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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

June 4th thru 6th, 2019

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.

To be argued Tuesday, June 4, 2019

No. 50 Kuzmich v 50 Murray Street Acquisition LLC
No. 51 West v B.C.R.E. - 90 West Street, LLC

The primary question in these appeals is whether the high-rent deregulation provisions of the Rent Stabilization Law (RSL) apply to buildings receiving tax benefits under Real Property Tax Law § 421-g, or is the deregulation of rents in such buildings forbidden by section 421-g? The tenants of three residential buildings in lower Manhattan brought these actions against the building owners, who began receiving tax abatements under section 421-g between 2001 and 2005. The plaintiffs sought a declaration that their apartments were subject to rent stabilization pursuant to section 421-g and reimbursement of rent overcharges, among other things.

Section 421-g (6) states, in part, "Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four, the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law, unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit, for the entire period for which the eligible multiple dwelling is receiving benefits pursuant to this section...."

Supreme Court granted partial summary judgment to the tenants in both cases, declaring their apartments are subject to rent stabilization based on the "unambiguous" language of section 421-g. In Kuzmich, the court said that "the introductory '[n]otwithstanding' phrase..., clearly refers to provisions in the RSL and the Emergency Tenant Protection Act of 1974, such as the high-rent and high-income decontrol provisions enacted in the Rent Regulation Reform Act of 1993 (RSL § 26-504.3), that are contrary to the regulation of rent. RPTL § 421-g provides that, regardless of those provisions, 'the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under' the RSL, except for dwelling units that are exempted by the RSL, because they are cooperatives or condominiums."

The Appellate Division, First Department reversed in both cases, declaring the plaintiffs' apartments were properly deregulated. It said in Kuzmich, "Except for condominiums and cooperatives, dwellings in buildings that receive tax benefits pursuant to Real Property Tax Law § 421-g are subject to rent stabilization for the entire period the building is receiving 421-g benefits (RPTL 421-g [6]). However, 421-g buildings are subject to the luxury vacancy decontrol provisions of Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-504.2(a), unlike buildings that receive tax benefits pursuant to Real Property Tax Law §§ 421-a and 489. [Section] 421-g does not create another exemption to Rent Stabilization Law § 26-504.2(a).... As plaintiffs point out, if 421-g buildings are subject to luxury vacancy decontrol, then most, if not all, apartments in buildings receiving 421-g benefits would, in fact, never be rent-stabilized, because the initial monthly rents of virtually all such apartments were set, as here, at or above the deregulation threshold. Although courts should construe statutes to avoid 'objectionable, unreasonable or absurd consequences'..., the legislative history in this case demonstrates that the legislature was aware of such consequences during debate on the bill that enacted" section 421-g.

For appellants Kuzmich and West et al: Robert S. Smith, Manhattan (212) 833-1100
For respondent 50 Murray: James M. McGuire, Manhattan (646) 837-5151
For respondent B.C.R.E.: Magda L. Cruz, Manhattan (212) 867-4466

State of New York
Court of Appeals

To be argued Tuesday, June 4, 2019

No. 52 Tomhannock, LLC v Roustabout Resources, LLC

In April 2002, Tomhannock, LLC sold 15.94 acres of vacant land in the Town of Pittstown, Rensselaer County, subject to an option agreement in which the buyers agreed to reconvey a 3.5-acre portion of the parcel to Tomhannock if it requested the reconveyance within 10 years of the original sale. As partial consideration for the option, Tomhannock reduced the purchase price by about $55,000; and the agreement permitted the buyers to terminate Tomhannock's right of reconveyance by payment of $55,000. The option agreement also states, "The Reconveyance Deed, together with such other instruments necessary for recording the Reconveyance Deed, shall be prepared and filed at the expense of Tomhannock. [The buyers] shall cooperate with Tomhannock in making such reconveyance, at no cost to Purchaser. Such cooperation may include, among other things, in making application for required municipal approvals for the reconveyance of the Reconveyance Parcel i[f] such are deemed necessary or desirable by Tomhannock...."

The buyers sold the 15.94-acre parcel to Ronald and Linda LaPorte in 2005. In January 2011, within the 10-year option period, Tomhannock advised the LaPortes that it was exercising its option on the 3.5-acre parcel. Instead of reconveying the 3.5 acres to Tomhannock, the LaPortes sold the entire 15.94 acre parcel to Roustabout Resources, LLC. In July 2011, still within the 10-year option period, Tomhannock again exercised its option and demanded that Roustabout reconvey the 3.5-acre parcel. When Roustabout refused, Tomhannock brought this action for specific performance of the option agreement. Roustabout moved to dismiss on the ground that, because Tomhannock had never sought subdivision approval for the 3.5-acre parcel from the town, it could not meet its obligation under the agreement to record the reconveyance deed.

Supreme Court denied the motion and ordered Roustabout to sign the deed, saying "the obligation to record the deed is not a condition precedent to defendant's obligation to reconvey title" to the 3.5 acres.

The Appellate Division, Third Department affirmed on a 3-2 vote, ruling that "the option agreement does not set forth any condition precedents to defendant's performance thereunder.... [W]e do not interpret the option agreement before us as requiring plaintiff to record the deed obtained subsequent to exercising its rights relative to the 3.5-acre parcel – only a provision that, if it elects to do so, it be at its expense. To be sure, plaintiff's inability and/or failure to record the reconveyance deed may present practical difficulties for the parties. Such difficulties, however, neither undermine nor stand as an impediment to plaintiff's exercise of the reconveyance rights that it possesses under the clear and unambiguous terms of the option agreement."

The dissenters said Roustabout's obligation to execute the deed "is preceded by that of plaintiff to prepare the deed 'together with such other instruments necessary for recording,' and plaintiff is further required to file (which there is little doubt encompasses an obligation to record) those documents once executed.... Plaintiff, by failing to obtain subdivision approval, cannot prepare and record the reconveyance deed and accompanying documents as required and has therefore failed to substantially perform its commitments under the option agreement ... and is not entitled to specific performance."

For appellant Roustabout: Andrew W. Gilchrist, Troy (518) 238-3759
For respondent Tomhannock: Thomas D. Spain, Troy (518) 270-1220

State of New York
Court of Appeals

To be argued Wednesday, June 5, 2019

No. 53 Pangea Capital Management, LLC v Lakian

This federal case involves competing claims to property on Shelter Island in Suffolk County. Andrea and John Lakian bought the house in 2002 for $4.5 million and spent another $4 million on improvements. Title to the property was initially placed in John's name alone, but was soon transferred to a trust in which Andrea and John each had a 50 percent interest, John was the sole trustee, but the trust declaration specified that its purposes "are limited to holding the record legal title of the Trust Premises for the benefit of the Beneficiaries." In 2013, Andrea filed for divorce and the couple signed a stipulation of settlement in 2015 that increased Andrea's interest in the property to 62.5 percent plus $75,000. Manhattan Supreme Court incorporated the stipulation into the judgment of divorce, which was entered in June 2015. Andrea never docketed the judgment in Suffolk County. Meanwhile, in 2012, Pangea Capital Management sued John Lakian, its managing member, accusing him of fraudulently diverting millions of dollars to himself. The dispute was submitted to binding arbitration, which resulted in a confirmation judgment by U.S. District Court awarding $14.5 million to Pangea in 2016. Pangea docketed the judgment in Suffolk County in November 2016. The Shelter Island property was sold in 2017 and the net proceeds of $5,039,616 were deposited with the District Court.

Pangea moved for a writ of execution on all of the proceeds. Andrea cross-moved for an order awarding her 62.5 percent plus $75,000 of the proceeds. The District Court granted Andrea's motion, ruling that Pangea was entitled only to the share of the proceeds that were awarded to John in the divorce judgment. The court awarded $1,822,671 to Pangea and $3,237,785 to Andrea.

On appeal, Pangea argued that its interest in the property has priority over the interest awarded to Andrea in the divorce judgment because Pangea docketed its judgment in the county where the property was located and Andrea did not. If so, it said Andrea would be entitled only to whatever interest she had in the property before the divorce. Pangea also contended that, prior to the divorce, Andrea had no interest in the property that would take priority over liens held by John's creditors because the nature of the trust entailed that John remained the absolute owner of the trust with regard to his creditors.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues of New York law in a pair of certified questions. The first question asks, "If an entered divorce judgment grants a spouse an interest in real property pursuant to [Domestic Relations Law §] 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?" The second question, if necessary, asks, "If a settlor creates a trust solely for the purpose of holding title to property for the benefit of himself and another beneficiary, and the settlor retains the unfettered right to revoke the trust, does the settlor remain the absolute owner of the trust property relative to his creditors, or is the trust property conveyed to the beneficiaries?"

For appellant Pangea: Caitlin L. Bronner, Manhattan (212) 907-9600
For respondent Andrea Lakian: Judith R. Richman, Manhattan (212) 687-1425

State of New York
Court of Appeals

To be argued Wednesday, June 5, 2019

No. 54 People v Arthur W. Ellis, Jr.

Arthur Ellis, Jr., a convicted sex offender living in Ticonderoga, was arrested in 2015 for allegedly failing to register or verify as a sex offender under the Sex Offender Registration Act. Six weeks earlier he had filed his Annual Address Verification Form with the Division of Criminal Justice Services (DCJS), in which he disclosed his internet service provider, email address, and screen names. Ellis was indicted on one felony count of violating Correction Law § 168-f(4) by failing to disclose his Facebook account to DCJS. The statute provides, "Any sex offender shall register with the division no later than ten calendar days after any change of address, internet accounts with internet access providers belonging to such offender [and] internet identifiers that such offender uses...." Ellis moved to dismiss the indictment, arguing that section 168-f(4) did not require him to register his Facebook account and that he complied with the statute by disclosing his email address and screen names.

Essex County Court denied his motion, citing the definition of "internet identifiers" in Correction Law § 168-a(18), which states, "'Internet identifiers' means electronic mail addresses and designations used for the purposes of chat, instant messaging, social networking or other similar internet communication." The court said, "Facebook is a social networking site, and thus the defendant's identifier for his Facebook account falls within the requirements of Correction Law § 168-f(4)." After the ruling, Ellis pled guilty to the charge and was sentenced to time served and a three-year conditional discharge.

The Appellate Division, Third Department reversed and dismissed the indictment. "[W]e conclude that the social media website or application – be it Facebook or any other social networking website or application – does not constitute a 'designation[] used for the purposes of chat, instant messaging, social networking or other similar [I]nternet communication' (Correction Law § 168-a[18])," the court said. "An Internet identifier is not the social networking website or application itself; rather, it is how someone identifies himself or herself when accessing a social networking account, whether it be with an electronic mail address or some other name or title, such as a screen name or user name. Defendant's failure to disclose his use of Facebook is not a crime, rendering the indictment jurisdictionally defective...."

The prosecution argues that Facebook is an "internet identifier" that sex offenders must register with DCJS. "Pursuant to Correction Law 168-a(18): an 'Internet Identifier' means electronic mail addresses and designations used for the purpose of chat, instant messaging, social networking or similar internet communication. Clearly, this definition includes Facebook as it can be used to 'chat,' 'instant message' and its main purpose is for 'social networking.'" The prosecution contends that its reading of the statute is supported by the legislative history.

For appellant: Essex County Assistant District Attorney Kathryn M. Moryl (518) 873-3335
For respondent Ellis: Noreen McCarthy, Keene Valley (518) 626-1272

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.

To be argued Wednesday, June 5, 2019

No. 55 People v Derrick Ulett

In March 2008, Ruben Alexandre was fatally shot in front of 48 St. Paul's Place in Brooklyn. Two eyewitnesses identified Derrick Ulett as the gunman, but one of them admitted at trial that she might have been mistaken in her identification. The other, Rashawn Cream, was a childhood friend of the victim and Ulett, and he testified that he was talking with Alexandre when Ulett shot him at close range. However, Cream said nothing to investigators at the time. Ten months later, when he was facing robbery and drug sale charges, Cream spoke to a prosecutor and identified Ulett as the shooter for the first time. He received a favorable plea deal, but testified that he received no benefit for testifying against Ulett. A third witness testified that he saw Ulett, who lived nearby, walking toward the scene shortly before the shooting and running away after the gunfire. A security camera in the lobby of the building recorded the shooting through glass doors and windows facing the street. Police recovered the video recording, but prosecutors did not introduce it into evidence or disclose it to the defense. A prosecutor told the jury in summation that there was no video of the shooting. Ulett was convicted of second-degree murder and sentenced to 20 years to life in prison.

Three years later, in response to a Freedom of Information Law request, the district attorney's office turned over the video to Ulett's appellate counsel. Ulett filed a CPL 440.10 motion to vacate his conviction, arguing that the prosecution deprived him of his rights to due process and a fair trial and violated its duty under Brady v Maryland (373 US 83), which requires prosecutors to disclose exculpatory material, including impeachment evidence. Ulett's trial attorney testified at a hearing that, had the recording been disclosed, she would have used inconsistencies between the video and trial testimony to impeach Cream, to investigate other potential eyewitnesses, and to support the defense theory that Ulett was not the shooter.

Supreme Court denied the motion, saying the video would most likely not have enabled the defense to locate additional witnesses and that "each of the defendant's alternative theories [about the shooter] are highly speculative and are not supported by a reasonable viewing of the surveillance tape." It said the tape "could have been used to support an argument that Mr. Cream was mistaken, or perhaps even lying, about who was at the crime scene before and after the shooting.... Based on the discrepancy between Mr. Cream's trial testimony and what appeared on the surveillance tape, trial counsel could have made a cogent argument at trial that Mr. Cream's identification had been impeached...." However, it found pre-trial disclosure of the tape would not have changed the verdict, saying "the limited impeachment value of the surveillance tape as to Mr. Cream's testimony is far outweighed by the corroborative details contained in the exhibit."

The Appellate Division, Second Department affirmed. It said Ulett "failed to show a reasonable probability that the result would have been different had the video been disclosed prior to trial, particularly in light of the very limited view provided in the video of the events occurring outside the building."

Ulett argues, "In this already weak identification case, the People's suppression of a video of the shooting – which revealed a previously unknown eyewitness, contradicted key aspects of the People's star witness's account, and provided a concrete, alternative argument supported by the medical evidence that someone other than appellant shot the deceased – made it reasonably probable that the verdict would have been different had the video been timely disclosed."

For appellant Ulett: Leila Hull, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Ruth E. Ross (718) 250-2529

State of New York
Court of Appeals

To be argued Thursday, June 6, 2019

No. 56 Matter of Wegmans Food Markets, Inc. v Tax Appeals Tribunal of the State of New York

Wegmans Food Markets, Inc., a supermarket chain headquartered in Rochester, has since 1995 contracted with RetailData, LLC to monitor prices charged by its competitors. Wegmans would ask for reports on pricing at particular stores or groups of stores, sometimes for all products and other times for specified products, during a certain period. RetailData would then send its data collectors to the chosen locations to record the prices shown on the stores' shelves. RetailData analyzed and verified the information and generated written reports in a customized format for Wegmans. A confidentiality provision in its contract prohibited RetailData from providing any of the information to third parties. In 2011, auditors with the Department of Taxation and Finance determined that Wegmans' purchases of the pricing reports was subject to sales taxes under Tax Law § 1105(c)(1), which imposes the tax on "[t]he furnishing of information..., including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons...." However, the statute excludes from sales taxes "the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons...." Wegmans was assessed an additional $227,270 in sales taxes for the period from June 2007 to February 2010.

The Division of Tax Appeals sustained the assessment and the Tax Appeals Tribunal affirmed, rejecting Wegmans' claim that its purchases of pricing reports qualified for the sales tax exclusion for "information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." The Tribunal said, "The pricing information that [Wegmans] purchases from RetailData is obtained from products on the shelves of supermarkets that are open to the public. There is nothing that is 'uniquely personal' about the price of an item in a supermarket. Furthermore, such information is obviously not confidential, as it is accessible to anyone who enters a store. These facts thus indicate that the [pricing information] is non-personal and non-individual in nature and therefore taxable."

The Appellate Division, Third Department granted Wegmans' petition to annul the Tribunal's determination, saying that "in the event of ambiguity, 'where, as here, an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer'...." It said, "While there is no question that the pricing information that RetailData collects ... is information that is available to the public, we agree with [Wegmans] that ... such information does not derive from a singular, widely accessible common source or database as that test has previously been applied and commonly understood in determining the applicability of the subject tax exclusion." It said "the information furnished to [Wegmans] was uniquely tailored to [its] specifications and was related exclusively to implementation of its confidential pricing strategy," so the "information services" it purchased "were personal or individual in nature" and "should have been excluded from taxation pursuant to Tax Law § 1105(c)(1)."

The Tax Commissioner argues that the Tribunal's determination that the tax exclusion does not apply "was rational and supported by the statutory language" and therefore should have been upheld. The Commissioner also contends that "any ambiguity in the text of an exclusion from tax must be construed in favor of the State and against the taxpayer" under M/O Mobile Oil Corp. v Finance Adm'r of City of N.Y. (58 NY2d 95).

For appellant Commissioner: Assistant Solicitor General Frederick A. Brodie (518) 776-2317
For respondent Wegmans: Jeffrey J. Harradine, Rochester (585) 454-0700

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.

To be argued Thursday, June 6, 2019

No. 58 People v James R. McIntosh

James McIntosh fatally stabbed his roommate, Michael Burnett, during an altercation at their apartment in East Rochester in August 2013. Both men had been drinking. A third roommate was in his bedroom at the time and heard them arguing, but did not see the incident. McIntosh was indicted on charges of second-degree murder and first-degree manslaughter, both intentional homicides.

McIntosh testified at trial that Burnett began pounding on his bedroom door and threatened to "break your fucking neck." McIntosh said he "poked" his knife at Burnett to hold him at bay as Burnett threatened him and tried to push through his door. McIntosh said he "poked it" toward Burnett's leg, causing what the medical examiner described as a superficial wound. McIntosh said this further enraged Burnett, who charged forward, and McIntosh said he raised the knife to chest level and "poked again, jabbed again." Burnett stepped back and fell with a knife wound that penetrated his heart. McIntosh testified, "I didn't mean to stab him. I just meant for him to just back off; see the knife and back off." He said he did not intend to kill or injure Burnett and did not foresee the risk that his actions might cause his death. Based on this evidence, defense counsel asked County Court to submit charges of second-degree manslaughter and criminally negligent homicide to the jury as lesser included offenses. The court refused; and it also failed to instruct the jury to consider the second-degree murder and first-degree manslaughter counts in the alternative. McIntosh was convicted of both counts and sentenced to 20 years to life in prison on the murder conviction.

The Appellate Division, Fourth Department dismissed the manslaughter count and otherwise affirmed on a 3-2 vote. The court agreed unanimously that the trial court erred in refusing to charge the jury on the two lesser included offenses, but it split on the question of whether the error was harmless.

The majority said, "[H]ad the jury acquitted defendant of the highest offense of murder in the second degree and convicted him of the intermediate offense of manslaughter in the first degree only, the court's error in refusing to charge the remote lesser included offenses would have constituted reversible error..., inasmuch as such a verdict would fail to dispel any significant probability that the jury, had it been given the option, would have instead convicted defendant of a remote lesser included offense.... By contrast, a determination of harmless error is warranted where, as here, the jury convicts the defendant of the highest charged offense, thereby foreclosing the defendant's contention that there was a significant probability that, had the jury been given the option, it would have rejected both the highest charged offense and the intermediate lesser included offense in favor of conviction of a remote lesser included offense...."

The dissenters said the trial court's error in refusing to charge the lesser included offenses was not harmless and was instead "compounded when the court erred in failing to instruct the jurors to consider the charged offenses in the alternative.... Due to the fact that the jury convicted defendant of both the" murder and manslaughter counts, "defendant correctly contends that we 'cannot know with certainty how the jury's deliberations would have been impacted if [it] had been instructed that [it] could convict [on] only one of the two counts.' We are thus unable to determine whether we should deem the lesser count dismissed or deem there to be an acquittal on the greater count.... As the Court of Appeals has written, '[t]he fact that defendant was convicted of both offenses ... does not establish that there was no significant probability the jury would have acquitted him of those charges and convicted him of [the remote lesser included offenses] if that option were available to it' (Green, 56 NY2d at 435-436)."

For appellant McIntosh: James A. Hobbs, Rochester (585) 753-4213
For respondent: Monroe County Assistant District Attorney Scott Myles (585) 753-4541

State of New York
Court of Appeals

To be argued Thursday, June 6, 2019

No. 57 People v Emmanuel Almonte

Joshua Chinga, planning to sell a pair of $500 sneakers, was expecting an old friend, Emmanuel Almonte, to pick them up at Chinga's apartment building in the Bronx in February 2012. When Almonte arrived with a cousin, who Chinga had also known for years, Chinga left his apartment without the sneakers to meet them in the third-floor stairwell. Chinga said the men ambushed him – striking him on the head with a gun, punching and kicking him, and dragging him down the stairs – and stole his cell phone. When they fled, Chinga returned to his apartment and his sister called 911. He did not describe the incident to his sister, but discussed it with his mother in the bathroom while he cleaned up his wounds. The 911 operator called back within minutes and spoke with Chinga, who said, "Somebody put a gun to my head and they beat me up." In response to questions, Chinga described his assailants, but did not disclose their names to the operator or to the officers who arrived to investigate. The officers drove him around the neighborhood, but they saw no one matching his descriptions. Chinga went to the precinct the following night and told officers who had assaulted him.

At Almonte's trial, Supreme Court allowed the prosecutor to play a recording of the 911 callback, in which Chinga mentioned the gun, under the excited utterance exception to the hearsay rule. The court denied Almonte's request to instruct the jury on third-degree assault, which does not involve the use of a dangerous instrument, as a lesser included offense of second-degree assault, which does. Almonte was convicted of second-degree robbery, first-degree attempted assault, and second-degree assault. He was sentenced to five years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly admitted a 911 phone call between the victim and a 911 dispatcher under the excited utterance exception to the hearsay rule.... The victim's statements were made within minutes after he was attacked. The record indicates that he was still under the influence of the stress of the incident despite the lapse of time..., and that his statements were spontaneous and trustworthy, and not the product of reflection or possible fabrication." It said the trial court properly denied Almonte's request to submit third-degree assault to the jury because there was "no reasonable view of the evidence, viewed most favorably to defendant, that the injury at issue was inflicted without the use of a deadly weapon or a dangerous instrument."

Almonte argues the 911 recording was improperly admitted. He says the lower courts "ignored the fact that Chinga deliberately omitted critical information about his alleged assailants during the 911 Callback. Moreover, Chinga spoke with the 911 operator *after* he had retreated to the safety of his home, spoken with his mother (but, deliberately, not his sister), and tended to his injuries. Under similar circumstances, " New York appellate courts have held that the excited utterance exception is not satisfied." Further, he says the Court should "abandon" the exception, which "is premised on the erroneous assumption that a statement made during or shortly after a startling event is inherently reliable. Advances in modern science have debunked this assumption, showing that such statements lack the guarantees of trustworthiness required for the exception to survive." He says third-degree assault should have been submitted to the jury because it could have reasonably found "that Chinga's injuries were not caused by a gun, but instead by coming into contact with any other sharp object during the altercation, such as the stairs or the stair railing."

For appellant Almonte: Avi Gesser, Manhattan (212) 450-4000
For respondent: Bronx Assistant District Attorney Joshua P. Weiss (718) 838-6229