State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

February 11 thru 13, 2020

State of New York
Court of Appeals

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To be argued Tuesday, February 11, 2020

No. 12 Plavin v Group Health Incorporated

Steven Plavin brought this federal class action on behalf of New York City employees and retirees against Group Health Incorporated (GHI) in U.S. District Court for the Middle District of Pennsylvania in 2017, alleging that GHI made misleading statements about the costs and scope of the out-of-network coverage and other benefits provided by its City-sponsored health insurance plan in violation of New York's consumer protection statutes, sections 349 and 350 of the General Business Law (GBL). The GHI plan was one of 11 health insurance plans the City made available to its workforce pursuant to collective bargaining agreements, and the City negotiated its contract with GHI with input from municipal unions. Plavin, a retired NYPD officer, claimed GHI made misrepresentations in two summaries it prepared to describe the coverage and benefits offered by its plan. GHI posted one of the summaries on its website and sent the other to the City, which distributed it along with summaries of the 10 competing insurance plans to its employees and retirees to provide guidance as they chose among them.

GHI moved to dismiss the suit on the ground, among others, that Plavin failed to adequately allege that its conduct was "consumer-oriented" as required by GBL §§ 349 and 350. The District Court granted the motion to dismiss, saying Plavin failed to state a claim that GHI engaged in consumer-oriented conduct. "Here, the alleged deception arises out of a private contract negotiated between" GHI and the City, it said. "Plavin cites the sheer number of employees affected as support [for] his argument that the conduct is 'consumer-oriented'.... But the fact that a large class of members is affected does not automatically transform the plan into something that has 'a broader impact on consumers at large'.... Plavin was only able to receive the benefits of [GHI's] plan by virtue of being an employee of the City of New York, which bargained with [GHI] on behalf of its employees – and only its employees – on the terms of employee benefit plans.... [H]e was a third-party beneficiary of a contract between two sophisticated institutions in this case, not a mere consumer of the public."

In asking this Court to resolve the key issue, the U.S. Court of Appeals for the Third Circuit said, "'No controlling [New York] precedent' exists on the question of whether an insurer's conduct is consumer-oriented for purposes of the GBL where hundreds of thousands of City employees and retirees ... have been materially misled by the insurer's summary plan documents." In a certified question, the Third Circuit asks, "Where a contract of insurance is negotiated by sophisticated parties such as the City of New York and an insurance company, and where hundreds of thousands of City employees and retirees are third-party beneficiaries of that contract, and where the insurance company's policy created pursuant to the contract is one of several health insurance policies from which employees and retirees can select, has the insurance company engaged in 'consumer-oriented conduct' under the GBL when: (1) The insurance company drafts summary plan information that allegedly contains materially misleading misrepresentations and/or omissions about the coverage and benefits of the insurance policy and sends these summary materials to the City, and the City does not check or edit these materials before sending them on to the City employees and retirees; OR (2) The insurance company directs City employees and retirees to information on the insurance company's website that allegedly contains materially misleading misrepresentations and/or omissions about the coverage and benefits of the insurance policy?"

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For respondent GHI: John Gleeson, Manhattan (212) 909-6000

State of New York
Court of Appeals

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To be argued Tuesday, February 11, 2020

No. 13 Matter of Vega (Postmates Inc. – Commissioner of Labor)

Postmates Inc. operates an on-line service that enables customers to order meals from local restaurants or merchandise from stores and have their orders delivered by courier, usually within about an hour. Louis A. Vega worked as a Postmates courier for one week in 2015, until Postmates terminated its relationship with him based on customer complaints. Vega applied for unemployment benefits and the New York State Commissioner of Labor determined he was eligible, finding that Postmates exercised sufficient control over his work to create an employer-employee relationship. Postmates appealed and an administrative law judge (ALJ) reversed the decision, holding that Vega had been an independent contractor. On the Commissioner's appeal the Unemployment Insurance Appeal Board reversed the ALJ's decision, holding that Vega had been an employee and that Postmates was liable for additional unemployment insurance contributions on remuneration paid to him as well as other Postmates couriers.

The Appellate Division, Third Department reversed on a 3-2 vote, saying the Appeal Board's finding of an employment relationship was not supported by substantial evidence. The majority said "there is no application and no interview" for couriers to begin working for Postmates, they "are not thereafter required to report to any supervisor, and they unilaterally retain the unfettered discretion as to whether to ever log on to Postmates' platform and actually work. When a courier does elect to log on to the platform, indicating his or her availability for deliveries, he or she is free to work as much or as little as he or she wants.... Couriers ... may accept, reject or ignore a delivery request, without penalty. Moreover, while logged on to Postmates' platform, couriers maintain the freedom to simultaneously work for other companies, including Postmates' direct competitors." It said couriers provide their own transportation, choose the delivery routes they wish to take, are paid only for deliveries they complete, are not required to wear a uniform, and are not reimbursed for delivery-related expenses."

The dissenters argued there was substantial evidence the couriers are employees, saying Postmates "advertises for and conducts criminal background checks on couriers" and "provides couriers with a PEX reloadable credit card onto which it can load money in the event that a customer requests that a courier also purchase an item to be delivered." When a courier accepts an assignment, Postmates "sends the customer a photograph of and contact information for the courier, as well as an estimated time and cost of the delivery, which are set by Postmates. A courier is prohibited from using a substitute for the delivery." Deliveries "can be tracked by the customer and Postmates. Payment is made to Postmates," which "directly deposits into the courier's bank account the non-negotiable 80% of the charged fee.... Postmates handles customer complaints and monitors customer feedback ... and can block couriers" from its platform. In sum, they said the facts that Postmates "sets the fees, provides financing for the transaction..., handles customer complaints, bears liability for defective deliveries and actually tracks the delivery" is substantial evidence of employment.

For appellant Labor Commissioner: Asst. Solicitor General Joseph M. Spadola (518) 776-2043
For respondent Postmates: David M. Cooper, Manhattan (212) 849-7000

State of New York
Court of Appeals

To be argued Tuesday, February 11, 2020

No. 14 Matter of O'Donnell v Erie County

Sandra L. O'Donnell was working as a juvenile probation officer for Erie County in December 2010, when she slipped and fell on a wet floor at work and injured her back, elbows and knees, which required surgery. She returned to light duty the following month, but continued to experience problems working due to her injuries. After she was transferred to the adult probation division, which was more physically demanding, she applied for disability retirement. O'Donnell was granted a disability retirement and began receiving benefits in March 2013, at the age of 57 and after more than 28 years as an Erie County employee. She has not looked for other work since her retirement.

In September 2015 (the "classification date"), a Workers' Compensation Law Judge (WCLJ) classified O'Donnell as having a permanent partial disability, awarded benefits, and found she had "a compensable retirement" that excused her from looking for work. The County and its Workers' Comp administrator appealed to the Workers' Compensation Board, arguing she was ineligible for benefits because she failed to seek employment. A panel of the Workers' Compensation Board (Board Panel) reduced her benefit award to $530.52 per week for a maximum of 375 weeks and otherwise affirmed, finding that O'Donnell "involuntarily withdrew from the labor market" due to her disabilities. The County sought full Board review.

In April 2017, while the County's request was pending, the State Legislature amended Workers' Compensation Law § 15(3)(w) to permit payment of benefits to claimants with a permanent partial disability "without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market." Three months later, the Board Panel amended its decision in O'Donnell's case to address the effect of the 2017 amendment. It said the WCLJ "found that [O'Donnell] was entitled to benefits at the time of classification based on the determination that she 'is excused from looking for work and in effect has a compensable retirement' (i.e. involuntary retirement). Therefore, in view of the amendment to WCL § 15(3)(w), the Board Panel finds that the claimant is not obligated to demonstrate an ongoing attachment to the labor market thereafter."

The Appellate Division, Third Department affirmed, holding that even though O'Donnell's injury occurred before the effective date of the 2017 amendment, section 15(3)(w) applies retroactively to pending cases and "obviates the need for claimant to demonstrate a continued attachment to the labor market ... subsequent to her retirement."

Erie County argues that O'Donnell's failure to seek other employment prior to her classification date made her ineligible for benefits at that time and, therefore, section 15(3)(w) does not relieve her of the need to prove her attachment to the labor market. The Workers' Compensation Board argues that it "inadvertently departed from its administrative precedent," which requires applicants for permanent partial disability awards to demonstrate a continued willingness to work prior to their classification, when it instead inferred O'Donnell's labor market attachment based on the involuntary nature of her retirement. It asks the Court to reverse and remit the matter to it for a corrected decision denying her application for benefits.

For appellants Erie County et al: Matthew M. Hoffman, Buffalo (716) 852-5200
For respondent Workers' Comp. Bd.: Asst. Solicitor General Patrick A. Woods (518) 776-2020
For respondent O'Donnell: Robert E. Grey, Farmingdale (516) 249-1342

State of New York
Court of Appeals

To be argued Wednesday, February 12, 2020

No. 15 People v Cadman Williams
No. 16 People v Elijah Foster-Bey

In these cases, trial courts denied defense requests to preclude genetic evidence or to hold a Frye hearing to determine the reliability of evidence provided by the use of "low copy number" (LCN) DNA testing and the New York City medical examiner's proprietary "Forensic Statistical Tool" (FST), which were developed recently to analyze very small samples of crime scene DNA. Both courts based their decisions on rulings of other trial courts that had admitted similar evidence. The defendants contend the courts abused their discretion by denying them Frye hearings in view of debates over the reliability of the LCN/FST methodologies within the scientific community and the conflicting results reached by other trial courts.

Cadman Williams was charged with the murder of Kenneth Sackey, who was shot to death during a street altercation in the Bronx in 2008. In 2010, police recovered a handgun they believed to be the murder weapon and found a mixture of DNA from at least two people on the handle and trigger guard. The samples were too small for standard DNA testing, but the Office of the Chief Medical Examiner (OCME) applied LCN analysis and its own FST, a software program the OCME developed to calculate likelihood ratios, and said they provided "very strong support" for a finding that Williams was a likely contributor to the DNA mix. Denying Williams' motion to preclude the evidence or hold a Frye hearing, Supreme Court relied on a Queens Supreme Court ruling in People v Megnath (27 Misc 3d 405), which found after a Frye hearing that LCN testing was generally accepted as reliable by the scientific community. The Bronx court found "unpersuasive" Williams' reliance on a Brooklyn Supreme Court justice's oral decision, followed by a written decision in People v Collins (49 Misc 3d 595), which found after a Frye hearing that neither LCN nor FST were generally accepted within the relevant scientific community. Williams was acquitted of murder, but convicted of first-degree manslaughter and sentenced to 20 years.

Elijah Foster-Bey was accused of shooting and wounding a police officer in the stairwell of a Brooklyn apartment building in 2010. Officers found the revolver on the stairs and recovered a very small sample of DNA from the ridges of its trigger. The OCME said LCN and FST analysis showed the DNA came from at least two people and provided "very strong support" for finding Foster-Bey was one of them. Denying his motion to preclude the evidence or hold a Frye hearing, Supreme Court relied on Megnath. Collins had not yet been decided. Foster-Bey was convicted of first-degree assault and weapon possession and sentenced to 30 years in prison.

The Appellate Division affirmed in both cases. The Second Department said in Foster-Bey that the trial court properly relied on Megnath "as well as the determinations of other courts of coordinate jurisdiction accepting that LCN DNA testing and the FST are not novel and are generally accepted by the relevant scientific community."

The defendants argue that the trial courts abused their discretion and denied the defendants due process by admitting the LCN and FST evidence without a Frye hearing, where there is disagreement within the scientific community about the reliability of these "novel" techniques and the few courts that have held Frye hearings reached conflicting results. Williams says "there was a single post-Frye-hearing decision on each process that found general acceptance" at the time of his trial. "The absence of other court decisions showed novelty, not general acceptance...." Foster-Bey says, "Judicial notice should be the result of, not a substitute for, general acceptance by the relevant scientific community."

No. 15 For appellant Williams: Mark W. Zeno, Manhattan (212) 577-2523 ext. 505
For respondent: Bronx Assistant District Attorney Robert C. McIver (718) 838-6144
No. 16 For appellant Foster-Bey: Dina Zloczower, Manhattan (212) 693-0085 ext.246
For respondent: Brooklyn Assistant District Attorney Seth M. Lieberman (718) 250-2516

State of New York
Court of Appeals

To be argued Wednesday, February 12, 2020

No. 17 People v George Tsintzelis
No. 18 People v Jose Velez

A key question raised in these appeals is whether the electronic raw data that the New York City Office of the Chief Medical Examiner (OCME) relied on in linking the defendants' DNA to the crime scenes is subject to discovery under Criminal Procedure Law § 240.20(1)(c), which provides that "the prosecutor shall disclose to the defendant ... [a]ny written report or document ... concerning a ... scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity...."

George Tsintzelis was accused of breaking into a car that a police officer left parked near her apartment in Astoria, Queens, in April 2013. When the officer returned to her car the next morning, she found a window broken, her GPS device missing, and blood inside the vehicle. The OCME determined that DNA in the blood from the car matched Tsintzelis' genetic profile in the state's DNA database and also matched a DNA sample obtained from Tsintzelis after his arrest. He demanded discovery of the underlying data used in the DNA analysis for review by his own forensic expert. Supreme Court denied the motion, saying the data he sought "is not 'a written report or document'" within the meaning of CPL 240.20(1)(c) and, further, finding "the raw data is not within the People's control in that OCME is 'not a law enforcement agency' and its duties are 'independent of and not subject to the control of the office of the prosecutor'....". Tsintzelis was convicted of criminal mischief in the third degree and petit larceny and was sentenced to two to four years in prison.

Jose Velez was charged with burglarizing a Queens home in July 2012 by breaking a window in the back door and stealing laptops and other items. Blood was found inside the house, which the OCME matched to Velez's genetic profile in the state's DNA databank. Denying Velez's demand for discovery of the raw data used in the testing, Supreme Court said the data was a "written document" within the meaning of CPL 240.20(1)(c), but found it was not in the possession of prosecutors but of the OCME. Velez was convicted of second-degree burglary and related crimes and was sentenced to 20 years to life in prison.

The Appellate Division, Second Department affirmed in both cases, resolving the discovery issue with identical language: "Supreme Court providently exercised its discretion in denying his discovery request ... for material that was not in the possession or control of the People...." It also rejected claims the defendants were entitled to reversal under the Confrontation Clause because the OCME analysts who testified did not conduct the DNA tests. It said the clause was violated in Tsintzelis, but the error was harmless. It found no error in Velez because the analyst who testified had "independently" verified the results.

The defendants say the language of the statute makes disclosure mandatory, not discretionary. They argue the raw DNA data is subject to discovery under the statute, Tsintzelis because it was generated "at the request or direction" of the NYPD and Velez because "the OCME acts as an arm of the People and they, therefore, had *de facto* control of the electronic raw data." They also pursue their Confrontation Clause claims.

No. 17 For appellant Tsintzelis: Tomoeh Murakami Tse, Manhattan (212) 577-7991
For respondent: Queens Asst. District Atty. Christopher J. Blira-Koessler (718) 286-5988
No. 18 For appellant Velez: Yvonne Shivers, Manhattan (212) 693-0085 ext 245
For respondent: Queens Assistant District Attorney Jonathan K. Yi (718) 286-7074

State of New York
Court of Appeals

To be argued Thursday, February 13, 2020

No. 19 Bill Birds, Inc. v Stein Law Firm, P.C.

Bill Birds, Inc. manufactures decorative metal auto parts for vintage cars and, for about 11 years, it operated under a license agreement with General Motors, Service Parts Operation (GM) to produce and sell restoration parts for discontinued GM models. At the end of 2005, as the agreement was coming up for renewal, Bill Birds paid the Stein Law Firm $7,500 to research the validity of the trademarks and copyrights that GM had been licensing to it. The law firm reported that GM did not own the rights it had been licensing and advised Bill Birds that it had superior rights to the trademarks. In response, Bill Birds did not renew the licensing agreement and, in 2006, it paid the Stein Law Firm another $17,500 to file a federal action for fraud and breach of contract against GM in the Eastern District of New York. The U.S. District Court dismissed the suit in 2008 based on the forum selection clause in GM's licensing agreement, which required that any litigation be commenced in Michigan.

In 2010, after attempts to obtain their client files from the law firm failed, Bill Birds and its president, William Pelinsky, brought this action against the Stein Law Firm and its principal Mitchell A. Stein (collectively, Stein), including claims for legal malpractice and violation of Judiciary Law § 487. Among other things, Bill Birds claimed Stein misrepresented the merits of its action against GM to it and the federal court solely to induce it to pay Stein $25,000 in legal fees. It sought treble damages under Judiciary Law § 487, which states, "An attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, 2. Wilfully delays his client's suit with a view to his own gain ... forfeits to the party injured treble damages, to be recovered in a civil action."

Supreme Court dismissed all claims except the claim for violation of Judiciary Law § 487, citing the views of Bill Birds' intellectual property expert that Stein should have known its client had no case against GM and sought to induce Bill Birds into litigation under false pretenses. The court said, "This evidence raises a triable issue of fact as to whether plaintiff sustained any damage proximately caused either by [Stein's] alleged deceit or by an alleged chronic, extreme pattern of legal delinquency.... In addition, the plaintiff's allegations in his affidavit, *inter alia*, that he wasn't told that the case was dismissed on March 31, 2008, until the statute [of limitations] had nearly run in December of that year, that counsel made up an excuse that 'the Judge held the decision in chambers and didn't release it,' all of which caused him to lose ... his $25,000 payment to [Stein], raise issues of fact that can only be resolved after a trial."

The Appellate Division, Second Department reversed and dismissed the section 487 claim, saying, "A chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487.... Further, the plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the 'intent to deceive the court or any party'.... Allegations regarding an act of deceit or intent to deceive must be stated with particularity (see CPLR 3016[b]...). That the defendants commenced the underlying action on behalf of the plaintiffs and the plaintiffs failed to prevail in that action does not provide a basis for a cause of action alleging a violation of Judiciary Law § 487 to recover the legal fees incurred."

For appellants Bill Birds et al: Thomas Torto, Manhattan (212) 532-5881
For respondents Stein Law Firm et al: James D. Spithogiannis, Garden City (516) 294-8844

State of New York
Court of Appeals

To be argued Thursday, February 13, 2020

No. 20 People v Jose Perez *(papers sealed)*

Jose Perez is challenging his designation as a level two (moderate risk) sex offender under the Sex Offender Registration Act (SORA), arguing he should not have been assessed the maximum 30 points under risk factor nine ("number and nature of prior crimes") because his 1999 conviction of "lewdness" in New Jersey does not constitute a "sex offense" or a felony under New York law.

Perez was charged in Florida with fondling the breasts and buttocks of a 10-year-old girl in 2002, pled guilty to the felony sex crime of lewd and lascivious molestation, and was sentenced to 9 years in prison. In 2010 Perez, who had absconded from New York after pleading guilty to a felony drug sale charge in Brooklyn in 1996, was returned to the state and sentenced to one to three years in prison. He was required to register as a sex offender in New York because his 2002 sex offense in Florida required registration there.

Prior to Perez's release by New York in 2012, the Board of Examiners of Sex Offenders recommended in its Risk Assessment Instrument that he be designated a risk level two offender based, in part, on the assessment of 30 points for his prior lewdness conviction in New Jersey. At his SORA hearing in Supreme Court, when he objected that the assessment was improper because his lewdness conviction was not a sex offense, the prosecutor argued the New Jersey case "involved lewd and lascivious" conduct toward a 12-year-old girl and should be treated as a prior sex crime. The prosecutor presented records from the New Jersey case that said Perez had exposed himself to the girl through his window and blew her a kiss. Supreme Court accepted the Board's recommendation and adjudicated Perez a risk level two offender.

The Appellate Division, Second Department affirmed. "The defendant's prior New Jersey conviction constituted 'a misdemeanor sex crime' under New York law for the purposes of risk factor nine," it said, citing the SORA Risk Assessment Guidelines. "[T]he prior conviction properly qualified as a 'misdemeanor sex crime' under the Guidelines despite the fact that it did not constitute the New York equivalent of a 'sex offense' within the meaning of Correction Law § 168-a(2), and is not otherwise codified under article 130 of the Penal Law," it said, citing a footnote in the Guidelines which states, "An offender who engages in public lewdness by exposing himself also may commit crimes that involve direct 'hands on' contact with a victim," although it does not expressly define public lewdness as a misdemeanor sex crime.

Perez argues that he was improperly assessed 30 points for his New Jersey conviction and should be redesignated a level one offender. "Public lewdness, in New York, is not considered a sex crime," but is instead "an offense against public sensibilities. Furthermore, public lewdness is not a registerable offense in New York or New Jersey, the jurisdiction in which appellant was convicted.... [A]s the Appellate Division properly held, neither Penal Law nor the Guidelines includes public lewdness in its definition of 'sex offense'...." He says, "Here, the People simply made a sexual conduct argument. Risk factor nine, however, is not based on conduct. Instead, it is solely limited to prior convictions and adjudications."

For appellant Perez: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Brooklyn Assistant District Attorney Jean M. Joyce (718) 250-3383

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To be argued Thursday, February 13, 2020

No. 21 People v Jose Delorbe

Jose Delorbe, a citizen of the Dominican Republic who had lawful permanent resident status in the United States, was charged with second-degree burglary for allegedly breaking into a Manhattan apartment and stealing cash in 2011. He was identified by a fingerprint found in a bedroom of the apartment. At his arraignment in August 2011, Delorbe was given a printed "notice of immigration consequences" that warned, in English and Spanish, that a guilty plea could result in deportation, but there was no discussion of immigration consequences on the record during the arraignment. In April 2012, he pled guilty to a reduced charge of second-degree attempted burglary in exchange for a sentence of five years in prison. The crime is an "aggravated felony" that made him subject to mandatory deportation under federal law. There was no mention of the immigration consequences of his plea in the record of the plea colloquy.

Delorbe filed a pro se CPL 440.10 motion to vacate his conviction in 2016, arguing that he received ineffective assistance of counsel because his defense attorney failed to inform him that his guilty plea would make him deportable. If he had known his deportation would be mandatory, he said he would have "asked his attorney to try to negotiate a plea with less severe immigration consequences, and, if unsuccessful, would have gone to trial." Supreme Court denied the motion without a hearing, saying "This conclusory assertion is unsupported by any factual allegations regarding the significance that potential deportation holds for him or his incentive to remain in the United States, as required by CPL 440.30(4)(b)."

In his direct appeal of the conviction, Delorbe argued his plea was obtained in violation of People v Peque (22 NY3d 168 [2013]), which says "deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea. We therefore hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea...." He also argued his CPL 440.10 motion was improperly denied.

The Appellate Division, First Department affirmed, ruling his Peque argument was unpreserved and he "has not established that the narrow exception to the preservation requirement applies to his Peque claim.... Defendant was informed of his potential deportation by a notice of immigration consequences served upon him in the presence of his attorney over a year before the guilty plea..., which gave him the opportunity to raise the issue." It also ruled his CPL 440.10 motion was properly denied without a hearing.

Delorbe argues "there was no indication that [he] was aware of the possibility of deportation. Thus, he should not have been required to 'preserve' his Peque claim.... [T]he trial court's Peque obligation cannot be satisfied by a generic immigration consequences form given at arraignment, often (and in this case) months before any plea agreement is even reached, and without any evidence the defendant read it, understood it, or was aware of deportation consequences. Permitting prosecutors to substitute this form for the trial court's obligation to ensure a knowing, intelligent and voluntary plea does not comport with Peque or due process."

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For respondent: Manhattan Assistant District Attorney Alexander Michaels (212) 335-9000