*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 or gspencer@nycourts.gov.**

# NEW YORK STATE COURT OF APPEALS

## Background Summaries and Attorney Contacts

## February 7 thru 9, 2017

## February 14 and 15, 2017

# *State of New York Court of Appeals*

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To be argued Tuesday, February 7, 2017

**No. 16 Matter of 381 Search Warrants Directed to Facebook, Inc. (New York County District Attorney's Office)**

In 2013, while investigating an extensive scheme by former New York City police officers, firefighters and others to fraudulently obtain Social Security disability benefits, the Manhattan District Attorney's Office applied under the federal Stored Communications Act (SCA) for bulk search warrants requiring Facebook, Inc. to find and turn over all information contained in the Facebook accounts of 381 individuals. In support of the application, it filed an affidavit alleging that the suspects obtained benefits by submitting false claims that they suffered mental disabilities due to the trauma of responding to the September 11, 2001 terrorist attacks, and stating that photographs, messages and other postings in the Facebook accounts could contradict their claims. The fraud scheme was allegedly headed by Long Island attorney Raymond Lavallee, who ultimately pled guilty to fourth-degree conspiracy in 2015. Supreme Court issued the warrants in July 2013. It also ordered Facebook, pursuant to 18 USC § 2703(b) of the SCA, not to notify the account holders of the existence or execution of the warrants to prevent interference with the criminal investigation.

In September 2013, Supreme Court denied Facebook's motion to quash the warrants, finding they were supported by probable cause and the district attorney "followed all of the requisite procedures" under the SCA. It also said Facebook failed to establish standing to challenge the warrants because only the account holders "could assert an expectation of privacy" in their accounts. Facebook appealed, but also complied with the warrants and turned over the data. After 62 of the targeted Facebook users and 70 other individuals were indicted in 2014, the court granted the district attorney's motion to unseal the warrants and supporting affidavit. It also allowed Facebook to notify its users of the warrants. When prosecutors refused to release the affidavit, on the ground that the criminal proceedings were not entirely resolved, Facebook moved to compel disclosure. Supreme Court denied the motion in August 2014.

On appeal, Facebook challenged the constitutionality of the bulk warrants, contending they violate the Fourth Amendment because they are overbroad and lack sufficient particularity regarding the information sought. It also argued the warrants' "gag provisions" violate the First Amendment and the SCA by barring Facebook from informing its users of the digital searches.

The Appellate Division, First Department dismissed the appeals, ruling "Facebook cannot litigate the constitutionality of the warrant pre-enforcement on its customers' behalf" because the orders are not appealable. The warrants were issued in a criminal proceeding, it said, and the Criminal Procedure Law does not provide "a mechanism for a motion to quash a search warrant, or for taking an appeal from a denial of such a motion." It said "the sole remedy for challenging the legality of a warrant is by a pretrial suppression motion" and, if the motion is denied, "appellate relief is limited to raising the issue upon direct appeal" from a conviction.

Facebook argues the SCA warrants are more akin to civil subpoenas, which can be challenged before they are executed. Citing Matter of Abrams (62 NY2d 183), it says, "This Court has held that a third party may move to quash Government demands for information in its possession -- even when those demands occur in the context of a criminal investigation -- and that the denial of such a motion is an appealable order." It also argues the SCA "specifically allows Facebook to move to quash an order issued under 18 USC § 2703 -- the very section on which the trial court relied in ordering execution of the warrants." It says dismissal of its appeals would shield any abuse of the SCA warrant process from appellate review.

For appellant Facebook: Thomas H. Dupree, Jr., Manhattan (212) 351-4000
For respondent: Manhattan District Attorney Cyrus R. Vance, Jr. (212) 335-9000

# *State of New York Court of Appeals*

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To be argued Tuesday, February 7, 2017

**No. 17 People v Matthew Slocum**

Matthew Slocum was charged with fatally shooting his mother and stepfather, Lisa and Daniel Harrington, and his stepbrother Joshua O'Brien at their Washington County home and then setting fire to the house on July 13, 2011. On the afternoon of the murders, the Public Defender's Office sent letters to the District Attorney's Office and police agencies which said it was representing Slocum in an unrelated criminal case and he "would qualify for representation on any additional charges;" asked that it be contacted if he was arrested or detained in the murder case; and requested that Slocum "not be questioned or interrogated without counsel present." Slocum was arrested later that evening in New Hampshire, where he had fled with his girlfriend, Loretta Colegrove, and their three-month-old son, and a sheriff's investigator and a state trooper were sent to interview him. The district attorney advised them that, despite the public defender's letter, they could question Slocum until he asked for an attorney. At the outset of the interview, one of the officers asked Slocum if he felt he should have an attorney or wanted to be represented by the public defender. Slocum replied, "Yeah, probably." After briefly discussing Slocum's dissatisfaction with his representation by a public defender in a prior case, the officers advised him of his Miranda rights, Slocum waived his rights and ultimately confessed to the murders.

County Court refused to suppress his statements, finding Slocum "knowingly and intelligently waived his Miranda rights." It said he "did not unequivocally request the assistance of counsel" by responding, "Yeah, probably," when asked if he should have an attorney. Slocum was convicted of second-degree murder (three counts), third-degree arson, and lesser charges.

The Appellate Division, Third Department reversed and ordered a new trial, finding he unequivocally invoked his right to counsel when he said, "Yeah, probably," before the questioning began. "The word 'probably' is defined as 'very likely' or 'almost certainly'...," it said. "It is difficult to conceive of circumstances where 'probably' would mean 'no,' particularly here, where the police knew that defendant was currently represented, albeit on unrelated charges, and also knew that counsel was so clearly attempting to protect his current client's constitutional rights. Defendant's demeanor and tone when saying 'Yeah, probably' was his simple expression, in everyday language, that he was not competent or capable to deal with the officers' questioning." It said, "Even if a reasonable officer could have interpreted 'Yeah, probably' to be equivocal," the public defender's letter "created a situation where [the officers] were required to inquire further to see if the indelible right to counsel had attached...."

The prosecution argues the reversal "is flawed for three reasons. First, defendant did not issue an unequivocal request for counsel; no credible evidence at the hearing supports a different conclusion. Second..., the Appellate Division failed to apply the proper standard...: it required the People to prove that defendant refused counsel rather than determining whether he unequivocally requested counsel; and it evaluated defendant's words by a subjective standard ... by taking into account information known by police but not defendant, while at the same time disregarding the evidence ... about defendant's demeanor and actions. Third, it wrongly held that the letter compelled additional action by police...."

For appellant Special District Attorney: Jason P. Weinstein, Albany (518) 432-1100 ext. 233
For respondent Slocum: Michael J. Mercure, Fort Edward (518) 746-2200

# *State of New York Court of Appeals*

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To be argued Tuesday, February 7, 2017

**No. 18 People v Norman Whitehead, Jr.**

In 2011, Norman Whitehead was charged along with more than 30 other people with conspiracy and multiple counts of criminal possession and sale of cocaine after a six-month investigation by the Attorney General's Organized Crime Task Force (OCTF) and Albany Police Department of a drug trafficking network that operated in Albany, Schenectady and New York City. The investigation relied heavily on wiretaps and surveillance. Whitehead was convicted in Albany County Court and is serving an aggregate term of 23 years in prison.

Whitehead argued on appeal that, among other things, there was insufficient evidence to support his convictions on four drug possession counts because the investigators never recovered any of the cocaine he allegedly possessed.

The Appellate Division, Third Department rejected his claim. "Defendant stresses that the People failed to recover or produce at trial any cocaine actually possessed by him. Significantly, however, two individuals who had been indicted with defendant eventually cooperated with the People and testified against defendant. These individuals clearly had knowledge of cocaine, they were involved in cocaine transactions with defendant and they indicated that defendant supplied a drug that they used and/or resold and that they knew to be cocaine," the court said, citing its 1990 ruling in People v Christopher (161 AD2d 896), which held that, where an illegal drug "is not available for analysis, drug users who can demonstrate a knowledge of the narcotic are competent to testify." It said sufficient evidence to support Whitehead's convictions "was provided by the combination of, among other proof, the extensive phone records, the explanation of the drug-related street language used therein, coinciding transactions (some observed by police), and testimony of cooperating witnesses who had been participants in various transactions."

Whitehead argues there was insufficient evidence of drug possession because the alleged cocaine was never tested or weighed. "[T]he prosecution was required to prove, *inter alia*, the existence of cocaine, and that it was in appellant's possession. Since the cocaine was never recovered, or even seen in appellant's possession, the prosecution was unable to establish any of these four possessory offenses. Recorded telephone calls, even if they contain overt admissions of narcotics possession, cannot establish the actual possession of a controlled substance," he said, citing People v Martin (81 AD3d 1178).

For appellant Whitehead: Matthew C. Hug, Albany (518) 283-3288
For respondent: Assistant Attorney General Lisa E. Fleischmann (212) 416-8802

# *State of New York Court of Appeals*

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To be argued Wednesday, February 8, 2017

**Nos. 19 & 20 People v Richard M. Leonard** *(papers sealed)*

Richard Leonard was charged with sexually molesting an 18-year-old woman in the Town of Parma, Monroe County, after she was rendered unconscious by alcohol in October 2007. The victim and her boyfriend testified that Leonard had been serving them liquor. The girl had no memory of the abuse, but her boyfriend testified that he saw Leonard with his hand on her vagina. The boyfriend drove the victim away, then returned with a baseball bat and struck Leonard on the head. The deputy sheriff who questioned the boyfriend the same day recorded that he said he "didn't see anything specific, but believed that Leonard was doing something inappropriate to his girlfriend ... while she lay passed out on the sofa." Leonard's defense attorney did not cross-examine the boyfriend about his initial statement that he "didn't see anything specific." When County Court allowed the prosecutor to introduce evidence of an uncharged crime -- the victim's claim that Leonard had sexually abused her in 2005 after he served her alcohol and she fell unconscious -- defense counsel did not request a limiting instruction that jurors were not to consider the incident as proof of Leonard's criminal propensity.

Leonard was convicted of first-degree sexual abuse, for having sexual contact with the victim when she was physically incapable of consent, and unlawfully dealing with a child in the first degree, for serving her alcohol when she was under the age of 21. County Court sentenced him to three and a half years in prison. Leonard filed a CPL 440.10 motion to vacate the judgment on the ground, among others, that he was denied effective assistance of counsel. The court denied the motion.

The Appellate Division, Fourth Department affirmed his conviction and the order denying his motion to vacate it. "[E]ven assuming, arguendo, that the evidence of the [boyfriend's] prior statements to the police would have been admissible, either to impeach that witness or on defendant's direct case, we conclude that defendant has not established that trial counsel's failure to utilize those statements demonstrated a lack of strategy. Rather, we conclude that defendant's contention reflects a mere disagreement with trial strategy, which does not amount to ineffective assistance of counsel...," it said. "[A]ny error on trial counsel's part in not requesting a limiting instruction regarding the evidence of past uncharged crimes does not rise to the level of ineffective assistance of counsel when that error is viewed in light of trial counsel's 'entire representation of defendant'...."

Leonard, saying the boyfriend "was the only witness to testify to having observed the charged sexual abuse," argues that "a conscious decision to fail to try to impeach [the witness] with his statements that he had not seen anything specific would be wholly contrary to reasonable professional competence. It could only have helped Mr. Leonard for counsel to take all steps to have the jury learn what [the witness] had told the police on the day of the alleged sexual abuse -- he had not seen anything specific. Whether counsel's failings were the product of ignorance or ineptitude, or a doomed strategy that fell outside the scope of professional norms, his performance was deficient." He also argues, "[B]y failing to seek a limiting instruction to insure that the jury did not consider the testimony about Mr. Leonard's alleged 2005 sexual abuse of [the victim] as proof of [his] propensities, and by not objecting to the prosecutor's arguments in summation about the significance of this testimony, counsel displayed an ignorance of the law which ... prejudiced Mr. Leonard's constitutional rights."

For appellant Leonard: Brian Shiffrin, Rochester (585) 423-8290
For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810

# *State of New York Court of Appeals*

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To be argued Wednesday, February 8, 2017

**No. 21 Matter of East Ramapo Central School District v King**

The East Ramapo Central School District brought this CPLR article 78 proceeding against the New York State Department of Education to challenge its 2012 determination that the District was in violation of the federal Individuals with Disabilities Education Act (IDEA), which requires that students with disabilities receive a free public education in the "least restrictive environment" suitable for them. The Education Department found the District had a "pattern" of placing disabled students in private schools and one out-of-district public school, the Kiryas Joel Union Free School District, to meet parental demands that their children be placed in Yiddish bilingual education programs. The Department said the placements were more restrictive than necessary and there was no documented need for such services. The Department also found the School District violated the IDEA by routinely allowing a single District representative to override the findings of its Committee on Special Education, which had recommended the students be placed in public school programs.

Supreme Court dismissed the School District's suit on the merits, finding the Education Department's determination was not arbitrary, capricious or an abuse of discretion. It found the Department's determination that the District violated the IDEA "was reasonable and rational."

The Appellate Division, Third Department affirmed on a different ground, ruling the IDEA does not grant local districts a right of action to challenge the Education Department's enforcement actions. It said, "Since the IDEA includes an express right of action in favor of a specific class of persons," aggrieved students and parents, "it is logical to assume that, had Congress intended to bestow upon [local districts] a right of action to challenge [a state educational agency's] regulatory and enforcement actions, it would have expressly done so...." The court said, "The delegation of regulatory and enforcement power to the [federal] Secretary of Education and the states, but not to [local districts], suggests that Congress specifically intended to deny [local districts] a right of action to challenge [a state agency's] compliance with the IDEA.... Moreover, it would be inconsistent for Congress to implicitly create this right of action, as doing so would divest the Secretary of Education and the states of their regulatory and enforcement authority and would transfer that power to the judiciary...."

The School District argues that it has an "independent right to judicial review" under article 78, and the Third Department's ruling to the contrary "effectively immunizes the Education Department's decisions in this sensitive area from any judicial scrutiny. School districts have no recourse to the courts even for Education Department decisions that are arbitrary, irrational, or inconsistent with the law." It says the IDEA does not control its right to challenge the determination because article 78 "provides an aggrieved party an independent right to seek judicial review of decisions by New York administrative agencies. Article 78 is a fundamental limitation on the powers New York grants to its administrative officials that neither depends upon nor requires federal authorization.... The only way that federal law could compel a different result would be by preempting article 78.... Nothing in the IDEA suggests congressional intent to preempt article 78 in this context."

For appellant School District: Randall M. Levine, Washington, DC (202) 373-6000
For respondents Education Dept. et al: Asst. Solicitor General Jeffrey W. Lang (518) 776-2027

# *State of New York Court of Appeals*

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To be argued Wednesday, February 8, 2017

**No. 22 People v Thomas Jackson** *(papers sealed)*

A woman accused Thomas Jackson of raping and sodomizing her in a Schenectady motel room after she met him at a nightclub in March 2011. A second woman, who worked at the same Schenectady nightclub, accused him of raping her in her SUV in Vale Park one month later. Jackson's defense at trial was that his sexual encounter with the first complainant was consensual and that he did not have sexual intercourse with the second complainant.

At a pre-trial Sandoval hearing, Supreme Court ruled that it would allow the prosecutor to cross-examine Jackson about eight prior criminal acts if he took the witness stand, including "the fact that the defendant was adjudicated as a juvenile delinquent in response to the charge of robbery in the second degree and it resulted in a year of probation." Jackson chose not to testify at trial. He was convicted of predatory sexual assault and criminal sexual act in the first degree and sentenced to 25 years to life in prison.

The Appellate Division, Third Department affirmed. It found the trial court erred in allowing Jackson to be impeached with his juvenile delinquency adjudication "because it is not a conviction for a crime," but it ruled the error was harmless. "[H]armless error analysis in the Sandoval context 'does not involve speculation as to whether a defendant would have testified if the legal error had not occurred'.... Defendant extensively attacked the credibility of the victims by other means and, given the overwhelming evidence of his guilt and the absence of any 'significant probability that the jury would have acquitted had the error not occurred,' we find that the error was a harmless one," it said, citing People v Grant (7 NY3d 421). The court also found he validly waived his right to be present at sidebar conferences during jury selection.

Jackson argues that, in applying harmless error analysis to a Sandoval error under Grant, the "decisive factor" is whether his decision not to testify "deprived the trier of fact of significant material evidence." He says his "decision not to testify certainly did deprive the jury of significant material evidence" in a case where "there was no physical evidence of forcible compulsion" in his encounter with the first complainant and "no physical evidence of sexual intercourse or forcible compulsion" in the encounter with the second complainant. "The proof of guilt was far from overwhelming," he says, and "there's no reasonable basis to conclude that Mr. Jackson lacked a viable defense or that the jury would invariably have discredited testimony by him disputing the complainant's claims...." He also argues his waiver of his right to attend sidebar conferences was invalid because the trial court did not explain that it included sidebars held to question prospective jurors about potential bias.

For appellant Jackson: Mitch Kessler, Cohoes (518) 235-6312
For respondent: Schenectady County Assistant District Attorney Peter H. Willis (518) 388-4364

# *State of New York Court of Appeals*

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To be argued Thursday, February 9, 2017 (arguments begin at noon)

**No. 23 People v Charles Smith**

Charles Smith walked into a Queens check cashing store in November 2011 and demanded money from the teller, who was alone and locked behind a counter with a bulletproof plexiglass partition. The teller testified that Smith told her he had a gun and that one of his hands was under his sweatshirt at his waist. When she did not comply, she said, Smith threatened to shoot her. After 10 or 15 minutes, he left the store empty-handed. Police arrested Smith minutes later, at which time he was unarmed. He was convicted of attempted robbery in the first degree and sentenced to 16 years to life in prison.

On appeal, Smith argued there was insufficient evidence to support his conviction under Penal Law § 160.15(4), which provides that a defendant is guilty of first-degree robbery when, during the commission of the crime or his immediate flight, he "displays what appears to be a ... firearm." Smith relied on People v Lopez (73 NY2d 214), which said the prosecution "must show that the defendant consciously displayed something that could reasonably be perceived as a firearm ... and that the victim actually perceived the display." Although "a mere threat without some display is insufficient," the Court said that "even a hand consciously concealed in clothing may suffice..., if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery."

The Appellate Division, Second Department affirmed Smith's conviction, finding there was sufficient evidence under Lopez that he "displayed what appeared to be a firearm."

Smith argues that his conviction should be reduced to attempted robbery in the third degree under Lopez. "This Court has never interpreted the display element of [section] 160.15(4) so broadly as to encompass a robbery in which a defendant did not make any volitional movement or gesture suggesting the presence of a firearm," he says, and there is no evidence that he "engaged in any affirmative, volitional act intended to convey the impression that he possessed a firearm. Instead, the sum total of the People's proof consisted of a single witness's testimony that Mr. Smith demanded money and stated that he had a gun and would shoot her, and that one of his hands happened to be obscured by his clothes during their interaction.... [T]he record reflects that Mr. Smith's hand remained passively out of view throughout the encounter with [the teller], even after she ignored his demands for money."

The prosecution argues the evidence satisfied Lopez. Smith's "actions and his threats demonstrated his conscious intent to create the impression that he had a handgun under his jacket. Moreover, the victim, having heard these threats and seen defendant's hand placed under his shirt at his waist, perceived the display and subjectively believed that, while she could not be certain, defendant had a gun.... [D]efendant did not simply keep his hand out of view; he held it under his shirt, at his waist -- where guns are often carried -- while telling the cashier that he had a gun and threatening to shoot her. Based on this evidence, the jury could reasonably infer that the gesture was not a random passive act fortuitously coinciding with the threat to shoot but that it was meant to convey what it in fact did convey, that defendant had a gun."

For appellant Smith: Craig A. Stewart, Manhattan (212) 715-1000
For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

# *State of New York Court of Appeals*

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To be argued Thursday, February 9, 2017 (arguments begin at noon)

**No. 24 Rivera v Department of Housing Preservation and Development**
**No. 25 Matter of Enriquez v Department of Housing Preservation and Development**

When a New York City agency orders tenants to vacate their apartment due to hazardous conditions or code violations, the city's Administrative Code authorizes the Department of Housing Preservation and Development (HPD) to provide relocation assistance including "temporary shelter benefits" to the displaced tenants and to recover the cost of "moving expenses or other reasonable allowances" from responsible landlords by filing a lien against their property. In these cases, brought by landlords seeking summary discharge of such liens, the question is whether courts may determine that claimed expenses are unreasonable and render the lien facially invalid without an evidentiary hearing. The Appellate Division has split on the issue.

In Case No. 24, the Fire Department issued a vacate order in 1995 that displaced two tenants from a Brooklyn building owned by David Rivera. In 2000, HPD filed a lien for $76,103.78 in relocation costs, including $75,228 for hotel expenses incurred over a period of four and a half years and $875.78 for administration costs. Rivera argued the lien was facially defective because the cost and length of the hotel stay were unreasonable. Supreme Court denied his motion for summary judgment and dismissed the complaint, saying "the lien is not invalid on its face, given that hotel expenses for tenants are allowable" under the Administrative Code, and thus the lien "was not subject to summary discharge" without a foreclosure trial.

The Appellate Division, Second Department affirmed. "A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19(6).... Where, as here, the notice of lien was not invalid on its face, any dispute regarding the validity of the lien must await trial thereof by foreclosure...," the court said.

In Case No. 25, the Department of Buildings issued a vacate order in 2010 that displaced one tenant from a Bronx building owned by Leonardo Enriquez. In 2011, HPD filed a lien for $16,862.89 in relocation expenses, including $16,425 for hotel expenses incurred over one full year and $437.89 for administration costs. Supreme Court dismissed Enriquez's suit, saying the lien "is facially valid" and "any dispute ... regarding the underlying validity of the lien" must be resolved after a foreclosure hearing.

The Appellate Division, First Department reversed and discharged the lien. Although hotel expenses are recoverable, it said, "HPD's financing of the tenant's residence in a hotel for an entire year was not reasonable.... Nor does HPD's payment of a year's worth of hotel charges qualify as 'temporary shelter benefits'.... Accordingly, because the notice of lien states that it is based on one year's worth of hotel charges, it is facially invalid and should be summarily discharged."

For appellant Rivera: Jason Chang, Manhattan (212) 929-4200
For respondent Enriquez: Ian Manas, Bronx (718) 328-0422
For respondent/appellant HPD: Asst. Corporation Counsel Jeremy W. Shweder (212) 356-2611

# *State of New York Court of Appeals*

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To be argued Thursday, February 9, 2017 (arguments begin at noon)

**No. 26 People v Ryan Brahney**

Ryan Brahney killed his former girlfriend, Bridget Bell, with a butcher knife after breaking into her home in the City of Auburn, Cayuga County, in November 2011. The medical examiner said Bell suffered 38 stab and slash wounds, but did not specify which of them were fatal. The police found signs of a struggle in her upstairs bedroom and smears and drops of blood in the upstairs hallway and on the stairs leading down to the living room, where her body was found. Brahney, who admitted killing the victim, presented a defense of extreme emotional disturbance. He was convicted at a bench trial of seven charges, including intentional murder in the first degree and two counts of burglary in the first degree, one based on his causing physical injury to the victim and the other on his use of a dangerous instrument.

County Court sentenced him to concurrent terms of 25 years on each of the burglary counts and directed that they run consecutively to a sentence of 25 years to life on the intentional murder count. Brahney argued on appeal that the consecutive sentencing violated Penal Law § 70.25(2), which requires concurrent sentences "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other."

The Appellate Division, Fourth Department upheld the consecutive sentences on a 3-2 vote, finding the burglary and the murder were committed through separate acts. "The evidence established that, after defendant entered the apartment through a window that he smashed with a cinder block, he dragged the victim from her bed and down the stairs to the living room, where he killed her," it said. The blood found in the upstairs hall and on the stairs showed that Bell was injured while she was still upstairs, but it said the amount of blood there was relatively small, while "there was a tremendous amount of blood evidence in the downstairs of the dwelling where the victim died.... [T]he People established that there were separate offenses, i.e., that the burglary was completed while the victim was still upstairs and that the murder occurred downstairs.... Thus, we conclude that the burglary and the murder offenses were 'committed through separate acts, though they are part of a single transaction.'"

The dissenters argued the consecutive sentences were illegal because "the People failed to meet their burden of establishing that the burglary and murder offenses were committed by separate and distinct acts.... Considering the fact that the victim's blood was found upstairs and on the staircase, it is apparent that defendant stabbed the victim at least once while they were upstairs, which would complete the burglary offenses. Unlike the majority, however, we conclude that the murder offense may also have occurred through that same act. In other words, the wound or wounds that the victim sustained while upstairs may have ultimately caused her death."

For appellant Brahney: Kathryn Friedman, Buffalo (716) 912-3699
For respondent: Cayuga County Asst. District Attorney Christopher T. Valdina (315) 253-1391

# *State of New York Court of Appeals*

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To be argued Tuesday, February 14, 2017

**No. 27 O'Brien v The Port Authority of New York and New Jersey**

Thomas J. O'Brien, Jr. was injured in July 2010 while working for DCM Erectors as a crane operator and mechanic at the construction site of the World Trade Center Freedom Tower. He slipped and fell down a temporary steel staircase that gave workers access to floors under construction. The staircase, or tower scaffold, was outdoors and was wet with rain when he fell. O'Brien sued The Port Authority of New York and New Jersey, the project owner, and Tishman Construction Corporation, the general contractor, alleging violations of the Labor Law.

Supreme Court denied summary judgment to both sides on O'Brien's claim under Labor Law § 240(1), the "scaffold law," which requires owners and contractors to provide scaffolding, ladders "and other devices which shall be so constructed, placed and operated as to give proper protection" to construction workers against elevation-related risks. It said conflicting affidavits from the parties' experts raised a question of fact about whether the staircase provided proper protection. The court granted summary judgment to O'Brien under Labor Law § 241(6), saying the evidence showed the defendants violated Industrial Code (12 NYCRR § 23-1.7[d]), which prohibits employers from allowing workers "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition."

The Appellate Division, First Department reversed. On a 4-1 vote, it granted summary judgment to O'Brien on liability under section 240(1), saying, "A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase ... is a safety device within the meaning of the statute.... The fact that the [parties'] experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor..., where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity.... Plaintiff's expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been." The court unanimously reversed the grant of summary judgment under section 241(6), saying, "Issues of fact exist concerning whether someone within the chain of the construction project had notice of the hazardous condition."

The dissenter said, "The parties' conflicting expert affidavits raise a triable issue as to whether a staircase offering superior protection from slipping hazards could have been provided. If a factfinder determines that no better staircase could have been provided, there was no violation of Labor Law § 240(1).... In my view, the motion court correctly determined that neither side was entitled to summary judgment.... While the staircase in question was a safety device within the purview of section 240(1), the record, including the conflicting expert affidavits concerning the adequacy of the staircase under prevailing safety standards, gives rise to a question of fact as to whether the accident arose from a violation of the statute...."

For appellants Port Authority and Tishman: Christopher Simone, Lake Success (516) 488-3300
For respondent O'Brien: David H. Perecman, Manhattan (212) 977-7033

# *State of New York Court of Appeals*

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To be argued Tuesday, February 14, 2017

**No. 28 People v Leonard Williams**

In December 2009, a group of men broke through the door of Lynville Scott's apartment in Crown Heights. They beat him and cut him with a knife, shot him in the legs, and poured bleach in his eyes while demanding money. They left with about $300. Scott testified at trial that Leonard Williams was among the men who broke in, but he could not remember who assaulted him. Scott's brother, Kurt Clarke, testified that he drove by the apartment in his truck just before the break-in and "thought" he recognized Williams among a group of men on the street. Surveillance video recorded at that time showed a group of men in hoodies walking on the street in a snowstorm along with a passing truck. None of the men could be identified from the video and, when Clarke was asked if the truck was his, he replied, "I can't say."

During his summation, the prosecutor made a PowerPoint presentation with slides of trial evidence, including still images taken from the surveillance video. One slide was a photo of Scott's street and was labeled, "Kurt Clark sees Defendant." Three stills from the video were labeled "Kurt Clark's Truck." Supreme Court instructed the jury to disregard the labels and "to look at the exhibit as you saw it." After a defense objection, the court said the labels "are amendments for the exhibits" and ordered the prosecutor to stop showing them. "I am not allowing any more ... superimposed words. None of that has been presented to the jury. You can say it, but you can't show it," the court said. Williams was convicted of first-degree burglary and second-degree weapon possession and assault. He was sentenced to 17 years in prison.

The Appellate Division, Second Department rejected Williams' claim that the prosecutor's slide show deprived him of a fair trial. "To the extent that the defendant contends that the prosecution mischaracterized the trial evidence with slides indicating that a truck belonged to one of the People's witnesses and that this witness saw the defendant on the street just prior to the assault, the defendant's challenges are preserved for appellate review. The defendant's remaining challenges regarding the slide show are unpreserved.... In any event, the slide show was not improper.... To the extent that there was any prejudice to the defendant, it was mitigated by the court's curative instruction to the jury..., which the jury is presumed to have followed."

Williams argues the prosecutor's slides deprived him of a fair trial because they "contained trial exhibits that he had modified by adding captions expressing his own personal conclusions regarding important factual questions. By adding his own captions..., the prosecutor improperly exposed the jury to altered exhibits that had never been admitted into evidence.... Making matters worse, the content of the slides misrepresented the evidence and transformed the prosecutor into an unsworn witness.... For example, contrary to the unequivocal assertion in a ... slide that an eyewitness "saw" appellant, the witness had testified only that he 'thought' he saw appellant, explaining that his view 'wasn't clear.' That witness also testified that he did not know if a truck depicted in a PowerPoint slide was his...."

For appellant Williams: A. Alexander Donn, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Jean M. Joyce (718) 250-3383

# *State of New York Court of Appeals*

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To be argued Tuesday, February 14, 2017

**No. 29 People v Trevor Anderson**

Trevor Anderson was charged with attempted murder and related crimes for allegedly shooting a man, who was dating Anderson's ex-girlfriend, at least twice with a .45 caliber handgun after confronting him on the street in front of his Brooklyn home in March 2010. Anderson's first trial ended with a hung jury.

Prior to his second trial, Supreme Court said at a Sandoval hearing that, if Anderson took the stand to testify, the prosecutor could question him about a witness's statement that she had seen him in possession of two guns some time before the shooting. Anderson chose not to testify. During summations, the prosecutor made a PowerPoint presentation that included slides of trial exhibits with superimposed labels, a timeline, and a photograph of Anderson surrounded by text boxes that said: "Lay in wait for [the victim] with .45 cal handgun;" "Fired .45 handgun twice from less than 8 feet away...;" "Fired .45 handgun twice more as [the victim] ran from deft;" "His bullets hit [the victim] twice in front and twice in back;" among other things. Anderson was convicted of second-degree murder and weapon possession. He was sentenced to 20 years in prison.

The Appellate Division, Second Department affirmed. While the trial court "improvidently exercised its discretion in determining, after a Sandoval hearing..., that the People could inquire about the defendant's prior conduct of possessing guns...," it said, "the fact that the defendant had possessed guns on a prior occasion had little bearing on his credibility...." It found the error harmless. As in No. 28, People v Leonard Williams (also to be argued today), the Second Department rejected Anderson's claim that the labeled slides in the prosecutor's PowerPoint presentation deprived him of a fair trial. It said his claim was unpreserved and, in any event, "the challenged remarks did not deprive the defendant of a fair trial.

Anderson argues the Sandoval error "was not harmless because there was plausible testimony that appellant could have provided" to negate the element of intent on the attempted murder charge, including that he only meant to "frighten," the victim, the gun discharged accidentally, or he feared the victim "was about to use deadly force against him." He says his attorney provided ineffective assistance during the prosecutor's summation when he failed to object to "an 80-slide PowerPoint presentation that contained numerous altered trial exhibits, including a version of appellant's arrest photo onto which prejudicial text had been inserted; a misleading timeline of events; and slides conveying the prosecutor's own assessments of the demeanor and credibility of the People's witnesses."

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For respondent: Brooklyn Assistant District Attorney Terrence F. Heller (718) 250-3599

# *State of New York Court of Appeals*

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To be argued Wednesday, February 15, 2017

**No. 30 People v William Cook** *(papers sealed)*
**No. 31 People v William Cook** *(papers sealed)*

William Cook pled guilty to multiple sexual offenses committed against four children, ranging from 7 to 12 years of age, in Queens and Staten Island in 1998 and 1999. All of them were the children of Cook's own childhood friends. Three of the victims were siblings and one was Cook's godson. The district attorneys for Queens and Richmond Counties coordinated their prosecutions and reached a plea agreement covering all of the charged offenses, under which Cook was sentenced to concurrent terms of up to 15 years in each county. He served 12 years in prison. Prior to his release in 2012, pursuant to the Sex Offender Registration Act (SORA), the Board of Examiners of Sex Offenders prepared a case summary and risk assessment instrument that covered all of Cook's convictions in both counties. The Board did not assess any points under risk factor 7, which applies when the victim is a stranger or "a person with whom a relationship had been established or promoted for the primary purpose of victimization."

At a SORA hearing in Richmond County, the prosecutor asked Supreme Court to assess Cook 20 points under factor 7, relying on Cook's descriptions in his Relapse Prevention Plan of how he "groomed the victims" for sexual abuse by playing with them, buying them gifts and taking them places. Cook argued the assessment would be improper because he had a well established, "family-like" relationship with the victims and their families long before any abuse occurred. The court assessed him 20 points under factor 7 and designated him a level three (high risk) offender, saying, "While the relationship may have started in a family sense, it's clear that the defendant brought that relationship to another level in order to accomplish his goals with each of these children."

When Supreme Court in Queens County notified Cook that it would also hold a SORA hearing, he moved to dismiss the proceeding as unauthorized by SORA and barred by res judicata. The court denied his motion and designated him a level three sex offender.

The Appellate Division, Second Department affirmed the Richmond County order, saying he was properly assessed "20 points under risk factor 7 since the defendant's self-authored 'Relapse Prevention Plan' described how the defendant groomed his victims, at least three of whom he knew through his longstanding friendship with their parents, for the primary purpose of victimizing them...." In a separate ruling, it reversed the Queens County order and dismissed the second proceeding. Under the SORA statute, it said, "only one SORA 'disposition' may be made per 'Current Offense,' or group of 'Current Offenses.'" It said the Queens proceeding was also barred by res judicata because "the crimes and the evidence ... were identical to those that were before the Richmond County SORA court, as were the parties and the issues to be determined."

Cook argues he should not be assessed points under factor 7 because he was not a "stranger" to the victims. "[H]e had been friends with their parents since childhood -- over two decades -- and knew their aunts, uncles, and grandparents well. His ties to the complainants existed long before he engaged in any sexual conduct with them. He was no different from the uncle who abuses his niece, a relationship that the Guidelines explicitly state is not covered by this risk factor." The Queens district attorney argues the Queens SORA proceeding was improperly dismissed because the statute requires "the sentencing court" in each case to determine the offender's risk level, a requirement that "cannot be circumscribed by applying a res judicata effect to the ruling of a single 'sentencing court.'"

For appellant in No. 30: Queens Assistant District Attorney Edward D. Saslaw (718) 286-5803
For respondent in No. 31: Staten Island Asst. Dist. Attorney Morrie I. Kleinbart (718) 556-7010
For appellant/respondent Cook: Lisa Napoli, Manhattan (212) 693-0085 ext. 202

# *State of New York Court of Appeals*

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To be argued Wednesday, February 15, 2017

**No. 32 People v Yusuf Sparks** *(papers sealed)*

Yusuf Sparks was smoking a cigarette in front of a Manhattan convenience store in December 2012 when Reginald Randolph, who appeared to be highly intoxicated, approached him and said, "I'm gonna fuck you up, I'm gonna fuck you up too." Both men entered the store and continued to exchange words. Sparks told Randolph to "take your hands off me" and punched him, then left the store. When Sparks returned a few minutes later, Randolph was standing nearby. Sparks took an empty milk crate out of the store and hit Randolph in the face with it. Two police officers, who were stopped at a traffic light near the store, arrested Sparks at the scene. Indicted on a charge of first-degree assault, he raised a justification defense at trial.

At a Sandoval hearing, the prosecutor sought permission, if Sparks chose to testify, to cross-examine him about his 2011 conviction for attempted second-degree robbery, in which he had tried to steal a cell phone by pretending to have a gun. Supreme Court ruled the prosecutor could elicit that Sparks had been convicted of a felony, but not ask about the underlying facts. However, it warned that it might reconsider its ruling if he testified that Randolph tried to rob him, saying details of the 2011 conviction would then be relevant because "that is exactly what the defendant has done on numerous occasions in the past." Sparks testified that Randolph had a reputation for violence and was the initial aggressor, that Randolph "insinuated that he had a gun" and tried to steal his coat inside the store, and that he feared Randolph was waiting to attack him again when he hit Randolph with the milk crate. The court then allowed the prosecutor to question Sparks about the details of his prior conviction. When the case was submitted to the jury, the court refused to instruct it on the defense of justification. Sparks was convicted of second-degree assault and sentenced to seven years in prison.

The Appellate Division, First Department affirmed. It said the justification charge was properly denied "since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support that charge.... Even under the version of the events contained in defendant's testimony, any conduct by the victim that might have been a basis for a justification defense had abated by the time defendant committed the assault." It said the trial court properly "modified" its Sandoval ruling based on Sparks' testimony, when "it became clear that there was a suspicious similarity, probative under the circumstances of the case, between the facts of defendant's own prior crime, and the conduct he was now attributing to the victim."

Sparks argues that, "in erroneously deciding that there was no reasonable view of the evidence to support justification, the court failed to consider the evidence in a light most favorable to Mr. Sparks and effectively usurped the jury's fact finding function.... [A] trial court is obligated to give a defendant the benefit of the doubt when considering whether a justification charge is warranted, and it cannot take the question out of the jury's hands simply because it is dubious of the defense." He also argues the trial court deprived him of a fair trial "by erroneously finding that the details of his 2011 ... conviction were probative of his justification defense and then refusing to charge the jury with justification."

For appellant Sparks: Andrew J. Dalack, Manhattan (212) 577-2523 ext. 539
For respondent: Manhattan Assistant District Attorney Susan Gliner (212) 335-9000

# *State of New York Court of Appeals*

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To be argued Wednesday, February 15, 2017

**No. 33 People v Carlos Valentin**

Carlos Valentin got into an argument with Justin McWillis and Edward Hogan in a Bronx bodega in January 2009. McWillis grabbed a mop handle and followed the others outside, where they continued to argue. McWillis dropped the mop handle, and Valentin and Hogan began to walk away. Hogan turned and saw McWillis pick up the mop handle and walk after Valentin. He said McWillis swung the mop handle at Valentin while Valentin reached into his jacket for a gun. Valentin fired at close range, killing McWillis. Charged with murder and related offenses, he contended at trial that he acted in self defense.

Hogan gave inconsistent testimony about whether Valentin pulled out his gun after McWillis swung the mop handle at him, at about the same time, or before the swing. Hogan acknowledged that, 10 days after the shooting, he told investigators that Valentin did not fire any shots until after McWillis hit him from behind. Supreme Court charged the jury on the justification defense and included instruction on the initial aggressor exception, explaining that the shooting would not be justified if jurors found Valentin was "the person who first attacks or threatens to attack." Valentin was acquitted of murder, but convicted of first-degree manslaughter and sentenced to 20 years in prison.

The Appellate Division, First Department reversed in a 4-1 decision, saying the initial aggressor concept "was completely inapplicable to the facts of the case. Although the jury could have reasonably determined that defendant's use of deadly force was unjustified (where defendant used a gun against the deceased, who wielded a mop handle), it could not have reasonably found that defendant was the initial aggressor.... [U]nder no iteration of Hogan's description of the events can it be concluded that defendant withdrew the gun before the deceased swung the mop handle. At most, it can be said that defendant withdrew the gun simultaneously with the deceased's attack." Finding the error was not harmless, the court said, "Contrary to the dissent, a mop handle swung at a person's head may constitute 'deadly physical force,' defined as 'physical force which ... is readily capable of causing death or other serious physical injury'...."

The dissenter said, "There was, in fact, evidence that it was defendant who was the first to use or threaten the imminent use of deadly force. For example, Hogan's admittedly inconsistent testimony included assertions that would have permitted the jury to find that when McWillis followed after defendant as he was walking away from the bodega, he held the mop handle but did not use or threaten to use it until defendant drew his gun." He also argued that any error was harmless. "Even assuming that the use of a mop handle could conceivably cause death or serious physical injury, the manner in which McWillis wielded the mop handle, by swinging it, does not qualify as creating a threat of deadly physical force" and Valentin could not "have reasonably believed that he was in deadly peril from McWillis at the time he shot him."

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