

# *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 or [gspencer@nycourts.gov](mailto:gspencer@nycourts.gov).

To be argued Tuesday, October 17, 2017

## **No. 55 People v Otis Boone**

Otis Boone was charged with robbing two men at knife-point in Brooklyn in February 2011. In the first incident, a stranger approached a man on a sidewalk and gestured toward his wrist as if asking for the time. When the victim took out his cell phone, the robber snatched it and fled. The victim pursued him, but abandoned the chase when the robber turned and pulled out a knife. Ten days later, a teenager was texting on his cell phone when a stranger came up behind him and asked for the time. The boy turned to answer, the robber grabbed the phone, and a brief struggle ensued. The robber then stabbed the victim in the back and fled with the phone.

The victims, who are white, identified Boone, who is black, as the perpetrator in separate lineups and at trial. Boone asked Supreme Court to give the jury a cross-racial identification charge, instructing jurors that they may consider whether there is a difference in race between the defendant and the witness who identified him and, if so, whether that difference affected the accuracy of the witness's identification. New York's pattern jury instructions say, in part, "Ordinary human experience indicates that some people have greater difficulty in accurately identifying members of a different race...." The court denied Boone's request, saying, "There is no evidence before this jury regarding ... a lack of reliability of cross-racial identification. There was no expert testimony to that effect. There was no cross-examination as to that." Boone was convicted of two counts of first-degree robbery and sentenced to an aggregate term of 25 years.

The Appellate Division, Second Department reduced Boone's sentence to 15 years and otherwise affirmed. The trial court "properly declined to charge the jury on the unreliability of cross-racial identification, as the defendant never placed the issue in evidence during the trial..., and the court's charge correctly conveyed the applicable legal principles on witness credibility and identification testimony....," it said.

Boone cites scientific research on the difficulties witnesses have in accurately recognizing people of different races and he argues, "In light of the now-undeniable science, its nationwide legal recognition, and New York's own model charge, New York should adopt the same rule as New Jersey and Massachusetts: trial courts must include a cross-racial identification charge unless the parties agree that no cross-racial identification has occurred. Alternatively, trial courts must include the charge in that situation when requested by defense counsel. At a minimum, the charge must be given if the People's case relies on a cross-racial identification and there is little or no corroboration of it." Boone says he is entitled to the charge under any of these standards because the witnesses' encounters with the robber lasted no more than a minute and the prosecutor "offered no corroborating evidence" linking him to either crime.

The prosecution argues that, "where the trial court not only charged the jury on evaluating credibility and that identification had to be proven beyond a reasonable doubt, but also provided an expanded identification charge -- the court committed no error of law in failing to include in its expanded identification charge an instruction on cross-racial identification." In any case, it says, "there was no evidence presented at defendant's trial that would have enabled the jury to assess -- pursuant to the CJI cross-racial identification charge -- whether the cross-race effect might have impeded either victim's ability to identify the person who had robbed him or ... enhanced the probability that either victim's identification of defendant ... was mistaken: No testimony was elicited regarding either victim's history of contacts with black people."

For appellant Boone: Leila Hull, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Seth M. Lieberman (718) 250-2516

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To be argued Tuesday, October 17, 2017

**No. 118 Matter of Jamie J.**

*(papers sealed)*

At the request of the Wayne County Department of Social Services (DSS), Family Court issued an ex parte order temporarily removing Michelle E.C.'s one-week-old child, Jamie J., from her care pursuant to Family Court Act § 1022 in November 2014. DSS placed the child in foster care and commenced a neglect proceeding against Michelle under Family Court Act article 10, alleging that Jamie was at imminent risk due to her mother's inability to provide proper care. The court held a permanency hearing under Family Court Act article 10-A in June 2015, and continued the child's foster care placement. In December 2015, the court dismissed the article 10 neglect petition on the ground that DSS did not prove Michelle "failed to exercise a minimum degree of care." However, Jamie was not returned to her mother and the court held another permanency hearing in January 2016, agreeing with DSS that it retained jurisdiction to hold the hearing under article 10-A despite its dismissal of the article 10 petition. After the hearing, Michelle consented to an order continuing Jamie's foster care placement through DSS, but reserved her right to challenge the court's jurisdiction after the neglect petition was dismissed.

The Appellate Division, Fourth Department affirmed the permanency order in a 3-2 decision, saying Family Court retained subject matter jurisdiction to conduct the permanency hearing under article 10-A despite the dismissal of the neglect petition. It held, "based upon the plain language of ... article 10-A, that the court obtains jurisdiction as a result of a placement with [DSS] pursuant to section 1022 (see § 1088), and that the court is required to make a determination whether to return the child to the parent based upon the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if the child were to return to the parent (see § 1089[d][1], [2][i])." It said, "We note that there is no provision in ... article 10-A that provides for the termination of the child's placement with [DSS] when a neglect or abuse petition is dismissed." It said Michelle failed to preserve her constitutional claim that she could not be deprived of the right to raise her child without a finding of neglect. In any event, her rights were protected by article 10-A, it said. "Because the court was required to determine ... whether the child would be at risk of abuse or neglect if returned to the mother..., and the evidence at the hearing clearly supported the court's determination that the child would be at such risk, we would conclude that the requisite 'overriding necessity' was established here..., and thus that the mother's substantive due process rights were not violated."

The dissenters said, "Pursuant to the legislative scheme of article 10, absent a finding of abuse or neglect, the court lacks any jurisdictional basis to block, delay, or impose conditions on the return of the child.... We cannot agree with the majority that the enactment of ... article 10-A abrogated that settled law and extended the subject matter jurisdiction of Family Court beyond the dismissal of the neglect petition." The language of article 10-A, "considered in isolation, appears to confer continuing jurisdiction regardless of the outcome of the underlying article 10 proceeding," they said, but that "'would require us to interpret the statute in a manner that would render it unconstitutional'.... The majority's application of the plain language ... effectively sanctions the use of the temporary order issued in an ex parte proceeding ... as the jurisdictional predicate for [DSS's] ongoing, open-ended intervention in the parent-child relationship after the neglect petition was dismissed on the merits. We agree with the mother that ... the court's exercise of jurisdiction pursuant to article 10-A resulted in the violation of her fundamental right to raise her child."

For appellant Michelle E.C.: Katharine F. Woods, Geneva (315) 781-1465

For respondent Wayne County DSS: Gary Lee Bennett, Lyons (315) 946-7540

Attorney for the child: Sean D. Lair, Sodus (315) 483-6931

For intervenor foster parents: James S. Hinman, Rochester (585) 325-6722

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**No. 119 In re: World Trade Center Lower Manhattan Disaster Site Litigation  
(Faltynowicz et al v Battery Park City Authority and two others)**

This federal case involves personal injury claims asserted by 18 asbestos handlers who developed serious respiratory illnesses after cleaning up toxic dust and debris spread by the collapse of the World Trade Center towers on September 11, 2001. The cleanup included several properties owned by the Battery Park City Authority (BPCA), which was created as a public benefit corporation by the State Legislature in 1968 to redevelop a 92-acre area on the lower west side of Manhattan. In 2009, U.S. District Court dismissed more than 600 such lawsuits against BPCA, and another 124 suits against other public entities, for failure to file a timely notice of claim. In response, the Legislature enacted General Municipal Law § 50-i(4)(a), known as "Jimmy Nolan's Law," which revived for one year all time-barred claims against public corporations by workers injured during the post-9/11 recovery and cleanup effort. In 2014, BPCA moved to dismiss revived claims on the ground that Jimmy Nolan's Law violated its due process rights under the State Constitution. The State intervened to defend the statute, arguing that BPCA lacked capacity as a public benefit corporation to challenge the law under New York's capacity-to-sue rule, which prohibits "municipalities and other local governmental corporate entities" from challenging the constitutionality of State legislation.

District Court agreed with BPCA that it must conduct a "particularized inquiry" to determine whether BPCA was sufficiently independent of the State that it would have capacity to assert its constitutional claim. Finding it did have capacity, the court said BPCA "was created to be independent of the State in performing primarily private functions, funded primarily by private means." On the merits, it ruled Jimmy Nolan's Law violated BPCA's State due process rights because the "serious injustice" or "exceptional circumstances" necessary to justify "the 'extreme exercise of legislative power' that a revival statute entails" were not present.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues in a pair of certified questions:

"(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' see Clark-Fitzpatrick, Inc. v Long Island R.R. Co. [70 NY2d 382 (1987)], based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' see John Grace & Co. v State Univ. Constr. Fund [44 NY2d 84 (1978)], and if so, what considerations are relevant to that inquiry?; and (2) Does the 'serious injustice' standard articulated in Gallewski v H. Hentz & Co. [301 NY 164 (1950)], or the less stringent 'reasonableness' standard articulated in Robinson v Robins Dry Dock & Repair Co. [238 NY 271 (1924)], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?"

For appellants Faltynowicz et al: Gregory J. Cannata, Manhattan (212) 553-9205

For appellants Alvear and Curly: Luke Nikas, Manhattan (212) 446-2300

For intervenor-appellant State: Sr. Asst. Solicitor General Andrew W. Amend (212) 416-8022

For respondent Battery Park City Authority: Daniel S. Connolly, Manhattan (212) 508-6104