State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

January 4 thru 6, 2022

State of New York
Court of Appeals

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To be argued Tuesday, January 4, 2022 (arguments begin at 2 p.m.)

No. 1 Hunters for Deer, Inc. v Town of Smithtown

Hunters for Deer, Inc., and its president, a licensed hunter, brought this action against the Town of Smithtown in 2017 to challenge the validity of chapter 160 of its Town Code, which prohibits the discharge of "firearms" within 500 feet of dwellings, schools or other occupied structures, and public spaces such as parks and playgrounds. Town Code § 160 defines "firearm" to include "a bow and arrow." The plaintiffs contended the 500-foot setback restriction for use of bows and arrows was preempted by the state Environmental Conservation Law (ECL) because it conflicts with ECL § 11-0931, which prohibits the discharge of "a firearm within five hundred feet, a long bow within one hundred fifty feet, or a crossbow within two hundred fifty feet" of houses, schools and playgrounds, and most other occupied structures. The ECL definition of "firearm" does not include a bow and arrow. The Town responded that its ordinance was a public safety measure it was expressly permitted to adopt under Town Law § 130(27), which states that certain towns, including Smithtown, may enact ordinances "prohibiting the discharge of firearms in areas in which such activity may be hazardous to the general public or nearby residents" and that those "ordinances, rules and regulations may be more, but not less, restrictive than any other provision of law."

Supreme Court granted the Town summary judgment dismissing the suit. While the 500-foot setback restriction for use of a bow and arrow in Town Code § 160 is more restrictive than the 150-foot setback in the ECL, the court ruled Smithtown's ordinance was authorized under the state's Town Law § 130. It said, "This section specifically allows the Town of Smithtown, among several other towns, to enact laws related to firearm discharge when 'such activity may be hazardous to the general public or nearby residents' and allows for those laws to 'be more, but not less, restrictive than any other provision of law.'" The court further held that "there is no conflict preemption within the state statutes and town code provisions since the state statutes do not specifically allow anything that the town code prohibits outside of Town Law § 130 specific language allowing the Town of Smithtown to enact firearm discharge laws."

The Appellate Division, Second Department reversed and ruled the Town's bow-and-arrow setback restriction is preempted by the ECL's 150-foot setback requirement. Town Code § 160 "defines a 'firearm' to include a bow and arrow, and the subject ordinance thereby purports to prohibit ... the discharge of a bow and arrow" within 500 feet of occupied buildings and public open spaces, it said. "Thus, the ordinance seeks to prohibit the discharge of a bow and arrow in circumstances where, under State law, discharge of a bow and arrow is allowed...." It rejected the Town's argument that it was authorized to regulate the discharge setback for bows and arrows by Town Law § 130(27), saying "that statute is premised upon a definition of the term 'firearm' that does not include a bow and arrow. The Town unpersuasively contends that it is free to define for itself the meaning of 'firearm,' as used in Town Law § 130(27), so as to include 'bow and arrow.' Although Town Law § 130(27) does not expressly define 'firearm,' it can be readily inferred that the term is used in the same manner as in ECL 11-0931(4), which explicitly distinguishes between firearms and bows in setting forth discharge setback requirements...."

For appellant Smithtown: Jennifer A. Juengst, Smithtown (631) 360-7570
For respondent Hunters for Deer: Christian Killoran, Westhampton Beach (631) 878-8787

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To be argued Tuesday, January 4, 2022 (arguments begin at 2 p.m.)

No. 2 People v Levan Easley

The primary issue here is whether Levan Easley was entitled to a Frye hearing to determine the admissibility of DNA evidence derived by the Office of the Chief Medical Examiner (OCME) by use of its proprietary forensic statistical tool (FST), which it developed to analyze trace samples of crime scene DNA that are too small for standard genetic testing. The FST is a computer program that was used in this case to assess the likelihood that Easley contributed to a mixed sample of DNA found on the trigger of a handgun. Frye hearings are held to determine whether novel scientific evidence is generally accepted as reliable by the relevant scientific community.

Easley was beaten and stabbed during a fight with several other men inside a Queens deli in November 2011. Police found a loaded handgun in the deli, on a shelf near where the fight occurred, and they said surveillance video showed Easley reaching in that area when he was being attacked. He was charged with criminal possession of the weapon. Before the prosecution presented expert testimony about the FST results linking Easley to the gun, he moved for a Frye hearing and sought disclosure of the source code, algorithm and validation studies of the FST.

Supreme Court concluded the FST is not a novel scientific technique and denied both requests. It relied on prior trial court decisions in People v Megnath (27 Misc 3d 405) and People v Garcia (39 Misc 3d 482), which it said "both agree" that the FST is "not even scientific. It's mathematics, and it's a statistical tool..., not some new and exciting DNA test." An OCME witness then testified that the FST analysis showed it was 4.57 million times more likely that Easley contributed to the DNA on the gun than that he did not. Easley was found guilty and sentenced to seven years in prison.

The Appellate Division, Second Department affirmed, saying a Frye hearing is not required when a court "can rely upon previous rulings in other court proceedings as an aid" in deciding admissibility. "At the time of the court's ruling, a court of coordinate jurisdiction had determined that the FST was not a new or novel scientific technique, but 'a computer software program that uses accepted mathematical equations based on Bayes' Theorem to calculate the likelihood ratio of obtaining a recovered mixture of DNA if the suspect is a contributor versus the probability of getting the same mixture if the suspect is not a contributor,'" it said, quoting Garcia. "The court of coordinate jurisdiction noted that the FST had been peer reviewed, accepted in professional journals, presented at numerous scientific conferences, and admitted in several criminal trials in this State." It also upheld the denial of Easley's request for the source code and other FST materials, saying they "were not required to be disclosed pursuant to Brady ... since they were not in the possession or control of the People, but of OCME...."

Easley argues, "The trial court's refusal to hold a Frye hearing before admitting FST-generated DNA evidence, over appellant's objection that FST's developer had never disclosed how the program worked and the People had never proved its general acceptance in the scientific community, was plainly incorrect under this Court's decisions in People v Williams [35 NY3d 24] and People v Foster-Bey [35 NY3d 959], and was not harmless where there was no other testimonial or physical proof of guilt. He also says the denial of his disclosure request for materials underlying FST "violated his constitutional rights to favorable evidence and confrontation, as well as CPL § 240.20's discovery requirements."

For appellant Easley: Jonathan Schoepp-Wong, Manhattan (212) 693-0085 ext 207
For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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To be argued Tuesday, January 4, 2022 (arguments begin at 2 p.m.)

No. 3 People v John Wakefield

John Wakefield was charged with murdering Brett Wentworth, who was strangled with a guitar amplifier cord in his Schenectady apartment in April 2010. As in Appeal No. 2, People v Levan Easley, DNA from the crime scene was subjected to analysis by a software program that uses statistical modeling to calculate the probability that a defendant contributed to a trace mixture of DNA from more than one person. The program used in this case was the TrueAllele Casework System, which was developed and owned by Cybergenetics, a private company. The TrueAllele analysis determined there was a high degree of probability that Wakefield's DNA was found on the amplifier cord and on the victim's forearm and T-shirt, with the likelihood of a match with Wakefield's DNA on different samples ranging from 56.1 million to 170 quintillion times more probable than a coincidental match to an unrelated person.

Before trial, Wakefield requested the source code for TrueAllele. Cybergenetics refused to disclose it, contending it was a trade secret, and prosecutors responded that the source code was neither discoverable nor within their possession or control. Wakefield then moved to preclude the DNA evidence or for a Frye hearing to determine whether the TrueAllele technology is generally accepted as reliable by the scientific community. He argued that access to the source code was necessary to assess the accuracy of TrueAllele. Supreme Court granted the Frye hearing, but not his demand for the source code, saying "scientists can, and have, validated the reliability of [TrueAllele] even though the source code underlying the process is not available to the public." After the hearing, the court ruled TrueAllele was generally accepted in the scientific community and admitted the DNA evidence at trial. Wakefield was convicted of first-degree murder and robbery and was sentenced to life without parole.

Wakefield argued on appeal that the trial court erred in its Frye ruling because prosecutors could not establish the reliability of TrueAllele when no one outside of Cybergenetics could review the source code; and that the source code, part of an artificial intelligence system that actually conducted the DNA analysis, was in effect an out-of-court declarant that he had the right to cross-examine.

The Appellate Division, Third Department affirmed the conviction, saying the trial court properly admitted the DNA evidence after the Frye hearing. It said "articles evaluating TrueAllele have been published in six separate forensics journals. In addition, at the time of the Frye hearing, TrueAllele had undergone approximately 25 validation studies, some of which appeared in peer-reviewed publications," and it had "been deemed admissible in Virginia, Pennsylvania and California." Rejecting Wakefield's argument that the Frye hearing was a "farce" because he was not allowed to review the source code, it said he waived the claim when "he proceeded with the Frye hearing in the absence of the source code and did not object in doing so." As for his claim that his right to confront witnesses was violated when he was denied access to the source code, it said, "This argument raises legitimate and substantial questions concerning due process as impacted by cutting-edge science. Given the exponential growth of technologies such as artificial intelligence, to embrace the future we must assess, and perhaps reassess, the constitutional requirements of due process that arise where law and modern science collide." However, while it found "the TrueAllele report is testimonial in nature," it said the source code is not a declarant due, in part, to the "human input" required in using the program. "Also key to our analysis is that [Cybergenetics CEO Mark] Perlin, the creator of TrueAllele and the individual who wrote the underlying source code, was present in court and testified.... Given the totality of the circumstances..., we find that Perlin was the declarant in the epistemological, existential and legal sense rather than the sophisticated and highly automated tool powered by electronics and source code that he created." Since Perlin testified, it said, "we find that there was no Confrontation Clause violation ... because [Wakefield] had the opportunity to confront his true accuser."

For appellant Wakefield: Matthew C. Hug, Albany (518) 283-3288
For respondent: Schenectady County Assistant District Attorney Peter H. Willis (518) 388-4364

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To be argued Wednesday, January 5, 2022 (arguments begin at 2 p.m.)

No. 4 Matter of Callen v New York City Loft Board
Matter of Fiscina v New York City Loft Board

Richard Fiscina and three other residents of unregistered lofts in a Manhattan building applied to the New York City Loft Board for coverage under the Loft Law (Multiple Dwelling Law article 7-C) in 2014, seeking to compel the building's owner, the Casper R. Callen Trust, to convert their units from commercial to residential use. Trustee Robinson Callen opposed the application, arguing the tenants' units did not qualify for Loft Law coverage because they were not occupied during a window period in 2008-09, as required by the statute. In 2015, as the application was being adjudicated at the Office of Administrative Trials and Hearings (OATH), the parties entered into a settlement agreement which provided that the tenants would withdraw their coverage application with prejudice and Callen would recognize the tenants as covered by the Rent Stabilization Law (RSL), register their units with the Division of Housing and Community Renewal as rent-stabilized, and obtain a certificate of occupancy for residential use. An administrative law judge recommended the Loft Board accept the tenants' request to withdraw their coverage application, but made no recommendation on the agreement.

The Loft Board rejected the agreement and the request to withdraw the application "as against public policy," and remanded the matter to OATH. The Board said it would be illegal for the tenants to remain in the building without a certificate of occupancy unless they obtained protection under the Loft Law, and they would not have that protection if they withdrew their application. It said the settlement agreement "perpetuates an illegality and undermines the purpose of" the Loft Law. When it denied the parties' applications for reconsideration, they commenced these proceedings to annul the Board's orders.

Supreme Court annulled the orders as irrational. It said the parties "have settled their differences and the Loft Board has refused to accept the settlement. This leaves two options – one is for the tenants to default at the forced hearing and the other is for the tenants to spend plenty of money and time litigating something they do not wish to litigate. Both options are wasteful and make no sense. While the Loft Board may not agree with the settlement, it is irrational to refuse to allow an applicant to withdraw his application."

The Appellate Division, First Department modified by upholding the Board's decision to reject the settlement, but ruling "it was irrational to refuse to allow the tenants to withdraw their conversion application because the Loft Law was not the sole basis for legalization of the subject units." It said the RSL provides "a separate and independent track for the tenants to obtain rent regulation coverage outside the Loft Law's statutory scheme" because their units are legal under the RSL. While the Board had a rational basis to reject the settlement, it said, "once the tenants decided to withdraw their conversion application..., the Board no longer had authority to supervise and approve the legalization process of the building because the tenants relinquished their rights to proceed to conversion pursuant to the Loft Law."

The Loft Board says the decision conflicts with Second Department precedent and it argues, "Having rationally rejected the underlying agreement, the Board also rationally rejected the tenants' attempt to withdraw their application and directed further investigation into Loft Law coverage. After all, the tenants' attempt to withdraw their coverage application went hand in hand with the illegal agreement, whose terms expressly required them to withdraw the application with prejudice. The First Department had no basis to separate the two. More fundamentally, the Board acted rationally where it knew the direct result of allowing withdrawal would be continued residential occupancy outside the Loft Law, with no residential certificate of occupancy – something that's plainly illegal."

For appellant Loft Board: Assistant Corporation Counsel Diana Lawless (212) 356-0848
For respondent Callen: Magda L. Cruz, Manhattan (212) 909-2144
For respondents Weinstock et al (tenants): Margaret B. Sandercock, Manhattan (212) 509-0440

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To be argued Wednesday, January 5, 2022 (arguments begin at 2 p.m.)

No. 6 Donohue v Cuomo

In this federal action, the lead case among 11 separate suits filed by unions against New York State, the Civil Service Employees Association (CSEA) alleges the State violated its collective bargaining agreements (CBAs) and the Contract Clause of the U.S. Constitution in 2011, when it unilaterally increased by two percentage points the share of premiums retired State workers must pay for coverage by the New York State Health Insurance Plan (NYSHIP). Since 1985, in a series of CBAs with CSEA and the implementing statutes, the State agreed to pay 90% of the cost of individual coverage and 75% of the cost of dependant under NYSHIP, and also agreed that retirees could retain their health insurance after retirement if they had 10 years of service. The State contributed to the retirees' premium costs at the same 90% and 75% rates. The CBAs did not specify the duration of the State's obligation to make the contributions. With the State facing a $10 billion budget deficit in 2011, and in an effort to avoid widespread layoffs, the State and CSEA negotiated a reduction of the State's contribution rate for active employees to 88% for individual coverage and 73% for dependent coverage as part of a new five-year CBA. The State unilaterally extended this reduction to retirees the same year by statutory amendment and regulation, a step it said has saved the State about $30 million per year.

The CSEA, its officers, and several retirees then brought this action in U.S. District Court for the Northern District of New York for breach of contract under New York law and for impairment of the obligations of contract in violation of the Contract Clause, contending that the CSEA's CBAs with the State gave retiring employees a vested right to retain NYSHIP coverage with the State contributing 90% of the cost of individual coverage and 75% for dependant coverage. While the CBAs did not expressly provide for a vested right to coverage at fixed contribution rates for life, the CSEA argued that such a right could be inferred from the language of the contracts or, at least, that the language is sufficiently ambiguous to permit consideration of extrinsic evidence to establish the vested right.

U.S. District Court granted summary judgment to the State dismissing the suit, finding that "the unambiguous terms of the CBAs at issue did not create a vested interest in the perpetual continuation of premium contribution rates at a specific level." The court said the CBA "simply provides that employees have the right to retain health insurance in retirement..., but is silent as to contribution rates.... The only reasonable interpretation of the unambiguous language of the CBAs is that the premium contribution rates are subject to the general durational clauses and that this obligation ceased upon the termination of each respective CBA."

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues with a pair of certified questions: "Under New York state law" does the 2007-2011 CBA "(1) create a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lifetimes, notwithstanding the duration of the CBA, or (2) if they do not, create sufficient ambiguity on that issue to permit the consideration of extrinsic evidence as to whether they create such a vested right?" If the CBA does create such a vested right, "does New York's statutory and regulatory reduction of its contribution rates for retirees' premiums negate such a vested right so as to preclude a remedy under state law for breach of contract?"

For appellant CSEA et al: Eric E. Wilke, Albany (518) 257-1443
For respondents State et al: Assistant Solicitor General Frederick A. Brodie (518) 776-2317

State of New York
Court of Appeals

To be argued Thursday, January 6, 2022 (arguments begin at noon)

No. 5 Matter of Aurora Associates LLC v Locatelli

Aurora Associates LLC, the owner of a residential building in Manhattan, brought this summary eviction proceeding against a tenant, Raffaello Locatelli, seeking to take possession of his apartment (Loft 3B) on the ground that his month-to-month tenancy had been terminated. Locatelli responded that he was not a month-to-month tenant, but instead was protected by rent stabilization, and he filed counterclaims for rent overcharges and attorney's fees.

The building had been an Interim Multiple Dwelling regulated under the Loft Law (Multiple Dwelling Law article 7-C). Aurora argued that, in 1998, the prior owner of the building purchased the improvements and the rights of the loft tenants pursuant to Multiple Dwelling Law § 286(12), which it said would exempt the building from rent regulation. It also argued that the vacancy lease entered into by the next tenant of Loft 3B had a monthly rent of $4,250, well above the threshold for high-rent deregulation. Locatelli argued that the alleged purchase agreement for improvements and rights in 1998 was inadmissible or invalid and, even if it were legitimate, it did not deregulate the building.

Civil Court agreed with Locatelli and dismissed the eviction proceeding. "Where, as here, the building contains six or more residential units, it is subject to rent stabilization by virtue of Emergency Tenant Protection Act (EPTA) notwithstanding the sale of Loft Law rights by a prior tenant, in part because [Multiple Dwelling Law] § 286(12) only applies to the actual occupant who sold her or his rights, not subsequent tenants," it said, citing Acevedo v Piano Bldg. LLC (70 AD3d 124 [1st Dept 2009]. It dismissed Locatelli's overcharge counterclaim and, finding "the outcome of this proceeding is mixed to the point that neither party is the prevailing party," it also dismissed his claim for attorney's fees.

The Appellate Term, First Department modified by granting Locatelli's motion for attorney's fees and otherwise affirmed, citing Acevedo on the rent regulation and eviction issues. It said Locatelli "is entitled to recover his reasonable attorneys' fees as the 'prevailing party'" because he won dismissal of the eviction proceeding on the merits.

The Appellate Division, First Department affirmed. "Notwithstanding the predecessor owner's purchase of a prior tenant's rights under Multiple Dwelling Law § 286(12), the loft unit at issue remained subject to rent regulation as the apartment is located in a pre-1974 building containing six or more residential units," it said, citing Acevedo.

Aurora argues, in part, that "after the exemption from rent regulation pursuant to the Loft Law," the apartment did not become subject to rent regulation under the ETPA "either because the first rent charged exceeded the high rent threshold at the time it was paid or because the purchase of the rights and fixtures from the former Loft Law tenant resulted in the rent deregulation of the unit which did not then become subject to the ETPA." It says the contrary decision in this case "creates an unresolvable conflict between the First and Second Departments, as well as between the Loft Law and the ETPA."

For appellant Aurora Associates: Joseph Goldsmith, Manhattan (212) 267-6364
For respondent Locatelli: Eduardo A. Fajardo, Rhinebeck (212) 404-7069

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To be argued Thursday, January 6, 2022 (arguments begin at noon)

No. 7 Matter of Endara-Caicedo v New York State Department of Motor Vehicles

New York City police officers arrested Pedro Endara-Caicedo on suspicion of driving while intoxicated in 2016 and took him to a precinct for a chemical breath test to determine his blood alcohol concentration. Because no officer trained to administer the test was available at that time, the police did not ask Endara-Caicedo to take the chemical test until nearly four hours after his arrest. When they did ask, he refused, which resulted in the suspension of his driver's license at his arraignment pursuant to Vehicle and Traffic Law (VTL) § 1194(2). The statute states, "Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test ... provided that such test is administered ... within two hours after such person has been placed under arrest" (VTL § 1194[2][a][1]). Under VTL §§ 1194(2) (b) and (c), the license of a driver who refuses the chemical test "shall be revoked" after an administrative hearing if the hearing officer finds the police had reasonable grounds to believe the driver was impaired; the arrest was lawful; the driver was "given sufficient warning, in clear or unequivocal language," that refusing the test "would result in the immediate suspension and subsequent revocation" of the driver's license; and the driver still refused the test.

Endara-Caicedo did not contest at his hearing the lawfulness of his arrest or the adequacy of the warnings he received, but argued that his license could not be revoked because he was not asked to take the test until more than two hours after his arrest. His license was revoked and he was fined $500. The Appeals Board of the Department of Motor Vehicles affirmed, saying the two-hour limit "is an evidentiary rule applicable to criminal prosecutions" that does not apply to chemical test refusal hearings.

Endara-Caicedo filed this suit to annul the license revocation, arguing that because he refused the test nearly four hours after his arrest, it was not a "refusal" within the meaning of the statute. He and DMV both cited a criminal case, People v Odum (31 NY3d 344 [2018]), as supporting their view.

Supreme Court upheld the license revocation, saying, "[A]lthough Odum did not precisely address or resolve the issue ... before this court, four Judges on the Court of Appeals have indicated that a motorist arrested for driving under the influence of alcohol may have his or her license suspended or revoked upon the refusal to take a chemical breath test ... even if that refusal occurs more than two hours after the motorist's arrest."

The Appellate Division, First Department affirmed, saying VTL § 1194(2) "permits the refusal of a motorist ... to submit to a chemical test to be used against the motorist in administrative license revocation hearings even if the chemical test is offered, and the refusal occurs, more than two hours after the motorist's arrest. This interpretation of the statute is supported by its legislative history, which indicates that the two-hour time limitation ... was confined to the admissibility of the chemical test results (or the chemical test refusal) in a criminal action...; the recent opinions of four Judges of the Court of Appeals" in Odum; and "the longstanding public policy of this State, and this Nation, to discourage drunk driving in the strongest possible terms...."

Endara-Caicedo says Odum "interpreted this statute to mean that a motorist's declining to take a chemical test is only a 'refusal' under the statute when the test is offered within that two-hour period." The provisions for administrative revocation of a license "are part of the same statutory scheme" as those addressed in Odum, governing when a driver's refusal to take the test is admissible in a criminal proceeding, and they should be interpreted in the same way, meaning a license can be revoked only if the driver refused the test within two hours of arrest, he argues. "After the two-hour period of deemed consent expires, a motorist has a choice whether to submit to a chemical test," and "the decision not to voluntarily consent to a test is not a 'refusal.'"

For appellant Endara-Caicedo: V. Marika Meis, Manhattan (212) 577-2523 ext 551
For respondent DMV: Assistant Solicitor General Philip J. Levitz (212) 416-6325

State of New York
Court of Appeals

To be argued Thursday, January 6, 2022 (arguments begin at noon)

No. 8 Konkur v Utica Academy of Science Charter School

Ersin Konkur was employed as a math teacher by the Utica Academy of Science Charter School during the 2013-14 and 2014-15 school years. In 2018, he filed this suit against the school and High Way Education Inc., a not-for-profit corporation doing business as the Turkish Cultural Center, which supports educational programs in the Rochester area. Konkur alleged that High Way and Utica Academy acted in concert to pressure him to make donations to High Way in the form of "illegal kickbacks" of his salary under threat of demotion or termination. He sought, among other things, civil damages for alleged violations of Labor Law § 198-b, the "kickback statute." Labor Law § 198-b provides:

"2. Whenever any employee who is engaged to perform labor shall be promised an agreed rate of wages..., it shall be unlawful for any person ... to request, demand, or receive ... a return, donation or contribution of any part or all of said employee's wages, salary, supplements, or other thing of value, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent such employee from procuring or retaining employment....

"5. A violation of the provisions of this section shall constitute a misdemeanor."

Supreme Court denied High Way's motion to dismiss the claim, rejecting its argument that section 198-b does not provide a private right of action. The court said, "The current status of the law is not settled, and ... we have case law that provides a private right of action does exist on kickbacks."

The Appellate Division, Fourth Department reversed and dismissed Konkur's kickback claim. "[W]e agree with High Way that the legislature did not intend to create a private right of action for violations of Labor Law § 198-b..., inasmuch as '"[t]he [l]egislature specifically considered and expressly provided for enforcement mechanisms" in the statute itself'...," the court said. "Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense.... We therefore conclude that plaintiff may not assert a cause of action based upon an alleged violation of Labor Law § 198-b."

Konkur argues the statute allows a private right of action, although its text is silent on the issue. "[T]he context of § 198-b is crucial. The statute is promulgated not in the Penal Law, but in the Labor Law," and specifically in article 6, "entitled 'Payment of Wages,' which is primarily a civil statutory scheme," he says. By placing it in article 6, "the Legislature expressed a clear intent to provide an additional protection to the rights of workers to collect their wages in a civil remedy as well as to create a criminal deterrent." He says allowing a private right of action is "entirely consistent with the legislative scheme" and "would promote the legislative purpose."

For appellant Konkur: David G. Goldbas, Utica (315) 724-2248
For respondent High Way Education: Matthew M. Piston, Rochester (585) 787-7000

State of New York
Court of Appeals

To be argued Thursday, January 6, 2022 (arguments begin at noon)

No. 9 People v Vladimir Duarte

Vladimir Duarte was arrested after a 13-year-old girl accused him of forcibly grabbing her vaginal area as she walked past him on a Manhattan sidewalk in April 2017. At the beginning of his suppression hearing, Duarte told the Criminal Court judge that he did not want his assigned counsel to represent him because the attorney had not spoken with him in detail about the case and "because he's ineffective and he doesn't believe that I did not do this." The judge denied his request without inquiry and instructed him to speak only to his attorney. Duarte said, "I object to your denying me ineffective counseling here.... I would love to go pro se." The judge did not respond to his remarks and told the prosecutor to call the first witness. Duarte was convicted after a bench trial of second-degree sexual abuse and forcible touching, both misdemeanors, and was sentenced to a year in jail.

The Appellate Term, First Department affirmed, rejecting Duarte's claim that his right to represent himself was violated. "Viewing the record as a whole, we conclude that defendant did not make a clear and unequivocal request to proceed pro se, sufficient to express the 'definitive commitment to self-representation' that would trigger the need for a full inquiry by the court.... Rather than being unequivocal, defendant's expression of a desire to represent himself came within the context of his complaints about his counsel.... In any event, defendant abandoned his request by proceeding with the scheduled suppression hearing and subsequent trial without expressing any further desire to represent himself...."

Duarte argues that he made an "unequivocal and timely request to represent himself by stating to the trial court that he 'would love to go pro se,'" and the court committed reversible error under People v McIntyre (36 NY2d 10 [1974]) when it rejected his request "without any inquiry whatsoever" into whether it was knowing and intelligent. He says "the Appellate Term devised two unfounded and unconstitutional rules of law to affirm" his conviction when it "held that (1) Mr. Duarte's request was not unequivocal because he made it after expressing dissatisfaction with his attorney..., one of the most common reasons a defendant chooses to proceed pro se; and, in the alternative, (2) Mr. Duarte had abandoned his pro se request solely because he did not repeat it..., thereby waiving his constitutional right to self-representation through his silence rather than any affirmative action. Neither of these new rules comports with this Court's precedent or the constitutional principles that animate it."

For appellant Duarte: Molly Schindler, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Jeannie Campbell-Urban (212) 335-9000