

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, November 13, 2012

**No. 216 People v Brandon McFadden**

*(papers sealed)*

Brandon McFadden was arrested in 2008 for an alleged retail sale of cocaine in Far Rockaway, Queens, and was charged with third-degree criminal sale and possession of a controlled substance, both felonies, and a misdemeanor count of seventh-degree criminal possession of a controlled substance. At trial, the jury informed the court that it had reached a verdict on the misdemeanor count, but was deadlocked on the felonies. With McFadden's consent, Supreme Court took a partial verdict of guilty of seventh-degree possession and granted his motion for a mistrial on the third-degree possession and sale charges, ordering a retrial on those counts.

Prior to his second trial, McFadden moved to preclude the prosecution from proceeding on the felony possession count on the ground of double jeopardy, noting that seventh-degree possession is a lesser-included offense of third-degree possession. Supreme Court denied the motion. The new jury convicted him of third-degree possession and acquitted him of third-degree sale of a controlled substance. The court subsequently set aside McFadden's misdemeanor conviction and dismissed the seventh-degree possession charge as an inclusory concurrent count of third-degree possession. On the felony conviction, it sentenced him to seven years in prison.

The Appellate Division, Second Department reversed and dismissed the felony possession charge. It held that because the first jury convicted McFadden of seventh-degree possession, a lesser-included offense of third-degree possession, "the Supreme Court erred in retrying the defendant on the higher offense.... The conviction of criminal possession of a controlled substance in the seventh degree is deemed an acquittal of criminal possession of a controlled substance in the third degree (*see* CPL 300.50[4]), and 'a retrial on the greater offense would be barred under settled double jeopardy principles'...."

The prosecution argues that McFadden "waived double jeopardy protections when he explicitly opted for a mistrial and partial verdict on a misdemeanor count, after being told that he could be retried on the unresolved felony counts." The prosecution also argues that, if the felony conviction is barred by double jeopardy, the misdemeanor conviction should be reinstated.

For appellant: Queens Assistant District Attorney Danielle Fenn (718) 286-5838

For respondent McFadden: Jonathan Garvin, Manhattan (212) 693-0085

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**No. 207 Matter of State of New York v John P.**

*(papers sealed)*

In 2008, as John P. was nearing the end of his four-year prison term for a first-degree sexual abuse conviction in Suffolk County, the State Office of Mental Health (OMH) began an evaluation to determine whether he qualified as a "sex offender requiring civil management" under Mental Hygiene Law article 10. OMH psychologist Dr. Paul Etu conducted the screening examination, in the absence of legal counsel for John; diagnosed him as having pedophilia and anti-social personality disorder; and concluded that he met the criteria for civil management under article 10. OMH's case review team recommended to the Attorney General that the State petition for civil management of John and, in November 2008, it commenced this proceeding.

At his article 10 trial, John sought to preclude testimony from Dr. Etu on the ground that it would violate his right to counsel, since the psychologist had examined him in the absence of counsel. Supreme Court allowed Dr. Etu to testify. At the conclusion of the trial, since John had waived his right to a jury, the court made the determination that he had a mental abnormality. After a dispositional hearing, the court ordered him confined to a secure treatment facility.

The Appellate Division, Second Department affirmed, saying the trial court properly allowed Dr. Etu's testimony. It said article 10 "provides ... that 'the respondent shall not be entitled to appointment of counsel prior to the time provided in section 10.06 of this article.' Further, [section] 10.06(c) provides for such appointment '[p]romptly upon the filing of a sex offender civil management petition....'" The court said, "John P.'s right to counsel did not attach until this article 10 judicial proceeding was commenced against him. Since the evaluation was conducted prior to the commencement of the article 10 proceeding, John P. was not entitled to have counsel present...."

John argues that "the information obtained from appellant during a preliminary administrative case review evaluation conducted by Dr. Etu, which was subsequently utilized by the State to establish and bolster its case-in-chief against appellant at the ... article 10 trial, rendered the evaluation a 'critical stage' of the litigation such that the preclusion of counsel implicated appellant's due process right to a fair trial. Hence, the Appellate Division erred when it affirmed the trial court's denial of appellant's request to preclude the testimony of Dr. Etu."

For appellant John P.: Scott M. Wells, Mineola (516) 746-4373

For respondent State: Assistant Solicitor General Matthew W. Grieco (212) 416-8014

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## **No. 218 People v Michael Mox**

Michael Mox, 42, killed his father in July 2007 by stabbing him and striking him in the head with a shillelagh. Mox had a long history of mental illness, had recently been discharged from a psychiatric hospital, and was living in his father's house in the Monroe County town of Henrietta while awaiting placement in a group home. Charged with second degree murder, Mox filed a notice of intent to introduce psychiatric evidence in support of an insanity defense. Defense and prosecution experts agreed he suffered from schizoaffective disorder, but disagreed on whether this prevented him from understanding the nature of his actions. After receiving the reports, the prosecution offered a plea to first-degree manslaughter with a sentence of 25 years.

Mox took the plea, and said in his allocution that he had a "meltdown" when he attacked his father. He said, "I was hearing voices. I had extreme painful bodily sensations and I was hearing voices and all of it together along with the past, I couldn't seem to make the right decision obviously." He said he was off his medication and in relapse. Asked if he had been "mad," Mox said, "In a psychotic state. Was I mad? Yeah. I think I was, yeah." His defense attorney said she had discussed the insanity defense with him and he was willing to forgo it for the plea. Prior to sentencing, however, Mox obtained new counsel and moved to withdraw his plea, saying he wished to assert an insanity defense. County Court denied the motion and sentenced him to 25 years.

The Appellate Division, Fourth Department reversed and vacated the plea in a 4-1 decision. Although Mox failed to preserve his claim that his plea was not knowing and voluntary, it said, "...this is one of those rare cases in which preservation is not required because 'the defendant's recitation of the facts underlying the crime pleaded to clearly cast[] significant doubt upon the defendant's guilt or otherwise call[ed] into question the voluntariness of the plea' (People v Lopez, 71 NY2d 662 ...)." The court said Mox's "plea allocution suggested that his underlying schizoaffective disorder, for which he was unmedicated, caused him to be in a 'psychotic state' at the time of the crime. Thus, defendant's plea allocution in fact negated the element of intent, and the court should not have 'accept[ed] the plea without making further inquiry to ensure that defendant [understood] the nature of the charge and that the plea [was] intelligently entered' (Lopez, 71 NY2d at 666)."

The dissenter argued, "[T]he record unequivocally establishes that the defense of not guilty by reason of insanity was fully explored by the court and counsel, and that defendant and his attorney waived that defense. Inasmuch as 'defendant was competent to stand trial, he was likewise competent to make decisions regarding his defense'..., and the court therefore properly accepted defendant's waiver of that defense.... In my view, no further inquiry was necessary under these circumstances."

For appellant: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

For respondent Mox: William T. Easton, Rochester (585) 423-8290

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**No. 219 Matter of Bitchatchi v Board of Trustees of the New York City Police Department**

**Pension Fund, Article II**

**No. 220 Matter of Maldonado v Kelly**

**No. 221 Matter of Macri v Kelly**

These appeals arise from claims for Accident Disability Retirement (ADR) benefits or death benefits filed by two New York City police officers, Karen Bitchatchi and Eddie Maldonado, and the widow of a third, Frank Macri, who were among the first responders to the World Trade Center (WTC) attacks of September 11, 2001. All three officers developed cancer. And all three of them spent enough time working on the rescue and recovery operations at the site to qualify for the presumption provided in the World Trade Center Law (NYC Administrative Code § 13-252.1), which states that if a police officer suffers from "a qualifying World Trade Center condition..., it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by the member's own willful negligence, unless the contrary be proved by competent evidence."

All three claims were denied in tie votes by the Board of Trustees of the Police Department Pension Fund, Article II, based on findings of its Medical Board. The Board concluded that Bitchatchi's colon cancer, which was diagnosed a year after the attacks, was caused by her colitis and not by exposure to toxins at the WTC site. The Board cited evidence that a malignant tumor in Maldonado's leg had developed prior to the attacks and rejected the opinion of his oncologist that his exposure at the WTC site "may have accelerated" the growth of the tumor. The Board found that Macri's diagnosis of advanced lung cancer in July 2002 came so soon after the attacks that the cancer must have developed before his WTC exposure. The claimants filed these article 78 proceedings to annul the Pension Fund's determinations and compel it to grant them WTC disability or death benefits.

Supreme Court granted the petitions in Bitchatchi and Macri. The Appellate Division, First Department affirmed, saying the Pension Fund provided no credible evidence to rebut the presumption that their cancers were caused by their service at the WTC site. In Macri, it said the Medical Board "relied on unidentified 'doubling time' literature which was not based on the responder population to support its conclusion that his cancer was a preexisting condition and was not WTC related," and the Board disregarded a chest x-ray taken on 9/11 that "showed no indication of any pulmonary cancer." The court said, "[W]e find the same conclusory reliance on undisclosed literature that we determined did not constitute credible evidence in Bitchatchi."

However, in Maldonado, the First Department said "credible evidence supports the Medical Board's determination ... that the aggravation of petitioner's cancer was not caused by the [WTC] site conditions." It said "not even petitioner's own physician could offer more than a wholly equivocal, speculative opinion on causation."

For Pension Fund and NYPD (appellants in 219 & 221, respondents 220):

Assistant Corporation Counsel Paul T. Rephen (212) 788-1200

For appellant Maldonado: Chet Lukaszewski, Lake Success (516) 775-4725

For respondent Bitchatchi: Rosemary Carroll, Clermont (917) 670-5725

For respondent Macri: James M. McGuire, Manhattan (212) 698-3500

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## **No. 158 Matter of Stray from the Heart, Inc. v NYC Dept. of Health and Mental Hygiene**

In 2000, the New York City Council passed the Animal Shelters and Sterilization Act (Administrative Code § 17-801 *et seq.*), which required the City's Department of Health and Mental Hygiene (DHMH) to "ensure that a full-service shelter is maintained in each borough of the city" and that the shelters be open to accept stray dogs and cats 24 hours per day, among other things. Stray from the Heart, Inc., a not-for-profit organization that provides rescue, rehabilitation and placement of homeless dogs, brought this article 78 proceeding in 2009 to compel the City and DHMH to comply with the statute. It also sought incidental damages in the amount of the additional expenses it allegedly incurred in caring for animals that should have been housed and treated by DHMH pursuant to the Shelter Act.

Supreme Court granted Stray from the Heart's petition, ordering DHMH to submit a plan for immediate implementation of the Shelter Act and holding that the organization was entitled to recover its expenses "in providing services mandated by the Act." The court found the City and DHMH "have blatantly failed to comply" with the statute, saying there were no animal shelters open 24 hours a day and no shelters at all in the Bronx and Queens. It rejected the City's argument that Stray from the Heart did not have standing to maintain the proceeding, finding that the organization had suffered direct harm as a result of the City's failure to comply. It said Stray from the Heart is "dedicated to providing specifically the services which, in the absence of shelters, the City has failed to provide."

The Appellate Division, First Department reversed and dismissed the proceeding for lack of standing. It said, "As the primary purpose of the Act is to protect the public health by addressing the overpopulation of 'unwanted dogs and cats'..., and not to alleviate the burdens voluntarily assumed by animal rescue organizations, petitioner's asserted injury does not constitute 'injury in fact' that falls within the 'zone of interests or concerns sought to be promoted or protected by' the Animal Shelters and Sterilization Act...."

In September 2011, after the Court of Appeals granted leave to appeal in this case, the City amended the Shelter Act to require full-service shelters in just three boroughs, instead of all five, and to reduce the required hours of operation to 12 hours per day.

Stray from the Heart argues that, although the amendments have rendered moot its petition to compel compliance with the original provisions of the Act, it is still entitled to recover incidental damages it incurred as a result of the City's failure to comply prior to the amendments. It contends it has standing "because it and its members have incurred actual injury by rescuing and caring for dogs that, but for the Department's undisputed failure to comply with the Act's mandate, would have been accepted and cared for at the shelters. This injury is different from the general health and safety risks suffered by the public at large and falls within the Act's 'zone of interest' to provide shelter for stray animals.... [The] legislative history unambiguously demonstrates that the Act's objectives include protection of the welfare of both (i) stray animals and (ii) the public." It says, "Denial of standing will erect an 'impenetrable barrier' to judicial review of the Department's defiance of the Act."

For appellant Stray from the Heart: Catherine St. John, Manhattan (212) 836-8000

For respondents City and DHMH: Assistant Corporation Counsel Karen Griffin (212) 788-0791

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## **No. 225 People v Calvin Mays**

Calvin Mays was charged with two armed robberies in Rochester -- one at a Wilson Farms store and the other at a Fastrac filling station -- in 2006. During jury deliberations at the end of his trial, the jury asked to review surveillance video of the suspects in the Fastrac robbery. The judge brought the jurors into the courtroom and allowed the prosecutor to operate the video player and discuss with jurors the footage they wanted to see. After playing one video, the prosecutor asked, "The next one? ... There is another." When a juror asked, "Can you freeze it when they're together, please?" the prosecutor replied, "I'll see if I can do that. I may have to start from the beginning to get that for you." After playing the desired footage, that prosecutor asked, "Do you want to see it again? ... I'll keep trying for you." Defense counsel made no objections during the playback.

Mays was acquitted of charges related to the Fastrac robbery, but was convicted of two counts each of first and second-degree robbery for the Wilson Farms hold-up. He was sentenced to 25 years to life in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, ruling that Mays failed to preserve his claim that Supreme Court erred in allowing the prosecutor to interact with deliberating jurors while the video was replayed. It rejected his argument that preservation was not required under People v O'Rama (78 NY2d 270), saying "there was no significant departure from the organization of the court or the mode of proceedings prescribed by law...." It said, "Here, the record establishes that the prosecutor's communications with the jury were 'merely ministerial'.... 'The [prosecutor] did not attempt to convey any legal instructions to the jury or to instruct [it] as to [its] duties and obligations ...[, nor did the prosecutor] deliver any instructions to the jury concerning the mode or subject of [its] deliberations'.... Thus, '[i]n the present case, unlike in O'Rama..., [any] error does not amount to a failure to provide counsel with meaningful notice of the contents of [a] jury note or an opportunity to respond'...."

The dissenters argued the prosecutor's interaction with jurors was a mode of proceedings error that did not require preservation. "In our view," they said, "Supreme Court improperly delegated control of a critical portion of the proceedings to the prosecutor insofar as it allowed the prosecutor to fashion responses to juror questions and guide the jurors through the playback of video recordings." They said, "[T]he prosecutor's conduct went beyond the playing of the video recordings and thus in our view cannot be considered to be a mere ministerial act." On the merits, they said the error was more serious than cases involving "the delegation of the court's function to a court employee who was neutral to the proceedings. Here, the delegation of duties was to the prosecutor, an advocate rather than a neutral party. The subtleties of advocacy are founded upon establishing a positive relationship with jurors, which is precisely why direct contact between attorneys and jurors during deliberations is strictly prohibited."

For appellant Mays: James Eckert, Rochester (585) 753-4431

For respondent: Monroe County Assistant District Attorney Stephen X. O'Brien (585) 753-4646