

# 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).

## NEW YORK STATE COURT OF APPEALS

### Background Summaries and Attorney Contacts

January 7 thru January 9, 2025

# State of New York Court of Appeals

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To be argued Tuesday, January 7, 2025

## No. 1 **Cuomo v New York State Commission on Ethics and Lobbying in Government**

Former Governor Andrew Cuomo filed this action to challenge the constitutional validity of the State Commission on Ethics and Lobbying in Government (COELIG), which was created in 2022 by enactment of a revised Executive Law § 94 to replace the Joint Commission on Public Ethics (JCOPE) as the enforcer of New York’s ethics and lobbying laws for government officials. COELIG consists of 11 members, five of them nominated by the Governor and other executive branch officials and six of them nominated by leaders of the legislative branch. Prior to appointment, all nominations must be reviewed and approved by the independent review committee (IRC), made up of the deans of the state’s accredited law schools. A COELIG member may only be removed by a majority vote of the other members.

In 2020, JCOPE approved then-Gov. Cuomo’s plans to publish a book about his handling of the COVID pandemic, but it subsequently conducted an investigation into his preparation and publication of the book and charged him with ethics violations. JCOPE was disbanded before resolving the charges, but COELIG elected to proceed with the case against Cuomo. Cuomo then filed this suit against COELIG, contending that the Legislature’s enactment of Executive Law § 94 violated the separation-of-powers doctrine under the State Constitution, which vests executive power in the Governor and provides that the Governor “shall take care that the laws are faithfully executed.”

Supreme Court granted summary judgment to Cuomo, finding that COELIG was exercising “executive power belonging to the executive branch” and declaring Executive Law § 94(10) and (14) unconstitutional.

The Appellate Division, Third Department affirmed, finding that “the Legislature, though well intentioned in its actions, violated the bedrock principles of separation of powers.... Executive Law § 94 revokes the Governor’s enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws. Instead, it places this power into the hands of [COELIG], an entity over which she maintains extremely limited control and oversight, as she appoints a minority of members and has no ability to remove members. Moreover, appointments must be approved by the IRC, an external nongovernmental entity made up of people who are in that position solely by virtue of their employment and do not answer to the populace. As such, Executive Law § 94 creates an agency with executive power, in that it has the authority to investigate and impose penalties for the violation of the ethics laws, while being entirely outside the control of the executive branch. Thus, it usurps the Governor’s power to ensure the faithful execution of the ... ethics laws.”

COELIG argues the separation-of-powers doctrine in New York “is practical, flexible, and permits overlap between the branches of government.” COELIG is constitutional because its “structure is designed to meet a compelling and legitimate institutional need: It ensures that the Commission is sufficiently insulated, both in fact and in appearance, from the political branches it monitors and thereby able to fulfill its mission. And that structure embodies the political branches’ considered judgment as to how to best regulate their own operations and thereby protect their integrity and good name – a judgment that is entitled to respect. Equally important, the Commission’s structure does not allow for the Legislature to usurp the executive power. The Governor agreed to the Commission’s structure and has retained meaningful influence and supervision over the Commission’s composition, funding, and operation. And numerous statutory constraints prevent the Legislature from controlling the Commission.”

For appellant COELIG: Assistant Solicitor General Dustin J. Brockner (518) 776-2017

For respondent Cuomo: Gregory J. Dubinsky, Manhattan (646) 837-5151

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To be argued Tuesday, January 7, 2025

## No. 2 Ezrasons, Inc. v Rudd

Ezrasons, Inc., a New York corporation, filed this shareholder derivative action in Manhattan on behalf of Barclays PLC, an English corporation that is registered to do business in New York, against 46 current and former officers and directors of Barclays who had been convicted or censured for money laundering, conspiracy to manipulate trading and other misconduct between 2008 and 2018, which cost Barclays \$18 billion in fines and sharply reduced the value of its shares. Ezrasons alleged that the defendants violated their fiduciary duties as officers and directors under English Companies Act (ECA) §§ 174 and 178, which governs shareholder derivative actions in England. The defendants moved to dismiss on the ground that Ezrasons lacked standing to bring the suit because it was not a registered “member” of Barclays as required by English law.

Ezrasons argued it had standing under New York law because Business Corporation Law (BCL) § 1319 overrides the common-law “internal affairs” doctrine, which otherwise “provides that relationships between a company and its directors and shareholders are generally governed by the substantive law of the jurisdiction of incorporation,” while “procedural rules are governed by the law of the forum” (Davis v Scottish Re Group Ltd. [30 NY3d 247]). BCL § 626(a) states, “An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates.” BCL § 1319 clarifies that section 626 “shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders.”

Supreme Court dismissed the suit, ruling that BCL § 1319 did not override the internal affairs doctrine because it “is a mere statutory predicate to jurisdiction.” It found the ECA’s membership requirement for standing is a substantive rule that Ezrasons failed to meet.

The Appellate Division, First Department affirmed, saying the internal affairs doctrine “has been consistently invoked by this Court in derivative actions to apply foreign law on substantive issues, including those affecting a party’s right to sue.” It said BCL § 1319 “merely confers jurisdiction upon New York courts over derivative suits on behalf of a foreign corporation” and “does not require application of New York law in such suits” nor override the internal affairs doctrine.

Ezrasons argues that the plain text and legislative history of BCL § 1319 demonstrate the Legislature’s intent to override the internal affairs doctrine and “apply New York’s gatekeeping rules governing derivative actions to foreign corporations doing business in New York.” It says the “common-law doctrine must give way to a statutory directive.” Ezrasons also argues that it has standing under New York law because the English statute’s membership requirement is procedural, not substantive, and the lower courts’ contrary conclusion conflicts with Davis v Scottish Re.

For appellant Ezrasons: Francis A. Bottini, Jr., LaJolla, CA (858) 914-2001

For respondents Rudd et al (defendant officers): Lara A. Flath, Manhattan (212) 735-3000

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To be argued Tuesday, January 7, 2025

## **No. 3 Haussmann v Baumann**

Rebecca Haussmann and another shareholder of the German company Bayer AG filed this derivative action on its behalf in Manhattan, alleging breach of fiduciary duty by its directors and two New York investment banks involved in Bayer's \$66 billion purchase of Monsanto Inc. in 2018. The acquisition, which was negotiated, financed, and closed in New York, resulted in Bayer taking on Monsanto's extensive liability for products posing a risk to human health and led to a decline in Bayer's stock value. The plaintiffs alleged that the defendants violated their fiduciary duties under the German Stock Corporation Act (GSCA) by failing to conduct due diligence on the purchase in order to enrich themselves.

The defendants moved to dismiss for lack of standing and other grounds, arguing that the plaintiffs lacked standing under German law because they did not satisfy the GSCA's requirement that they obtain permission to sue from the regional court in Leverkusen, Germany, where Bayer AG is headquartered. The plaintiffs argued they had standing under New York law because Business Corporation Law (BCL) § 1319 overrides the internal affairs doctrine, which provides that relations between a company and its shareholders are generally governed by the substantive law of the jurisdiction where it was incorporated, while procedural rules are governed by the law of the forum where the suit was brought. BCL § 626 would give plaintiffs standing as shareholders without court permission, and BCL § 1319 provides that section 626 "shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders." The plaintiffs also argued that the GSCA provision requiring court permission to sue is procedural, not substantive, and thus requires courts to apply New York law on the issue of standing.

Supreme Court dismissed the suit, finding the plaintiffs lacked standing under German law. "As Bayer rightfully asserts, the internal affairs doctrine requires application of German law to determine whether the Plaintiffs have standing to bring this derivative suit."

The Appellate Division, First Department affirmed, saying "we agree with Supreme Court that the internal affairs doctrine applies to this shareholder derivative action on behalf of a foreign corporation to make applicable relevant substantive German laws. Furthermore, we agree with Supreme Court's implicit finding that the German Stock Corporation Act § 148 is a substantive law rather than a procedural one and requires plaintiffs to seek leave from the German court to bring a derivative action."

For appellants Haussmann et al: Francis A. Bottini, Jr., LaJolla, CA (858) 914-2001  
For respondents Baumann et al: William Savitt, Manhattan (212) 403-1000

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To be argued Tuesday, January 7, 2025

## No. 4 Albert Behler v Kai-Shing Tao

Albert Behler brought this breach of contract action against Kai-Shing Tao, a longtime friend who controlled a publicly traded company, Remark Holdings Inc., and Digipac LLC, a vehicle he used to route investments by friends and family to Remark. In 2012, the two men entered into an oral contract (the exit opportunity agreement) in which Behler agreed to invest \$3 million in Remark through Digipac on the condition that Tao would cash out his investment after five years – in November 2017. Behler acquired a 24.14% stake in Digipac with his investment. Tao acknowledged the cash-out deadline at a meeting with Behler in June 2017, but failed to cash out his shares, then valued at \$11.6 million. Tao admitted his breach of the exit opportunity agreement when Behler confronted him in January 2018, and Behler then filed this suit.

Tao moved to dismiss, arguing that his oral exit agreement with Behler had been superceded by an amendment to Digipac’s LLC agreement that he unilaterally drafted and executed in 2014. The original LLC agreement designated Tao as the “Sole Member” of Digipac, gave him exclusive discretion to make distributions, and provided that the agreement “may be amended only in a writing signed by the Sole Member.” The amended LLC agreement made no mention of an automatic exit opportunity for Behler of any other member. Its merger clause states that it “constitutes the sole and entire agreement of the parties ... and supercedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral. The original and amended LLC agreements say they are governed by Delaware law.

Supreme Court dismissed Behler’s suit and the Appellate Division, First Department affirmed in a 3-2 decision. The majority said the primary question is whether, under Delaware law, “a parties’ oral side agreement to repurchase shares survived the subsequent amendment of the LLC agreement concerning the same subject matter, and whether the contesting party’s ‘acknowledgment’ of the existence of the side agreement subsequent to the execution of the amended LLC agreement had any legal import. We hold that the oral side agreement did not survive the amendment of the LLC agreement, which contains a merger clause and has provisions at odds with the side agreement; and that any so-called acknowledgment of the oral side agreement did not work as an estoppel or otherwise alter the calculus.”

The dissenters said, “The fundamental issue in this case is whether a manager of an LLC may persuade a friend to invest in his LLC by orally promising the friend a guaranteed exit opportunity at a specific time and price, and then, with total impunity, amend the LLC’s operating agreement unilaterally, by, among other things, including a merger provision which he now contends nullifies their oral agreement, relieves him of all obligations under it, and deprives his friend of all legal remedies, even though nothing in the amended operating agreement is inconsistent with Tao’s obligations to perform under the oral agreement. As stated, it is clear that the answer must be no. Yet that is just ... what the majority would have this court do, in violation of basic principles of contract law and fundamental fairness.”

For appellant Behler: Jesse T. Conan, Manhattan (212) 888-3033

For respondent Tao: Kerrin Klein, Manhattan (212) 451-2300

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To be argued Tuesday, January 7, 2025

## No. 5 People v Charles Howard

Charles Howard was charged with first-degree robbery and lesser crimes for stealing a wallet from a sleeping subway passenger, Guztavo Herrera, at the Stillwell Avenue subway station in Brooklyn in November 2017. Herrera told the arresting officer that, when he woke up in his seat, he found his coat pocket had been cut open, his wallet removed, and he saw Howard drop the wallet and run. At trial 18 months later, Herrera testified that when he awoke, he found Howard had been trying to open his pocket with a box cutter and was standing in front of him demanding his property. Herrera handed his wallet and cell phone to Howard, who took cash and a MetroCard from the wallet and handed them back, and then fled. The arresting officer, on cross-examination, repeated Herrera's initial, conflicting account of the crime. The prosecutor did not present any testimony addressing the discrepancies between Herrera's initial statement and his trial testimony. Howard moved for a trial order of dismissal, arguing that Herrera's initial statement to the police would only support a charge of larceny, not forcible theft. The court denied the motion and Howard was convicted of first-degree robbery. He was sentenced to ten years in prison.

The Appellate Division, Second Department affirmed, saying "the evidence established that the complainant ... awoke to find that the defendant was cutting or had cut his pocket with a box cutter in order to steal his wallet. After the complainant awoke, the defendant did not flee. The defendant did not hold the box cutter at his side or put it in his pocket. Rather, the defendant continued to brandish the box cutter, holding it out while demanding that the complainant give the defendant what he had. The defendant testified that he, in fact, feared that the defendant would cut him.... [T]his evidence, and the reasonable inferences to be drawn therefrom, established, beyond a reasonable doubt, that the defendant did not merely possess the box cutter while committing a larceny, but, rather, that he forcibly stole property while threatening to use the box cutter." The court did not address the discrepancies between Herrera's two accounts of the crime.

Howard argues that his conviction should be reversed under People v Jackson (65 NY2d 265), which held, "When all of the evidence of guilt comes from a single prosecution witness who gives irreconcilable testimony pointing both to guilt and innocence, the jury is left without basis, other than impermissible speculation, for the determination of either" and "the reasonable doubt standard has not been met." Howard says the evidence against him "was insufficient under the Jackson 'sole witness rule' because the only evidence defendant committed robbery, rather than larceny, was the trial testimony of ...Herrera, and that testimony was contradicted by the statement Herrera gave to the police on the day of the crime, which described conduct that was only larceny and not robbery. There is an exception to the Jackson rule for cases in which the evidences provide jurors with "an objective, rational basis" for resolving a witness's contradictory versions of events beyond a reasonable doubt, but Howard says, "There is no explanation in this record for the conflict in Herrera's 'versions of events.'"

For appellant Howard: Howard B. Comet, Manhattan (212) 310-8000

For respondent: Brooklyn Assistant District Attorney Jordan Cerruti (718) 250-2792

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To be argued Wednesday, January 8, 2025

## No. 6 Matter of Oceanview Home for Adults, Inc. v Zucker

In 2013, the State Department of Health (DOH) adopted regulations to promote the deinstitutionalization of persons with mental disabilities in compliance with the U.S. Supreme Court's 1999 decision in Olmstead v L.C. (527 US 581), which held that "unjustified institutional isolation of persons with disabilities is a form of discrimination" that violates title II of the Americans with Disabilities Act (ADA). The regulations were also meant to implement a Federal Court settlement of litigation against New York requiring the state to provide greater opportunities for mentally ill residents of large adult care facilities to move into community-based housing. The regulations set an admissions cap for large "transitional" adult homes, defined as facilities with 80 or more beds and where at least 25% of the residents have serious mental illness, prohibiting them from admitting anyone who would increase their percentage of mentally ill residents above 25%.

Oceanview Home for Adults, a large, privately-owned adult care home, brought this action to challenge the regulations in 2016, after DOH Commissioner Howard Zucker upheld a citation finding Oceanview in violation of the admissions cap. More than 90% of its residents had a serious mental illness in 2013, a share that dropped to about 47% by 2019. Oceanview contended, among other things, that the admissions cap violated the federal Fair Housing Act (FHA) by discriminating in housing against persons with mental illness.

Supreme Court enjoined enforcement of the admissions cap and related provisions, finding they violated and were preempted by the FHA. It rejected DOH's argument that the cap, rather than discriminating against the mentally ill, furthered the integration mandate of Olmstead by diverting them from institutions into community settings more conducive to their recovery. The court ruled the regulations are "not necessary for compliance with Olmstead, nor are they narrowly tailored to suit individuals' particular needs" and that less discriminatory alternatives were available to promote the goal of integration.

The Appellate Division, Third Department reversed and declared the regulations valid under the FHA. It agreed the regulations "are discriminatory on their face – regardless of their remedial purpose," but said Supreme Court erred in applying the "least restrictive alternative" test to determine their validity under the FHA. The proper standard is whether the discriminatory housing restriction "benefits the protected class" and is "narrowly tailored to effectuate the beneficial purpose," it said. The regulations "are narrowly tailored to implement the integration mandate of" the ADA because the admissions cap "applies only to people with a *serious* mental illness" and, thus, "is specifically tailored to the very individuals who are the subject of the integration mandate;" "the regulations apply solely to a subcategory of large adult homes" with higher populations of the mentally ill; "once the mental health census of a transitional adult home has been sufficiently reduced below the cap, the facility may resume accepting residents with serious mental illness;" and a waiver permits facilities to readmit previous residents even if they exceed the 25% limit.

For appellant Oceanview: Michael Hawrylchak, Albany (518) 462-5601

For respondent Zucker (DOH): Gary J. Malone, Manhattan (212) 350-2700

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To be argued Wednesday, January 8, 2025

## No. 7 Weisbrod-Moore v Cayuga County

The plaintiff brought this negligence action against Cayuga County under the Child Victims Act in 2021, alleging that the County placed her in a foster home in 1974, when she was three months old, and that she was sexually and physically abused there by her foster father from 1975 to 1982. She claimed the County was negligent in choosing her foster parents and in failing to properly supervise the foster home in which it placed her.

The County moved to dismiss the suit on the ground, among others, that it had immunity because it was acting in a governmental capacity and the plaintiff failed to allege that it had assumed a special duty to her beyond its obligations to the general public and that she did not claim she had relied on any promises by the county to act on her behalf. The plaintiff responded that municipalities have assumed a special duty to protect foster children who are in their legal custody.

Supreme Court denied the County's motion, finding the plaintiff's claims were not barred by governmental immunity. It relied on the Appellate Division, First Department's decision in Sean M. v City of New York (20 AD3d 146), which said, "The weight of appellate authority in this state does not recognize governmental immunity where recovery is predicated on negligence in the supervision of care provided by foster parents to a child placed in their custody. This court agrees that liability may be imposed upon a state or its subdivisions for injuries sustained by children due to negligent oversight of the foster homes that care for them."

The Appellate Division, Fourth Department reversed and dismissed the suit. Because "the County was acting in a governmental capacity in administering the foster care system ... and supervising plaintiff's foster care," the plaintiff was required to show that the County breached a special duty owed to her, it said. The court concluded that the plaintiff "cannot establish the requisite special relationship between the parties based upon the County's alleged voluntary assumption of a duty that generated justifiable reliance on her part," which required her to show "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act" on her behalf; "(2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking."

The plaintiff argues the special duty requirement was satisfied by the fact that she was in the custody of the County. "As a matter of law, a governmental entity that assumes custody of a foster child undertakes a positive duty to advance the child's health, safety, and well-being. This duty imposes a 'supervisory mandate' on the governmental entity having custody to act affirmatively, and without negligence, in placing the foster child and supervising the placement," she argues, saying the custodial agency "assumes the role of 'substitute parent'.... The negligent breach of this duty ... causing foreseeable injuries to the child can result in liability."

For appellant Weisbrod-Moore: Jeffrey Herman, Manhattan (212) 390-0100

For respondent Cayuga County: Matthew J. Larkin, Syracuse (315) 425-2805

For amicus New York City: Assistant Corporation Counsel Philip W. Young (212) 356-2375

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To be argued Wednesday, January 8, 2025

## No. 8 People v Divine Fredericks

Divine Fredericks was accused of shooting two men sitting in a car in the Bronx, killing Tyreek Simmons and severely wounding the other man, after all three spent a night together drinking at a club in June 2017. Dissatisfied with his assigned counsel, Fredericks wrote a letter to the court asking for the appointment of new counsel. He complained that his attorney “is not working in my best interest,” refused to meet with him “even via Video,” hung up on him when Fredericks called, and was needlessly delaying the case, among other things.

Supreme Court treated the letter as a pro se motion and showed it to defense counsel, who responded, “Well, I’m opposing ... that. I want to put on the record ... that ... sometimes you want to shoot the messenger ... because you don’t like the message. I, and my investigator..., have gone over this stuff with Mr. Fredericks any number of times. And we have gone through everything and Mr. Fredericks just doesn’t like what I have to tell him. I’m required to give him an honest assessment of the case.” The court asked Fredericks if he wanted to hire a private attorney and he said he didn’t have the money, “but I do want another attorney.” The court denied the motion, saying, “The State is paying for this attorney. This is a highly confident and experienced attorney. So your request for a new attorney by the state is denied. If you come into funds and hire your own attorney, you are free to do that.” Fredericks was convicted of second-degree murder, attempted murder and weapon possession, and sentenced to 45 years in prison.

The Appellate Division, First Department affirmed, finding that Fredericks received effective assistance of counsel and that the court “providently exercised its discretion” in denying his request for new counsel without a hearing. “Defendant ‘failed to proffer specific allegations of a seemingly serious request that would require the court to engage in a minimal inquiry’...,” it said. “Defendant expressed only a generalized and conclusory complaint about counsel’s representation, and this complaint did not require an inquiry under all the circumstances. In addition, counsel did not argue that defendant’s motion lacked merit, but ‘merely [outlined] his efforts on his client’s behalf.’”

Fredericks argues, in part, that his assigned counsel opposed his motion for new counsel and, “[w]ithout any question posed by the court, he then stated that ‘Mr. Fredericks just doesn’t like what I have to tell him’ and was thus ‘shoot[ing] the messenger.’” The court did not ask Mr. Fredericks a single question to elaborate on his request for new counsel, not even after his lawyer opposed the motion and expressed that it lacked merit. The court’s failure to conduct a minimal inquiry warrants reversal. Mr. Fredericks’ convictions should also be reversed and a new trial ordered because, by opposing and opining that Mr. Fredericks’ motion lacked merit, counsel took a position adverse to his client, depriving him of the right to counsel and creating a conflict of interest.”

For appellant Fredericks: V. Marika Meis, Manhattan (212) 577-2523

For respondent: Bronx Assistant District Attorney Nicole Neckles (718) 838-6150

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To be argued Wednesday, January 8, 2025

## No. 9 People v Mitchell Hernandez

This appeal raises two primary questions: whether time spent incarcerated before sentencing on a prior conviction extends the 10-year look-back period for determining whether a defendant is a persistent violent felony offender under Penal Law § 70.04(1)(b)(iv)(v); and whether the U.S. Supreme Court’s recent decision in Erlinger v United States (602 US 821) requires that facts necessary to apply the tolling provisions of New York’s predicate felony statutes must be determined by a jury rather than a judge.

Mitchell Hernandez was convicted of first-degree robbery and related crimes for robbing a convenience store at gunpoint on Manhattan’s Lower East Side in March 2015. He was sentenced to 20 years to life in prison as a persistent violent felony offender based on his two prior violent felony convictions for second-degree robbery in 1991 and for first-degree robbery and burglary in 1997. For the earlier offense, which was committed in March 1990, he was incarcerated beginning in January 1991, nine months prior to his sentencing in October 1991.

For a prior conviction to serve as a predicate violent felony, Penal Law § 70.04(1)(b) provides in (iv) that “sentence must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted;” and states in (v) that to calculate that ten-year span, “any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration.”

Although Hernandez had been at liberty for 10.4 years between his 1991 sentence and his commission of the 2015 crime, Supreme Court determined that his nine months of presentence incarceration in 1991 qualified that offense as a predicate offense under “the plain language of the statute.” The Appellate Division, First Department affirmed, implicitly rejecting his claim that the trial court misinterpreted Penal Law 70.04 to improperly penalize defendants who go to trial, and spend time in pre-trial detention, by making them more likely to be deemed persistent violent felony offenders than those who plead guilty and are sentenced more quickly.

With his appeal pending here, the U.S. Supreme Court issued its decision in Erlinger on June 21, 2024, holding that facts necessary to increase the penalty for a crime beyond the statutory maximum must be proven beyond a reasonable doubt before a jury. Hernandez says Erlinger “makes clear that the trial court’s application of the enhanced sentencing framework violated [his] right to a trial by jury” because he “simply would not have received an indeterminate life sentence without unconstitutional, judge-found facts” needed to toll the 10-year limitation for predicate felonies in Penal Law 70.04. The New York Attorney General has intervened to defend the constitutionality of the state’s sentencing scheme for second and persistent felony offenders.

For appellant Hernandez: Amit Jain, Manhattan (212) 763-0883

For respondent Manhattan D.A.: Appeals Division Chief Steven C. Wu (212) 335-9000

Intervenor Attorney General: Solicitor General Barbara D. Underwood (212) 416-6037

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## No. 10 People v Raymond Williams

In January 2017, Raymond Williams entered the CVS store at 300 Park Avenue South in Manhattan, took two cans of Red Bull from a display at the rear of the store, then walked back toward the front. He was confronted there by the store manager, who was aware that Williams had been issued a trespass notice four months earlier after he allegedly attempted to steal 23 bottles of nail polish and eyeshadow from a different CVS store in Manhattan. The notice, which Williams signed, informed him that he was barred from entering any CVS property in the future and warned that if he did enter he would be arrested for trespassing. The store manager asked him to leave and, after handing over the Red Bull cans, he left the store.

Williams was arrested a month later and indicted on a charge of third-degree burglary, alleging that he knowingly entered the Park Avenue CVS unlawfully with the intent to commit a crime. At his jury trial, Supreme Court denied his motion to dismiss the burglary charge for insufficient evidence. He was convicted as charged and sentenced to 3½ to 7 years in prison.

The Appellate Division, First Department affirmed in a 3-2 decision, finding that the trespass notice established Williams' knowledge that his entering the store was unlawful and that surveillance and other evidence "supported the jury's finding that defendant entered CVS with the intent to commit a crime." The video "shows defendant walking past the CVS store while looking inside, and then returning a few seconds later and entering the store. This conduct was consistent with defendant surveying the store to determine whether he should go in and take property or whether anyone might recognize him as a prohibited customer. Defendant's arguably furtive behavior continued after he entered the store. As he walked down aisle nine" toward the Red Bull cooler, "he looked over his shoulder several times, conduct which the jury could certainly find was consistent with trying to make sure that he was not being watched.... We disagree with the dissent that the surveillance video supports a reasonable inference that defendant was planning to purchase the two cans of Red Bull because he has 'what appears to be cash' in his hand.... Defendant never indicated that he intended to buy the two cans of Red Bull or made any effort to pay for them."

The dissenters argued the evidence of criminal intent was insufficient and "susceptible to an innocent explanation" that Williams entered the store to buy Red Bull. "The video shows defendant entering the store holding a plastic bag in his left hand and what appears to be cash in his right hand.... That the video shows him looking over his shoulder once as he walks to the rear of aisle nine is not conduct indicative of guilt." When he took the Red Bull from the cooler and returned to the front of the store, "with the cans visibly in each hand," the dissenters said he did not try to conceal them. "The video ... shows that he went past the exit doors and stood next to the cashier and self-checkout register when he was confronted by the manager who took the two Red Bull cans from his hands. Because his actions were susceptible to a reasonably innocent explanation, the verdict was not supported by legally sufficient evidence."

For appellant Williams: Ayushe Misra, Manhattan (212) 225-2000

For respondent: Manhattan Assistant District Attorney Anna Notchick (212) 335-9000

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To be argued Thursday, January 9, 2025

## No. 11 People v Juan Silva Santos

Juan Silva Santos was arrested with four accomplices for drug trafficking in October 2018 after state and local investigators recovered about 50 pounds of heroin and fentanyl in raids on stash houses in the Bronx and Yonkers and, from Silva Santos's apartment in Yonkers, a ledger recording more than \$6 million in drug transactions. He was indicted on class A-1 felony counts of operating as a major trafficker (Penal Law 220.77) and first-degree possession of a controlled substance, along with lesser drug-related charges. The major trafficker charges carried a statutory minimum sentence of 15 years to life in prison if convicted.

In 2021, Silva Santos accepted a prosecution plea offer in which he pled guilty to third-degree possession of a controlled substance in exchange for a sentence of nine years in prison. As a condition of the plea, he was required to "waive participation in the Shock Incarceration Program" and "agree not to apply for participation in the Program at any time during my incarceration with the New York State Department of Corrections and Community Supervision [DOCCS]." Shock is a six-month program of intensive regimentation and rehabilitation, and inmates who successfully complete it become eligible for early release. Individuals convicted of A-1 felonies are not eligible for Shock and others must apply and be approved for the program by DOCCS when they have three years or less remaining on their sentences.

At his sentencing, Silva Santos asked Supreme Court to include "a shock program or something" in his sentence. The court declined, saying, "Unfortunately, this was an offer made by the People" and a condition of the offer "was that you waive shock. And so, I cannot offer you a program at this time. I wish I could, but I can't."

The Appellate Division, First Department affirmed, saying his "claim that waiver of his right to participate in, and apply to, the shock incarceration program runs afoul of public policy and infringes upon [DOCCS'] statutorily authorized role in determining conditions of confinement is unavailing. Here, the record indicates that he voluntarily, knowingly, and intelligently waived this right."

Silva Santos contends his "sentence was illegal because it contained an unauthorized component: preclusion from Shock. Correction Law § 867 only provides DOCCS with the authority to determine Shock placement and it details the process for DOCCS to determine candidate selection. While the Drug Law Reform Act (DLRA) allows a trial-level court to order enrollment in Shock..., it does not give courts the power to prohibit access to Shock. The Legislature's expressed purpose was to enroll more Shock participants via the DLRA by expanding eligibility and allowing courts to directly sentence participants into the program."

The prosecution argues Silva Santos' waiver of Shock "comported with the statutory scheme" because the Legislature "made clear that the decision to apply for Shock ... belongs to an eligible inmate, not to DOCCS or the sentencing court." Thus, it is the defendant's choice whether to waive the opportunity to apply. Since the original A-1 felony charges would have made Silva Santos ineligible for Shock, the prosecution says "the significant sentence reduction [he] obtained by signing the shock waiver" made his decision "fair and reasonable."

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For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (212) 335-9000

# 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 Thursday, January 9, 2025

## **No. 12 Matter of NYP Holdings, Inc. v New York City Police Department**

The Police Benevolent Association of the City of New York (PBA) is appealing an order that would compel the New York City Police Department to disclose disciplinary records of police officers under the Freedom of Information Law (FOIL). The FOIL requests for records of 144 NYPD officers were filed by New York Post reporter Craig McCarthy in June 2020 after the Legislature repealed Civil Rights Law § 50-a, which had shielded from disclosure “all personnel records used to evaluate performance toward continued employment or promotion” of police officers since 1976. When the NYPD denied access to all but one officer’s records on various grounds, the Post’s publisher NYP Holdings filed this suit to compel disclosure. The PBA intervened to assert a new defense that the repeal of section 50-a did not apply retroactively to disciplinary records created prior to June 12, 2020, the date of the repeal, and that such records remained confidential. The NYPD took “no position” on the PBA’s retroactivity argument.

Supreme Court granted the Post’s petition to compel disclosure, finding “the NYPD failed to sufficiently justify its claim that the requested documents are so burdensome as to constitute a basis to deny petitioners’ FOIL requests.” It did not address the merits of the PBA’s argument that the repeal did not apply retroactively, saying it “would be wholly inappropriate ... to permit an intervenor to raise arguments not asserted by the agency.”

The Appellate Division, First Department affirmed and, further, held that the repeal of section 50-a applies retroactively to records created prior to the repeal. “While ‘the legislature made no express statement in the repeal itself, or in the limited legislative history..., as to whether the repeal was to be applied retroactively’..., the repeal ‘went into effect immediately and, by its plain reading and intent, applies to records then existing and not simply to records created’ subsequently, it said. “The legislative history clarifies that the legislature ‘conveyed a sense of urgency’ and intended for the legislation to be remedial...,” which “should be given retroactive effect in order to effectuate its beneficial purpose.” It said, “PBA’s position ... would run counter to the clear legislative purpose of providing public access to records that may contain information about actual or alleged police misconduct.”

The PBA argues, “The First Department violated New York’s strong presumption against retroactivity by writing retroactivity into the repeal of [section] 50-a where the legislature was silent.” “Retroactive application of the repeal of [ ] 50-a creates the fundamentally unfair result of exposing long-closed, confidential disciplinary records to disclosure only after officers made decisions based on the promise of confidentiality,” it says. The First Department “wrote retroactivity into the repeal ... because the court, without explanation, labeled the repeal as ‘remedial,’ which is not sufficient to imply retroactivity “since virtually any legislation can be labeled as such.... [A]s this Court recently confirmed, the repeal of legislation after decades of consistent interpretation is not remedial and, in fact, indicates a prospective change.”

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For respondents NYP Holdings and McCarthy: Jeremy A. Chase, Manhattan (212) 489-8230

# State of New York Court of Appeals

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To be argued Thursday, January 9, 2025

## **No.13 Matter of New York Civil Liberties Union v City of Rochester**

The City of Rochester and its Police Department are appealing an order requiring them to disclose, under the Freedom of Information Law (FOIL), disciplinary records of unsubstantiated complaints against police officers. In June 2020, the Legislature repealed Civil Rights Law § 50-a, which had shielded police disciplinary records from disclosure since 1976. Among other amendments enacted at the same time, the Legislature amended Public Officers Law § 86(7) to define “law enforcement disciplinary proceeding,” records of which must be disclosed, as “the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.” In September 2020, as part of its review of police accountability procedures in more than a dozen jurisdictions around the state, the New York Civil Liberties Union (NYCLU) filed a FOIL request for all civilian complaints against Rochester police offices, investigative reports, and related disciplinary records dating back to Jan. 1, 2000. In February 2021, Rochester disclosed substantiated disciplinary records for 117 active police officers dated between 1986 and 2021. It refused to disclose unsubstantiated complaints on two grounds: that complaints which did not result in a hearing or disciplinary action were not records of a “law enforcement disciplinary proceeding” as newly defined in FOIL; and that disclosure of unsubstantiated complaints would constitute an unwarranted invasion of personal privacy, an exception to disclosure under FOIL.

Supreme Court denied the NYCLU’s petition for disclosure of unsubstantiated claims, saying the repeal of Civil Rights Law § 50-a “does not require a law enforcement agency to disclose ‘unsubstantiated and unfounded complaints against an officer’ where such agency determines that disclosure of the complaint would constitute an unwarranted invasion of personal privacy.... [T]he public’s interest in the release of the documents related to unsubstantiated [claims] does not outweigh the privacy concerns of individual officers.”

The Appellate Division, Fourth Department reversed on that issue and ordered disclosure of unsubstantiated complaints, subject to redactions permitted by FOIL. It said FOIL’s privacy exemption does not “create a blanket exemption allowing [the City] to categorically withhold the law enforcement disciplinary records” of unsubstantiated claims. The court relied on its decision issued the same day in a companion case, M/O New York Civil Liberties Union v City of Syracuse (210 AD3d 1401), which held, “In order to invoke the personal privacy exemption ... [the] respondents must review each record responsive to petitioner’s FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy.”

Rochester argues that records concerning unsubstantiated complaints are not subject to FOIL because they do not relate to a “law enforcement disciplinary proceeding” as defined in Public Officers Law § 86(7) since unverified complaints do not result in any “hearing or disciplinary action.” The lower courts did not address this issue. In any case, the City contends, the release of records of unverified or unfounded complaints would be “an unwarranted invasion of personal privacy,” making them exempt from disclosure under FOIL.

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For respondent NYCLU: Robert Hodgson, Manhattan (212) 607-3300