State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of October 10 thru October 12, 2017

State of New York Court of Appeals

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To be argued Tuesday, October 10, 2017

No. 111 Davis v Scottish Re Group Limited

Paul Davis, an investor living in Mexico City who held substantial shares of the preferred and common stock of Scottish Re Group Limited, a Cayman Islands reinsurance company, filed this action in New York after the company merged in 2011 with affiliates of Massachusetts Mutual Life Insurance Company (MassMutual) and Cerberus Capital Management. He alleged that MassMutual and Cerberus, working through Scottish Re directors they controlled, structured the merger and other transactions to enrich themselves at the expense of minority shareholders like himself. Davis, who owned about 48 percent of the preferred shares and 20 percent of the common stock of Scottish Re, asserted both direct and derivative causes of action against MassMutual, Cerberus and certain Scottish Re directors, among others. In three derivative causes of action on behalf of Scottish Re, he asserted claims for breach of fiduciary duty and waste of company assets against the directors and others.

Supreme Court, as relevant to this appeal, dismissed the derivative claims. The court ruled Davis lacked standing to pursue the claims because he did not comply with rule 12A of the Grand Court Rules of the Cayman Islands, which provides, in part, that plaintiff-shareholders asserting derivative claims on behalf of a company "must apply to the Court for leave to continue the action.... The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based."

The Appellate Division, First Department affirmed, saying the derivative claims were correctly dismissed due to Davis's failure to comply with Grand Court rule 12A. "The rule is applicable in the courts of this state as a substantive, rather than procedural, condition precedent to the continuation of a derivative action, as the underlying remedy is extinguished if a plaintiff fails to file an application to continue the derivative action...," it said. "Accordingly, the law of the forum of incorporation governs plaintiff's derivative claims..., and plaintiff is barred from asserting those claims."

Davis argues that his derivative claims should be reinstated and his standing to pursue them decided by New York courts. "Rule 12A says nothing about the substantive rules for shareholder derivative claims against Cayman companies, and it does not mandate that only Cayman courts have authority to grant leave to proceed with such claims." He says the rule is a "procedural mechanism" for Cayman courts "to determine a shareholder's standing to sue on behalf of a corporation from *any* jurisdiction *regardless of whether it is a Cayman company or not and regardless of what substantive standing doctrines control*. In New York, the CPLR likewise has various pre-trial procedural mechanisms" to determine standing "under whatever substantive law controls -- Cayman or otherwise. New York courts have routinely undertaken this analysis in the past. There is no basis to prevent them from doing so" in the future.

For appellant Davis: Eric Brenner, Manhattan (212) 446-2300
For respondents Scottish Re et al: Jean-Marie L. Atamian, Manhattan (212) 506-2500

State of New York Court of Appeals

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To be argued Tuesday, October 10, 2017

No. 112 People v Roberto Estremera

Roberto Estremera was charged with murder and attempted murder after shooting at two men in Manhattan in 1999, killing one and wounding the other. In 2000, Estremera pled guilty to first-degree manslaughter and second-degree attempted murder in exchange for a prison term of 25 years. Supreme Court did not inform him prior to his plea that he would also face a mandatory term of post-release supervision (PRS) after his release from prison, nor did the court impose any term of PRS at his sentencing.

In 2005, the Court of Appeals ruled in People v Catu (4 NY3d 242) that mandatory PRS is a direct consequence of conviction and a court's failure to advise a defendant prior to his guilty plea that he would face a term of PRS renders the plea involuntary. In 2008, the Court held in People v Sparber (10 NY3d 457) that only the sentencing judge may impose a term of PRS and that the "sole remedy" for a judge's failure to do so would be resentencing. The State Legislature responded in 2008 by enacting Penal Law § 70.85, which provides that a trial court may, with consent of the district attorney, "re-impose the originally imposed determinate sentence of imprisonment without any term of [PRS], which then shall be deemed a lawful sentence."

In 2009, Estremera moved to vacate his plea based on the Catu violation. He also argued that his sentence was illegal because it did not include the mandatory term of PRS. In 2010, in a proceeding at which Estremera was not present, Supreme Court denied his motion to vacate the plea and granted the prosecution's request to re-impose the original prison sentence without PRS pursuant to Penal Law § 70.85. The court issued an order that said, "No resentence. Original sentence with no PRS stands." Estremera appealed, arguing the court violated CPL 380.40 by resentencing him in absentia. The statute provides, "The defendant must be personally present at the time sentence is pronounced."

The Appellate Division, First Department affirmed the order. "Even assuming, without deciding, that this appeal is properly before us as an appeal from a judgment of resentence..., notwithstanding that the court's order expressly states: 'No resentence. Original sentence with no PRS stands,' we find no basis for a remand," it said. "Defendant was not adversely affected by any alleged procedural defect in the court's determination, including the fact that he was not present when the court let stand his original sentence, 'because the result, i.e., freedom from having to serve a term of PRS, was in his favor'...."

Estremera argues the 2010 proceeding held pursuant to Penal Law § 70.85 was clearly a resentencing because the statute says the procedure for correcting an illegal sentence that omitted PRS is to "re-impose the originally imposed determinate sentence," and because "[t]his Court has consistently recognized that the 're-impos[ition]' of a sentence under Penal Law § 70.85 is a resentencing." He says CPL 380.40 gives defendants an "unyielding right" to be present at sentencing, a right he neither waived nor forfeited, and one the lower court violated by sentencing him in absentia. He says he is entitled to "a new resentencing" in his presence, without any need to show he was "adversely affected" by the prior proceeding.

For appellant Estremera: Samuel J. Mendez, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, October 10, 2017

No. 113 Chauca v Abraham

Veronika Chauca began working for Park Management Systems as a physical therapy aid at its Park Health Center in Queens in 2006. In July 2009, she informed her supervisors, Dr. Jamil Abraham and Office Manager Ann Marie Garriques, that she was pregnant and requested maternity leave until November, which they approved. When she contacted the Center about returning to work, she said the supervisors delayed and then declined to reinstate her, telling her there was not enough work available. Chauca complained the explanation was pretextual because no other employees had been laid off and, she alleged, at least three other women had been illegally terminated after becoming pregnant. In December 2009, she filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission. And in November 2010, she filed this suit against the Center, Abraham and Garriques in U.S. District Court for the Eastern District of New York, alleging pregnancy discrimination in violation of the New York City Human Rights Law (NYCHRL), New York State Human Rights Law, and the federal Pregnancy Discrimination Act, which is part of Title VII of the Civil Rights Act of 1964.

At trial, the District Court denied Chauca's request to instruct the jury on punitive damages under the City Human Rights Law. "There is nothing here that supports punitive damages under any stretch of anybody's imagination.... There's no showing of malice, reckless indifference, that there was an intent to violate the law," the court said, invoking the standard for punitive damages under Title VII. The jury awarded her compensatory damages of $10,500 for lost pay and $50,000 for pain and suffering. Chauca appealed, arguing that she was entitled to have the jury consider punitive damages as well.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issue with a certified question: "What is the standard for finding a defendant liable for punitive damages under the New York City Human Rights Law...?" The NYCHRL does not provide a standard for liability. In Farias v Instructional Systems, Inc. (259 F3d 91 [2001]), the Second Circuit ruled the federal Title VII standard applies to punitive damages under the NYCHRL, limiting liability to defendants who engaged in intentional discrimination "with malice or with reckless indifference" to the rights of plaintiffs. However, it said the ruling has been called into question by subsequent actions of the New York City Council, which "has twice legislatively clarified the 'uniquely broad and remedial purposes' of the NYCHRL.... As part of the Restoration Act of 2005, the City Council instructed that '[t]he provisions of [the NYCHRL] shall be construed liberally ... regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL], have been so construed.'" On the other hand, the court said, neither the Restoration Act of 2005 nor amendments to the NYCHRL adopted in 2016 name Farias among the cases they were intended to override, and neither statute discusses punitive damages. "Given the lack of clarity concerning the appropriate standard for punitive damages and the importance of this issue to state and city law, we believe the prudent course of action is to certify this question to the New York Court of Appeals," the Second Circuit said.

For appellant Chauca: Stephen Bergstein, New Paltz (845) 469-1277
For respondents Abraham et al: Arthur H. Forman, Forest Hills (718) 268-2616

State of New York Court of Appeals

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To be argued Wednesday, October 11, 2017

No. 49 People v Stanley Hardee

In July 2010, three Manhattan police officers stopped Stanley Hardee on Lexington Avenue for speeding and weaving through traffic without signaling. When the officers surrounded his car, they said Hardee appeared to be nervous and kept looking around from them to his front-seat passenger and to the empty back seat. They asked him to stop looking around and to step out of the car, but he did not comply until they repeated the request two or three times. They frisked him, finding no weapon or contraband, and he continued to look over his shoulder toward the back seat of the car. One officer testified that Hardee's behavior suggested he might fight or flee so he decided to handcuff him but, with one wrist cuffed, Hardee began to resist. Another officer testified that Hardee's demeanor, repeated glances at the back seat, and refusal to follow directions led him to believe there was a weapon in the car. The officer picked up a shopping bag from the floor behind the passenger seat and, feeling something heavy, he looked in and saw a handgun. After Supreme Court denied his motion to suppress the gun, Hardee pled guilty to criminal possession of a weapon in the second degree and was sentenced as a persistent violent felony offender to 16 years to life in prison.

The Appellate Division, First Department affirmed in a 4-1 decision. "The testimony supports the trial court's finding that the facts available to the officers, including defendant's furtive behavior, suspicious actions in looking into the back seat on multiple occasions and refusal to follow the officers' legitimate directions, went beyond mere nervousness," the majority said. "Rather, defendant's actions both inside and outside of the vehicle created a 'perceptible risk' and supported a reasonable conclusion that a weapon that posed an actual and specific danger to their safety was secreted in the area behind the front passenger seat, which justified the limited search of that area, even after defendant had been removed from the car and frisked...."

The dissenter said, "Evidence that ... defendant behaved in a very nervous manner, looked several times toward the back seat of the car, and failed to comply with the officers' directives, was not sufficient to lead to a reasonable conclusion that a weapon located within the car presented an actual and specific danger to the officers' safety so as to justify a limited search of the car after defendant had been removed from the car and frisked without incident. There was no testimony that defendant looked in the specific direction of the bag or even the floor.... In the absence of objective indicators that could lead to a reasonable conclusion that there was a substantial likelihood that a weapon was located in defendant's car, the search was unlawful since no actual and specific danger threatened the safety of the officers...."

For appellant Hardee: Rachel T. Goldberg, Manhattan (212) 577-2523 ext. 529
For respondent: Manhattan Assistant District Attorney Jessica Olive (212) 335-9000

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To be argued Wednesday, October 11, 2017

No. 114 People v Mary Anne Grady Flores

This case arises from a series of demonstrations protesting the use of Reaper drones operated by an Air National Guard unit at Hancock Field in the Town of DeWitt, near Syracuse. In October 2012, Mary Anne Grady Flores and other protesters were arrested for disorderly conduct while demonstrating outside the gates of the airbase. DeWitt Town Court issued an order of protection at the request of Colonel Earl Evans, commander of the drone unit, requiring Flores and the others to "stay away" from Col. Evans and Hancock Field. The order gave the address of the airbase, but did not describe the boundary of the base nor specify how closely the protesters could approach. Flores was arrested again in February 2013, as eight other people demonstrated at the intersection of a public road and the driveway to the main gate of the base. Flores was acting as a spokeswoman for the group and taking photographs of the protest. She was charged with criminal contempt for violating the order of protection.

Col. Evans and other witnesses testified in DeWitt Town Court that, at the time of the 2013 protest, there were no signs marking the boundary of the airbase property, which a survey later found extended to the public road. There were "no trespassing" signs on the fence surrounding the base, which was about 170 feet from the road where the protesters had lined up blocking traffic onto the driveway. Flores was convicted of second-degree criminal contempt and sentenced to one year in jail and a $1,000 fine. She argued on appeal that the order of protection was not validly issued under CPL § 530.13(1)(a) because Col. Evans was not a victim of or witness to the 2012 protest and because the order was meant to protect property, not him. She also claimed it was overbroad and unconstitutionally vague.

Onondaga County Court reduced her jail term to six months and otherwise affirmed, finding that "the issuance of the order was in all respects proper. Colonel Evans could have qualified as either a victim or a witness of the October 25, 2012 protest. Moreover, the language in the order of protection was not overly broad or unconstitutionally vague. The language in the order gave the defendant notice of the prohibited conduct and was not written in such a manner that it permitted or encouraged arbitrary or discriminatory enforcement.... Indeed, [Flores] testified at trial that she understood that the order prohibited her from going on base property."

Flores argues the "vague" stay away order infringed on her First Amendment rights to freedom of speech, of assembly, and to petition for redress of grievances because it was "designed to bar protests in traditional areas of public access near the base entrance" and it restricted "more speech than is necessary to secure a significant government interest." Given the "great uncertainty" about the location of the base boundary, she says she could not be in criminal contempt because the order "provided no specificity as to what conduct was allowed or disallowed," did not say if she "was to simply stay off the base property or if she was to stay a certain distance away from the base," and did not "indicate how and where the defendant's presence on a public roadway outside the campus of Hancock Field would constitute a violation of the order." She also says the order was invalid because it was not issued to protect a crime victim or witness.

For appellant Flores: Lance Salisbury, Ithaca (607) 272-7669
For respondent: Onondaga County Chief Asst. Dist. Attorney James P. Maxwell (315) 435-2470

State of New York Court of Appeals

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To be argued Wednesday, October 11, 2017

No. 67 Bransten v State of New York

After the State notified judges that it would reduce its contributions to the cost of their health insurance premiums in 2011, 13 sitting and retired Supreme Court justices and two judicial associations brought this lawsuit to enjoin the action on the ground that it would violate the Compensation Clause of the State Constitution, which states, "The compensation of a judge ... or of a retired judge ... shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed." The State was acting to address a budget shortfall and it negotiated with public employee unions for wage and benefit concessions, including reduced insurance contributions, in return for immunity from layoffs. At the same time, the Legislature amended Civil Service Law § 167(8) to impose similar reductions in insurance contributions on non-union employees while also granting them immunity from layoffs. The change increased insurance costs for current judges by 6 percent and for retired judges by 2 percent.

Supreme Court denied the State's motion to dismiss the suit, finding the reduced insurance contributions were a direct diminution of judicial compensation because they increased the amounts withheld from judges' salaries.

The Appellate Division, First Department affirmed. Insurance benefits are protected "compensation" within the meaning of the Compensation Clause, it held, saying "it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits." It also ruled section 167(8) was unconstitutional as applied to judges because it subjects them to discriminatory treatment in violation of the Compensation Clause. The statute "affects judges differently from virtually all other state employees, who either consented to the State's reduced contribution in exchange for immunity from layoffs or were otherwise compensated by the State's promise of job security...," it said. "The judiciary had no power to negotiate with the State with respect to the decrease in compensation, and received no benefit from the no-layoffs promise, because their terms of office were either statutorily or constitutionally mandated."

The case returned to Supreme Court, which issued an order declaring Civil Service Law § 167(8) unconstitutional as applied to judges.

The State argues the reduction of its contributions did not implicate the Compensation Clause because it "did not directly affect any constitutionally protected compensation at all," but instead "merely increased the price of health insurance for those judges who chose to buy a state health insurance plan. This rise in premium prices did not affect judges' statutorily defined salaries, nor did it eliminate any payment given directly to judges." It says the statute did not discriminate against judges because the reductions "apply equally to ninety-eight percent of all state employees, including many state employees who, like judges, cannot collectively bargain.... [N]early all employees ... must pay the same range of prices for the same selection of state-subsidized health insurance plans. This evenhanded treatment is precisely the type of nondiscriminatory policy that the Compensation Clause does not disturb."

For appellant State: Assistant Solicitor General Judith N. Vale (212) 416-6274
For respondents Bransten et al (judges): Alan M. Klinger, Manhattan (212) 806-5818

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To be argued Thursday, October 12, 2017 (arguments begin at noon)

No. 115 People v Mario Arjune

Mario Arjune immigrated to the United States with his parents from Suriname in 2006 and was a lawful permanent resident in 2008, when he was arrested after an altercation in a Queens restaurant in which he stabbed a man with a utility knife. He then hid the knife behind a ceiling tile. He was acquitted at trial of attempted murder and assault, but was convicted of tampering with physical evidence and fourth-degree weapon possession and sentenced to one to three years in prison. According to the sentencing transcript, the court clerk said, "Let the record reflect the defendant is being handed a notice of appeal." Arjune's trial attorney, who was retained by his parents, filed a timely notice of appeal at the Appellate Division, Second Department in 2009, but took no further steps to perfect the appeal. In 2013, the prosecution moved to dismiss the appeal as abandoned and served a copy on his trial counsel, who did not respond. A copy was also mailed to his parents' address, but Arjune no longer lived there. The Appellate Division dismissed his appeal in December 2013.

Arjune was placed in custody of U.S. Immigration and Customs Enforcement for deportation in December 2014, based on his felony conviction. He was released on bond four months later after his immigration attorney referred him to an indigent defense provider. In April 2015, his assigned appellate counsel moved to reinstate his appeal. The Appellate Division denied the motion and a subsequent motion to reconsider. Arjune then sought a writ of error coram nobis to reinstate his appeal, arguing that his trial counsel had been ineffective in failing to protect his right to appeal. In an affirmation, trial counsel said he did not remember informing Arjune of the steps needed to perfect his appeal or receiving the prosecution's motion to dismiss the appeal. He said it "was understood" that he was not appellate counsel. Arjune also submitted a psychological report that said he was cognitively impaired and barely literate. The Appellate Division denied his application, saying he "has not established his entitlement to the relief requested (see People v Syville, 15 NY3d 391 [2010])."

Arjune argues his "petition for a writ of error coram nobis should have been granted because trial counsel, ignorant of his professional responsibilities, failed to protect his cognitively limited, barely literate, incarcerated client's fundamental right to a first-tier appeal of his felony trial conviction by (a) failing to explain his entitlement to poor person relief and how to seek it, and (b) failing to take any action when counsel was served with the People's motion to dismiss the appeal."

The prosecution argues, "The Appellate Division properly denied coram nobis relief because his factual allegations were contradicted by the record and his own motion, because he was well aware of his right to appeal and to apply for poor person relief, and because, in any event, he never established his indigency."

For appellant Arjune: Jenin Younes, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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To be argued Thursday, October 12, 2017 (arguments begin at noon)

No. 116 People v Leroy Savage Smith

Leroy Smith was charged with assault for striking his supervisor on the forehead with a hammer, and fracturing his skull, during a dispute over withheld wages at a Syracuse work site in 2012. As jury selection was set to begin, Smith asked Onondaga County Court to relieve his assigned counsel, saying "I think it's in my best interest.... One, in the basic interest he's failed to investigate employee-told defense in my case. He's failed to list and subpoena any witnesses exculpatory to the defendant. He has failed to keep the defendant informed as to ongoing status of this case, and he's failed to file all copies of motions, answers to motions of discovery. He did not hire a private investigator to investigate some of the witnesses in this case cause he said I don't have the money or the resources to hire a proper private investigator at this time. So it's in my best interest to get rid of him. I don't think he's doing a good enough job." The court denied his request without asking any questions of Smith or his counsel, saying, "Well..., this is the first I heard about that, and the jury is about to come into this courtroom, and I'm not going to, based upon what you've said, and in this very general way, I'm not going to ... assign you another lawyer." The court ultimately permitted Smith to represent himself at trial, with his original assigned counsel remaining at his side to advise him. Smith was convicted of first-degree assault and misdemeanor weapon possession and was sentenced to 20 years in prison.

The Appellate Division, Fourth Department affirmed. "[W]e conclude that County Court did not abuse its discretion in denying [Smith's] request for substitution of counsel inasmuch as 'defendant failed to proffer specific allegations of a "seemingly serious request" that would require the court to engage in a minimal inquiry,'" the Appellate Division said, quoting People v Porto (16 NY3d 93 [2010]).

Smith argues the trial court "failed to conduct an adequate inquiry pursuant to People v Sides (75 NY2d 822 [1990]) when it summarily denied [his] request for new counsel predicated upon specific complaints demonstrating ineffective assistance as a matter of law." He says his case is "fully distinguishable" from Porto, in which defendants made "vague and belated complaints" about their assigned attorneys, because Smith "raised specific claims of ineffectiveness through failure to investigate and ignorance of the expert resources available to indigent defendants." He says the seriousness of his allegations "demanded at least minimal inquiry by the trial court," which "improperly focused on just the late timing of the request" and asked no questions.

For appellant Smith: Philip Rothschild, Syracuse (315) 218-0179
For respondent: Onondaga County Chief Asst. Dist. Attorney James P. Maxwell (315) 435-2470

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To be argued Thursday, October 12, 2017 (arguments begin at noon)

No. 117 People v Marlo S. Helms

Marlo Helms was arrested in Rochester for illegal possession of a .32 caliber revolver in 2012. He pled guilty to a reduced charge of attempted criminal possession of a weapon in the second degree with an agreement that his sentence would depend on whether his 1999 conviction for "residential burglary" in Georgia was equivalent to a New York felony, making him eligible for sentencing as a repeat felon. The Georgia statute at that time provided, "A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another." The prosecutor argued the Georgia crime was equivalent to second-degree burglary in New York under Penal Law § 140.25(2), which provides that a defendant "is guilty of burglary ... when he knowingly enters or remains unlawfully" in a dwelling "with intent to commit a crime therein." Helms admitted his prior conviction, but argued it could not serve as a predicate felony because the Georgia statute does not require proof that the defendant "knowingly" entered a dwelling without legal authority, as does the New York law.

Monroe County Court found the two burglary statutes were equivalent and sentenced Helms as a second violent felony offender to five years in prison.

The Appellate Division, Fourth Department vacated his sentence on a 4-1 vote, finding the Georgia felony was not a predicate conviction because the Georgia crime of burglary "is lacking as essential element required by the equivalent New York statute." It remitted the matter to County Court, which resentenced Helms as a first-time felony offender to one year in jail.

The majority said, "[O]n its face, the Georgia statute is lacking an essential element -- knowledge that the entry or decision to remain is unlawful. Because New York law requires proof of an element that Georgia law does not, defendant's Georgia conviction cannot serve as a predicate.... [T]he inquiry into whether a foreign state's conviction should be used as a predicate is limited "'to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes"'.... Although it is a requirement that a person act intentionally in order to be convicted of burglary in Georgia, the fact remains that the element of acting 'knowingly' is not included in the statute." It said, "In any event, the dissent has failed to present any Georgia case law specifically reading the 'knowingly' requirement into the Georgia burglary statute."

The dissenter said that, while determining which foreign felonies can serve as predicates is "generally" limited to comparing the crimes' elements as defined in the penal statutes, "I respectfully disagree with the majority's mechanical application of this standard inasmuch as the Court of Appeals routinely looks to the foreign state's statutory definitions and to case law...." He said, "In my view, the majority is comparing words in the two burglary statutes rather than elements.... Under Georgia law, burglary is a 'crime,' which is defined as 'a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence'.... Thus, the 'act' of entering under Georgia's burglary statute is only a 'crime' if it was 'intentional.' This statutory interpretation is substantiated by Georgia case law."

For appellant: Monroe County Assistant District Attorney Leah R. Mervine (585) 753-4354
For respondent Helms: David R. Juergens, Rochester (585) 753-4093