# *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, February 9, 2016

**No. 23 Matter of New York State Correctional Officers and Police Benevolent Association, Inc. v Governor's Office of Employee Relations**

Thomas Tierney was employed by the State Office of Mental Health (OMH) as a Safety and Security Officer 2 (SSO 2), a salary grade 15 position, at the Hudson River Psychiatric Center in June 2011, when his supervisor, the Chief Safety and Security Officer (CSSO), transferred to another facility. Tierney was assigned to serve as "Acting Chief" and he performed duties of the CSSO for the next seven months, until the Hudson River facility closed in January 2012. Tierney and his union, the New York State Correctional Officers and Police Benevolent Association (NYSCOPBA), filed an out-of-title work grievance seeking additional pay for the work he performed as acting CSSO, a salary grade 20 position. He said the duties included supervising all day shift officers, scheduling assignments, tracking overtime, overseeing vendors, attending committee meetings, and generating reports.

OMH sustained the grievance, saying, "After a thorough review of the record, facts, documentation and discussion with facility management, it is the agency's determination that the grieved duties are most appropriate to that of a [CSSO]." However, the Division of Classification and Compensation (DCC) recommended that the grievance be denied, finding the grieved duties "are consistent with those of a properly classified" SSO 2. The Governor's Office of Employee Relations (GOER) adopted the recommendation and denied the grievance. Tierney and NYSCOPBA brought this proceeding to challenge the determination.

Supreme Court found there was a rational basis for the determination and dismissed the suit. "Many, if not all of petitioner's grieved duties were either listed in or directly derived from the [SSO 2] classification," it said.

The Appellate Division, Third Department affirmed on a 3-2 vote, disagreeing about whether to give greater weight to the findings of OMH or of GOER. The majority said GOER and DCC compared the grieved duties with the classification standards for CSSO and SSO 2. "Some of the listed duties are appropriate for either title, as both are supervisory positions.... Tierney did not assert in his grievance form that he was performing all, or even the most distinctive aspects, of the duties of a CSSO. Based on the limited duties listed on Tierney's grievance form, DCC and GOER rationally found that the work he was performing, in the absence of his supervisor, either fell within the duties of an SSO 2 or were a reasonable and logical outgrowth of those duties.... Rather than deferring to OMH, as the dissent does, we should defer to DCC and GOER, the agencies or offices that are responsible for regularly making this type of determination ... and that are not bound by OMH's decision."

The dissenters argued GOER's denial of the grievance was irrational, saying, "[I]t is important to note that Tierney was not simply filling in for a CSSO who was temporarily absent," but instead replaced a CSSO "who had transferred out ... for a period of seven months until the ... facility closed...." They said, "As the agency providing oversight and supervision for [Tierney's] facility, OMH is ... in a significantly better position than GOER to understand and evaluate the tasks performed by its employees.... [I]t strikes us as irrational for GOER to base its decision to deny Tierney's grievance upon a generic, out-of-context examination of ... Civil Service classification standards rather than the reasoned conclusion reached by OMH" after "thorough review of the particular facts and circumstances and, more importantly, discussions with facility personnel."

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For respondents GOER et al: Assistant Attorney General Laura Etlinger (518) 776-2028

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To be argued Tuesday, February 9, 2016

**No. 24 People v Assad Cedeno**

Assad Cedeno and six co-defendants were arrested during a gang fight between the Latin Kings and the Trinitarios on a crowded subway platform in Queens in June 2008. Ariel Pena Rodriguez, a suspected Trinitario, was stabbed to death during the melee. Cedeno moved to sever his trial from that of co-defendants Jason Villanueva and Alexandra Huacon, arguing that they incriminated him in statements they gave to the police and that admission of those statements at a joint trial would violate his right to confront witnesses under Bruton v United States (391 US 123). In a written statement, Villanueva said "one of the Latin Kings wearing red and white trunks pulled out a knife and rushed the whole crowd.... [T]he male with the red and white trunks ran over to the victim and started punching him with a small knife." Other witnesses established that Cedeno was wearing red and white swim trunks. In an oral statement, Huacon identified Cedeno by his nickname as a Latin King and said he cut his hand during the fight.

Supreme Court denied the motion to sever the trial, saying that "the confrontation problem may be eliminated by redacting the statement so that it no longer connects the defendant to the crimes charged.... [A] redaction of the reference to the red and white clothing [in Villanueva's statement] would eliminate any prejudice to defendant. In reviewing Huacon's statement, redaction of the name 'Fidel' or 'Bambino' and replacing it with the neutral pronoun [or] the word 'person' would eliminate the right to confrontation problem."

The redacted statements were admitted at the joint trial. The court also permitted Enerfry Hierro, an alleged Trinitario, to testify that he recognized Cedeno and Villanueva from an assault four months earlier, in which Cedeno struck him with a cane and Villanueva slashed his face, although they were not charged. Hierro testified that Cedeno and Villanueva were approaching him on the train platform when Rodriguez intervened and both men stabbed Rodriguez. Cedeno was acquitted of murder, but convicted of first-degree gang assault and weapon possession. He was sentenced to 16 years in prison.

The Appellate Division, Second Department affirmed. Admission of Villanueva's redacted statement did not violate the Bruton rule because the redaction "would not have caused the jurors to 'realize that the confession refers specifically to the defendant,'" it said, citing Gray v Maryland (523 US 185). It said Huacon's statement was inadmissible hearsay, but found the error harmless. The uncharged crime evidence in Hierro's testimony was properly admitted because it "established the witness's ability to identify the defendant..., was probative of the defendant's motive and intent, and it provided necessary background information about the nature of the relationship between the witness and the defendant, placing the charged conduct in context."

Cedeno argues, "The manner in which the People redacted Villanueva's statement was rejected as insufficient in Gray," which held, "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration ... leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that ... the law must require the same result." He also argues that he was denied due process and a fair trial when the court "permitted the People to elicit unreliable uncharged crime evidence" in Hierro's testimony "without making a threshold determination of whether it was even minimally reliable."

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To be argued Tuesday, February 9, 2016

**No. 25 People v Keith Johnson**

Keith Johnson and Joe Rushing were charged with using a toy pistol to steal $30 from an undercover officer during a buy-and-bust operation in the Bronx in 2009. The undercover officer testified that, when he approached Johnson and asked to buy crack, Johnson led him to a car and climbed in. Johnson demanded the money and the officer replied, "No, give me the stuff." The officer said Rushing, in the driver's seat, asked to count the cash and the officer reached over Johnson to hand Rushing $30 in pre-recorded buy money. He said Johnson pulled out what appeared to be a gun and pointed it at him as Rushing drove away. The officer fired once at the vehicle, striking Johnson in the shoulder. When they were arrested a few blocks away, officers found the buy money in Rushing's pocket and a plastic toy pistol next to the passenger's seat.

At their joint trial, the prosecutor sought to introduce Rushing's grand jury testimony, in which he said he had been driving around with Johnson and stopped to let him get something to eat. When Johnson returned, "someone came to the vehicle talking about where is the stuff and reaching money out." Rushing said he "knew it was time for me to leave" and, as he drove off, "the money dropped in the car." He admitted putting the money in his pocket, but denied having seen a firearm or toy gun during the incident. Johnson's attorney moved to sever the trials, arguing that the grand jury testimony incriminated his client and its admission at a joint trial would violate his right to confrontation under Bruton v United States (391 US 123).

Supreme Court denied the motion, saying Rushing's statements to the grand jury "were not facially incriminating as to Mr. Johnson.... [T]here is nothing in Mr. Rushing's statement that suggests that Mr. Johnson was involved in any illegal conduct." Johnson was convicted of second-degree robbery and related crimes and sentenced to five years in prison.

The Appellate Division, First Department reversed in a 4-1 decision, saying, "Although [Rushing's] grand jury testimony was intended as an innocent explanation of the events surrounding the alleged robbery, and admitted no wrongdoing, nevertheless it was 'facially incriminating' as to [Johnson] within the meaning of Bruton. [Rushing's] narrative placed [Johnson] with [him] throughout the relevant events and, specifically referring to [Johnson] approximately 40 times, described [Johnson's] conduct," including his return to the car when the officer appeared asking for "the stuff" and dropped the money in the car. "This narrative suffices to create an inference that [Johnson] ... had purported to set up a deal for a sale of contraband that was to culminate in the vehicle, but did not fulfill the deal...." It said the testimony "was the only nonpolice evidence that [Rushing] possessed the buy money when the car was stopped."

The dissenter said the testimony was not facially incriminating under Bruton because "Rushing made no mention of any interaction" between Johnson and the officer before the officer approached the car and "Rushing did not testify that [Johnson] demanded or took possession of the buy money. Moreover, he asserted that he never saw a toy pistol. In sum, the bizarre encounter Rushing recounted ... did not attribute any criminality to [Johnson]." He said "the identity of the [buy] money as the proceeds of the robbery could not have been established by Rushing's grand jury testimony alone," but required "the testimony of the police witnesses."

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To be argued Tuesday, February 9, 2016

**No. 26 People v Oliver Berry**

Josiah Salley was shot to death in July 2002, while driving near a Queens intersection where he had been involved in a traffic dispute an hour earlier. His passenger, Korin Bush, was uninjured. Police chased two men who ran from the scene and caught one, Kevin Kirven, whom Bush said was not the shooter. During an interview at the police station, Kirven allegedly gave a statement implicating Oliver Berry in the shooting and provided contact information for Berry from his address book. When Berry was arrested nearly two years later, Bush identified him in a lineup as the shooter.

The prosecutor did not call Kirven as a witness at Berry's first trial, but elicited testimony from a detective that he had copied a page from Kirven's address book during the police station interview and then issued a "wanted card" for Berry. The Appellate Division, Second Department reversed Berry's conviction, saying the "plain implication" of the detective's "testimonial hearsay" was that Kirven had accused Berry of the crime and admission of the testimony violated Berry's right to confrontation. It also said, "The evidence in this single eyewitness identification case was not overwhelming...."

The prosecutor called Kirven as a witness at Berry's retrial. Kirven's attorney had told prosecutors that his client denied giving any statement to police, denied that he had even seen the shooting, and would invoke his Fifth Amendment right to remain silent. The prosecutor elicited testimony that Kirven and Berry were friends and then, when she questioned him about the shooting, Kirven repeatedly invoked his Fifth Amendment rights. The prosecutor impeached him with his contradictory accounts of the shooting, including a redacted version of his police statement. Berry was convicted of second-degree murder, attempted murder and related crimes, and was sentenced to 25 years to life in prison.

The Appellate Division, Second Department affirmed, saying, "Under the circumstances presented here, invocation of the Fifth Amendment privilege against self-incrimination by a prosecution witness did not add critical weight to the prosecution's case, and the defendant was not deprived of his right to a fair trial by that testimony.... Furthermore, the Supreme Court properly permitted the People to impeach that witness with a prior inconsistent statement...."

Berry argues, "[T]he People called Kirven even though his attorney had informed them that he would invoke the Fifth Amendment, deny having made the statement, and refuse to implicate [Berry].... [T]he prosecutor elicited Kirven's repeated invocations of the Fifth Amendment in front of the jury, questioned him in an accusatory manner, repeatedly impeached him on bias and other grounds, and introduced the written statement Kirven had disavowed.... This massive, multi-faceted impeachment of the People's own witness ... denied [Berry] his due process right to a fair trial." He also argues the trial court improperly precluded his identification expert from testifying about the effect of "high stress" on the accuracy of an identification.

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