State of New York Court of Appeals

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WEEK OF NOVEMBER 14 - 17, 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 Monday, November 14, 2016

No. 191 Stonehill Capital Management LLC v Bank of the West

After borrowers defaulted in 2011, Bank of the West (BOTW) retained Mission Capital Advisors LLC to auction off some of its non-performing loans including the subject of this case, a syndicated loan with an unpaid balance of $8.8 million. The offering memorandum sought "non-contingent" sealed bids and provided that acceptance of a bid would "require immediate execution of [a] pre-negotiated Asset Sale Agreement" and payment of a 10 percent deposit by the winning bidder. It also stated that BOTW "reserves the right, at their sole and absolute discretion, to withdraw any or all of the assets from the loan sale, at any time," and that it was selling the loans "subject only to those representations and warranties explicitly stated in the Asset Sale Agreement."

On April 18, 2012, Stonehill Capital Management and two related companies submitted a bid of $2.4 million for the $8.8 million loan. Stonehill also informed Mission that the proposed sale agreement was not the correct form to transfer a syndicated loan. Mission told Stonehill two days later that it had made the highest bid and, in an April 27 email, informed it that BOTW had accepted the bid subject to "mutual execution of an acceptable" sale agreement. Stonehill and BOTW negotiated changes to the sale agreement into May 2012. During the same period, Stonehill arranged to refinance the $8.8 million loan in return for an increased payoff from the defaulting borrowers of $4.2 million, about $1.8 million more than BOTW was to receive from the auction sale. BOTW learned of the refinancing deal and, on May 18, refused to complete the sale, contending it was not obligated to proceed because it had no signed agreement with Stonehill and because it had reserved its right "to withdraw any loan from the auction at any time." BOTW ultimately received the $4.2 million loan payoff, and Stonehill brought this breach of contract action against BOTW and Mission.

Supreme Court granted summary judgment to Stonehill on its claim against BOTW, saying "the auction was structured such that the material terms were pre-negotiated" and so, despite discussions about the proper sale agreement to use, "the material terms of the sale were established at the time of Mission's acceptance of Stonehill's bid" on behalf of BOTW. It said the "material terms" of the sale "are readily ascertainable by reference [to] the Offering Memorandum, the original [sale agreement], Stonehill's bid, and Mission's email accepting the bid." The court awarded Stonehill $1.8 million in damages.

The Appellate Division, First Department reversed and dismissed the suit. It said BOTW "made explicit statements that it was not to be bound absent an executed writing." The parties were negotiating "necessary modifications" to the sale agreement, but "[b]efore any writing was executed, [BOTW] exercised its right under the offering memorandum to withdraw the loan asset in question from the auction process and refused to go forward with the transaction." It said the "conditions comprising a valid acceptance" of the bid -- a signed agreement and payment of a deposit -- "were not fulfilled."

For appellant Stonehill: Martin Eisenberg, Manhattan (212) 351-5020
For respondent Bank of the West: David A. Crichlow, Manhattan (212) 940-8800
For respondent Mission Capital Advisors: Damian R. Cavaleri, Manhattan (212) 689-8808

State of New York Court of Appeals

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To be argued Monday, November 14, 2016

No. 192 Matter of Henry v Fischer

Jevon Henry was an inmate at Greene Correctional Facility in April 2012, when he was charged with assault, weapon possession, gang activity and other violations of prison rules for allegedly joining in a gang assault on an inmate who was a member of a rival gang. Henry pled not guilty at his disciplinary hearing, claiming that he was in his cell when the assault occurred and that he did not associate with gang members. Representing himself, Henry repeatedly asked the hearing officer for copies of the unusual incident (UI) report on the assault, any log book entries regarding the incident, and "to/from memoranda" on inmate movements related to it. The hearing officer denied his requests for the documents, saying Henry was not entitled to the Unusual Incident report because he was not named in it, the log book had no entry about the assault, and the to/from memoranda were confidential. Henry asked to call two correction officers as character witnesses to testify that he did not associate with gang members. The hearing officer called one of them, who said he had only a vague memory of the assault and did not know whether Henry associated with the inmates who were involved or if he was near the scene. The hearing officer denied the request to call the other officer, saying his testimony would be "redundant." Henry also sought to call several inmate witnesses, two of whom testified that Henry was not near the scene of the assault and a third who said Henry would not associate with the inmates involved. The hearing officer said a fourth inmate refused to testify, but did not say whether he had asked the inmate why he refused. Henry had explained why he was seeking the documents and witnesses, but did not specifically object to the hearing officer's rulings. He twice said, "I am objecting to the whole hearing."

The hearing officer found Henry guilty of the disciplinary charges and imposed penalties of 24 months of confinement in the Special Housing Unit, 24 months loss of good time, and loss of other privileges. After his administrative appeal was denied, Henry brought this article 78 proceeding to challenge the determination, claiming his rights to call witnesses and to present documentary evidence had been violated.

Supreme Court dismissed the suit, ruling that Henry's claims were not preserved for judicial review because he did not raise objections regarding those issues at the hearing. The Appellate Division, Third Department affirmed, agreeing the issues were "unpreserved due to his failure to specifically object at the hearing."

Henry argues that, under CPLR 4017, "Formal exceptions to rulings of the court are unnecessary" to preserve an issue for review, and that a party need only "make known the action which he requests the court to take" even in proceedings where parties are represented by counsel. "Because inmates faced with disciplinary proceedings are pro se, the rules of waiver should be less severe," he says, and his objections to the "whole hearing" should suffice to preserve his claims. He also argues he preserved the issues by raising them in his administrative appeal.

For appellant Henry: Donna H. Lee, Long Island City (718) 340-4300
For respondent Fischer (State): Assistant Solicitor General Marcus J. Mastracco (518) 776-2007

State of New York Court of Appeals

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To be argued Monday, November 14, 2016

No. 193 People v James Brown *(papers sealed)*
No. 194 People v Terrence Young
No. 195 People v Earl Canady

In these cases, where prosecutors filed an off-calendar statement of readiness for trial and then said at the next court appearance that they were not ready for trial, the defendants contend the statements of readiness were illusory and did not stop the speedy trial clock under CPL 30.30. A key question is who bears the burden of showing that the statement of readiness was illusory or valid. The parties focus on People v Sibblies (22 NY3d 1174 [2014]), in which the Court found illusory a statement of readiness that was followed at the next appearance by a declaration that the prosecutor was not ready for trial, but the Court split 3 to 3 on the rationale. Chief Judge Jonathan Lippman argued in one concurrence that the People should have the burden of proving they were actually ready when the statement was filed. "[T]he People must demonstrate that some exceptional fact or circumstance arose after their declaration of readiness so as to render them presently not ready for trial," he said, or "the time between the filing and the following appearance ... should be charged to them." Judge Victoria Graffeo argued the burden should be on the defendant to show the prosecution was not actually ready when the readiness statement was filed, saying "there is a presumption that a statement of readiness is truthful and accurate."

Here, the trial courts denied speedy trial motions by James Brown, who is serving 22 years to life for first-degree robbery, and Terrence Young, who received a conditional discharge for disorderly conduct.

Affirming the ruling in Brown, the Appellate Division, First Department applied "the narrower approach of Judge Graffeo" and said, "[D]efense counsel merely speculated that the certificate of readiness was illusory because the People announced that they were not ready at the next court appearance after it was filed, which is insufficient to rebut the presumption that the certificate of readiness was accurate and truthful." The Appellate Term affirmed in Young.

In Canady, Criminal Court granted the defendant's speedy trial motion and dismissed misdemeanor assault and menacing charges. The Appellate Term, 2nd, 11th and 13th Judicial Districts affirmed, saying "the People bear the burden of ensuring that the record explains the cause of adjournments sufficiently for the court to determine which party should properly be charged with any delay.... Here, the People failed to provide any reason why they were not ready on April 19, 2011, one day after filing an off-calendar statement of readiness, and, thus, did not meet their burden. Consequently, in accordance with the respective concurring opinions in People v Sibblies..., the off-calendar statement of readiness dated April 18, 2011 was illusory...."

No. 193 For appellant Brown: Danielle Muscatello, Kew Gardens (718) 575-5145
For respondent: Manhattan Asst. District Attorney Sylvia Wertheimer (212) 335-9000
No. 194 For appellant Young: Jonathan Garelick, Manhattan (212) 577-3607
For respondent: Brooklyn Assistant District Attorney Leonard Joblove (718) 250-3128
No. 195 For appellant: Brooklyn Assistant District Attorney Seth M. Lieberman (718) 250-2516
For respondent Canady: Andrew C. Fine, Manhattan (212) 577-3440

State of New York Court of Appeals

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To be argued Tuesday, November 15, 2016

No. 196 Turturro v City of New York

Anthony Turturro was 12 years old in December 2004, when he was struck by a speeding car while riding his bicycle on Gerritsen Avenue in Brooklyn. The police report says the car was traveling at least 54 miles per hour in a 30 mile-per-hour zone. Turturro suffered severe brain injuries and was in a coma for five months. His mother brought this personal injury action on his behalf against New York City, among others, alleging that the City had received complaints about vehicles speeding on Gerritsen Avenue prior to the accident and that it was negligent in failing to address the problem.

At the trial, evidence showed that, for several years prior to the accident, the City received numerous complaints from neighborhood residents and elected officials about chronic speeding on Gerritsen and about a lack of traffic lights at certain intersections. The evidence showed the City conducted several studies of the need for traffic signals at specific intersections, but the studies did not address the separate issue of speeding along the length of the road. The jury found the City 40 percent at fault for the accident, the driver of the car 50 percent at fault, and Turturro 10 percent at fault. Turturro was ultimately awarded $3 million for past pain and suffering, $7 million for future pain and suffering, $7 million for future medical expenses and $3 million for lost earnings.

Supreme Court denied the City's motion to set aside the verdict on the grounds that it was entitled to qualified immunity under Weiss v Fote (7 NY2d 579), and that Turturro failed to establish that it owed him a special duty.

The Appellate Division, Second Department affirmed the liability verdict, saying Turturro did not have to prove the City owed a special duty because it was not acting in a governmental capacity, since "a municipality's duty to keep its roads and highways in a reasonably safe condition is proprietary in nature." It said the doctrine of qualified immunity did not apply because, given the evidence, "there was a rational process by which the jury could have found that the City had notice that excessive speeding along the length of Gerritsen Avenue created a dangerous condition and that the City failed ... to conduct a study which 'entertained and passed on [this] very same question of risk' ... posed by excessive speeding.... Similarly, there was a rational process by which the jury could have found that the frequency of speeding cars ... was unreasonably dangerous, and that the City's negligence in terms of studying the problem and implementing a plan to mitigate or resolve the problem was a proximate cause of the accident...."

The City argues the plaintiff failed to establish proximate cause because the speeding driver was entirely responsible for the accident and the City "cannot be held liable in tort for failing to prevent criminally reckless speeding on public roads." It says Turturro was required to show it owed him a special duty because "protecting the public from criminally reckless speeders is a classic governmental function," not a proprietary one; and it is entitled to qualified immunity because it responded appropriately to the complaints of speeding.

For appellant City: Assistant Corporation Counsel Susan P. Greenberg (212) 356-2484
For respondent Turturro: Robert J. Walker, Mineola (516) 248-2002

State of New York Court of Appeals

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To be argued Tuesday, November 15, 2016

No. 197 People v Immanuel Flowers *(papers sealed)*

Immanuel Flowers was arrested for attempted second-degree murder and related assault and weapon possession charges after allegedly shooting a man in the leg during a dispute on a Brooklyn street in June 2008. A witness saw Flowers discard a gun as he ran away immediately after the shooting, and police investigators linked the gun and two spent shell casings to the shooting. The victim did not testify at trail, and Supreme Court dismissed the attempted murder and assault charges for insufficient evidence. Flowers was convicted of one count of second-degree weapon possession.

Supreme Court sentenced him to 20 years to life in prison as a persistent violent felony offender. The court cited, among other things, "the impact that [the incident] had on the victim," who "was shot in the leg."

The Appellate Division, Second Department vacated the sentence and remitted the case for resentencing because "the remarks of the sentencing court demonstrated that it improperly considered a crime that was dismissed at trial for lack of legally sufficient evidence as a basis for sentencing...."

At the resentencing, Supreme Court imposed the same term of 20 years to life. Defense counsel sought the minimum term of 16 years to life, saying, "The sole count of the convict[ion] is plain possession without any intent to use the firearm unlawfully. Mr. Flowers should not receive a punishment usually reserved for homicides or sex crimes." The court said its sentence was based on evidence that "the defendant was seen throwing a gun away after that gun had been fired," as well as Flowers' history of felony convictions and parole violation and the conclusion of the probation report that he posed "a significant risk to the safety of the community."

The Appellate Division affirmed, saying "defendant's contention that the resentence imposed was improperly based on counts which were dismissed at trial for lack of legally sufficient evidence is unpreserved for appellate review...."

Flowers argues, "The post-appeal imposition of a sentence that is the same as a sentence that was found by an appellate court to have relied on improper criteria, absent reliance on any new bad facts, is fundamentally unfair. This Court should adopt a presumption that ... the reimposition of the same sentence violates due process" because it "constitutes a rejection of the appellate court's binding direction to refrain from relying on the improper criteria." He says, "The proposed presumption is analytically comparable to the presumption of vindictiveness" adopted in People v Van Pelt (76 NY2d 156), which "applies when a sentencing court, following an appeal, enhances a sentence in the absence of new, bad facts."

For appellant Flowers: Lawrence T. Hausman, Manhattan (212) 577-7989
For respondent: Brooklyn Assistant District Attorney Avshalom Yotam (718) 250-3492

State of New York Court of Appeals

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To be argued Tuesday, November 15, 2016

No. 198 Matter of Newcomb v Middle Country Central School District

On March 23, 2013, 16-year-old Austin Newcomb suffered severe head trauma when he was struck by a car as he attempted to cross Route 25 in the Town of Brookhaven. The car fled, but the police ultimately identified the driver and the car owner and they pled guilty to criminal charges. Within days of the accident, Newcomb's father reported it to his son's high school, Centereach, in the Middle Country Central School District. He also served timely notices of claim on the State, Suffolk County and Town of Brookhaven, but not on the School District. The Suffolk County Police Department, which refused to provide access to its accident file until its investigation was closed, released full-size photographs of the accident scene on November 5, 2013. The photos showed an over-sized sign at the intersection advertising a musical production at the School District's Newfield High School. Newcomb served a proposed notice of claim on the School District on November 25, five months after the 90-day notice period provided by General Municipal Law § 50-e expired, alleging the District contributed to the accident by negligently placing the sign where it obstructed the views of pedestrians and motorists passing through the intersection. He commenced this proceeding for permission to file a late notice of claim under General Municipal Law § 50-e (5).

Supreme Court denied the petition, although it said the severity of Newcomb's injuries and the delayed release of the police photographs provided "a reasonable excuse" for the filing delay. It said the "most important factor" in its decision was its conclusion that the District did not acquire "actual knowledge of the essential facts constituting that claim" within a reasonable time after the accident. It further held that the filing delay prejudiced the District's ability to defend against the suit, since the "graduation of students and personnel changes presumably hinder the school district's ability to gather information about the creation of the sign and the decision about where and how to position it."

The Appellate Division, Second Department affirmed. It said, "Even assuming that the School District was responsible for the placement of the sign, [Newcomb] failed to establish that the School District became aware, within 90 days after the claim accrued or a reasonable time thereafter, that the placement of the sign was connected with the happening of the accident in a way that would give rise to liability" on its part. It said Newcomb failed to show that the delay in serving the notice of claim "would not substantially prejudice" the District's ability to defend against the claim.

Newcomb argues, "The necessary actual knowledge of the facts and circumstances of the claim is established as a matter of law because [the District] created the condition and subsequently removed such condition prior to 90 days following the accident.... The Second Department erred in finding prejudice because [Newcomb] placed undisputed evidence into the record demonstrating how [the District] is able to conduct a full investigation of the claim and defend on the merits while [the District] offered no admissible evidence showing prejudice."

For appellant Newcomb: Paul A. Montuori, Mineola (516) 338-4714
For respondent School District: Christine Gasser, Uniondale (516) 542-5900

State of New York Court of Appeals

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To be argued Tuesday, November 15, 2016

No. 199 People v Robert Patterson

Robert Patterson was arrested for a home invasion robbery committed in the Bronx in September 2007. The victim told police he was in his apartment with a woman he knew only as Michele when two masked men with guns burst in, tied him up, and stole cash and jewelry. He said the woman helped the men tie him up and then left the apartment. He gave her cell phone number to a detective, who subpoenaed the subscriber information from the service provider along with a list of calls made on the day of the robbery. Investigators learned that the phone belonged to Daichelle Goree and that she had made and received calls from a certain number immediately before and after the robbery. They subpoenaed the subscriber information and call logs for the new number and found the prepaid cell phone account was registered under an alias used by Robert Patterson and listed his address. The victim identified Patterson in a lineup.

At trial, the prosecutor sought to introduce records from both prepaid cell phone accounts as business records to corroborate the victim's identification of Patterson as one of the robbers. Patterson moved to preclude the subscriber information as inadmissible hearsay, arguing that, because the accounts were prepaid, subscribers were not required to provide truthful identifying information and the service providers did not verify the information given. Supreme Court admitted the phone records of Patterson and Goree. Patterson was convicted of robbery and burglary in the second degree and sentenced to 10 years in prison.

The Appellate Division, First Department affirmed, saying, "Authenticated records showing that the person who purchased a particular prepaid cell phone, which was linked to the crime, supplied pedigree information linked to defendant were properly admitted as circumstantial evidence of defendant's identity as the purchaser of the phone.... [T]he pedigree information did not constitute assertions of fact, but circumstantial evidence that the declarant was, in all likelihood, defendant.... Rather than being factual, the pedigree information was analogous to a fingerprint left on a document, tending to show the true identity of its author.... Although the purchaser of the phone was not under a business duty to provide the pedigree information, that requirement of the business records exception to the hearsay rule did not apply, because the initial declaration was independently admissible...."

Patterson argues the Appellate Division "erred in holding that subscriber information from pre-paid cell phone records ... was independently admissible, where that argument was not addressed by the trial court" and, because the Appellate Division "exceeded its statutory authority by affirming on a ground that was not decided adversely to appellant," this Court's review is limited to his claim that the subscriber information was improperly admitted under the business records exception. He says the information did not qualify for the exception because the prepaid cell phone subscribers had no business duty to provide accurate identifying information to service providers and, therefore, the information was inadmissible hearsay.

For appellant Patterson: Ellen Dille, Manhattan (212) 577-3285
For respondent: Bronx Assistant District Attorney Marianne Stracquadanio (718) 838-6100

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To be argued Tuesday, November 15, 2016

No. 200 People v Rodolfo Hernandez *(papers sealed)*

School bus driver Rodolfo Hernandez was charged with molesting a three-year-old girl on his Staten Island route in March 2007. The girl arrived home late, between 3 and 3:30 pm, and was crying and screaming. She opened her pants and her mother, seeing her underwear was pushed down below her hips, asked what happened and had someone done something to her. The girl finally replied "señor bus," meaning bus man. The father arrived a short time later and asked the girl what happened. She said "señor bus," stuck out her tongue and moved it up and down. The parents took her to the hospital at about 4 pm, still screaming and crying, and they held her down while a doctor performed a pelvic examination. After the doctor left, at roughly 6:30 pm, the parents continued to ask what happened. She said "señor bus." They asked if he did something to her and she nodded. Asked what he did, she stuck out her tongue in a licking gesture. Asked where, the girl gestured toward her vaginal area.

The girl, who had delayed speech development, was five years old when the trial was held. Supreme Court found she was capable of giving unsworn testimony, but the prosecutor did not call her to the stand. Instead, he sought to have her parents testify about her statements and gestures under the excited utterances exception to the hearsay rule.

Supreme Court ruled the statements and gestures were admissible as excited utterances. "Considering the child's age, her uncontrollable crying and emotional state throughout the events from the time she exited the bus until the hospital..., considering the abbreviated questions [--] essentially 'what happened' [--] put to her, considering the time frame, which is minimal, as to the statements in the house and less than three hours approximately as to the statements in the hospital..., I am satisfied that at the times her utterances were made ... the child was ... under the influence of the excitement precipitated by an external startling event ... and she lacked the reflective capacity essential for fabrication," it said. Hernandez was convicted of first-degree sexual abuse and endangering the welfare of a child. He was sentenced to seven years in prison.

The Appellate Division, Second Department affirmed, ruling the girl's communications qualified as excited utterances. It said, "The surrounding circumstances reasonably justify the conclusion that the child's communications were not made under the impetus of studied reflection.... Further, because the communications were nontestimonial in nature, the admission of this evidence did not violate the defendant's right to confront a witness against him...."

Hernandez argues the trial court erred in admitting the testimony because "the complainant's communications to her parents were not 'spontaneous' 'excited utterances' prompted by a 'startling event.' Rather, they were reluctant, mostly non-verbal replies to her parents' relentlessly persistent questions, and were unreliable given the young complainant's cognitive limitations and susceptibility to suggestion, as evidenced by her performance" at the hearing on her ability to testify.

For appellant Hernandez: Anna Pervukhin, Manhattan (212) 693-0085
For respondent: Staten Island Assistant District Attorney Anne Grady (718) 876-6300

State of New York Court of Appeals

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To be argued Wednesday, November 16, 2016

No. 201 Hain v Jamison

A newborn calf escaped from the Drumm Family Farm and wandered near or onto Curtis Coopers Road in Steuben County in November 2010. Holly Hain stopped her car and got out to move the calf away from the roadway. Seventeen-year-old Leah Jamison, driving at night, rounded a curve and struck Hain, killing her. The decedent's husband, Andrew Hain, brought this wrongful death action against Jamison and the car's owner, Angela Jamison; and against Drumm Farm, claiming the farm was negligent in allowing the calf to escape and failing to retrieve it after a neighbor told the farm's owner the calf was on the side of the road. The Jamisons cross-claimed against Drumm Farm for indemnification and contribution. Drumm Farm moved for summary judgment dismissing the complaint and cross-claims, arguing its alleged negligence was not a proximate cause of the accident, which was instead the result of the unforeseeable acts of Holly Hain walking on the road to help the calf and Leah Jamison driving negligently.

Supreme Court denied the motion. "[T]his court cannot say, as a matter of law, that [decedent's] conduct was extraordinary under the circumstances, that it was not foreseeable in the normal course of events, and was that far removed from the situation created by [Drumm Farm's] negligence. I don't believe that I can say that her actions were not foreseeable, that someone would not try to get the cow out of the road either because it was in their way, because it was in the way of another motorist, because it was injured...."

The Appellate Division, Fourth Department reversed on a 3-1 vote and dismissed all claims against Drumm Farm, saying it "established that any negligence on its part in allowing the calf to escape merely 'created the opportunity for [decedent] to be standing [in the roadway], [but] it did not cause [her] to stand' there.... 'In short, the [alleged] negligence of [Drumm Farm] merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated'...." Because Hain did not contend or show "that the calf's presence in the road ... forced decedent to stop her vehicle," Drumm Farm established "that its 'alleged negligent act, at most, caused the [calf to wander] out of the field, which was not the immediate cause of the accident'...."

The dissenter said the farm failed to establish that "decedent's conduct was 'of such an extraordinary nature or so attenuate[d] [Drumm Farm's] negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to [Drumm Farm]," or that "its alleged negligence did not place decedent in an unsafe position on the roadway by creating a hazard.... It is impossible to determine from the evidence in the record whether the calf was on the shoulder of the road or in the travel lane, and thus it is equally impossible to determine whether the calf's presence placed decedent in a position of danger. If the calf was in a position that forced decedent to stop her vehicle on the curve of a dark country road, she would have been in a 'position of peril' ... regardless of whether she remained in the vehicle."

For appellants Angela and Leah Jamison: James P. O'Brien, Binghamton (607) 723-9511
For respondent Andrew Hain: Ellen B. Sturm, Buffalo (716) 888-8888
For respondent Drumm Family Farm: Derek J. Roller, Buffalo (716) 852-2000

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To be argued Wednesday, November 16, 2016

No. 202 People v Anthony Perkins *(papers sealed)*

Anthony Perkins was charged with committing a series of four gunpoint robberies in Ridgewood, Queens, in July 2007. In describing the robber to police, two of the victims -- Szczepan P. and Amit B. -- said he had dreadlocks or long hair. The other two -- Monika B. and Michelle H. -- did not mention his hair, although Monika B. testified at trial that the robber had dreadlocks. The four victims identified Perkins in a photo array in which all of the men pictured had dreadlocks. The police then placed Perkins and five fillers in a lineup in which Perkins was the only one with dreadlocks. All six men wore baseball caps, but Perkins' dreadlocks remained visible. All four victims identified Perkins as the man who robbed them. Perkins moved to suppress the lineup identifications as unduly suggestive.

A judicial hearing officer concluded the lineup identifications of Szczepan P. and Amit B., who had told police the robber had dreadlocks, should be suppressed because "the fact that the defendant was the only participant in the lineup with long dreadlocks, a distinctive physical feature, created the likelihood of misidentification." However, he said the lineup testimony of Monika B. and Michelle H., who had not mentioned dreadlocks in their initial descriptions, need not be suppressed because "it is not just the fact that a defendant has a distinctive feature or stands out in some way which renders a procedure suggestive. Rather, it is where such distinctive feature is an integral part of the description provided by the complainant that the suggestiveness arises. Therefore..., where [neither] of the ... witnesses described the perpetrator as having dreadlocks, the fact that the defendant had dreadlocks is of no legal significance."

Supreme Court adopted the JHO's report and denied the motion to suppress. The court also denied defense counsel's request for an adverse inference charge regarding tapes of 911 calls made by three of the victims. He had asked for the recordings, but they had been destroyed in accordance with Police Department policy and he was given summaries of the contents of the calls. Perkins was convicted of two counts of first-degree robbery and sentenced to consecutive terms of 20 years to life.

The Appellate Division, Second Department affirmed, ruling the lineup identifications of Monika B. and Michelle H. were properly admitted. "The defendant's dreadlock hairstyle was not part of the subject complainants' descriptions of the perpetrator..., was minimized by the fact that the participants all wore hats, and, under the circumstances of this case, did not render the lineup unduly suggestive...," it said.

Perkins says, "The facts ... belie the court's reasoning," where "the police suggested to all four witnesses that the robber had dreadlocks because they showed all of them photo arrays of potential suspects in which *all of the photographs* prominently displayed dreadlocks" and where Monika B., who did not mention dreadlocks in her description, revealed at trial that she had seen them. "The unfair rule upon which the court purportedly relied -- i.e., that the same lineup is unconstitutional as to two witnesses but not as to two others *solely* because of the mere words uttered in their initial descriptions -- is a hyper-literal misinterpretation of this Court's precedent. In truth, the lineup ... was unduly suggestive as to *all of the* complainants because Appellant was the sole person having dreadlocks."

For appellant Perkins: Stephen P. Younger, Manhattan (212) 336-2131
For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

State of New York Court of Appeals

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To be argued Wednesday, November 16, 2016

No. 204 People v Patrick Morgan

Patrick Morgan was tried on murder and manslaughter charges for the shooting death of Shawn Folkes in the Bronx in April 2008. On its second day of deliberations, the jury said in a note that it was deadlocked. Supreme Court sent the jurors home for the night and the next morning gave them a full Allen charge, instructing them to continue deliberations to reach a unanimous verdict. It said they should deliberate "with a view toward reaching an agreement if that can be done without surrendering individual judgment. Each of you must decide the case for yourself, but only after a fair and impartial consideration of the evidence with the other jurors. You should not surrender an honest view of the evidence simply because you want the trial to end or you are outvoted. At the same time, you should not hesitate to re-examine your views and change your mind if you become convinced that your position was not correct." Shortly after noon the jury announced it had reached a verdict, but when jurors were polled the vote was actually 10 to 2. The court denied a defense motion for a mistrial as premature and directed the jurors to resume deliberations, reminding them that their verdict must be unanimous.

The next morning, the jury requested readbacks of witness testimony and of defense counsel's summation. The court denied the request for the defense summation on the ground that it was not evidence. Defense counsel did not object. The jury reached a verdict that afternoon acquitting Morgan of murder and convicting him of first-degree manslaughter and second-degree weapon possession. Morgan was sentenced to 18 years in prison.

The Appellate Division, First Department affirmed on a 4-1 vote, rejecting Morgan's claim that the charge given after the jury poll revealed a 10-2 split was coercive. "[D]efendant was not deprived of due process by the absence from this instruction of language reminding the jurors not to surrender their conscientiously held beliefs. The court had so instructed the jury in a charge that was given, with defendant's consent, two hours earlier," it said, and the second charge "did not apply improper pressure on the two jurors who did not agree with the verdict." It said Morgan's claim that the trial court improperly denied the jury's request to re-hear the defense summation was "unpreserved and waived" and, in any event, there was no abuse of discretion.

The dissenter argued the second deadlock charge, delivered after jurors split 10-2 on a verdict, was "unduly coercive" because the trial court "directed the jury to resume deliberations in an effort to reach a unanimous verdict, without including cautionary language admonishing them to adhere to their conscientiously held views.... The minority jurors very well may have felt 'impermissibly singled out for noncompliance with the majority'...." Regarding the requested readback of the defense summation, she said jurors "may have perceived the court's denial of the request as a sign of judicial disapproval of the defense position."

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For respondent: Bronx Assistant District Attorney Catherine M. Reno (718) 838-7119

State of New York Court of Appeals

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To be argued Wednesday, November 16, 2016

No. 205 People v Prince Clark

In September 2008, Prince Clark was beaten by a group of men, including Jamal Wisdom and Gamard Talleyrand, a few blocks from his Brooklyn apartment building. A prosecution eyewitness saw Clark's eye bleed and heard him say, "They got a knife, they are going to cut me," but she did not see a knife. Clark and his cousin, Michael Morrison, retreated to their building pursued by the others, who beat Clark again. Clark and Morrison went into the building, then quickly returned to the street. Grainy surveillance video recorded a man in a white T-shirt, identified by the eyewitness as Clark, taking a handgun from a man she identified as Morrison and then walking down the street out of camera range. Seconds later Talleyrand was shot in the calf, then the man in the T-shirt reappeared on the videotape still holding the gun. Wisdom pursued him inside the building and they wrestled briefly in the lobby, until the man in the T-shirt broke free and fatally shot Wisdom. Talleyrand said he did not see who shot him and he could not identify the men on the videotape.

Clark asserted his innocence and insisted on pursuing a misidentification defense at trial. His attorney told Supreme Court that, while the evidence could support a justification defense, "I would need the defendant's permission to make such an argument" and Clark "said no way. I do not wish to have you indicate in any manner, shape or form as far as justification.... Without his permission I've told him I cannot do it." During deliberations, the jury sent a note asking, if Wisdom "initiated the struggle" and Clark "was acting defensively[,] does that negate intent to kill[?]" In response, after explaining intent, the court said, "You were not instructed on what's commonly called the law of self defense. What you were instructed on is the issue of intent.... That is ... what you have to focus on; whether or not the defendant intended to cause the death of Mr. Wisdom...." Clark was convicted of second-degree murder and assault and sentenced to an aggregate term of 25 years to life.

The Appellate Division, Second Department affirmed on a 3-2 vote, ruling Clark was not deprived of effective assistance of counsel by his attorney's failure to raise a justification defense. "[S]ince the defendant had the right to chart his own defense, and since he made a voluntary, knowing, and intelligent election to pursue a viable misidentification defense and to eschew reliance upon a justification argument, it was not the role of his counsel to override his wishes by championing an inconsistent defense." It said the trial court responded meaningfully to the jury's request for information about self-defense. Where "an instruction regarding such a defense is adamantly opposed by the defendant and his counsel, would logically conflict with the defendant's well-considered defense choice, and possesses only tenuous applicability to the facts...," it said, "the trial court is under no obligation to charge justification sua sponte...."

The dissenters argued Clark was deprived of effective assistance of counsel by his attorney's deference in rejecting a justification defense. "[T]he case law indicates that matters of strategy and tactics are ultimately left to the professional judgment of counsel. In this case..., defense counsel failed to exercise his own professional judgment due to his erroneous belief that he was prohibited from doing so." They also said the trial court failed to respond meaningfully to the jury's question about self defense on the murder count, where "there was a reasonable view of the evidence which would permit the jury to conclude that the defendant's conduct was justified."

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For respondent: Brooklyn Assistant District Attorney Sholom J. Twersky (718) 250-2537

State of New York Court of Appeals

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To be argued Wednesday, November 16, 2016

No. 203 People v Brandon Warrington

Brandon Warrington was charged with fatally beating five-year-old Gary Carpenter, his girlfriend's son, who died of a traumatic brain injury caused by blunt force trauma inflicted at the couple's Glens Falls apartment in November 2012. The autopsy report and witness testimony provided evidence that Carpenter had suffered severe physical abuse prior to the fatal injury.

During jury selection, after defense counsel asked the prospective jurors if anyone felt they could not be fair, juror number 383 said, "It's a five year old [victim.] Adult [defendant]. I can't do it." Neither defense counsel nor County Court asked the juror any follow-up questions at that time. After defense counsel asked jurors if they agreed that the prosecutor bore the burden of proving guilt beyond a reasonable doubt, he asked juror 383 if she would "have a problem" finding Warrington not guilty if the prosecutor did not meet that burden. She replied, "I don't know." Later, the court asked juror 383 what her verdict would be if she was not convinced of Warrington's guilt beyond a reasonable doubt and she replied, "I would have to say not guilty, you know, if they can't do it to my satisfaction." After another, similar exchange, the court asked if she could follow the law regarding crediting witness testimony. Juror 383 said, "... I'll listen to what they have to say and then I'll draw my own conclusion." The court asked if she would "follow the law as I instruct at the end of the case," and she said, "Yes."

The court denied Warrington's motion to dismiss juror 383 for cause, and he used a peremptory challenge. Warrington was convicted of second-degree murder, manslaughter and endangering the welfare of a child. He was sentenced to 25 years to life in prison.

The Appellate Division, Third Department reversed on a 3-1 vote and remitted the case for a new trial, ruling juror 383 should have been dismissed for cause. The juror "unambiguously acknowledged a form of bias -- based on the respective ages of the victim and defendant," but "she was never asked ... whether she could set aside any biases she held, generally, or whether she could set aside her specific bias...," it said. "Therefore, [the juror] did not unambiguously state that, despite preexisting opinions that might indicate bias, [she would] decide the case impartially and based on the evidence, because she never made any statement regarding her preexisting opinion, let alone an unambiguous statement that she could set such opinion aside...." The juror "never contradicted or retracted her statement that her bias related to the respective ages of defendant and the victim prevented her from being a fair and impartial juror...."

The dissenter said, "The record does not suggest that juror No. 383 harbored any specific animus toward defendant. It does demonstrate her fears that she could not be fair given the fact that horrible crimes were committed against a young victim, but most if not all jurors bring some predispositions, of varying intensity, when they enter the jury box." He said the juror "confirmed that a fair and impartial verdict of guilt could only flow from the People meeting their burden of proof, and provided unequivocal assurances that she would not have any problem in following the law and acquitting defendant if the People failed to meet that burden. County Court plainly credited those assurances despite the prior indications that she might not be able to do so. Thus..., I perceive no abuse of discretion in the denial of defendants challenge for cause...."

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For respondent Warrington: Paul J. Connolly, Delmar (518) 439-7633

State of New York Court of Appeals

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To be argued Thursday, November 17, 2016

No. 206 People v Steven Finkelstein

Steven Finkelstein was indicted on two felony counts of first-degree coercion, the first count alleging that he threatened a woman with physical harm and threatened to chase away the clients of her travel agency to prevent her from removing him from her Manhattan apartment during the summer of 2005. The second count alleged that he made similar threats to prevent her from disposing of his belongings after he was arrested for a parole violation in September 2005.

At trial, Finkelstein asked Supreme Court to submit to the jury misdemeanor counts of second-degree coercion as a lesser included offense of each count of first-degree coercion. The two crimes contain identical elements, requiring proof that the defendant compelled a person to engage in or abstain from legal conduct "by instilling in the victim a fear" that he will "cause physical injury to a person" or "cause damage to property." This Court said in People v Eboli (34 NY2d 281 [1974]) and People v Discala (45 NY2d 38 [1978]) that the "heinousness" of the conduct distinguishes first-degree coercion from the lesser charge.

Supreme Court denied the request because it found "this is not an extraordinary case" in which submission of second-degree coercion would be appropriate "and because of the impossibilities of following the remainder of the requirements set" by appellate courts that a trial judge must instruct "the jury that they must first acquit on the higher charge before they can consider the lesser included charge.... [I]nasmuch as the same elements must be found beyond a reasonable doubt for conviction of both charges, it is a logical impossibility for that to occur in this case. Finkelstein was convicted of both first-degree coercion counts and was sentenced to an aggregate term of 7 to 14 years in prison. The Appellate Division, First Department affirmed.

Finkelstein argues that his rights to trial by jury, equal protection and due process were violated "because coercion in the first degree has an implicit element of heinousness" that was "not submitted to the jury." He relies on Apprendi v New Jersey (530 US 466 [2000]), which held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Finkelstein says, "The jury in this case ... was not permitted to determine whether this heinous quality was present. Instead, it was the prosecution that made this determination" by charging him with only first-degree coercion. He also argues that, because "there was a reasonable view of the evidence that heinousness was lacking in this case, the defense was entitled to have the jury charged on coercion in the second degree as a lesser included offense," and the trial court's refusal "resulted in a necessary factual determination being improperly taken from the jury."

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For respondent: Manhattan Assistant District Attorney Dana Poole (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, November 17, 2016

No. 207 People v Joseph Bridgeforth *(papers sealed)*

Joseph Bridgeforth and a codefendant were charged with robbing a man in Queens in October 2011. The codefendant allegedly held a knife. During jury selection, Bridgeforth's attorney raised a Batson challenge after the prosecutor used peremptory strikes to remove five "black or dark-colored" women from the jury pool. Four of those prospective jurors were African-American and the fifth said she was born in India. The prosecutor agreed that African-Americans are a cognizable group under Batson, but said "we ... can't do black or skin color, Judge." He offered race-neutral reasons for striking the four African-American women. Supreme Court accepted three of the reasons, but rejected the fourth and seated that juror. The prosecutor said he could not remember why he struck the Indian juror and never gave a reason for her. The court did not pursue the matter, allowed the peremptory challenge to stand, and the Indian woman was not seated on the jury. Bridgeforth was convicted of robbery in the first and second degrees and was sentenced to five years in prison.

The Appellate Division, Second Department affirmed. It said Bridgeforth argued in his Batson motion "that the prosecutor used peremptory challenges to strike all the black ... or 'dark-colored' prospective female jurors, including an Indian woman. Under the circumstances of this case, the defendant did not meet his prima facie burden of establishing that the prosecutor exercised a peremptory challenge to remove that prospective juror on the basis of her membership in a constitutionally cognizable class protected under the Equal Protection Clause of the United States and New York Constitutions...."

Bridgeforth argues that people with dark-colored skin are a cognizable class under Batson and that the Indian woman should have been seated on the jury because the prosecutor never provided a non-discriminatory reason for striking her. "[S]kin color is expressly enumerated as a cognizable class in New York for the purpose of ensuring the equal protection to which both litigants and prospective jurors are entitled," he says, citing the prohibition of discrimination "because of race, color, creed or religion" in the New York Constitution's Bill of Rights. "In addition, the recognition that those with dark skin constitute a cognizable group is consistent with decisional law of the Supreme Court, which has often referred to color prejudice in its condemnation of racially motivated peremptory strikes...."

The prosecution argues the prosecutor was not required to give a reason for striking the Indian juror because Bridgeforth did not establish that she was in the same protected class as the African-American jurors. "Defendant has not shown that women with 'dark' skin tones with their varying ancestries, religions, cultures, and histories form a single distinct group, or that they all suffered the same tragic history of discrimination ... that African-Americans suffered."

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For respondent: Queens Assistant District Attorney Merri Turk Lasky (718) 286-5856

State of New York Court of Appeals

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To be argued Thursday, November 17, 2016

No. 208 People v James Miller

William Richardson was shot to death in the Bronx in June 2007 and 15 days later police in Charlotte, North Carolina arrested James Miller at the request of New York detectives, who went to Charlotte to question him. Miller waived his Miranda rights and made oral and written statements, saying that Richardson had tried to kill him two years earlier and that, on the day of the shooting, Richardson approached him enraged and screaming with an ice pick in his hand. When Richardson grabbed him, Miller said he pulled out his gun to defend himself and Richardson tried to run. Miller said he emptied his gun at the fleeing Richardson, who was hit five times. Miller then gave the detectives a videotaped statement to the same effect.

During jury selection, defense counsel sought to ask potential jurors if they would be able to follow the law and disregard a confession if they found it was involuntary. Supreme Court denied the request as "premature," relying in part on the prosecutor's statement that "I am not definite that we are going to introduce the statement." Defense counsel said he wanted to avoid jurors "who will never accept" that an involuntary confession may not be considered for any purpose, who would say "if he confessed or ... said he did it, that's the end of the story for me." The court said it was unclear what, if anything, might be made of the statements at trial. "Also, the People may not introduce the statements and now you're running the risk that [jurors] could speculate" about why they weren't presented, the court said. "Are the People withholding [evidence] because it's exculpatory? Is the defense withholding it because it's inculpatory? I think it raises issues that should not be raised with the jury at this stage."

The statements were presented to the jury. Miller testified they were coerced and untrue. He said he denied shooting Richardson and requested an attorney several times during the questioning, and he was not read his Miranda rights until after the last statement. He testified the detectives slapped him and threatened to arrest his aunt and girlfriend and to lock him up for life if he did not cooperate, all of which the detectives denied. Miller was acquitted of second-degree murder, but convicted of first-degree manslaughter and sentenced to 25 years in prison.

The Appellate Division, First Department affirmed, saying the trial court "properly exercised its discretion ... in precluding defendant from questioning prospective jurors" about confessions. "The People had not yet decided whether they would introduce defendant's statements, which could be viewed as inculpatory or exculpatory, depending on defendant's choice of defenses. Thus, if the statements ultimately were not admitted, questioning the jurors regarding their ability to disregard an involuntary confession would invite the jurors to speculate as to the content of the statements and why they had not been introduced...."

Miller argues, "By prohibiting Mr. Miller from identifying and removing jurors incapable of evaluating the voluntariness of his confession, the trial court denied [him] his constitutional right to a fair trial. Moreover, the trial court did so based on the prosecution's stated lack of certainty about whether it would use" the statements, thereby "affording the prosecution the authority to unilaterally limit the scope of voir dire." He says the First Department's decision conflicts with the Second Department's ruling in People v De Francesco (88 AD2d 920 [1982]).

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For respondent: Bronx Assistant District Attorney Lori Ann Farrington (718) 838-6223

State of New York Court of Appeals

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To be argued Thursday, November 17, 2016

No. 209 People v Cristian Morales

Cristian Morales, a native of Honduras, was convicted of misdemeanor driving while intoxicated and related traffic charges in Nassau County District Court on October 13, 2011. His attorney filed a notice of appeal one week later. On November 18, 2011, Morales was deported to Honduras, not based on his DWI conviction, but for being illegally in the United States after having been previously deported in 2005. His whereabouts were unknown and he did not speak with his appellate counsel for the next four years. He has been in communication with counsel by email and telephone since December 2015. Eight months earlier, in April 2015, appellate counsel filed a brief on Morales' behalf with the Appellate Term. The Nassau County District Attorney moved to dismiss the appeal.

The Appellate Term for the 9th and 10th Judicial Districts granted the motion to dismiss "on the grounds, among others, that appellant has been deported and is no longer available to obey the mandate of the court ... and that appellant has failed to have any contact with appellate counsel." It dismissed the appeal "without prejudice to appellant moving to reinstate the appeal should he return to this court's jurisdiction."

Morales argues that his appeal should be reinstated under People v Ventura (17 NY3d 675 [2011]), which held that defendants who have been involuntarily deported have "an absolute right to seek appellate review of their convictions" under CPL 450.10; and People v Harrison (27 NY3d 281 [2016]), which said Ventura "did not depend upon any causal relationship between the defendant's conviction and deportation" and was not limited to appeals seeking outright dismissal of charges, but also applies to appeals that could result in remittal for further proceedings. He says the cases make clear "that deported defendants have a fundamental right to intermediate appellate review" regardless of the basis for their deportation, the issues they raise on appeal, or whether that remained in communication with their appellate counsel.

The prosecution, observing that the defendants in Ventura and Harrison had perfected their appeals before they were deported, argues that Morales' "disappearance and lack of communication with his attorney constituted, at the very least, a 'failure of action' by defendant to prosecute and perfect -- indeed, were an abandonment of -- his appeal.... Although defendant's deportation was involuntary, his decision to avoid contact with his appellate attorney was not."

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