# *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.**

**Week of September 3 - 4, 2013**

## 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, September 3, 2013

**No. 141 People v Scott F. Doll**

In February 2009, a Genesee County sheriff's deputy approached Scott Doll shortly before 9 p.m. in the Town of Pembroke because he fit the description of a suspicious person reported by a 911 caller. Doll was carrying a car jack and lug wrench and he had what appeared to be wet blood on the legs of his pants, his shoes and hands. He told the deputy he had worn the clothing while butchering deer. After the 911 caller and another witness identified Doll as the suspicious person they had seen hiding between parked cars, the deputy handcuffed Doll and said he would detain him until he could sort out what had happened. The deputy drove Doll to his van and found blood inside and outside the vehicle and on the ground beside it. Other deputies arrived and they interrogated Doll for several hours without Miranda warnings and despite his request for counsel, repeatedly asking if someone was injured and indicating they would release him if he could show them the deer. Doll replied that he could not take them to a deer nor explain the source of the blood. At about 1:30 a.m., deputies went to the nearby home of Doll's friend and business partner, Joseph Benaquist, and found him in his driveway, beaten to death. Doll was then formally arrested. Deputies later allowed a friend to speak with him at the Sheriff's Office, in the presence of an investigator, and Doll made additional incriminating statements.

County Court denied Doll's motion to suppress his statements to the deputies based on the emergency exception to Miranda adopted in People v Krom (61 NY2d 187), saying the deputies "had reasonable grounds to believe that there was an emergency at hand and an immediate need to intervene for the protection of life which justified the continued detention and questioning of the defendant without counsel or Miranda warnings." The court ruled Doll's statements to his friend were admissible because she was not acting as an agent of the police. Doll was convicted of second-degree murder and sentenced to 15 years to life in prison.

The Appellate Division, Fourth Department affirmed on a 3-2 vote, saying, "The deputies possessed specific information establishing that one or more persons had been injured to the point where he, she or they had lost a significant amount of blood. Consequently, the deputies did not violate defendant's right to counsel by continuing to question him despite his request for an attorney. We respectfully disagree with the dissent's conclusion that the exception does not apply because the deputies lacked knowledge that there was a victim.... The deputies did not know the name of the victim or victims, but they possessed enough information about his/her/their condition to justify the continued questioning of defendant despite his request for an attorney."

The dissenters argued the exception did not apply because "the police in this case were not aware that there was even a victim who needed police assistance." While the deputies "did not need to know the victim's identity..., they at least had to know that there was a victim of a crime. The majority relies on the fact that the defendant had blood on his clothes to support the inference that there was a victim somewhere, but defendant explained that the blood on his clothes was from butchering deer, which is certainly a reasonable explanation. To allow the police to disregard a person's invocation of the right to counsel based on the mere fact that the person has blood on his or her clothing is an unwarranted expansion of the emergency exception."

For appellant Doll: Timothy M. Murphy, Buffalo (716) 849-1333
For respondent: Genesee County Assistant District Attorney William G. Zickl (585) 344-2550

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To be argued Tuesday, September 3, 2013

**No. 142 Landon v Kroll Laboratory Specialists, Inc.**

Eric Landon was serving a five-year term of probation for a forgery conviction in Orange County when his probation officer ordered him to submit to a random drug test in December 2007. His sample was sent to Kroll Laboratory Specialists, Inc., a Louisiana company that had a contract with the County Probation Department to perform drug screening of probationers. On the same day his sample was taken, Landon obtained an independent blood test that found no drugs were present, but Kroll informed the county that the sample it analyzed was positive for marijuana. Based on Kroll's report, the Probation Department filed a petition to revoke Landon's probation. At the revocation hearing, Landon presented the results of his independent blood test and submitted to a new urine test, which was also negative for drugs. The department finally withdrew its petition in March 2008, nearly three months after his probationary sentence was to have ended. Landon filed this negligence action against Kroll, alleging that the laboratory failed to exercise reasonable care in analyzing his sample and that, as a result of its false positive report, his sentence was extended for months beyond its original term.

Kroll moved to dismiss the complaint for failure to state a cause of action, arguing that Landon could not show that Kroll owed him any legal duty or that he suffered any damages. Supreme Court dismissed the suit.

The Appellate Division, Second Department reversed and reinstated the complaint, holding that "a drug testing laboratory may be held liable in tort to the subject of a drug test for failing to use reasonable care under the circumstances, notwithstanding the absence of a formal contractual relationship between the drug testing laboratory and the subject of the drug test." It said a positive drug test "may have far-reaching, permanent, and devastating effects on, among other things, an individual's livelihood, family life, and liberty.... Given the importance drug testing holds in the management of modern affairs and the costs that inaccuracies may exact on society, it is paramount that incentives exist to minimize the risk of erroneous test results. However, we are unaware of any legislative remedies extended to test-subjects who are victims of negligent drug testing.... Nor do we perceive adequate incentives in the operation of market forces." Since more accurate testing is more expensive, the court said, "the test subject's preference for increased accuracy may be outweighed by the contracting parties' cost concerns."

Kroll argues that "no court in New York has ever recognized a 'duty' and, thus, a negligence claim ... between a non-contracting testing laboratory and a third-party test subject. No court, in any jurisdiction, has ever recognized the right of an individual, in the criminal justice system, to recover 'loss-of-freedom damages,' under a negligence theory, against a private drug testing laboratory under contract with a governmental agency, as a result of drug test results (negligently obtained or otherwise), and reported to that agency as part of the terms and conditions of probation." Kroll says "there was no relationship, actual or legal, between [Landon] and Kroll, and, therefore, no duty owed him by Kroll;" and Landon suffered no harm since he was "afforded his due process rights resulting in the full and complete dismissal of the probation violation charges brought against him." It says, "Given the number of persons tested (estimated to be 54 million), and in all walks of life, it would be hard to overstate the impact the Appellate [Division] decision, if it stands, will have on future litigation in the State."

For appellant Kroll: Mitchel H. Ochs, Manhattan (212) 344-3600
For respondent Landon: Robert N. Isseks, Middletown (845) 344-4322

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To be argued Tuesday, September 3, 2013

**No. 143 People v James Alcide**

James Alcide was charged with fatally shooting Steven St. Jean in a Brooklyn grocery store in February 2005. At his trial, the jury sent two notes during its deliberations requesting that the testimony of two prosecution witnesses be read back. One witness was a police officer and the other an eyewitness who identified Alcide as the shooter. Supreme Court brought the jury into the courtroom, read the notes into the record and announced that it would participate in the read-back. For the direct examination, the judge read the prosecutor's questions to each witness and the court reporter read the witnesses' answers. They switched roles for the cross-examination, with the court reporter reading defense counsel's questions and the judge reading the witnesses' responses. Defense counsel did not object that he was not given notice or an opportunity to be heard on the proper response to the notes, nor did he object to the judge's participation in the read-back. Alcide was convicted of second-degree murder and weapon possession and was sentenced to 18 years to life.

The Appellate Division, Second Department affirmed, saying Alcide's claim that Supreme Court's procedure for handling the jury notes violated People v O'Rama (78 NY2d 270) was unpreserved for appellate review. "Since the jury merely requested read-backs of certain trial testimony, the alleged error did not constitute a mode of proceedings error which would obviate the preservation requirement," the court said, citing People v Starling (85 NY2d 509). "The defendant's contention regarding the Supreme Court's participation in reading back certain trial testimony is also unpreserved for appellate review...."

Alcide argues, "By personally participating in the readbacks, and especially by doing so in an uneven manner, the trial judge failed to properly execute his supervisory role and to remain a neutral arbiter during deliberations, thereby depriving appellant of his due process rights to a fair trial and a trial by jury.... Because the right to a trial by jury is a fundamental right affecting the organization of the court and established mode of proceedings, no objection was required to preserve this issue for this Court's review." Regarding the trial court's handling of the jury notes, Alcide argues that "the court's surprise adoption of a novel and unfair readback procedure, revealed for the first time in front of the jury, constituted a mode of proceedings error, not requiring preservation."

For appellant Alcide: Melissa S. Horlick, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Keith Dolan (718) 250-2485

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To be argued Tuesday, September 3, 2013

**No. 144 People v Eddie Thompson, Jr.**

Eddie Thompson, Jr. was charged with murder after shooting his girlfriend, Frances Johnson, twice at close range at her home in Milton, Ulster County, in October 2008. Thompson testified that he shot Johnson accidentally while helping her unload her handgun. During jury selection, a prospective juror informed Supreme Court that he had been a friend of the District Attorney for more than 40 years. The District Attorney agreed to excuse the juror, but the court asked whether the friendship would affect the juror's ability to be fair and impartial, and the juror replied "no." Defense counsel then questioned the juror and, when the court denied his challenge for cause, defense counsel declined to use a peremptory challenge to remove the juror. After the juror was seated, defense counsel said on the record, "I have [the prosecutor's] best friend on the jury. I should have my head examined." Thompson was acquitted of second-degree murder, but convicted of first-degree manslaughter. He was sentenced to 25 years in prison.

The Appellate Division, Third Department affirmed. It said Thompson "waived any argument regarding his unsuccessful challenge for cause to one juror [the District Attorney's friend] by thereafter declining to use an available peremptory challenge to remove that juror.... In contrast, his arguments regarding a prospective juror who lived in the same town as the District Attorney [and was struck with a peremptory challenge] are properly before us. Nevertheless, the juror's 'nodding acquaintance' with the District Attorney amounted to occasional encounters at social events that were not likely to preclude the prospective juror from reaching an impartial verdict...."

Thompson argues the trial court committed reversible error by denying his challenges for cause to both jurors, and he argues that his attorney's failure to use a peremptory challenge to strike the District Attorney's friend from the jury constituted ineffective assistance of counsel. Thompson says his trial attorney -- in remarking that "I should have my head examined" -- "may well have recognized that by not making a peremptory challenge to the seating of [that juror] he had made a major error. This impromptu statement of defense counsel demonstrates that the failure to exercise a peremptory challenge was not part of a legitimate trial strategy." He also argues, among other things, that the trial court erred in refusing to order disclosure of the grand jury testimony of the prosecution's ballistics expert and that there was legally insufficient evidence to support the verdict.

For appellant Thompson: Jack H. Weiner, Chatham (518) 392-2426
For respondent: Ulster County Assistant District Attorney Joan Gudesblatt Lamb (845) 340-3280

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To be argued Wednesday, September 4, 2013

**No. 150 People v Omar Shabazz**
**No. 151 People v Donald Perrington**

Omar Shabazz and Donald Perrington were in a car that was stopped for traffic infractions by officers of the Manhattan North Anticrime Unit in January 2008. Shabazz and a third passenger, Karla Corneille, were seated in the rear with an unfastened woman's handbag between them. After officers found a loaded 9-millimeter handgun in the purse, all three were charged with second-degree weapon possession under the automobile presumption (Penal Law § 265.15), based on their presence in the car where the gun was found, and a constructive possession theory. Corneille was tried first, testified the gun was not hers, and was acquitted.

At their joint trial, Perrington and Shabazz sought to call Perrington's former attorney to testify that Corneille had approached him prior to her own trial, asking why her co-defendants were still in jail because the gun belonged to her. Perrington and Shabazz argued her hearsay statement was admissible as a declaration against penal interest. Supreme Court denied their request on the ground the hearsay statement was not reliable. "[A]llowing that statement in while knowing that [Corneille] at a later time stated under oath the exact opposite of what she said to [Perrington's former counsel] just seems wrong on many levels.... In any event, I don't think the statement is reliable." Shabazz and Perrington were each convicted of second-degree weapon possession and sentenced to eight years in prison.

The Appellate Division, First Department affirmed, finding insufficient proof that the hearsay statement was reliable or that Corneille was unavailable as a witness. "The People's inability to locate [Corneille] after her own trial was not dispositive of whether she would cooperate with defendants, with whom she was associated," it said. "Furthermore, there was nothing to confirm the statement's reliability, and it was particularly unreliable in light of her testimony at her own trial." It said the defendants failed to preserve their claim that exclusion of the statement violated their right to a fair trial. Alternatively, it rejected the constitutional claim on the merits, saying the hearsay statement "was neither reliable nor critically exculpatory.... [Corneille's] assertion that she owned the pistol would not have established her exclusive possession of it at the time of the arrest."

The defendants argue Corneille's pre-trial admission that the gun was hers was an admissible statement against penal interest because there was sufficient evidence to establish "a reasonable possibility that the statement might be true," as required by People v Settles (46 NY2d 154). Shabazz says the circumstances "show that she made the admission spontaneously, and that it was unequivocal, coherent, and plainly against her own penal interests. She made it to an attorney and officer of the court whom she knew would consider it significant and act upon it." Her "contradictory trial testimony went to the declaration's weight, not its admissibility." The defendants argue the trial court precluded the statement on the sole ground that it was unreliable and the Appellate Division erred in reaching the issue of Corneille's availability. They also contend the prosecutor's misconduct denied them a fair trial.

For appellant Shabazz: Barbara Zolot, Manhattan (212) 577-2523
For appellant Perrington: David K. Bertan, Bronx (718) 742-1688
For respondent: Manhattan Assistant District Attorney Britta Gilmore (212) 335-9000

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To be argued Wednesday, September 4, 2013

**No. 146 Matter of Murphy v NYS Division of Housing and Community Renewal**

Paul Murphy brought this article 78 proceeding to obtain succession rights to his family's apartment in a Mitchell-Lama building, Southbridge Towers in Manhattan. His family began leasing the apartment in 1981, when Murphy was a month old, and he was named as a shareholder on the lease. His mother filed annual income affidavits for 1990 through 1997, listing Murphy as an occupant, but she did not file the required affidavits for 1998 or 1999. In 2004, when he was 23 years old, Murphy applied to the building owner for succession rights, saying his parents had moved out of the apartment and he had lived there with them for more than the necessary two years. In support, he submitted copies of the lease and his mother's income affidavits for 1990-1997, as well as the income affidavits he filed for 2000-2003. He also submitted his birth certificate, high school transcript, driver's license, tax returns, bank statements and other evidence showing the apartment had been his life-long residence.

The owner, Southbridge Towers, Inc., asked Murphy to submit the income affidavits for 1998 and 1999. When he did not, it denied his application and ordered him to vacate the apartment. Murphy appealed to the State Division of Housing and Community Renewal (DHCR), submitting a statement from his mother in which she said she did not file the affidavits for 1998 and 1999 due to concerns about privacy and the security of her financial information.

DHCR denied his appeal, saying he failed to establish co-occupancy because his mother did not file an income affidavit for 1998. It said, "Those affidavits are the primary evidence showing that the subject apartment was a succession claimant's primary residence" under DHCR regulations. "In addition, the appearance of a succession claimant's name on the subject apartment's annual affidavits executed during the applicable qualification period is a separate and coextensive requirement for obtaining succession rights to the unit's tenancy." The agency rejected the "purported excuse" for his mother's failure to file the affidavits.

Supreme Court annulled the determination and ruled Murphy is entitled to succession rights, saying DHCR "arbitrarily applied" its regulations to make the income affidavit "a trump card, invalidating all other evidence in the case. Such a result is not supported by the wording of the regulations or the policy behind it."

The Appellate Division, First Department affirmed. Saying "the relevant inquiry is primary residency" during the qualification period, it held that "the failure to file the requisite annual income affidavit is not fatal to succession rights, provided that the party seeking succession proffers an excuse for such failure ... and demonstrates residency with other documentary proof listed within 9 NYCRR 1727-8.2(a)(2)(b)." It said the mother's "excuse ... was supported by the record" and Murphy "submitted a host of other documents" establishing that the apartment was his primary residence during the qualification period.

DHCR says, "For over twenty years, DHCR regulations have unambiguously limited succession to individuals who were listed on income affidavits filed by the tenant during the two years before the tenant vacated the apartment," an "essential prerequisite" that Murphy failed to meet. "The Appellate Division's ruling improperly revised duly promulgated agency regulations to promote the court's own policy preferences -- thereby impeding the orderly administration of Mitchell-Lama housing and favoring succession applicants over low-income persons on long waiting lists."

For appellant DHCR: Assistant Solicitor General Brian A. Sutherland (212) 416-8096
For respondent Murphy: David Hershey-Webb, Manhattan (212) 349-3000

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To be argued Wednesday, September 4, 2013

**No. 147 People v Chadon Morris**

In May 2007, police officers responding to a 911 call about a gunpoint robbery in Far Rockaway, Queens, stopped and searched Chadon Morris, finding a loaded .22 caliber pistol. He was never charged with the robbery, but he was tried for weapon possession and resisting arrest.

Morris raised a defense of temporary and innocent possession, testifying at trial that he had just found the gun in a parking lot and was going to report it to the police when he got home. The prosecution sought to introduce a recording of the 911 call, along with police testimony that Morris fit the description of the alleged robber, in order to explain the officers' decision to stop and search him. Defense counsel objected that the evidence of the uncharged robbery would be overly prejudicial and told the court he would not challenge the propriety of the police stop. Supreme Court, saying "police conduct in stopping defendants is always on trial," admitted the evidence as "background information" to explain the officers' actions and instructed the jury that the 911 recording was not admitted for the truth of the caller's statements. Morris was convicted of criminal possession of a weapon in the second degree and sentenced to five years in prison.

The Appellate Division, Second Department affirmed. "The challenged evidence was properly admitted to 'provide background information as to how and why the police pursued and confronted [the] defendant' (People v Tosca, 98 NY2d 660, 661 [2002] ...), and the challenged evidence was more probative than prejudicial (cf. People v Resek, 3 NY3d 385, 389 [2004])," the court said. "Moreover, the trial court nullified any potential prejudice by properly instructing the jury several times as to the limited purpose of this evidence...."

Morris argues that, since he admitted that he possessed the gun and agreed not to challenge the propriety of the police stop, the 911 call was inadmissible under Resek, "because the circumstances of the defendant's arrest can be 'easily dealt with by less prejudicial means.'" Under Resek, he says, the court should have simply instructed the jury that the arrest was lawful. "Since the uncharged gunpoint robbery evidence had no probative value to any issue at trial, and its prejudice to appellant's defense of temporary innocent possession could not be ameliorated by the court's limiting charge, appellant was deprived of his due process right to a fair trial."

For appellant Morris: Barry Stendig, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Rebecca Height (718) 286-6541

# *State of New York Court of Appeals*

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To be argued Wednesday, September 4, 2013

**No. 148 People v Donny P. Beaty** *(papers sealed)*

Donny Beaty was charged with raping a 23-year-old neighbor after breaking into her home in Rochester in March 2007. The woman said she had fallen asleep on her couch and awoke to find a man lying next to her. She said she smelled alcohol on his breath. When she told him to leave, he began choking her and raped her, then left with her cell phone, a pink Razr. Police found the phone hidden in Beaty's bedroom when they executed a search warrant. Confronted with the phone, Beaty gave investigators a written statement in which he said "I have a problem with alcohol. If I drink too much, I am taken over by a spirit that takes control of my body and my thoughts. It's something that I can't control.... [O]ne night earlier this month I was out drinking all over. I remember going to Lux bar on South Avenue and other places. I got drunk. The next thing I remember is knocking on the front window of the house across the street.... No one answered." He said he went in through the window and "I think I fell asleep on the couch. I remember a woman screaming. I was scared and got up and ran." The next day, he said he found a pink phone in his clothes, "but I could not remember how I got it. I knew something bad had happened."

At trial, Beaty requested an intoxication charge, an instruction to the jury that intoxication may negate the intent or knowledge element of a crime. Supreme Court denied the request, saying "there is no evidence whatsoever indicating the alleged intoxication of the Defendant." Beaty was convicted of first-degree rape and burglary and second-degree assault and was sentenced to 21 years in prison. He was also sentenced to a consecutive term of 10 years for an unrelated burglary.

The Appellate Division, Fourth Department affirmed, citing People v Sirico (17 NY3d 744), which held that "bare assertions by a defendant concerning his intoxication, standing alone, are insufficient" to warrant an intoxication charge. The Appellate Division said, "Here, the only evidence in the record apart from defendant's statements to the police regarding his alleged intoxication on the night of the rape incident was the victim's testimony that she smelled alcohol on the perpetrator's breath. We thus conclude that defendant failed to establish his entitlement to the intoxication charge...."

Beaty argues that his case "is not one involving a 'bare' assertion by the defendant of intoxication with nothing more.... Rather, the evidence ... is distinctive to the specific impact of the alcohol upon Mr. Beaty's behavior and mental state -- evidence from which a juror could reasonably entertain doubt on the elements of intent and knowledge -- requiring that the charge be given...." He says his "lack of recall relating to much of what occurred was consistent with his conversation with the investigator about blackouts and his inability to control his actions or thoughts when he drinks alcohol.... This is the exact opposite of Sirico, where the defendant recalled everything.... And Mr. Beaty's claim that he had been drinking was corroborated by ... the complainant, who testified her attacker's breath smelled of alcohol." He says the trial court's refusal to give an intoxication charge deprived him "not only of his defense, but of his right to have a jury determine issues of fact."

For appellant Beaty: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Wednesday, September 4, 2013

**No. 149 Matter of Belzberg v Verus Investments Holdings Inc.**

In October 2008, investor Samuel Belzberg and Ajmal Khan, sole owner of Verus Investments Holdings Inc., decided to buy securities in Fording Canadian Coal. Belzberg asked Khan to process the trade through Verus's brokerage account at Jefferies & Company, Inc. The brokerage agreement between Verus and Jefferies contained an arbitration clause. Belzberg directed that $5 million for the Fording investment be wired to the Jefferies account from Winton Capital Holding, which Belzberg had organized for the benefit of his children. According to Belzberg, he acts as Winton's financial advisor, but has no beneficial interest in it. The Fording securities were liquidated in November 2008 and the proceeds placed in Verus's account at Jefferies, including Winton's $5 million principal investment and $223,655 in profits attributable to that investment. At Belzberg's direction, Verus returned the $5 million principal amount to Winton and wired the $223,655 in profits to Belzberg's friend Doris Lindbergh. In subsequent proceedings in this case, Belzberg described the payment to Lindbergh as a loan to enable her to buy a house. Lindbergh testified that, while the loan was not documented, she was to repay it to Belzberg when she could.

Canadian authorities later notified Jefferies that a $928,053 withholding tax was owed on the transaction. Khan asked Belzberg to pay Winton's share of the tax, but he refused. Jefferies then commenced an arbitration against Verus for the unpaid taxes before the Financial Industry Regulatory Authority, and Verus asserted third-party arbitration claims against Belzberg, Winton and others for payment of their share of the taxes. Belzberg filed an article 75 petition to stay arbitration of the claim against him, asserting that he was not subject to the arbitration agreement between Verus and Jefferies because he was not a customer of Jefferies. Verus cross-moved to compel arbitration under the doctrine of direct benefits estoppel, contending he had knowingly received direct benefits from the Verus-Jefferies brokerage agreement.

Supreme Court granted Belzberg's petition to stay the arbitration, saying, "Even if Belzberg initiated and orchestrated the entire transaction on behalf of Winton, and even if he knew of the arbitration clause in the Customer Agreement, Belzberg did not receive a benefit flowing directly from the Customer Agreement.... Belzberg's benefit, if any, consisted in Lindbergh -- his long-time friend -- receiving a loan from Winton. This benefit, however, did not flow directly from the Customer Agreement between Verus and Jefferies, but from the business relationship between Belzberg and Winton and Belzberg's authority to make investment decisions, including loans, on Winton's behalf."

The Appellate Division, First Department reversed, saying "Belzberg should be estopped from avoiding arbitration because he knowingly exploited and received direct benefits from the customer agreement.... The profits Belzberg diverted to Lindbergh were generated in the Fording trade that Belzberg orchestrated using Verus's account at Jefferies.... [A]bsent the Verus-Jefferies customer agreement, Belzberg would not have been able to place the trade with Jefferies. And, as Lindbergh testified, she will repay the money directly to Belzberg, which means that Belzberg will ultimately receive the profits from the trade."

For appellant Belzberg: H. Peter Haveles, Jr., Manhattan (212) 836-8000
For respondent Verus: Charles J. Hecht, Manhattan (212) 545-4600