NEW YORK COURT OF APPEALS ROUNDUP:

COURT AFFIRMS NO COURT TV IN NEW YORK AND DECIDES CRIMINAL CASES

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The Court of Appeals recently upheld New York's statutory ban on televised trials, rejecting the argument that such a ban violated the constitutional right to trial access. We discuss that decision, as well as its decisions in two criminal cases. In the first, the Court upheld New York's statutory scheme for persistent non-violent felony offenders against the argument that it violates the right to a jury trial, although it held the door slightly ajar for a future challenge should the Supreme Court overrule a precedent that several Justices of that Court have criticized. In the second, the Court made clear that it will continue to apply its own ineffective assistance of counsel test because "our state standard . . . offers greater protection [to defendant] than the federal test," and therefore if a defendant cannot demonstrate ineffective assistance under New York's constitution, his federal claim necessarily must fail.

We also wish to recognize the death last month of Judge Vito J. Titone, who after having served on the Supreme Court and Appellate Division was an Associate Judge of the Court of Appeals from 1985 to 1998, where he authored many ground-breaking decisions and supported a broad reading of constitutional rights.

Television in the Trial Courts

To the extent that there was any hope of televising proceedings in the trial courts of New York, that hope was put to rest in *Courtroom Television Network LLC ("Court TV") v. State of New York*. A unanimous Court, in an opinion by Judge George Bundy Smith, affirmed the grant of summary judgment against Court TV in the Supreme Court, which decision had been affirmed in the Appellate Division, First Department. In all, none of the thirteen judges who reviewed the case found any merit in the argument that § 52 of New York's Civil Rights Law violated Court TV's rights under the federal or State constitutions. It is now clear that any chance of televising proceedings in New York's trial courts can come only from action by the

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Legislature.

In 2001, Court TV brought an action seeking to have Civil Rights Law § 52 declared unconstitutional. The action asserted that the law violated Court TV's right to access to trials as guaranteed by the First Amendment to the United States constitution and Article I, § 8 of the New York constitution. As recited in the comprehensive and scholarly opinion of Justice Shirley Warner Kornreich of the Supreme Court, New York County, § 52 had been passed by the Legislature in 1952 with only one dissenting vote, and promptly signed into law by Governor Thomas E. Dewey, one of New York's most renowned prosecutors.

The statute, in the clearest language, proscribes the televising, broadcasting or taking of motion pictures of proceedings in New York in which the testimony of witnesses is to be taken. While the statute has been amended twice since 1952, the amendments permit only audio-visual coverage of specified proceedings in the Legislature and before State Commissions, including rate proceedings held before the Public Service Commission.

Court TV was unable to overcome both federal and State precedent that, while acknowledging the important right of the public and the press to have access to trial proceedings, declined to provide to the press some special right of access to enable it to televise them. These precedents are bottomed on the prejudicial impact of pretrial publicity on jurors, the impact on the truthfulness of witnesses, the pressure placed on the trial judge to assure a fair trial, and the potential harm to the rights of the defendant.

Unfortunately for the media, dramatic examples of its coverage of notorious trials – starting with the 1935 trial of Bruno Hauptmann who was convicted in the kidnapping-murder of Charles A. Lindberg's son, which trial at the time was described as a "Roman Holiday" – continue to haunt the efforts of the press for greater access to trials. The more recent trial of O.J. Simpson provides another example of cases that, it can be argued, were improperly affected by media coverage.

As Justice Kornreich's opinion shows us, New York through legislative action has on several occasions flirted with the opening of trials to audio-visual coverage, only to have the law permitting such coverage on an experimental basis, which it extended four times, expire on June 30, 1997.

Thus, while many states permit televised trials, New York continues to impose a total ban on such coverage.

Persistent Offenders

The defendant in *People v. William Rivera* was convicted of unauthorized use of a vehicle. The indictment's additional charges for criminal possession of stolen property were not

considered by the jury. While the charge of which he was convicted carried a maximum sentence of two to four years, Rivera was sentenced to 15 years to life under New York's recidivist laws.

Those laws provide that when a court "(a) has found that the defendant is a persistent felony offender [defined as having two or more previous felony convictions with sentences in excess of one year] . . . *and* (b) is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest," it may impose an indeterminate sentence up to life imprisonment (emphasis added). Rivera's enhanced sentence was based upon several judicial findings beyond the defendant's prior convictions, including facts relating to the crime charged that had not been found by jury, such as that the burglar's tools were found in the vehicle.

The defendant asserted a violation of his rights under the Sixth Amendment, as interpreted in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), because the enhanced sentence was based upon findings of fact made by the court, rather than by the jury. In upholding the sentence, the majority interpreted the recidivist statutes in such a way as to potentially lower the bar for courts to apply enhanced sentences.

Important to the decision in *Rivera* was a prior decision, *People v. Rosen,* 96 N.Y.2d 329 (2001), in which the Court ruled that New York's statutory scheme does not contravene *Apprendi* because "felony convictions are the sole determinate of whether a defendant is subject to enhanced sentencing." *Rosen* held that the additional judicial findings contemplated by the laws are relevant only to where "within the permissible statutory range" the sentencing court imposes a sentence. The majority and dissents in *Rivera* differed over whether post-*Apprendi* and post-*Rosen* Supreme Court authority required a finer point on the statutes' interpretation.

The Court, in an opinion by Judge Albert M. Rosenblatt, observed that had *Rosen* interpreted the statutes to require judicial fact-finding as to the defendant's character and criminal conduct as a predicate to persistent offender sentencing eligibility, the result in *Rivera* would be different. The Court continued that, "*no* additional fact-finding beyond the fact of two prior felony convictions is required. . . . Once the defendant is adjudicated a persistent felony offender, the requirement that the sentencing justice reach an opinion as to the defendant's history and character is merely another way of saying that the court should exercise its discretion." (Emphasis in original.) Thus, under this latest interpretation of the statutes, a defendant may receive a persistent felon sentence based upon no more than sufficient prior convictions.

Although it does not appear controlling to the result, the Court pointed out that appellate review of sentences should "mitigate inappropriately severe applications" of the

statutes. The Appellate Division may exercise its discretion to reduce a sentence "in the interest of justice."

The open question is whether *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), will continue to be the law of the land. There, the Supreme Court ruled that the finding of defendant's prior convictions may be made by a judge without violating the Sixth Amendment. A majority of the Justices on that Court, however, have expressed disagreement with *Almendarez-Torres*. Because Justice Sandra Day O'Connor was not among those Justices, a majority of the Supreme Court presumably will continue to disagree with the decision. The Court of Appeals stated in *Rivera* that unless and until *Almendarez-Torres* is overturned by the Supreme Court, New York will continue to apply it.

Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick each wrote dissenting opinions in which the other joined. Both dissents argued that *Rosen's* interpretation of the statutes needed to be revisited given subsequent Supreme Court decisions, even assuming that *Almendarez-Torres* is correct.[1] They would read the statutes to require the sentencing court to find more than prior convictions before it imposes an enhanced sentence. Judge Ciparick wrote, "[w]here a statute, like ours, considers facts beyond recidivism that were neither proven to the jury beyond a reasonable doubt nor admitted by a defendant for the purpose of enhancing a sentence beyond the statutory maximum, then that statute runs counter to the United States Supreme Court's current interpretation of the Sixth Amendment."

While perhaps difficult to square with their joinder in the Court's unanimous *Rosen* decision, the dissenters also argued that their current interpretation is mandated by the "plain language" of the statutes. At the same time, the statutes can fairly be read to permit enhanced sentences only if the court *both* finds the necessary prior conviction prong is met *and*, following a hearing, makes additional findings as to the defendant's character and conduct. We cannot help but point out that several members of the majority, which gave an arguably strained reading to the statutes, frequently place great emphasis on "plain meaning."

Ineffective Assistance

In our June column, we observed that a decision handed down by the Second Circuit in May, *Henry v. Poole,* called into question the continuing validity of New York's test for ineffective assistance of counsel, enunciated in *People v. Baldi,* 54 N.Y.2d 137 (1981), which predated the Supreme Court's formulation in *Strickland v. Washington,* 466 U.S. 668 (1984). The Court of Appeals has since reiterated that *Baldi* should be applied by New York courts.

In rejecting the defendant's ineffective assistance argument in *People v. Carlos Caban,* the Court applied the *Baldi* test, which provides that to prevail on an ineffective assistance claim, a defendant must demonstrate that his attorney "failed to provide meaningful representation." Stated alternatively, counsel's error must have been "sufficiently egregious

and prejudicial as to compromise a defendant's right to a fair trial." The defendant also must establish an absence of strategic or other legitimate explanation for counsel's conduct. The Court found it unnecessary to apply the federal *Strickland* test, which requires a showing that counsel's performance both was deficient and prejudiced the defendant. New York law, Chief Judge Kaye's opinion for the unanimous Court explained, treats prejudice as a "significant but not indispensable element in assessing meaningful representation. . . . Thus, under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial."

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[1] The post-*Apprendi* decisions that the dissenters relied upon are *United States v. Booker*, 125 S. Ct. 738 (2005), *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Ring v. Arizona*, 536 U.S. 584 (2002).