State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

September 8 thru 10, 2020

State of New York
Court of Appeals

To be argued Tuesday, September 8, 2020 (arguments begin at 2 pm)

No. 48 People v Edward Hardy

On January 25, 2015, Edward Hardy was arrested on charges of second-degree contempt and harassment based on allegations that he entered the home of his estranged wife in Queens "and began to yell and curse" at her in violation of a "stay away" order of protection that was to expire on September 9, 2015. In the misdemeanor complaint, the arresting officer said the incident occurred on "October 25, 2015." The officer dated the complaint "January 25, 2014."

At a plea proceeding in Criminal Court five days later, on January 30, 2015, defense counsel objected that the complaint was deficient because it alleged the crime occurred on "October 25, 2015," a date that was yet to occur and would come after the order of protection expired. The court said, "Well, that's clearly a typographical error which the People can move to amend at any time." The prosecutor moved to amend the date of occurrence to "January 25, 2015." The court granted the motion "since it's a matter as to date, time or place." At the same proceeding, Hardy waived his right to be prosecuted by information and pled guilty to second-degree criminal contempt in return for a sentence of 90 days in jail.

The Appellate Term for the 2nd, 11th & 13th Judicial Districts affirmed, finding the amended date was authorized under People v Easton (307 NY 336 [1954]). In Easton, the Court of Appeals upheld an order allowing a prosecutor to amend the date of a drunk driving incident alleged in an information from 1953 to 1952, saying that to "sustain the reversal of the conviction and hold impermissible an amendment made solely to correct an obvious typographical error in the information – a date not yet come – would be to exalt form over substance, to enthrone technicality purely for its own sake." Although Easton was decided before the Criminal Procedure Law was enacted, the Appellate Term held that, "notwithstanding the fact that CPL 100.45 does not authorize factual amendments of informations and complaints, the common-law rule of Easton still governs, and, thus, courts retain the inherent authority to permit factual amendments to these types of instruments pursuant to the guidelines set forth in Easton." It further found that amending the incident date from "October" to "January" in this case was permissible under Easton "since it caused 'no surprise or prejudice' ... but, rather, was designed to correct what was clearly a typographical error of which defendant should have been aware."

Hardy argues, "Because the plain language of [CPL 100.45] and the legislative history demonstrate the Legislature's intent to preclude factual amendment of informations and misdemeanor complaints, the prosecutor's amendment of the incident date here was impermissible and the accusatory instrument was facially insufficient." He says Easton "is no longer good law;" and "allowing unverified factual amendments to informations and misdemeanor complaints would defeat the purpose of the verification and reasonable cause requirements of the Criminal Procedure Law."

For appellant Hardy: Ronald Zapata, Manhattan (212) 693-0085 ext. 257
For respondent: Queens Assistant District Attorney Edward D. Saslaw (718) 286-5882

State of New York
Court of Appeals

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To be argued Tuesday, September 8, 2020 (arguments begin at 2 pm)

No. 49 Matter of Marian T. (Lauren R.)

Marian T., a woman with profound intellectual disabilities and extremely limited verbal ability, was 61 years old and had been living for 12 years in a licensed family care home in Worcester, Otsego County, when the married couple that operate the home, Lauren M. and Gregg H. (petitioners), commenced this proceeding to adopt her in 2015. Marian had no known living relatives. Surrogate's Court appointed Mental Hygiene Legal Service (MHLS) to represent Marian and ordered a psychological evaluation to determine her capacity to consent to the adoption. Two psychologists agreed her mental disabilities were profound and she was largely nonverbal, but they split on whether she understood what it meant to be adopted and had the capacity to consent. The court also appointed a guardian ad litem for Marian, who concluded the adoption was in her best interests and should be approved.

A key issue in the proceeding was whether Marian's consent was required by Domestic Relations Law § 111(1)(a), which provides that "consent to adoption shall be required ... [o]f the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent." The petitioners argued that, because Marian was over the age of 14 and the adoption was in her best interests, the court could dispense with the need for her consent. MHLS argued the statute requires an adult's consent to be adopted and that, because Marian lacked the capacity to understand the consequences of adoption, she could not consent.

Surrogate's Court granted the adoption petition, finding it was "clearly" in Marian's best interests. "The court finds [petitioners] are absolutely sincere in their affection for Marian and their desire to care for her as a member of their family," it said, and the adoption would provide "stability and structure in her living arrangements." As for consent, it said "in light of the similarities between this situation and adult guardianship proceedings, the court finds that Marian's Guardian ad Litem had the implied authority to consent to the adoption on her behalf."

The Appellate Division, Third Department affirmed "for different reasons," saying the surrogate erred in finding the guardian had implied authority to consent. Based on the language of section 111(1)(a), it said, "because [Marian] is over the age of 14, the court had express statutory authority to dispense with her consent. This conclusion is well-grounded in sound statutory construction and avoids categorically prohibiting adoptions of those who are over the age of 14 but are incapable of giving consent, including an entire class of adoptees who are so severely disabled that they simply lack the ability to communicate such consent." In view of the surrogate's "thorough best interests analysis," Marian's "consent was properly dispensed with."

MHLS argues that, based on its legislative history, the statute "was meant to apply only to child adoptees between 14 and 17" and was "intended to give court's discretionary authority to dispense with the child adoptee's consent only in the limited circumstance where knowledge that the proposed adoptive parents are not the child's natural parents would harm the child." It argues the Appellate Division "failed to strictly construe" the statute and both lower courts erred "by failing to treat the question of consent as a threshold consideration before moving on to determine whether adoption is in [Marian's] best interests."

For appellant Marian T.: Cailin Connors Brennan, Albany (518) 451-8710
For respondents Lauren R. et al (petitioners): Douglas A. Eldridge, Delmar (518) 475-0393

State of New York
Court of Appeals

To be argued Wednesday, September 9, 2020 (arguments begin at noon)

No. 39 Chavez v Occidental Chemical Corporation

Tobias Bermudez Chavez and some 200 other plaintiffs are agricultural workers from Costa Rica, Ecuador and Panama who claim they suffered a range of physical harms – including sterility, liver damage, cancer, vision loss, and skin and respiratory disorders – due to their exposure to dibromochloropropane (DBCP), a pesticide used on Central and South American banana plantations where they were employed from the 1960s through the 1980s. In 2012, they brought this putative class action in federal court against manufacturers of DBCP, including Occidental Chemical Corp. Occidental moved to dismiss the plaintiffs' claims as time-barred under New York's three year statute of limitations for personal injury suits.

U.S. District Court for the Southern District of New York denied the motion to dismiss, finding the limitations period was tolled from 1993 to 2010 based on a putative class action filed in Texas state court in 1993 on behalf of Latin American plantation workers against manufacturers of DBCP. Under class action tolling, the filing of a class action suspends the statute of limitations for all members of the putative class until class certification is denied. Although New York courts have not addressed the doctrine of cross-jurisdictional class action tolling, the federal court in Chavez concluded that "New York most likely would recognize" the doctrine because its courts have adopted class action tolling triggered by cases filed in New York, and it said such tolling serves similar purposes regardless of whether the prior action was filed in New York or elsewhere. The Texas case was dismissed in 1995 on the ground of *forum non conveniens* – and the pending motion for class certification denied as moot – to permit the plaintiffs to pursue their claims in their home countries, but the federal court said this did not end the tolling for Chavez plaintiffs because the Texas order "effected only a conditional dismissal" and did not deny class certification on the merits. The Texas court included a "return jurisdiction" clause in its 1995 order which provided that, if the plaintiffs' claims were dismissed for lack of jurisdiction in their home countries, the Texas court "will resume jurisdiction over the action as if the case had never been dismissed." The Texas court reinstated the plaintiffs' claims in its case in 2005, and the federal court ruled that tolling continued for the Chavez plaintiffs until the Texas court denied a motion for class certification on the merits in 2010, thus rendering the Chavez action timely. On appeal, Occidental argued that New York law does not permit cross-jurisdictional class action tolling and, even if it did, any tolling would have ended when the Texas case was first dismissed in 1995.

The U.S. Court of Appeals for the Second Circuit has asked this Court to resolve the key issues in a pair of certified questions: "(1) Does New York law recognize cross-jurisdictional class action tolling," i.e., tolling of a New York statute of limitations by the pendency of a class action in another jurisdiction? "(2) Can a non-merits dismissal of class certification terminate class action tolling, and if so, did the Orders at issue do so?"

For appellant Occidental Chemical: Jeremy C. Marwell, Washington, DC (202) 639-6507
For respondents Chavez et al: Jonathan S. Massey, Washington, DC (202) 652-4511

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To be argued Wednesday, September 9, 2020 (arguments begin at noon)

No. 41 People v Jonathan Batticks

Jonathan Batticks and two fellow gang members, Princesam Bailey and Reginald Wiggins, were charged with assaulting another inmate at the Manhattan Detention Complex in October 2011. At their joint trial, Bailey's attorney repeatedly asked the victim during cross-examination whether Wiggins had referred to him with an inflammatory racial epithet by calling him an "old n....r" prior to the assault. A juror interrupted the proceedings with an outburst directed at Bailey's attorney, saying, "Please, I am not going to sit here ... and having you say that again. Don't say it again or I am leaving.... I find it very offensive." The judge told the juror, "Ma'am, that's not appropriate from you;" and then told the attorney, "I don't want to hear it again.... You don't ask the same question over and over and over again. Move on."

Supreme Court denied motions to discharge the juror or declare a mistrial, and rejected a request to ask the juror if she could be fair and impartial. It said, "[I]f you look at the Court of Appeals decision ... in [People v Mejias (21 NY3d 73)], you will see that, unless it's clear on its face that a juror is grossly disqualified, that there is no need to question the individual juror.... I don't think there would be any basis to remove the juror without first establishing that she can't be fair and impartial. I don't think her statement indicates that she could not be, only that she found the repeated use of the phrase distasteful." The court gave the jury a curative instruction. Batticks was convicted of second-degree assault and sentenced to 6½ years in prison.

The Appellate Division, First Department affirmed, rejecting Batticks' claim that People v Buford (69 NY2d 290) required the trial court to inquire into the juror's fitness to serve. It cited its prior decision affirming the conviction of a codefendant, People v Wiggins (132 AD3d 514), which said the trial court "properly determined, based on its own observations, that no inquiry was necessary.... The juror's brief outburst telling the codefendant's counsel not to use a racial epithet 'again' ... demonstrated that she was bothered by the repeated use, at least four times, of the phrase, rather than by counsel's initial line of questioning.... In any event, a juror's mere annoyance with a question or with counsel would not be a basis for discharge...."

Batticks argues the juror "became grossly unqualified to serve as a juror because her ability to remain fair and impartial was vitiated by her outburst, which, in and of itself, constituted substantial misconduct warranting her discharge. [The juror] disregarded the court's instructions, disrupted the course of the trial, and threatened to leave the proceedings if co-defendant's counsel did not cease using the phrase ... during cross-examination of the complainant, effectively abrogating her sworn duty as a juror by threatening to strike herself off the jury. She usurped the role of the court and unduly injected the issue of her highly emotional reaction to the line of cross-examination into the proceedings. This conduct required that the court strike her from the jury or, at the very least, required the court to conduct a probing and tactful *in camera* examination of the juror to determine if she could separate her emotional reaction from her duty to render an impartial verdict."

For appellant Batticks: Jonathan R. McCoy, Manhattan (212) 577-3518
For respondent: Manhattan Assistant District Attorney Rebecca Hausner (212) 335-9000

State of New York
Court of Appeals

To be argued Wednesday, September 9, 2020 (arguments begin at 2 pm)

No. 45 People v Robin Pena

As Robin Pena was driving in the Bronx in November 2015, police officers pulled him over when they saw the center brake light on the rear of his Dodge van was not working. After telling the officers he "had a few beers" and failing sobriety tests, Pena was charged with driving under the influence of alcohol.

Pena moved to suppress the evidence on the ground that it was the result of an illegal stop, contending that Vehicle and Traffic Law (VTL) § 375(40)(b) does not require a functioning middle brake light. The statute states, "Every motor vehicle ... shall be equipped with at least two stop lamps, one on each side, each of which shall display a red to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied." At a suppression hearing before a judicial hearing officer (JHO), the arresting officer testified he stopped Pena solely because he was "driving with a broken brake light." The officer explained that only the "middle brake light" was out and the "right brake light and left brake light worked." The prosecutor argued the stop was permissible because the officer made a reasonable mistake of law in thinking the VTL required the middle brake light to be in working order.

The JHO recommended suppression of the intoxication evidence, finding the stop was illegal. He said Heien v North Carolina (574 US 54 [2014]) held "that a mistake of law may be objectively reasonable and therefore permissible in situations when the statute at issue is one that is so ambiguous that it is objectively reasonable for a police [officer] to be confused as to its application." However, he said, "New York's brake light section, VTL § 375(40)(b), is clear as to the exact number of lights required and their location on the vehicle.... Additionally, a review of the various sections of the VTL relating to lights does not detract from the clarity of § 375(40)(b).... Accordingly, there is no ambiguity in the New York statute that would support a mistaken belief of law argument for the officer's stop of the defendant's vehicle. Criminal Court adopted the JHO's recommendations and suppressed the evidence.

The Appellate Term, First Department affirmed, saying, "Defendant's vehicle, though having working brake lights on the right and left sides as required by section 375(40)(b) of the [VTL], was stopped by police because a third brake light located in the center was defective. Since such defect is not a traffic violation under the unambiguous language of section 375(40)(b) and it was 'not an objectively reasonable mistake of law' for the officer to conclude otherwise, the stop violated the Fourth Amendment...."

The prosecution argues "the courts below should have found that the entire New York statutory scheme regulating automobile lights invites mistaken interpretation. Given the complicated nature of the VTL and the undefined terms of art it uses in describing lighting equipment, the officer's mistake of law was reasonable here." Citing VTL 376(1)(a), which requires "Lamps, signaling devices and reflectors" to be in "good working order," and a regulation requiring some passenger cars to have a center brake light to pass inspection, the prosecution argues it should be "objectively reasonable" for an officer to stop a car with a broken brake light "to investigate further, and to at least advise the driver" of the problem.

For appellant: Bronx Assistant District Attorney Paul A. Andersen (718) 838-6667
For respondent Pena: Morgan Everhart, Bronx (347) 842-1159

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To be argued Wednesday, September 9, 2020 (arguments begin at 2 pm)

No. 61 Matter of Hon. Richard H. Miller, II

Broome County Family Court Judge Robert H. Miller, II, is challenging a determination of the State Commission on Judicial Conduct that he should be removed from office for misconduct, which included making "extremely inappropriate and sexist remarks" to the female chief clerk and berating a court assistant in open court. The Commission said that in 2017, when the chief clerk apologized for using a fan while having a hot flash, Miller replied, "It's nice to know I still have that effect on you." Later that month, it said, Miller stepped into the clerk's office and said, "You look really hot in that outfit. You should always wear that outfit." The Commission further found that Miller, who became a Family Court judge in 2015, violated the Rules Governing Judicial Conduct by allowing his court secretary to prepare a letter to collect legal fees owed for work in his prior private law practice. It found he also violated the Rules by failing to timely disclose his outside income from legal fees and rental properties to the court system's Ethics Commission, to the Family Court clerk, or on his federal and state income tax returns for 2015 and 2016.

The Commission split 7-2 on the issue of sanction, with the majority determining Miller should be removed for a pattern of "serious misconduct." It said, "Most troubling were [his] unwanted sexual comments to a female court employee." The majority also cited a censure the Commission imposed on Miller in 2002 for misconduct when he was a part-time town and village court justice. It said, "While there was some indication in the record that [Miller] is an effective judge, our mandate is to protect the integrity of the courts.... Given [his] three categories of current misconduct, his apparent failure to learn from his previous discipline, his failure to take responsibility for his actions and the unfortunate message another censure would send to the public, we believe that [he] should be removed from the bench to protect the integrity of the courts."

The dissenters concurred with the findings of misconduct, but argued "the draconian sanction of removal of an elected judge is not warranted in this case" and said Miller should instead be censured. Although Miller's remarks to the chief clerk were "crude and vulgar," they said, "The record supports the referee's conclusion that [Miller's] inappropriate statements ... constituted an extremely poor attempt at humor.... Commission precedent demonstrates that censure or admonition would have been held to be appropriate punishments for significantly worse conduct." While Miller failed to disclose his outside income to court officials and tax authorities, they said he filed the disclosures and amended tax returns during the Commission's investigation, which is "a mitigating factor." They cited testimony that Miller "is a hardworking judge" who "treated all who appeared before him, both men and women, with respect."

For petitioner Miller: Paul DerOhannesian II, Albany (518) 465-6420
For respondent Commission: Robert H. Tembeckjian, Albany (518) 453-4600

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To be argued Thursday, September 10, 2020 (arguments begin at 10 am)

No. 42 CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc.

In December 2005, Cleveland Unlimited, Inc., a wireless communications company in Ohio, issued $150 million in secured notes which were to mature in five years. Section 6.07 of the indenture, mirroring the language in section 316(b) of the federal Trust Indenture Act of 1939 (TIA), stated, "Notwithstanding any other provision of this Indenture, the right of any Holder to receive payment of principal of, premium, if any, and interest and Additional Interest, if any, on a Note, on or after the respective due dates expressed in such Note, or to bring suit for the enforcement of any such payment..., shall not be impaired or affected without the consent of such Holder." Section 6.05 said a majority of the noteholders "may direct the time, method and place of conducting any proceeding for exercising any remedy available to the [trustee]" to collect payment. A collateral trust agreement authorized the trustee to foreclose after a default upon the direction of a majority of the holders, and provided that no holder "shall have any right individually to realize upon any of the Collateral..., it being understood and agreed that all powers, rights and remedies ... may be exercised solely by the Collateral Trustee."

In April 2010, after the notes were sharply downgraded by Moody's Investors Service, CNH Diversified Opportunities Master Account L.P. and three other plaintiffs bought $5 million of the notes on the secondary market, which was 3.33% of the outstanding principal. When the notes matured in December 2010, Cleveland Unlimited could not repay the principal. In June 2011, after negotiations with the issuer, a majority of the investors holding 96% of the notes informed the plaintiffs that they intended to direct the collateral trustee to foreclose on Cleveland Unlimited's collateral, which consisted of all of the company's stock. The minority noteholders objected, saying they would seek full payment under the notes, but they did not attempt to enjoin the foreclosure. Three months later, in a debt-for-equity transaction, the stock was transferred to the collateral trustee in full satisfaction of the notes. The minority holders received 3.33% of the stock, their pro rata share.

In January 2012, CNH and the other minority holders brought this breach of contract action against Cleveland Unlimited and the guarantors of the notes, seeking full payment of principal and interest under the notes. They contended section 6.07 of the indenture and the TIA prevented the defendants from depriving them of their right to payment without their consent.

Supreme Court dismissed the suit. Reading the "unambiguous" indenture, collateral trust and security agreements together, it said, "there was a collective design to this transaction, and the Collateral Trustee was to act for all the noteholders in the event of the issuer's default, upon the direction of a majority of noteholders." The Appellate Division, First Department affirmed, saying, "A fair reading of the [agreements] demonstrates that the collateral trustee was authorized to pursue default remedies, including the strict foreclosure at issue here, if so directed by a majority of the noteholders." Section 6.07 "does not supersede the numerous default remedy provisions of the Agreements, nor does it conflict with them." Citing Marblegate Asset Mgt., LLC v Education Mgt. Fin. Corp. (846 F3d 1), in which the Second Circuit ruled the TIA "prohibits only non-consensual amendments to an indenture's core payment terms," the Appellate Division said the foreclosure and debt-for-equity transaction here "did not amend the core payment terms in violation of section 6.07..., even if it had a 'similar effect'...."

The plaintiffs, saying the lower courts misread Marblegate as barring only "formal" amendments to payment terms without consent, argue the debt-for-equity exchange, to which they objected, violated section 6.07 by terminating Cleveland Unlimited's obligations under the notes and thereby impaired their right to sue for payment. They say "the plain text of Section 6.07, which ... applies 'notwithstanding any other provision of the Indenture," makes clear that it "controls over any conflicting provisions."

For appellants CNH et al: James H. Millar, Manhattan (212) 248-3140
For respondents Cleveland Unlimited et al: James M. McGuire, Manhattan (646) 837-5151

State of New York
Court of Appeals

To be argued Thursday, September 10, 2020 (arguments begin at 10 am)

No. 28 Hewitt v Palmer Veterinary Clinic, PC

In April 2014, Marsha Hewitt brought her cat in a plastic carrier to the Palmer Veterinary Clinic in the Town of Plattsburgh. While Hewitt was waiting with her cat in the reception area, a Palmer veterinarian brought a dog out of an examination room, where it had just been treated for a paw injury, and handed its leash to its owner. The dog slipped its collar, jumped up on Hewitt from behind and grabbed her ponytail, pulling her backward and allegedly injuring her neck, arm and hand.

Hewitt brought this action against the Palmer Clinic seeking damages for negligence and premises liability. She contended the Clinic had "a duty to provide a safe waiting room for its customers" and " violated that duty by bringing a deranged pit bull into the same waiting area as a cat;" that it "failed to use due care in bringing an agitated, distressed, and deranged pit bull into the waiting area;" and it had "actual and/or constructive notice that the dog ... was dangerous." Hewitt's claims against the dog's owner were later discharged in bankruptcy. The Palmer Clinic moved for summary judgment dismissing the suit, contending that ordinary negligence and premises liability claims are not available for damages caused by a dog attack.

Supreme Court dismissed the suit. The established rule in New York is that "the owner of a dog may only be held legally responsible for injuries inflicted by such animal based upon a theory of strict liability and that a negligence claim does not lie," it said, citing Bard v Jahnke (6 NY3d 592) and other cases. Relying on Appellate Division precedent that extended the Bard rule to defendants who are the owners of property where a domestic animal they do not own causes injury, the court ruled that "Hewitt is limited to recovery in strict liability, which requires proof that the [dog] had vicious propensities and that Palmer ... knew, or should have known, of such propensities." It said Hewitt submitted no admissible evidence that Palmer had such notice.

The Appellate Division, Third Department affirmed on a 3-1 vote, adopting the view of the other Appellate Divisions which "applied the strict liability rule in cases where the plaintiff seeks to recover from a defendant who maintained the premises where the injury occurred, but did not own the dog.... Accordingly, we hold that for [Palmer] to be liable for the personal injuries allegedly sustained due to the dog attack..., [Hewitt] must establish that [Palmer] knew or should have known about the dog's vicious propensities," which is said she failed to do.

The dissenter said the Bard rule should not be extended to non-owners of the offending animal. "The rationale behind the 'vicious propensity rule' is that an animal owner is in a unique position, from day-to-day familiarity, to observe his or her animal's personality and demeanor and act accordingly based on that knowledge...," he said. "[I]t does not fit the situation where, as here, the defendant is not the animal's owner, but only the owner of the property on which the animal's injurious behavior occurred and, therefore, typically has no knowledge, one way or the other, of the animal's propensities. In such a case..., general principles of negligence and premises liability should apply...."

For appellant Hewitt: Mark Schneider, Plattsburgh (518) 566-6666
For respondent Palmer Veterinary Clinic: Peter Balouskas, Albany (518) 862-1386

State of New York
Court of Appeals

To be argued Thursday, September 10, 2020 (arguments begin at noon)

No. 44 Lynch v City of New York

The Patrolmen's Benevolent Association of the City of New York (PBA) and its president, Patrick Lynch, brought this suit against New York City and its Police Pension Fund (PPF) to require them to allow police officers in tier 3 of the retirement system to obtain service credit for child care leave. The City and PPF maintained that only members of earlier tiers – officers hired before July 2009 – were eligible for the credit. The credit was created in 2000 by enactment of Administrative Code § 13-218(h), which provides that "any member [of PPF] who is absent without pay for child care" leave "shall be eligible" to purchase up to one year of pension credit for such leave. It also states, "In the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." The City argued that the pension benefits of tier 3 police officers are governed exclusively by article 14 of the Retirement and Social Security Law (RSSL), which does not contain a child care service credit. Article 14 also states, "In the event that there is a conflict between the provisions of this article and the provisions of any other law or code to the contrary, the provisions of this article shall govern" (RSSL § 500 [a]).

Supreme Court granted the PBA's motion for summary judgment, saying Administrative Code § 13-218(h) "plainly and unambiguously states that it applies to 'any member,' and ... does not limit its application to tier 2 police officers only." The "legislative history supports the plain statutory text, that the legislature intended the child care benefit to apply to all members of the PPF." Rejecting the City's argument that benefits for tier 3 officers are governed solely by article 14 of the RSSL, the court said "both articles 11 and 14, and the general laws setting forth the benefits for tiers 2 and 3, respectively, were enacted years before Administrative Code § 13-218(h), which also states that '[i]n the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern'.... Further, defendants fail to explain why article 14 should not be read in conjunction with [section] 13-218(h), when article 11 is read in conjunction therewith, and affords the [child care benefit] to tier 2 police officers."

The Appellate Division, First Department reversed and dismissed the complaint, finding that tier 3 officers are not eligible for the credit. "While on its face [Administrative Code § 13-218(h)] does not distinguish between tiers of membership, upon review of the broader statutory scheme ... and legislative history, we conclude that tier 3 police officers are not entitled to service credit for unpaid child care leave," it said, noting that when the section was enacted "there were no police officers in tier 3." It said tier 3 officers' pension benefits are governed by article 14 of the RSSL, which does not provide a child care credit, and by title 13 of the Administrative Code, which "affords the credit to 'any member' of the PPF. "In the face of this conflict between the two, article 14 governs" based on its clause stating that its provisions "shall govern" over any conflicting law or code.

For appellant Lynch and PBA: Robert S. Smith, Manhattan (212) 833-1100
For respondent City and PPF: Assistant Corporation Counsel John Moore (212) 356-0840

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To be argued Thursday, September 10, 2020 (arguments begin at noon)

No. 62 People v Reginald Goldman

In January 2012, Reginald Goldman was being held at Rikers Island on attempted murder and assault charges when police obtained evidence linking him to the unrelated murder of Tyshawn Bromfield, who was killed in a drive-by shooting in the Bronx in August 2010. Investigators applied for a search warrant to obtain Goldman's saliva for DNA analysis to see if his genetic profile would match DNA recovered from the car used in the shooting, and a prosecutor notified Goldman's defense attorney in the assault case of the warrant application.

Supreme Court refused to allow defense counsel to review the warrant application or to challenge it at a pre-trial hearing, saying "search warrants ... have always been ex-parte." Defense counsel contended he was entitled to argue against the warrant under Matter of Abe A. (56 NY2d 288 [1982]), which addressed a warrant to obtain a blood sample from a suspect. The decision says "Fourth Amendment safeguards should be seen as implicated at two discrete levels," first the detention of the person and second the seizure of biological evidence. In its discussion of the first level, the Court of Appeals said "when frustration of the purpose of the application is not at risk, it is an elementary tenet of due process that the target of the application be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed." Supreme Court said the right to notice and be heard applied only to the first-level seizure, detention of the person, and not to the second-level seizure of biological evidence. The court said "this case does not have a first stage seizure ... because your client is in custody, and therefore, notice to you is totally unnecessary to bring him constitutionally before this court...."

When Goldman's saliva sample matched the DNA from the car, he was charged with murder. A jury acquitted him of murder, but convicted him of first-degree manslaughter. He was sentenced to 25 years to life in prison.

The Appellate Division, First Department reversed and suppressed the DNA evidence, ruling Goldman was entitled to challenge the warrant application. It said "special rules apply to evidence to be taken from a suspect's body" under Abe A. "We agree with defendant that the mere fact that the Abe A. court placed its pronouncement regarding notice in the midst of its discussion of the first level of intrusion at issue there does not establish that the principle announced applied only to that first level. Nothing in the Court's opinion suggests a basis for applying the 'elementary tenet of due process' described by the Court only to the first part of an application for an order to physically detain a person and then make a corporeal search."

The prosecutors argue that, because Goldman was already in custody, a warrant based on probable cause was "constitutionally sufficient to obtain a saliva sample" and no "adversarial hearing" was required. They say "it is well-established that applications for a search warrant are conducted ex-parte," in part to protect ongoing investigations and the safety of witnesses. The Abe A. court bifurcated its analysis and "held that the first seizure of the person to bring him within the government's control must be done on notice," but "made no mention of the same requirement for the second seizure implicating a 'bodily intrusion,'" they say. Defendants would still retain their right to "pursue traditional means of challenging the warrant" after it is issued.

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