

**NEW YORK COURT OF APPEALS ROUNDUP:**

**CONFRONTATION CLAUSE, DEPRAVED INDIFFERENCE MURDER,  
AND RES JUDICATA**

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This month we discuss the Court of Appeals' decisions in two criminal cases, one of which raises an evidentiary issue for civil as well as criminal actions, and the Court's resolution of a matrimonial issue. In *People v. Andrew Goldstein*, the Court held that the defendant should have been afforded the opportunity to confront and cross-examine the individuals whose statements the People's psychiatrist not only relied upon, but also relayed to the jury. The Court noted the absence of New York authority on when inadmissible facts underlying an expert opinion may be brought out through the expert's testimony. In *People v. Santos Sanchez*, the Court again circumscribed the use of the depraved indifference murder charge. *Chen v. Fischer* established that personal injury claims that could have been but were not litigated as part of a divorce proceeding are not barred by the doctrine of *res judicata* and, therefore, may be raised in another action.

We also note that Judge George Bundy Smith, whose term expires in September, has announced that he will apply for a second term. If Judge Smith's tenure is extended, he will have to retire in 2007 when he reaches 70, and his seat will be filled after the expiration of Governor George E. Pataki's current term. If his tenure is not extended, the Court will lose a member with a gentlemanly yet strong and effective voice.

**Confrontation Clause**

On the heels of the U.S. Supreme Court's decision in *Crawford v. Washington*,<sup>1</sup> the Court of Appeals was called upon to consider whether a defendant convicted of second-degree murder had been denied his right under the Sixth Amendment to the federal constitution to be confronted at trial with the witnesses against him. Persuaded that he had, the Court (6-1) in *People v. Goldstein*, in an opinion by Judge Robert S. Smith, reversed the Appellate Division, First Department, and sent the case back to be tried for the third time. (The first trial had ended with a hung jury.)

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In doing so, the Court provided significant additional guidance in criminal cases concerning (1) the admissibility of an expert's opinion when the expert relies upon inadmissible hearsay, (2) when hearsay is "testimonial" in nature and, as such, must be tested by confrontation and cross-examination, and (3) the burden the prosecution must meet when a constitutional right has been denied to prove that the error was harmless. It was this latter issue upon which Judge Susan Phillips Read based on her searching dissent.

The facts underlying the case are well known, having given rise to a statute providing for forced treatment of released mentally ill patients known as "Kendra's law." Goldstein had pushed Kendra Webdale to her death onto subway tracks in the path of an oncoming train. The only issue at the trial was whether the defendant, whom the prosecution acknowledged was mentally ill, was not criminally responsible because he suffered from mental disease or defect at the time of the killing.

Because the insanity defense was the core of the case, there was lengthy expert testimony on the issue from both sides. The defense sought to establish that the crime was a "sudden psychotic act" and that the defendant did not appreciate what he was doing or that it was wrong. The People's expert, however, opined that the defendant's mental disorder was in remission at the time of the killing, and that he was a predator driven to acts of violence against women who was using his mental illness to excuse his actions.

In support of her opinion, the People's psychiatrist relied upon, among other things, interviews she had conducted with six people; she testified at the trial concerning facts learned from these interviews. It was this testimony that provided the grounds for the reversal.

In reaching its decision, the Court initially concluded that the opinion of the People's psychiatrist was properly admitted, even though the opinion had been reached through consideration of hearsay, because evidence had been adduced that reliance upon interviews, such as those the psychiatrist had conducted, was accepted in her profession.

The second question that the Court recognized had not been raised by the parties, namely "when a proponent may present inadmissible facts underlying an admissible opinion." Both parties apparently assumed that, if the interviewees' statements met the test of acceptance in the profession, the expert "was free, subject to the defendant's constitutional right of confrontation, not only to express her opinion but to repeat to the jury all the hearsay information on which it was based." The Court called such assumption "questionable." While it specifically declined to resolve the issue in deciding this case, the Court pointed out the dearth of case law in New York on the matter and observed that Federal Rule of Evidence 703 permits otherwise inadmissible evidence to be received *if* the court finds that its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. Whether the federal standard will be applied in criminal or civil cases in New York remains to be seen.

The Court next dealt with the factually intensive issue of whether the interviews were “testimonial” and concluded they were, thereby providing a broad interpretation of materials that will not pass muster under the Sixth Amendment. The Court also concluded that the interviewees’ statements relayed to the jury by the expert constituted inadmissible hearsay because they were, in fact, offered for their truth. “In short, defendant’s rights under the Confrontation Clause were violated when [the expert] was allowed to tell the jury what witnesses defendant had no chance to cross-examine had said to her.”

Finally, the Court found in a detailed review of statements from four of the interviewees that the prosecution could not meet its burden of proving beyond a reasonable doubt that the admission of the facts learned from the interviews was harmless error. Indeed, it concluded that any one of the four interviewees’ statements could have affected the jury’s verdict. Unquestionably, the contents of the statements would have opened up a fertile ground for cross-examination by the defense had confrontation been afforded.

It has been reported that the People will seek review and the reinstatement of the conviction in the Supreme Court of the United States.

### **Depraved Indifference**

The Court, in *People v. Suarez*, further narrowed the definition of depraved indifference murder, a process it began several years ago.<sup>2</sup> Whether one accepts the *per curiam* opinion’s characterization that the Court merely was “depart[ing] slightly” from its criticized “objective” definition of the crime in *People v. Register*,<sup>3</sup> or concludes that the Court really was overruling *Register* – something the three concurring Judges argued the Court should do explicitly – the decision leaves no doubt that only a “small, and finite” category of cases involves depraved indifference murder.

Indeed, *Suarez* and other recent decisions are a reaction to what the Court believed had become an all-too-common event: twin-count indictments charging intentional homicide and depraved indifference murder, sometimes resulting in a conviction for the latter crime because the jury believed (incorrectly) it was a lesser included offense of second-degree murder.

The Court instructed in *Suarez* that depraved indifference murder rarely should be charged together with intentional murder or manslaughter, and even more rarely submitted together to the jury. Trial courts should “presume” that the defendant’s conduct falls within only one category and, absent “compelling evidence to the contrary,” before charging the jury should dismiss the count less appropriate to the facts.

The crucial distinction here is intent. Almost every homicide may be considered depraved, yet only in rare circumstances is the killer indifferent to whether he takes or endangers human life. Shooting a gun into a crowd without caring whether someone is hit is a classic example of the “depraved indifference to human life” that is at least as reprehensible as intentional murder. When such state of mind is coupled with recklessness and conduct creating

a grave risk of death, the three elements of the crime are met. But recklessness leading to the death of another unaccompanied by the requisite indifference cannot be more than reckless manslaughter.

When a person acts with conscious intent to cause “serious injury” but kills, he commits first-degree manslaughter. The Court explained that, only if this intent is coupled with torture or “brutal, prolonged” conduct against a particularly vulnerable victim such as a child, will the level of depravity elevate first-degree manslaughter to depraved indifference murder.

The defendant in *Suarez* admitted stabbing his girlfriend, but testified that he had not meant to kill her. Charged on the defenses of justification and extreme emotional disturbance, which it rejected, the jury acquitted Suarez of intentional murder and manslaughter and convicted him of depraved indifference murder. The defendant in the companion case, *People v. McPherson*, stabbed her former boyfriend. She testified that she had long suffered violence at the hands of her victim and was acting in self-defense. In a bench trial, the court convicted her of depraved indifference murder over the first-degree manslaughter charge. In reversing both convictions, the Court of Appeals reiterated what it had said just two years ago in *People v. Payne*: a one-on-one shooting or stabbing “can almost never qualify as depraved indifference murder.”<sup>4</sup> In neither of these cases could the facts be reconciled with a theory the defendant acted with indifference.

Judges George Bundy Smith, Albert M. Rosenbaltt and Robert S. Smith signed a concurrence, while stating they were “full participants” in the *per curiam* opinion. They expressed the “hope” that *Suarez* would be applied prospectively only, and the concern that by not expressly reversing *Register*, the Court actually might be increasing the number of killers released from prison, via *habeas corpus*, because some federal courts have questioned the constitutionality of *Register*.

Judge Victoria A. Graffeo dissented from *Suarez* but concurred in *McPherson*, and felt the Court’s rationale for its decisions represented a “fundamental shift” in New York’s homicide jurisprudence. She would have hewed to a distinction for reckless conduct leading to the death of another – if it posed a “grave” risk of death, the crime was depraved indifference murder, but if it is posed only a “substantial” risk, the crime was manslaughter. Moreover, Judge Graffeo argued, the decision as to which of these charges was more appropriate should be left to the jury. Judge Susan Phillips Read joined in the result of both cases, but agreed with Judge Graffeo that the majority was departing from the Court’s long-standing precedent, calling its rationale for doing so “unconvincing.”

## Tort and Divorce

In *Chen v. Fischer*, the Court ruled unanimously that tort claims arising out of events occurring during the marriage may be litigated separately from the parties' divorce, a position supported by women's organizations and other *amici*. Although personal injury claims may be asserted in a divorce action, failure to do so will not bar a spouse from asserting them in another action.

The parties in *Chen* had filed family offense petitions against each other arising out of the same incident. The husband then filed for divorce on the ground of cruel and inhuman treatment, and the wife counterclaimed for divorce on the same ground, as well as fraud. The parties stipulated to a finding of fault against both of them arising out of a relatively benign allegation, and dismissed the remaining fault allegations. After a trial on equitable distribution and the wife's fraud claim, the parties agreed to dismiss their offense petitions without prejudice.

During the pendency of the divorce action, the wife filed a personal injury action. Her claim for intentional infliction of emotional distress was dismissed because New York does not recognize the cause of action between spouses in such circumstances, a ruling with which the Court of Appeals agreed. She also asserted a claim for assault and battery arising out of the incident that had been the subject of the parties' family offense petitions. The trial court dismissed that claim on the basis of *res judicata*. The Appellate Division, Second Department, affirmed. It relied on *Baronow v. Baronow*,<sup>5</sup> in which the Court of Appeals held that a subsequent action for title to the marital home was barred because the plaintiff had a full and fair opportunity to raise that claim during the concluded matrimonial action.

In *Chen*, however, the Court, in an opinion by Judge Carmen Beauchamp Ciparick, reached the opposite conclusion with respect to personal injury claims. The Court first analyzed the issue under the "pragmatic test" for determining whether claims are part of the same transaction for *res judicata* purposes: "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations . . ." It held that personal injury tort actions and divorce actions do not form a "convenient trial unit," due to the fact that the two involve different relief and types of proof, the former is tried to a jury and the latter to the bench, and personal injury lawyers may be compensated on a contingent fee basis, an arrangement prohibited with respect to obtaining a divorce, property settlement or distributive award.

Next, the Court observed that policy considerations also supported its result. Requiring spouses to assert personal injury claims in their divorce actions would complicate matrimonial proceedings, and create an incentive to litigate rather than stipulate the fault basis of divorces. It also would prolong the resolution of issues of child custody/support and asset distribution, which could result in "extreme hardship and injustice . . . especially for the victims of domestic abuse." The Court observed that even the New Jersey Supreme Court, which held that interspousal personal injury claims and divorce form a "single controversy" that must be litigated at one time, has recognized that its ruling may have a negative impact.

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> See *People v. Hafeez*, 100 N.Y.2d 253 (2003); *People v. Gonzalez*, 1 N.Y.3d 464 (2004); *People v. Payne*, 3 N.Y.3d 266 (2004); see also *People v. Sanchez*, 98 N.Y.2d 373 (2002) (Rosenblatt, J. dissenting).

<sup>3</sup> 60 N.Y.2d 270 (1983).

<sup>4</sup> 3 N.Y.3d at 272.

<sup>5</sup> 71 N.Y.2d 284 (1988).