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.

FEBRUARY 2014 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

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 Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 31 Matter of Kaslow v City of New York

David Kaslow was employed by New York City's Department of Environmental Protection (DEP) for three and a half years before he joined the City's Department of Correction (DOC) in 1991. He was placed in a newly created 20-year retirement plan for correction officers, the Tier 3 CO-20 Plan of the New York City Employees' Retirement System (NYCERS), which was established in December 1990 and is governed by Retirement and Social Security Law § 504-a. When Kaslow retired in 2009, he was given credit for three years of prior military service in the Navy, but not for his civilian employment at DEP.

City corrections officers in Tier 1 and Tier 2, as well as Tier 3 members who became correction officers prior to December 19, 1990, and later joined the Tier 3 CO-20 Plan, receive service credit toward their retirement benefits for prior city employment in civilian jobs. However, for Tier 3 CO-20 Plan members who became court officers after December 19, 1990, NYCERS has interpreted RSSL 504-a as limiting "credited service" to service as a correction officer, not civilian work. Kaslow brought this article 78 proceeding to challenge NYCERS's determination to exclude his prior employment at DEP from his pension benefit calculation.

Supreme Court granted Kaslow's petition and directed NYCERS to "recalculate [his] pension to include his DEP service." The Appellate Division, Second Department affirmed, saying NYCERS's "interpretation of the term 'credited service,' pursuant to [RSSL] 504-a, was irrational, unreasonable, and inconsistent with the other applicable statutes governing the retirement benefits of officers employed with the DOC...."

The City and NYCERS argue that NYCERS's interpretation of "credited service" as meaning only "allowable correction service" is consistent with the language of the statute and its legislative history. They say the lower court rulings improperly give the term "credited service," which is limited to correction service for retirement eligibility, member contributions and vesting, a broader meaning for benefit calculations by including civilian service.

For appellants City and NYCERS: Asst. Corporation Counsel Keith M. Snow (212) 356-4055
For respondent Kaslow: Mercedes Maldonado, Manhattan (917) 551-1300

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 Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 32 People v Merlin G. Sage

Merlin Sage and Damion Clarke were charged with murder for the fatal beating of Hector Merced in a Rochester apartment in November 2007. A key prosecution witness, Andrew Mogavero, testified at Sage's trial that he had been out drinking for several hours with Sage and Clarke when they met Merced at a bar and that all four of them went to the apartment of Miguel Velez. Shortly after arriving, Mogavero said, Clarke began arguing with Merced and head-butted him. Mogavero said Merced then came at him and Mogavero punched him twice to protect himself. Mogavero testified that Sage, Clarke and Velez repeatedly punched and kicked Merced, Clarke jumped on his head and dropped a large speaker on his head, and Sage urinated on him. Mogavero, who was never charged, said he did not try to intervene because he feared the others would turn on him. Mogavero and Velez carried Merced outside and placed him on the porch of a neighboring house, where Mogavero said Sage struck Merced several times with a mop handle on the head and neck. Mogavero then went to Sage's house, where he placed his bloody clothing in a garbage bag and borrowed new clothes. Mogavero said he left after a few hours, around dawn, and learned later that day that Merced was dead. The next day Mogavero went to the police, who found Sage's fingerprints and Merced's blood on the mop handle. A pathologist testified that Merced's death was due to blunt force trauma and that some marks on the body could have been made by the mop handle. Sage denied participating in the beating, but admitted urinating on Merced and said he "poked" him with the mop handle to check on his condition.

Sage's attorney asked the trial court to issue an accomplice charge, instructing the jury to determine whether Mogavero was an accomplice and, if so, whether his testimony was corroborated. The court denied the request as unjustified, saying the pathologist testified that Mogavero's two punches "were contributory" and Mogavero testified his punches were "in the early stages of this prior to the jumping on the head" and beating with the speaker. Sage was acquitted of murder, but convicted of first-degree manslaughter and sentenced to 25 years.

The Appellate Division, Fourth Department affirmed, saying the trial court properly concluded that Mogavero "'may not reasonably be considered to have participated in the offenses charged or offenses based upon the same or some of the same facts or conduct that constitute the offenses charged[, and thus that] ... there was an insufficient basis upon which to submit [the witness's] accomplice status to the jury'...." It concluded, "We note in any event that there was overwhelming evidence corroborating the testimony of that witness...."

Sage argues he was entitled to the accomplice instruction because the "trial testimony put ... Mogavero's involvement in ... Merced's beating death squarely at issue. The proof showed that Mogavero had himself assaulted Mr. Merced in the early stages of the beating, engaged in collaborative behavior with the alleged principal actors before, during, and following the attack, and demonstrated a consciousness of guilt" by carrying Merced away from the apartment, fleeing the scene, and disposing of his bloody clothing. Sage says, "The evidence of corroboration was not overwhelming and ... there is a significant probability that a properly charged jury would have reached a different verdict by finding no corroboration."

For appellant Sage: Drew R. DuBrin, Rochester (585) 753-4947
For respondent: Monroe County Assistant District Attorney Matthew Dunham (585) 753-4627

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 Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 33 People v Vincent Zeh

Vincent Zeh is serving 20 years to life in prison for the murder of his estranged wife, Kimberly Zeh, who was stabbed to death in 1997 in Ulster County. The Appellate Division, Third Department affirmed his second-degree murder conviction in 2001, but said Zeh raised sufficient issues concerning the adequacy of the defense afforded by his trial counsel -- including counsel's failure to challenge statements Zeh made to police or clothing stained with the victim's blood that was seized from his home -- to warrant CPL 440 review. "Given the critical nature of defendant's oral statements to police and the seized physical evidence, the failure to make any pretrial motions is troubling," the court said, but to decide the issue on direct appeal "would require us to resort to 'supposition and conjecture'.... [P]rudence dictates that the issue of ineffective assistance of counsel be raised in a posttrial application ... where 'a thorough evaluation of each claim based on a complete record' can be made...."

Eight years later, Zeh filed a CPL 440.10 motion to vacate his conviction on the ground that he received ineffective assistance of counsel. In opposition, the prosecution submitted an affirmation from Zeh's trial counsel, in which he said that he and Zeh had agreed the best trial strategy "would be to show that despite the nature of the tactics that investigators used, including questioning the defendant for approximately 26 hours, the defendant had not confessed and that the defendant was with his children at the time of the murder." Counsel said he filed no suppression motions because he believed Zeh would have had to testify at the pretrial hearing, which might have undermined his ability to testify in his own defense at trial.

Ulster County Court denied the motion without a hearing, saying, "This court's comprehensive review of the record before it establishes that trial counsel made cogent argument, actively promoted a reasonable defense theory, conducted effective examination of witnesses, and that '[n]one of counsel's strategies or alleged errors were sufficient to constitute a deprivation of meaningful representation, either alone or when considered in aggregate.'"

The Appellate Division affirmed. Rejecting Zeh's claim that County Court improperly denied his motion without first conducting a hearing, it said, "Defendant's motion papers did not present any factual evidence to develop the record with regard to any of the alleged deficiencies of trial counsel beyond the trial record." It said trial counsel "presented strategic explanations for the alleged errors, which have not been controverted by defendant.... Inasmuch as defendant has not demonstrated that counsel's trial approach was the result of incompetence or imprudence rather than merely unsuccessful tactics, we find no error in County Court's denial of the motion without a hearing...."

Zeh argues that he was entitled to a hearing on his 440 motion and that his trial counsel's affirmation "establishes beyond any doubt that there was no legitimate trial strategy" for making no suppression motions. "No competent criminal trial lawyer in the State of New York would go forward on a case of this nature without testing the validity of statements made during a twenty-six hour interrogation and highly prejudicial physical evidence obtained through the use of six search warrants issued by a local magistrate," he says.

For appellant Zeh: Norman P. Effman, Warsaw (585) 786-8450
For respondent special prosecutor: Jacqueline L. Spratt, Albany (518) 432-1100

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 Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 34 Jacobsen v New York City Health and Hospitals Corporation

William Jacobsen began working in the central office of the New York City Health and Hospitals Corporation (HHC) in 1979 and spent a day or two a week visiting construction sites at HHC facilities, where he was exposed to asbestos and other dust. In August 2005, he was reassigned to an office at Queens Hospital, which was undergoing major renovation including asbestos abatement, and he was required to monitor that work on a daily basis. He testified that he requested a respirator, but was provided only with a dust mask. In September 2005, he was diagnosed with pneumoconiosis, an occupational lung disease, and HHC granted him a three-month medical leave. His union asked that he be assigned work "that he is capable of doing in the office." Jacobsen's pulmonologist, Dr. Gwen Skloot, cleared him to work in the field in March 2006, but wrote that it was "imperative that he not be exposed to any type of environmental dust." He returned to work at Queens Hospital where, he testified, he complained to his supervisor about the dust and again requested a respirator. In May 2006, he sought reassignment to the central office as a reasonable accommodation for his disability. HHC refused, saying assignment to the central office was not feasible because the essential functions of his job required that he be able to visit construction sites. In June 2006, HHC placed him on a six-month unpaid leave and sought clarification of his condition. Dr. Skloot responded that Jacobsen was cleared to perform office work only. When the leave ended, HHC terminated him.

Jacobsen brought this action against HHC alleging, among other things, that he was wrongfully terminated because of his disability in violation of the New York State and City Human Rights Laws. Supreme Court granted HHC's motion for summary judgment to dismiss.

The Appellate Division, First Department affirmed in a 4-1 decision, finding that HHC engaged in the required "interactive process" to consider reasonable accommodations. "HHC sought clarification from Dr. Skloot regarding plaintiff's medical condition and his ability to perform his job.... It was only after plaintiff's doctor and plaintiff himself confirmed that he could no longer work at construction sites that HHC terminated him." Rejecting Jacobsen's claim that HHC failed to consider a respirator as a reasonable accommodation, it said he "focused below on HHC's denial of his request to work in an office, not on the adequacy of the equipment provided to him.... [A]ll of the letters that plaintiff relies on ... make a request for relocation to the central office.... None of the letters ask for a respirator...."

The dissenter said Jacobsen "testified that he could visit [construction] sites so long as he was provided with proper respiratory protection. Thus, a triable issue of fact exists as to whether plaintiff was capable of performing the essential functions of his job. A triable issue of fact also exists as to whether [HHC] made a reasonable accommodation for plaintiff's disability.... [T]he provision of a dust mask, of the type to be found in any hardware store, is not a 'reasonable accommodation' for a worker who is exposed to asbestos dust on a daily basis." She said a respirator "designed to filter and protect against airborne dust from known toxins and potential carcinogens would be the type of 'reasonable accommodation' envisioned by the statute."

For appellant Jacobsen: Kenneth F. McCallion, Manhattan (646) 366-0880
For respondent HHC: Assistant Corporation Counsel Elizabeth S. Natrella (212) 356-2609

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 Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 35 People v Angel Cintron

In 2001, Angel Cintron was convicted of first-degree robbery in the Bronx and sentenced to ten years in prison, but Supreme Court failed to impose a mandatory term of post-release supervision (PRS) as part of the sentence. The Appellate Division, First Department affirmed the judgment in 2004. In 2008, while Cintron was out of prison on conditional release, Supreme Court sought to correct the legal defect in his sentence by resentencing him to add a five-year term of PRS. Cintron's maximum sentence expired in 2009. In March 2010, Cintron filed a CPL 440.20(1) motion to vacate the PRS term on the ground that it violated double jeopardy because he was not in prison, but on conditional release, when it was imposed.

Supreme Court granted his motion to vacate the PRS term. Citing People v Williams (14 NY3d 198 [2010]), the court said, "[I]t was error to resentence defendant after his release from incarceration, when he had an expectation of finality in the court's original sentence."

The Appellate Division, First Department dismissed the prosecution's appeal as academic. Based on People v Lingle (16 NY3d 621 [2011]), it said Supreme Court erred in vacating the PRS term because Cintron was on conditional release, and therefore still serving his original sentence, when PRS was imposed. However, it concluded that the valid 2008 resentence could not be reinstated under Williams. "[A] term of PRS cannot now be added because the maximum expiration date of defendant's sentence has passed," the court said. "To add this term to his sentence would violate his legitimate expectation of finality in his sentence, which has been fully served."

The prosecution argues that reinstating the PRS term would not violate the double jeopardy clause because Cintron was still serving his original sentence when it was imposed and no resentencing is now required. If Supreme Court's order is reversed, it says, "defendant's sentence reverts back to the lawful one imposed on June 18, 2008, well before defendant's maximum expiration date" in 2009. It also argues that Cintron "cannot have an expectation of finality in an illegal sentence [without PRS] ... when the People have timely exercised their right to appeal."

For appellant: Bronx Assistant District Attorney Justin J. Braun (718) 838-7111
For respondent Cintron: Mark W. Zeno, Manhattan (212) 577-2523

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 Wednesday, February 12, 2014 (arguments begin at 1 p.m.)

No. 36 Hoover v New Holland North America, Inc.

This products liability case arose in October 2004, when Gary Hoover was using a tractor-mounted post hole digger in the backyard of his Niagara County home. His 16-year-old step-daughter, Jessica Bowers, was helping him by making sure the auger was vertical before Hoover set it in motion. Bowers's coat became snagged on the rotating driveline that connected the tractor's power take off with the gearbox of the digger. As she was pulled into the driveline, her right arm was severed above the elbow. The tractor and post hole digger were owned by Peter Smith, who had previously removed a plastic safety shield from the digger's gearbox after several years of use left it damaged beyond repair. The shield was meant to cover part of the driveline where it was attached to the gearbox with a bolt and nut, which protruded from the driveline.

Bowers brought this action against the seller of the post hole digger, CNH America LLC, and its distributor, Niagara Frontier Equipment Sales, Inc., among other defendants, alleging defective design. All defendants except CNH and Niagara Frontier settled during the trial for $4.6 million. The jury awarded Bowers $8.8 million in damages, apportioning 35 percent of the liability to CNH and 2 percent to Niagara Frontier.

The Appellate Division, Fourth Department affirmed, ruling Bowers submitted sufficient proof to establish that "a protruding bolt that attached the driveline to the gearbox was an entanglement hazard; the plastic gearbox shield used to guard against the protruding bolt could be damaged by normal use or foreseeable misuse of the digger; and there were design alternatives that would have reduced or eliminated the hazards in the subject product and would have resulted in only a nominal increase in cost. Thus, [Bowers] presented sufficient evidence that the digger was defectively designed, and ... that Smith's removal of the damaged gearbox shield did not constitute a substantial modification."

CNH and Niagara Frontier argue they cannot be held liable under a design defect theory because Smith's removal of the safety shield, and his failure to replace it when it was damaged after years of use, constituted a substantial modification of the digger. The product "had all necessary shields, including the gearbox shield, and was reasonably safe" when it was sold to Smith, they say. The Appellate Division's ruling "would require manufacturers to design safety components that will never wear out and will never need replacement" and would encourage "risky behavior by owners of products because it shifts to manufacturers the consequences of the owner's failure to perform maintenance and to keep equipment in safe condition."

For appellants CNH and Niagara Frontier: Paul F. Jones, Buffalo (716) 847-8400
For respondent Bowers: John A. Collins, Buffalo (716) 849-1333
For respondent Andrews: Joseph A. Matteliano, Buffalo (716) 852-2500

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 Wednesday, February 12, 2014 (arguments begin at 1 p.m.)

No. 37 Matter of Gupta v Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts

Federal prosecutors charged Brooklyn immigration attorney Raghubir K. Gupta in 2007 with helping undocumented aliens submit fraudulent applications for an amnesty program. He was convicted of one felony count of immigration fraud after a jury trial in U.S. District Court for the Southern District of New York in 2008, and was sentenced to 51 months in prison and fined $10,000. In 2010, the Appellate Division, Second Department struck Gupta's name from the roll of attorneys to reflect his automatic disbarment based on the federal felony conviction.

In 2012, the U.S. Court of Appeals for the Second Circuit vacated Gupta's criminal conviction and remanded the case for further proceedings, ruling the federal trial court violated his constitutional right to a public trial by excluding the public from jury selection without justification. Based on the Second Circuit's decision, Gupta moved at the Appellate Division to vacate its prior disbarment order and reinstate him to the practice of law.

The Appellate Division, Second Department vacated its disbarment order, but denied his motion for reinstatement. Instead, on its own motion, the court ordered that Gupta "is immediately suspended from the practice of law based on the acts of professional misconduct underlying the criminal allegations." The court authorized the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts to initiate a disciplinary proceeding against Gupta and directed it to serve him with a petition within 60 days.

Gupta argues the Appellate Division order suspending him from practice violated due process because he "had no notice of an application for suspension, no notice of the evidence upon which the application was based and no opportunity to respond." He says the suspension order should be reversed because the Grievance Committee had not opposed his reinstatement nor sought an interim suspension; he had no notice a suspension was being considered and no opportunity to argue why suspension was not appropriate; no facts justifying suspension were in the record before the Appellate Division and it did not explain the reasons for its decision; and there was "no evidence of misconduct which immediately threatens the public interest."

For appellant Gupta: Raghubir K. Gupta (pro se), Brooklyn (718) 222-1948
For respondent Grievance Committee: Mark F. DeWan (718) 923-6300

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 Wednesday, February 12, 2014 (arguments begin at 1 p.m.)

No. 38 Matter of The Association for a Better Long Island, Inc. v New York State Department of Environmental Conservation

In 2010, the State Department of Environmental Conservation (DEC) amended its regulations in 6 NYCRR Part 182 to extend its enforcement power under the State's Endangered Species Act to include "incidental" takings of protected species. The regulations require a permit for "any activity that is likely to result in the take or a taking of any species listed as endangered or threatened," including hunting, trapping, "and all lesser acts such as disturbing, harrying or worrying." They define an incidental taking as one "that is incidental to, and not the intended purpose of, an otherwise lawful activity." Among other things, the amendments would require landowners to obtain an "incidental take permit" before conducting any activity that would destroy or degrade the habitat of a protected species.

The Town of Riverhead and its Community Development Agency, along with other plaintiffs, brought these consolidated actions to challenge the amended regulations on procedural and substantive grounds. Riverhead owns 3,000 acres of property on the site of the closed Grumman manufacturing facility, now called Enterprise Park at Calverton, and it plans to subdivide and redevelop the site. It says the property provides habitat for several listed species, including the tiger salamander and short eared owl, and thus would be subject to regulation under the challenged amendments. The DEC moved to dismiss for lack of standing, arguing the plaintiffs had not suffered any actual injury because they had not applied for permits nor been subject to any DEC action under the regulations.

Supreme Court dismissed the suits, ruling the plaintiffs lacked standing and their claims were not ripe for review because none of them "has shown that they are currently engaged in an activity regulated under Part 182.... The fact that the petitioners may be required, in the future, to undergo the DEC Part 182 review process is insufficient to constitute an actual or concrete injury." It said they had not applied for a permit, sought a DEC determination of what activities would be subject to regulation, nor had they been cited or fined for a violation under Part 182.

The Appellate Division, Third Department affirmed. It ruled the procedural challenges were ripe, but still must be dismissed for lack of standing because "petitioners' allegations that they may be required to comply with the regulations is potential, speculative harm that is insufficient to confer standing."

Riverhead argues landowners "affected by illegally adopted regulatory amendments must have standing to assert their invalidity at the time of adoption" or the four-month statute of limitations will bar court review. "The Third Department's decision ... creates an untenable "Catch 22" situation. Procedural challenges to improperly adopted regulations ... cannot be brought until the property owner is subjected to the amendments, by which time the procedural challenges would be time barred. No party would have standing to bring such a challenge within the very short four-month statute of limitations period."

For appellant Riverhead: Frank A. Isler, Riverhead (631) 727-4100
For respondent DEC: Assistant Solicitor General Andrew B. Ayers (518) 474-0768

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 Wednesday, February 12, 2014 (arguments begin at 1 p.m.)

No. 39 People v Anthony Lewis

Anthony Lewis was arrested in May 2007 and charged with participating in a scheme to produce counterfeit credit cards, with account information stolen from bank customers in other states, and using the fraudulent cards to make purchases at stores in Manhattan. In January 2007, investigators from the New York County District Attorney's Office had obtained wiretap warrants to eavesdrop on Lewis's phone calls. In March 2007, acting without a warrant, the investigators attached a global positioning system (GPS) device to his car to track its movements and assist them in following him. He was found guilty of multiple larceny, forgery, and identity theft charges. After the trial and before sentencing, the Court of Appeals held in People v Weaver (12 NY3d 433 [2009]) that a warrant is required for continuous monitoring with a GPS tracker. The trial court summarily denied Lewis's motion to set aside the verdict based on Weaver. He was sentenced to 9⅓ to 28 years in prison.

Lewis argued on appeal that he was entitled to a new trial and suppression of the warrantless GPS evidence based on Weaver. Among other claims, he argued the trial court violated CPL 310.20(2) by listing the names and locations of stores where the forged cards were used, rather than the victims -- the banks and cardholders -- to distinguish between similar counts on the verdict sheet. The statute permits courts to use "names of complainants" on verdict sheets.

The Appellate Division, First Department affirmed, saying that "the very limited GPS surveillance in this case was permissible under Weaver.... Unlike the sophisticated device in Weaver..., it did not track defendant continuously. Rather, reports indicate that the device was only accessed by the police on two days to enhance their visual surveillance." Even if it violated Weaver and the 2012 Supreme Court ruling in United States v Jones (132 S Ct 945), any error was harmless because the GPS evidence "played a minimal role in the prosecution's overwhelming case." Finding the verdict sheet complied with CPL 310.20(2), the court said, "The stores were proxies for the complainants in that they are victims of defendant's fraudulent use of the credit cards, even if they do not bear the ultimate loss."

Lewis argues the GPS evidence must be suppressed even if the device was attached to his car for three weeks, only worked for two weeks, and did not track him continuously. "Weaver simply does not turn on such fine distinctions. What mattered: that the GPS did not 'present[] ... the use of a mere beeper to facilitate visual surveillance during a single trip.'" He says the error was not harmless because the events on just one of the days the device was used produced half of the charges that were submitted to the jury. Naming stores on the verdict sheets violated CPL 310.20(2) and requires automatic reversal, he says. The Appellate Division's "creation and approval of complainant 'proxies' -- defined as anyone 'affected' by a defendant's conduct -- would expand the meaning of 'complainant' beyond the statute's limits. Aside from including all witnesses, such 'proxies' would embrace family members and friends of crime victims as 'affected' persons."

For appellant Lewis: Susan H. Salomon, Manhattan (212) 577-2523 ext. 518
For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000

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 Wednesday, February 12, 2014 (arguments begin at 1 p.m.)

No. 53 Matter of Subway Surface Supervisors Assn. v New York City Transit Authority

The New York City Transit Authority (TA) employs two categories of supervisory personnel at its subway stations, Station Supervisor Level I (SS-I) and Station Supervisor Level II (SS-II). Station Supervisor is a single job title, the skills required for SS-I and SS-II are the same, and job applicants for either level take a single competitive civil service examination. When the two job categories were created in 1984, some duties of SS-Is and SS-IIs differed and SS-IIs were paid about $14,000 more in base annual salary. Since 2003, the TA has been shifting work from SS-IIs to SS-Is. The union representing SS-IIs, the Transit Supervisors Organization, sought to block the work reassignments, but its improper practice charge was dismissed.

The union representing SS-Is, the Subway Surface Supervisors Association (SSSA), now contends there are no significant differences between the duties of the two job levels and, because they perform the same work, SS-Is are entitled to the same pay as SS-IIs under Civil Service Law § 115 and the state and federal Equal Protection Clauses. Section 115 states, "In order to attract unusual merit and ability to the service of the state of New York, to stimulate higher efficiency among the personnel, to provide skilled leadership in administrative departments, to reward merit and to insure to the people and the taxpayers of the state of New York the highest return in services for the necessary costs of government, it is hereby declared to be the policy of the state to provide equal pay for equal work, and regular increases in pay in proper proportion to increase of ability, increase of output and increase of equality of work demonstrated in service."

Supreme Court denied the TA's motion to dismiss the suit, ruling that SS-Is would be entitled to the same pay as SS-IIs if they perform the same work. It found there were questions of fact as to whether SS-Is and SS-IIs perform the same work.

The Appellate Division, First Department affirmed on a 3-2 vote, holding that section 115 codifies an enforceable public policy. "Contrary to the TA's position, the issue here is not whether the union negotiated an unfavorable deal but whether the TA has violated public policy. Such disputes are amenable to review by the courts." Regarding the constitutional issue, it said, "[T]he fact that SS-Is bargained for their salary has no bearing on whether they have a viable equal protection claim, and we find that the petition sufficiently alleges the claim.... Indeed, because of SSSA's inability to control SS-II pay levels, only a judicial declaration that the TA illegally differentiated between the two classes of workers, if that is indeed what occurred, could prevent a salary disparity from re-emerging."

The dissenters argued, "[A]ll of the case law supports [the TA's] position that Civil Service Law § 115 'merely' enunciates a policy as opposed to providing an enforceable statutory right." They also found there was no viable constitutional claim. SSSA "has not cited any case law in which a union, after agreeing to a salary schedule through collective bargaining, has successfully prosecuted a claim that the equal protection clause has been violated because the salary schedule it agreed to was lower than the salary schedule for similarly situated employees."

For appellant Transit Authority: Robert K. Drinan, Brooklyn (718) 694-4667
For respondent SSSA: Gail M. Blasie, Manhattan (212) 267-9090

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, February 13, 2014 (arguments begin at noon)

No. 40 People v Terence McCray *(papers sealed)*

Terence McCray is serving 22 years in prison for first-degree rape. He first met the complainant, an 18-year-old woman with an extensive history of mental illness, at an Albany bus stop in April 2009, when he was 40. They walked for several hours and talked about various things, including sex, and McCray gave her a back massage in a parked vehicle. She denied anything else happened, but McCray testified at his trial that she performed oral sex. While out on a date in May 2009, they stopped at the apartments of two of McCray's friends, where she admitted exchanging sexual innuendos with him and engaging in consensual kissing and fondling. Then their testimony diverged. She said he insisted on having intercourse, but she refused and left the apartment. McCray said the complainant tried to initiate sex, but he wanted to find a more private place. By both accounts, they ended up in an abandoned house. The complainant testified that McCray demanded to have intercourse and she resisted, he punched and choked her, and she submitted after an extended struggle. She reported the incident to police from a pay phone. McCray testified that after they had consensual intercourse the complainant demanded money, then grabbed his pants and took cash from his pocket, and she was injured as he struggled with her to retrieve his money. Prior to trial, McCray sought disclosure of all the complainant's mental health records. After reviewing the records in camera, County Court turned over a limited number that it found "pertinent to this case."

The Appellate Division, Third Department affirmed McCray's conviction in a 3-2 decision, saying the trial court's approach to the records "properly balanced defendant's 6th Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential.... We have reviewed the victim's voluminous mental health records and conclude that the court provided an appropriate sample of documents that covers all of the victim's relevant and material mental health issues." It said the court did not err in withholding records that suggest the complainant may have falsely accused her father of sexually abusing her when she was 13 since "this evidence would not be admissible under New York's Rape Shield Law because it is far too different and attenuated" from this case "and we cannot envision how such information might have led to other material and admissible evidence."

The dissenters, noting the defense received just 28 pages "out of the thousands of pages" of records the trial court reviewed, said "criminal defendants are entitled to more than just a 'sample' of documents addressing a key witness's mental health problems that could affect his or her testimony," especially in a case "which the majority correctly characterizes as presenting 'a classic he-said she-said credibility determination.'" Records of possibly false allegations of sexual abuse are relevant, even if inadmissible, they said. "When considered in conjunction with the many undisclosed records regarding the victim's impaired memory, hallucinations, ability to recall events, sexual fantasies and flashbacks, the failure to disclose these records was error. The undisclosed records all raise issues that would affect the victim's credibility or ability to recall events, and the allegations of prior sexual assault -- if proven to be false -- would be extremely damaging to the People's case. Regardless of their admissibility at trial, defendant was entitled to be aware of and afforded the opportunity to investigate these matters prior to trial."

For appellant McCray: Paul J. Connolly, Delmar (518) 439-7633
For respondent: Albany County Assistant District Attorney Steven M. Sharp (518) 487-5460

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, February 13, 2014 (arguments begin at noon)

No. 41 Matter of Gabriela A. *(papers sealed)*

Gabriela, a 15-year-old Westchester County girl who had been adjudicated a person in need of supervision (PINS), appeared in Family Court on three PINS violation petitions in February 2012. The court remanded her to a nonsecure detention facility, but she absconded the same day and the court issued a warrant for her arrest and return to the nonsecure facility. In March 2012, five probation officers executed the warrant at her home. Gabriela refused to cooperate, shouted obscenities at the officers, tried to run away and struggled to prevent them from handcuffing her, at one point grabbing hold of one of the open cuffs, but the officers prevailed. Based on her conduct during the arrest, the County Attorney's Office filed a juvenile delinquency petition charging her with resisting arrest and obstructing governmental administration, among other things.

After a fact-finding hearing, Family Court rejected Gabriela's argument that the agency was improperly "bootstrapping" a PINS case into a juvenile delinquency case. It found she had committed acts which, if committed by an adult, would have constituted the crimes of resisting arrest and obstructing governmental administration, adjudicated her a juvenile delinquent and imposed a conditional discharge.

The Appellate Division, Second Department reversed and dismissed the juvenile delinquency petition. "'A PINS is one who is, inter alia, "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care"'...," the court said. "Under the particular circumstances of this case, [Gabriela's] conduct was consistent with PINS behavior, not juvenile delinquency." It concluded, "'[T]he Family Court may not do indirectly what it is prohibited from doing directly -- placing a PINS in a secure facility'...."

The County Attorney's Office argues that "Gabriela's conduct crossed the line from PINS behavior over to those of a juvenile delinquent," and the Second Department should have deferred to Family Court's credibility determination. "Gabriela's admitted conduct against peace officers (which fell short of an actual attempted assault...) still constituted acts for which a PINS could be adjudicated a juvenile delinquent, as such acts, if committed by an adult, would unquestionably constitute the crimes of Resisting Arrest and Obstructing Governmental Administration in the Second Degree," it says. "Furthermore, the decision of the Second Department, in essence, changes a prior adjudication as a PINS into a shield against an adjudication as a juvenile delinquent, as well as a sword which can be utilized to justify seriously defiant and unequivocally illegal conduct against any peace officer."

For appellant Westchester County Attorney:
Associate County Attorney Linda M. Trentacoste (914) 995-2839
For respondent Gabriela A.:
George E. Reed, Jr., White Plains (914) 946-5000

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, February 13, 2014 (arguments begin at noon)

No. 42 People v Diane Wells

Diane Wells was charged with assaulting her wealthy mother in May 2005 in their Manhattan apartment. After a jury trial in Criminal Court, she was convicted of a misdemeanor count of third-degree assault and sentenced to 60 days in jail. In March 2010, the Appellate Term, First Department reversed the conviction and remanded the case for a new trial, finding the jury had been given improper instructions. The prosecution applied for leave to appeal to the Court of Appeals and, while the application was pending, Criminal Court adjourned the case. A Court of Appeals Judge denied leave to appeal on May 14, 2010. The case was not recalendared in Criminal Court until August 23, 2010. On that date, Wells moved to dismiss the assault charge pursuant to CPL 30.30 on the ground that, because more than 90 days had passed since the date of the Court of Appeals order denying leave to appeal, her statutory right to a speedy trial would be violated.

Criminal Court granted her motion to dismiss, finding the 101-day period from May 14 to August 23, 2010 should be charged to the prosecution. "Pursuant to CPL 30.30(5)(a), where a defendant is to be retried following an order for a new trial, the action is deemed to have commenced on [']the date the order occasioning a retrial becomes final.['] Here, the case law supports, and the parties concede, that the order remanding the matter for a new trial became final on May 14, 2010 when the Court of Appeals denied the People's application for leave to appeal." Therefore, it said, the 90-day speedy trial period began to run on that date and expired on August 12, 2010, without any statement of readiness by the prosecution.

The Appellate Term, First Department reversed and reinstated the assault charge. Relying on People v Vukel (263 AD2d 416 [1st Dept 1999]), it said that, because the case had been adjourned by the trial court while the application for leave to appeal was pending, the entire time from May 14 to August 23, 2010 should be excluded from the speedy trial period. In Vukel, the Appellate Division held that the time from denial of leave to appeal until the next adjourned court date is excludable as a "period of delay resulting from ... appeals" under CPL 30.30(4)(a).

Wells argues that Vukel "eviscerates the long-standing rule that the speedy trial clock starts on the date that this Court denies leave. In virtually every case, the trial court adjourns proceedings during the pendency of this Court's decision on a leave application.... Effectively, the 'Vukel exception' would turn on its head this Court's conclusion that CPL 30.30 was enacted to 'discourage prosecutorial inaction'.... Under Vukel, the People are able to wait through the duration of an adjournment in the trial court -- even after this court has denied leave, and the adjournment has no more legitimate purpose -- without advancing the case, and that inaction has no consequences under CPL 30.30. Such a result is contrary to this Court's jurisprudence, well-settled case law, and the spirit of the speedy trial statute."

For appellant Wells: Ross M. Kramer, Manhattan (212) 446-2323
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

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, February 13, 2014 (arguments begin at noon)

No. 43 People v Todd Johnson

Todd Johnson and three other men were confronted by police officers as they stood in front of a Harlem deli in October 2010. Johnson's companions were members of a gang called the "40 Wolves," officers said, and one of his companions was partially blocking the entrance to the deli. Several officers ordered them to leave the corner, but the men objected that they lived in the neighborhood and were doing nothing wrong. When they refused to move, they were arrested for disorderly conduct. Johnson was later searched at the precinct and officers found cocaine in a pocket of his gym shorts. He was then charged with drug possession.

Johnson moved to suppress the drug evidence on the ground that the police did not have probable cause to arrest him for disorderly conduct under Penal Law § 240.20(6), which states, "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: ... He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." Supreme Court denied the suppression motion. Johnson then pled guilty to criminal possession of a controlled substance in the third degree and was sentenced to two years in prison.

The Appellate Division, First Department affirmed. "Given the information the [arresting] officer had about the gang problems that had occurred at that location in the past and the gang background of several of the men, he had a reasonable basis to believe their presence could cause public inconvenience, annoyance or alarm," the court said. "Defendant's failure to obey the police officer's direction provided probable cause to arrest him."

Johnson argues the prosecution failed to establish probable cause because there was no proof the arrested men "engaged in any disruptive *conduct* demonstrating intent to cause a breach of the peace," and the Appellate Division erred in holding -- based on the "gang background" of his companions and "past 'gang problems' in the vicinity" -- that his "mere *presence* in a public place" could satisfy the public harm element of section 240.20. He says this Court "has *never* found a violation of [section] 240.20 absent evidence of disruptive behavior by the defendant in the presence of members of the public." He argues the Appellate Division decision renders the statute unconstitutionally vague because it "leaves citizens without guidance as to the conduct" it prohibits and "gives police broad discretion to make arrests in an arbitrary fashion."

For appellant Johnson: Stephen M. Sinaiko, Manhattan (212) 715-9100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

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, February 13, 2014 (arguments begin at noon)

No. 44 People v Marsha Sibblies

During a traffic stop in the Bronx in November 2006, police officers allege that Marsha Sibblies refused to hand over her license and registration and then physically resisted their efforts to obtain the documents, remove her from the car and finally to arrest her, at one point rolling up her window on an officer's arm. On February 8, 2007, she was charged in a misdemeanor complaint with third-degree assault and other charges, and on February 22 the prosecutor filed an off-calendar statement of readiness for trial. At the next court appearance on March 28, 2007, the prosecutor said, "The People are not ready at this time. The People are continuing to investigate and are awaiting medical records" concerning the treatment of the injured officer. The prosecutor and defense counsel requested adjournments, and the court adjourned the case to June 7 for trial. On May 23, 2007, the prosecutor filed a certificate of readiness for trial.

Sibblies moved to dismiss the charges on speedy trial grounds. She argued the prosecutor's first statement of readiness on February 22 was "illusory" because the prosecutor stated at her next court appearance that she was not ready for trial, and therefore the prosecution should be charged with the period from February 8 to May 23, 2007, when the second statement of readiness was filed. This would exceed the 90 days allowed by CPL 30.30. Supreme Court found the prosecutor acted in good faith and denied the motion. Sibblies was acquitted of assault, but convicted of obstructing governmental administration and resisting arrest and sentenced to a conditional discharge.

The Appellate Division, First Department affirmed, saying, "The People's unequivocal contention that they could have proceeded without the medical records is both undisputed and plainly correct.... The People indicated that they in fact subsequently changed their strategy for presenting the case, and decided to offer the medical records in support of the assault charge (of which defendant was ultimately acquitted). Since the People were plainly ready to present a prima facie case when they filed their certificate of readiness on February 22, that certificate was not illusory...."

Sibblies argues, "[T]his Court has never held that 'actual readiness' encompasses only the minimum level of preparedness to [go] forward as a matter of law. Such a limited interpretation of the phrase 'ready for trial' is inconsistent with the legislative purpose -- to promote speedy trials by sanctioning prosecutorial delay.... The point of CPL 30.30 was to require the prosecutor to be actually ready for trial within the designated time frame. This means doing all that is necessary to proceed, including determining what evidence is needed to go to trial. Indeed, even assuming that the prosecution only concluded they needed the medical records to go to trial after declaring ready, this only indicates that the prosecution was mistaken about their own state of readiness; the declaration of readiness was still illusory."

For appellant Sibblies: Jonathan Garelick, Manhattan (212) 577-3607
For respondent: Bronx Assistant District Attorney Kayonia L. Whetstone (718) 838-7143

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, February 13, 2014 (arguments begin at noon)

No. 24 Melcher v Greenberg Traurig, LLP

James L. Melcher is asking the Court to reinstate his damages claim for attorney deceit under Judiciary Law § 487 against Greenberg Traurig, LLP and a partner in the firm, Leslie D. Corwin. Melcher's claim arises from their defense of Apollo Medical Fund Management and its principal, Brandon Fradd, in a prior action Melcher brought to recover his membership share of profits under Apollo's operating agreement. Melcher alleges Corwin told him and his attorney at a January 27, 2004 meeting that his rights to a share of Apollo's profits had been diminished by a 1998 amendment to the agreement and that he had confirmed the authenticity of the amendment with Jack Governale, the lawyer who was said to have drafted it. Days after the meeting, according to Melcher's complaint, Fradd told Corwin he had accidentally set fire to the two-page amendment while making tea, destroying the first page and singeing the second. Melcher moved to compel production of the signed original of the amendment and, on February 17, 2004, Greenberg and Corwin moved to dismiss the suit against Apollo based on the amendment. In a March 20, 2004 letter to Supreme Court, Melcher's attorney accused Fradd, Greenberg and Corwin of "concealment of material facts" and "misleading representations" regarding the amendment, including its partial destruction. Melcher contends he first learned the amendment was a "back-dated forgery" when Governale was deposed on December 7, 2005 and denied drafting the amendment or having any knowledge of it.

Melcher commenced this action against Greenberg and Corwin on June 25, 2007. Supreme Court, applying a three-year statute of limitations, denied the defendants' motion to dismiss the lawsuit as time-barred.

The Appellate Division, First Department reversed and dismissed the suit on a 3-2 vote. The majority said the March 20, 2004 letter by Melcher's counsel demonstrates that he knew of Greenberg's and Corwin's "alleged deceit concerning Fradd's destruction of the purported amendment more than three years before this action was commenced." It said, "Corwin's concealment from the court of information regarding the claimed incineration of the purported document upon which he based his clients' motion to dismiss the Apollo Management complaint was actionable under [Judiciary Law § 487].... This action is time-barred by reason of plaintiff's admitted awareness of the alleged concealment for more than three years before he filed suit."

The dissenters said the March 20, 2004 letter did not trigger the statute of limitations because it "did not accuse the defendants of collusion or deceit under Judiciary Law § 487," but instead "only accused Fradd and Apollo Management of concealment in connection with an already submitted motion to dismiss and merely accused the defendants of omissions to the court in connection therewith." Melcher's claim is based on Corwin's alleged violation of section 487 on January 27, 2004, when he allegedly told Melcher about the amendment, the dissenters said. Melcher "did not become aware of this alleged deception until December 7, 2005, when Governale was deposed. Therefore, it was not until this date, when all the facts necessary to a cause of action ... were known that plaintiff's cause of action accrued."

For appellant Melcher: James T. Potter, Albany (518) 436-0751
For respondents Greenberg Traurig et al.: Roy L. Reardon, Manhattan (212) 455-2000

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 Tuesday, February 18, 2014

No. 45 Isabella v Koubek

Roberta Oldenborg was driving home from a business meeting in November 2007 when she collided near Coxsackie with a car driven by Doris Hallock. Oldenborg's co-worker, Matthew Isabella, was a passenger in her car and was injured in the accident. Because the injury occurred in the course of his employment, Isabella was barred by Workers' Compensation Law § 29(6) from suing Oldenborg, and he was eventually awarded workers' compensation benefits.

In 2009, Isabella brought this federal action against Hallock and her husband, Peter Hallock, who owned the car she had been driving. Isabella claimed Doris Hallock's negligent driving was the proximate cause of his injuries. The Hallocks then filed a third-party complaint against Oldenborg's husband, Michael Koubek, who owned the car she had been driving. The Hallocks claimed that Oldenborg's negligent driving was the proximate cause of Isabella's injuries and that Koubek was liable under New York's Vehicle and Traffic Law § 388, which provides that a vehicle owner is liable for injuries resulting from the negligent permissive use of the vehicle. Koubek moved for summary judgment dismissing the Hallocks' third-party complaint, arguing that his wife's statutory immunity under Workers' Compensation Law § 29(6) protected him from liability.

U.S. District Court for the Northern District of New York denied Koubek's motion. Relying on a New York Supreme Court decision, the District Court found that Koubek could be vicariously liable for his wife's negligence under Vehicle and Traffic Law § 388 despite her statutory immunity. The District Court said, "The purpose of [Workers' Compensation Law § 29(6)] will not be frustrated by allowing this suit to proceed since the [Hallocks and Koubek] are unrelated by employment." Prior to trial, the parties agreed to a settlement in which Isabella would receive $800,000 and the jury would apportion liability between Koubek and the Hallocks. They also agreed that if District Court's motion decision is reversed on appeal and the Hallocks' claim against Koubek dismissed, the Hallocks would pay the entire settlement. The jury found Koubek 90 percent liable and the Hallocks 10 percent liable for the accident. Koubek appealed.

The U.S. Court of Appeals for the Second Circuit is asking the New York Court of Appeals to resolve the "apparent conflict" between the two statutes, "both of which arguably apply in this case." In a certified question, it asks, "Whether a defendant may pursue a third-party contribution claim under New York Vehicle and Traffic Law § 388 against the owner of a vehicle, where the vehicle driver's negligence was a substantial factor in causing the plaintiff's injuries, but the driver is protected from suit by the exclusive remedy provisions of New York Workers' Compensation Law § 29(6).

For appellant Koubek: Arthur J. Siegel, Albany (518) 533-3000
For respondent Hallocks: Glenn A. Kaminska, Albertson (516) 294-5433

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 Tuesday, February 18, 2014

No. 46 People v Tyrone Sweat

Tyrone Sweat and his brother, Michael, were charged with possession of stolen property in Buffalo in 2011. Sweat was granted transactional immunity after testifying against Michael before the grand jury. When the prosecutor called him as a witness at his brother's trial in 2012, Sweat refused to testify. County Court explained that, since he had immunity, he had no Fifth Amendment right to remain silent, but he still refused. The prosecutor asked that Sweat "be cited for civil contempt and confined until he agrees to testify or until the end of the proceeding, and also we'll charge him with criminal contempt for refusing to be sworn and testify." The court found him in contempt, placed him in custody, and appointed counsel to represent him. After conferring with counsel, Sweat again refused to testify and refused to explain why. The court returned him to custody, saying, "I find you're in contempt in my immediate view and presence for engaging in conduct which has obstructed and threatened to obstruct these proceedings and impair ... my authority to preside over these proceedings and, therefore, I will issue a mandated commitment." Sweat was brought to court the next day and still refused to testify. His lawyer said he was "morally opposed to testifying against his brother." Sweat was held until the end of the two-day trial, when his brother was acquitted and the court ordered Sweat released.

Three weeks later, Sweat was arrested on two misdemeanor counts of criminal contempt. Buffalo City Court dismissed the charges, finding further prosecution was barred by double jeopardy.

Erie County Court affirmed. It said prosecution for criminal contempt would be barred by double jeopardy only if the prior contempt proceedings were criminal, rather than civil, in nature, and it found "the proceedings amounted to a hybrid combination of both criminal and civil characteristics." It held, "[A]lthough the court never formally pronounced sentence upon [Sweat], it clearly confined him pursuant to a Mandate of Commitment (Judiciary Law 752) upon a finding that his conduct obstructed the proceedings and impaired the court's authority to preside (Judiciary Law 750[1] ...). By the court's own language, then, the proceedings were perforce criminal in nature and under these circumstances, this court is compelled to conclude that the defendant's release at the conclusion of the trial was tantamount to a sentence of time served."

The District Attorney's Office argues that prosecution on the criminal contempt charges is not barred because the prior contempt proceedings were intended "to compel defendant's testimony rather than to punish him" and, therefore, "the contempt proceeding was not 'criminal' for double jeopardy purposes. The lack of an unconditional sentence (or any sentence for that matter) or a fine, combined with the court's returning defendant to court on three occasions and the release of defendant immediately when the opportunity to testify had passed, indicates that the purpose was remedial or coercive rather than punitive."

For appellant: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424
For respondent Sweat: John R. Nuchereno, Buffalo (716) 875-2503

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 Tuesday, February 18, 2014

No. 47 Palladino v CNY Centro, Inc.

Until his termination in 2008, Eugene Palladino was employed as a bus driver by CNY Centro, Inc., and was represented by the Amalgamated Transit Union, Local 580, an unincorporated association. Centro disciplined him in 2007 after he informed the dispatcher that he had been called out of town and could not make it back in time for his regular shift. Centro concluded that he gave false reasons for his inability to report for work and suspended him for five days. The Union filed a grievance on his behalf and sought arbitration, but Palladino refused to provide information it sought in investigating the matter. Months later, citing "significant" concerns about the merits of his grievance and his failure to cooperate, the Executive Board of Local 580 voted unanimously to withdraw the grievance. Centro sought to terminate Palladino in 2008, based in part on his late departure at the start of his shift and "unnecessary delay" on a bus run. The charges again included "misrepresentation," based on a videotape from his bus that contradicted his explanation for the delay. The Union negotiated a settlement that would avoid termination and instead impose a 12-day suspension, but Palladino did not return the union's call urging him to accept the deal and did not attend his termination hearing. Centro discharged him. Palladino filed a grievance, but the Union's Executive Board voted unanimously against submitting it to arbitration.

Palladino brought these consolidated actions against Local 580 and Centro to challenge both disciplinary actions. His suit included claims for breach of the duty of fair representation against the Union and claims for breach of contract against both defendants. The Union and Centro moved for summary judgment dismissing all claims against them.

Supreme Court dismissed all claims against the Union except for breach of the duty of fair representation. "Contrary to ... the Union's ... contentions that the General Association Law, Section 13, bars Mr. Palladino's action, I find that Palladino's claim alleging breach of duty of fair representation does not rise to the level of an intentional tort requiring proof that the individual members of the Union ratified the alleged negligence complained of."

The Appellate Division, Fourth Department reversed and dismissed the remaining claims. It relied on Martin v Curran (303 NY 276 [1951]), which held that, in a tort action against an unincorporated association, the plaintiff must allege and prove that every member of the association approved or ratified the wrongful conduct. The court agreed with Local 580 "that the Union is a voluntary unincorporated association and that plaintiff has failed even to plead that the Union's conduct was authorized or ratified by the entire membership of the association" and, therefore, the claim "that the Union breached its duty of fair representation is 'fatally defective.'"

Palladino argues the Appellate Division erred in applying the Martin rule to an action against a labor organization for breach of the duty of fair representation "rather than the exception to unanimous ratification carved out by this Court in Madden v Atkins (4 NY2d 283 [1958]) where elected union officials are delegated with authority to act on behalf of the union membership."

For appellant Palladino: Robert Louis Riley, Syracuse (315) 254-4233
For respondents Local 580 et al: Kenneth L. Wagner, Syracuse (315) 422-7111
For respondent Centro: Craig M. Atlas, East Syracuse (315) 437-7600

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 Tuesday, February 18, 2014

No. 48 People v Enrique Rivera

Enrique Rivera was charged with second-degree murder for the fatal stabbing of Edgar Ojeda during a brawl at El Borinquen Bar in Brooklyn in February 2005. The fatal injury was a five inch deep stab wound in Ojeda's chest; he also suffered shallower non-fatal wounds to his upper back and shoulder. When Rivera was arrested the next day, he told the police that he got into a minor confrontation and "right away the crowd rose. Then I felt punches and grabbing. So I take out a knife, used it in self defense, swinging it at the crowd not knowing that I really hurt anyone." At his first trial, the judge submitted first and second-degree manslaughter to the jury as lesser-included offenses. The jury deadlocked and the court declared a mistrial.

At the retrial, Supreme Court submitted first-degree (intentional) manslaughter as a lesser-included offense, but denied Rivera's request to submit second-degree (reckless) manslaughter to the jury, saying there was no evidence to support the charge. "The medical examiner testified in this case that these were stab wounds that could not have been inflicted by someone just swinging a knife around. They had to have been stabbed -- stabbing wounds caused by intentional infliction. So there is no basis to submit a reckless count on the evidence in this case." The jury acquitted Rivera of murder and convicted him of first-degree manslaughter. He was sentenced to 25 years in prison.

The Appellate Division, Second Department affirmed. "Viewing the evidence in the light most favorable to the defendant..., we find that there was no reasonable view of the evidence that would support a finding that the defendant acted recklessly when he stabbed the victim...," it said. "Accordingly, the Supreme Court properly denied the defendant's request to charge manslaughter in the second degree."

Rivera argues the trial court violated his due process right to a fair trial by refusing to submit reckless manslaughter to the jury. "Here, a defense eye-witness testified that Edgar Ojeda was killed during a sudden barroom brawl among people who had been drinking, during which appellant was surrounded by several angry men and numerous people threw punches," he says. "This evidence of a chaotic fight involving multiple people, as well as evidence of appellant's intoxication, provided a reasonable basis for the jury to conclude that appellant's *mens rea* was reckless rather than intentional." He says the nature of the victim's wounds "did not make this the rare case in which the injuries were so extreme that they conclusively established an intent to cause death or serious physical injury."

For appellant Rivera: Leila Hull, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Solomon Neubort (718) 250-2514

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 Tuesday, February 18, 2014

No. 49 Albunio v City of New York

Attorney Mary D. Dorman represented two former officers of the New York Police Department, Captain Lori Albunio and Lieutenant Thomas Connors, in a civil rights action under the New York City Human Rights Law seeking damages for retaliation and constructive discharge from the NYPD. In retainer agreements, each plaintiff agreed to pay Dorman $2,500 upon executing the agreement, $5,000 if the case went to trial, and 33⅓ percent "of the sum recovered, whether recovered by suit, settlement or otherwise." After trial, a jury awarded $479,473 to Albunio and $507,198 to Connors. Dorman applied for counsel fees under NYC Administrative Code § 8-502(f) and was awarded $279,756 in fees and $17,070.04 for her trial work. When the City appealed, Dorman and her clients signed separate retainer agreements providing that, if successful, Dorman would be entitled to any statutory counsel fees for appellate work "in their entirety." After the judgment was affirmed by the Appellate Division and this Court, Dorman applied for statutory fees under section 8-502(f) and was ultimately awarded $267,732.50 in appellate fees and $3,053.43 in disbursements.

When a dispute arose between Dorman and her clients over calculation of the contingency fee, Dorman sought an order interpreting and enforcing the retainer agreements. She argued that her one-third contingency fee should be based on the total amount of the jury verdict plus the statutory fees awarded for her trial work. Her clients argued the contingency fee should be based solely on the jury award and then offset by the statutory counsel fees awarded for the trial. They also argued Dorman's contingency fee should be offset by the $7,500 in retainer fees they each had paid, as well as by any statutory fees awarded for appellate work.

Supreme Court ruled for Dorman on the primary issue, holding she was entitled to one third of the statutory fee award for trial work and one third of the jury verdict. It ruled her clients were entitled to an offset for their $7,500 in retainer fees, but not for statutory appellate fees.

The Appellate Division, First Department affirmed, saying, "The broad terms of the contingency fee agreement providing for a fee of 33⅓ percent of 'the sum recovered, whether recovered by suit, settlement or otherwise,' unambiguously require that the award of attorneys' fees [for trial work] be included in 'the sum recovered'.... Nor does this State follow the rule found in certain federal statutes that contingency counsel must take the larger of the contingency fee or the statutory fee...."

Albunio and Connors argue that statutory counsel fees should ordinarily be credited against an attorney's contingency fee. They say statutory fees may be added to the jury verdict for the purpose of determining the contingency fee only "if the clients specifically agree to such an arrangement. But when the retainer agreement simply specifies that the lawyer should receive a certain percentage of the 'sum recovered,' a client would not understand that the 'sum recovered' included statutory fees which are not mentioned anywhere in the retainer agreement." They also argue the appellate fee award must be subtracted from Dorman's contingency fee based on federal precedents.

For appellants Albunio and Connors: Leon Friedman, Manhattan (212) 737-0400
For respondent Dorman: Paul O'Dwyer, Manhattan (646) 230-7444

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 Wednesday, February 19, 2014

No. 63 Matter of Kapon v Koch

William I. Koch, a wealthy wine collector, brought suit in California Superior Court against Rudy Kurniawan in 2009, alleging that Kurniawan sold him 149 bottles of counterfeit wine through Acker, Merrall & Condit Company (AMC), a New York dealer in fine and rare wines. Kurniawan was later indicted on federal fraud charges for allegedly selling counterfeit wine. In 2012, Koch served subpoenas in New York, pursuant to CPLR 3119, on John Kapon, chief executive officer of AMC, and Justin Christoph, an AMC employee, to obtain discovery in the California action. They are not parties in the California case. Koch had sued AMC in New York in 2008, alleging it sold him five bottles of counterfeit wine consigned by Kurniawan, but he did not take depositions from Kapon or Christoph before a March 2010 discovery deadline expired. The New York action is still pending. Kapon and Christoph commenced this special proceeding to quash the subpoenas or, in the alternative, to obtain a protective order limiting the scope and use of their depositions to the California action, among other things. They contended Koch was using the third-party subpoenas to evade the cutoff of discovery in the New York case.

Supreme Court denied the petition to quash and dismissed the proceeding. Since a 1984 amendment to CPLR 3101(a)(4) removed language requiring a showing of "special circumstances" to obtain disclosure from nonparties, it said, conflicting interpretations within the Appellate Division have left unclear the proper standard for enforcing such subpoenas. However, it said the question was "academic" in this case because Koch "has demonstrated that the information he seeks from petitioners is not reasonably available either from Kurniawan, or from any other source." It ruled that any motion to limit the scope or use of the depositions should be decided by the California court.

The Appellate Division, First Department affirmed. "A heightened standard of review does not apply to applications brought pursuant to CPLR 3119(e) for a protective order or to quash an out-of-state subpoena," and they are instead governed by the "generally applicable" standards for depositions under CPLR article 31, it said. Here, the motion to quash was properly denied "since the petitioners failed to show that the requested deposition testimony is irrelevant to the prosecution of the California action.... Further, petitioners failed to articulate a sufficient, nonspeculative basis" for postponing or restricting the scope and use of their depositions.

Kapon and Christoph argue, "Section 3119 requires a New York court to review an out-of-state subpoena to a non-party witness with solicitude to ensure that a New York resident is not unduly burdened in responding to a discovery demand in a lawsuit in which he has no stake. The courts below failed to treat appellants' motion to quash with that solicitude. They put the burden on appellants to show that the proposed depositions were utterly irrelevant to the California action. And they failed to limit the use of the depositions, even though the potential for misuse was evident." Limitations on the scope or use of the depositions should be decided by courts in New York, not California, they say.

For appellants Kapon and Christoph: Paul Shechtman, Manhattan (212) 704-9600
For respondent Koch: Moez M. Kaba, Los Angeles, CA (310) 277-1010

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 Wednesday, February 19, 2014

No. 51 Matter of Santer v BOE of the East Meadow Union Free School District
No. 52 Matter of Lucia v BOE of the East Meadow Union Free School District

These appeals stem from demonstrations conducted in 2007 by members of the teacher's union of the East Meadow Union Free School District in Nassau County, who had been picketing at the Woodland Middle School when students were dropped off in the morning in order to protest the pace of contract negotiations. On a rainy day in March 2007, rather than picket outside, some teachers parked their cars along both sides of a street that runs by the school and displayed their signs in their car windows. They were parked legally, but in locations where parents usually dropped off students. Traffic became congested and slow moving, so some students got out of cars in travel lanes rather than at the curb. No school officials asked teachers to move their cars.

The School District filed disciplinary charges against six teachers, alleging they "intentionally created a health and safety risk" by parking their vehicles along the curb "in order to preclude children from being dropped off at the curbside" and causing students to alight "in the middle of the street." The teachers in these proceedings, Richard Santer and Barbara Lucia, argued they had a constitutional right to picket peacefully in a public area before the beginning of the school day. The arbitrator rejected the argument, found them guilty of creating a health and safety hazard, and imposed fines of $500 on Santer and $1,000 on Lucia.

Santer and Lucia brought these proceedings to vacate the arbitration awards. Supreme Court denied their petitions, finding the arbitrator's decision was "not clearly violative of a strong public policy" nor "completely irrational."

The Appellate Division, Second Department reversed and granted the petitions to vacate on First Amendment grounds. Although "evidence that children were dropped off in the middle of the street due to the arrangement of the cars provided a rational basis for the arbitrator's determination," it said in Santer, the teachers' "'speech' regarding collective bargaining issues indisputably addressed matters of public concern" and the District "failed to meet its burden of demonstrating that Santer's exercise of his First Amendment rights so threatened the school's effective operation as to justify the imposition of discipline." Observing that the teachers broke no laws or school policies and complied with parking regulations, no school officials asked them to move and no students were injured, it said, "[T]he record establishes that the danger presented by the legally parking teachers could not have been substantial," while the discipline imposed "would likely have the effect of chilling speech on an important matter of public concern."

The School District argues that the teachers' "parking activity" did not qualify "as a form of speech under the First Amendment" and, even if it did, "it was nevertheless unprotected given that [their] actual intent was to create a health and safety risk and not to convey a particularized message." The District says it filed disciplinary charges based on the teachers' "intention to create a health and safety hazard for students, and not in retaliation for [their] speech." It says the balancing test in Pickering v Bd. of Educ. (391 US 563) "weighs heavily in favor of the District."

For appellant School District: George B. Pauta, Manhattan (212) 583-9600
For respondents Santer and Lucia: Sherry B. Bokser, Manhattan (212) 533-6300

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 Wednesday, February 19, 2014

No. 54 Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Brothers Company

Mashreqbank PSC, a United Arab Emirates (UAE) bank with a branch in New York, brought this breach of contract action against Ahmed Hamad Al Gosaibi & Brothers Company (AHAB), a Saudi Arabian general partnership, to recover $150 million it allegedly lost in a fraudulent currency transaction. Mashreqbank said it wired $150 million to AHAB's account at the Bank of America in New York, but AHAB failed to wire it the Saudi riyals agreed to in the currency exchange. The funds in the Bank of America account were instead transferred to an HSBC account in New York controlled by Maan Abdul Waheed Al Sanea, a Saudi national who headed AHAB's money exchange operations. Al Sanea allegedly transferred the $150 million through the HSBC account to institutions outside the United States. AHAB, claiming the fraudulent currency transaction with Mashreqbank was part of an international Ponzi scheme orchestrated by Al Sanea without its knowledge, filed a third-party action against him. Al Sanea moved to dismiss AHAB's third-party complaint on the ground of forum non conveniens.

Supreme Court dismissed the third-party complaint and the main action as well, although no motion was made to dismiss the main action on forum non conveniens grounds. "The UAE is the more appropriate forum for determination of the primary actions, and they will be decided in the case that Mashreqbank had already commenced there," it said. "AHAB can decide whether it prefers to bring its third-party action in the UAE as well, or seek redress in Saudi Arabia."

The Appellate Division, First Department reversed on a 3-2 vote and reinstated both complaints, ruling Supreme Court had no power to dismiss the main action because no such motion was made. It cited VSL Corp. v Dunes Hotels & Casinos (70 NY2d 948), which held, "Under CPLR 327(a) a court may stay or dismiss an action in whole or in part on forum non conveniens grounds only upon the motion of a party; a court does not have the authority to invoke the doctrine on its own motion." The majority also ruled the court improperly dismissed the third-party action on the merits, in part because "New York has a compelling interest in the protection of the native banking system from misfeasance or malfeasance," New York law would apply, and the court "failed to identify an alternative forum that would have jurisdiction..., let alone whether the dispute would be 'better adjudicated' in the alternative forum."

The dissenters argued the lower court properly dismissed both actions. They said it had authority to dismiss the main action under CPLR 327(a), which states, "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action...." Al Sanea's motion to dismiss the third-party action on that ground satisfied the requirement for a "motion of any party," they said, and further, "the doctrine was raised before the court, and the parties contested the matter." On the merits, they said the dispute "is between a foreign bank and foreign businesses, the alleged wrongdoing took place in foreign countries even though New York banks were its instrumentalities, documentary evidence and witnesses are located outside of New York, and the resolution likely requires the application of foreign law."

For appellant Mashreqbank: Carmine D. Boccuzzi, Manhattan (212) 225-2000
For third-party appellant Al Sanea: Robert F. Serio, Manhattan (212) 351-4000
For respondent AHAB: Bruce R. Grace, Washington, DC (202) 833-8900

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, February 20, 2014

No. 55 People v Reynaldo Perez
No. 56 People v Ivan Calaff
No. 57 People v Alexander Dockery a/k/a John Harris
No. 58 People v Teofilo Lopez a/k/a Garcia Lopez a/k/a Isidoro Garcia

The common issue here is whether the Appellate Division, First Department abused its discretion or violated the appellants' rights by dismissing their appeals, many years after they were convicted, for failure to timely prosecute or perfect their appeals under CPL 470.60(1).

Reynaldo Perez was convicted of two counts of murder and sentenced to consecutive terms of 25 years to life in 1996. His trial counsel filed a timely notice of appeal and Perez retained private counsel in 1997 to pursue it, but the appeal was never perfected. In 2012, he retained new counsel and unsuccessfully moved to enlarge the time to perfect his appeal.

Ivan Calaff pled guilty to attempted burglary in 1993 and was sentenced to three to six years in prison. He filed a timely notice of appeal, but did not move for assignment of appellate counsel until 2012. The First Department assigned him counsel, who filed a brief, but the court then granted the prosecution's motion to dismiss.

Alexander Dockery was 16 years old in 1986, when he was convicted of robbery and sentenced to two to six years. A notice of appeal was filed, but not perfected. In 2011, while serving 25 years to life as a persistent felony offender, he sought assignment of counsel to appeal the 1986 conviction. The First Department granted his request, but dismissed his appeal six months later without opinion.

Teofilo Lopez absconded before his robbery trial in 1999. He was convicted in absentia and sentenced to 15 years. He was recaptured in 2010 and sought to appeal his conviction in 2012. The court granted the prosecution's motion to dismiss without opinion.

The First Department discussed its dismissal only in Calaff. "'The right to appeal is a statutory right that must be affirmatively exercised and timely asserted,'" it said, quoting People v West (100 NY2d 23). "The sentencing minutes establish that [Calaff] was advised of the simple procedural steps to be taken by defendant, personally, to obtain poor person relief and assigned appellate counsel," but did not do so for 19 years.

The appellants argue the Appellate Division abused its discretion under People v Ventura (17 NY3d 675), which said the court's "discretionary power" to dismiss appeals under CPL 470.60(1) "cannot be accorded such an expansive view as to curtail defendants' basic entitlement to appellate consideration. As a matter of fundamental fairness, all criminal defendants shall be permitted to avail themselves of intermediate appellate courts as 'the State has provided an absolute right to seek review in criminal prosecutions.'" They also say the court should have considered the merits of their appeals, importance of the issues, and whether the prosecution would have been prejudiced. Dockery argues that minors, due to their lack of maturity and sound judgment, are entitled to assistance of counsel in obtaining poor person relief and assigned appellate counsel.

55 - For appellant Perez: Howard R. Birnbach, Great Neck (516) 829-6305
For respondent: Bronx Assistant District Attorney Noah J. Chamoy (718) 838-7142
56 - For appellant Calaff: Claudia Trupp, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney David E.A. Crowley (212) 335-9000
57 - For appellant Dockery: Barbara Zolot, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Deborah L. Morse (212) 335-9000
58 - For appellant Lopez: Kerry Elgarten, Manhattan (212) 577-3610
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000