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.

MAY 28 - 30, 2013 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, May 28, 2013

No. 122 Barenboim v Starbucks Corporation
Winans v Starbucks Corporation

In these federal cases, two groups of Starbucks employees brought putative class actions against the company contending that its tip distribution policy violates New York Labor Law § 196-d, which states, "No employer or his agent ... shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee.... Nothing in this subdivision shall be construed as affecting the ... sharing of tips by a waiter with a busboy or similar employee." The term "agent" is defined as a "supervisor," but the Labor Law does not define "supervisor." The State Department of Labor, in its Hospitality Industry Wage Order (12 NYCRR Part 146), interprets the statute as permitting food service workers to share in tips if they "perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental."

The Starbucks policy requires that customers' tips be pooled and then distributed among baristas and shift supervisors, and it prohibits store managers and assistant store managers from receiving any share of the tip pool. In Barenboim, baristas argue shift supervisors are "agents" under section 196-d and Starbucks violates the statute by distributing a portion of the tips to them. Shift supervisors, like baristas, are paid hourly and are primarily responsible for serving customers, but they also assign baristas to their work stations, administer break periods, and perform other limited supervisory duties. In Winans, assistant store managers argue they are not "agents" and are eligible to receive tips under section 196-d and, therefore, Starbucks violates the statute by denying them a share of tips that their own customer service helps to generate. Assistant managers are generally full-time, salaried employees who serve customers and who have more extensive managerial duties than shift supervisors.

U.S. District Court granted summary judgment to Starbucks in both cases. The court ruled in Barenboim that shift supervisors are not agents of Starbucks because their limited supervisory duties "do not carry the broad managerial authority or power to control employees that courts have held to be sufficient to render an employee an 'employer or [employer's] agent' within the meaning of Section 196-d." In Winans, it found there were unresolved issues of fact regarding whether assistant store managers are agents of Starbucks, but it ruled the tip distribution policy is legal because the statute, while precluding employers and their agents from retaining tips, does not compel employers to include any specific eligible employees in a tip pool.

The U.S. Court of Appeals for the Second Circuit has asked this Court to resolve the key issues by answering a pair of certified questions: "1. What factors determine whether an employee is an 'agent' of his employer [under section 196-d] and, thus, ineligible to receive distributions from an employer-mandated tip pool?" and "2. Does New York Labor Law permit an employer to exclude an otherwise eligible tip-earning employee under § 196-d from receiving distributions" from such a tip pool? Regarding the first question, it also asks whether "the degree of supervisory or managerial authority exercised by an employee" is relevant and whether the Labor Department's Wage Order is "a reasonable interpretation of the statute that should govern disposition of these cases?"

For appellants Barenboim et al: Shannon Liss-Riordan, Boston, MA (617) 994-5800
For appellants Winans et al: Adam T. Klein, Manhattan (212) 245-1000
For amicus curiae Labor Dept.: Steven C. Wu, Manhattan (212) 416-6312
For respondent Starbucks: Rex Heinke, Los Angeles, CA (310) 229-1000

State of New York Court of Appeals

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To be argued Tuesday, May 28, 2013

No. 128 Kowalski v St. Francis Hospital and Health Centers

In December 2006, a highly intoxicated Kevin Kowalski arrived at the emergency room of St. Francis Hospital and Health Centers in Poughkeepsie at about 11:20 am, seeking admission to a detoxification program. He had a bruised face, broken nose, and a blood alcohol content (BAC) of .369. Dr. Chandra Chintapalli examined him and arranged for a detox facility to accept him. About four hours later, Kowalski removed his IV line and informed hospital staff that he wanted to leave. A nurse told him to wait for the friend who brought him to the hospital to return. Kowalski left the hospital at 3:45 pm, unaccompanied and without being discharged. At about 5:30 pm, he was struck by a car as he attempted to cross Route 9 in Poughkeepsie. After the accident, which left him quadriplegic, his BAC was .350.

Kowalski filed this medical malpractice action against the hospital, Dr. Chintapalli and the doctor's employer, Emergency Physician Services of New York (EPSNY), alleging they were negligent in not detaining him at the hospital and not providing more intensive supervision. The defendants moved for summary judgment and submitted affidavits from medical experts, who said Kowalski could not have been involuntarily detained because he was not suicidal and did not pose an imminent threat to others. In opposition, Kowalski submitted expert affidavits saying the defendants were obligated to provide more intensive supervision for a patient in his impaired condition and should have searched for him or called the police when he left the hospital.

Supreme Court denied the defense motions, saying the opinions of the defendants' experts were "contradicted by the plaintiff's medical expert[s], leaving a conflict of medical opinion that should be resolved by a finder of fact."

The Appellate Division, Second Department reversed and granted the defendants' summary judgment motions to dismiss, saying, "A person who is brought voluntarily to a medical facility for treatment of alcoholism cannot be involuntarily confined solely for that treatment (see Mental Hygiene Law § 22.09[d] ...)." It said the defendants established "that they lacked authority to confine the plaintiff upon his departure from St. Francis, where he voluntarily sought treatment. In opposition, the plaintiff failed to raise a triable issue of fact."

Kowalski argues the defendants had a common law duty "to protect and safeguard the intoxicated Appellant, once he was a patient in their care. They could not discharge this duty simply by looking the other way and leaving him all alone, when he wandered on foot out of the ER, into a position of much greater peril." He says, "The Appellate Division erred in deciding this case as a matter of law, rather than allowing a jury to consider the reasonableness of the medical defendants' acts and omissions."

For appellant Kowalski: Susan E. Galvão, White Plains (914) 949-2700
For respondent St. Francis Hospital: Robert R. Haskins, Poughkeepsie (845) 471-4455
For respondent EPSNY: Timothy S. Brennan, Albany (518) 640-6900
For respondent Chintapalli: Robert A. Spolzino, Manhattan (212) 490-3000

State of New York Court of Appeals

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To be argued Tuesday, May 28, 2013

No. 124 People v Isidoro Marra *(papers sealed)*

Isidoro Marra was charged with raping a woman who was passed out on a couch at Villa Isidoro, a restaurant and inn he owned in Richfield Springs, in September 2009. The complainant and her boyfriend had drinks at the bar with Marra and, after she spilled some wine on herself, the complainant went to another room to lie down and fell asleep. As she slept, her boyfriend went home with her car. She testified that when she woke up, Marra was on top of her having intercourse and she pushed him off. Herkimer County Court allowed the prosecutor to introduce several photographs taken at the hospital after the incident showing bruises and red marks on the complainant's face, back, arms and legs, although there was no allegation that Marra used force nor was any evidence offered concerning the cause of the bruises. A prosecution DNA expert testified that testing of a vaginal swab "excluded" Marra as a contributor. During summation, the prosecutor told the jury that the absence of Marra's DNA from the vaginal swab could be explained if he had worn a condom, although there was no evidence he wore a condom. Marra was convicted of first-degree rape under Penal Law § 130.35(2) (having intercourse with a person "incapable of consent by reason of being physically helpless") and was sentenced to 18 years in prison.

The Appellate Division, Fourth Department reduced the sentence to 10 years and otherwise affirmed the judgment although, in weighing the evidence, it said "a different verdict would not have been unreasonable." Ruling the photographs were relevant and properly admitted, it said, "The nurse who took the photographs testified that some of the bruises and red marks depicted looked 'fresh' while other injuries looked 'older.' The photographs of the 'fresh' injuries were relevant to the issue of physical helplessness under the People's theory that, by undressing the victim and having sexual intercourse with her while she was sleeping, defendant caused bruising and red marks to the victim's body that would not normally result from consensual intercourse." Any error in admitting photos of older bruises was harmless, it said, because the injuries "were relatively minor in nature and thus not inflammatory" and "the jury was well aware of the fact that the 'older' bruises may have existed prior to the rape." The court rejected Marra's claim that his attorney rendered ineffective assistance by failing to object to the prosecutor's remarks about possible condom use and by undermining a witness who gave testimony favorable to the defense.

Marra argues the trial court erred in admitting "inflammatory photographs showing injuries to a rape victim that were never alleged to have been inflicted by the defendant, that were irrelevant to the charge of rape of a helpless victim and the most inflammatory of which were inflicted before the incident.... While the photographs were not gruesome, they painted a picture of a man who took advantage of a helpless woman by using physical force, which was not the charge defendant faced." He says their admission was not harmless in "this factually close case," which "was based almost exclusively on the credibility of the victim, whose behavior immediately after the incident was inconsistent with her later claim of rape." He argues his counsel was ineffective in, among other things, failing to object to the prosecutor's unfounded suggestion of condom use. "There is no strategic reason to allow the People to create new evidence to explain away what the Appellate Division found disturbing -- the lack of DNA proof of penetration in a rape case."

For appellant Marra: Salvatore D. Ferlazzo, Albany (518) 462-0300
For respondent: Herkimer County Asst. District Attorney Jeffrey S. Carpenter (315) 867-1155

State of New York Court of Appeals

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To be argued Tuesday, May 28, 2013

No. 125 People v Lester Q. Jones

Lester Jones was accused of beating and robbing a woman after following her into the elevator of her Manhattan apartment building in May 2006. The police sergeant who arrested him about two weeks later acted on a report from a witness who did not see the robbery itself, but saw Jones enter the building and then flee at about the time of the incident. After taking Jones to the 28th Precinct, the sergeant contacted the lead detective on the case and learned the detective had obtained detailed descriptions of the robber from the victim and an eyewitness, who knew Jones by the nickname "Iz," and a police photo of the suspect, who used the same nickname. The descriptions and photo matched Jones. After eight more hours in custody, Jones was placed in a lineup and the victim identified him. Jones moved to suppress the lineup identification, arguing the police lacked probable cause to arrest him. Supreme Court denied the motion without a hearing. Jones was convicted of first-degree burglary and second-degree robbery and was sentenced to 20 years to life in prison.

On appeal, the Appellate Division, First Department remitted the matter to Supreme Court for a Dunaway hearing on Jones' motion to suppress the lineup. The lower court found the initial arrest was illegal because the sergeant did not have probable cause to believe Jones committed the robbery. The court denied the motion, however, finding that the lead detective had sufficient evidence and when the sergeant called him, the sergeant was "led immediately to information which provided the requisite probable cause that allowed the defendant to be held for the line-up conducted several hours later. The telephone call between the sergeant and the detective was the 'intervening event' that attenuated the arrest from the corporeal identification of the defendant as the perpetrator of the robbery."

The Appellate Division affirmed, saying, "The hearing court correctly found that although the police initially lacked probable cause to arrest defendant, the lineup identification by the victim was based on intervening probable cause and was sufficiently attenuated from the illegal arrest...." It said, "Under the circumstances, the communication between the detective and the sergeant constituted a direction to arrest defendant. Accordingly, under the fellow officer rule, the sergeant now had probable cause for defendant's continued detention...."

Jones argues the evidence at the hearing "established that a lineup identification of Mr. Jones -- the principal evidence at Mr. Jones's trial -- was the direct product of a flagrantly unconstitutional and pretextual arrest for doing nothing more than standing on a public sidewalk at two o'clock in the morning.... [T]he Appellate Division's conclusion that the lineup was sufficiently attenuated from the illegal arrest was wrong as a matter of law and lacks factual support in the record of the Dunaway hearing. Where the police held Mr. Jones on a bogus charge in order to investigate a more serious crime, suppression of the fruits of the arrest is necessary to deter similar constitutional violations in the future." Among other issues, he argues the trial court improperly admitted evidence of threats made to a witness by third parties.

For appellant Jones: Matthew L. Mazur, Manhattan (212) 698-3500
For respondent: Manhattan Assistant District Attorney Grace Vee (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, May 28, 2013

No. 126 James v Wormuth

Marguerite James brought this medical malpractice action against Dr. David Wormuth and his medical group for damages allegedly arising from a lung biopsy he performed at Crouse Hospital in Syracuse in October 2004. The procedure involved inserting a thin guide wire through the chest wall to mark the area of the lung that was to be biopsied. The four-centimeter strand of wire became dislodged and Dr. Wormuth was unable to locate it. He stopped searching after 20 minutes and decided to leave the wire in James' chest, explaining that he believed it would be riskier to extend the time she was under general anesthesia and make a larger incision to find and remove the wire. James subsequently complained of pain caused by the wire and Dr. Wormuth performed another operation to remove it two months later.

At trial, James did not present expert testimony to support her claim that Dr. Wormuth negligently failed to remove the wire and instead relied on the doctrine of res ipsa loquitur (the thing speaks for itself), which would permit a jury to infer negligence when a foreign body is unintentionally left in a patient. Supreme Court granted a defense motion for a directed verdict dismissing the complaint, ruling the doctrine did not apply: "It is undisputed that the wire was left in plaintiff's body intentionally. There has been no proof and plaintiff does not contend that the wire was negligently or improperly inserted into plaintiff's body or that any negligence on the part of Dr. Wormuth caused the wire to dislodge." Regarding the decision to leave the wire in place, it said expert testimony was necessary to establish the standard of care and how it was breached.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying, "Although plaintiff is correct that '[r]es ipsa loquitur is applicable where ... a foreign body is unintentionally left in a patient following an operative procedure'..., plaintiff neither established at trial nor argued in opposition to defendants' motion that the wire fragment was unintentionally left inside her thorax. To the contrary, she elicited testimony from the defendant that he purposely left the wire inside plaintiff because he determined, in the exercise of his medical judgment, that there was a lower risk of harm to plaintiff by taking that course of action than by making a larger incision to remove the wire."

The dissenters argued that res ipsa loquitur applies here: "[W]e respectfully disagree with the majority that the failure to remove the subject part of the wire was solely purposeful. The record establishes that the loss of that part of the wire was unintentional and, in our view, the fact that defendant realized the foreign body at issue had been lost before closing the incision does not change the fact that plaintiff presented evidence that the operation had the unplanned and inadvertent result of leaving an implement inside plaintiff's body. Even though a medical decision was made to abandon the lost implement and close the incision before it was recovered, the loss of that foreign body at the surgical site speaks for itself and satisfies the element of res ipsa loquitur at issue in this appeal...."

For appellant James: Woodruff Lee Carroll, Syracuse (315) 474-5356
For respondents Wormuth et al: Mark L. Dunn, DeWitt (315) 449-2616

State of New York Court of Appeals

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To be argued Tuesday, May 28, 2013

No. 63 People by Cuomo &c. v Greenberg

In 2005, the New York Attorney General filed this civil enforcement action against two former executives of American International Group (AIG), former Chairman and Chief Executive Officer Maurice R. Greenberg and former Chief Financial Officer Howard I. Smith, alleging they violated the Martin Act and Executive Law § 63(12) by conducting two fraudulent reinsurance transactions five years earlier in order to conceal from investors the declining financial condition of AIG, which was then the largest insurance company in the world. The Attorney General alleged that a sham transaction with General Reinsurance Corporation (GenRe) was designed to conceal a decline in AIG's loss reserves, which had become a concern to investors, and a transaction with CAPCO Reinsurance Company, Ltd., an offshore company controlled by AIG, was designed to mischaracterize underwriting losses as capital losses. After Greenberg and Smith left the company in 2005, AIG publically acknowledged improprieties in both transactions and restated its financial statements for 2000 through 2004. In this action, the Attorney General sought money damages on behalf of AIG shareholders and injunctive relief.

Supreme Court denied the defendants' motion for summary judgment dismissing the suit. The Appellate Division, First Department affirmed in a 4-1 decision in May 2012, holding that the Martin Act and Executive Law claims for damages on behalf of private investors are not preempted by federal securities laws, that the Attorney General has standing to pursue those claims, and that there are triable issues of fact as to whether the defendants knew of or participated in the fraudulent aspects of the GenRe and CAPCO schemes.

In the wake of the settlement of a parallel federal securities class action brought by AIG shareholders, approved by U.S. District Court for the Southern District of New York in April 2013, the Attorney General's Office withdrew the claims for damages. However, it said the federal settlement "has no effect on the Attorney General's claims for equitable relief, which we intend to pursue vigorously." The office said it will "continue to seek, among other remedies, several forms of injunctive relief, including but not limited to a ban on participation in the securities industry and a ban on serving as an officer or director of a public company."

Attorneys for Greenberg and Smith replied that any injunctive relief would be moot and that the Attorney General "long ago abandoned any pursuit of equitable relief." They said the Attorney General "repeatedly represented to the courts below and to the federal court that this action was brought *to recover damages on behalf of AIG shareholders worldwide*.... As a matter of law and fact, this case is not an action for injunctive or other equitable relief."

For appellant Greenberg: David Boies, Armonk (914) 749-8200
For appellant Smith: Vincent A. Sama, Manhattan (212) 836-8000
For respondent State: Solicitor General Barbara D. Underwood (212) 416-8808

State of New York Court of Appeals

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To be argued Wednesday, May 29, 2013

No. 127 EBC I, Inc. v Goldman, Sachs & Co. *(papers sealed)*

In May 1999, Goldman, Sachs & Co. served as lead underwriter for the initial public offering (IPO) of common stock of eToys Inc. (now known as EBC I, Inc.), a web-based retailer of children's products. The IPO price was set at $20 per share. On the first day of trading, share prices reached as high as $85 and closed at $76.56. eToys stock fell to near $25 by the end of 1999 and continued to fall through 2000, as did the company's operating capital.

When eToys declared bankruptcy in March 2001, the Bankruptcy Court appointed a committee of unsecured creditors, which brought this action against Goldman. The committee claimed Goldman deliberately underpriced eToys shares so it could profit by selling its own eToys stock at a much higher price after the IPO and by taking "kickbacks" from favored customers to whom it had allocated shares in the IPO, thereby diverting capital that should have gone to eToys. Among other claims, the committee alleged that eToys relied on Goldman's expertise in pricing the IPO and that Goldman breached a fiduciary duty by failing to disclose the incentive it had to underprice the IPO or disclose its profit-sharing arrangements with other clients.

Supreme Court partially granted Goldman's motion to dismiss the complaint for failure to state a cause of action, but refused to dismiss the claim for breach of fiduciary duty. The Appellate Division, First Department agreed the claim for breach of fiduciary duty was properly pleaded. In 2005, this Court upheld that portion of the ruling in EBC I, Inc. v Goldman, Sachs & Co. (5 NY3d 11), holding that "a cause of action for breach of fiduciary duty may survive, for pleading purposes, where the complaining party sets forth allegations that, apart from the terms of the contract, the underwriter and issuer created a relationship of higher trust than would arise from the underwriting agreement alone."

After discovery, Supreme Court granted Goldman's motion for summary judgment dismissing the claims for breach of fiduciary duty and fraud. "Plaintiff properly pleaded an advisory relationship independent of the underwriting agreement," it said, citing EBC I (5 NY3d at 20). "However, the facts belie the pleadings."

The Appellate Division affirmed on a 4-1 vote, saying "the underwriting agreement was negotiated at arm's length" and Goldman's discounted price for eToys stock "is an express term of the negotiated agreement.... Absent fraud..., the undisputed arm's length negotiation of the offering price negates plaintiff's claim that it was the subject of advice given by Goldman Sachs as a fiduciary." Citing evidence that the parties' relationship was adversarial, it said "a fiduciary relationship cannot have been created between parties who have been adversaries throughout their transaction." Noting that eToys "did not separately compensate" Goldman for "advisory services," it said, "Advice alone ... is not enough to impose a fiduciary duty."

The dissenter argued, "[T]he majority's analysis essentially hinges solely on the language of the agreement, which concededly does not set forth a fiduciary relationship. This analysis runs afoul of the Court of Appeals' recognition that an advisory relationship independent of the underwriting agreement would be demonstrated upon proof that 'eToys was induced to and did repose confidence in Goldman Sachs' knowledge and expertise to advise it as to a fair IPO price and engage in honest dealings with eToys' best interest in mind' (5 NY3d at 20). Because the record presents proof on this very subject, the majority improperly engages in issue determining rather than issue finding when it concludes as a matter of law that there was no fiduciary relationship."

For appellant EBC I (creditors committee): John H. Reichman, Manhattan (212) 909-9500
For respondent Goldman Sachs: Penny Shane, Manhattan (212) 558-4000

State of New York Court of Appeals

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To be argued Wednesday, May 29, 2013

No. 123 Matter of Cunningham v New York State Department of Labor

Michael A. Cunningham, former Director of Staff and Organizational Development for the State Department of Labor (DOL), is challenging his termination for misconduct based, in part, on evidence from a global positioning system (GPS) tracking device that was placed on his personal vehicle without a warrant in 2008. He argues that warrantless use of the GPS device was an illegal search under the State Constitution.

Suspecting Cunningham was falsifying time records and travel vouchers, DOL first had an investigator try to tail him when he left his office, but he spotted the tail. DOL referred the matter to the Office of the Inspector General (OIG), which subpoenaed his E-Z Pass records and, without a warrant, placed a GPS tracker on his car while it was parked in a lot near his Albany office. OIG replaced the device twice and recorded the car's movements for 30 days, from June 3 to July 3, 2008. At his disciplinary hearing, Cunningham moved to suppress the GPS evidence as the fruit of an unconstitutional search. The Hearing Officer denied the motion, sustained 11 charges of misconduct and recommended termination, a report the Commissioner of Labor adopted.

The Appellate Division, Third Department confirmed the determination in a 3-2 decision. "Although the GPS evidence ... would have likely been excluded from a criminal trial under [People v Weaver (12 NY3d 433)], the standard for using or excluding evidence at administrative proceedings is not controlled by criminal law...," it said. "A search conducted by a public employer investigating work-related misconduct of one of its employees is judged by the standard of reasonableness under all the circumstances, both as to the inception and scope of the intrusion...." The majority said, "To establish a pattern of serious misconduct (i.e., repeatedly submitting false time records and not a mere isolated incident), it was necessary to obtain pertinent and credible information over a period of time. Obtaining such information for one month was not unreasonable in the context of a noncriminal proceeding involving a high-level state employee with a history of discipline problems who had recently thwarted efforts to follow him in his nonwork-related ventures during work hours."

The dissenters argued that use of the tracker was an unconstitutional search. "We wholly agree -- given petitioner's past misconduct and the difficulty in obtaining evidence by traditional methods -- that the use of a GPS device was warranted at inception. In our view, however, the scope of its use was so broad and intrusive as to defy a finding of reasonableness. [DOL's] valid interest in petitioner's whereabouts extended only to the hours of his workday, yet the device placed on [his] personal vehicle collected data 24 hours a day, seven days a week. Petitioner's movements were tracked for over a month, including during a week-long family vacation. Further, because we feel that deterring this type of intrusive conduct outweighs the detrimental impact on the process of determining the truth -- especially given that non-GPS evidence was amassed against petitioner sufficient to sustain other, multiple charges -- the evidence should have been suppressed at his hearing...."

For appellant Cunningham: Corey Stoughton, Manhattan (212) 607-3300
For respondent Department of Labor: Asst. Solicitor General Kate H. Nepveu (518) 473-6085

State of New York Court of Appeals

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To be argued Wednesday, May 29, 2013

No. 129 People v Jean Cantave

Jean Cantave was charged with assault for pushing and biting a man during an argument at Cantave's used car lot in Queens in November 2007. Cantave raised a defense of justification, intending to testify that the complainant had struck him with a handgun. At a pre-trial Sandoval hearing, Supreme Court ruled that, if Cantave testified, the prosecutor could cross-examine him about the underlying facts of an unrelated rape conviction, which was then pending on direct appeal at the Appellate Division. He did not take the stand. The court also precluded Cantave from introducing a recording of his call to 911, in which he said a man had hit him with a gun and was still at the scene. The court found the call was "not contemporaneous with the events." Cantave was convicted of third-degree assault and sentenced to a year in jail. The Appellate Division subsequently reversed the rape conviction and ordered a new trial, which resulted in acquittal of the rape charge.

The Appellate Division, Second Department affirmed the assault conviction, holding that his challenge to the Sandoval ruling was not preserved and, in any event, the ruling "was not an improvident exercise of discretion.... The defendant's felony [rape] conviction was relevant to the issue of his credibility because it demonstrated his willingness to put his own interests above those of society...." The court said the 911 call was properly excluded because it did not fall under the "excited utterance" or "present sense impression" exceptions to the hearsay rule.

Cantave argues the Sandoval ruling "violated his Fifth Amendment privilege against self-incrimination [in the rape case] and due process right to testify at his [assault] trial" by allowing, if he took the stand, the prosecutor "to cross-examine him about the underlying facts of a conviction that was then pending on direct appeal." Citing People v Betts (70 NY2d 289), which held that allowing the prosecution to question a defendant's credibility "through the use of cross-examination concerning an unrelated pending criminal charge would unduly compromise" both rights, he argues Betts should apply equally to a pending appeal of a criminal conviction as to a pending criminal charge. He says the risk of self-incrimination for him was "not remote or merely theoretical," since a new trial was later ordered in his rape case. Cantave also argues that his 911 call was improperly excluded.

For appellant Cantave: DeNice Powell, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

State of New York Court of Appeals

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To be argued Wednesday, May 29, 2013

No. 130 People v Tawond Leach

In March 2008, shots were fired at three people in a vehicle parked on DeKalb Avenue in Brooklyn. The vehicle was damaged, but no one was injured. Two of the occupants told the police that Tawond Leach and his brother were the shooters, that Tawond Leach had fired a silver revolver, and that he lived in an apartment across the street. The apartment belonged to Leach's grandmother and he was living there in his own room. The officers entered the apartment and arrested Leach and his brother when they arrived minutes later. The grandmother arrived shortly after the arrests. She later testified that an officer took her to a spare bedroom and pointed to a silver handgun, saying "Look what I found." She testified that she did not give her consent to search the apartment until after the officers found the gun. She also said that, while Leach was living with her in his own bedroom, she had the only key to the apartment.

Supreme Court denied Leach's motion to suppress the gun, ruling that he lacked standing to challenge the search. The court said Leach did not live in the spare room where the gun was found, there was no evidence that he used or "even went into" the spare room and, thus, he failed to show that "he had an expectation of privacy in a room that wasn't his." Leach was convicted of two counts of first-degree attempted assault, second-degree weapon possession, and reckless endangerment. He was sentenced to six years in prison.

The Appellate Division, Second Department affirmed, holding that exigent circumstances justified the officers' entry into the apartment without a warrant and that Leach "had no standing to object to the search that uncovered the silver revolver because he had no reasonable expectation of privacy in the guest room of his grandmother's apartment."

Leach argues the issue of standing should be governed by "the analysis set forth in the Supreme Court's recent decision in United States v Jones [132 S Ct 945 (2012)], under which the relevant inquiry is simply whether the police entered his home for the purpose of obtaining information. As the police unquestionably did just that, Mr. Leach had standing to challenge the search." He says he has standing even if the "reasonable expectation of privacy" standard applies, since he had unrestricted access to the spare bedroom. He cites People v Love (152 AD2d 925 [4th Dept 1989]), which held that a defendant who lived in the basement of his family's house and "had free access to the entire house, had a reasonable expectation of privacy" in the upstairs rooms where evidence was seized.

For appellant Leach: Yvonne Shivers, Manhattan (212) 480-4000
For respondent: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534

State of New York Court of Appeals

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To be argued Wednesday, May 29, 2013

No. 131 People v Reece Rudolph *(papers sealed)*

Reece Rudolph was 17 years old in February 2008, when he was charged with possession of heroin with intent to sell in the Town of Queensbury, Warren County. He pled guilty under a negotiated agreement to one count of criminal possession of a controlled substance in the third degree, in satisfaction of a five-count indictment, and entered into a cooperation agreement with the district attorney. County Court ordered a pre-sentence investigation, which found Rudolph showed little remorse. "Due to his age, it is doubtful he has any comprehension of the magnitude of the decisions he has made. This includes his cooperation with officials and his choice to sell drugs," the report said, concluding prison was "appropriate given the severity of the crime." It said Rudolph appeared to be eligible for youthful offender status, but made no recommendation.

Prior to sentencing, neither Rudolph nor his attorney asked for youthful offender treatment and County Court did not consider, on the record, whether Rudolph should be granted youthful offender status. The court sentenced him as an adult to five years in prison. On appeal, Rudolph argued the court failed to comply with CPL 720.20(1), which provides, "Upon conviction of an eligible youth, the court must order a pre-sentence investigation... After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender."

The Appellate Division, Third Department affirmed, saying, "It is clear from the record that at the time defendant entered into the negotiated plea agreement, he was aware that it did not include youthful offender treatment." The court said, "Defendant subsequently waived his right to be considered for youthful offender treatment by failing to make a request for such consideration.... Under such circumstances, County Court was not required to address the issue at sentencing...."

The Court of Appeals held in People v McGowen (42 NY2d 905 [1977]) that where a defendant "made no assertion at the time of sentence that he was entitled to an adjudication of his youthful offender status, his right thereto was waived." Rudolph argues McGowen "was wrongly decided" and asks the Court to reconsider it, saying "the plain language" of CPL 720.20 mandates that "at the time of pronouncing sentence **the court must determine whether or not the eligible youth is a youthful offender**." He contends this requirement cannot be waived or bargained away, and the failure of County Court "to independently make such determination renders the sentence herein unlawful." McGowen "has created a trap for defendants," he says, and has created a situation "where the parties must argue ineffective assistance of counsel" when their trial attorney fails to request youthful offender adjudication at sentencing.

For appellant Rudolph: Jack H. Weiner, Chatham (518) 392-2426
For respondent: Warren County Assistant District Attorney Emilee B. Davenport (518) 761-6405

State of New York Court of Appeals

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To be argued Thursday, May 30, 2013

No. 11 Applewhite v Accuhealth, Inc.

Tiffany Applewhite was 12 years old in February 1998, when she suffered anaphylactic shock after receiving an intravenous steroid medication from a private nurse in the Applewhites' Bronx apartment. While the nurse began cardiopulmonary resuscitation, Tiffany's mother called 911 and said her daughter was having difficulty breathing. A basic life support (BLS) ambulance was dispatched because no advanced life support (ALS) ambulance was available at the time. Tiffany was in cardiac arrest and was not breathing when it arrived. Her mother said she asked the ambulance EMTs to immediately take Tiffany to a nearby hospital, about four minutes away, but they advised her to wait for an ALS ambulance while they continued CPR. The ALS ambulance arrived about 20 minutes later and its paramedics administered oxygen and epinephrine, then took Tiffany to the hospital. She survived, but suffered severe brain damage. Her mother brought this action on her behalf against New York City, among other parties, claiming the BLS ambulance EMTs were negligent in failing to bring oxygen to the apartment and in waiting for the ALS ambulance to transport the girl.

Supreme Court granted the City's motion to dismiss the suit, ruling Applewhite failed to prove the City owed a special duty of care. That would require her to show, among other things, that the City assumed an affirmative duty to act on her behalf and that she justifiably relied on its assurances to her detriment. The court said there was no proof of "detrimental reliance" because Tiffany's mother had no other options for providing oxygen or transporting her and, thus, "there is no showing that Plaintiff was deprived of assistance that reasonably could have been expected from another source because of the government's conduct...."

The Appellate Division, First Department reversed and reinstated the suit, holding that justifiable reliance was established. It said the mother wanted to go to the hospital immediately, but the EMTs allegedly assured her it was best to wait for the ALS ambulance to arrive with paramedics and proper equipment, without telling her it would take another 20 minutes. It said, "The mother justifiably relied on the [EMTs], who had taken control of the emergency situation, and who elected to await the arrival of the ALS ambulance." It said any questions regarding the mother's credibility and the issue of proximate cause, including the degree to which Tiffany's brain damage could have been avoided or mitigated, could not be resolved on the existing record.

The City argues that Applewhite "failed to state a claim, as she did not allege that the City assumed or breached a special duty." Even if she did allege a special duty, it says, she failed to establish the justifiable reliance element because the EMTs' response to her request for immediate transport to the hospital -- that they should wait for the ALS ambulance -- "did not constitute an assurance or guarantee of her daughter's safety." It also argues that Applewhite cannot prove that any reliance by her on the EMTs' statements was detrimental because "no alternative transport could possibly have been utilized within the limited time frame for successful resuscitation and, in any event, [] no viable alternative means of transport existed, given Tiffany's need for uninterrupted CPR."

For appellant City: Assistant Corporation Counsel Drake A. Colley (212) 788-1613
For respondent Applewhite: Matthew Gaier, Manhattan (212) 267-4177

State of New York Court of Appeals

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To be argued Thursday, May 30, 2013

No. 132 Island Park, LLC v State of New York

Island Park, LLC, the owner of a 400-acre commercial nursery in Rensselaer County, is seeking compensation for loss of access to its easement over CSX railroad tracks that bisect its land. The tracks are part of the heavily-traveled Hudson Line between Rensselaer and New York City. Island Park had used the easement, a private at-grade rail crossing known as Abele's Crossing, to move farm machinery from its property on one side of the tracks to the other. In February 2005, the State Department of Transportation (DOT) obtained an order to close Abele's Crossing under Railroad Law § 97(3), which authorizes the commissioner to "require alterations" in a private rail crossing "[i]n order to ensure public safety," in this case to prevent collisions between passenger trains and farm equipment. After DOT ordered barricades installed to close the crossing in November 2009, Island Park said it had to move its machinery nearly five miles over public roads to reach the isolated portion of its property. The company brought this action for compensation for a de facto taking of its easement and consequential damages, asserting the State should have acquired the easement and paid just compensation through its eminent domain power under Railroad Law § 97(5).

The Court of Claims granted the State's motion for summary judgment dismissing the claim, saying DOT's "closure of Abele's Crossing was an exercise of the police power, and accordingly, any damages allegedly suffered by claimant are not compensable." It said subsection 97(5) "does not expressly mandate appropriation of, and compensation for, all interests in property that may be affected by a determination under [subsection] 97(3)."

The Appellate Division, Third Department affirmed. It said the State must pay compensation when it "appropriates unto itself private property and puts it to public use," but when it "regulates the use of private property in a reasonable manner to protect the health and safety of the public ... the property owner is not entitled to compensation..., unless the regulation 'permanently so restricts the use of property that it cannot be used for any reasonable purpose' and effectively destroys its economic value." In closing Abele's Crossing, it said the State "did not appropriate claimant's easement for public use but, rather, ordered it closed because ... the crossing presented a significant danger to the public." The court found "no evidence that ... the closing of the crossing 'impose[s] so onerous a burden' such that it has deprived claimant of 'the reasonable income' it derives from the fields."

Island Park argues the closure of its crossing was a de facto and regulatory taking of its property interest in the easement, since the company is denied all use of it, and the State's refusal to pay compensation violates the state and federal constitutions and Railroad Law § 97. "The State's reliance on police power does not provide immunity for takings," it says. "By failing to compensate Island Park for the economic costs associated with the closure, the State impermissibly allocated the entire cost of improving rail corridors to a private individual, with no attempt to apportion the cost to the primary beneficiary: society at large."

For appellant Island Park: J. Michael Naughton, Albany (518) 438-9907
For respondent State: Assistant Solicitor General William E. Storrs (518) 474-5464

State of New York Court of Appeals

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To be argued Thursday, May 30, 2013

No. 133 People v Derek Chisholm *(papers sealed)*

In January 2006, a New York police officer applied to Criminal Court Judge Alex J. Zigman for a warrant to search a house in Queens. The officer and a confidential informant, who had reported buying cocaine there from a man named Derek three times in the prior month and who said he had seen firearms and other drugs in the house, appeared before the judge, who found reasonable cause and issued the warrant. When it was executed, the officers found Derek Chisholm in a bedroom with a pistol, sawed-off shotgun, marijuana and a supply of ziplock bags.

Before trial, Chisholm moved to controvert the search warrant and suppress the evidence, asserting it was not based on probable cause. He also sought a Darden hearing to determine the informant's existence and reliability. Supreme Court denied the motion after reviewing the search warrant and affidavit for the warrant. The defense moved to reargue the motion to controvert the warrant and the request for a Darden hearing. Supreme Court granted reargument, but adhered to its original decision. Chisholm was convicted at a bench trial of multiple weapon possession and drug-related offenses and was sentenced to 12 years in prison.

On appeal to the Appellate Division, Second Department, Chisholm filed a pro se motion requesting a transcript of the informant's appearance before Judge Zigman, who died in 2009. Chisholm said the record failed to show whether the informant "was examined under oath" or his testimony "recorded or summarized on the record" as required by CPL 690.40(1). The court granted the motion in February 2011 and ordered the court reporter to file a copy of the transcript under seal. In August 2011, the court reporter certified that she could not locate the transcript after a "diligent search."

The Appellate Division affirmed the conviction in November 2011, saying, "The Supreme Court providently exercised its discretion in denying the defendant's application for a Darden hearing..., in light of the fact that the confidential informant appeared before the issuing magistrate and gave sworn testimony concerning the events in question...."

The prosecution says that in November 2012, after reviewing the brief Chisholm filed in this Court, it asked the court reporter to conduct another search for the transcript of the informant's January 2006 appearance before Judge Zigman. The reporter located and transcribed the minutes by January 2013 and, pursuant to the Appellate Division's order, filed it under seal in Queens Supreme Court. The prosecution says this shows that Judge Zigman "fully complied with the requirements of CPL 690.40(1), because the transcript of the informant's testimony before the magistrate does, in fact, exist...."

Chisholm argues, "As a policy matter, this Court should not reward the People for waiting more than six years to produce minutes in response to an issue that appellant raised before three different courts. To allow the People to now rely on a transcript that they unjustifiably did not provide below would only encourage abuse and future delays."

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For respondent: Queens Assistant District Attorney Donna Aldea (718) 286-5927

State of New York Court of Appeals

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To be argued Thursday, May 30, 2013

No. 134 Manuel de la Cruz v Caddell Dry Dock & Repair Co., Inc.

This breach of contract action arose from renovation and repair work that Caddell Dry Dock & Repair Co. performed on maritime vessels owned by New York City, including fire boats, garbage barges and ferries, under contracts with several City departments from 1996 to 2006. The contracts required Caddell to pay the prevailing rate of wages and supplemental benefits for work performed on "public works" projects pursuant to Labor Law § 220(3), and they incorporated schedules setting forth specific rates based on workers' job titles.

In September 2002, Manuel de la Cruz and two other Caddell employees brought this class action on behalf of 750 workers against Caddell and its sureties, alleging the plaintiffs performed repair and maintenance work for Caddell under "public works" contracts and that Caddell paid them less than the prevailing wages in violation of section 220(3). Supreme Court granted Caddell's motion for summary judgment dismissing the suit on the ground that repair and reconstruction of vessels is not a "public work."

The Appellate Division, First Department affirmed, holding that repair of city-owned vessels is not "public work" because boats and barges are not fixed structures and, thus, the contractual provision for payment of prevailing wages does not apply. Labor Law § 220(3) "does not define 'public work,' but ... precedent mandates that the prevailing wage law is limited to those workers employed in the construction, repair and maintenance work of fixed structures, and does not apply to workers who are servicing a commodity owned by the City," it said, citing Brukhman v Giuliani (94 NY2d 387). Rejecting the plaintiffs' "proposition that purpose and function alone determine whether a project is a public work," the court said, "[I]t is construction or construction-like activity on a fixed structure, rather than a finding of public purpose, that is the essential component of any determination as to a project being a 'public work.'"

The plaintiffs argue that their labor on the City's fleet is "the type of work contemplated under Labor Law § 220" and that the Appellate Division misinterpreted Brukhman as limiting "public work" to work performed on fixed structures. They say the focus of Brukhman was defining the type of work that constitutes "public work," not the type of structure on which the work is performed. They argue that "Federal authority has consistently held that repair of Federal vessels constitutes 'public work' subject to the prevailing wage requirements of the Davis-Bacon Act, 40 USC § 3142, the Federal analog to New York's Labor Law § 220.... It cannot be argued that, as a matter of public policy, the interests protected by New York Labor Law § 220 are any narrower than those protected by the Davis-Bacon Act.... Indeed, the wage protections to workers embodied in Labor Law § 220 are even more expansive, as [it] 'is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealings with laborers, workmen and mechanics.'"

For appellants de la Cruz et al: James Emmet Murphy, Manhattan (212) 943-9080
For respondents Caddell et al: Richard V. Singleton II, Manhattan (212) 885-5000

State of New York Court of Appeals

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To be argued Thursday, May 30, 2013

No. 135 People v Christopher Brinson *(papers sealed)*
No. 136 People v Lawrence Blankymsee *(papers sealed)*

In 2000, Christopher Brinson was sentenced to a determinate prison term of 10 years for a second-degree robbery conviction along with indeterminate terms for related offenses, to be served consecutively, resulting in an aggregate sentence of 13 years under the merger/aggregation provisions of Penal Law § 70.30. In 2004, Lawrence Blankymsee was sentenced to two determinate prison terms of 5 years for possession of loaded firearms and longer, indeterminate terms for drug possession convictions, all to run concurrently, resulting in an aggregate sentence of 8 to 16 years under Penal Law § 70.30. At sentencing in both cases, the trial court failed to pronounce the mandatory term of post-release supervision (PRS) for the determinate sentences.

Brinson and Blankymsee were still incarcerated in 2010, when they were scheduled for resentencing to correct the error. They objected to imposition of PRS, arguing that they had an expectation of finality in their sentences because they had already served more prison time than was imposed in their determinate terms and, thus, they had completed their determinate sentences. Supreme Court rejected their arguments and imposed 5 years of PRS on both defendants.

The Appellate Division, Second Department affirmed, ruling the resentencings did not violate double jeopardy because the defendants were still serving a "single, combined sentence" of determinate and indeterminate terms when PRS was imposed. In Brinson, it said he was "charged with knowledge" that his multiple sentences would be aggregated into a single sentence under Penal Law § 70.30 and he had "no reason to expect that discrete prison sentences nonetheless survive such that, as he serves the aggregated sentence, he is sequentially completing his punishment for each particular conviction. Thus, the defendant, who was still serving what the statute regards as a single, combined sentence at the time of the resentencing, did not have an expectation of finality in the portion of the sentence attributable to" his determinate term for robbery.

The defendants argue the imposition of PRS violated double jeopardy protections because each had an expectation of finality in his determinate sentence. Brinson says, "Since the sentencing court had ordered that the indeterminate terms be served consecutively to, i.e. after, the determinate term, and appellant had finished serving that term, he had established an expectation of finality in that sentence such that it could not be altered to add a term of PRS." Penal Law §§ 70.30 and 70.40, which determine how prison officials "must calculate service of concurrent and consecutive sentences in order to establish release and expiration dates, do not purport to create a single aggregate sentence from the multiple ones that were imposed by the sentencing judge. Nor could they, consistent with constitutional due process principles, effectuate such a change ... because even a mandatory statutory provision cannot override the sentences actually imposed by the sentencing judge."

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For respondent: Queens Assistant District Attorney Anastasia Spanakos (718) 286-5810