingly, the issue of whether consecutive sentences require separate unlawful intents ... is not implicated here. The evidence clearly established that defendant was carrying the weapon at the time he encountered and shot the victim. Accordingly, the act of possession was complete before the shooting ... and consecutive sentences were authorized by Penal Law § 70.25(2)."

The defendants argue that concurrent sentences are required because their possession of a gun and shooting of the victim were simultaneous and part of the same transaction. They also raise a policy issue based on People v Wright (19 NY3d 359), which addressed a weapon possession statute requiring proof of "intent to use the [weapon] unlawfully against another," and held that consecutive sentences for possession and murder was not authorized unless "defendant's possession was marked by an unlawful intent separate and distinct from his intent to shoot the victims." Defendants say there is no sound reason to punish simple possession more harshly than possession with unlawful intent.

For appellant Brown: Lily Goetz, Bronx (718) 579-3090
For respondent: Manhattan Assistant District Attorney Martin J. Foncello (212) 335-9000
For appellant Harris: Thomas M. Nosewicz, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Ellen Stanfield Friedman (212) 335-9000
For appellant Carter: Mary-Jean Bowman, Lockport (716) 439-7071
For respondent: Niagara County Assistant District Attorney Thomas H. Brandt (716) 439-7085

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To be argued Thursday, October 17, 2013

**No. 202 Matter of Beth V. v New York State Office of Children and Family Services**

Beth V. was a youth division aide at Camp Cass juvenile detention center in Rensselaerville in December 2004, when a detainee assaulted and raped her at knifepoint. She had a dispute with the detainee several days before the incident and had reported to her superiors that she "felt unsafe" around him. After the rape, the detainee kidnapped her in her own car, driving over her foot in the process. She escaped when he stopped in Albany to make a call from a payphone. The Workers' Compensation Board ruled the rape, post-traumatic stress disorder and physical injuries, including to her foot, were work-related, found her permanently partially disabled, and awarded her weekly benefits of $155.44.

Meanwhile, Beth filed a federal civil rights action against her employer, the State Office of Children and Family Services (OCFS), and several co-workers, claiming she suffered constitutional deprivations as well as physical, psychological and emotional damages. The suit was settled for $650,000, with Beth receiving $429,186 after attorney's fees. In the stipulation of settlement, the parties acknowledged that "the entire settlement sum is allocated to plaintiff's physical injuries and the loss of enjoyment of life and emotional response related thereto."

The State Insurance Fund, the workers' compensation carrier for OCFS, asserted a right under Workers' Compensation Law § 29 to take a credit for future benefits against her settlement. Beth challenged the Fund's right to a credit, and her attorney in the federal suit testified that "the thrust of the claim was for ... the constitutional deprivation" and that physical injuries were not a major part of it. He said the parties referred to physical injuries in the stipulation for tax purposes. A Workers' Compensation Law Judge ruled the Insurance Fund was not entitled to a credit, saying section 29 does not apply to recoveries against a claimant's employer and, alternatively, that the settlement "was for violation of claimant's civil and constitutional rights, recovery not included in" section 29. The Workers' Compensation Board reversed, ruling the Fund can take a credit against the settlement. It said section 29 applies to a civil suit against an employer, and the lien created by the statute "applies to any recovery" by a claimant.

The Appellate Division, Third Department affirmed, saying the stipulation "and the testimony of the attorney who represented claimant in the federal action constitute substantial evidence supporting the Board's conclusion that the injuries for which claimant recovered in the settlement were the same injuries for which workers' compensation benefits were awarded. Accordingly, the carrier is entitled to a credit against the settlement recovery...."

Beth V. argues the decision creates "a windfall for the carrier" because her "worker's compensation benefits and settlement proceeds address different injuries.... The settlement was based primarily on constitutional deprivation involving a pattern of conduct that injured [her] constitutional rights" throughout 2004, while the worker's compensation benefits "were based on a single event -- the few minutes it took for [her] to be raped and beaten, and the few hours it took for her to escape after being kidnapped." She also argues section 29 does not apply to her suit against her employer.

For appellant Beth V.: James E. Buckley, Albany (518) 449-3107
For respondent State Insurance Fund et al: Thomas A. Phillips, Albany (518) 437-6965
For respondent Special Funds Conservation Committee: Jill B. Singer, Albany (518) 438-3585

# *State of New York Court of Appeals*

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To be argued Thursday, October 17, 2013

**No. 203 People v Robert L. Worden** *(papers sealed)*

In December 2007, a woman told police that Robert Worden, her former boyfriend, had raped her three days earlier at her home in Rochester. She said she had fallen asleep after taking anti-depressant medication and awoke to find him having intercourse with her. She said he stopped when she shouted "get the hell off me," they argued, then she went back to her bedroom and fell asleep. She said she again woke up to find Worden penetrating her. Worden told investigators that he and the complainant had consensual sex, but he ultimately pleaded guilty to third-degree rape (Penal Law § 130.25[3]) in exchange for a sentence of ten years probation.

Less than three weeks after the guilty plea, the complainant called defense counsel and told him she had not been raped and Worden "should not have to do time for something he didn't do." In a signed statement, the complainant said she did not remember having intercourse with Worden on the date of the alleged rape, but if she did, it was consensual because they were in a relationship. She said she made the accusations because her family and friends, who disliked Worden, "were pushing me to press charges."

County Court denied Worden's motion to withdraw his plea without a hearing. It said the complainant's statement is "equivocal, at best" and Worden's plea colloquy "is consistent with the victim's sworn testimony before the grand jury." Citing People v Nichols (302 AD2d 954), it said "recantation evidence is inherently unreliable and is insufficient alone to require setting aside a conviction."

The Appellate Division, Fourth Department affirmed, saying Worden's "motion was based on a purported recantation by the victim. We conclude that the court properly denied defendant's motion to withdraw his plea on that ground because, as the court properly noted, recantations are inherently unreliable (see People v Nichols...). In any event, the court further noted that the victim's recantation was 'equivocal at best.'"

Worden argues that "it was an abuse of discretion as a matter of law" for County Court to deny his motion "without first conducting a hearing at which the victim could testify in person" about her recantation. While Nichols held recantations are inherently unreliable, he says, the Appellate Division in this case "ignored that the trial court in Nichols had granted the defendant a hearing at which the complainant recanted her recantation, and testified that she had been pressured to change her testimony by the defendant's niece and girlfriend." Worden also argues that his plea colloquy revealed that he did not understand the nature of the charge to which he was pleading guilty and, thus, his plea was not knowing, voluntary and intelligent.

For appellant Worden: Timothy S. Davis, Rochester (585) 753-4213
For respondent: Monroe County Asst. District Attorney Nicole M. Fantigrossi (585) 753-4618

# *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 Thursday, October 17, 2013

**No. 204 People v Hector Santiago**

Manhattan narcotics detectives were conducting surveillance of Giovanni Gonzalez on Amsterdam Avenue in May 2008, when he entered the rear of a minivan and it drove away. The detectives stopped it a few minutes later, finding Hector Santiago in the front passenger seat, Gonzalez in the rear seat, and the owner of the van at the wheel. Searching the van, they found nearly a kilogram of cocaine in a hidden compartment, or "trap," under the floor on the front passenger side.

Santiago was charged with possession of the cocaine based, in part, on the automobile presumption in Penal Law § 220.25(1), which states, "The presence of a controlled substance in an automobile is presumptive evidence of knowing possession thereof by each and every person in the automobile." Defense counsel stipulated that the brick of cocaine weighed 991 grams. At trial, Santiago requested a circumstantial evidence charge, which instructs the jury that "it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence." Supreme Court denied the request, and instructed the jury on the automobile presumption and constructive possession. Santiago was convicted of criminal possession of a controlled substance in the first degree and sentenced to 14 years in prison.

The Appellate Division, First Department affirmed, ruling the request for a circumstantial evidence instruction was properly denied. "The case was not based on circumstantial evidence," the court said. "Instead, it was based on direct evidence of defendant's presence in the car in close proximity to a large quantity of cocaine. From that evidence, the jury could infer possession under the automobile presumption, the theory of constructive possession, or both. The court properly instructed the jury on those theories, and there was no need for the court to give a circumstantial evidence charge as well...."

Santiago argues he was entitled to a circumstantial evidence charge because the proof that he knowingly possessed cocaine "was entirely circumstantial. Appellant was not in actual physical possession of the cocaine, which was secreted in a trap beneath the floor of a minivan.... Both the cocaine and trap were physically undetectable to anyone in the passenger compartment. To conclude that appellant knowingly possessed the cocaine, the jury had to infer guilt from these directly established facts." He argues the error was not harmless because the evidence of knowing possession "was decidedly weak. Appellant was neither the minivan's owner nor driver, and he did not act suspiciously before, during, or after police stopped the minivan. No evidence connected appellant to the man under police surveillance or to the driver-owner."

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# *State of New York Court of Appeals*

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To be argued Thursday, October 17, 2013

**No. 205 People v Daniel Boyer**
**No. 206 People v Equan Sanders**

The question here is whether a defendant can be subject to enhanced sentencing as a persistent violent felony offender for a crime committed before he is resentenced at the request of the State on a predicate offense, pursuant to People v Sparber (10 NY3d 457), to address the issue of post-release supervision (PRS). Lower courts disagree on whether the date of the original sentencing or the Sparber resentencing determines the defendant's eligibility for an enhanced sentence under the predicate felony offender statutes. It is a question the Court of Appeals left open in People v Acevedo (17 NY3d 297 [2011]), which held that the original sentencing date applies when Sparber resentencing for a predicate offense is sought by the defendant rather than by the State.

Daniel Boyer was charged with committing a burglary in Albany County in 2008 and pled guilty to a reduced charge of second-degree attempted burglary. He was sentenced as a persistent violent felony offender to 13½ years to life in prison based, in part, on a prior attempted burglary conviction in 2002, for which the sentencing court failed to pronounce a term of PRS. To correct the error in the 2002 sentence, the State Department of Corrections and Community Supervision sought a Sparber resentencing in 2009. The Appellate Division, Third Department upheld the 2008 sentence, rejecting Boyer's argument that his 2002 conviction could not serve as a predicate offense because he was resentenced in that case after he committed the 2008 crime. The court said the original sentencing date for the predicate conviction controls regardless of who initiates the Sparber resentencing.

Equan Sanders was charged with weapon possession in 2007 and pled guilty to a reduced charge of attempted criminal possession of a weapon in the second degree. Supreme Court sentenced him as a second violent felony offender to seven years in prison, rejecting the prosecution's request to adjudicate him a persistent violent felony offender. The court held that one of his prior offenses, a 2002 conviction of attempted weapon possession, did not qualify as a predicate offense for enhanced sentencing because he had been resentenced in that case in 2008, at the request of the State Division of Parole, to address the issue of PRS. The Appellate Division, First Department affirmed, holding that where the State seeks a Sparber resentencing for a prior offense, "the resentencing date controls whether the conviction meets the sequentiality requirement for sentencing as a persistent violent felony offender...."

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