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.

WEEK OF SEPTEMBER 6 - 8, 2016

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, September 6, 2016

No. 127 People v Steven Henderson *(papers sealed)*
No. 128 People v Nnamdi Clarke

A key question in these appeals is whether delays by prosecutors in seeking analysis of DNA evidence qualify as "exceptional circumstances" that would make those periods excludable from speedy trial calculations under CPL 30.30. In felony cases, the statute requires prosecutors to be ready for trial within six months after the commencement of the criminal action.

Steven Henderson and Treymain Songster were charged with engaging in forcible intercourse and other sexual conduct with a 14-year-old girl in Songster's Brooklyn apartment in October 2008. Henderson was arraigned on first-degree rape and related charges the same month, and the prosecution obtained a sample of his DNA in January 2009. In June 2009, after the medical examiner reported that Henderson's DNA profile did not match semen samples in the rape kit, the prosecution sought testing of DNA evidence recovered from the victim's fingernails. The case was adjourned for a total of 86 days until September 2009 while the additional tests were conducted, which also found no match to Henderson. His attorney moved to dismiss on speedy trial grounds in April 2010. The prosecution argued the 86 days of adjournment for additional DNA tests should not be charged to it, and Henderson's attorney did not reply. Supreme Court denied the motion finding, in part, that the 86 days for testing was the result of exceptional circumstances. Henderson was convicted and sentenced to eight years in prison.

The Appellate Division, Second Department affirmed, saying Henderson did not preserve his speedy trial claim. "[A]fter the People set forth the statutory exclusions they intended to rely upon..., the defendant failed to raise before the Supreme Court the legal or factual impediments to the exclusions that he seeks to raise on appeal." It also said he failed to show he was deprived of effective assistance of counsel. Henderson argues the prosecution's "dilatory decision" to seek testing of the fingernail samples violated his right to a speedy trial, and that his attorney's failure to preserve the issue deprived him of effective assistance of counsel.

Nnamdi Clarke was arrested in November 2007 by police officers who said he fired a shot at them and then discarded the gun as they chased him on a street in Queens. He was arraigned four days later. In August 2008, he was indicted and the prosecutor declared she was ready for trial. In May 2009, the prosecutor moved to obtain a DNA sample from Clarke, saying the medical examiner had just informed her that a small amount of genetic evidence recovered from the gun could be tested with the new Low Copy Number DNA procedure. Clarke objected on speedy trial grounds, but agreed to provide the sample in June 2009. The lab report matching his DNA profile to the gun was filed in November 2009. Supreme Court denied his speedy trial motion to dismiss. Clarke was convicted of second-degree weapon possession and sentenced to 21 years to life in prison.

The Appellate Division, Second Department reversed, saying, "[B]ecause the People failed to exercise due diligence in obtaining the DNA sample from the defendant, the 161-day period between June 5, 2009, and November 13, 2009, was not excludable on the ground that their need to obtain the DNA test results constituted excusable, exceptional circumstances...." The prosecution argues the time spent on the DNA tests was excludable. "The People were not informed that this new form of DNA testing was available in this case until well into its pendency, the People were not otherwise on notice to request it, and the People acted diligently to obtain the testing and provide the results and the underlying file to defendant as expeditiously as possible."

No. 127 For appellant Henderson: Leila Hull, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464
No. 128 For appellant: Queens Assistant District Attorney Sharon Y. Brodt (718) 286-5878
For respondent Clarke: William G. Kastin, Manhattan (212) 693-0085 ext. 240

State of New York Court of Appeals

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To be argued Tuesday, September 6, 2016

No. 129 People v Dru Allard

Dru Allard was charged with second-degree menacing as a hate crime for allegedly holding a knife toward a Muslim man and directing ethnic slurs at him in front of a Brooklyn mosque in September 2006. Supreme Court dismissed the felony counts on May 31, 2007, with leave for the prosecution to resubmit the case to a new grand jury. The second grand jury issued a new indictment on September 5, 2007, 97 days later, and the prosecutor filed a statement of readiness for trial. When Allard moved to dismiss the charges on speedy trial grounds in November 2008, he argued the entire 97 days preceding the second indictment should be charged to the prosecution. The prosecutor argued that 32 days of that period were excludable under the "exceptional circumstances" provision of CPL 30.30(4)(g) because the complaining witness was on vacation in Yemen and unavailable to appear before the second grand jury. Allard did not submit a reply. The court found the 32 days were excludable and denied the motion, saying, "The people contend and the defense does not dispute that the complaining witness was in Egypt between July 27 and August 28 and beyond the control of the people." Allard was convicted of second-degree menacing as a hate crime and sentenced to five years of probation.

On appeal, Allard argued the 32 days were not excludable because the witness's vacation in Egypt was not an exceptional circumstance and the prosecution did not exercise due diligence to obtain his grand jury testimony before he left the country. The prosecution contended this claim was unpreserved because he did not contest its assertion that the 32-day period was excludable. The Appellate Division, Second Department ruled Allard's claim was preserved for appellate review and remitted the matter for a hearing. After the hearing, Supreme Court found the prosecution was responsible for the delay because "the People failed to conclusively demonstrate that they attempted with due diligence to make the complainant available" for the grand jury.

The Appellate Division agreed and dismissed the indictment on speedy trial grounds, saying "the People failed to demonstrate that the 32-day period must be excluded from the time charged to them on the ground of 'exceptional circumstances' inasmuch as they failed to show that they 'attempted with due diligence to make the [complainant] available'...."

The prosecution argues the Appellate Division erred in holding the speedy trial claim was preserved "because, prior to the determination of the [CPL] 30.30 motion, defendant did not challenge the People's argument that the period at issue was excludable pursuant to [CPL] 30.30(4)(g), and because the trial court did not expressly decide the question that defendant raised on appeal regarding the excludability of that period."

For appellant: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534
For respondent Allard: Joshua M. Levine, Manhattan (212) 693-0085 ext. 212

State of New York Court of Appeals

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To be argued Tuesday, September 6, 2016

No. 130 Matter of Yoga Vida NYC, Inc. v Commissioner of Labor

Yoga Vida NYC, which has operated a yoga studio in Manhattan since 2009, is challenging a 2010 determination of the New York State Commissioner of Labor that its non-staff yoga instructors are employees, not independent contractors, and required Yoga Vida to make unemployment insurance contributions for those instructors. Yoga Vida also employs staff instructors who are allowed to teach only at its studio and are paid a flat rate. Non-staff instructors work under short-term contracts, choose whether they will be paid hourly or a percentage of the fees from their students, and receive no benefits. They inform Yoga Vida when they will be available for classes; they may provide their own substitutes if they become unavailable; and they are free to work at other studios, including competitors, and to solicit students at Yoga Vida to attend classes they teach elsewhere. Yoga Vida determines weekly class schedules, sets and collects fees from students, and addresses any safety concerns students raise about non-staff instructors.

An administrative law judge overruled the Commissioner and held the non-staff instructors are independent contractors, finding Yoga Vida "does not exercise a sufficient amount of direction, supervision and control ... to establish an employer-employee relationship." Although the studio set the student's fees and provided the space for classes, she said there was no evidence the instructors "are supervised and there are no prohibitions against them working for competitors. It is important to note that the non-staff yoga instructors are permitted to notify [Yoga Vida's] students of other locations or competitors where they can take their classes."

The Unemployment Insurance Appeal Board reversed the ALJ and reinstated the Commissioner's determination, finding Yoga Vida had "an employment relationship" with its non-staff instructors and must pay for unemployment insurance. "[T]he company established the fees charged, established the master schedule that was published on its website, set the class duration and provided the space and some equipment...," it said. "Moreover, the instructors were required to notify the company of substitutes.... In addition, the company evaluated the services of the instructors to determine whether their services would be continued."

The Appellate Division, Third Department affirmed, saying, "Overall, despite the existence of evidence that could result in a contrary result, the record contains substantial evidence to support the Board's decision that Yoga Vida had sufficient control over the instructors' work, thereby allowing for a finding of an employer-employee relationship...."

Yoga Vida argues the Appellate Division "failed to consider factors that have repeatedly been considered significant under New York law in the context of determining whether a person is an employee or an independent contractor," including "whether the person: (1) worked at his or her own convenience; (2) was free to engage in other employment; (3) received fringe benefits; (4) was on the employer's payroll; and (5) was on a fixed schedule."

For appellant Yoga Vida: Elizabeth A. Harlan, Baltimore, MD (410) 783-3526
For respondent Commissioner: Assistant Solicitor General Valerie Figueredo (212) 416-8019

State of New York Court of Appeals

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To be argued Tuesday, September 6, 2016

No. 131 Three Amigos SJL Rest., Inc., d/b/a The Cheetah Club v CBS News Inc.

This libel action arose in November 2011 from CBS news coverage of a federal crackdown on an illegal immigration ring, allegedly controlled by organized crime, that recruited women from Russia and eastern Europe and forced them to work as strippers in New York. Federal agencies called the crackdown "Operation Dancing Brides" because the women were placed in sham marriages for citizenship purposes. The operation included a search of The Cheetah Club, a strip club in midtown Manhattan. CBS covered the raid on Cheetah's and reported that "federal authorities say it is run by the mafia."

Claiming the statement defamed them, three employees of companies that provided services to Cheetah's sued CBS Broadcasting Inc., its local station and reporters for libel. Dominica O'Neill is president of Times Square Restaurant No. 1, which provides management and promotional services, and Sean Callahan is a manager for the company, responsible for supplying food and beverages to Cheetah's. The third individual plaintiff, Philip Stein, is a manager for Times Square Restaurant Group, which books dancers for the club. CBS moved to dismiss the complaint, arguing the plaintiffs could not show the statement was "of and concerning" them since the news reports made no mention of the plaintiffs or their employers. The plaintiffs argued the statement would be seen as referring to them because they were at the club on a daily basis, overseeing all aspects of its operation and interacting with customers.

Supreme Court granted the motion to dismiss, finding the statement was not "of and concerning" the plaintiffs. "The challenged reports do not state that all or even any employees of Cheetah's are members of organized crime, much less that employees of unnamed affiliated companies are members of organized crime...," it said.

The Appellate Division, First Department affirmed in a 3-2 decision, saying "[P]laintiffs' relationship to Cheetah's is peripheral, and the public at large would have no reason to think that they were implicated in the federal investigation.... While the individual plaintiffs involved" in providing supplies or booking dancers "may be present at the club 'on a daily basis ... and are highly visible to ... customers'..., they are nevertheless mere employees. Significantly, they are not employees of Cheetah's itself, but rather, present at the club to perform the services provided to it by their own employers. They can hardly be understood to be 'those who "run" the Cheetah Club,' which implies persons in a position of ownership or control...." It said, "[E]xposing news organizations to defamation claims by any business supplying goods or services to an entity reported to be engaged in illegal conduct would have a chilling effect on free speech...."

The dissenters said, "[T]here are sufficient facts pleaded at this early stage in the litigation to reasonably connect the individual plaintiffs" with the statement that Cheetah's is run by the Mafia. "O'Neill provided an affidavit in which she alleged extrinsic facts that she, Callahan, and Stein were part of a 'small and exclusive group of individuals' who ran and managed Cheetah's, with constant visible contact with customers, officials, dancers, and vendors. Taking these allegations as true..., the individual plaintiffs are members of a small, identifiable group that allegedly 'ran' Cheetah's and are thus implicated in the allegedly defamatory statement."

For appellants O'Neill et al: Nichelle A. Johnson, New Rochelle (914) 633-4102
For respondent CBS: Jay Ward Brown, Manhattan (212) 850-6100

State of New York Court of Appeals

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To be argued Wednesday, September 7, 2016

No. 132 Rivera v Montefiore Medical Center

Wilbur Rodriguez, 44, went to the emergency room at Montefiore Medical Center in January 2009, suffering from fever, vomiting and shortness of breath. He was admitted about 11 hours later, at 11 p.m., with a diagnosis of pneumonia. Rodriguez was found dead in his bed at 4:40 a.m. the next morning, about 40 minutes after he was last checked. The medical examiner found that he died of pneumonia. His mother, Evelyn Rivera, brought this action against Montefiore, claiming its failure to have him continuously monitored was malpractice.

Prior to trial, the hospital submitted a CPLR 3101(d) statement that said its expert witness would "testify as to the possible causes of the decedent's injuries and contributing factors ... [and] on the issue of proximate causation." The statute requires disclosure "in reasonable detail" of "the substance of the facts and opinions on which each expert is expected to testify." During the trial, after an emergency room physician testified that Rodriguez likely died of a heart attack, Rivera moved to preclude the hospital's expert from testifying about possible causes of death, arguing that its CPLR 3101(d) statement was not sufficiently specific. Supreme Court denied the motion as untimely because she had not objected prior to trial to any lack of specifity in the statement regarding cause of death. The expert then opined that Rodriguez died of sudden cardiac arrest. The jury awarded damages to Rivera for past and future economic loss, but no damages for pain and suffering. The court denied Rivera's post-trial motion to strike the expert's testimony and set aside the verdict on pain and suffering.

The Appellate Division, First Department affirmed in a 4-1 decision, ruling Rivera's application to preclude the expert's testimony was untimely. On receipt of the 3101(d) statement, Rivera "neither rejected the document nor made any objection to the lack of specificity regarding the cause of death," it said. "Having failed to timely object..., plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence. Plaintiff now argues that the testimony ... should be stricken because it came as a surprise. However, after plaintiff's own experts acknowledged on cross-examination that such a sudden cardiac event was a possibility..., defendant's expert appropriately elaborated on that theory of causation...."

The dissenter said, "As of mid-trial, both parties' actions and submissions were consistent with the medical examiner's autopsy report finding that the decedent died of ... pneumonia, a death necessarily accompanied by pain and suffering attendant to the patient's eventual suffocation." The possibility that Rodriguez died of a heart attack was first raised by the emergency room doctor, who testified as a fact witness, and Rivera properly moved to preclude expert testimony on the matter, he said. "There was no basis for this specific objection to have been raised in response to the CPLR 3101(d) exchange, since no one had hypothesized that the decedent died of a heart attack.... In my view, disallowing a motion to limit expert testimony by excluding a new theory revealed for the first time at trial would eviscerate the procedural protection that CPLR 3101(d) was drafted to create."

For appellant Rivera: Brian J. Shoot, Manhattan (212) 732-9000
For respondent Montefiore: Christopher Simone, Lake Success (516) 488-3300

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To be argued Wednesday, September 7, 2016

No. 133 People v Antonio Aragon

Antonio Aragon was charged in a misdemeanor complaint with criminal possession of a weapon in the fourth degree in Manhattan in June 2011. In the complaint, the arresting officer said he "recovered one set of brass metal knuckles" from Aragon's pocket, and did not further describe or discuss the object. Penal Law § 265.01(1) makes it a crime to possess "metal knuckles," but does not define the term. Aragon moved to dismiss the complaint as jurisdictionally defective because it "merely asserts an ultimate determination" that he possessed metal knuckles without "any language describing the object recovered or what particular aspects of the object fit any definition of 'metal knuckles.'" After Criminal Court denied his motion, Aragon pled guilty to disorderly conduct and was sentenced to time served.

The Appellate Term, First Department affirmed. "Considering 'the well-understood character' of brass or metal knuckles (People v Persce, 204 NY 397, 402 [1912]), no additional descriptive detail of the object recovered from defendant was required for the People's pleading to provide 'adequate notice to enable defendant to prepare a defense and invoke his protection against double jeopardy'...," it said. "To be distinguished is People v Dreyden, 15 NY3d 100, 103-104 (2010), in which a majority of the Court of Appeals held insufficient a misdemeanor complaint which set forth no more than '[a] conclusory statement that an object recovered from a defendant is a gravity knife,' an 'esoteric' weapon which, unlike metal knuckles, 'the Penal Law explicitly defines in complicated detail'...."

Aragon, noting that no New York appellate court has defined the term "metal knuckles," argues the complaint was jurisdictionally defective because it provided "no factual basis to support [the officer's] conclusion that the recovered object was 'metal knuckles.' There was no language in the accusatory instrument that describes the object recovered or what particular aspects of the object fit the definition of 'metal knuckles' defined by either statutory or case law. Indeed, the accusatory instrument provided no physical description of the recovered object in terms of size, color, type of metal. It likewise failed to state that this object was even wearable on a person's hand."

For appellant Aragon: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Manhattan Assistant District Attorney Philip Morrow (212) 335-9000

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To be argued Wednesday, September 7, 2016

No. 134 People v Alexis Ocasio *(papers sealed)*

Alexis Ocasio was arrested in the Bronx in September 2013 after officers stopped and questioned him about graffiti and found a collapsible baton in his back pocket. He was charged with a misdemeanor count of criminal possession of a weapon in the fourth degree under Penal Law § 265.01(1), which makes it a crime to possess a "billy." The statute does not define the term. The arresting officer said in the complaint that Ocasio possessed a "rubber-gripped, metal, extendable baton (billy club)" and that, based on his "training and experience, said baton device is designed primarily as a weapon, consisting of a tubular, metal body with a rubber grip and extendable feature and used to inflict serious injury upon a person by striking or choking."

Criminal Court granted Ocasio's motion to dismiss the complaint for facial insufficiency, saying, "[I]n the absence of either a statutory definition of a 'billy' which includes collapsible, extendable or telescoping batons or the inclusion of such batons as a per se weapon..., the complaint allegations are insufficient to establish that the defendant was in possession of a 'billy' in violation of [section] 265.01(1). It cited People v Talbert (107 AD2d 842 [3rd Dept 1985]), which held that "the term 'billy' must be strictly interpreted to mean a heavy wooden stick with a handle grip which, from its appearance, is designed to be used to strike an individual and not for other lawful purposes."

The Appellate Term, First Department affirmed. "The item described in the underlying accusatory instrument -- a 'rubber-gripped, metal, extendable baton' is not one of the prohibited instruments or weapons set forth in the statute. Nor does the object constitute a 'billy,' one of the objects prohibited," it said, citing Talbert.

Prosecutors say New York courts, including the Third Department in Talbert, recognize that a police nightstick qualifies as a "billy" under section 265.01(1); and now "an expandable baton is an accepted variant on the standard police baton that is currently in use in the New York City Police Department.... Since an expandable baton is a form of police baton, and a police baton is a form of billy club..., one should deduce that an expandable baton is a form of billy club.... The fact that [Talbert] described a 'billy' as 'heavy' and 'wooden' was simply due to the fact that police batons as of 1985 were heavy, wooden objects." They say the complaint in this case "was sufficient to permit defendant to understand the charge and assert a defense."

For appellant: Bronx Assistant District Attorney Marianne Stracquadanio (718) 590-2000
For respondent Ocasio: Paul A. Paterson, Manhattan (212) 373-3000

State of New York Court of Appeals

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To be argued Wednesday, September 7, 2016

No. 135 Matter of Simon v State Commission on Judicial Conduct

Alan M. Simon, a justice of the Spring Valley Village Court and Ramapo Town Court in Rockland County, is challenging a determination of the State Commission on Judicial Conduct that he should be removed from office for "a pattern of injudicious behavior" in which he "abused his judicial position in order to bully, harass, threaten and intimidate his court staff, his co-judge and other village officials and employees with whom he dealt in an official capacity." It also found that Simon "engaged in impermissible political activity" on behalf of a candidate for Rockland County executive in 2013; and removed a legal services agency as counsel for a housing litigant without consulting the client and sanctioned the agency "without authority in law."

The Commission expressed particular concern about a July 2012 incident in the Spring Valley court, when Simon objected to the presence of a college student who had been hired as an intern and threatened to hold him in contempt. When others refused his orders to remove or arrest the intern, Simon threatened contempt citations against the mayor, the chief court clerk, and the Spring Valley Police Department. When fellow Justice David Fried tried to intervene, Simon "threatened him with contempt and told him to 'have a stroke and die,'" then attempted to remove the intern by grabbing his arm. "Where ... a physical confrontation is coupled with multiple threats of arrest and contempt, a two-hour display of unrelenting rage and aggression, and a stream of invective and vitriol, public confidence in [Simon's] fitness to serve as a judge is irredeemably damaged," the Commission said. It cited "numerous other incidents" in which he threatened officials with contempt or arrest "with no lawful or reasonable basis."

Simon argues he should be censured, but not removed from office. "As the record demonstrates, there is a high level of assurance that if petitioner were permitted to remain on the bench, the misconduct complained of -- threats to court staff and others to hold them in contempt, rudeness and use of abusive language -- will not be repeated." He says, "While petitioner's intemperate conduct in dealing with court and other Spring Valley personnel cannot be excused, it always arose from an effort -- albeit misguided -- to improve the efficiency of the court or maintain the court's integrity and independence from a corrupt village administration that saw its mayor and deputy mayor convicted of federal corruption charges.

For petitioner Simon: Lawrence M. Mandelker, Manhattan (212) 682-8383
For respondent Commission: Edward Lindner, Albany (518) 453-4613

State of New York Court of Appeals

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To be argued Wednesday, September 7, 2016

Nos. 136-143 Matter of County of Chemung v Shah (and seven related cases)

In these cases, eight counties sued the state Department of Health (DOH) and its commissioner to obtain Medicaid reimbursement for "overburden expenditures" made prior to 2006. Overburden expenditures, the costs counties incurred for care provided to some Medicaid recipients with mental illness or disabilities, were repaid in full by the state from 1984 through 2005 pursuant to Social Services Law § 368-a(1)(h)(i). When the state enacted a Medicaid cap statute in 2005 to limit increases in the counties' share of the program's cost, it also eliminated overburden reimbursements for costs incurred on or after January 1, 2006, but courts ruled that the state remained obligated to reimburse counties for overburden expenditures incurred prior to 2006. In 2012, the governor proposed an amendment to the Medicaid cap statute -- Section 61 of Part D of the 2012-2013 Health and Mental Hygiene Budget (hereinafter Section 61) -- to "make clear" that the intent of the cap statute was to bar any further reimbursement of overburden expenditures incurred prior to 2006. Section 61, which was enacted on March 30 and took effect on April 1, 2012, provided that counties would not be reimbursed for pre-2006 claims submitted on or after its effective date.

The counties challenged the constitutionality of Section 61, arguing that it retroactively deprived them of their vested rights to reimbursement of pre-2006 overburden costs without due process. They also sought, among other things, mandamus relief directing DOH to review its records, identify any overburden expenses still owed to them from 1984 to 2005, and make appropriate reimbursements. At least 20 counties have brought similar lawsuits, and the state estimates its liability for past overburden reimbursements could exceed $180 million.

The Appellate Division, Third Department ruled that St. Lawrence and Chemung Counties were entitled to reimbursement of their pre-2006 overburden expenditures. It ruled Section 61 was constitutional because it did not retroactively deprive counties of their right to reimbursement, but "simply imposed a statute of limitations for the payment of claims." However, to satisfy due process, it gave the counties "a reasonable grace period" of six months to file their claims. It also held that, under Social Services Law § 368-a(1), "DOH was required to pay ... reimbursements even without any claims being made," and directed DOH to search its records to identify and reimburse any remaining pre-2006 overburden expenditures.

The Appellate Division, Fourth Department dismissed the suits filed by six other counties -- Chautauqua, Jefferson, Oneida, Genesee, Cayuga, and Monroe -- saying they had not shown that Section 61 was unconstitutional. "Inasmuch as [the counties] are not persons who may raise a due process challenge to state legislation, they are not entitled to the relief they seek...," it said. It also ruled the counties were not entitled to submit any further claims or to have DOH search out and process any unreimbursed overburden expenses, reiterating its prior holding in M/O County of Niagara v Shah (122 AD3d 1240) that "the unequivocal wording of Section 61 retroactively extinguishes [a county's] right to submit claims for reimbursement of overburden expenditures made prior to 2006."

For appellant & respondent State: Assistant Solicitor General Victor Paladino (518) 473-4321
For respondent & appellant Counties: Christopher E. Buckey, Albany (518) 487-7600

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To be argued Thursday, September 8, 2016 (arguments begin at noon)

No. 144 People v Louis Speaks

Louis Speaks and an accomplice were charged with robbing a Brooklyn fast food restaurant at gunpoint in August 2010. The thieves took money from the cash registers and a safe and also took cash and cell phones from five restaurant employees, three of whom testified against Speaks two years later. Two of the witnesses identified Speaks for the first time at trial. Supreme Court allowed the prosecutor to elicit testimony from Detective Michael Henry about a description of the robbers that he obtained on the day of the crime from the restaurant's assistant manager, who did not testify at trial. The court said, "I will not allow it for the truth, I am just allowing it to explain why this witness did whatever he may have done." The detective also testified about a similar description he obtained from a cashier, who did appear as a witness and identified Speaks for the first time at the trial. The detective said that, after he spoke with the two witnesses, he went "to do an investigation to find if there was any video." Speaks was convicted of first- and second-degree robbery and sentenced to eight years in prison.

The Appellate Division, Second Department affirmed on a 3-1 vote, saying the detective's testimony about descriptions he obtained at the crime scene was properly admitted "for a limited nonhearsay purpose." Regarding the assistant manager's description, it said, "The jury was specifically instructed not to consider this description for its truth, and the description was properly admitted for the relevant, nonhearsay purpose of 'establishing the reasons behind the detective's actions, and to complete the narrative of events leading to the defendant's arrest....'" The prosecutor established a sufficient connection between the "general description" and subsequent events because it "led to successive police investigatory conduct such as interviewing other witnesses, including a witness who identified the defendant at trial, and procuring the surveillance video of the defendant...." It said Speaks' hearsay and bolstering challenges to use the cashier's description were unpreserved and, on the merits, said the detective's testimony was properly admitted for similar reasons.

The dissenter argued the detective's testimony about the pretrial descriptions was inadmissible hearsay because the prosecutor "failed to connect" them "to any subsequent course of action taken by the police." Regarding the assistant manager's description, she said, "[W]here there is no connection between the out-of-court statement and subsequent police action, it cannot be said that the out-of-court statement was offered for a nonhearsay purpose.... Without this connection, there was no purpose for the introduction of [the] description, other than for its truth." She said the detective's testimony about the cashier's description also constituted improper bolstering because it "served to implicitly bolster her identification testimony. Such testimony was of little or no probative value, and the danger of such bolstering testimony was 'especially acute,' since it was provided by a law enforcement officer...."

For appellant Speaks: Nao Terai, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Lori Glachman (718) 250-4943

State of New York Court of Appeals

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To be argued Thursday, September 8, 2016 (arguments begin at noon)

No. 145 People v Lerio Guerrero *(papers sealed)*

In November 1998, police investigating the rape and robbery of a woman in lower Manhattan recovered blood and semen of her attacker, which enabled them to obtain the perpetrator's DNA profile, but it did not match any profile in their database. They also recovered a fingerprint, but because it was made by the joint of the attacker's index finger it could not be matched through the automated identification system and had to be compared manually to the print of a known suspect. The police released surveillance video and circulated a sketch of the attacker, but closed their investigation eight months later without identifying a suspect.

In April 2005, to forestall expiration of the statute of limitations, prosecutors obtained a "DNA indictment," which charged "John Doe, with the following DNA profile," with the rape and robbery. In May 2011, the police obtained a DNA sample from Lerio Guerrero, using a cigarette he smoked while they questioned him in an unrelated case. His DNA profile matched the perpetrator's profile in the 1998 rape case. The police then matched the finger joint print to Guerrero. In June 2011, the prosecutor moved to amend the indictment to name Guerrero as the defendant in place of "John Doe," and submitted an affirmation in which she described the DNA and fingerprint matches.

Supreme Court granted the motion to amend the indictment. Guerrero moved to dismiss, arguing the indictment "is defective in that it does not ... provide an adequate description of the accused;" the prosecutor's motion to amend "contains improper hearsay and double hearsay;" and the scientific evidence linking the DNA profiles was never presented to a grand jury. The court denied the motion, ruling the indictment and amendment were valid. It also rejected his statute of limitations and speedy trial claims. Guerrero pled guilty to first degree counts of rape, sodomy, robbery and burglary, in return for a 15-year prison sentence, and waived his right to appeal. The Appellate Division, First Department affirmed.

Guerrero argues, "[T]he identification of any perpetrator is an essential element of proof that must be established before a grand jury for an indictment to be legally sufficient; it is of no moment that the identification is made through DNA or more traditional means such as a fingerprint or lineup." The evidence linking his DNA profile and fingerprint to the perpetrator were not presented to a grand jury, but were contained in the motion to amend the indictment "which set forth this evidence in the form of hearsay allegations," he says, violating his constitutional right to prosecution by indictment and "circumventing" the statute of limitations.

The prosecution argues that Guerrero waived his claims with his guilty plea. On the merits, the prosecution argues the indictment was valid because "the DNA evidence presented to the grand jury, which identified defendant based on the unique DNA profile developed from the vaginal swabs collected from the victim, provided compelling, indeed definitive, proof of the identity of the person -- i.e., defendant -- who had attacked" the victim. And it was properly amended because "the amendment did not result in a new or different person being charged" nor did [it] alter, in any way, the charges or the People's theory of the case."

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For respondent: Manhattan Assistant District Attorney Malancha Chanda (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, September 8, 2016 (arguments begin at noon)

No. 162 Matter of Brandes

Joel Brandes, a specialist in matrimonial law and the author of "Law and the Family New York," was disbarred in 2002 for misconduct in representing his ex-wife in a fee dispute with her counsel in their divorce. In the disbarment order, the Appellate Division, Second Department directed Brandes to "desist and refrain from ... practicing law in any form, [and] giving to another an opinion as to the law or its application or any advice in relation thereto." He moved to Florida and in 2003 formed Joel R. Brandes Consulting Services, Inc., which offered legal research and drafting services to attorneys. His website stated that his corporation "is not a law firm and does not give legal advice." His first two motions for reinstatement to the bar in 2009 and 2011 were denied by the Appellate Division. Brandes then removed all references to paralegal services from his website and, in 2013, filed his third motion for reinstatement. At a hearing, he told members of the Committee on Character and Fitness that he worked only for lawyers, not clients, and provided research primarily on matrimonial issues. He said attorneys used him because he "had more expertise" than they did. The Committee recommended that he be reinstated.

The Appellate Division denied his motion, saying Brandes "engaged in the unauthorized practice of law ... when he provided paralegal services via the Internet," thus violating Judiciary Law § 90(2) and the disbarment order. It said, "Under the guise of being a paralegal, Mr. Brandes, a noted authority and expert on New York family law and divorce..., would give advice to an attorney, who had a difficult case.... Upon presentation of the particulars of the case or problem, Mr. Brandes would guide the attorney to the applicable statutes and precedent cases, and offer his past experience. Such rendering of legal advice or opinion constitutes the practice of law, since Mr. Brandes ... exercised professional judgment directed at the legal problem of a particular client, notwithstanding the fact that Mr. Brandes had no direct contact or relationship with the client." Regarding his drafting services, it said, "Given the fact that Mr. Brandes was vastly more experienced in matrimonial and domestic relations matters than the attorneys..., the provision of such services can be deemed to be performing legal services for a client, namely, the attorney for whom he drafted the brief and documents."

Brandes argues the order "singles Mr. Brandes out from other disbarred lawyers seeking reinstatement because of his expertise and denies him equal protection of the law, due process of law and freedom of speech. It is arbitrary and capricious. It is also punitive in that Mr. Brandes is now prohibited from working as a paralegal for any New York divorce or family lawyer who is less knowledgeable than him, without offering any objective criteria to determine who is less knowledgeable...." He says he was not practicing law because he did not represent or have a fiduciary relationship with any of the clients of the lawyers who employed him, who used their own judgment to decide how much of his advice to take. "Implicit in the decision is that if Mr. Brandes did not have special skills and experience, and was not more knowledgeable than the attorneys he served, he would have been deemed to have properly acted as a paralegal...," he says, complaining the order prohibits him "from doing that which he could do ... were he never a lawyer in the first place."

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For respondent Character and Fitness Committee: Robert H. Cabble, Hauppauge (631) 231-3775

State of New York Court of Appeals

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To be argued Thursday, September 8, 2016 (arguments begin at noon)

No. 147 People v Charles K. Wilson

Charles Wilson and a co-defendant, Kenneth Boykins, were accused of a home invasion robbery and shooting in Rochester in September 2006. After two of the victims identified Wilson in photo arrays and a lineup, the police arrested him and advised him of his Miranda rights. Wilson invoked his right to remain silent, saying, "No. I have nothing to say." The police informed him that he was being charged along with Boykins and, when Wilson looked puzzled, they said he must know Boykins because he had shot and injured himself shortly after the robbery. Wilson denied knowing Boykins. When they repeated that Boykins shot himself, the police said, Wilson "became upset and said that ... he didn't shoot himself, nobody shoots themselves there like that. And he indicated that he knew who he was." One of the investigators acknowledged at the suppression hearing that, while information obtained through questioning after a defendant invokes Miranda cannot be used in the prosecution's direct case, he was aware from his training that it may be used for cross-examination or rebuttal if the defendant chooses to testify. The prosecutors indicated they would use Wilson's post-Miranda statements to impeach him if he took the stand.

County Court denied Wilson's motion to preclude any use of statements he made to the police after invoking his Miranda rights. "It has long been held that statements obtained from a defendant in violation of any aspect of his Miranda rights may still be used to impeach a defendant who chooses to take the stand and testify inconsistently with his illegally obtained statement," it said, citing Harris v New York (401 US 222 [1971]). It said Wilson's statements "were voluntarily made, and thus may be used by the prosecution on cross-examination of the defendant." Wilson did not testify at his trial. He was convicted of charges including first-degree robbery, assault and burglary, and was ultimately sentenced to 25 years in prison.

The Appellate Division, Fourth Department affirmed, saying Wilson's post-Miranda statements to the police "were voluntary and thus were admissible for impeachment purposes." It also rejected his claims that the identification procedures were unduly suggestive.

Wilson argues that a "bright line rule" barring any use of evidence obtained in violation of Miranda should be adopted under the New York Constitution, "which offers greater protection to its citizens." "[T]he voluntariness of unlawfully obtained statements should not be a factor to be considered by the state court.... A simple, clear rule excluding any statements for any purpose that are extracted from the defendant subsequent to his invoking his Miranda rights supports the policy behind the Constitutional mandate, that is, the curbing of improper tactics to extract information by law enforcement." He says, "The investigators in this case unabashedly admitted that they were aware continued questioning despite defendant's invocation of his rights could result in statements" that might be used against him if he testified. "By seeking to prevent or limit defendant's right to present a defense, the police could rightfully be accused of a premeditated attempt to violate the defendant's constitutional rights."

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