JUDGE STEIN: NEITHER LEFT NOR RIGHT

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INTRODUCTION

Judge Leslie E. Stein, a 1981 Albany Law School graduate, *Magna Cum Laude*, was nominated by Governor Andrew M. Cuomo to serve as an Associate Judge of the Court of Appeals in October 2014, and her nomination was confirmed by the New York State Senate on February 9, 2015.[1] Judge Stein, a Democrat, replaced Judge Victoria Graffeo, a 1977 Albany Law School graduate.[2]

JUDGE STEIN'S PATH TO THE NEW YORK STATE COURT OF APPEALS

"Judge Stein began her legal career as the law clerk to the Schenectady County Family Court Judges."[3] She continued to practice matrimonial and family law with the Albany law firm McNamee, Lochner, Titus & Williams, P.C., where she ultimately became a partner in the firm.[4]

In 1997, Judge Stein began her judicial career when she was elected an Albany City Court Judge and Acting Albany County Family Court Judge, where she remained until 2001.[5] Thereafter,

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[1] *See Honorable Leslie E.* Stein, COURT OF APPEALS, STATE OF NEW YORK, https://www.nycourts.gov/ctapps/jstein.htm (last visited Apr. 26, 2018); *Hon. Leslie E. Stein '81*, ALB. L. SCH., http://www.albanylaw.edu/about/board-of-trustees/Pages/Hon.-Leslie-E—Stein%20'81.aspx (last visited Apr. 26, 2018).

[2] Vincent Bonventre, *NYCOA: Cuomo's Latest Two Nominees (Part 1—Common Denominators)*, NEW YORK COURT WATCHER (Jan. 19, 2015), http://www.newyorkcourtwatcher.com/2015/01/nycoa-cuomos-two-nominees-part-1-common.html; *Hon. Victoria Graffeo '77 to Receive New York Law Journal Lifetime Achievement Award*, ALB. L. SCH., (July 12, 2016), http://www.albanylaw.edu/about/news/current/Pages/Hon-Victoria-Graffeo-77-to-Receive-New-York-Law-Journal-Lifetime-Achievement-Award-.aspx.

[3] *Honorable Leslie E. Stein*, *supra* note 1.

[4] *Id.*

[5] Jonathan D. Gillerman, *A Special Tribute to the Third Department: The Albany Nine: Recognizing Albany Law School's Alumni Justices of the Third Department*, 73 ALB. L. REV. 1145, 1155 (2010); *Honorable Leslie E. Stein*, *supra* note 1.

"[s]he was then elected to the New York State Supreme Court, Third Judicial District for a term commencing January 2002."[6] Judge Stein also "served as the Administrative Judge of the Rensselaer County Integrated Domestic Violence Part from January 2006, until February 2008."[7] In February 2008, "she was appointed a Justice of the New York State Appellate Division, Third Department."[8]

While Judge Stein was a practicing attorney, she was elected a Fellow of the American Academy of Matrimonial Lawyers, and she served as "co-chair of the NYS Unified Court System Family Violence Task Force."[9] Judge Stein was also a "founding member of the New York State Judicial Institute on Professionalism in the Law and chaired the Third Judicial District Gender Fairness Committee from 2001-2005."[10] She also "served on the Executive Committee of the Association of Justices of the Supreme Court of the State of New York, as an officer of the New York State Association of City Court Judges, and as a member of the Board of the New York Association of Women Judges."[11]

Before getting into Judge Stein's decisions on the New York Court of Appeals, it is interesting to look into her decisions while she was on the New York State Appellate Division, Third Department and, what, if any, tendencies there were. Although Judge Stein was not a one-sided liberal on the Appellate Division, many of "[h]er positions were the more ideologically liberal ones taken on the Appellate Division," especially when the Court was divided.[12] As a result, the more-liberal wing of the New York Court of Appeals, consisting of former Chief Judge Jonathan Lippman, former Judge Carmen Ciparick, and former Judge Theodore Jones, regularly sided with her.[13] However, while Judge Stein was on the Court of Appeals with former Chief Judge Jonathan Lippman, he did not always agree with her, and was sometimes a lone dissenter to her majority opinions.[14] Additionally, when a close decision was rendered, and Judge Stein wrote a dissenting opinion, Chief Judge Lippman was most often on

[6] *Honorable Leslie E. Stein*, *supra* note 1.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Vincent Bonventre, *Part 3 [Judge Stein's 'Tendencies']—NYCOA: Cuomo's Latest Two Nominees*, NEW YORK COURT WATCHER (Feb. 5, 2015), http:// www.newyorkcourtwatcher.com/2015/02/part-3-judge-steins-tendencies-nycoa.html.

[13] *See id.*

[14] *See, e.g.*, People v. Matthew P., 44 N.E.3d 149, 150, 153 (N.Y. 2015); Nicometi v. Vineyards of Fredonia, LLC, 30 N.E.3d 154, 155, 162 (N.Y. 2015).

the other side.[15]

Not surprisingly, Judge Stein had a strong record of siding with aggrieved women and their children while on the Appellate Division.[16] She also had a very strong record of deferring to administrative decisions when challenged.[17] Both of these tendencies can likely be attributed to Judge Stein's extensive experience in Family Court, matrimonial law, and serving as an Administrative Judge on the Domestic Violence Part of Rensselaer County.[18] Interestingly, she does not appear to have an "overwhelmingly clear pattern" in criminal cases; however, some of her dissenting opinions showed her to lean towards the sensitive side when dealing with intrusions on a criminal defendant's rights.[19]

The remainder of this article will discuss both the majority opinions and dissenting opinions authored by Judge Stein to examine the course she has taken while on the New York Court of Appeals.

WHERE JUDGE STEIN STANDS IN CRIMINAL CASES

In two of the three decisions below, Judge Stein has voted in favor of the criminal defendant. Although it cannot be said that she *always* votes in favor of the accused,[20] it may be fair to say, through the lens of her dissenting opinions, that she votes in favor of the accused more often than not when the Court addresses intrusions on a criminal defendant's rights.[21]

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[15] *See* Davis v. South Nassau Communities Hosp., 46 N.E.3d 614, 625, 636 (N.Y. 2015); Pegasus Aviation I, Inc. v. Varig Logistica S.A., 46 N.E.3d 601, 607, 612 (N.Y. 2015); People v. Hatton, 44 N.E.3d 188, 194, 196 (N.Y. 2015); People v. Sprint Nextel Corp., 42 N.E.3d 655, 663, 669 (N.Y. 2015); People v. Middlebrooks, 35 N.E.3d 464, 472, 475 (N.Y. 2015) (joined cases which Judge Stein dissented in *People v. Middlebrooks* and concurred in result in *People v. Lowe*); Viviane Etienne Med. Care v. Country-Wide Ins. Co., 35 N.E.3d 451, 460, 464 (N.Y. 2015); Barreto v. Metropolitan Transp. Auth., 34 N.E.3d 815, 820, 829 (N.Y. 2015).

[16] Vincent Bonventre, *Part 4 [More of Judge Stein's 'Tendencies']—NYCOA: Cuomo's Latest Two Nominees*, NEW YORK COURT WATCHER (Feb. 7, 2015), http://www.newyorkcourtwatcher.com/2015/02/part-4-more-of-judge-steins-tendencies.html ("Whether the case involved criminal conduct, possible negligence, or the need for assistance, Stein's opinions—in the majority or dissent—typically argued for their relief or redress.").

[17] *See id.*

[18] *See id.*; *Honorable Leslie E. Stein*, *supra* note 1.

[19] *See* Bonventre, *supra* note 16.

[20] *See, e.g.*, People v. Joseph, 64 N.E.3d 957, 960 (N.Y. 2016) (Stein, J., dissenting); *Middlebrooks*, 35 N.E.3d at 472 (Stein, J., dissenting) ("I would hold that a defendant who is presumptively ineligible for youthful offender treatment must request, and the burden rests on such defendant to establish, that he or she is an eligible youth, rather than obligating the courts to initiate an inquiry into the defendant's potential eligibility.").

[21] *See, e.g.*, People v. Andujar, 88 N.E.3d 309, 318 (N.Y. 2017) (Stein, J., dissenting) ("At the very least, because we are presented with two plausible constructions of Vehicle and Traffic Law § 397, we should adopt the one more favorable to defendant."); People v. Gray, 49 N.E.3d

People v. Valentin[22]

The defendant in *People v. Valentin* was convicted of manslaughter in the first-degree.[23] The victim, McWillis, had picked up the handle of a mop and approached the defendant, at which time he was shot.[24] However, the People's primary witness provided inconsistent testimony regarding the timing of events, indicating that the defendant took out his gun only after McWillis swung the mop handle, while also indicating that the actions occurred simultaneously.[25]

In a 4-3 decision, the Court of Appeals held that there was a reasonable view of the evidence that the defendant was the initial aggressor and thus, the inclusion of the initial aggressor exception in the trial court's justification charge to the jury was proper.[26]

Judge Stein dissented, reasoning that the inconsistent eye witness testimony foreclosed any inference that the defendant shot McWillis before he was threatened by McWillis, and therefore there was no "*reasonable* view" of the evidence supporting a finding that the defendant was the initial aggressor in the altercation.[27] Thus, because the outcome "hinged on a justification defense," Judge Stein concluded, in opposition to the majority, that the inclusion of the initial aggressor exception in the justification charge was prejudicial and the defendant should be given a new trial.[28]

People v. Hardee[29]

In a concise 4-3 decision, the majority held that the issue regarding "whether 'the likelihood of a weapon in [defendant's] car [was] substantial and the danger to the . . . safety [of the officers who stopped that vehicle was] actual and specific'" presented a mixed question of law and fact, and the record supported the determination that such circumstances "existed and justified the limited search of

1180, 1184 (N.Y. 2016) (Stein, J., dissenting) ("[D]efense counsel's failure to move to reopen the suppression hearing deprived defendant of the effective assistance of counsel."); People v. Hatton, 44 N.E.3d 188, 195 (N.Y. 2015) (Stein, J., dissenting).

[22] People v. Valentin, 74 N.E.3d 632 (N.Y. 2017).

[23] *Id.* at 634.

[24] *See id.* at 633.

[25] *See id.* at 632–633.

[26] *See id.* at 632.

[27] *See id.* at 638 (Stein, J., dissenting).

[28] *See id.* at 635.

[29] People v. Hardee, 88 N.E.3d 354 (N.Y. 2017).

the interior of that vehicle."[30] Thus, the defendant's challenge to the denial of his suppression motion was held beyond the Court's review.[31] In contrast to this short decision, Judge Stein issued a lengthy dissent, believing the issue to be "whether the People [] demonstrated 'the minimum showing necessary' to establish the legality of police conduct," and thus "the question of whether the protective search was lawful is a mixed question of law and fact reviewable only for record support."[32] In addressing this issue, Judge Stein argued that the search of the defendant's vehicle was unlawful.[33]

In this case, the defendant had been convicted of criminal possession of a weapon in the second-degree.[34] The defendant sought suppression of the gun that was found during a search of his car, arguing that this was a warrantless search for which the police did not have probable cause, and that there was no basis for the search of his car.[35] The People argued, and the New York Court of Appeals[36] agreed, that the search of his car was "justified based on defendant's behavior" and "the officers had a reasonable belief that there was a weapon in the vehicle that presented an actual and specific danger to their safety."[37] While there are many facts that the Court looks at in determining whether a search was justified, Judge Stein emphasized how the defendant did not evade the police when realizing he was being pulled over, and he complied with the officers' requests.[38] Additionally, there was no testimony indicating that the defendant was engaged in an unusual manner of driving on the streets of Manhattan, and even if there was, while this justifies a traffic stop, it "[does] not justify a belief that the presence of a weapon posed an *actual and specific threat* to officer safety."[39]

Judge Stein emphasized the narrowness of the warrant exception embedded in New York's case law, providing comparisons to *People*

[30] *Id.* at 354.
[31] *Id.* at 355.
[32] *Id.* (Stein, J., dissenting).
[33] *See id.*
[34] *See id.*
[35] *See id.* at 356.
[36] *See id.* There was one dissenting Justice who granted defendant leave to appeal to the New York Court of Appeals. *See id.*; People v. Hardee, 5 N.Y.S.3d 430, 432 (App. Div. 2015) (Acosta, *J.* dissenting).
[37] *Hardee*, 88 N.E.3d at 356; *see Hardee*, 5 N.Y.S.3d at 431, 432.
[38] *Hardee*, 88 N.E.3d at 359.
[39] *Id.* at 360 (emphasis in original).

v. Torres,[40] *People v. Mundo*,[41] and *People v. Carvey*,[42] reasoning that there must be some demonstration of objective facts supporting a belief that the defendant, or some other individual in the car, "present[s] a danger to officer safety," in order to justify a protective search.[43] Judge Stein recognized the difficulties that police officers face during street encounters with an individual who appears nervous and engages in "furtive movements or glances," however, the Court must be careful with how far they go in broadening the exception for a protective search "beyond its purpose and rationale."[44]

People v. Garvin[45]

In a 4-3 decision, Judge Stein, writing for the majority,[46] held that the warrantless arrest of defendant inside the doorway of his home was permissible under the Fourth Amendment, because the defendant voluntarily answered the door, and there was an absence of exigent circumstances.[47] The defendant argued that the police officers violated his Fourth Amendment "right to be free from unreasonable search and seizures because he opened his [apartment] door only in response to knocking by police officers."[48]

Although Judge Wilson and Judge Rivera urged the court "to adopt a new rule that warrantless 'threshold/doorway arrests' violate *Payton* when the only reason the arrestee is in the doorway is that he or she was summoned there by police,"[49] the majority held that no

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[40] People v. Torres, 543 N.E.2d 61 (N.Y. 1989).

[41] People v. Mundo, 780 N.E.2d 522 (N.Y. 2002).

[42] People v. Carvey, 680 N.E.2d 150 (N.Y. 1997).

[43] *See Hardee*, 88 N.E.3d at 359.

[44] *Id.* at 358–59, 360.

[45] People v. Garvin, 88 N.E.3d 319 (N.Y. 2017).

[46] *Id.* at 353–54.

[47] *Id.* at 325–26 (first quoting United States v. Allen, 813 F.3d 76, 82 (2d Cir. 2016); then quoting People v. Garvin, 13 N.Y.S.3d 215, 216 (App. Div. 2015)).

[48] *Garvin*, 88 N.E.3d at 323 ("The Supreme Court of the United States held in *Payton* itself that 'the Fourth Amendment . . . prohibits the police from making a *warrantless and nonconsensual entry into a suspect's home* in order to make a routine felony arrest' despite 'ample time to obtain a warrant.' The Court explained that 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (quoting Payton v. New York, 445 U.S. 573, 576, 583 (1980)).

[49] *Garvin*, 88 N.E.3d at 325; *id.* at 338–39 (Rivera, J., dissenting) (citation omitted) ("Residents would not imagine that simply by living in a two-family house, they effectively forfeit their privacy to all areas except for that space which is not commonly shared by the residents of the house or invited guests. . . . Human experience leads to the conclusion that a resident of an upstairs living area in a two-family house has a privacy interest effective at the door leading into the building. The purpose of a front door to someone's home is to ensure the privacy and security of those living behind it. It signals for all who approach that the home is

such *Payton* violation occurred.[50] Although the majority emphasized how the Court was bound by the Appellate Division's findings,[51] the dissent argued how

> [t]he court, by necessity if not implication, decided that defendant had no privacy interest in the area between the front doorway and the door leading to defendant's living space when it denied defendant's motion to suppress and concluded the arrest was outside the home because it was conducted "in the hallway of his apartment building."[52]

However, Judge Stein reasoned that when determining whether a *Payton* violation has occurred, the inquiry of whether the defendant was standing outside his home or "in the doorway" is irrelevant.[53]

WHERE JUDGE STEIN STANDS WHEN CHILDREN ARE INVOLVED

People v. Badalementi[54]

In *Badalementi*, defendant was charged, *inter alia*, with one count of endangering the welfare of a child, whereby the People introduced a recording taken by the child's father.[55] This recording set the scene where the defendant, the child, and the child's mother were present, where the mother was yelling at the child and the defendant threatened to beat the child.[56] Defendant argued that the father's recording was equivalent to eavesdropping, prohibited by Penal Law 250.05, "because no party to the conversation [had] consented to the recording" and thus was inadmissible under CPLR 4506.[57] In another 4-3 decision, the Court of Appeals held that in the context of "mechanical overhearing of a conversation," the definition of consent includes vicarious consent – here, the father's vicarious consent on

not a public venue. When one approaches a door to a house, one seeks permission to enter because of our common understanding that this is a private residence. . . . As our shared living arraignments necessarily reflect family commitments, evolving social norms, limited personal finances, and market forces that drive housing preferences and vacancy rates, these factors redefine concepts of 'intimacy' and communal interaction. Residents, like defendant, should not be penalized and stripped of their constitutional protections based on choices driven, in part, by financial and family concerns.").

[50] *See Garvin*, 88 N.E.3d at 324–25.

[51] *See id.* at 326 (quoting *Garvin*, 13 N.Y.S.3d at 216; citing People v. Bradford, 937 N.E.2d 528, 532 (N.Y. 2010)).

[52] *Garvin*, 88 N.E.3d at 341 (Rivera, J., dissenting).

[53] *Id.* at 324.

[54] People v. Badalementi, 54 N.E.3d 32 (N.Y. 2016).

[55] *See id.* at 34–35.

[56] *See id.* at 34.

[57] *Id.* at 36.

behalf of a minor child.[58] The Court stated:

> There is no basis in legislative history or precedent for concluding that the New York legislature intended to subject a parent or guardian to criminal penalties for the act of recording his or her minor child's conversation out of a genuine concern for the child's best interests. By contrast, the vicarious consent doctrine recognizes the long-established principle that the law protects the right of a parent or guardian to take actions he or she considers to be in his or her child's best interests. Yet it also recognizes important constraints on that right, by requiring that the parent or guardian believe in good faith that it is necessary for the best interests of the child to make the recording, and that this belief be objectively reasonable.[59]

Judge Stein dissented, stating that the recording should have been inadmissible, reasoning that the majority "disregards settled principles of statutory interpretation and encroaches on the province of the legislature."[60] Judge Stein's lengthy dissent focused on the intent of the legislature in writing the statute, and the specific language of the statute itself, noting how "regardless of our views as to the social benefits or drawbacks of permitting parents to lawfully eavesdrop on their children, ultimately, this is not our decision to make."[61]

People v. Cook[62]

In a 5-2 decision, Judge Stein, writing for the majority, reversed the findings of the Appellate Division and presumptively lowered the defendant from a level three sex offender to a level two, "moderate risk" offender.[63] The "[d]efendant pleaded guilty to . . . first-degree sodomy, second-degree rape, and first-degree sexual abuse, for sexually abusing . . . three boys under the age of 11 and a 12-year-old girl suffering from cerebral palsy."[64] However, the Court, highlighting how "[i]f the legislature had intended for everyone who sexually offended against children to be designated risk level three, it could have imposed a mandatory override under such

[58] *Id.* at 34.
[59] *Id.* at 39–40.
[60] *Id.* at 43, 45 (Stein, J., dissenting).
[61] *Id.* at 49.
[62] People v. Cook, 75 N.E.3d 655 (N.Y. 2017).
[63] *Id.* at 661.
[64] *Id.* (Garcia, J., dissenting).

circumstances," reasoned that the defendant had a long-term, pre-existing relationship with each of the victims, as "the victims were children of defendant's childhood friends."[65] Judge Stein's opinion emphasized how the need to notify the community is heightened when a sex offender does not know his victims well or at all, as compared to when the sex offender "is other than that of stranger or professional – e.g., familial."[66] However, the dissent strongly emphasized the threat child sex offenses pose to the public and how in the majority of cases, the Guidelines call for more points to be assessed to these offenders, including this one.[67]

CONCLUSION

While serving on New York State's highest court, Judge Stein still finds the time to give back to Albany Law School, serving as a member on the Board of Trustees,[68] and consistently volunteering in the Moot Court Program, Albany Law Review Symposiums, and various panel discussions. She was presented the Albany Law School Kate Stoneman Award of Albany Law School in 2007, which is awarded to those individuals in the legal profession "who have demonstrated a commitment to actively seeking change and expanding opportunities for women."[69] Albany Law School is incredibly proud to count Judge Stein as one of our most distinguished alumna.

[65] *Id.* at 656, 658, 661 ("In his relapse prevention plan . . . defendant wrote that '[a]ll four victims are the children of my childhood and family friends who I grew up with since we were adolescen[ts]. . . . we all socialized together. I spent most of my leisure time with these families and their children.'").

[66] *Id.* at 658.

[67] *Id.* at 663 ("The record is replete with clear and convincing evidence that defendant 'promoted' his relationships with the child victims for the primary purpose of abusing them.").

[68] *See Board of Trustees*, ALB. L. SCH., http://www.albanylaw.edu/about/board-of-trustees/Pages/default.aspx (last visited Apr. 29, 2018).

[69] *About Kate Stoneman*, ALB. L. SCH., http://www.albanylaw.edu/katestoneman/Pages/ Bio graphy.aspx (last visited Apr. 29, 2018); *Kate Stoneman Award Winners & Lectures*, ALB. L. SCH., http://www.albanylaw.edu /katestoneman/Pages/awards.aspx (last visited Apr. 29, 2018).