State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

WEEK OF SEPTEMBER 8 - 11, 2015

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, September 8, 2015

No. 122 Nomura Asset Capital Corporation v Cadwalader, Wickersham & Taft, LLP

Nomura Asset Capital Corporation retained Cadwalader, Wickersham & Taft to advise it on legal and tax aspects of its securitization of commercial mortgages in the 1990s, including whether the pools of mortgages qualified for favorable federal tax treatment as real estate mortgage investment conduit (REMIC) trusts. A key requirement for REMIC eligibility is that the mortgaged property must be worth at least 80 percent of the loan. Under REMIC regulations, the value of collateral securing a loan includes land, buildings and improvements, but excludes the intangible assets of an operating business and some equipment. Cadwalader advised Nomura on a 1997 transaction that pooled 156 mortgages totaling $1.8 billion. One of the largest mortgages was a $50 million loan to Doctors Hospital of Hyde Park in Chicago, which would have to be secured by property worth $40 million to qualify for a REMIC trust. Nomura hired an appraiser, who valued the hospital at $68 million using the income capitalization method, which included the hospital's intangible assets. The appraiser valued it at only $40.6 million using the cost approach, which excludes intangibles but includes all equipment. Cadwalader issued an opinion that the mortgages in the trust qualified for REMIC treatment. The firm relied on Nomura's representations and did not review the appraisal for the hospital loan. When shares in the trust were sold to investors, Nomura warranted that each mortgage qualified for REMIC treatment and was secured by property that met the 80 percent test.

When Doctors Hospital went bankrupt and defaulted on its loan in 2000, the trustee sued Nomura in federal court for breach of its warrantees, alleging the hospital loan failed the 80 percent test and was not eligible for REMIC. Nomura settled the suit for $67.5 million, which included repurchase of the loan. Nomura then brought this legal malpractice action against Cadwalader, alleging the law firm failed to provide adequate advice on regulations for REMIC eligibility and failed to perform necessary due diligence before issuing its opinion letter.

Supreme Court denied Cadwalader's summary judgment motion, finding "triable issues of fact with respect to both issues." Among other things, it said a document describing "Deal Highlights" of the hospital loan, which presented the appraiser's various property valuations, "could be viewed as a 'red flag' that this loan needed to be further scrutinized for REMIC-eligibility" before Cadwalader issued its opinion. "On the other hand, a jury might conclude that Cadwalader properly exercised its professional judgment by relying on the business expertise and factual representations of its client...."

The Appellate Division, First Department modified on a 3-1 vote by dismissing the negligent advice claim, citing testimony by a former Nomura vice president that he received proper advice about REMIC eligibility. Regarding due diligence, it rejected Nomura's claim that Cadwalader "had a duty to review all of the underlying appraisals," but said "a jury could reasonably conclude that the 'Deal Highlights' document ... contains warning signs that the Doctors Hospital Loan may not have qualified for REMIC treatment."

The dissenter argued the due diligence claim should also be dismissed, saying the Deal Highlights document "has nothing in it to indicate that the [hospital] loan ... was more likely to be inappropriate [for REMIC treatment] than any of the other 155 loans." He said the appraisal itself "arguably should have alerted an attentive professional to the possible existence of a problem with the loan," but Nomura did not give the appraisal to Cadwalader "because Nomura had not retained Cadwalader to review appraisals of the properties that secured the loans."

For appellant-respondent Cadwalader: David R. Marriot, Manhattan (212) 474-1000
For respondent-appellant Nomura: James T. Potter, Albany (518) 436-0751

State of New York Court of Appeals

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To be argued Tuesday, September 8, 2015

No. 123 People v Anthony Barksdale

In April 2009, two Manhattan police officers were patrolling an apartment building on 129th Street when they saw Anthony Barksdale "just standing" in the lobby. The building's management had enrolled it in the Trespass Affidavit Program, which authorizes the police to conduct patrols to deter trespassing. In response to the officers' questions, Barksdale said he did not live in the building, but was visiting a friend. When he could not provide the name or apartment number of his friend, the officers placed him under arrest and searched him, finding a razor blade in his pocket.

Supreme Court denied his motion to suppress the razor blade, ruling that "because the building is part of the trespass affidavit program," the officers had an "objective credible reason" to ask Barksdale why he was there. The court said his failure to give the name or apartment number of the person he said he was visiting provided probable cause to arrest him for trespassing. Barksdale later pled guilty to third-degree criminal possession of a weapon and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, holding that Barksdale's presence "in the lobby of a 'trespass affidavit' building ... gave the officer an 'objective credible reason' to ask defendant whether he lived there, which constituted a level one request for information (see People v Hollman, 79 NY2d 181 ...). The inquiry was not based merely on the reputation of the area, but also on the fact that the building was so prone to trespassing that the landlord had 'request[ed] police assistance in removing intruders'.... Furthermore, the officer's simple inquiry as to whether defendant lived there was the type of minimally intrusive question that a building employee might ask."

Barksdale argues that "a building's mere enrollment in the Trespass Affidavit Program (TAP) does not provide the police with an objective, credible reason to initiate a De Bour level one request for information of anyone encountered simply standing in the lobby." He "did not act in a strange or suspicious manner" and there "was nothing distinguishing [him] from any other resident of the building as his demeanor was calm and unaffected." He says, "While enrollment in the TAP authorizes the police to enter the premises, it can neither diminish an individual's right to be free from unreasonable search and seizure nor relieve the People of their burden in the suppression hearing of going forward with evidence of the legality of the police conduct. Moreover, upholding the intrusion in this case would subject all individuals in TAP buildings -- residents, guests, temporary refugees from the weather -- to indiscriminate police inquiry."

For appellant Barksdale: Jan Hoth, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Sheila L. Bautista (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, September 8, 2015

No. 124 Matter of Linares v Evans

Jorge Linares was serving 16 2/3 to 40 years in prison for rape and sexual abuse of a child in Suffolk County when he appeared for his first parole hearing in November 2011. He asked the Parole Board whether his application would be evaluated pursuant to 2011 amendments to Executive Law § 259-c(4), which required the Board to replace its former "guidelines" with "written procedures for its use in making parole decisions," which "shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board [and] the likelihood of success of such persons upon release." The Board did not respond to Linares' inquiry and it denied his parole application without considering a risk and needs assessment instrument known as the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) system. Parole Board Chair Andrea Evans had issued a memorandum in October 2011 directing Board members to include consideration of COMPAS risk and needs assessments in future deliberations, but the Board did not adopt regulations implementing the Executive Law amendments until July 2014.

Linares brought this article 78 proceeding to challenge the Board's denial of his parole application, arguing that it failed to comply with the amended Executive Law § 259-c(4), among other things. Supreme Court dismissed his suit, ruling the Board complied with the Executive Law amendments based on the "promulgation" of the Evans memorandum "as well as the record as a whole."

The Appellate Division, Third Department reversed and directed the Board to give Linares a new hearing. The court did not grant his request for parole release, but it said he "is entitled to a new parole hearing due to the Board's failure to use a 'COMPAS Risk and Needs Assessment' instrument, which is a document created and intended to bring the Board into compliance with recent amendments to Executive Law § 259-c(4)...."

Linares says the Parole Board "has failed to establish written procedures required by 2011 legislation that abolished the 1978 parole release guidelines and replaced them with a new scheme based on risk and needs principles to measure a parole candidate's relative risk of reoffending," arguing that neither the Evans memo nor the 2014 regulations comply with the statute. Under the regulations, he says, "board members are free to dismiss COMPAS results out of hand without revealing that they are doing so or explaining why.... Petitioner simply asks that the Board be directed to comply with the enabling legislation and to otherwise give detailed reasons for determinations that run counter to COMPAS' empirically-based results ... so that courts can subject parole release denials to rationality review."

The Parole Board has moved to dismiss Linares' appeal as moot, given its adoption of implementing regulations in July 2014. It has also moved to strike his brief "because it is permeated by issues that are entirely outside the scope of this proceeding."

For appellant Linares: Alfred O'Connor, Albany (518) 465-3524
For respondent Evans (Parole Board): Assistant Solicitor General Kate Nepveu (518) 776-2016

State of New York Court of Appeals

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To be argued Tuesday, September 8, 2015

No. 179 People v Jennifer Jorgensen

Jennifer Jorgensen was seven or eight months pregnant in May 2008, when she allegedly drove recklessly on Whiskey Road in Suffolk County and collided head-on with another car. The occupants of the other vehicle, Robert and Mary Kelly, were killed. Jorgensen's baby was delivered alive by emergency Caesarean section less than two hours after the accident, but died six days later.

In June 2009, she was indicted on charges of aggravated vehicular homicide, manslaughter in the second degree, driving under the combined influence of drugs and alcohol, and endangering the welfare of a child. Supreme Court dismissed the child endangerment charge on the ground the statute "does not apply to unborn children." Jorgensen's first trial ended with a hung jury. At her second trial, she was acquitted of two counts of second-degree manslaughter relating to the deaths of the Kellys, aggravated vehicular homicide, and driving under the influence. She was convicted of only one count of second-degree manslaughter for recklessly causing the death of her daughter. Jorgensen was sentenced to three to nine years in prison, which has been stayed pending appeal.

The Appellate Division, Second Department affirmed. Jorgensen did not raise a claim that she could not legally be convicted of manslaughter for the death of a child who was injured in utero. The court rejected her arguments that she was denied due process and a fair trial when the prosecutor introduced evidence of prescription drugs she was given for anxiety during her pregnancy and by the prosecutor's comments in summation.

In this appeal, both sides cite the Penal Law definitions of "homicide" and "person" in support of their arguments that Jorgensen could, or could not, be criminally liable for recklessly injuring her unborn child when the child died of those injuries after being born alive. Penal Law § 125.00 states, "Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first [or second] degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree." Penal Law § 125.05(1) states, "'Person,' when referring to the victim of a homicide, means a human being who has been born and is alive."

Jorgensen argues she was improperly convicted under Penal Law § 125.15(1), which says a person is guilty of second-degree manslaughter when "[h]e recklessly causes the death of another person," because her child had not been born and was not a "person" within the meaning of Penal Law § 125.05(1) at the time she "supposedly engaged in that reckless conduct." Had she not consented to the C-section and her child died in utero, she "could not have been prosecuted for anything related to the death of her unborn baby.... [S]he is now being prosecuted for the failed attempt to save the baby's life."

The prosecution argues that, because the child "was born alive, she was a person as defined under New York State law.... If it had been Mr. Kelly who caused the crash" and injured the fetus, "who later was born and died from the injuries sustained in utero, Mr. Kelly would be guilty for the death of [the child].... [S]ince the Penal Law does not specifically exempt a mother from liability for her acts which recklessly cause the death of a baby due to injuries sustained in utero, Jorgensen can be guilty of recklessly causing the death of her child."

For appellant Jorgensen: Richard E. Mischel, Manhattan (212) 425-5191
For respondent: Suffolk County Assistant District Attorney Karla Lato (631) 852-2500

State of New York Court of Appeals

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To be argued Tuesday, September 8, 2015

No. 180 People v Jose Martinez Baxin *(papers sealed)*

Jose Martinez Baxin was arrested in 2001 for sexually abusing a 10-year-old girl on three occasions in Manhattan over a two-month period. Charged with multiple counts of first-degree sodomy and first-degree sexual abuse, he absconded before trial. After Baxin was recaptured in 2008 he pled guilty, in full satisfaction of the indictment, to a single count of first-degree sodomy based on one incident. He was sentenced to five years in prison.

Prior to his release, the Board of Examiners of Sex Offenders recommended that Baxin be assessed 85 points on the risk assessment scale, which would classify him as a level two offender under the Sex Offender Registration Act (SORA). The board assessed him 20 points under risk factor four for engaging in a "continuing course of sexual misconduct," which was enough to raise him from a level one risk of re-offending to level two.

At his SORA hearing, Baxin objected to the 20-point assessment for a continuing course of misconduct on the ground that his conviction did not support it, since he pled guilty to only one criminal act. The prosecutor argued the assessment for continuing misconduct was supported by the grand jury minutes, Baxin's confession and the indictment. Supreme Court, after obtaining the grand jury minutes from the prosecutor, refused to disclose them to the defense. The court adopted the board's recommendation and adjudicated Baxin a level two sexually violent offender, finding the grand jury minutes, confession and indictment supported the assessment for continuing misconduct.

The Appellate Division, First Department affirmed, rejecting Baxin's claim that the hearing court denied him due process when it relied on grand jury minutes it refused to let him see. "Although in assessing points under the risk factor for continuing course of sexual misconduct, the court relied in part on grand jury minutes that were not disclosed to defendant, there was no violation of due process under the circumstances of this case, and a new hearing is not required. The grand jury minutes were cumulative to other evidence, establishing the same risk factor, that was fully disclosed to defendant, and defendant has not established that he was prejudiced...."

Baxin argues, "Defendants in SORA hearings have a significant liberty interest in avoiding the stigmatization, reduced employability, and other adverse consequences that the registration and notification requirements may cause" and are entitled to "the minimum procedural protections enumerated by the courts and ... State Legislature," including the right to counsel and "extensive pre-hearing discovery of relevant materials.... [D]espite Mr. Baxin's clear constitutional and statutory right to have discovery of the evidence presented against him..., the hearing court elected to rely upon grand jury testimony that it refused to disclose.... This withholding of evidence ... violated not only Mr. Baxin's statutory and due process rights to pre-hearing discovery, but his right to be represented by counsel -- where counsel had no opportunity to rebut the unseen evidence -- as well as to know the basis of the court's decision and to have a meaningful appeal...."

For appellant Baxin: Julia Busetti, Manhattan (212) 577-2523 ext. 530
For respondent: Manhattan Assistant District Attorney Brian R. Pouliot (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, September 9, 2015

No. 127 People of the State of New York v Sprint Nextel Corp.

This tax enforcement action arises from a qui tam suit brought in 2011 by Empire State Ventures, LLC against Sprint Nextel Corp. and three subsidiaries, alleging that Sprint was evading New York sales taxes on some revenue from sales of its flat-rate mobile telephone plans. Attorney General Eric T. Schneiderman intervened and filed a superseding complaint in 2012, alleging that Sprint knowingly filed false tax returns and failed to collect and remit more than $100 million in sales taxes in order to gain an advantage over its competitors by reducing the cost of its fixed-rate plans. He is seeking treble damages from Sprint under New York's False Claims Act (Finance Law § 189[1][g]) for making false statements on tax forms; he also asserts claims under Executive Law § 63(12) for fraudulent conduct and Tax Law article 28 for failure to pay the taxes. The Attorney General alleges that, beginning in 2005, Sprint began treating "an arbitrary and fluctuating percentage" of its monthly flat-rate bills as charges for tax-exempt interstate calls, although its invoices to customers did not distinguish between interstate and intrastate calls. He says this violates Tax Law § 1105(b)(2), which was enacted in 2002 to conform with a new federal law, the Mobile Telecommunications Sourcing Act (MTSA), by imposing sales tax on the entire monthly charge for flat-rate mobile voice services when the cost of interstate calls is aggregated with taxable charges. An August 2010 amendment applies the False Claims Act to knowing violations of the Tax Law.

Supreme Court denied Sprint's motion to dismiss the action, finding the allegations in the Attorney General's complaint were sufficient to state claims under the False Claims Act, Executive Law and Tax Law. Rejecting Sprint's claim that Tax Law § 1105(b)(2) permits it to exclude from sales taxes the portion of its flat-rate charge attributable to interstate calls, the court said its interpretation "is inconsistent with the plain language used" in the statute. The court said the Tax Law does not conflict with the MTSA, which was enacted "to address jurisdictions that, unlike New York, do not subject aggregated mobile telecommunications charges to taxation." It also held that application of the False Claims Act to statements made prior to its amendment in August 2010 does not violate the federal Ex Post Facto Clause.

The Appellate Division, First Department affirmed, finding no conflict with the MTSA and no obstacle to retroactive application of the False Claims Act. "Defendants fail to show that the Act's sanction of civil penalties, including treble damages, is so punitive in nature and effect as to have its retroactive effect barred by the Ex Post Facto Clause," it said.

Sprint argues that the Attorney General's claims fail "for two independent reasons. *First*, section 1105(b) does not tax interstate voice services, even when they are sold as part of a fixed monthly charge. *Second*, if the Attorney General's interpretation of section 1105(b) were correct, it would flatly conflict with, and therefore be preempted by, the 'unbundling' provision of the federal MTSA." Sprint also argues that it "cannot be held liable for knowingly violating the Tax Law because its interpretation of the relevant statute was objectively reasonable. And at the very least, the Ex Post Facto Clause of the federal Constitution bars application of the False Claims Act to statements made before August 13, 2010.

For appellant Sprint: Kannon K. Shanmugam, Washington, DC (202) 434-5000
For respondent State: Deputy Solicitor General Steven C. Wu (212) 416-6312

State of New York Court of Appeals

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To be argued Wednesday, September 9, 2015

No. 128 People v James R. Poleun *(papers sealed)*

James Poleun pled guilty to a felony count of possession of a sexual performance by a child in 2009, after the State Police executed a search warrant at his Niagara County home and found two child pornography images on his computer. He was sentenced to 1 1/3 to 4 years in prison. Prior to his release in 2013, the Board of Examiners of Sex Offenders assessed him 100 points on the risk assessment scale, which would classify him as a level two offender under the Sex Offender Registration Act (SORA), but it recommended an upward departure to risk level three based on his disciplinary infractions in prison, lack of supervision upon release, three prior arrests for sexual misconduct with young girls, and his admitted searching for child pornography on the internet, among other things.

Prior to his SORA hearing, Poleun wrote two letters to Niagara County Court saying he did not wish to appear because he would be transferred to Attica Correctional Facility for the hearing and he feared for his safety. In the first letter, he said, "With all respect to the court, I do not wish to appear. There is a lot I wish to say, but, I truly fear for my life having to sit at Attica for 2-3 weeks. Like I wrote before I seen IG twice there, and was beat up by COs 3 times.... I hope it will not be held against me for not coming. Believe me I want to. There are many wrong things wrote in that report. And I hope my lawyer will speak up on them. My parents will also be there. I do hope for a fair outcome." In the second, he asked the court to "revoke the order to have me brought there" and added, "It would be nice if I could appear via web-cam, but, my lawyer will speak on my behalf."

At the hearing, Poleun's attorney consented to proceeding in his client's absence and submitted a waiver of appearance signed by Poleun. After the hearing, County Court granted the prosecutor's request to designate Poleun a level three sex offender.

The Appellate Division, Fourth Department affirmed, saying Poleun failed to preserve his claim that County Court violated due process by accepting his waiver of appearance. On the merits, it said there was no due process violation because he "waived his right to be present at the SORA hearing when he informed the court in writing that he did not wish to appear. Defendant also signed a written waiver of that right, in which he '"was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his ... absence"'...."

Poleun argues his waiver of appearance was invalid because it was involuntary. "It is fundamentally unfair and a deprivation of due process for an incarcerated defendant to be forced to forego his constitutional right to be present at a hearing because he fears harm to himself resulting from his transportation and housing attendant to that hearing.... The defendant expressly stated to the court in his letters that the only reason that he would waive his right to be present ... was his fear of injury or death if transferred for purposes of that hearing. At a minimum, the SORA court should have made some attempt to ascertain whether those statements had any basis in fact." He also argues an upward departure to risk level three was not warranted.

For appellant Poleun: Joseph G. Frazier, Lockport (716) 439-7071
For respondent: Niagara County Assistant District Attorney Laura T. Bittner (716) 439-7085

State of New York Court of Appeals

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To be argued Wednesday, September 9, 2015

No. 129 Remet Corporation v Estate of Pyne

James R. Pyne sold Remet Corp. to a holding company for about $28 million in March 1999. The sale included an industrial facility on Turner Street in Utica and the "Erie Canal Site" in the Town of Frankfort. To address the buyer's concerns about potential liability for contamination of the properties, Pyne agreed in the Purchase and Sale Agreement to indemnify the buyer, for a period of ten years, for any environmental costs that "arise out of or result from actions ... that [the buyer] *is required to take* under or in connection with any Environmental Law or Environmental Permit" (emphasis added). When Remet was re-sold, the new owners acquired the indemnification rights.

In October 2002, the Department of Environmental Conservation (DEC) sent a notice letter to Remet identifying it as a "potentially responsible party" (PRP), along with four other entities, for hazardous waste on the Erie Canal Site because it "was a generator of wastes which it disposed at the site." DEC "requested" that Remet "develop, implement and finance a Remedial Program for this site" and said if Remet did not sign a consent order within 30 days, DEC would perform the work itself and seek recovery from Remet as a PRP, in which case "this Notice also serves as a demand for payment of all monies the Department may expend...." Remet did not sign the consent order, but began its own investigation of DEC's claims. Pyne died in 2003. In 2010, DEC issued its final remediation plan, which it estimated would cost in excess of $12.5 million, and identified Remet as a PRP that could be liable for the cost. When the Estate of Pyne refused to indemnify Remet for this cost and an additional $550,000 of its own expenses, Remet brought this action seeking a declaration that it was entitled to indemnification.

Supreme Court granted partial summary judgment to Remet on liability and declared it was entitled to indemnification, rejecting the Estate's argument that the DEC's October 2002 letter did not "require" Remet to take action. "Central to the message of the DEC letter is that an environmental clean up would take place, one way or another, with the cost paid voluntarily by Remet under a consent order, or by judgment if the DEC successfully proceeded against it, as it says it was required to do.... Faced with these 'options,' the letter clearly required some action by the plaintiff."

The Appellate Division, Fourth Department reversed and declared that Remet was not entitled to indemnification, since the purchase agreement limits that obligation to losses resulting from actions Remet "is required to take" in connection with environmental laws. "Because the DEC's letter 'merely informed ... plaintiff[] of [its] potential liability and sought voluntary action on [its] part'..., we conclude that it did not require plaintiff to take action," the court said.

For appellant Remet: Scott A. Chesin, Manhattan (212) 506-2500
For respondent Estate et al: Neil M. Gingold, Fayetteville (315) 445-0060

State of New York Court of Appeals

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To be argued Wednesday, September 9, 2015

No. 130 People v Raymond Denson *(papers sealed)*

Raymond Denson was 54 years old in 1998, when he was questioned by police about his conduct toward a 10-year-old girl who lived in the Manhattan building where he worked. Denson, who had a 20-year-old sodomy conviction for molesting a minor, repeatedly asked the girl to go out with him for ice cream or to go ice skating or to the movies, offers she always rejected or ignored. When he appeared at her apartment door and asked if she was "ready to go to the movies," she said no, she would be busy all week, and closed the door. Five days later, Denson greeted her and said, "Here's the keys to my apartment." When she refused to take them, he asked three times if she was sure, then offered to take her for ice cream. She told her mother, who called the police. Denson told them he and the girl were friends and he had asked her out on dates a number of times. He said he had offered her his keys and "suggested that she stay at his apartment until he got off of work, [and] that she could play with his cats." He was charged with a top count of attempted kidnapping in the second degree.

At his bench trial, Supreme Court allowed evidence and expert testimony about his prior sex offense "to show his intent in the present case." The court said the evidence, "potentially, demonstrates more than criminal propensity, but purports to show an actual link between the two offenses. For example, pictures of the two children show them to so closely resemble each other ... as to be virtual twins. Certain distinctive patterns of behavior employed by the Defendant on each occasion match to an extraordinary degree. The People now offer expert testimony to prove a theory" that Denson "has transferred his fixation and fantasy from victim number one to victim number two and is now re-living the previous sexual encounter." Denson was convicted and sentenced to 10 years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, finding there was sufficient proof of attempted kidnapping. "The evidence left no doubt that the victim was unlikely to be found had she succumbed to defendant's pressure to take his keys and go to the apartment. Similarly, the evidence left no doubt that defendant, a 'highly-fixated' pedophile, attempted to restrain the victim, i.e., to move her to a different location without the permission of her mother." No proof of force was required because "the definition of restraint, with respect to a child less than 16 years of age, encompasses movement or confinement by 'any means whatever,' including the acquiescence of the child.... His insistence that she go to his apartment, and his offer of keys, were steps that came 'dangerously near' to accomplishing his objective...." The court said, "There was extensive evidence to support the conclusion that defendant's motive was to sexually molest the victim, which ... was highly probative of his intent to abduct her."

The dissenters said, "Even a convicted sexual predator like defendant ... is entitled to protection from an overcharged prosecution," and argued there was insufficient proof of attempted kidnapping. "To successfully prove that defendant came dangerously near to completing a kidnapping of the child in this particular situation, the evidence would have had to show either that he was near forcibly taking her ... or that he came close to taking her with her acquiescence." But he made no use of force and "the evidence establishes that there was essentially no possibility that the child was going to comply with defendant's request." They said, "The majority makes an unreasonable leap in logic, and embraces fuzzy psychology, when it infers the intent to abduct based on" Denson's motive to sexually molest the girl. "Defendant's sexual interest in the complainant did not justify an inference that he harbored the intent to abduct her ... nor did his actual conduct toward her justify any such inference."

For appellant Denson: Kerry S. Jamieson, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Christopher P. Marinelli (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, September 10, 2015

No. 131 The Ministers and Missionaries Benefit Board v Snow

Prior to his divorce, Reverend Clark Flesher joined two benefits plans -- a retirement plan and a death benefit plan -- administered by the Ministers and Missionaries Benefit Board (MMBB), a New York not-for profit corporation. He designated his wife, now Reverend LeAnn Snow, as the primary beneficiary of both plans and her father, Leon Snow, as the contingent beneficiary. When Flesher and LeAnn Snow divorced in California in 2008, they signed a settlement agreement in which each of them relinquished all rights to inherit from the other. The agreement also authorized them to change the beneficiaries of their MMBB plans, but Flesher never did so. He died without a will in Colorado in 2011, and competing claims of entitlement to the proceeds of his MMBB plans were made by his Estate and by LeAnn and Leon Snow. To determine how to distribute the disputed funds -- in excess of $400,000 -- MMBB brought this federal interpleader action against the claimants in the Southern District of New York.

U.S. District Court granted summary judgment to Flesher's Estate, holding that it was entitled to the disputed funds under New York law. Estates, Powers & Trusts Law § 3-5.1(b)(2) provides, "The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed by a will, are determined by the law of the jurisdiction in which the decedent was domiciled at death." The court found that the proceeds of the MMBB plans are "personal property" and that Flesher had changed his domicile to Colorado prior to his death. Under Colorado law, divorce revokes any beneficiary designations of an ex-spouse and relatives of the ex-spouse, the court said, so the designations of both Snows were automatically revoked. Under New York law, divorce revokes beneficiary designations of ex-spouses, but not of their relatives.

The U.S. Court of Appeals for the Second Circuit found a threshold issue raised by the governing law provisions of the MMBB plans, which state, "The provisions of this Plan shall be governed by and construed in accordance with the laws of the State of New York." The court said, "The provisions could be read to require a court to apply both New York substantive law and New York choice-of-laws principles. They could also be read to require only the application of New York substantive law.... There is also a third possible reading...; namely, that they preclude the application of New York common-law conflict-of-laws analysis, but not the application of a choice-of-law directive in a New York statute." It said it is also unclear whether entitlement to the proceeds of the MMBB plans is "personal property" under EPTL § 3-5.1(b)(2).

The Second Circuit is asking this Court to resolve the issues in a pair of certified questions: (1) Whether a governing law provision, which was "not consummated pursuant to New York General Obligations Law section 5-1401, requires the application of [EPTL] section 3-5.1(b)(2), a New York statute that may, in turn, require application of the law of another state? (2) If so, whether a person's entitlement to proceeds under a death benefit or retirement plan, paid upon the death of the person making the designation, constitutes 'personal property ... not disposed of by will' within the meaning of [EPTL] section 3-5.1(b)(2)?"

For appellants Snow et al: Jesse Wilkins, Levittown (212) 809-5808
For respondents Estate of Flesher at al: Brian Rosner, Manhattan (212) 785-2577

State of New York Court of Appeals

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To be argued Thursday, September 10, 2015

No. 90 El-Dehdan v El-Dehdan *(papers sealed)*

Jacqueline El-Dehdan (El-Dehdan) brought this divorce action against Salim El-Dehdan, also known as Sam Reed (Reed), in 2008. After Supreme Court informed Reed it would refer equitable distribution issues to a referee, he transferred ownership of two parcels of marital property -- selling a parcel in Brooklyn for $950,000 in March 2009 and transferring a parcel in Queens in April 2009, apparently without consideration. After a hearing, at which Reed did not appear, the referee determined that El-Dehdan should be awarded the Brooklyn and Queens properties. When El-Dehdan learned both properties had been transferred, she sought relief from Supreme Court, which issued an order in January 2010 directing Reed to "deposit immediately" with El-Dehdan's attorney the net proceeds of the March 2009 transfer ($776,000). Reed failed to deposit any money and El-Dehdan moved to hold him in civil and criminal contempt. Reed responded in an affidavit that he no longer possessed the proceeds of the Brooklyn transfer. At the contempt hearing before a referee, Reed conceded he received a copy of the January 2010 order and did not turn over any money pursuant to the order. He invoked his Fifth Amendment privilege against self-incrimination in response to all questions about the proceeds of the March 2009 transfer. The referee found Reed dissipated marital assets, but recommended denial of the contempt motion for lack of proof he could have complied with the January 2010 order.

Supreme Court rejected the referee's report and held Reed in civil contempt, finding that he "was fully awar[e] of the court's lawful and unequivocal order" to turn over the proceeds of the Brooklyn transfer and that El-Dehdan "was clearly prejudiced by [his] refusal to comply."

The Appellate Division, Second Department affirmed, holding that "willfulness" is not an element of civil contempt under Judiciary Law § 753. It said "subdivision (3) of the civil contempt statute ... does not include the words 'wilful' and 'wilfully,' which are included in the criminal contempt statute.... The absence of the term 'wilful' ... indicates that the legislature, by inference, intentionally omitted or excluded the requirement of willfulness...." Finding no Fifth Amendment violation, it said Reed "had the burden of establishing his defense of an inability to pay the sum required by the January 2010 order...; his invocation of his privilege against self-incrimination did not relieve him of the obligation of coming forward with evidence in support of that defense.... Moreover, the Supreme Court was entitled to draw an adverse inference against him" in a civil proceeding, although it "did not hold him in contempt solely for having asserted his Fifth Amendment privilege. Rather, [it] held him in civil contempt for failing to comply with the ... order."

Reed argues that "the difference between civil and criminal contempt is not the existence of willfulness, but the level of willfulness required." Omitting willfulness from the civil contempt statute "would raise constitutional problems given the quasi-criminal nature of civil contempt proceedings. Without a willfulness element, defendants like Mr. Reed could be thrown in jail for simply failing to pay court-ordered debts." He says the federal and state Constitutions "do not permit a negative inference from a defendant's invocation of his Fifth Amendment rights where both civil and criminal penalties are being sought in the same proceeding." He also argues he should have been permitted to collaterally attack the validity of the January 2010 order.

For appellant Salim El-Dehdan (aka, Sam Reed): Donna Aldea, Garden City (516) 745-1500
For respondent Jacqueline El-Dehdan: Karina E. Alomar, Ridgewood (718) 456-1845

State of New York Court of Appeals

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To be argued Thursday, September 10, 2015

No. 132 People v Terrance Mack

Terrance Mack was charged with gang assault in the first degree for his alleged participation in a September 2007 brawl, during which Latasha Shaw was beaten and stabbed to death by a large number of people in Rochester. Only one eyewitness identified Mack as a participant. During jury deliberations, County Court declared a recess and told the attorneys they would address any questions or concerns raised by the jury when they returned. The jury sent the court three notes during the recess. The first note said "we would like to have the instructions regarding the importance of a single witness in a case versus multiple witnesses and the instructions about the meaning of reasonable doubt read back to us." The second note asked "to hear [the eyewitness's] testimony regarding Terrance Mack's leaving of the crime scene" and requested "more jury request sheets." The third asked for a smoking break. Upon reconvening, the court read the notes into the record and indicated it would read the requested instructions, but before it did so, the jury sent another note saying it had reached a verdict. The court recessed for 16 minutes, then accepted the jury's guilty verdict without responding to the notes. Mack was sentenced to 25 years in prison.

The Appellate Division, Fourth Department reversed and ordered a new trial in a 3-1 decision, finding that "the core requirements" of CPL 310.30 were triggered by the jury's requests for readbacks of legal instructions and "a portion of the testimony of the sole witness who had identified defendant," and that Mack was "seriously prejudiced" by the trial court's failure to respond. "[A]lthough defense counsel failed to object to the court's procedure of accepting the verdict without responding to the jury's notes, the failure of the court to provide a meaningful response to the substantive requests of the jury is a mode of proceedings error for which preservation is not required...." It said the "request for a readback of the instruction on reasonable doubt, the determination of which is the crux of a jury's function, and for a readback of the instruction regarding 'the importance of a single witness in a case versus multiple witnesses,' 'demonstrates the confusion and doubt that existed in the minds of the jury with respect to ... crucial issue[s].... The jury is entitled to the guidance of the court and may not be relegated to its own unfettered course of procedure'...."

The dissenter said the jury, "by issuing a note stating that it had reached a verdict, impliedly rescinded its outstanding notes requesting a readback of certain instructions and certain testimony, and County Court therefore did not err in concluding that 'the jury had resolved its questions and was no longer in need of the requested information'...." He also argued that any error was unpreserved. "Although providing a meaningful response to notes from the jury is clearly among the court's 'core responsibilities' under CPL 310.30..., the statute does not expressly require the court to respond to a note that is followed by an announcement from the jury that it has reached a verdict.... In my view, the court's failure to respond to the outstanding jury notes, even if error, was not so significant or prejudicial as to constitute a fundamental flaw in the criminal process."

For appellant: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674
For respondent Mack: Nicolas Bourtin, Manhattan (212) 558-4000

State of New York Court of Appeals

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To be argued Thursday, September 10, 2015

No. 133 People v Kenneth Nealon

Kenneth Nealon and an accomplice were arrested for allegedly mugging a man in Queens in September 2007. Witnesses said that, while posing as undercover police officers, the two men stole cash and property from the victim, then beat him when he questioned their authority. Nealon was charged with first and second-degree robbery, second-degree assault, and possession of stolen property. During deliberations, the jury sent three notes to the judge. The first asked for the "difference between robbery in the 1st degree and 2nd degree." The second said, "Please reinstruct us on all 4 charges." The third note said, "Clarify if 1st count robbery in first degree includes assault and 2nd count robbery in second degree doesn't include assault;" and then asked, "Does the degree of injury count towards 1st or 2nd degree?" Supreme Court called the jury into the courtroom, read the notes aloud into the record, and then responded to the jury's requests. Nealon was convicted of all four counts and sentenced to 20 years in prison.

On appeal, Nealon argued the trial court erred under People v O'Rama (78 NY2d 270) by responding to the jury notes without first informing him of the contents of the notes and affording him an opportunity to consult on the response. The prosecution then moved at the trial court to resettle the record, contending the court showed the notes to defense counsel at unrecorded sidebar conferences before the jury was called into the courtroom. Supreme Court granted the motion "to the extent that the record reflects that the attorneys were shown the notes" before the court responded to the jury.

The Appellate Division, Second Department struck the portions of the prosecution's brief that referred to the resettled record and reversed Nealon's conviction, finding the trial court committed a mode of proceedings error based on the original record. "[T]he record demonstrates that the Supreme Court violated the procedure set forth in O'Rama by reading the contents of the jury note for the first time in front of the jury and immediately providing a response.... Significantly, the jury's repeated requests for clarification of the difference between the counts of robbery in the first degree and ... second degree within the context of this case required a 'substantive response' ... rather than a merely 'ministerial' one...." It said this was a mode of proceedings error requiring reversal despite defense counsel's failure to object.

The prosecution argues the trial court "read the jury notes *verbatim* and out loud in the presence of defendant, defense counsel, the prosecutor, and the jury. Afterwards, the court answered the jury's inquiries.... Since defendant was privy to the exact contents of the notes, he was in possession of all the information he needed to object if he so desired, and was required to do so in order to preserve his claim that the trial court violated O'Rama.... [W]hen the trial court fully reveals the contents of a jury note to defendant and counsel, the defense must object to preserve an O'Rama claim, even if this disclosure first occurs in front of the jury." It also argues, "The resettled record demonstrates that there was no O'Rama error" because "the notes were disclosed prior to the jury's return to the courtroom."

For appellant: Queens Assistant District Attorney Christopher Blira-Koessler (718) 286-5988
For respondent Nealon: Kendra L. Hutchinson, Manhattan (212) 693-0085

State of New York Court of Appeals

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To be argued Thursday, September 10, 2015

No. 134 People v Rhian Taylor

Rhian Taylor was accused of fatally shooting Darion Brown during an argument in Laurelton, Queens, in August 2007. Taylor allegedly fired several shots at Brown, who was sitting at the wheel of his car. Three bullets struck Brown and one struck a passenger sleeping in the front seat. Two other passengers, Anthony Hilton and Seprel Turner, identified Taylor as the gunman at his trial. They also received benefits for their cooperation with the prosecutor. Shortly before the trial, Hilton faced a hearing on alleged violation of his probation for possession of a weapon. The prosecutor appeared at the hearing, described his cooperation in the murder case and asked that he be released without bail, a request the court granted. The court also restored Hilton to probation at the same hearing. Turner was arrested on felony weapon possession charges in 2009 and 2010 and entered into a written cooperation agreement, which promised that the felony charges would be dismissed and he would receive probation for a misdemeanor plea in return for his truthful testimony in the murder case. Turner's cooperation agreement was entered into evidence as an exhibit at Taylor's trial, but the benefits offered to Hilton were reflected only in testimony.

Before the jury began deliberating, the parties agreed Supreme Court could provide any "exhibits" requested by the jury without consulting counsel. When the jury asked "to see the benefits offered to Mr. Hilton and Mr. Turner," the court sent in Turner's cooperation agreement, but not Hilton's testimony. When defense counsel later learned of the note, he complained that Hilton's testimony about his benefits should have been read to the jury. The court said, "They didn't ask for that." The next time the jury was brought to the courtroom, the court mentioned the note and said, "I believe we sent in to you the cooperation agreement with Mr. Turner. That's what is in evidence." It did not ask the jury for clarification of its request. Taylor was convicted of second-degree murder and lesser charges and was sentenced to 20 years to life in prison.

The Appellate Division, Second Department affirmed, rejecting Taylor's claim that he was deprived of his rights under People v O'Rama to notice of the note and to be heard on it. It said, "While it may have been preferable for the court to seek further clarification from the jury with respect to its request to 'see the benefits'..., the wording of the subject jury note, particularly when read in conjunction with several other notes, demonstrated that the jury was requesting only the physical exhibit. Under these circumstances, the Supreme Court's response did not fall outside the acceptable bounds of its discretion...."

Taylor argues, "A trial court has no 'discretion' to unilaterally construe an inherently ambiguous jury note as 'ministerial' without according the defendant his fundamental constitutional rights to notice, presence, and the opportunity to be heard." He says, "Reversal is also required because the trial judge responded to the jury's note in a prejudicially misleading way and failed to provide the jury with all evidence responsive to its request."

For appellant Taylor: Joel B. Rudin, Manhattan (212) 752-7600
For respondent: Queens Assistant District Attorney Sharon Y. Brodt (718) 286-5801

State of New York Court of Appeals

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To be argued Friday, September 11, 2015

No. 135 Matter of Bottom v Annucci

Anthony Bottom was an inmate at the Attica Correctional Facility in February 2013, when he was stopped and frisked on his way into the prison law library. The correction officer found two loose postage stamps and personal documents. Inmates are allowed to keep such items in their cells, but a local facility rule at Attica prohibits them in the law library. Stamps are allowed only if they are affixed to envelopes. Bottom was charged with violating Prison Rule 113.22, which prohibits the possession of authorized items in unauthorized areas, as well as rules prohibiting contraband, smuggling and solicitation.

A hearing officer found Bottom guilty of possessing authorized items in an unauthorized area and not guilty of the other charges. "It appears to this hearing officer that inmate Bottom inadvertently carried the reported items en route to the law library," he said, and imposed a penalty of seven days in pre-hearing keeplock, which Bottom had already served.

Bottom brought this article 78 proceeding against Anthony Annucci, acting commissioner of the Department of Corrections and Community Supervision (DOCCS) to challenge the disciplinary determination. The Appellate Division, Fourth Department upheld the determination without opinion.

Bottom argues that Attica's local rule prohibiting loose stamps in its law library, a rule contained in the prison's handbook, is unenforceable because it was never filed with the Secretary of State pursuant to article IV, section 8 of the State Constitution. He says he had no notice of the loose-stamp rule prior to the incident and did not intentionally violate the rule. He argues there was insufficient evidence to support the determination because he was searched and his stamps seized in the D Block lobby, while he was on his way to the law library, but before he entered it.

DOCCS argues that Bottom failed to preserve his constitutional challenge to the loose-stamp rule because he did not raise the claim at his disciplinary hearing, his administrative appeal, or in his article 78 petition. In any event, it says, the rule is exempt from the constitutional filing requirement, in part because the rule relates to the internal management and operation of the Attica prison.

For appellant Bottom: Norman P. Effman, Warsaw (585) 786-8450
For respondent Annucci (DOCCS): Asst. Solicitor General Allyson B. Levine (518) 473-6948

State of New York Court of Appeals

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To be argued Friday, September 11, 2015

No. 136 People ex rel. DeLia o/b/o Stephen S. v Munsey *(papers sealed)*

Stephen S. was involuntarily committed to Holliswood Hospital in Queens under Mental Hygiene Law article 9 in March 2012. Two months later the hospital applied for a court order authorizing his continued retention under Mental Hygiene Law § 9.33. Supreme Court granted the application for a three-month period ending on September 13, 2012. When the order expired, Holliswood continued to retain him without seeking an order authorizing further confinement. Mental Hygiene Legal Service (MHLS) filed this petition for a writ of habeas corpus under CPLR article 70 on October 23, 2012, arguing that Stephen was being illegally detained by the hospital. Two days later, Holliswood sought an order to continue his involuntary confinement under section 9.33. It submitted two certificates from Stephen's physicians, who said he was paranoid, psychotic, unable to care for himself, and could pose a threat to himself and others.

Supreme Court granted the writ and ordered Stephen's discharge, but stayed its order pending appeal. It rejected Holliswood's argument that it was entitled to a hearing on Stephen's mental status under Mental Hygiene Law § 33.15 to determine whether continued retention was warranted, saying it would have held such a hearing "if you did what you were supposed to do" by applying for a new retention order before the prior order expired. The court agreed with MHLS that no hearing is required for a writ of habeas corpus under CPLR article 70.

The Appellate Division, Second Department reversed, ruling that a hearing must be held despite the hospital's failure to comply with the retention procedures of the Mental Hygiene Law. Stephen was discharged before it ruled, but it invoked the exception to mootness because the case raised an important question that is likely to recur and to evade review. A writ sought under CPLR article 70 is not "substantively different from a petition for a writ brought under Mental Hygiene Law § 33.15," which allows patients who are involuntarily confined to challenge the need for their detention, it said. "[A] petition for a writ of habeas corpus, ostensibly filed on behalf of the patient pursuant to CPLR article 70, is still governed by the specific provisions of Mental Hygiene Law § 33.15.... Indeed, because [section] 33.15 is the more specific statute, the provisions of [section] 33.15 ... are controlling, not CPLR article 70.... A contrary determination would frustrate the legislative intent that an examination be conducted when a psychiatric patient seeks habeas corpus relief...."

Stephen S. argues, "The Appellate Division's holding ... unconstitutionally restricts psychiatric detainees' access to the common law, 'great writ' of habeas corpus, available pursuant to CPLR article 70. It improperly conflates the 'great writ,' available to all people illegally restrained in their liberty, and Mental Hygiene Law § 33.15, which the Legislature passed to provide an additional procedural vehicle for patients alleging, prior to the end of a lawful period of retention, that their mental status has improved and that they no longer meet the standard for involuntary retention." He says that, because he "was involuntarily confined ... for approximately six weeks without any application for, or order authorizing, his continued detention, his constitutional and statutory rights were violated, and the Supreme Court properly granted his application for a great writ of habeas corpus and ordered his release" under CPLR article 70.

For appellant Stephen S.: Lisa Volpe, Mineola (516) 746-4373
For respondent Holliswood: Eric Broutman, Lake Success (516) 328-2300

State of New York Court of Appeals

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To be argued Friday, September 11, 2015

No. 137 People v Dupree Harris *(papers sealed)*

Dupree Harris was charged with bribing witnesses and witness tampering for persuading three teenage girls to recant their statements identifying his half-brother, Wesley Sykes, as the gunman who shot and killed Dennis Brown in front of numerous witnesses in a Brooklyn park in 2001. Harris approached each of the girls in the two months leading up to Sykes' trial in 2002. They testified they had heard Harris was dangerous, but he showered them with gifts and attention, took them to restaurants and sometimes gave them cash. One of the girls had a sexual relationship with him. On separate occasions, Harris took each girl to the office of Sykes' attorney, where they recorded statements recanting their prior identifications of Sykes and claiming another man committed the murder. They said Harris gave each of them $500 after they left the office. When another eyewitness, Bobby Gibson, was shot to death on the eve of Sykes' trial, the three teenage girls said they became frightened and told a detective about Harris' conduct. The Brooklyn District Attorney's Office relocated the girls and their families to hotels, and all three girls testified at Sykes' trial that he shot Brown. Travis Ragsdale later confessed to shooting Gibson in a drunken dispute unrelated to Brown's murder. A jury acquitted Ragsdale of murder on a witness-elimination theory, but convicted him of intentional murder in June 2004.

At Harris' trial for witness tampering and bribery in July 2004, Supreme Court allowed the prosecutor to elicit testimony about Gibson's murder, in part to explain why the three girls, after recanting their identifications of Sykes, changed their minds and testified against him, and in part to explain why they were placed in the witness relocation program. The court also allowed one of the girls to testify that, shortly before Sykes' trial began, she heard Harris say he wanted to talk to Gibson. Harris was acquitted of witness tampering, but convicted of three counts of bribing a witness and sentenced to 15 years to life in prison.

The Appellate Division, Second Department affirmed on a 3-1 vote, rejecting Harris' claim that the admission of evidence concerning Gibson's murder deprived him of a fair trial. It said "evidence that Gibson was murdered two days before he was scheduled to testify against Sykes did not constitute proof that the defendant committed an uncharged crime or bad act," and thus was not prejudicial Molineux evidence, and it had probative value, even though Gibson was killed after the girls recanted their original statements and accepted $500. "Evidence that Gibson's death motivated the girls to come forward to the police and admit that they had been bribed by the defendant was particularly important to an assessment of their credibility..., since ... a major theme of the defense was that the girls had retracted their recantations because of the money and benefits they received through ... the witness protection program."

The dissenter said the evidence of Gibson's murder "had a far-reaching impact on the course and character of the defendant's entire trial. The court's evidentiary rulings permitted the defendant to be cast as a man who had been involved in a heinous witness-elimination murder and the specter of that uncharged crime overshadowed the charges for which the defendant was on trial. The focus of the trial was so completely shifted to the uncharged murder that the case unraveled into a trial within a trial" regarding "the defendant's involvement in the uncharged crime." The evidence had little or no probative value, he said, and the "prejudice suffered by the defendant ... was severe and unmistakable."

For appellant Harris: Mark W. Vorkink, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Morgan J. Dennehy (718) 250-2515

State of New York Court of Appeals

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To be argued Friday, September 11, 2015

No. 138 People v Vincent Izzo *(papers sealed)*

Vincent Izzo was 21 years old in 2010, when he was arrested in Chemung County for sexual misconduct with two 14-year-old girls and for endangering the welfare of a child and aggravated harassment for his dealings with a third girl, who was 13 years old. The 14-year-old girls had come to Izzo's apartment after numerous telephone and online communications. Izzo told police he engaged in oral sex with one of them after they made food and watched a movie during a "date;" and when the other 14-year-old came to his apartment, they kissed and he touched her breasts and buttocks over her clothing. Izzo also told police about his telephone and online communications with the 13-year-old girl, including a webcam conversation in which he touched himself over his clothing near his crotch and told her she could "fix it" if she were with him. Izzo pled guilty to the entire indictment and was sentenced to one year of interim probation. After he violated probation by failing to complete sex offender treatment and by purchasing a computer and sending numerous messages, including some with sexual content, to a 17-year-old community college student, he was sentenced to two years in prison.

Prior to his release, the Board of Examiners of Sex Offenders recommended that he be assessed 105 points on the risk assessment scale, presumptively making him a risk level II offender under the Sex Offender Registration Act (SORA). County Court adopted the Board's recommendations and designated Izzo a level II offender. It found he was properly assessed 30 points under risk factor 3 for having three or more victims, rejecting Izzo's argument that the 13-year-old should not count as a victim because he did not engage in "sexual conduct" with her and the endangerment and harassment charges are not SORA offenses. The court said he was properly assessed 20 points under risk factor 7, based on his relationship with the victims, finding he "groomed" them in order to sexually offend against them. Izzo requested a downward departure from level II based on the "statutory rape exception" under risk factor 2, because he was not accused of using force and the lack of consent was due to the ages of the girls, and based on his developmental disabilities. The court denied the request.

The Appellate Division, Third Department affirmed in a 3-2 decision, saying the 30 points assessed for three or more victims "was entirely appropriate" based on "clear and convincing evidence ... that defendant indeed touched himself in a sexual manner while in contact with one of his victims via a webcam." Upholding the 20 points assessed for his relationship to the victims, it said, "While it is true that the online contact between defendant and his victims precludes a finding that the victims were 'strangers' for purposes of SORA..., there is clear and convincing evidence ... that defendant engaged in 'grooming' behavior by cultivating a relationship with each of his victims for the purpose of satisfying his sexual desires."

The dissenters said Izzo was improperly assessed points for a third victim because there was insufficient proof of "prohibited sexual conduct" with the girl on the webcam; "viewed objectively, the testimony demonstrates nothing more than a brief swipe of defendant's hand in his genital region, accompanied by innuendo." They said there was insufficient proof he "purposefully 'groomed' the victims," due to his disabilities and lack of maturity, and they argued the case should be remitted "for a full and express analysis" of his request for a downward departure.

For appellant Izzo: Adam Bevelacqua, Manhattan (917) 656-7076
For respondent: Chemung County Assistant District Attorney Damian Sonsire (607) 737-2944