

COURT OF APPEALS
STATE OF NEW YORK

-----X
CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff-Respondent,

-against-

CAYUGA COUNTY SHERIFF DAVID S. GOULD,
SENECA COUNTY SHERIFF JACK S. STENBERG,
CAYUGA COUNTY DISTRICT ATTORNEY JON E.
BUDELMANN, AND SENECA COUNTY DISTRICT
ATTORNEY RICHARD E. SWINEHART;

Defendants-Appellants.

-----X
AMICUS CURIAE BRIEF FOR THE DISTRICT
ATTORNEYS ASSOCIATION OF NEW YORK STATE
IN SUPPORT OF DEFENDANTS-APPELLANTS

KATHLEEN B. HOGAN
Warren County District Attorney
President, District Attorneys Association
of New York State
c/o Westchester County District Attorney
111 Martin Luther King, Jr. Blvd.
White Plains, New York 10601
(914) 995-4457 / (914) 995-4672 (FAX)

ANTHONY J. SERVINO
Second Deputy District Attorney

JOHN J. CARMODY
Assistant District Attorney

MORRIE KLEINBART
Assistant District Attorney

Of Counsel

Dated: January 28, 2010

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AMICUS CURIAE BRIEF
FOR THE DISTRICT ATTORNEYS
ASSOCIATION OF NEW YORK STATE

INTRODUCTION

Pursuant to Rule § 500.23 of the Rules of this Court, the District Attorneys Association of the State of New York (DAASNY) respectfully submits this brief *amicus curiae* in the captioned case.

DAASNY is a state-wide organization composed of elected District Attorneys and Assistant District Attorneys from throughout New York State, with a membership body totaling approximately 2000. Members of DAASNY are from some of the largest prosecutor offices in the nation, *i.e.*, New York County, which

employs hundreds of prosecutors, and some of the smallest, which may have only a single prosecutor. Because it is DAASNY that represents the interests of prosecutors throughout this State, *amicus* has a substantial interest in the outcome of this case.

Further, DAASNY's concerted focus on issues relating to criminal law and the procedures for the prosecution of crime, places it in a unique position to brief this Court as to those specific statewide concerns raised by the Cayuga Indian Nation's successful use, to date, of a civil proceeding to attack and thwart a criminal prosecution.

Insofar as it impacts the lawful and effective administration of criminal justice in this State, this appeal concerns the propriety of allowing the target of an ongoing criminal investigation, against whom "criminal proceedings" have commenced, to collaterally attack those proceedings by seeking declaratory relief from a court exercising civil jurisdiction and, in the process, derail the criminal prosecution. More specifically, the question of paramount concern to DAASNY is whether the Appellate Division, Fourth Department, properly determined that the pending criminal proceeding against Plaintiff-Respondent Cayuga Indian Nation of New York (the "Nation") – for allegedly selling untaxed and unstamped cigarettes from two of its convenience stores located, respectively, in Cayuga and Seneca Counties - did not preclude the Nation from maintaining a civil declaratory

judgment action challenging the underlying criminal proceeding (*Cayuga Indian Nation of New York v Gould*, 66 AD3d 100 [2009]).¹

In the course of reaching this finding and, indeed, as a prerequisite to reaching the merits of the case, the Fourth Department concluded that this Court's holding in *Kelly's Rental, Inc. v City of New York*, 44 NY2d 700 [1978] should be read as prohibiting a party against whom a "criminal action" (demarcated by the filing of an accusatory instrument) is pending from seeking declaratory relief, notwithstanding this Court's explicit use of the more encompassing, statutorily defined term "criminal proceeding." Unilaterally imposing this unprecedented limitation on the longstanding rule against equity interfering to enjoin the enforcement of the criminal law, the Fourth Department concluded that because no accusatory instrument had yet been filed against the Nation, it was free to seek declaratory relief from the court exercising civil jurisdiction and, in the process, deter the Counties' ongoing criminal investigation and the impending criminal prosecution.

The Fourth Department's holding which permits the Nation to collaterally attack the pending criminal proceeding is in direct contravention to more than 130 years of established precedent, including this Court's rulings in *Kelly's Rental* and

¹ Other concerns raised on this appeal are whether the Fourth Department properly determined that the Nation's two convenience stores, which were recently purchased on the open market from non-Indian sellers, are located within a "qualified reservation" under New York Tax Law § 470 [16] [a]; and that New York Tax Law § 471-e exclusively governs the imposition of sales and excise taxes on cigarettes sold on a "qualified reservation" (*id.*).

its predecessor, *Reed v Littleton*, 275 NY 150 [1937], which for more than 70 years has embodied the long established policy of this State that, except in narrowly defined circumstances (which are not present here), equity will not intervene to enjoin the enforcement of law by criminal prosecution.

If allowed to stand, the Fourth Department's decision, permitting the Nation's collateral attack, will create a system in which a local prosecutor will be forced to race uncharged targets of criminal investigations to to the courthouse; if the prosecutor manages to file an accusatory instrument and commence a criminal action before the target files a declaratory judgment action, the prosecution will continue. If not, the resources expended in an investigation will go for naught as the prosecution will be halted. This is what happened here. As a result, prosecutors and law enforcement officials will hasten their investigations and rush to indictment in order to avoid such collateral attacks. The resource waste is easily appreciated; there will be costs in manpower, resources, duplication of efforts, and potentially divergent outcomes. Indeed, the ensuing morass of litigation, occurring simultaneously in courts exercising criminal and civil jurisdiction, will have a ruinous effect on an already overtaxed criminal justice system. Even more troubling, putative targets of criminal investigations, particularly those who are well financed (like the Nation), will have not only the means, but also a judicially sanctioned mechanism for disrupting and perhaps indefinitely avoiding criminal

prosecution. Such are the inevitable consequences to the criminal justice system in this State unless the Fourth Department's order and judgment in *Cayuga* is reversed.

QUESTION PRESENTED ON AMICUS

Was the Nation's civil action for declaratory and injunctive relief cognizable in the Supreme Court as a means of collaterally attacking a pending "criminal proceeding," in light of this Court's rulings in *Kelly's Rental, Inc. v City of New York*, 44 NY2d 700 [1978] and *Reed v Littleton*, 275 NY 150 [1937], which prohibit the use of a civil declaratory judgment action to collaterally attack a "criminal proceeding," not just a "criminal action?"

The Fourth Department answered the question affirmatively.

STATEMENT OF FACTS

A full and complete factual and procedural history of this case is set forth in Defendants-Appellants' brief.

Briefly, as pertains to *amicus*, the following facts are relevant to the determination of this appeal:

As early as late summer 2008, the District Attorney's Offices in Seneca and Cayuga counties (hereinafter, the "Counties") were actively involved in an ongoing criminal investigation concerning attempts by the Plaintiff-Respondent Cayuga Indian Nation of New York (hereinafter, the "Nation") to avoid its legal obligation to pay and collect excise tax imposed by Tax Law § 471 on cigarettes sold at the Nation's LakeSide Trading stores in Union Springs, New York, and Seneca Falls, New York (R: 130-132, 181-182).²

On November 25, 2008, upon applications submitted by both counties, Justice Kenneth R. Fisher (Supreme Court, Monroe County)³ issued search warrants authorizing law enforcement officials to search the Nation's stores in

² Numerical references preceded by the letter "R" refer to page numbers in the Record on Appeal.

Details regarding certain elements of the criminal investigation conducted by Cayuga County are outlined in Cayuga County's search warrant application, which is contained in the Record on Appeal (R: 126-129, 175-183).

³ The Court may take judicial notice of the fact that, upon the joint application of the District Attorneys of both counties, Administrative Judge Van Strydonck of the 7th District had assigned Justice Kenneth R. Fisher (Supreme Court, Monroe County) to preside over the cases in both counties (*Long v State*, 7 NY3d 269 [2006]; *People v Petgen*, 55 NY2d 529, 536 [1982]; *Khatibi v Weill*, 8 AD3d 485, 486 [2004]).

Seneca Falls and Union Springs, and seize evidence relating to the possession and sale of unstamped cigarettes and/or business records depicting the receipt and sale of unstamped cigarettes in violation of Article 473 of the Tax Law (R: 111-112, 126-129, 175-183), thereby marking the commencement of “criminal proceedings” against the Nation.

That same day, the sheriffs of the respective counties executed the search warrants. Among the items seized were unstamped/untaxed contraband cigarettes, documentary evidence, and computers, all material evidence and information relating to criminal prosecutions against the Nation (hereinafter, the “seized property”) (R: 112).⁴

The very next day, November 26, 2008, in direct response to the execution of the search warrants and the seizure of incriminating evidence by the Counties, the Nation attacked the criminal proceedings by commencing a civil action against the Counties in the Supreme Court, Monroe County (Fisher, J.) for declaratory and injunctive relief (R: 105-118).

The thrust of the Nation’s complaint was that the Sheriffs and District Attorneys of Cayuga and Seneca counties were unlawfully attempting to enforce Tax Law § 471-e, which the Appellate Division, Fourth Department had

⁴ Notably, although the Nation has sought the return of the seized property in both the Appellate Division and the Supreme Court, it does not dispute that the District Attorneys of Cayuga and Seneca counties will rely on the seized property to prove their criminal cases against the Nation.

purportedly ruled unenforceable in *Day Wholesale v State of New York*, 51 AD3d 383 [2008] (R: 111, 114-115). As pertains to *amicus*, the Nation sought a declaratory judgment that “Cayuga County law enforcement authorities who executed the warrant exceeded the scope of the warrant’s authorization by seizing a computer used in, and essential to, the operation of the Union Springs Store, which also sells gasoline” (which, significantly, raises an issue of fact); an injunction restraining the Counties from pursuing “threatened criminal prosecution” by alleging that Plaintiff-Appellant violated Tax Law §§ 471 and 1814; an order requiring the immediate return of the seized property; and a judicial declaration that it was not in violation of Tax Law §§ 471, 471-e, 473 or 1814 (R: 117-118).⁵ In substance and effect, the Nation commenced a collateral civil proceeding to enjoin any prosecution arising from the Counties’ criminal investigation and search warrants, notwithstanding its statutory right to challenge the warrants in any ensuing criminal action.

⁵ Through this collateral civil proceeding, the Nation also sought a judicial declaration that its obligation to pay or collect taxes on the cigarettes sold at its LakeShore Trading stores is governed exclusively by Tax Law § 471-e, and that, therefore, it had not evaded or avoided payment of cigarette taxes in violation of § 1814 of the Tax Law (R: 114).

The Counties cross-moved to dismiss the Nation’s complaint, asserting, *inter alia*, that it cannot bring a civil action to impede an ongoing criminal investigation once it has been commenced (R: 8, 149-154).⁶

Notably, as the Nation’s civil proceeding was progressing, so too was the criminal proceeding against the Nation. On December 3 and 4, 2008, before the Supreme Court issued its decision and order, the grand juries in each county heard evidence on the Nation’s alleged criminal violations of Tax Law § 471 and 1814.⁷

By decision and order, dated December 9, 2008, Justice Fisher (Supreme Court, Monroe County) permitted the Nation’s civil suit, but nevertheless denied its request for preliminary injunctive relief, as well as its motion for summary judgment, and granted summary judgment to the Counties (R: 33).⁸

On the question of the whether the Nation, as the target of a criminal investigation, had a cognizable claim for collateral declaratory and injunctive relief, Justice Fisher, relying on *Beneke v Town of Santa Clara*, 9 AD3d 820 [3rd Dept. 2004], concluded that the “absence of a pending criminal action at the time

⁶ Oral argument on the motions was heard on December 3, 2008 (Supreme Court, Monroe County, Fisher, J.), during which the parties agreed that the pleadings be converted to cross-motions for summary judgment (R: 8).

⁷ Again, this Court may take judicial notice of undisputed court records and files, as well as records filed in the County Clerk’s Office (*Long v State*, 7 NY3d 269; *People v Petgen*, 55 NY2d at 536; *Khatibi v Weill*, 8 AD3d at 486; *see also People v Sowle*, 68 Misc2d 569, 571 [1971]).

⁸ Justice Fisher held that Tax Law § 471 is valid and enforceable against the Nation; that the sale of cigarettes at the Nation’s stores in Cayuga and Seneca Counties are not exclusively governed by Tax Law § 471-e; and that the Fourth Department’s decision in *Day Wholesale*, 51 AD3d 383 [2008], does not bar the application of Tax Law § 471 to the Nation’s operations at these stores (R: 14-27).

of the commencement of the declaratory judgment action makes it discretionary whether to entertain the motion” (R: 11), and determined that the Nation’s first two causes of action for declaratory relief were cognizable (R: 12).⁹

Justice Fisher further ruled that the balance of the Nation’s complaint directed to the manner of the search, the request for an injunction prohibiting prosecution, and the return of the seized property was not cognizable on the “current record” (R: 12-14).¹⁰

Finally, Justice Fisher ruled that the State Tax Department’s forbearance policy under 471-e does not bar district attorneys from exercising their plenary powers under County Law § 700 and bringing criminal charges against violators (R: 28-33).

The day after Justice Fisher’s ruling, December 10, 2008, a sealed indictment against the Nation was handed up in Cayuga County relating to the sale of unstamped cigarettes at its LakeSide Trading store in Union Springs, thereby commencing the criminal *action* against the Nation (*see* Defendants-Appellants Brief at 40). The following day, December 11, 2008, a sealed indictment against

⁹ The Nation sought a declaration that Tax Law § 471-e, as amended, was not in effect and that it had no obligation to pay or collect taxes on the cigarettes it sells, and therefore, the Nation had not evaded or avoided the payment of cigarette taxes in violation of Tax Law § 1841 (R: 114-115).

¹⁰ Justice Fisher ruled that the Nation was not entitled, in the context of the collateral civil proceeding, to review the manner of search or to return of the property, noting that “the proper remedy is a motion to suppress in any ensuing criminal action, or a writ if it appears that no prosecution will be brought” (R: 14).

Plaintiff-Appellant was handed up in Seneca County, relating to sale of unstamped cigarettes at the LakeSide Trading store in Seneca Falls (*id.*).

To date, more than one year after the indictments were handed up, the defendants in these criminal actions have still not been arraigned in the respective county courts.

On December 11, 2008, the day after the commencement of the *criminal action* against the Nation, the Nation filed a notice of appeal and moved in the Appellate Division, Fourth Department, for an order enjoining the District Attorneys in both Cayuga and Seneca Counties from prosecuting the Nation for alleged violations of §§ 471 and 1814 of the Tax Law.

On December 16, 2008, the Nation's request for a temporary restraining order (TRO) was denied by Associate Justice Nancy Smith. During the TRO conference, owing to the secrecy of grand jury proceedings, the District Attorneys were necessarily restrained in their discussions regarding the sealed indictments as they attempted to address procedural questions raised by Justice Smith.

On January 21, 2009, more than 40 days after the criminal indictments had been handed up, and at least seven months into the Counties' criminal investigation, the Fourth Department issued an order granting the Nation's request for a preliminary injunction enjoining the Counties from further criminal prosecution of the Nation, its members and/or employees for violations of Tax Law

§§ 471, 471-e and 1814, including any further prosecution of the indictments currently pending against the Nation, pending the hearing and determination of the appeal taken from the Supreme Court's December 10, 2008 order.

By its January 21, 2009 order, the Fourth Department also provided the Nation with an avenue for obtaining the return of the seized property, by providing that such property "may be released in the discretion of the court issuing the warrant upon application to such court, and upon such terms and conditions as that court may set."

By letters dated January 26 and 27, 2009, the District Attorneys of Cayuga and Seneca Counties formally advised Justice Fisher that true bills had been handed up against the Nation on December 10 and 11, 2008; thus, for the first time confirming to the Supreme Court the filing of these accusatory instruments constituting the "commencement of a criminal action" pursuant to CPL 1.20 [17].¹¹

On January 26, 2009, pursuant to the Fourth Department's January 21, 2009 order, the Nation filed an order to show cause in the Supreme Court seeking return of the seized property. On January 30, 2009, notwithstanding the pending criminal actions in both counties, the Nation reopened its LakeShore trading stores and resumed possessing and selling the untaxed/unstamped cigarettes to non-Indian

¹¹ Of note, that the criminal indictments had been handed up was not part of the documentary record before the Fourth Department when that court considered and granted the Nation's request for injunctive relief barring any further criminal proceedings.

consumers. That same day, the Counties filed an order to show cause in the Supreme Court, seeking to punish the Nation for contempt and enjoin them from continuing to possess and sell contraband cigarettes. The Counties also opposed the return of the seized property (*i.e.*, evidence in the ongoing criminal case) on the ground that, because a criminal action is ongoing, the Nation's sole avenue for return of property and/or inspection of the property is CPL 240, 690 and 710, and there is no civil remedy available that would allow return of property to a criminal defendant.

By decision and order dated February 18, 2009, Justice Fisher (Supreme Court, Monroe County), after first determining that the Counties' motion was properly a motion "at the foot of the judgment" for enforcement of the declaratory judgment action, denied the Nation's request for the return of the seized property and determined that the Nation may not, consistent with Tax Law § 471, sell untaxed cigarettes to non-Indian consumers on the two parcels in question.

On February 19, 2009, the Nation filed a notice of appeal from Justice Fisher's February 18, 2009 order and, by order to show cause, a motion seeking a TRO and stay pending the determination of that appeal. The following day, February 20, 2009, the Appellate Division, Fourth Department, denied the Nation's application for a TRO.

On February 26, 2009, the Counties cross-moved for an order vacating the Fourth Department's January 21, 2009 order enjoining criminal prosecution of the Nation, and dismissing the appeals taken from the Supreme Court's December 10, 2009 and February 18, 2009 orders. The Counties argued, *inter alia*, that the criminal indictments were not part of the documentary record when the Fourth Department considered and granted the Nation's request for a preliminary injunction enjoining criminal prosecution under the Tax Law, and that the handing up of the indictments constituted the commencement of a criminal action thereby precluding declaratory relief challenging the validity of a criminal statute.

By decision and order dated March 3, 2009, the Fourth Department denied the Nation's application for a stay, as well as the Counties' cross-motion to dismiss.

On July 10, 2009, the Fourth Department reversed Justice Fisher's judgment and granted summary judgment to the Nation (*Cayuga Indian Nation of New York v Gould*, 66 AD2d 100, 884 NYS2d 510, 513 [4th Dept 2009]).

Of paramount concern to *amicus*, the Fourth Department – in contravention to established precedent, and fully cognizant that the Nation had commenced its declaratory judgment action in direct and immediate response to the execution by law enforcement officials of lawfully obtained search warrants and the seizure of incriminating evidence, in an attempt to avoid criminal prosecution - ruled that the

existence of “criminal proceedings” against the Nation did not preclude the Nation from collaterally attacking those proceedings with a declaratory judgment action in civil court (*Cayuga* at 513).¹²

On this issue, the Fourth Department ruled that defendants’ and *amicus*’ reliance on *Kelly’s Rental v City of New York*, 44 NY2d 700 [1978] – in which this Court explicitly stated, “a party against whom a *criminal proceeding* is pending may not seek declaratory relief” (emphasis supplied) (*id.* at 702) - was “misplaced,” and that “although in *Kelly’s Rental* the Court of Appeals uses the term ‘criminal proceeding’ instead of ‘criminal action,’ a criminal action had been commenced in that case when the declaratory judgment was sought... Thus, under the facts of *Kelly’s Rental*, plaintiff was not precluded from bringing this action inasmuch as a criminal action against it had not yet been commenced” (*Cayuga* at 13).

The Fourth Department also held that reliance on *Morgenthau v Erlbaum*, 59 NY2d 143, *cert denied* 464 US 993 [1983], for proposition that “only the People may commence a declaratory judgment action in this context” was misplaced,

¹² Reaching the merits of the case, the Fourth Department ruled, in sum and substance, that the Nation’s convenient stores were located within a “qualified reservation,” within the meaning of the statute governing taxes imposed on qualified reservations, and thus the Nation’s sale of untaxed cigarettes at the stores to non-Indians and non-member Indians was not subject to criminal prosecution.

finding support for its radical modification of *Kelly's Rental* in the fact that “the declaratory judgment in *Morgenthau*...was commenced during the pendency of a criminal action, rather than prior to its commencement” (*Cayuga* at 513 – 514).

On October 2, 2009, the Fourth Department granted leave to appeal to this Court. DAASNY has been granted permission to file an *amicus* brief on this appeal.

ARGUMENT

POINT I

THE FOURTH DEPARTMENT'S RULING THAT THE PENDENCY OF A "CRIMINAL PROCEEDING" DOES NOT PRECLUDE A DEFENDANT OR TARGET OF A CRIMINAL INVESTIGATION FROM SEEKING DECLARATORY AND INJUNCTIVE RELIEF IN A CIVIL FORUM IS CONTRARY TO ESTABLISHED PRECEDENT, VIOLATIVE OF PUBLIC POLICY, AND MUST BE REVERSED.

In *Cayuga Indian Nation of New York v Gould*, 66 AD2d 100, 884 NYS2d 510, 513 [2009], the Fourth Department permitted the Cayuga Indian Nation of New York ("Nation") to commence and maintain a collateral attack on a pending criminal proceeding in direct contravention of *Reed v Littleton*, 275 NY 150 [1937] and *Kelly's Rental, Inc. v City of New York*, 44 NY2d 700 [1978]. This holding does not merely violate the holdings of these two cases, it also violates sound public policy by encouraging a two track defense to criminal prosecutions at a time when resources of local prosecutors are already stretched too thin. Put simply, the Appellate Division's order of reversal must itself be reversed.

For well over a century, this Court has explicitly recognized, as a fundamental principle of legal jurisdiction, that "equity will not interfere to prevent the enforcement of the criminal law" (*Delany v Flood*, 21 Bedell 323, 183 NY 323, 327-328 [1906]; see also *Davis v American Society for the Prevention of Cruelty to*

Animals, 30 Sickels 362, 75 NY 362 [1878]). What this means, of course, is that equitable remedies, such as the injunction sought here, cannot be obtained in a civil action parallel to a criminal proceeding.

For more than 130 years, this Court has steadfastly adhered to this principle. Indeed, more than 70 years ago, this Court, in *Littleton*, laid to rest any question as to whether a criminal defendant can obtain declaratory relief from a court of equity during the pendency of a criminal proceeding, stating that, when a court in equity is called upon to enjoin the enforcement of law through criminal prosecution, “the rule has been firmly established that it will not ordinarily interfere to enjoin the enforcement of law by the prosecuting officials...unless under proper circumstances there would be irreparable injury, and the sole question involved is one of law” (*Littleton*, 275 NY at 153). More than 40 years later, in *Kelly’s Rental*, this Court reaffirmed its *Littleton* holding when it unequivocally stated, “[a] party against whom a criminal proceeding is pending may not seek declaratory relief” (*Kelly’s Rental*, 44 NY2d at 702).

Nevertheless, the Fourth Department has now concluded to the contrary. As will be demonstrated below, the bases that court advanced for its refusal to apply the *Littleton* and *Kelly’s Rental* principles cannot withstand serious scrutiny.

a.) The Fourth Department's Failure to Follow *Kelly's Rental*, Despite Clear and Unambiguous Language, is in Error.

Preliminarily, there can be no dispute that a criminal proceeding was pending at the time the Nation commenced the action underlying this appeal.

As early as late summer 2008, the district attorneys of Cayuga and Seneca Counties were conducting an active criminal investigation of Plaintiff-Appellant, its members and employees for suspected violations of sections 471, 471-e, 473 and 1814 of the New York State Tax Law ("Tax Law"). That investigation centered on attempts by Plaintiff-Appellant, through its agents and businesses, to avoid its legal obligation to pay and collect excise tax imposed by Tax Law § 471 on cigarettes sold at its LakeSide Trading stores in Union Springs, New York, and Seneca Falls, New York (R: 130-31, 132, 171).

Pursuant to their ongoing criminal investigation, on November 25, 2008, the district attorneys sought and obtained search warrants authorizing the Counties to search Plaintiff-Appellant's stores in Seneca Falls and Union Springs. The warrants were issued by the Supreme Court justice (Hon. Robert R. Fisher), who, at the request of the district attorneys, had been assigned to preside over the actions in both counties.

The search warrants were immediately executed by the Sheriffs of the respective counties. Among the items seized were unstamped/untaxed contraband cigarettes, documentary evidence, and computers containing what the Counties

anticipate will be relevant and material information relating to the criminal prosecutions against Plaintiff-Appellant (hereinafter, the “seized property”) (R: 152).

Plainly, it is self-evident that at the time Plaintiff-Appellant commenced a collateral civil proceeding for declaratory relief on November 25, 2008, a “criminal proceeding” against the Nation was pending.

CPL 1.20 [18] defines a “criminal proceeding” as “any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this State or of any other jurisdiction, or involves a criminal investigation.”

Based on this clear and unequivocal definition, there can be no dispute that the ongoing, months-long criminal investigation by the district attorneys’ offices in Cayuga and Seneca Counties, which included the issuance and execution of valid search warrants and the seizure of contraband and other evidence of criminal conduct, constituted a “criminal proceeding” (*see In the Matter of Newsday, Inc. v Morgenthau*, 3 NY3d 651, 651 [2004] [“Newsday’s application to intervene and obtain access to records supporting issuance of a search warrant was an application ‘involving a criminal investigation and the proceeding in which the order was issued was therefore a criminal proceeding’”]; *see also* Preiser, Peter, Practice Commentaries, McKinney’s Cons Laws of NY, Book 11A, CPL 1.20 at pp. 26-27

[“[o]bserve that the term ‘criminal proceeding’ defined in subdivision 18 encompasses not only (a) the criminal action; but also (b) matters that occur in a criminal court relating to *prospective*, pending or completed criminal actions, or criminal investigations” and further, “[n]ote that CPL Section 1.10 mandates exclusive CPL governance of criminal actions, ‘proceedings,’ and appeals”)].

In *B.T. Productions, Inc. v Barr*, 54 AD2d 315, 319-320 [1976], *affd* 44 NY2d 226 [1978], the court, relying on the statutory definition of “criminal proceedings” (CPL 1.20 [18]) held that “the actual presentation of the application to the court for the issuance of a search warrant must be considered a criminal proceeding...The OCTF application to County Court clearly involved a criminal investigation. The application denominates no less than four different suspected crimes in support of the request for the warrant. Where an order is granted in the course of a criminal investigation, the proceeding in which the order was issued has been held to be a criminal proceeding. Thus, the search warrant issued by respondent Barr was the product of a criminal proceeding” [internal citation omitted].

That grand jury presentations were admittedly underway in both counties before the Supreme Court rendered its December 9, 2008 decision and order is further indicative of the fact that criminal proceedings were pending when Plaintiff-Appellant sought collateral declaratory relief (*see People v Feinberg*, 19

Misc2d 433 [New York County 1959] (“a grand jury investigation is a criminal proceeding”; *see also* nn. 4 and 5).

In short, as this Court plainly stated in *Kelly’s Rental v City of New York*, (44 NY2d at 702), “a party against whom a *criminal proceeding* is pending may not seek declaratory relief (emphasis supplied).” Thus, on this basis alone, the Appellate Division should have affirmed the judgment rendered in Supreme Court.

Confirming the impropriety of even entertaining this action are *Littleton* and *Church of St. Paul and St. Andrew v Barwick*, 67 NY2d 510, 523 [1986]. In *Littleton*, the plaintiff had, for a number of years, run dog races at the Mineola Fair Grounds during the summer months. Although by all accounts, the enterprise was legal, the district attorney charged defendant with gambling but a prosecution ended in favor of Littleton, concluding the “criminal action.” Thereafter, the district attorney *threatened* a re-prosecution. Then Littleton resorted to declaratory judgment seeking a declaration that his operation was a legal one. Following a civil trial upon which the parties relied exclusively on documentary evidence (including the prior criminal court action), the Supreme Court, sitting in equity, ruled that plaintiff’s business was “not violative of the Penal Law” (*Reed v Littleton*, 159 Misc 853 [Supreme Court, Nassau County, 1936]). The Second Department, noting that plaintiff’s declaratory judgment action was brought in response to a “threatened further prosecution,” reversed on the law and dismissed

plaintiff's complaint (249 AD 310, 312 [1936]). The court reasoned that "these provisions of statute and rules [relating to declaratory judgment] do not contemplate that the courts shall determine the precise rights existing between public officers and violators of the law, and determine in advance whether certain acts do or do not constitute a crime ... such questions as to guilt or innocence are to be determined in the established courts of criminal jurisdiction" (*id.* at 313).

On a further appeal, this Court affirmed. It relied upon both the longstanding rule against courts of equity "impeding or interfering with the administration of criminal law," as well as the "futility of resorting to equity to determine whether certain or uncertain facts constitute crime" (emphasis supplied) (*Littleton*, 275 NY at 154, 157).

Notably, the *Littleton* Court – astutely observing that the "district attorney has served notice *of his intention to institute further prosecutions*" – was unconcerned about whether or not a "criminal action" was pending at the time plaintiff commenced his declaratory judgment action; it was enough that plaintiff – faced only with a threatened arrest – had improperly sought to disrupt and delay a potential criminal prosecution by resorting to equity (*id.* at 152). In other words, even in the absence of a pending "criminal action," the *Littleton* Court rejected the notion that an action in equity lay to spike a possible prosecution. *A fortiori*,

where a criminal proceeding has commenced by application for a search warrant, no such action can be brought.

Similarly, in *Church of St. Paul and St. Andrew v Barwick*, 67 NY2d 510, 523 [1986], this Court appeared to recognize that equity did not lie to halt a theoretical criminal prosecution. In *Church*, the plaintiff, who planned a complete renovation of its church and the construction of a commercial condominium on part of its property, brought a declaratory judgment action against the Landmarks Preservation Commission to establish the unconstitutionality of the Landmarks Preservation Law as applied to it. The Supreme Court dismissed the action as not ripe, a conclusion affirmed by both the Appellate Division and this Court.

As relevant here, in reaching its conclusion that plaintiff's action was not ripe, this Court relied on *Kelly's Rental* and *Littleton* and observed that "plaintiff's declaratory judgment action cannot be ripe to the extent that it is based on plaintiff's claim of constitutional injury from being *theoretically subject to criminal sanctions* for noncompliance with the Landmarks Law's repair and maintenance requirements. Plaintiff does not allege that these requirements have been enforced, and nothing in the record suggests that imposition of criminal sanctions *has been threatened or even intimated*" (internal citations omitted) (*Church*, 67 NY2d at 523). The preference for resolution in criminal proceedings of questions of criminal liability cannot be clearer.

In rejecting the plain language of *Kelly's Rental* and understanding the term “criminal proceeding” to mean “criminal action”, the Fourth Department examined the facts underlying *Kelly* to maintain that underlying *Kelly* was a criminal action that had already commenced. This is simply not a fair conclusion from the opinion. A brief discussion of the case will make this clear.

In *Kelly's Rental*, “representatives” of the New York City Taxi and Limousine Commission (“Commission”) had issued “summonses” to the plaintiffs, who operated private car rental businesses, directing them to appear in New York City Criminal Court for alleged violations of the New York City Administrative Code. Plaintiffs commenced a declaratory judgment action, seeking a determination that the Commission lacked jurisdiction over them and enjoining the issuance of further summonses. Plaintiffs also sought to enjoin the Commission from instituting or continuing any criminal action or proceeding against them (*see Kelly's Rental, Inc. v City of New York*, 52 AD2d 904, 905 [1976]).

On appeal from the intermediate appellate court’s order granting the Commission summary judgment, this Court ruled that “a party against whom a *criminal proceeding* is pending may not seek declaratory relief” (*Kelly's Rental*, 44 NY2d at 702 [“the constitutionality and applicability of the statutory provisions alleged to have been violated are issues to be determined within the *criminal proceeding* itself”]) (emphasis supplied). It would appear that the use of the term

summons convinced the Fourth Department that “criminal actions” had already been commenced (*Cayuga Indian Nation v Gould*, 884 NYS2d 510, 513 [2009]). This position cannot be sustained.

A “summons” is “a process of a local criminal court or superior court...requiring a defendant to appear before such court for the purpose of arraignment upon an accusatory instrument filed therewith by which a criminal action against him has been commenced” (CPL 1.20 [27]; *see also* CPL 130.10 [1] [“a summons is a process issued by a local criminal court directing that a defendant designated in an [accusatory instrument] filed with such court, or by a superior court directing a defendant designated in an indictment filed with such court, to appear before it...”] and CPL 130.10 [2] [“a summons must be subscribed by the issuing judge...]). In other words, it is only after an accusatory instrument has been filed that a court exercising criminal jurisdiction may issue a summons.

In *Kelly’s Rental*, it is clear that the summons being issued was not one issued by a criminal court after the filing of an accusatory instrument and the commencement of a criminal action. Rather, these were summonses issued by an New York City Administrative Agency, the Taxi and Limousine Commission. Such a summons is akin to an “appearance ticket,” a “written notice issued *by a public servant* ... requiring a person to appear before a local criminal court in connection with an accusatory instrument *to be filed* against him therein” (CPL

1.20 [26] [emphasis supplied]; *see also* CPL 150.10, 150.20 [3] and 150.50 [1] [“[a] police officer or other public servant who has issued and served an appearance ticket must, at or before the time such appearance is returnable, file or cause to be filed with the local criminal court ... a local court accusatory instrument”). Since the “summons” referred to in *Kelly’s Rental* were not issued by the criminal court, but by an administrative agency, it cannot be maintained that an accusatory instrument had already been filed inasmuch as the issuance of such a ticket is neither dependent on the existence of a “criminal action,” nor can it constitute the commencement of a “criminal action.”¹³ Significantly, the CPL recognizes that the terms summons and “appearance ticket” are commonly used interchangeably (*see* CPL § 150.10 [1] [“A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title”]).

Further, the Fourth Department’s reliance upon *Morgenthau v Erlbaum*, 59 NY2d 143 [1983] in support its misinterpretation of *Kelly’s Rental* (*Cayuga*, 884 NYS2d at 513-514 [“the declaratory judgment action in Morgenthau, however, was commenced during the pendency of the criminal action, rather than prior to its

¹³ In defining “appearance ticket,” the CPL expressly acknowledges that an “appearance ticket” may, at times, be referred to summons (CPL 150.10 [1] [“A notice conforming to such definition constitutes an appearance ticket regardless of whether it is referred to in some other provision of law as a summons or by any other name or title”]).

commencement”]) is misplaced. In *Morgenthau*, this Court cautiously approved the use of a declaratory judgment action during the pendency of a criminal action, but only under very limited circumstances where *the People* sought to challenge an interlocutory ruling by the Criminal Court and “the controversy is over the validity of the statute, the determination of which does not require resolving any factual disputes, and there is no immediate attempt to prevent the criminal court from proceeding on the course which it has started by its ruling” (*id.* at 150-151).

While *Morgenthau* was decided in the context of a pending criminal action, it cannot be read as an endorsement of any limitation or modification of the longstanding rule against equity interfering to enjoin the enforcement of the criminal law. Indeed, the *Morgenthau* Court was careful to both reaffirm its holdings in *Littleton* [“the remedy (of declaratory relief) is not available to restrain the enforcement of a criminal prosecution where the facts are in dispute, or open to different interpretations”] and *Kelly’s Rental* [“inasmuch as a defendant always has available a right to appeal, only an application for declaratory relief by the People should be entertained”] (*id.* at 150-151, 152), and to caution future courts against expanding the scope of use of a declaratory judgment action as a means of collateral attack [“In approving the use of declaratory judgment in the present situation, it is incumbent upon this court to caution that this doctrine is to be used

carefully and wisely. The extent to which this relief may be invoked remains to be developed”] (*id.* at 153).

What is truly remarkable about this case is that it highlights precisely the mischief that can result from a collateral attack in a court exercising civil jurisdiction reasons. By the time this matter reached the Appellate Division, a “criminal action” was pending. On December 9, 2008, Justice Fisher (Supreme Court, Monroe County), while denying the Nation injunctive relief, nevertheless ruled, *inter alia*, that the Nation had a cognizable claim for collateral declaratory and injunctive relief, finding that “the absence of a criminal action made it discretionary whether to entertain the motion.” The following day (December 10, 2008), with no stay in effect, the grand jury in Cayuga County handed up a sealed indictment against the Nation, thus commencing a “criminal action” (CPL 1.20 [16] and [17]). Then, on December 11, 2008, the grand jury in Seneca County handed up a sealed indictment against the Nation, thus commencing a second “criminal action.” On December 11, 2008, the day *after* the commencement of the “criminal action,” the Nation sought an order enjoining the Counties from prosecuting the Nation for alleged violations of Tax Law §§ 471 and 1814. Plainly, a “criminal action” was undeniably pending when the Nation sought and obtained injunctive relief from criminal prosecution from the Fourth Department.

Nevertheless, although Associate Justice Nancy Smith initially denied the Nations request for a TRO – thus allowing the criminal actions to progress¹⁴ - on January 21, 2009, the Fourth Department, in direct contravention with its own reading of *Kelly's Rental*, enjoined the Counties from “further criminal prosecution of [the Nation]...including, but not limited to, *any further prosecution of indictments currently pending*” (*Cayuga Indian Nation v Gould*, Docket No. CA 09-02582, January 21, 2009). Thus, notwithstanding its awareness of the pending “criminal actions,” the Fourth Department did what equity had heretofore refused to do – it halted the continued criminal prosecution of an indicted defendant.

Under the rule of *Littleton* and its progeny, at the point the Nation sought relief in the Fourth Department, injunctive and declaratory relief should not have been available and the Fourth Department should have allowed the issues raised by the Nation to be decided in the proper forum (*Morgenthau*, 59 NY2d at 154 [“it is an abuse of discretion for a court to entertain an action for declaratory judgment when there is pending between the parties an action that will fully dispose of the controversy”]).

Particularly troublesome is the notion that the Appellate Division could step in and spike not merely a criminal proceeding, but a criminal action. Inevitably,

¹⁴ The Counties have acknowledged that, at the time of the Nation’s TRO application before Associate Justice Smith, the District Attorneys were necessarily constrained in their discussions regarding the sealed indictments.

these kind of efforts on the part of targets of criminal investigations and criminal actions will do little else than force the People to litigate their cases in two fora – the civil and the criminal – with a concomitant waste of resources resulting from a duplication of effort. An affirmance here will encourage this dual track litigation on the part of well-heeled defendants.

In the end, good public policy cries out for a reversal. As made evident here, the inevitable fallout of the dual track litigation that ensues when the target of an investigation is allowed to collaterally attack a criminal proceeding with a preemptive complaint for declaratory relief is months of delay, occasioned by motion practice in both the trial and appellate courts, and the concomitant expenditure of vast amounts of time, money and energy. All of which strike at the heart of the policy reasons, articulated by this Court in *Littleton*, militating against any decision that would permit, encourage or expand the ability of a criminal defendant or the target of a criminal investigation to seek collateral declaratory or injunctive relief during the pendency of a criminal proceeding.

Such proceedings are routinely employed for the sole purpose of derailing criminal investigations and evading prosecution, and clearly interfere with the timely and orderly administration of criminal justice in this State, adding layer upon layer of collateral litigation to resolve issues properly decided in the criminal

action and in the appropriate criminal forum. Indeed, the course this case has traveled thus far is perfectly illustrative of DAASNY's statewide concerns.

First, after months of investigation carried out by law enforcement authorities in Seneca and Cayuga Counties, a Supreme Court justice, upon applications submitted by both counties, issued search warrants, based upon probable cause, authorizing the search of the Nation's stores and the seizure of suspected contraband and other incriminating evidence. The warrants were lawfully executed and evidence was seized; thus, progressing the criminal investigation toward a grand jury presentment.

Within a day, attorneys for the well-financed Nation—attuned to the inevitability of criminal prosecution—literally hastened to civil court, where they were able to successfully thwart the criminal investigation and delay the impending criminal prosecution, perhaps indefinitely. Indeed, the Nation does not dispute that its declaratory judgment action was initiated in direct response to the criminal investigation, the execution of the search warrants, the seizure of evidence, and the District Attorneys' professed intention to prosecute; all in an effort to derail the criminal prosecution. And, in fact, more than one year after the sealed indictments were handed up, the Nation has still not been arraigned.

Whereas a prompt and appropriate dismissal of the Nation's declaratory judgment action on jurisdictional grounds would, by now, have allowed the

criminal court action to reach fruition and likely dispositive resolution, Justice Fisher's decision to allow the Nation's collateral attack laid the ground work for what has now become costly and protracted litigation in both the trial and appellate courts, with no immediate end in sight. Realistically, had the criminal court action been allowed to proceed in due course, the issues raised herein, including the legal sufficiency of the indictments and a determination of the Nation's obligations under Tax Law §§ 471 and 1814 (which are, in all events, properly decided by the criminal court), would by now be resolved, at least at the trial court level, and possibly at the intermediate appellate level.

Instead, more than one year after the indictments were handed up, the Nation's declaratory judgment action is now coming before this Court, after months of motion and appellate practice in the trial and intermediate appellate court, all while the criminal court action is stalled at its pre-arraignment stages. In the process, the Nation has successfully avoided answering the criminal charges, and has been permitted to continue to engage in conduct that grand juries in two counties have determined warrant the filing of criminal charges.

The futility of allowing such collateral attacks on criminal proceedings is further demonstrated by the fact that a declaratory judgment action can provide only limited relief; "it contemplates a judgment that will merely dictate the rights of parties in respect to the matter in controversy and lets things go at that" (Siegel,

New York Practice, Third Edition, § 436 at p. 705, noting further that the “the main distinguishing factor of the declaratory judgment...is the absence of coercive enforcement”).

By its complaint, the Nation sought a declaration that it is not in violation of certain statutory provisions relating to its obligation to collect and pay taxes on cigarettes sold at its stores. The Nation has further demanded, presumably as consequential relief, that the Counties be enjoined from pursuing “threatened criminal prosecution.” However, because indictments are pending in the criminal court, neither the Supreme Court nor the Appellate Division has the power to grant this type of consequential relief in the context of the Nation’s declaratory judgment action (CPL 210.20 [1] and [2]; *People v Cocco*, 285 AD 856, 857 [1955]; *People v Joseph*, 159 NYS2d 892 [Kings County 1956]);¹⁵ rather, to obtain dismissal of the indictments the Nation will have to move in the Criminal Court, adding yet another layer of litigation.

Nor, in the context of the Nation’s declaratory judgment action, could the Supreme Court or the Appellate Division conceivably fashion an order that would

¹⁵ In *People v Joseph*, 159 NYS2d 892 [Kings County 1956], the court held that where an indictment is found in County Court, such court is vested with exclusive jurisdiction over the case and its authority continues only subject to right of removal before trial for good cause pursuant to statute, and Supreme Court has no jurisdiction, where there has been no removal, to entertain a motion to dismiss the indictment. In *People v Cocco*, 285 AD 856, 857 [1955], the court stated, “after removal [of the indictment from Supreme to County Court], jurisdiction of all proceedings connected with the disposition of the indictment, whether before or after trial, is vested exclusively in the County Court.”

prohibit the District Attorneys from proceeding on the indictments. Such an order would entail the extraordinary remedy of a writ of prohibition pursuant to CPLR Article 78 (yet another layer of litigation), which does not lie where, as here, there is no viable “substantial claim” that the district attorneys are exceeding the scope of their authority in acting upon the indictments, and the Nation has other ordinary avenues of judicial review available to address its grievances (*see Maisonet v Merola*, 69 NY2d 965, 966 [1987] [“[u]se of the writ is restricted, especially in criminal cases, ‘to prevent incessant interruption of pending proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings’”]; *see also Matter of Rush v Mordue*, 68 NY2d 348, 352 [1986];¹⁶ *McLaughlin v Eidens*, 292 AD2d 712 [3rd Dept 2002]).¹⁷

Thus, even with a legal pronouncement of declaratory relief, the criminal actions against the Nation – which have already been commenced – will survive and proceed in due course. It is only in the context of the criminal actions that the

¹⁶ In *Rush*, this Court stated, “[w]e again observe that although CPLR 7803 (2) authorizes a proceeding under article 78 to test ‘whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction,’ the extraordinary remedy of prohibition lies only where there is a clear legal right, and only when a court (if a court is involved) acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction...[w]e have stressed it should be available only when a court exceeds its jurisdiction or authorized power in such a manner as to implicate the legality of the entire proceeding, as for example, the prosecution of a crime committed beyond the county’s geographic jurisdiction” (*id.* at 352).

¹⁷ In *McLaughlin*, the court stated, “[i]n the absence of a showing that petitioner will suffer irreparable harm if relegated to another avenue of judicial review, prohibition ordinarily does not issue where an adequate legal remedy is available, i.e., where the grievance can be address by ordinary proceedings at law or in equity, such as by motion, appeal, or other ordinary applications” (*id.* at 714).

legal sufficiency of the indictments and the evidence upon which they are based can be properly decided. Under these circumstance, in entertaining the declaratory judgment action, Equity acts in vain and, in the process, succeeds only in stymieing the criminal prosecutions (*see Livoti v Easton*, 52 AD2d 444, 450 [1976] [“equity will not suffer the making of a vain order”]).

* * *

In sum, should this Court affirm *Cayuga*, or in any way deviate from its longstanding prohibition against “a party against whom a criminal proceeding is pending” seeking declaratory relief (*Kelly’s Rental*, 44 NY2d at 702), it will open the floodgates for any defendant – but particularly those who are well financed and the putative targets of ongoing criminal investigations involving multiple law enforcement agencies – to systematically launch pre-emptive complaints for declaratory relief in civil court as a means of either interfering with on-going investigations (“criminal proceedings” within CPL 1.20 [18]), thereby resulting in the potential loss or dissipation of possible evidence, or completely derailing viable criminal prosecutions. In the resulting race to the courthouse between the prosecutor and his putative target, a defendant could get collateral review of his possible prosecution even before prosecutors have completed their investigation and are ready to present evidence to the grand jury. Indictments filed under such

pressured circumstances and without a full investigation would lead to additional post-indictment delay to allow full investigation to be completed. The ensuing dual-track litigation – and its attendant motion practice in both the Supreme Court and the Appellate Division – will not only jeopardize the effective prosecution of persons suspected of criminal activity, but will, in quick succession, cripple the already strained resources of the criminal justice system in this State. The financially strapped courts, prosecutor’s offices and law enforcement agencies of this State simply do not have sufficient funds, time or personnel to litigate allegations of criminal wrongdoing simultaneously in two courts; all while the alleged wrongdoer enjoys a judicially sanctioned mechanism for avoiding prosecution and punishment. Surely, such a result is at odds with the principles of justice, which require a timely and orderly disposition of criminal cases (*Littleton*, 275 NY at 157).

CONCLUSION

The order of the Fourth Department should be reversed, and the Counties' motion for summary judgment granted.

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Respectfully submitted,

KATHLEEN B. HOGAN
Warren County District Attorney
President, District Attorneys
Association of New York State
c/o Westchester District Attorney
111 Martin Luther King, Jr. Blvd.
White Plains, New York 10601
(914) 995-4457
(914) 995-4672 (FAX)

By:


JOHN J. CARMODY
Assistant District Attorney

ANTHONY J. SERVINO
Second Deputy District Attorney

MORRIE KLEINBART
Assistant District Attorney

