

## NEW YORK COURT OF APPEALS ROUNDUP:

### COURT OPENS NEW TERM AND IS JOINED BY JUDGE PIGOTT

ROY L. REARDON AND MARY ELIZABETH MCGARRY\*  
SIMPSON THACHER & BARTLETT LLP

OCTOBER 12, 2006

#### Judge Piggott Joins the Court

Last month the nomination to the Court of Appeals of Hon. Eugene F. Piggott, Jr., former Presiding Justice of the Appellate Department, Fourth Department, was unanimously confirmed by the State Senate. The Court now clearly bears the stamp of Governor George E. Pataki, who made six appointments to it over the course of his terms in office. The Governor's successor will also have the opportunity to have an impact on the composition of the Court. Judge Albert M. Rosenblatt will retire at the end of this year. The terms of Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick expire during the next calendar year, although both may wish to continue to serve.

Judge George Bundy Smith left the Court in September at the end of his term, creating the vacancy filled by Judge Piggott. Judge Smith had served on the Court with distinction since his appointment by former Governor Mario M. Cuomo in 1992. He previously had sat on the Civil Court for New York City, Supreme Court for New York County, and Appellate Division, First Department. The opinions of Judge Smith were thoughtful and, at times, passionate. His 2004 decision for the majority in *People v. LaValle*, invalidating the death penalty statute under the State constitution, exemplified his approach to difficult issues with its scholarly analysis of history and precedent, and willingness to follow what Judge Smith believed to be the correct course, regardless of popular opinion.

Although the Court's current term is very new, decisions have been handed down in a few criminal cases. This month we discuss those matters, as well as a number of certification requests the Court has accepted from the Second Circuit Court of Appeals to address important and unresolved issues of New York law.

---

\* Roy L. Reardon and Mary Elizabeth McGarry are partners at Simpson Thacher & Bartlett LLP.

## Drug Sentencing Retroactivity

By the Drug Reform Act of 2004, New York revised the long-criticized sentencing scheme of the Rockefeller Drug Laws. In *People v. Thomas Utsey*, the Court decided three cases in which the defendants sought to be sentenced under the new scheme, although their crimes had been committed prior to the time that the Drug Reform Act took effect. One of the defendants had been sentenced prior to the effective date, and two had been convicted before that date but had their sentences imposed after the Act became effective.

Although commonly referred to as a question of retroactive application, the relevant doctrine is, in fact, “amelioration.” Under that doctrine, statutory amendments reducing the punishment for a crime generally are applied to all cases decided subsequent to the amendment’s effective date (but not to sentences already imposed), absent legislative provisions or intent otherwise. The rationale for the doctrine is that the new law presumptively reflects a legislative judgment that the harsher penalty is not necessary to serve the purposes of the law prohibiting and punishing the conduct at issue. The presumption is overcome, however, when the Legislature “manifests a specific intent that the ameliorative amendment *not* be the retroactively applied.” (Emphasis in original.)

The Court unanimously found in *Utsey*, in an opinion by Chief Judge Judith S. Kaye, that the Legislature intended the new sentencing provisions to apply only to crimes committed on or after the effective date of the Drug Reform Act. This was evidenced in part by the inclusion of provisions designed to afford distinct relief to defendants sentenced under the Rockefeller Laws. Whether the Legislature could or should have reached a different result on retroactive application of its sentencing reform was not a matter for the Court to decide.

## Deportation of Defendant

In *People v. Jose Diaz*, the Court in a memorandum opinion dismissed the appeal of a criminal conviction without prejudice, due to defendant’s absence as a result of involuntary deportation. The Court observed that dismissal was not mandatory or jurisdictional, but rather a matter of discretion. It characterized retention of the appeal as “inappropriate,” however, because the defendant was “unavailable to obey the mandate of the Court.” Judge Robert S. Smith dissented. Mr. Diaz did not cooperate in his deportation and thus his case was unlike that of a defendant who absconds or otherwise voluntarily makes himself unavailable, Judge Smith noted, and through his counsel Mr. Diaz wished to pursue the appeal. The dissent would have decided the matter on its merits.

## Juvenile Violation Petition

A petition originating a juvenile delinquency proceeding must contain sworn allegations or have non-hearsay support, and failure to satisfy the requirement is non-waivable. The issue in *Matter of Markim Q.*, was whether the same defect in a juvenile violation of probation petition similarly is non-waivable. The Court unanimously held that it is not. Judge Robert S. Smith’s opinion for the Court observed that, whereas an originating petition is

jurisdictional, a violation petition does not commence a proceeding but, instead, rather is a step in the existing delinquency proceeding, and thus the failure of Markim's counsel to raise an objection in the Family Court precluded the issue from being raised on appeal.

### **Certifications Accepted**

The Court's recent acceptance of certification requests by the Second Circuit will result in the Court of Appeals addressing several open issues of New York law:

- (1) A defense to an action for tortious interference with contractual relations is that the defendant was exercising an equal or superior right, in which case the plaintiff must prove actual malice or fraudulent or illegal means. The contours of this "economic interest" defense are somewhat unclear. Does a "generalized economic interest in soliciting business for profit" suffice when the defendant had no prior economic relationship with the party that breached its contract with plaintiff? *White Plains Coat & Apron Co. v. Cintas Corp.*
- (2) Does the tort of conversion, normally inapplicable to intangible property, apply to electronic data (in this case, personal and business data of plaintiff insurance agent that were lost to him when, after terminating the parties' agency agreement, the defendant insurance company denied plaintiff access to an office-automation system and reclaimed computer hardware and software)? *Thyroff v. Nationwide Mut. Ins. Co.*
- (3) What is the meaning of "securities" for purposes of Article 8 of the New York Uniform Commercial Code? Specifically, do the subordinated promissory notes at issue, which are "securities" for purposes of New York's Martin Act and federal securities laws, constitute "securities" under U.C.C. Article 8? *Highland Capital Management LP v. Schneider.*
- (4) When a registered employee of a National Association of Securities Dealers member firm is terminated, the firm must fill out and submit to the NASD a Form U-5 stating the reason for termination. In a defamation action, are statements in a Form U-5 subject to absolute immunity or qualified immunity? *Rosenberg v. MetLife, Inc.*