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.

WEEK OF SEPTEMBER 13 - 15, 2016

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, September 13, 2016

No. 148 Utica Mutual Insurance Company v Style Management Associates, Corp.

During the renovation of a single-family home in Lake Success, two separate fires caused by floor finishing chemicals and sawdust caused property damage on June 23 and 24, 2009. The homeowners' insurer, Utica Mutual Insurance Company, paid their fire damage claims and then brought this subrogation action against Style Management Corp. and its owner, Yosef Sason, and against Zak Baruch and his company, AA Fine Home Builder, Inc., for negligence in handling and disposing of flooring materials. It alleged that the Style defendants were liable as the general contractor for the project. The Style defendants moved for summary judgment dismissing the complaint against them, arguing that they were not the general contractor and that their involvement was limited to obtaining the building permit for Baruch and performing a few days of minor carpentry work that had nothing to do with the flooring. Utica Mutual argued that, because Style Management was named on the building permit as the contractor and Baruch, who was unlicensed paid Sason $5,000 to obtain the permit, there was a triable issue of fact as to whether the Style defendants were the general contractor.

Supreme Court denied Style's motion to dismiss, finding that "there are indeed questions of material fact regarding the role [the Style defendants and Baruch] played in the construction at the subject premises...," including "exactly who was the general contractor...."

The Appellate Division, Second Department reversed on a 3-1 vote and dismissed the complaint against the Style defendants. The court said Style showed that the homeowners "hired the Baruch defendants as the general contractor ... and that the Baruch defendants undertook general contractor duties by coordinating and supervising the project, and hiring and paying subcontractors.... The fact that the building permit ... named Style Management Corp. as the contractor" and Baruch paid Sason "for the use of the name Style Management Corp. on the permit" did not raise a triable question about Style's role. It based its conclusion "on Labor Law personal injury cases, which hold that the mere listing of an entity as the contractor on a work permit, without more, is insufficient to raise a triable issue of fact as to whether that entity is the general contractor on a particular project.... [T]he rule..., which is based on the basic definition of a general contractor as one who ... coordinates and supervises the work and hires and pays subcontractors ... applies equally to this subrogation action.... There is no persuasive reason for having two separate definitions of a general contractor...."

The dissenter said, "The Nassau County Administrative Code ... states that the purpose of requiring home improvement contractors to obtain a home improvement license if to 'safeguard and protect the homeowner against abuses....' When a contractor files for a permit..., as Style Management Corp. did in this case, the contractor is required to present its home improvement license" and obtain "liability insurance to protect against loss ... and provide Workers' Compensation insurance to cover the workers on the job.... The fact that the Style defendants may have abandoned their duty as the licensed home improvement contractor in allowing Zak Baruch..., or someone else, to oversee and safeguard the premises ... should not obviate the responsibilities of the Style defendants as the named contractor, who was carrying the insurance. To hold otherwise would allow the Style defendants to perpetuate a fraud on the Village of Lake Success and circumvent the very purpose of requiring licenses and insurance to protect both consumers and workers."

For appellant Utica Mutual: Chris Christofides, Manhattan (212) 422-1200
For respondent Style: Tracy L. Frankel, Garden City (516) 739-5100

State of New York Court of Appeals

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To be argued Tuesday, September 13, 2016

No. 149 People v Roni Smith
No. 150 People v Keith Fagan

A primary issue here is whether a defendant may be sentenced as a repeat felony offender based on a prior conviction that was obtained in violation of People v Catu (4 NY3d 242 [2005]), which held that, before accepting a guilty plea, courts have a constitutional duty to inform the defendant that the sentence will include a mandatory term of post-release supervision (PRS). CPL 400.15(7)(b) provides, "A previous conviction ... which was obtained in violation of the rights of the defendant under ... the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate violent felony conviction."

Roni Smith pled guilty in Manhattan to second-degree weapon possession in 2012. He was sentenced to seven years as a second violent felony offender based on his 2002 conviction of first-degree robbery in a plea proceeding at which there was no mention of PRS. Smith was later returned to court in the 2002 case for a Sparber resentencing pursuant to Correction Law § 601-d, during which he agreed to the minimum term of PRS and did not seek to withdraw his plea.

Keith Fagan pled guilty in the Bronx to first-degree attempted robbery in 2010. He was sentenced to 18 years to life as a persistent violent felony offender based, in part, on his 2000 conviction of first-degree attempted robbery in a plea proceeding at which there was no mention of PRS. Fagan was subsequently resentenced in the 2000 case under Penal Law § 70.85, which allows a court to impose the original prison term "without any term of [PRS], which then shall be deemed a lawful sentence."

Both defendants filed CPL 440.20 motions to set aside their current sentences on the ground that their prior felony convictions, obtained several years before Catu was decided, were unconstitutional and therefore CPL 400.15(7)(b) barred their use as predicates. Supreme Court ultimately held in favor of both defendants. Smith was resentenced to six years in prison as a first felony offender, Fagan was resentenced to 15 years as a second violent felony offender.

The Appellate Division, First Department affirmed. It said in Smith, "Because a conviction obtained in violation of Catu implicates rights under the federal Constitution as well as the state constitution..., the court properly ... vacated [defendant's] sentence as a second violent felony offender on the ground that his 2002 conviction could not be counted as a predicate felony under CPL 400.15(7)(b)." Although the 2002 conviction pre-dated Catu, it said "the rule of law announced in Catu applies retroactively to pre-Catu convictions...."

The prosecutors argue the prior convictions may serve as predicate felonies because Catu was decided on state constitutional grounds and CPL 400.15(7)(b) only bars the use of convictions obtained in violation of federal constitutional rights. They say Catu "established a new rule that cannot be applied retroactively. They also argue Smith "explicitly waived any Catu challenge to ... his 2002 guilty plea at his Sparber resentencing," and "the PRS defect" in Fagan's 2000 plea "was cured by [his] subsequent resentencing pursuant to Penal Law § 70.85."

No. 149 For appellant: Manhattan Assistant District Attorney Dana Poole (212) 335-9000
For respondent Smith: David J. Klem, Manhattan (212) 577-2523 ext. 527
No. 150 For appellant: Bronx Assistant District Attorney Justin J. Braun (718) 838-7111
For respondent Fagan: Barbara Zolot, Manhattan (212) 577-2523

State of New York Court of Appeals

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To be argued Tuesday, September 13, 2016

No. 151 Pullman v Silverman

David Pullman had been a patient of Dr. David Silverman for about 12 years when, in January 2007, the Manhattan physician prescribed Lipitor to reduce Pullman's cholesterol level. Nearly a month later, Pullman called Silverman to report he had stopped taking Lipitor because he was feeling chest discomfort, especially while running. Silverman also prescribed Azithromycin, a macrolide antibiotic, when Pullman complained of flu symptoms. In March 2007, Pullman was hospitalized after a near-fainting episode and was diagnosed with atrioventricular (AV) heart block, an impairment of the electrical impulses that control the heartbeat. He ultimately had a pacemaker implanted. Pullman brought this malpractice action against Silverman, alleging that the doctor's negligent administration of Lipitor, alone or in combination with Azithromycin, caused cardiac arrhythmia which progressed to AV heart block.

Silverman moved for summary judgment dismissing the suit and submitted an affidavit from an expert who said there were no epidemiological studies linking Lipitor, other statins, or Azithromycin to AV heart block. Pullman submitted affidavits from four experts who, relying on anecdotal case studies, opined that his heart condition was caused by the prescribed drugs based on the relatively brief time between his taking the drugs and the onset of his symptoms, their knowledge of the interactions between the drugs, and their view that he had no other risk factors for heart block.

Supreme Court denied the motion. "There are clear questions as to whether Dr. Silverman should have prescribed" the drugs for Pullman, it said, but the plaintiff's experts failed to establish that the drugs were the proximate cause of his AV heart block.

The Appellate Division, First Department affirmed, noting that "New York courts permit expert testimony based on scientific principles, procedures or theories only after they have gained general acceptance in the relevant scientific field" as determined under the Frye test. It said Pullman "failed to submit evidence sufficient to raise a triable issue of fact that his expert's opinions were generally accepted in the medical community. Although plaintiff submitted numerous articles in medical literature concerning adverse reactions to Lipitor and Azithromycin, none of the articles linked [AV] heart block to the drugs prescribed by defendant. Biological plausibility and convergence in time between the administration of the drugs and the AV heart block diagnosis are insufficient, where no scientific evidence of causation was provided. '[O]bservational studies or case reports are not generally accepted in the scientific community on questions of causation'...."

Pullman argues his expert evidence "established questions of fact ... as to whether the administration of Lipitor and Azithromycin caused plaintiff's third degree AV heart block, based on medical science, accepted chemical and pharmacological principles, plaintiff's physical condition, and the temporal relationship between the onset of symptoms and the commencement of the regimen, combined with plaintiff's lack of prior cardiac lesions or problems.... [T]he absence of peer reviewed articles precisely on point goes only to the weight of the testimony and should not result in dismissal of the complaint on this record...."

For appellant Pullman: Brian J. Isaac, Manhattan (212) 233-8100
For respondent Silverman: Elliott J. Zucker, Manhattan (212) 593-6700

State of New York Court of Appeals

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To be argued Tuesday, September 13, 2016

No. 152 Matter of Cortorreal v Annucci

Rafael Cortorreal was an inmate at the Sing Sing Correctional Facility in August 2012, when he was charged with violating two disciplinary rules: drug possession and smuggling. A correction officer found two bags of marijuana hidden in a basement, and a confidential informant said Cortorreal had hidden them. He was found guilty after a hearing, but the Department of Corrections and Community Supervision administratively reversed the determination and ordered a new hearing. Cortorreal asked that 10 inmates be called to testify at his second hearing. One testified by telephone and one could not be found in the DOCCS database. The other eight signed refusal forms and, as the basis for their refusal, marked the pre-printed phrase "I do not want to be involved." Five of them added that they knew nothing about the incident, but three inmates said nothing further.

The hearing officer told Cortorreal that he had not personally verified that the eight inmates refused to testify. Cortorreal told the hearing officer that one of those inmates, Brian Blackman, shortly after the first hearing signed an affidavit in which he said a correction officer had pressured him to refuse to testify on Cortorreal's behalf at that hearing and to say on the refusal form, "I don't know nothing." The hearing officer entered Blackman's affidavit into the record and summoned the correction sergeant who had asked Blackman if he would testify at the second hearing. The sergeant testified that Blackman said he knew nothing about the hidden marijuana and said nothing about being coerced out of testifying at the first hearing. The sergeant testified that neither he nor anyone in his presence pressured Blackman not to testify. The hearing officer did not interview Blackman himself or the correction officer Blackman accused of coercion. The hearing officer found Cortorreal guilty of both charges and imposed a penalty of 12 months in the Special Housing Unit.

Supreme Court denied Cortorreal's petition to overturn the determination. The Appellate Division, Third Department affirmed, saying, "Inasmuch as the requested witnesses had not previously agreed to testify and each signed a witness refusal form indicating the reason for the refusal, [Cortorreal's] right to present witnesses was adequately protected...."

Cortorreal argues, "An allegation that a witness in a prison disciplinary hearing has been coerced by staff to refrain from testifying in a substantially related proceeding requires meaningful, personal inquiry by the hearing officer into the allegation." He says the hearing officer's failure to interview Blackman personally about the alleged coercion, or to inquire into any effect it may have had on his willingness to testify at the second hearing, violated his right to call witnesses. He also argues that a hearing officer's obligation to ascertain the reason for an inmate's refusal to testify "is not contingent upon whether a requested inmate witness initially agrees to testify prior to refusing to do so."

For appellant Cortorreal: Matthew McGowan, Albany (518) 438-8046
For respondent DOCCS: Deputy Solicitor General Andrea Oser (518) 776-2029

State of New York Court of Appeals

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To be argued Tuesday, September 13, 2016

No. 153 Villar v Howard *(papers sealed)*

While being held in pre-trial detention at the Erie County Correctional Facility in January 2010, Adam Villar was sexually assaulted twice on consecutive days by another inmate in the shower area of the Nova Unit. He brought this personal injury action against Erie County Sheriff Timothy Howard, alleging the sheriff breached his duty to protect Villar from the foreseeable harm of assault by other inmates, that the sheriff had been negligent in training and supervising deputy sheriffs and other employees at the jail, and that he was vicariously liable for the negligence of deputies and other jail employees. Villar said the sheriff was aware of the risks faced by inmates based on a report on an investigation of the jail by the Civil Rights Division of the U.S. Department of Justice (DOJ), which was submitted to the Erie County executive with a copy to Sheriff Howard in July 2009; and on a lawsuit brought by DOJ in September 2009 against the county and Sheriff Howard for failure to remedy the deficiencies cited in the report, including "a failure to protect inmates vulnerable to sexual abuse by other inmates."

Supreme Court granted Howard's motion to dismiss Villar's suit for failure to file a timely notice of claim and failure to state a cause of action. "Plaintiff was required to serve a notice of claim on the County pursuant to [General Municipal] Law § 50-e because his action is solely against an officer of the County and the County is statutorily obligated to indemnify that officer," it said, finding the notice requirement was triggered by a 1985 resolution of the County Legislature in which it agreed to indemnify the sheriff in return for payment of $1. The court also ruled the sheriff was not directly or vicariously liable to Villar, saying, "While it may be the case ... that the sheriff is charged with administering the jail pursuant to [Correction] Law § 500-c, his carrying out that mandate necessitates developing and instituting policies and procedures as well as hiring and training personnel, all ... discretionary activities."

The Appellate Division, Fourth Department modified by reinstating claims alleging the sheriff violated a duty of care to protect Villar from foreseeable harm and that he was negligent in training and supervising deputies. "Service of a notice of claim upon a public corporation is not required for an action against a county officer ... unless the county 'has a statutory obligation to indemnify such person ...' and, here, Erie County has no statutory obligation to indemnify defendant...," it said. "We further conclude that the court erred in determining that defendant owed no duty of care to plaintiff. Pursuant to Correction Law § 500-c, a sheriff has a 'duty to "receive and safely keep" prisoners in the jail....' A sheriff may also be held liable for negligent training and supervision of the deputy sheriffs who worked in the jail.... [T]he issue whether defendant's alleged acts of negligence 'were discretionary and thus immune from liability is a factual question which cannot be determined at the pleading stage'...." It said the sheriff could not be held vicariously liable for the negligence of his deputies.

For appellant Howard: Kenneth R. Kirby, Buffalo (716) 858-2200
For respondent Villar: John T. Loss, Buffalo (716) 852-5533

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To be argued Wednesday, September 14, 2016

No. 154 People v Ronel Joseph

In June 2010, at the Greenleaf Deli on the Upper West Side of Manhattan, a surveillance camera recorded Ronel Joseph as he entered the basement through a pair of cellar doors built into the sidewalk. The deli was on the first floor of a seven-story building, and the six upper floors contained apartments. The basement could be reached only through the sidewalk doors outside the deli, and there was no direct access from the basement to any of the residential floors or to the deli itself. After watching Joseph on a video screen as he looked around the basement with a flashlight, a deli employee went outside and locked the sidewalk doors, trapping Joseph until police arrived to arrest him.

Joseph was charged with second-degree burglary under Penal Law § 140.25(2), burglary of a "dwelling," among other counts. He testified at trial that he went into the basement to retrieve his cell phone after dropping it through the open sidewalk doors. He moved to dismiss the burglary charge on the ground that the isolated basement was not a "dwelling" within the meaning of the statute and that there was no proof he intended to commit a crime. Supreme Court denied his motion. Joseph was convicted of second- and third-degree burglary and lesser charges, and sentenced to seven years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, disagreeing over how to apply the rule restated in People v McCray (23 NY3d 621) that "if a building contains a dwelling, a burglary committed in any part of that building is the burglary of a dwelling; but an exception exists where the building is large and the crime is committed in a place so remote and inaccessible from the living quarters that the special dangers inherent in the burglary of a dwelling do not exist."

The majority in Joseph said, "Although the inaccessibility requirement appears to have been met, the other condition for application of the exception -- namely, that the building in question be 'large' -- has not.... The apartment building in this case cannot be characterized as 'large' within the meaning of McCray. With the residential dwellings located immediately above the store, it cannot be said that there was 'virtually no risk' that the people living in the apartments would not 'even be conscious' of the presence of a burglar who entered the basement through the sidewalk doors (23 NY3d at 627). Thus..., the scenario before us falls within the general rule, not the exception."

The dissenters said "the evidence showed that the basement was entirely sealed off and inaccessible from the residences above," and they argued this was enough to apply the exception to the rule regardless of the building's size. "Here, the burglar was trapped inside a basement vault, which was not connected in any way, internally or externally, with the upper elements of the building.... Consistent with the Court of Appeals' admonition that a conviction for burglary of a dwelling is not authorized where 'the burglar neither comes nor readily can come near to anyone's living quarters' (McCray, 23 NY3d at 628), I would reverse. I would in any event urge the Court to clarify whether the size of the building is a necessary criterion in making the determination as to whether a building constitutes a 'dwelling.'"

For appellant Joseph: Eunice C. Lee, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Diane N. Princ (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, September 14, 2016

No. 155 Justinian Capital SPC v WestLB AG

Justinian Capital SPC is asking the Court to reinstate its breach of contract and fraud claims against WestLB AG, New York Branch, and a related affiliate of a German bank, for alleged misconduct involving mortgage-backed securities. The lower courts dismissed the suit under New York's champerty statute, Judiciary Law § 489(1), which prohibits investors from acquiring debts or securities "with the intent and for the purpose of bringing an action or proceeding thereon." Justinian argues the champerty defense is precluded by the safe harbor provision in Judiciary Law § 489(2), which exempts from the champerty statute the purchase of securities at "an aggregate purchase price of at least five hundred thousand dollars."

West LB was the sponsor and asset manager for Blue Heron VI and VII, which issued notes that were originally purchased by Deutsche Pfandbriefbank AG (DPAG), a German bank that is not a party to this litigation. The Blue Heron companies collapsed in 2007 during the subprime mortgage crisis. DPAG concluded it had viable claims against WestLB for including mortgage-backed securities in its portfolio, but it did not sue WestLB directly because DPAG depended on financing from the German government, which was a part-owner of WestLB. Justinian, a Cayman Islands company with virtually no assets, entered into an agreement to buy the notes from DPAG for $1 million in 2010. Justinian did not actually pay any of the $1 million to DPAG, an event apparently contemplated by the agreement, which provided that DPAG could take the unpaid portion of the sale price out of any recovery obtained from WestLB. The agreement also required Justinian to pay about 85 percent of any recovery on the notes to DPAG and gave DPAG approval power over any settlement with WestLB or sale of the notes to others.

Supreme Court granted WestLB summary judgment dismissing the suit, ruling Justinian's purchase of the notes was champertous. It said, "[I]f the purchase price is not paid -- such as here, where Justinian paid nothing -- the safe harbor does not apply."

The Appellate Division, First Department affirmed. It rejected Justinian's argument that a "promise to pay" at least $500,000 was sufficient to invoke section 489(2), "since this reading would effectively do away with champerty in New York, a doctrine the legislature chose to sustain in 2004, when it voted to adopt the safe harbor provision." Without "actual payment," it said, "plaintiff cannot avail itself of the safe harbor." It also ruled the purchase of the notes "is champertous since DPAG maintained significant rights in the notes and expected the lion's share of any recovery.... There is every indication that [Justinian] entered into the purchase agreement with the intent of pursuing litigation on DPAG's behalf in exchange for a fee; plaintiff's intent was not to enforce the notes on its own behalf...."

Justinian argues its "promise to pay" was sufficient to invoke the safe harbor provision. Section 489(2) "does not state that the money must have changed hands in order for the safe harbor to apply; it merely requires a purchase price of $500,000 per note or series of notes. Furthermore, even if the statute had said that the purchaser must 'pay' $500,000..., it has long been the law that '[t]he word "pay" means to satisfy by other means than cash as well as by cash,' ... including, for example, by promissory note.... [T]he decision below has seriously undermined the Legislature's intent to facilitate New York's role in the trading of distressed debt." It argues its purchase was not champertous because "there is substantial evidence that the assignment did not stir up litigation and that the purpose of the assignment was to enforce a legitimate claim."

For appellant Justinian: James J. Sabella, Manhattan (646) 722-8500
For respondent WestLB: Christopher M. Paparella, Manhattan (212) 837-6000

State of New York Court of Appeals

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To be argued Wednesday, September 14, 2016

No. 156 People v Luis A. Pabon *(papers sealed)*

In November 2012, Luis A. Pabon was indicted on a charge of course of sexual conduct against a child in the first degree for allegedly abusing a Rochester girl in 1998 and 1999, when she was seven years old. The girl first disclosed the abuse in 2012.

Pabon moved to dismiss the indictment as time-barred under CPL 30.10(3)(e), which at the time of the offense provided, "A prosecution for course of sexual conduct in the first degree as defined in [Penal Law § 130.75] ... may be commenced within five years of the commission of the most recent act of sexual conduct." A second provision enacted in the same bill in 1996, CPL 30.10(3)(f), provided, "For purposes of a prosecution involving a sexual offense as defined in [Penal Law article 130] committed against a child less than eighteen years of age..., the period of limitation shall not begin to run until the child has reached the age of eighteen" unless the offense is reported earlier. Pabon argued that only "the specific and more restrictive" five-year limit for course of sexual conduct prosecutions in paragraph (e) applied to him because it "supplanted the broader and more general provisions" of paragraph (f). The prosecutor argued that paragraph (e) established the limitations period for course of sexual conduct prosecutions, and paragraph (f) "is a tolling provision and indicates when the period of limitations set forth in [paragraph (e)] should start to run...."

Supreme Court ruled the indictment was timely. At a bench trial, the court overruled a defense objection to a detective's testimony that Pabon "lied to me" during questioning. Defense counsel said, "He can not reach a conclusion of whether [Pabon is] lying or not.... He is making a judgment which you have to make...." The court replied, "Well, I'm not taking his judgment. I'm listening to his testimony." Pabon was convicted and sentenced to seven years in prison.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, saying the trial court "properly applied CPL 30.10(3)(f), which ... tolls the statute of limitations for sexual offenses committed against a minor until the age of 18...." It said the court erred in allowing the detective to testify that Pabon lied to him, but ruled the error "is harmless because, in a nonjury trial, the court is presumed to be capable of disregarding any improper or unduly prejudicial aspect of the evidence...."

The dissenter argued the indictment was time-barred under the five-year limit in CPL 30.10(3)(e). He said, "[I]f CPL 30.10(3)(f) were applicable to all article 130 offenses," paragraph (e) "would be rendered 'superfluous and ineffective'.... In my view, if the legislature intended the tolling provision of paragraph (f) to apply to course of sexual conduct against a child in the first degree..., it would not have simultaneously enacted paragraph (e), with its specific requirement of a five-year limitation period."

For appellant Pabon: Brian Shiffrin, Rochester (585) 423-8290
For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810

State of New York Court of Appeals

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To be argued Wednesday, September 14, 2016

No. 157 People v Roy S. Kangas

Roy S. Kangas was arrested for drunk driving in the City of Rome in July 2012 after registering a blood alcohol level of 0.19 in a breathalyzer test. To establish a foundation for admission of the blood alcohol evidence at his trial in Rome City Court, the prosecutor submitted, as exhibit 7, an electronic record of analysis of the simulator solution used in the breathalyzer, with a certification digitally signed by a supervisor at the State Police Forensic Identification Center (SPFIC), and, as exhibit 8, calibration and maintenance records for the breathalyzer itself, with certifications from a supervisor at the Division of Criminal Justice Services DCJS. With both exhibits, the prosecutor submitted certifications from the Oneida County Sheriff's Department that the records were made and kept by the Sheriff's Department. Kangas objected that the exhibits were records of state agencies, not the Sheriff's Department; that the certifications by the state agencies were photocopies, nor originals; and that the electronic records from SPFIC did not include an affidavit describing "the manner or method by which tampering or degradation of the reproduction is prevented," as provided in CPLR 4539(b). City Court admitted the exhibits into evidence under the business records exception to the hearsay rule. Kangas was convicted of a misdemeanor count of driving while intoxicated.

On appeal, County Court affirmed. Although both exhibits were improperly certified as business records of the Sheriff's Department, the court said, the records were admissible under CPLR 4518 based on the additional certifications provided by DCJS and SPFIC. It held that CPLR 4539(b), requiring verification that a "reproduction" is tamper-proof, does not apply to the electronic records for the simulator solution because the statute governs the admissibility of records of private entities, not government agencies such as DCJS and SPFIC; and because the statute addresses "'reproductions' of business records that were originally in documentary form," not "electronic records" like those of SPFIC "which were created by electronic means and which contained electronic signatures from the very outset of their existence...."

Kangas argues the electronic records of the simulator solution were improperly admitted because the SPFIC certification "fails to provide any details" about how they were handled to prevent tampering or degradation. State Technology Law § 306 provides that "an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of [CPLR article 45] including, but not limited to [CPLR 4539]," which he says required an affidavit describing how "tampering or degradation of the reproduction is prevented." He says there is nothing in the language of CPLR 4539(b) that would limit its reach to private entities or to images of documents that were originally in hard copy. Kangas also contends both exhibits were improperly admitted based on "false certifications" by the Sheriff's Department and that admission of the DCJS records with photocopied certifications violated the best evidence rule.

For appellant Kangas: Mark C. Curley, Rome (315) 336-1410
For respondent: Oneida County Assistant District Attorney Steven G. Cox (315) 798-5766

State of New York Court of Appeals

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To be argued Wednesday, September 14, 2016

No. 158 Pink v Rome Youth Hockey Association, Inc.

Raymond Pink attended a Bantam hockey game sponsored by the Rome Youth Hockey Association (RYHA) in November 2006, and a fight broke out among spectators as the game ended. When Pink sought to intervene, has was punched in the head by Matthew Ricci, who later pled guilty to third-degree assault. Witnesses gave differing accounts of the temper and conduct of the crowd, with some saying hostilities rose as the game went on. Pink and his wife brought this personal injury action against RYHA, which had rented the arena from the City of Rome, among other defendants.

Supreme Court denied RYHA's motion for summary judgment dismissing the suit, rejecting its argument that the incident was unforeseeable because there had been no prior fights among spectators at its games. The court said Pink "asserts that it was the increase in tensions between [spectators who started the fight] that, essentially, put [RYHA] on notice of [the] need to enforce [its] so-called 'No Tolerance' policy," which provided for removal of "parents/spectators" for "inappropriate" or "destructive" behavior. "[T]here is evidence that tensions between [spectators] were escalating throughout the game and that they may have been warned by a referee to tone things down, thus creating a question of fact as to whether [RYHA] may have violated a duty [it] assumed."

The Appellate Division, Fourth Department affirmed in a 4-1 decision. "[T]here is an issue of fact whether the duty of RYHA to plaintiffs included the duty to protect plaintiffs from Ricci's conduct...," it said. "'Foreseeability ... determines the scope of [a] duty once it is determined to exist' ... and, given the hostile environment in the arena before the fight, there is an issue of fact whether RYHA knew or should have known of the likelihood of the fight.... Here, the tensions in the stands built throughout the game such that we conclude that a trier of fact should determine whether RYHA had a duty to intercede and protect plaintiff...."

The dissenter said, "Here, there is no evidence that there were any prior fights among spectators at a youth hockey game involving teams from RYHA. In fact, plaintiffs have not cited a single instance in New York State history in which a spectator was injured during a fight at a youth hockey game. Thus..., it was not foreseeable that a spectator would be assaulted by another spectator ... and RYHA therefore had no duty to protect plaintiff from being assaulted." Regarding the escalating "tensions in the stands," he said there was no evidence "that any representative from RYHA was in the arena at the time so as to put RYHA on notice that a fight could ensue, and in any event by that time it would have been too late to arrange for security personnel to intervene."

For appellant RYHA: Matthew J. Kelly, Albany (518) 464-1300
For respondent Pink: Andrew W. Kirby, Latham (518) 533-1050

State of New York Court of Appeals

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To be argued Thursday, September 15, 2016

No. 146 Matter of Jamal S. *(papers sealed)*

In August 2012, police stopped Jamal S. and a companion for riding bicycles in the wrong direction on a one-way street in the Bronx and weaving between moving cars. The officers said they intended to issue them summonses for disorderly conduct. Jamal, who told them he was 16 years old, could not be given a summons because he had no identification, so they handcuffed and searched him and took him to the precinct, where he was searched again. No contraband was found. When Jamal admitted he was only 15, one officer called his mother and told her to pick him up in the morning while a second officer took him to the juvenile room and frisked him again. The officer, who later testified he had no reason to expect Jamal "had anything on him," told Jamal to remove his belt, shoelaces and shoes. The officer found a revolver inside his right shoe. The corporation counsel's office filed a juvenile delinquency petition against him for possession of the weapon.

Family Court denied Jamal's motion to suppress the gun after a hearing, at which the officers testified that removal of his shoes was required under the precinct's standard procedure to make sure Jamal had nothing hidden that could be used to harm himself or others. The court said they acted properly in "following standard procedures in place to ensure [his] protection." Jamal was adjudicated a juvenile delinquent and placed on probation for 18 months.

The Appellate Division, First Department reversed on a 3-2 vote, ruling the search of the shoe "was unreasonable as a matter of law." It said, "Considerations of safety provide no justification in this case where Jamal was continuously in police custody and had been searched twice before being directed to remove his shoes. It is of no moment that Jamal was directed to remove his shoes pursuant to an alleged standard procedure.... The standard of reasonableness still applies.... The dissent's suggestion that the search ... was necessary to prevent Jamal from shooting himself or a police officer is inflammatory, and unsupported by the record of events in this case, which began with the detention of a juvenile who did nothing more than ride a bicycle in the wrong direction on a roadway. The dissent's position, if taken to its logical extreme, would call for a full search of any juvenile even temporarily detained in a precinct for any reason. This position finds no support in the Fourth Amendment."

The dissenters said "the State has a significant interest in preserving life and preventing suicidal acts of its detainees..., and the legitimate ends of a detainee safety search are broader than a search incident to a lawful arrest.... [I]t was reasonable, both in scope and manner of execution, for the second officer, who had not participated in [Jamal's] arrest or the prior pat down searches, to ask [him] to remove his shoes as a protective measure before [he] was left by himself in the juvenile room.... [N]either the interest of the juvenile detainee nor the interest of law enforcement ... will be promoted by the establishment of a rule that prohibits the search of a juvenile's shoes in a police station.... Indeed, had the police failed to properly search [Jamal]..., one can only imagine the public outcry had [he] shot himself or harmed an officer with the gun secreted in his shoe."

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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 Thursday, September 15, 2016

No. 159 People v Lyxon Chery

In April 2012, while making an arrest on Amsterdam Avenue in Manhattan, two police officers heard a commotion about a block away and went to the scene in front of a deli. They found Lyxon Chery and the clerk of the deli in an altercation and handcuffed both men until they could determine what was going on. Two witnesses identified the clerk as an employee of the deli, and the clerk said Chery had robbed him of $215, which the officers found in Chery's pocket. When the officers uncuffed the clerk, Chery exclaimed, "[W]hy isn't he going to jail, he kicked my bike, he should be going to jail, too." The officers then arrested Chery and advised him of his Miranda rights.

At trial, the clerk testified that Chery and another man stole his wallet and cash after striking him with a wooden board, choking him, and threatening him with a thin metal object. Chery took the stand and testified that the clerk attacked him with the board after he rebuked the clerk for verbally abusing two female customers. Supreme Court allowed the prosecutor to impeach Chery with the omissions in his pre-Miranda statement that "he kicked my bike, he should be going to jail, too," which made no mention of the clerk harassing women or striking him with a board. The court relied on People v Savage (50 NY2d 673), which held that, when a defendant chooses to make a statement after receiving Miranda warnings, and "when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for the purposes of impeachment." Chery was convicted of first- and second-degree robbery and sentenced to five years in prison.

The Appellate Division, First Department affirmed. "The court properly permitted the prosecution to impeach defendant with omissions from the spontaneous statement he made to the police at the time of his arrest," it said, citing Savage. "Under the circumstances, defendant's failure to make the serious accusations against the victim that defendant made at trial, while only informing the officer of relatively trivial alleged misconduct, was an unnatural omission...."

Chery argues his pre-Miranda statement was improperly used to impeach him at trial because, under Savage, "a defendant may only be impeached with omissions after he receives his Miranda warnings and has an opportunity to narrate the essential facts of the case. Indeed, this Court's most recent decision in People v Williams [25 NY3d 185] reaffirmed this principle and explained that 'absent unusual circumstances, the People may not use a defendant's silence to impeach his or her trial testimony.' Since Mr. Chery's omissions were made to the responding officers at the time of his arrest and before he received his Miranda warnings, there was no time for deliberate calculation that would indicate Mr. Chery's exculpatory testimony at trial was recently fabricated to warrant impeachment." He also argues that the trial court improperly denied his request for a missing witness charge based on the prosecutor's failure to call the arresting officer's partner and that there was insufficient evidence the clerk suffered physical injury.

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For respondent: Manhattan Assistant District Attorney Patricia Curran (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, September 15, 2016

No. 160 People v Herman Bank
No. 161 People v Herman H. Bank

While under the influence of cocaine in May 2007, Herman Bank drove the wrong way on Interstate 590 in Monroe County and collided with another vehicle, killing two people and injuring a third. He was indicted on manslaughter and related charges. His defense attorney told him incorrectly that he would face consecutive sentencing and that he could expect a sentence of no less than 6 to 18 years in a plea bargain. Bank said he would accept no more than 4 to 12 years. His attorney told the prosecutor Bank was not interested in plea negotiations and no offer was made. At trial, defense counsel pursued a defense of not guilty by reason of mental disease or defect and presented, as his only expert witness, a pharmacist who opined that Bank was unable to appreciate the risks of driving while using cocaine due to his bipolar disorder and a possible reaction to a prescription drug that could induce mania in some people with the disorder. The pharmacist said she relied on diagnoses of bipolar disorder in Bank's medical records but, because she was not a psychologist, she could not determine whether he was suffering from the disorder at the time of the accident. Bank was convicted of second-degree manslaughter, first-degree vehicular manslaughter and related charges, and was sentenced to the maximum term of 5 to 15 years.

Bank filed a CPL 440.10 motion to vacate the judgment for ineffective assistance of counsel, arguing his attorney's mistaken advice about consecutive sentencing deprived him of the opportunity to obtain a lesser sentence by plea bargaining. He presented testimony of a veteran public defender who said, even when a prosecutor refused to offer a plea, Monroe County judges were often willing to consider a deal. Bank's prosecutor testified that, due to his history and the strength of the case, she never considered offering a plea. County Court denied the motion.

The Appellate Division, Fourth Department affirmed, saying "The court properly concluded that, based on the circumstances of the crime and the strength of the People's case, the prosecutor would not have offered a plea bargain acceptable to defendant, and that County Court ... would not have agreed to such a plea bargain in any event. Although defendant established at the hearing that defense counsel incorrectly advised him during plea negotiations that he was facing consecutive sentences after conviction," he failed to show this caused him "any prejudice."

On direct appeal, the Fourth Department rejected Bank's claim that he was deprived of effective assistance of counsel by his attorney's pursuit of the mental disease defense and his failure to call a psychiatric expert to establish the defense, saying he "failed to establish 'the absence of strategic or other legitimate explanations.'" Regarding the decision to rely solely on a pharmacist for expert testimony, it said there was no showing "that an additional expert" was likely to disagree with the prosecution's experts, "all of whom opined that defendant was acting under the influence of a cocaine binge rather than a phase of his bipolar disorder."

Bank argues his attorney's advice about consecutive sentencing was entirely wrong -- "Not only were consecutive sentences not mandatory, they were not even an option" -- and caused prejudice by preventing him from engaging in plea negotiations. He argues his attorney was also ineffective in trying to establish a psychiatric defense with expert testimony of a pharmacist, who was "professionally incapable of meeting the defense's burden of proof," thus presenting a defense "which materially aided the prosecution and which had no hope of success."

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For respondent: Monroe County Assistant District Attorney Leah R. Mervine (585) 753-4354

State of New York Court of Appeals

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To be argued Thursday, September 15, 2016

No. 163 Killon v Parrotta

A feud between Stacy Killon and Robert Parrotta came to a head late at night in October 2008 when Killon, apparently intoxicated, made two threatening phone calls to Parrotta at his home in Bolton Landing, and Parrotta drove his pickup 20 miles to Killon's home in Olmstedville to "end the situation," as he later testified. When he arrived, Killon retrieved the handle of a splitting maul from his house and stood on his porch. Parrotta said he pulled a baseball bat from his truck to "level the playing field," and the two men stood at a distance of 30 or 40 feet shouting obscenities at each other while Killon repeatedly pounded the maul handle on the porch deck. Parrotta said he walked toward the house as the men continued shouting and, when he reached the porch, he challenged Killon to drop the maul handle and come down for a fist fight. Killon raised the handle over his head and swung it at Parrotta, who said he believed he was in "jeopardy" and swung his bat at Killon "as hard as I could," striking him in the jaw.

Killon filed this personal injury action against Parrotta, who raised a justification defense. The jury found Parrotta was not the initial aggressor and acted in self-defense. Supreme Court denied Killon's motion to set aside the verdict as against the weight of the evidence.

The Appellate Division, Third Department reversed on a 3-2 vote, set aside the verdict and remitted for a new trial, finding Parrotta was the initial aggressor. "Despite plaintiff's prior threatening phone calls and the evidence that plaintiff was the first of the two to swing his club, there is no dispute that defendant drove to plaintiff's home and then advanced on plaintiff's front porch with a bat in his hand while demanding a fist fight," it said. "Given these circumstances, the jury's conclusion that defendant was not the first to threaten the immediate use of physical force is unreachable on any fair interpretation of the evidence.... Inasmuch as defendant chose to force this encounter, he could have -- and should have -- withdrawn from it long before he reached plaintiff's porch steps."

The dissenters said, "[W]hen we accord due deference to the jury's credibility determinations, [Parrotta's testimony] constitutes viable evidence to support its conclusion that, at the moment that plaintiff raised his arm, defendant actually believed that plaintiff was about to cause him serious physical injury and that a reasonable person in defendant's circumstances could have so believed.... In our view, the fact that defendant went to plaintiff's home, approached the porch holding a bat and invited plaintiff to fist fight with him does not require a finding that defendant was the initial aggressor. The jury was entitled to consider, as it apparently did, that defendant -- in an effort to verbally resolve a problem with plaintiff -- went to plaintiff's home in response to repeated belligerent phone calls..., that plaintiff retrieved the maul handle from inside the house when defendant had no weapon in hand and that plaintiff was the first to actually attempt to use force immediately preceding defendant's use thereof."

At the second trial, Parrotta was found liable. Killon was awarded $525,000 in damages. In this appeal, Parrotta challenges the Appellate Division's ruling that he was the initial aggressor and therefore not entitled to raise a justification defense.

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