

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 10, 2015 (arguments begin at 2:30 p.m.)

No. 25 People v Benny Garay

No. 26 People v Lee Carr

No. 27 People v Walter Cates, Sr.

The defendants in these appeals argue they were deprived of their right to counsel when trial courts, in the absence of defense counsel, discharged a sick juror in Garay (No. 25) and held ex parte, untranscribed discussions with a key prosecution witness who claimed he was too sick to testify in Carr (No. 26) and Cates (No. 27).

Benny Garay and six others were charged in 2008 with cocaine trafficking at the Dyckman Houses in Manhattan. Nearly four weeks into Garay's joint trial with the alleged head of the drug ring, a juror called in sick. Supreme Court reported the matter to both defense attorneys and the prosecutor, then spoke with the juror off the record. Later in the day, when Garay's attorney was late in returning, the court said it had decided to replace the ill juror with an alternate. Counsel for the codefendant objected and said Garay's counsel joined in the objection, but the court said more jurors could be lost if the trial were delayed. Garay's counsel then entered the courtroom and the court seated the alternate juror. Garay, who had been jailed for 26 months, was convicted of fifth-degree drug possession and sentenced to time served.

The Appellate Division, First Department affirmed, saying Garay's "constitutional challenges to his attorney's momentary absence from a brief discussion ... about whether to replace an ill juror are unpreserved..., and we decline to review them in the interest of justice.... [T]he circumstances accorded counsel ample opportunity to preserve this issue." Alternatively, it rejected his claims on the merits.

Lee Carr and Walter Cates, Sr. were charged with fatally beating and strangling Matharr Cham in Cates' Bronx apartment in 2006. At their joint trial, the prosecution's only eyewitness failed to appear on the day he was to testify. After the jury was dismissed, detectives brought the witness to court and the judge spoke with him, off the record and in the absence of the defense attorneys, and ordered him to testify five days later. The witness appeared that day, but said he was unable to testify. The court spoke with him, off the record and without defense counsel, and reported that the witness said he had a migraine and denied that he was on drugs or alcohol. The court also disclosed its prior ex parte meeting with the witness. The witness testified the next day. Carr and Cates were convicted of second-degree murder and sentenced to 25 years to life.

The Appellate Division, First Department affirmed. Rejecting defense claims that the trial court's ex parte meetings with the witness violated their right to counsel, it said in Carr, "This inquiry was not a hearing, nor part of the trial, and it did not involve the determination of any issue requiring input from defendant or his counsel...."

All three appellants argue the trial judge in each case committed a mode of proceedings error requiring reversal regardless of whether the issue was preserved by objection. They say their defense attorneys were improperly excluded because the discharge of a sworn and seated juror, and an examination into a prosecution witness's mental and medical capacity to testify, are material stages of trial. Carr and Cates also argue they properly preserved their claims.

No. 25 For appellant Garay: Adam J. Bernstein, Manhattan (212) 373-3000

For respondent: Manhattan Assistant District Attorney Patricia Curran (212) 335-9000

No. 26 For appellant Carr: Amy Donner, Manhattan (212) 577-3487

No. 27 For appellant Cates: Bruce D. Austern, Manhattan (212) 577-2523 ext. 514

For respondent: Bronx Assistant District Attorney Melanie A. Sarver (718) 838-6280

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 10, 2015 (arguments begin at 2:30 p.m.)

No. 28 Matter of Powers v St. John's University School of Law *(papers sealed)*

David Powers applied for admission to St. John's University School of Law in November 2005. In response to a question asking if he had "ever been charged with, pleaded guilty to, or been found guilty of any crime," he explained he had been arrested in New Jersey "shortly after a drug deal" in 1999, accepted a plea bargain for a sentence to probation and rehabilitation, and pled guilty to possession of a controlled dangerous substance. He certified on the application that he understood "the failure to provide truthful answers ... may result in denial of admission, dismissal, or rescission of an awarded degree." His criminal record had been expunged by court order two weeks earlier. St. John's admitted Powers and he enrolled for the Fall 2006 semester. After completing three semesters, Powers took a leave of absence and petitioned the Appellate Division for an advance ruling on his application for admission to the New York bar. During that process, St. John's officials learned he had originally been charged with distribution of LSD and possession of LSD and Ecstasy with intent to distribute, rather than simple possession. The law school required him to amend his application for admission to provide a full account of the criminal case, which he did, admitting he had "sometimes" sold drugs to others. St. John's rescinded his admission, noting that Powers' original application included "material omissions and misrepresentations" about the charges and that he acknowledged he had been charged with and was guilty of drug distribution. Powers brought this proceeding to challenge the decision.

Supreme Court dismissed the suit, finding that "St. John's actions were neither arbitrary nor capricious" and the school made a rational distinction "between applicants with a history of drug use and those with a history of drug dealing." It also said, "Because the 'material omissions and misrepresentations' occurred before Mr. Powers was admitted as a student at St. John's, the formal grievance process outlined in the Student Handbook does not apply...."

The Appellate Division, Second Department affirmed on a 3-1 vote, saying, "The law school's determination was made on the grounds of the petitioner's misrepresentations and omissions on his application..., and was based upon the exercise of discretion after a full review. Despite the petitioner's subsequent disclosure..., and in light of the true nature of the petitioner's prior criminal activity, the law school's determination to rescind his acceptance was not arbitrary and capricious, and does not warrant judicial intervention.... Since the petitioner disclosed, subsequent to his admission, that he was originally charged with and was guilty of distributing ... a controlled dangerous substance, we do not consider the penalty imposed to be 'so disproportionate to the offense ... as to be shocking to one's sense of fairness'...."

The dissenter said the school's decision "to retroactively deny an admitted student's application for admission after he had successfully completed more than 1½ years of course work, without following the grievance process established in its student handbook, was arbitrary and capricious and in violation of lawful procedure." It was also based, in part, on "impermissible grounds" because the application did not seek disclosure "of every uncharged crime that an applicant may have engaged in" or require Powers to say "whether he was actually guilty of charges that were later dropped."

For appellant Powers: Roland R. Acevedo, Manhattan (212) 371-4500

For respondent St. John's: Michael J. Keane, Great Neck (516) 393-2200

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 10, 2015 (arguments begin at 2:30 p.m.)

No. 29 Matter of Kickertz v New York University

On the eve of her graduation from New York University's College of Dentistry in May 2009, a faculty member informed Katie Kickertz that her graduation was "uncertain." She had passed all of her academic courses, competency exams and the National Board Dentistry Examinations, but was told she did not have enough clinical practice credits to graduate. After unsuccessful and apparently unharmonious efforts to resolve the matter, she was charged by a student Peer Review Board with falsifying patient records to obtain the necessary credits. The board recommended dismissal, but NYU withdrew the determination because Kickertz had not been afforded a hearing as required by its ethics code. After a hearing, the board again voted to dismiss her and a faculty review board confirmed the decision. The dean of the dental college rejected her appeal and she was dismissed from the school without the possibility of readmission in November 2009.

Kickertz brought this article 78 proceeding to annul the determination alleging, among other things, that NYU failed to follow its own disciplinary rules and denied her due process by not allowing her to cross-examine its witnesses. Rather than answer, NYU moved to dismiss the petition. Supreme Court granted the motion and dismissed the suit, finding that NYU "substantially complied" with the procedures in its 2009 Code of Ethics.

The Appellate Division, First Department reversed on a 3-2 vote and granted Kickertz's petition. The court agreed unanimously that Kickertz's lawsuit should not have been dismissed, but split on whether it should be remanded to permit NYU to serve and file an answer. CPLR 7804(f) provides that in an article 78 proceeding, when a pre-answer motion to dismiss is denied, "the court shall permit the respondent to answer, upon such terms as may be just...."

The majority relied on an exception for cases where "the facts are so fully presented ... that it is clear that no dispute as to the facts exists and no prejudice will result from the failure to require an answer." The majority said facts in the record "establish that NYU did not substantially comply with its own published guidelines and policies, whether judged under the 2005 Code [of Ethics] or the 2009 Code. In violation of both codes, petitioner was not afforded substantial justice. Significantly, among other things, she was not given a fair opportunity to cross-examine her accusers, and key procedural rulings were made and/or influenced by [an assistant dean]. Under these circumstances, we need not remand to allow NYU to interpose an answer; we can annul the determination expelling petitioner...."

The dissenters argued that "this case does not fall within that exception.... There are a number of disputed issues of fact in the record as presently developed, including, but not limited to, whether a 2005 or 2009 code of ethics governed the challenged disciplinary proceedings and whether petitioner falsified a patient's chart.... Curiously, by today's ruling, the majority grants all of the requested relief even though it acknowledges an issue as to whether petitioner falsified patient records as alleged in the underlying disciplinary proceeding."

For appellant NYU: Ira M. Feinberg, Manhattan (212) 918-3000
For respondent Kickertz: Bryan Arbeit, Carle Place (516) 873-9550