

# *State of New York Court of Appeals*

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

To be argued Tuesday, April 30, 2013

## **No. 107 People v Nicholas Sanchez**

A livery cab driver was robbed in December 2004 by two men in the Bronx. The driver identified Nicholas Sanchez as the robber who held a handgun and sat on the right side of the rear seat. He was unable to identify the other robber. Just prior to opening statements, Sanchez's defense attorney told the court he had just learned that his firm, the Legal Aid Society, had been representing another client, Franklin DeJesus, who was investigated by police in connection with this robbery. Defense counsel also said he had learned through "privileged communication" that DeJesus had "some connection" with Elvis Montero, whose fingerprint had been found in the cab where this robbery occurred. Defense counsel conceded that this created "the possibility of potential" for a conflict of interest, but said, "For evidentiary reasons and for just reasons related to common sense, we don't see a need to go into Mr. DeJesus, since there is no physical evidence connecting him to this crime. Therefore, so long as we don't actively go into Mr. DeJesus, we don't see the possibility of a conflict...." In trying the case, defense counsel argued that Montero, not Sanchez, was the gunman in the right-rear seat, but made no reference to DeJesus. The trial court permitted two detectives to testify that Sanchez was the person depicted in photographs the cab's surveillance camera took of the gunman. Sanchez was convicted of first-degree robbery and sentenced to eight years in prison.

The Appellate Division, First Department affirmed in a 4-1 decision, ruling Sanchez was not deprived of effective assistance of counsel by Legal Aid's simultaneous representation of Sanchez and DeJesus. "Although one of the defendant's Legal Aid attorney's testified at the CPL 330.30(3) hearing that counsel thought DeJesus was depicted in the photograph on the driver's side [of the rear seat], the third-party culpability defense, that was focused on Montero only, did not require counsel to implicate DeJesus or otherwise act in a way that was adverse to his interests. For this reason, counsel was correct in telling the court that there was no need to reference DeJesus by name during the trial. There was no conflict between defendant's interests and those of DeJesus. Even if such a conflict existed, it would not have affected the conduct of defendant's defense or operated on counsel's representation of defendant...." The majority said the detectives' testimony identifying Sanchez in the surveillance photos "was properly admitted based on the evidence of their familiarity with defendant from prior occasions."

The dissenter said defense counsel's "decision to overlook the evidence he had already obtained showing some connection between the man investigated by the police [DeJesus] and the man whose latent fingerprints were found in the livery cab [Montero], and to forgo any further pursuit of evidence of a connection between the two men, was itself the inevitable product of the conflict of interest he faced, which clearly affected the conduct of the defense. Rather than proceeding to trial with the understanding that there would be no reference to this other suspect, a nonconflicted attorney would have, at least, sought a recess of the trial to further investigate this suspect for the purpose of building a third-party culpability defense." She also argued that admission of the detectives' identification testimony was improper bolstering.

For appellant Sanchez: Margaret E. Knight, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Noah J. Chamoy (718) 838-7142

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**No. 108 People v Chester J. Thomas**

*(papers sealed)*

Chester J. Thomas is serving 13 years in prison for his conviction of criminal sexual act in the first degree. The complainant, who was living with Thomas and their three children in Rochester, testified at trial that Thomas forced her to have anal intercourse by threatening her with a box cutter and later beat her with a chain. Defense counsel contended that she fabricated those claims and pointed out that her first written statement to the police, which she signed, did not mention anal rape, the box cutter, or being beaten with a chain. The complainant testified that she did not include those things in her statement because the police officer who was taking it told her "no judge would ever believe that happened because me and Chester Thomas was in an intimate relationship." The prosecutor did not call that police officer as a witness to corroborate her account. In summation, defense counsel argued the complainant did not mention rape in her initial police statement "because it didn't happen," but when he said the officer should have been called as a witness, the court sustained the prosecutor's objection and told the jury to disregard the statement. Defense counsel moved for a mistrial, arguing the court improperly prevented him from discussing the prosecutor's failure to put the officer on the stand. The court denied the motion. It said counsel had been allowed to comment on the officer's absence, but it had precluded counsel from discussing the inferences that should be drawn from the prosecutor's failure to call the officer because the defense had not requested a missing witness instruction.

The Appellate Division, Fourth Department affirmed the judgment. It rejected the trial court's rationale, but said, "In the event that the officer would have merely confirmed the victim's story, such testimony would have been cumulative of the victim's testimony, and the People were not required to call him as a witness.... Moreover, defendant never made an offer of proof with respect to the officer's prospective testimony, and thus there was no good faith basis to comment on the People's failure to call him as a witness...."

Thomas argues, "New York law is clear and well-settled: in summation, a party may point out the failure of the opposing party to call certain witnesses to support a claim..., and may attempt to persuade jurors to draw inferences from the absence of such witnesses.... This Court has also made clear that entitlement to a 'missing witness' instruction is not a prerequisite to a party's ability to urge jurors to draw a negative inference from the opposing party's failure to call certain witnesses...." He also argues that, because the basis for the trial court's ruling was that a missing witness charge must be requested before counsel may argue the adverse inference, appellate review is limited to that issue.

For appellant Thomas: Janet C. Somes, Rochester (585) 753-4329

For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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## **No.109 People v Travis Augustine**

On July 18, 2008, Travis Augustine was arrested by the State Police on a bench warrant for violating misdemeanor probation. He was driving a pick-up truck that belonged to Martha Conners, a resident of the Town of Catskill. He also had her debit card and cell phone. He was arraigned on the probation violation charge in Cairo Town Court and was remanded to the Greene County Jail. On July 27, 2008, Conners' son called the State police to report she had been missing for about three weeks, and a trooper questioned Augustine the same day at the jail regarding her whereabouts. On July 28, Conners' body was found buried with her dog on her property in Catskill. She had been shot in the head. On July 29, 2008, State Police investigators questioned Augustine at the jail in the absence of counsel after he waived his Miranda rights.

After Augustine was charged with the murder, he moved to suppress the statements he made on July 27 and July 29 on the ground that the police had violated his indelible right to counsel. He submitted the Cairo Town Court's arraignment memorandum, on which the court had checked the "Yes" box next to "Counsel assigned" and had written in "Public Defenders Office." However, the town justice who arraigned Augustine testified the defendant had told him he "didn't think he needed an attorney ... or wasn't sure that he wanted an attorney," and the justice said he filled out the assigned counsel section so the Public Defender's Office would determine whether Augustine was eligible for assigned counsel. County Court denied the suppression motion, concluding that "no true attorney-client relationship was established" until after the July 27 and 29 interrogations. Augustine was convicted of second-degree murder, aggravated cruelty to animals and possession of stolen property, and was sentenced to an aggregate term of 29 years to life.

The Appellate Division, Third Department affirmed. "Given this equivocal evidence regarding representation [from the suppression hearing], defendant did not meet his burden of showing that he was represented on the probation violation charge at the time of questioning. Even if -- despite evidence to the contrary -- the arraignment memorandum constituted assignment of counsel such that defendant was represented on that charge, there was no proof of entry by counsel. Entry requires 'actual appearance or communication by an attorney'...", the court said. "The proof showed that defendant did not request counsel on the pending charge ... and no one from the Public Defender's office visited defendant at any time prior to the questioning at issue."

Augustine argues the "contemporaneously written assignment of counsel" on his arraignment memorandum "was an actual assignment of counsel," saying the Town Court "was obligated to do so" by court rules requiring assignment of counsel at arraignment before a defendant is remanded to jail. He argues that "entry of counsel" is only required for retained counsel "to provide an objective baseline for reviewing when the relationship was formed." This is not necessary for assigned counsel because "an objective measure" of when the representation began "is the court's order." He also argues the July 27 questioning violated his Miranda rights.

For appellant Augustine: Matthew C. Hug, Troy (518) 283-3288

For respondent Greene County District Attorney: Hannah E.C. Moore, Albany (518) 432-1100

