

Response to the Coalition of  
Progressive Groups report to the  
Governor and a synopsis of  
notable cases authored by  
Presiding Justice LaSalle

## PART I

These are the cases cited by the Coalition of Progressive Groups. Contrary to their mischaracterizations in their report to the Governor, the published decisions discuss the true facts and circumstances of the cases:

1. Matter of Evergreen Association Inc. v Schneiderman, 153 AD3d 87

The legal issues of this case do not involve abortion in any way, and it is not an anti-abortion decision. The case involves the First Amendment right to freedom of association. Evergreen Association, Inc. (Evergreen) is a not-for-profit pro-life corporation that operates crisis pregnancy centers. The Attorney General (AG) commenced an investigation into Evergreen to determine if it was engaging in the unauthorized practice of medicine in its centers. The AG served a subpoena duces tecum on Evergreen that sought information related to Evergreen's corporate structure and facilities, the education and credentials of staff, the materials provided to clients, its medical equipments and supplies, and the source of its funding. The Supreme Court denied Evergreen's petition to quash the subpoena. On appeal, a panel of the Appellate Division, Second Department, with Justice Cohen authoring the opinion, unanimously modified the Supreme Court's order.

The panel determined that: (1) the AG was authorized to issue the subpoena pursuant to Executive Law 63(12) to determine whether Evergreen was engaged in "fraudulent and illegal acts" in conducting its business; (2) the AG had an actual factual basis for the issuance of the subpoena based on evidence that Evergreen's clinics were set up to look like medical offices, members of its staff were dressed in lab coats, medical histories were taken, and medical diagnoses were made; and (3) the information the AG sought was reasonably related to the investigation. However, the panel determined that the breadth of the AG's subpoena violated Evergreen's First Amendment rights. The panel concluded that Evergreen met its initial burden of demonstrating that the production of the information the subpoena sought would impair its right to freedom of association based on evidence that the subpoena had already negatively impacted its relationship with Bronx Lebanon Hospital and its argument that the subpoena would have a chilling effect on its associations with employees and potential clients. Thus, the burden shifted to the AG to show that the subpoena was narrowly tailored to serve a compelling state interest. Although the panel concluded that the AG had a compelling state interest in preventing the practice of medicine without a licence, the panel concluded that the AG's demands were not narrowly tailored enough. Thus, the panel "limit[ed] in scope the demands set forth in the subpoena to require the disclosure of only those documents that are substantially related to the [AG's] legitimate need to gather evidence to determine whether Evergreen was engaged in the unauthorized practice of medicine." The panel modified the order and granted Evergreen's petition to quash but ONLY to the extent that it directed an in camera inspection of documents by the Supreme Court, which would then decide which documents pertained to medical-related services and should be disclosed to the AG and which demands should be quashed.

2. People v Delvillartron, 120 AD3d 1429

The synopsis by the Coalition completely ignores the fact that Justice LaSalle only dissented in part in this case. In fact, he agreed with the majority who held that the evidence was legally insufficient to prove the defendant's guilt of criminal possession of stolen property in the third degree. The majority, however, also voted to reverse the defendant's conviction finding that the police did not have probable cause to arrest him. Justice LaSalle wrote a dissenting opinion arguing that the totality of the circumstances demonstrated that the police had probable cause to arrest the defendant. The police responded to an armed robbery in progress at a residence. When they arrived at the home, two complainants were on the porch still bound and gagged. The complainant's used gestures to direct the officers attention to two men, later identified Myers and Santos, walking on the sidewalk. Myers and Santos started running and the officers gave chase. Santos dropped a gun while running. Upon turning a corner, an officer observed the rear door of a vehicle close. The officer ran up to the vehicle, saw Myers and Santos in the back, and saw the defendant, Delvillartron, fumbling with the car keys and attempting to put the keys in the ignition. The defendant was arrested. The majority found that the defendant's behavior in the car was "innocuous", and that it was just as likely that the defendant was not complicit in the crime, as that he was the getaway driver, and that this behavior did not establish probable cause for the defendant's arrest. In his dissent, Justice LaSalle found that the defendants behavior was not innocuous, but rather, the circumstances surrounding the events would lead a reasonable person with the same expertise as the arresting officer, to conclude that the defendant was acting in concert with Myers and Santos in attempting to assist them in fleeing the scene of the home invasion. Thus Justice LaSalle would have held that there was probable cause for the defendant's arrest. Thus, it's a gross mischaracterization to argue that Justice LaSalle found that the police had probable cause to arrest a defendant "when the only suspicious things he did was sit in his car and fumble with his keys".

3. People v Gerald, 197 AD3d 1324

The Coalition indicated that in this case, where a defendant plead guilty to attempted criminal possession of a weapon in the second degree, Justice LaSalle dissented and indicated that "he would refuse to allow the defendant to withdraw his guilty plea even after it emerged that the defendant's lawyer had lied to trick him into pleading guilty". In reality, Justice LaSalle concurred with an opinion authored by Justice Chambers, which concurred in part and dissented in part with the majority, voted to REVERSE the judgment of conviction on the law, the facts, and as a matter of discretion in the interests of justice, and remit the case to the County Court for further proceedings on the defendant's application to withdraw his guilty plea. Justice Chambers and LaSalle along with the majority, found that the County Court erred in summarily denying the defendant's application to withdraw his guilty plea. They dissented in part however, because they found that the record on appeal did not warrant granting the defendant's application to withdraw his guilty plea outright. So they voted to remit the matter to the County Court, for a further inquiry by the County Court, and a new determination thereafter.

4. Matter of Tyler L., 197 AD3d 645

In this juvenile delinquency proceeding involving allegations of sexual abuse by a 15 year old boy on his 11 year old sister, Justice LaSalle and the majority found that a the fifteen year old, who was accompanied by his grandfather at the time, voluntarily agreed to waive his Miranda rights and speak to the police. The entire interview was conducted inside a designated juvenile room in the precinct, was videotaped, and demonstrated that both the juvenile and his grandfather understood the Miranda rights and agreed to waive them. While the juvenile did have an IQ of 74, on appeal the juvenile's own expert stated that the juvenile had a basic comprehension and understanding of Miranda rights consistent with other 15 year olds of comparable abilities. The video recording demonstrated that the officers very deliberately and thoroughly explained the rights and that the juvenile understood the rights as explained to him.

5. Matter of Keanu, 167 AD3d 27

In this Family Court proceeding, Justice LaSalle and the majority voted to affirm the Family Court's denial of a juvenile's renewed motion for the issuance of an order enabling him to petition to the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101(a)(27)(J), and for a finding that he was dependant upon the Family Court. This statute was intended to offer a pathway for undocumented children to lawful permanent residency and citizenship. The child had been previously adjudicated a juvenile delinquent by the Family Court for an incident that occurred while he was in high school where he punched another student in the face causing serious injuries including two jaw fractures. He was placed on probation for 12 months. While on probation, the juvenile and three others, punched and kicked another victim, causing serious injury, and stole the victim's jacket and cell phone. The majority agreed with the Family Court and found that there was no basis to find that the juvenile was an intended beneficiary of the provisions of the immigration statute because he was not placed in custody of the Commissioner of Social Services due to his status as an abused, neglected or abandoned child, but rather, he was in custody based upon him committing acts which if committed by adults would have constituted serious crimes. This was a case of first impression, and the majority found that the juvenile's interpretation of how the statute should be applied would have contradicted the intent of Congress in enacting the immigration statute.

6. Matter of Adonnis M., 194 AD3d 1048

This case languished in various Family Court's in different counties for an extremely long time. Adonnis was in foster care. His half-sibling was in the care of their Godmother. The Godmother filed for custody of Adonnis so he could reside with his half-sibling, and the foster mother filed for custody of Adonnis and his half-sibling. It was undisputed throughout the proceeding that everyone agreed that Adonnis and his half-sibling should reside together. The Family Court found that both individuals were appropriate custodians, but ultimately selected the Godmother because the half-sibling's biological father objected to his child going to reside with the foster mother. At one point, a hearing was scheduled, and the family Court denied the foster

mother's request to adjourn the hearing to obtain new counsel. The matter had previously been adjourned at the foster mother's request, and she was supposed to have counsel present on the date of the hearing. The mother never disputed the Court had indicated that she had to have counsel present for the hearing. The case had been awaiting a permanency hearing for several months. Under these circumstances, the majority found that the Court providently exercised its discretion in denying the foster mother's request for an adjournment.

7. Singh v City of New York, 189 AD3d 1697

In this class action case, the plaintiffs argued for a rescission of their contracts for the purchase of taxi cab medallions in part based on allegations that the City breached the covenant of good faith and fair dealing. However, the plaintiffs CONCEDED that the official bid form for the Taxi cab Medallion Auction contained a clear acknowledgment that the City made no representations or warranties to the present or future value of the taxi cab medallion. The City only warrantied clear title to the Medallion. So the documentary evidence clearly supported the defendant's argument that they did not breach the covenant of good faith and fair dealing.

8. People v Corbin, 121 AD3d 803

At the time of this decision, the Court of Appeals had not yet decided the case of People v Thomas, which ultimately provided guidance to both the appellate and trial courts of the parameters to consider when deciding whether a defendant has validly waived his right to appeal. Thus, the determination of the majority that the defendant validly waived his right to appeal was entirely in line with the precedent of the time.

9. White v Cuomo, 38 NY3d 209

In this case the majority (including PJ LaSalle as a vouched in Judge of the Court of Appeals), determined that there was ample support for the NYS Legislatures determination that Interactive Fantasy Sports did not violate the constitutional prohibition against gambling because IFS contests were skill-based competitions for prizes. The plaintiffs failed to meet their burden beyond a reasonable doubt the IFS contests were gambling and thus were unconstitutional.

10. Martucci v Nerone, 198 AD3d 654

This defendant was found in willful violation of his child support order and owed an exorbitant amount of **\$12,000** of arrears, not \$1,200 as indicated by the Coalition in its remarks. The Family Court sentenced the father to 60 days jail. This Court determined that there was no basis to find that the Family Court improvidently exercised its discretion in sentencing Mr. Nerone to 60 days under the circumstances of the case.

## PART II

The Coalition ignored many of Presiding Justice LaSalle's opinions over the years, which he authored, where defendant's criminal convictions were reversed:

1) People v Palencia, 130 AD3d 1072

In this majority opinion authored by Justice LaSalle, the defendant was convicted after a jury trial of driving while under the influence of alcohol as a felony. The facts of the case included that the defendant refused to submit to a chemical breath test when he was brought to the New York State Police barracks, but at the scene of the arrest he had submitted to a portable breath test which showed positive for alcohol. In NY portable breath tests are not admissible at trial to prove intoxication. The Majority found that the defendant was deprived of his right to a fair trial based on the Supreme Court allowing the prosecutor to admit the result of the portable breath test, even if it wasn't admitted for the purpose of establishing intoxication. This was not a unanimous decision, and two justices of the Appellate Division dissented.

2) People v Calderon, 146 AD3d 967

In this majority opinion authored by Justice LaSalle, the defendant's conviction of rape in the first degree was reversed and a new trial was ordered, based upon the Sandoval ruling by the Court. The Supreme Court had determined that the prosecutor would be permitted to cross examine the defendant, if he chose to testify, about a prior robbery conviction and the underlying facts which included the defendant placing a knife to the victim's neck. In the instant rape case, the victim also claimed that the defendant placed a knife to her neck. The majority found that the Supreme Court should have precluded this line of proposed questioning by the prosecutor and that this determination denied the defendant his right to a fair trial. This was not a unanimous decision, and one justice of the Appellate Division dissented.

3) People v Giuca, 158 AD3d 642

A unanimous panel of the Appellate Division, with a majority opinion authored by Justice LaSalle, determined to reverse a defendant's criminal conviction for murder and found that the lead Prosecutor in the Brooklyn DA's Office had committed a Brady violation. On appeal, the Court of Appeals reversed, but Judge Rivera dissented and agreed with Justice LaSalle's opinion.

4) People v Buyund, 179 AD3d 161

In a majority opinion authored by Justice LaSalle this case modified the defendant's judgment of conviction for burglary in the first degree as a sexually motivated felony, to the extent that it vacating so much of the judgment that required the defendant to register as a sex offender. The Bench found that based upon the clear reading of Correction Law § 168-a(2)(a), burglary in the first degree was not a registerable offense under the Sex Offender Registration

Act. The People argued that it was clear that the Legislature's intent was to include this charge as a registerable offense, but in keeping with the doctrine that the courts must be guided by the clear language of statutes enacted by the Legislature, the Bench found that the language of the statute did not include that charge as a sex offense. On appeal, the Court of Appeals, with Judge Cannataro writing for the majority, reversed but not on the merits. It only determined that the issue raised by the defendant was unpreserved and the Second Department should have implemented its interests of justice jurisdiction to reach the issue. Judge Wilson dissented in an opinion in which Judge Rivera concurred. They agreed with the Second Department. The case was remitted to the Second Department for it to reconsider the issue. Upon remittitur, Justice LaSalle and the panel exercised its interests of justice jurisdiction and once again found that the defendant's certification as a sex offender was unlawful.

Another notable opinion authored by Justice LaSalle:

5) Matter of Masullo v City of Mount Vernon, 141 AD3d 95

This case held that a municipality was not authorized to terminate permanent disability retirement benefits which had previously been awarded to a firefighter who was injured in the line of duty or to require a formal application for such benefits after the firefighter had already retired. The case held that there was no evidence that the payments were made in error. The firefighter's article 78 petition was granted and the petitioner's benefits were reinstated retroactively.