# *State of New York Court of Appeals*

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To be argued Wednesday, September 6, 2017

**No. 93 Matter of City of Schenectady v NYS Public Employment Relations Board**

In 2007, while its negotiations on a new contract with the Schenectady Police Benevolent Association (PBA) were stalled, the City of Schenectady announced that it would no longer follow the negotiated disciplinary procedures in its expired contract with the PBA, which gave the PBA the right to appeal police disciplinary determinations to a neutral arbitrator. Instead, the City unilaterally adopted procedures that gave its public safety commissioner the authority to issue final disciplinary determinations, as provided by Second Class Cities Law article 9. In 2008, the City issued Police Department General Order 0-43, which imposed the new disciplinary procedures for police officers without negotiation.

The PBA filed an improper practice charge with the State Public Employment Relations Board (PERB), contending the City violated the Taylor Law by refusing to negotiate. The City argued that because the Second Class Cities Law, enacted in 1906, pre-dated the Taylor Law's enactment in 1967, the provisions of article 9 giving police disciplinary authority to City officials prohibit collective bargaining on the subject. An Administrative Law Judge sustained the PBA's charge and PERB affirmed, ruling that the Taylor Law superseded article 9 and made police discipline a mandatory subject of negotiation. PERB relied largely on Second Class Cities Law § 4, which states that the law's provisions "shall apply ... until ... changed, repealed or superseded pursuant to law." PERB said section 4 "reveals a statutorily planned obsolescence for that law resulting from subsequent enactment of state or local legislation."

Supreme Court confirmed PERB's determination and the Appellate Division, Third Department affirmed, citing the "broad supersession provision" in Second Class Cities Law § 4. "[T]he Legislature intended to allow any or all of the provisions of the Second Class Cities Law to be supplanted by later laws applicable to the same subject matter.... Accordingly..., Second Class Cities Law article 9 does not require 'that the policy favoring collective bargaining should give way,'" it said, distinguishing the case from M/O Patrolmen's Benevolent Assn. of City of N.Y. v New York State Pub. Empl. Relations Bd. (6 NY3d 563) and M/O Town of Wallkill v Civil Serv. Empls. Ass. (19 NY3d 1066).

Schenectady argues that "PERB's conclusion that the adoption of the Taylor Law in 1967 superseded those provisions of the [Second Class Cities Law] which specifically commit police discipline to the discretion of local officials, thereby rendering the subject of police discipline a mandatory subject of collective bargaining, is contrary to accepted rules of statutory construction; conflicts with the prior decisions of this Court in Patrolmen's Benevolent Assn. and Town of Wallkill; and undermines what this Court has previously characterized as the important public policy favoring the authority of public officials over the police."

For appellant Schenectady: Christopher P. Langlois, Albany (518) 462-0300
For respondent PERB: David P. Quinn, Albany (518) 457-2678
For respondent PBA: Michael P. Ravalli, Albany (518) 432-7511

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To be argued Wednesday, September 6, 2017

**No. 94 People v Brian Novak**

In August 2012, Brian Novak was arraigned in Schenectady City Court on uniform traffic tickets charging him with a misdemeanor count of driving while intoxicated and related traffic infractions. In August 2013, the District Attorney's Office filed a superseding prosecutor's information charging him with the lesser offense of driving while ability impaired along with the related infractions. Novak proceeded to a bench trial before Schenectady City Court Judge Matthew Sypniewski, who found him guilty of all charges.

Novak appealed his conviction to Schenectady County Court. After he filed his appellate brief, Judge Sypniewski was elected to County Court and Novak's appeal was assigned to him. Judge Sypniewski affirmed Novak's conviction.

The parties to this appeal agree there are no constitutional or statutory provisions in New York law that expressly address the question of whether judges may determine appeals taken from their own decisions, but Novak argues that Judge Sypniewski should have disqualified himself "to maintain the appearance of impartiality" and abused his discretion when he did not. When "a Judge has presided as the trier of fact over an Appellant's criminal trial..., and Appellant thereafter challenges the Judge's conduct of the trial, that same judge should not be in a position to review his rulings and verdict on appeal," he says. Novak relies on federal law, which prohibits the practice by statute (28 USC § 47) and federal court rulings.

The prosecution argues there was no abuse of discretion because there has not "been any allegation that Judge Sypniewski as an elected judicial official did not have the competence and intellectual integrity to objectively evaluate the issues before him on appeal and render a decision regardless of the prior judicial contact with the appellant.... In this regard, a judge presiding over defendant's appeal is not unlike a judge presiding over a CPL 440 motion filed in a case where the same judge was the trier of fact. Judges deciding post-conviction 440 motions of their own verdicts at trial is common practice that goes uncontested.

Among other issues, Novak argues that his conviction must be vacated because the accusatory instrument on which he was tried was jurisdictionally defective. He was originally charged in simplified traffic informations (traffic tickets), and Novak cites lower court rulings that "a simplified traffic information is not the type of accusatory instrument that can be superseded by a prosecutor's information," as was done in his case. The prosecution argues that, although CPL 100.50 does not name "simplified traffic informations" among the charging documents that a prosecutor's information may supersede, Novak was served at his arraignment with a supporting deposition and bill of particulars along with the ticket charging him with DWI. This gave him sufficient notice of the allegations and met "all of the requirements necessary for a valid information," which was properly superseded by the prosecutor's information charging him with DWAI.

For appellant Novak: Danielle Neroni Reilly, Albany (518) 366-6933
For respondent: Schenectady County Asst. District Attorney Tracey A. Brunecz (518) 388-4364

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To be argued Wednesday, September 6, 2017

**No. 95 People v James L. Carr**

In 1993, Buffalo police investigating the stabbing death of 81-year-old Percy Blake Saunders found James Carr's fingerprint at the murder scene. Carr admitted entering the victim's home, but said no one else was present at the time. He testified before a grand jury and waived immunity, acknowledging that the grand jury "is investigating the charges of burglary in the second degree, burglary in the first degree, murder in the second degree and any other matter of every nature pertaining thereto." After presenting the evidence, the prosecutor asked the grand jury to consider only the charge of second-degree burglary. Carr was indicted and convicted on that count and was sentenced to 7 to 15 years in prison.

While he was incarcerated, a fellow inmate claimed Carr had admitted that he committed the murder. The prosecutor presented the informant's testimony and other evidence to a second grand jury, which indicted Carr on charges of second-degree murder and first-degree robbery. He was convicted at trial and sentenced to 37½ years to life in prison.

Carr filed this CPL 440.10 motion to vacate the judgment, contending the prosecutor violated CPL 190.75(3) by submitting the murder and robbery charges to the second grand jury without court permission. The statute requires court authorization to resubmit a charge that has been dismissed by a grand jury. He cited People v Wilkins (68 NY2d 269), which held, "The prosecutor's withdrawal of a case from the Grand Jury after presentation of the evidence is the equivalent of a dismissal by the first Grand Jury, and the prosecution may only resubmit the charges with the consent of the court." Supreme Court denied Carr's CPL 440.10 motion.

The Appellate Division, Fourth Department affirmed, saying the prosecutor did not withdraw the murder and robbery charges from the first grand jury as in Wilkins. "Although the presentation had been completed..., we conclude that charging the grand jury with only one offense did not constitute the functional equivalent of the dismissal of the murder and robbery counts. Indeed, although it was clear that defendant was a suspect in the victim's death, there was no direct evidence presented to the first grand jury tying defendant to those additional offenses. Instead, 'the witnesses, at best, provided only an inferential link to [those additional crimes],'" the court said, quoting People v Gelman (93 NY2d 314).

Carr argues that, "because the [first] Grand Jury was informed early in the proceedings that they were considering a murder charge, and the defendant was a suspect, the prosecutor was required to obtain leave from the court before resubmitting the charges to a second Grand Jury." He says the presentation of evidence was complete, and exceeded the presentation made in Wilkins because "the Grand Jury here was presented with prosecution-controlled testimony from the Appellant himself.... [T]he withdrawal [of charges] here met and exceeded the standard required for the withdrawal of the charges to equal a dismissal by the Grand Jury" under Wilkins.

For appellant Carr: Evan M. Lumley, Buffalo (716) 885-2889
For respondent: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424

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To be argued Wednesday, September 6, 2017

**No. 103 Matter of Honorable J. Marshall Ayres**

J. Marshall Ayres, a non-attorney justice of the Conklin Town Court in Broome County since 2009, is asking the Court of Appeals to overturn a determination of the State Commission on Judicial Conduct removing him from office.

The Commission found Ayres improperly interfered in two matters pending in other courts, including a traffic ticket issued to his 30-year-old daughter for using a cell phone while driving. It said he "made two back-channel attempts" to have the case transferred from a Kirkwood town justice he viewed as biased, because Ayres had fired the judge's wife when she was his court clerk, to a second judge. He first asked a clerk to transfer the ticket, then called the second judge directly and asked him to handle the case. "After these attempts to have the ticket transferred proved unsuccessful, [Ayres] attended the pre-trial conference with his daughter, where ... he acted as her advocate, attempted to intimidate the prosecutor and invoked his judicial position in arguing that the ticket should be dismissed...," the Commission said. "While the instinct to help a child is understandable, a judge's '"paternal instincts" do not justify a departure from the standards expected of the judiciary'...." In the second matter, it said he sent "eight unauthorized letters -- five of which were ex parte --" to a Broome County Court judge who was handling an appeal of a $2,949.42 restitution order Ayres issued in a petit larceny case. The Commission said he "abandoned his role as a neutral arbiter and became an advocate, repeatedly telling the court that the appeal lacked 'merit' and should be dismissed ... while making biased, discourteous and undignified statements about the defendant and his attorney."

The Commission, citing his "impermissible, ex parte advocacy" in both matters, said, "If a judge initiates ex parte communications, the public would have reason to doubt whether the judge would reject such private discussions in his own court." It said Ayres' "failure to recognize the impropriety of his actions and to modify his behavior when ethical concerns were brought to his attention exacerbates the underlying misconduct and 'strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same'...."

Ayres argues, in part, that he is entitled to "immunity" for conduct on behalf of his daughter because "I was relying on the advice of the Resource Center and subsequent statements by the Commission," which he said "instructed us that it was permissible for a judge to be present at their child's court hearing, provided they were there only as a parent and did not attempt to use their judicial position ... to obtain special favors or outcomes." He says he "was present only as a parent," and his efforts "were not intended to influence the disposition of the ticket but simply ... to ensure my daughter would receive a fair and impartial hearing." His ex parte letters about the appeal in County Court were prompted by a letter he received from that judge, he says. "Not being an attorney, and relying on my training in the private sector of responding directly to the person who contacted you, I forwarded my letter back to" the County Court judge. He says, "The Town of Conklin would be better served by having an experienced judge who has learned from his mistakes ... rather than installing a new inexperienced justice who may repeat the same mistakes I have made."

For petitioner Ayres: J. Marshall Ayres (pro se), Conklin (607) 775-3374
For respondent Commission: Edward Lindner, Albany (518) 453-4613