

# *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, January 12, 2016

## **No. 12 People v Raymond Leach**

Raymond Leach found discarded medical records of several patients in the parking lot of the Greater Hudson Valley Family Health Center in the Town of Cornwall, Orange County, in September 2010. He allegedly told Health Center officials that he planned to prepare lawsuits for the patients unless the Center paid him \$10,000, wrote letters of apology to the patients and paid them money, saying it would be costly if the Center were sued and embarrassing if the records were released to the media. He also directed them to draft a "stipulation of settlement," which provided that he would not "take the matter to court" and that there would be no disclosure of the underlying facts. The Center's chief executive arranged for him to bring back the records the next morning. After he was given a \$10,000 check and a copy of the stipulation stamped with the Health Center's corporate seal, Leach was arrested by waiting police officers. He was initially charged with third-degree grand larceny, but County Court reduced the charge to attempted grand larceny after concluding the check was not negotiable.

Leach pled guilty to third-degree attempted grand larceny and was sentenced to a year in jail. At his plea colloquy, Leach said, "I gave [a Health Center official] copies of the medical records that I found in the parking lot and she gave me a check for \$10,000 as a stipulation of settlement not to take the matter to court." He admitted the records were not his. When the court said, "You should have just given them the records, is that a fair statement?" Leach initially replied, "That is not a fair statement," but after discussion with his attorney, he said it was fair. He also agreed when the court said "you were extorting them" and "were overreaching when you demanded they give you money for the records."

The Appellate Division, Second Department affirmed the judgment, finding his waiver of the right to appeal was voluntary, knowing, and intelligent.

Leach argues his appeal waiver is invalid because the court "only tangentially referred to the appellate waiver in a single sentence" before his plea, and did not place its terms on the record until after he was sentenced. He also argues that "a stipulated payment, as consideration for the return of mislaid medical records, does not constitute attempted grand larceny in the third degree." He says "stealing" is an element of the crime and he "never 'took' or used anything without permission." He "merely 'found' and repatriated medical records," he says, and he did not steal money because the stipulation was not extortion, but "a meeting of the minds, with a reward payable to a finder."

The prosecution argues that Leach's challenge to the validity of his appeal waiver is unpreserved because he "did not object to the trial court's procedure of having him execute the written waiver at the time of sentencing," and in any event, "execution of the waiver at sentence simply confirmed defendant's previously communicated intent to waive his right to appeal." Leach's claim that his plea did not establish the elements of the crime "is both unpreserved and baseless," since he admitted that "he attempted to extort \$10,000" from the Health Center for return of the records, which he admitted were not his, and threatened the center with legal action.

For appellant Leach: Steven A. Feldman, Uniondale (516) 522-2828

For respondent: Orange County Assistant District Attorney Elizabeth L. Schulz (845) 615-3640

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**No. 13 People v Gordon Gross**

*(papers sealed)*

Gordon Gross was charged in 2008 with sexually abusing a Wayne County girl, S.W., over a period of years. S.W. testified at trial that Gross repeatedly engaged in anal intercourse with her from 1999, when she was five years old, to 2004, when she was ten. She also testified that she told her mother at age six that Gross had touched her in a sexual manner; that she told her sister in 2008, when she was 14, that Gross had raped her; that she reported the abuse to a detective the following day; and that she described the abuse to a pediatrician who examined her at a prosecutor's request after Gross was indicted. The pediatrician testified that her examination of the girl was normal and she found no scarring, but she also testified that S.W. told her Gross "anally penetrated" her when she was six and seven years old. Gross's attorney did not object to any of the testimony about S.W.'s prior statements to others regarding the abuse. Gross was convicted of first-degree course of sexual conduct against a child and endangering the welfare of a child and was sentenced to 25 years in prison. The judgment was upheld on direct appeal.

In 2011, Gross filed a CPL 440.10 motion to vacate the judgment. He said he was deprived of the effective assistance of counsel by, among other things, his trial attorney's failure to object to testimony about S.W.'s prior consistent statements or to the prosecutor's use of that testimony during summation, which he said improperly bolstered S.W.'s credibility. Wayne County Court denied the motion.

The Appellate Division, Fourth Department affirmed on a 3-2 vote, saying S.W.'s testimony that she reported the abuse to her mother, her sister, and the police was admissible, so defense counsel was not ineffective in failing to object. "Although the dissent correctly notes that the repetition of prior consistent statements may 'give to a jury an exaggerated idea of the probative force of a party's case'..., here, the victim's testimony constituted a narrative of events" explaining how the abuse was disclosed and the investigation began. "Indeed, she did not repeat the specific allegations of her testimony, i.e., that defendant had engaged in anal penetration...." It said "defense counsel lacked any strategic or reasonable basis for her failure to object when the [pediatrician] repeated the specific allegations that defendant had anally penetrated her," but "the single error in an otherwise competent representation" did not deprive Gross of a fair trial.

The dissent said S.W.'s testimony that she reported the abuse to her mother, sister, the police and the pediatrician was inadmissible "and we can discern no strategic reason for defense counsel's failure to object." They said, "We found no cases that recognize a narrative exception to the rule against the admission of prior consistent statements, and such an exception, if created, would swallow the rule altogether." Further, "the testimony at issue here did not complete the narrative; instead, the testimony merely repeated the narrative, which was that defendant sexually molested the victim." In view of defense counsel's failure to object to the pediatrician's inadmissible testimony and the prosecutor's summation as well, they said Gross was deprived of his right to effective assistance of counsel.

For appellant Gross: Brian Shiffrin, Rochester (585) 423-8290

For respondent: Melvin Bressler, for Wayne County District Attorney (585) 586-5993

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## **No. 14 People v Jin Cheng Lin**

Cho Man Ng (known as Sharon) and her brother Sek Man Ng (known as Simon) were murdered in their Queens apartment on May 12, 2005. The next morning, May 13, detectives brought Jin Cheng Lin to their precinct to discuss the case. Lin stayed for more than 12 hours, telling them he had been to the Ngs' home on the day of the murders to give Sharon, his former girlfriend, two seashell figurines. Lin returned to the precinct on May 14 and was given Miranda warnings. After he was told witnesses had seen the figurines in the apartment weeks earlier, Lin said he helped two men get into the apartment to rob the Ngs, but didn't know they would be killed. He was arrested that night, 10 hours after his arrival, and was held at the precinct. He was given Miranda warnings again on May 15 and, after detectives falsely told him Simon had survived and was talking to them, Lin began sobbing, then said in a written statement that he meant to rob the Ngs and used a knife from the kitchen to stab them. Still at the precinct on May 16, Lin began to make a videotaped statement, but invoked his right to counsel when a prosecutor explained his Miranda rights and the interview ended. He was arraigned that night.

Supreme Court denied Lin's motion to suppress his statements, finding that he was not in custody when he made his initial statement about delivering the figurines and that he made the subsequent statements after Miranda warnings, which he knowingly and voluntarily waived. Although Lin "was not totally fluent in English," it said he "was able to fully understand the 'immediate import of the warnings.'" The delay in arraignment was not "designed to deprive him of his right to counsel," it said, but was due to "the police investigation into the circumstances surrounding a double homicide and their need to follow-up on differing versions of the events as provided by the defendant and other witnesses." Lin was convicted of first-degree murder and other crimes and was sentenced to life in prison without parole.

The Appellate Division, Second Department affirmed, finding Lin's statements were voluntary. "Approximately 28 hours elapsed between the time the police arrested the defendant and the time the defendant made the statement sought to be suppressed," the court said, but "a delay in arraignment alone does not warrant suppression.... [T]he delay in arraigning the defendant was attributable to the time it took the police to conduct a thorough investigation and not to a strategically designed plan to permit the defendant to be questioned outside the presence of counsel.... Moreover, the record supports the hearing court's finding that the defendant understood the import of the Miranda warnings...." It said the trial court properly precluded Lin from introducing the videotape of his aborted May 16 statement because its "probative value was outweighed by potential prejudice to the People."

The dissenter said the prosecution failed to show "beyond a reasonable doubt" that the statements were voluntary. Lin was periodically questioned at the precinct for more than 22 hours over two days before his arrest and then was held two more days without access to a lawyer before he was arraigned, she said. "Upon my reading of the record, I find that the delay in the arraignment was strategically designed so that the defendant could be questioned outside the presence of counsel.... The police could have initiated the arraignment process shortly after the defendant's arrest, and should have initiated it, at the latest," the next morning. "Their failure to do so strongly suggests that the defendant's arraignment was delayed for an improper purpose." She said the videotape "was relevant to the issue of whether the defendant's statements were voluntary," and its preclusion deprived Lin of his right to present a defense.

For appellant Lin: De Nice Powell, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Anastasia Spanakos (718) 286-5810