NATIONAL NEWS

Second Circuit Removes Judge in Stop-and-Frisk Case

BY MARK HAMBLETT
New York Law Journal

U.S. District Judge Shira Scheindlin of the Southern District of New York has been ordered off the stop-and-frisk cases by the U.S. Court of Appeals for the Second Circuit.

The circuit said the judge had given the "appearance of partiality" in her handling of *Floyd v. City of New York*, and it stayed pending appeal Scheindlin's appointment of a monitor to reform New York City Police Department stop-and-frisk policies and practices she had held unconstitutional.

Two days after oral argument on whether to stay Scheindlin's appointment of monitor Peter Zimroth, a partner at Arnold & Porter, to help remedy police violations of the Fourth and 14th amendments, the Second Circuit said Scheindlin presented the appearance of partiality both in how she came to preside over the *Floyd* case in the first place and in interviews she gave to reporters.

Judges Jose Cabranes, Barrington Parker Jr. and John Walker, in a three-page order, stayed Scheindlin's Aug. 12 liability opinion in *Floyd*, where she found a top-down police department practice of making hundreds of thousands of stops without reasonable suspicion of criminal activity, and that blacks and Hispanics were targets of those stops.

The circuit also stayed Scheindlin's opinion and order Jan. 8 in the related case of *Ligon v. City of New York*, where she issued a preliminary injunction ordering police to cease making stops for trespass without reasonable suspicion outside of privately-owned buildings in the Bronx.

Scheindlin's ruling had been attacked by the city as a dangerous judicial overreach Tuesday before the Second Circuit.

Arguing for a stay of Scheindlin's August ruling just one week before stop-and-frisk opponent Bill de Blasio could be elected as the next mayor of New York City, Celeste Koeleveld of the Law Department said Scheindlin's order of a monitor and her finding that police targeted minorities for stopping and frisking without reasonable suspicion of criminal activity has sowed confusion in the police department and endangered public safety.

"I believe we are challenging legal conclusions that are fundamentally flawed," Koeleveld said during a remarkable two-and-a-half hours of arguments before Cabranes, Parker and Walker.

Koeleveld insisted that the impending mayoral election, and the possibility of changes in police practices imposed from the top down by City Hall and a new legal strategy at the Law Department, shouldn't stop the court from hearing the appeal quickly.

"We all read the papers" about the Nov. 5 election, Parker said. "Are we going to be faced with a situation where your marching orders are going to change?"

"I read the papers too," Koeleveld said. "The problem is, this case is here today and it raises very important issues" about municipal liability, [illegible] litigation and judicial authority.

Photo by Stacey Cramp

Judge Barrington Parker Jr. of the U.S. Court of Appeals for the Second Circuit.

"We are in a court of law where we have to address these issues head-on," she said.

But Darius Charney of the Center for Constitutional Rights, co-counsel for the plaintiffs in *Floyd*, said the city's own arguments belie its claim that anyone is being harmed by Scheindlin's orders.

The remedial order signed by Scheindlin after she found the NYPD liable for widespread violations of the Fourth and 14th amendments, Charney said, calls for "nothing more than participation in a consultative process" between the police, the plaintiffs and other stakeholders along with the monitor, Zimroth, who will "develop a set of proposed reforms" for Scheindlin to sign off on.

Walker disagreed, saying the judge's order has real impact and could only be justified on a showing of bad faith by the police. Walker said such broad relief is more suitable to situations where there is entrenched institutional hostility, such as the fight over segregation in the Deep South in the days of George Wallace and Orval Faubus.

"What's out there now is an order that says what they're doing is unconstitutional," Walker said. "There are practical consequences to her decisions" that have to have a "chilling effect."

Cabranes echoed that thought later, saying of officers on the street, "They got the message" of Scheindlin's ruling, adding, "Don't you think the message is, 'If I don't bother questioning [a suspect] further, it's not my problem.'?"

The mayoral election and the likelihood that de Blasio, currently New York City's public advocate, will win the election and reverse course on stop-and-frisk was acknowledged more than once by the judges and lawyers as the "elephant in the room."

Addressing that issue as amici was John Siegal of Baker & Hostetler, who said de Blasio was against a stay and felt the consultative process called for in the remedial order should continue.

Cabranes asked whether the "public advocate is dying to have the police department bc [illegible]

"No, absolutely not," Siegal said, emphasizing the remedial order was a temporary measure and a "quick, consultative process" after which the court will issue its orders and step aside.

"The legal process continues regardless of the political process," Siegal said, adding that the appeal would not be complete until well into the next mayor's term.

Cabranes opened the session by pressing Koeleveld on why, if the citizens of New York are being harmed because Scheindlin's ruling has made police gun-shy, has the city moved to appeal the remedial orders at a "glacial" and "painfully slow pace" since the August decision. Cabranes wondered aloud if the Law Department was engaged in the "pretense of ineffectiveness" made famous by Muhammad Ali's "rope-a-dope" strategy.

Why did the city "drag its heels"? he wanted to know, even as public officials were deriding Scheindlin's decision as a menace to public safety.

"If you had acted with real urgency, you could have been before this court a long time ago," Cabranes said.

Koeleveld responded that the city was hoping for a faster appeal, but the "other side" was "delaying things."

Parker said that when the Law Department asked for, but was denied, an expedited appeal, "You said the district court's [order] was seeding uncertainty, chaos and trouble in the New York City Police Department. It's hard for me to square those assertions" with a proposed briefing schedule that would have delayed oral arguments until the spring.

ATTACKING THE RECORD

Parker was also the most skeptical of Koeleveld's dismissal of Scheindlin's factual findings and how high a hill the city had to climb to earn a stay.

"The problem you have is you have a record where the district court made detailed factual findings," Parker said. "What you have to address is the rather substantial burden of demonstrating that all of these findings are clearly erroneous."

Google Pleads for Chance to Appeal Ruling Over Gmail

BY JULIA LOVE
The Recorder

Lawyers for Google are urging U.S. District Judge Lucy Koh of the Northern District of California to allow the company to appeal legal questions at the center of email privacy suits that are closing in on the company.

In a controversial ruling in September, Koh struck down Google's defenses to claims that it violated the federal Electronic Communications Privacy Act and state privacy laws by scanning Gmail messages to help sell ads. At a hearing Tuesday, Google lawyer Kathleen Sullivan of Quinn Emanuel Urquhart & Sullivan pressed Koh to certify her order for interlocutory review, arguing that the judge had tackled novel legal questions that could reshape technology companies' interactions with users.

"It is important not just for getting this case right but for getting other cases right that are going to determine the course of business in the Valley," Sullivan said. She pointed to a similar suit filed against Yahoo Inc. the week after Koh's order.

Koh questioned whether granting Google's request for an immediate appeal to the U.S. Court of Appeals for the Ninth Circuit would advance or delay the litigation. The case, Koh noted, is proceeding at a brisk pace, and she is set to hear the plaintiffs' motion for class certification in January.

Koh referenced the Ninth Circuit's review this year of an interlocutory appeal Google filed in another privacy fight. In that case, Google asked the appeals court to reconsider a 2011 ruling from U.S. District Judge James Ware over data collected during its Street View mapping project. Earlier this year, the Ninth Circuit ruled against Google and endorsed the district judge's findings that the company can be sued under the federal Wiretap Act for sniffing out data from home Wi-Fi networks.

"More than two-and-a-half years later, we're still no closer to the termination of the litigation," Koh said. "In fact, I think we might be further away."

Sullivan told Koh that speed should not be the only consideration. "The point here ... is to try to get the guiding law right in advance," she said.

Koh found in September that scanning messages to help sell ads does not fall under an "ordinary course of business" exemption for electronic communications service providers under federal and state wiretap laws. She also rejected the company's argument that users had agreed to the practice, finding that Google's terms of service and privacy policy were too vague to add up to consent.

Insisting that no other courts have ruled contrary to Koh's conclusions, plaintiffs lawyer Nancy Tompkins of Kerr & Wagstaffe argued that the law is already clear enough. To

Challenge

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That is when Koeleveld said it was Scheindlin's legal conclusions that justify a stay and, ultimately, a reversal, including Scheindlin's finding of "indirect racial profiling" based on a "smattering" of anecdotes and statistical analysis. Scheindlin, she said, also failed by "ignoring the totality of the circumstances at each stop."

Daniel Connolly of Bracewell & Giuliani, appearing for amici Rudolph Giuliani and former federal judge and Attorney General Michael Mukasey, argued that Scheindlin's rulings make police "defensive, passive and scared." Connolly said in his brief that Giuliani and Mukasey entered the case because of concern the Law Department was dragging its feet.

Steven Engel of Dechert appeared for amici the Patrolmen's Benevolent Association of the City of New York and the Detectives' Endowment Association, and Courtney Saleski of DLA Piper appeared for amici Sergeants Benevolent Association. Both warned of the harm done to the police department and public safety in asking the court for a stay.

Matthew Brinckerhoff of Emery Celli Brinckerhoff & Abady appeared for former Assistant Attorney General for Civil Rights Bill Lann Lee, who played a central role in Justice Department suits that ended with police department monitors being appointed for large urban police departments, including Los Angeles and Cincinnati. Brinckerhoff said monitors have actually improved the police-community relations.

The city's "luxurious" briefing schedule, he said, stood in contrast to its "histrionic" statements about the immediate impact of Scheindlin's rulings, which he said require the city do nothing.

But Christopher Dunn of the New York Civil Liberties Union, lead counsel in *Ligon*, said that if "Ray Kelly thought we had a serious public safety issue" with the judge's order "we would have been" in the Second Circuit "that night."

Dunn said Scheindlin "is not requiring them to do anything yet," and even Scheindlin's more explicit orders have no immediate impact. The judge's remedial order includes a pilot program whereby police in one precinct in each borough wear body cameras to record stops. It also requires changes to police forms documenting stops.

Mark Hamblett is a reporter for the New York Law Journal, a Legal affiliate. •