

***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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of February 17 - 19, 2009

State of New York Court of Appeals

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To be argued Tuesday, February 17, 2009

No. 37 People v Walkins Contreras

papers sealed

Walkins Contreras was arrested in his estranged wife's Manhattan apartment in February 2004, after she reported to police that he had held her and her seven-year-old there against their will and had raped and assaulted her. Contreras was ultimately convicted of first-degree rape, second-degree kidnapping and first-degree burglary, among other charges, and was sentenced to 20 years in prison.

Prior to jury selection, the prosecutor informed the court of a page of notes with graphic sexual content that police had found in the complainant's apartment on the day of the incident. The prosecutor made an ex parte application for a protective order precluding the defense from using the notes at trial. The court examined the notes in camera and heard testimony from the complainant, who said she made the notes in preparation for a letter she intended to write to her new boyfriend. She testified the notes had nothing to do with Contreras. The court then called in defense counsel and for the first time disclosed the contents of the notes to him, but ordered him not to disclose the nature or existence of the notes to his client. Over defense objections, the court ruled the notes were inadmissible because they were irrelevant to the case and were protected under the Rape Shield Law. Contreras was excluded from the entire proceeding.

The Appellate Division, First Department affirmed, rejecting Contreras's argument that his exclusion from proceedings on the admissibility of the notes deprived him of his right to be present at a material stage of the trial. "There was no indication that defendant had any knowledge of the note's existence, and his arguments to the contrary are speculative," it said. "Therefore, he could not have contributed in any meaningful way to the proceedings...." The court also rejected his right to counsel claim, saying, "The court's order prohibiting defense counsel from disclosing the note to defendant did not deprive defendant of his right to effective assistance of counsel. The court had a legitimate interest in protecting the victim from an unnecessary invasion of her privacy...." The court further ruled that the Rape Shield Law did not apply, but that the notes were properly excluded as irrelevant.

Contreras argues that his exclusion from the in camera proceeding "violated [his] right to be present because (1) the proceeding was critical to the case's outcome and his presence would have contributed to the fairness of the procedure; (2) his presence would have given him the opportunity to defend himself better at trial; and (3) [he] could have made a meaningful contribution to the proceedings and assisted his attorney by providing his knowledge of the note and pointing out inconsistencies in the complainant's testimony." His attorney was also excluded from most of the proceeding and, he says, "was not given a meaningful opportunity to argue that the evidence should be admitted." He argues the court order barring defense counsel from discussing the notes with him "deprived [him] of his right to counsel, and no exceptional circumstances existed to justify such an extensive ban."

For appellant Contreras: Krista M. Chiauuzzi, Manhattan (212) 259-8000

For respondent: Manhattan Assistant District Attorney Sheila O'Shea (212) 335-9000

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To be argued Tuesday, February 17, 2009

No. 38 People v Amber Bauman and Charles Edward Lafler

Amber Bauman and Charles Edward Lafler resided with 51-year-old Bruce Phillips, who suffered from multiple sclerosis, and his daughter from August 2004 to April 2005, first at the Harris Park Apartments in Rochester and then at a house on Hurstbourne Road in the Town of Irondequoit. During that time, prosecutors alleged, Bauman and Lafler struck him with their fists, a baseball bat and a hammer, burned him with a frying pan and with hot water, and denied him food. He suffered various injuries, including fractured fingers, ribs and facial bones, internal bleeding, a detached retina, and burns. In Irondequoit, the defendants allegedly locked him in an unheated basement room for hours at a time and made him sleep in the basement on a plastic lawn chair. Phillips was unresponsive when his daughter went to see him in the basement on April 7, 2005, and she called 911. Ambulance personnel found him unconscious and near death.

Bauman and Lafler were indicted on two counts of assault in the first degree based on ten incidents that occurred during the eight-month period, one alleging intentional assault with a dangerous instrument and the other alleging assault under circumstances evincing a depraved indifference to human life. Supreme Court dismissed both counts as duplicative, with leave to resubmit appropriate charges to another grand jury.

The Appellate Division, Fourth Department affirmed, but split 3-2 on the depraved indifference count. The court agreed unanimously that the intentional assault count was properly dismissed as duplicative because it charged more than one offense. "[A] jury might find both that defendants committed the offense of intentional assault by burning the victim's arm with a hot frying pan and that they committed the offense of intentional assault by breaking the victim's fingers with a hammer. Thus, in the event of a conviction, 'there is such multiplicity of acts encompassed in [count one] as to make it virtually impossible to determine the particular act ... as to which the jury reached a unanimous verdict,'" it said, quoting People v Keindl (68 NY2d 410).

The majority held that the depraved indifference count was also duplicative. "Although the alleged conduct in count two is not duplicitous with respect to the element of depraved indifference to human life, we nevertheless conclude that, as with count one, in the event of a conviction there 'is such a multiplicity of acts ... as to make it virtually impossible to determine the particular' conduct that allegedly created a grave risk of death or which serious injury was thereby caused, and thus whether the jury reached a unanimous verdict...," it said. "Indeed, a jury might find on the alleged facts that defendants' ongoing conduct created a grave risk of death on several occasions over the eight-month period, each of which resulted in serious physical injury...."

The dissenters argued that depraved indifference assault is a continuing crime and said, in view of that determination, "we are compelled to conclude that there was only one occasion on which defendants' conduct resulted in serious physical injury and a grave risk of death, i.e., on April 7, 2005. We thus conclude that count two of the indictment is not duplicitous because it alleges a continuing offense with a series of serious physical injuries culminating in a grave risk of death on one occasion."

For appellant: Monroe County Asst. District Attorney Kelly Christine Wolford (585) 753-4654

For respondent Bauman: William Clauss, Rochester (585) 753-4340

For respondent Lafler: Gary Muldoon, Rochester (585) 262-5130

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To be argued Tuesday, February 17, 2009

No. 39 Samuel v Druckman & Sinel, LLP

Attorney Elliot Sinel, of Druckman & Sinel, was retained in 2000 by the mother of a child who suffered brain injury during childbirth at Bellevue Hospital to bring a medical malpractice action against the New York City Health & Hospitals Corp. In January 2002, Sinel referred the case to Steven B. Samuel, of Samuel & Ott, for trial pursuant to a letter agreement which provided that Druckman & Sinel would receive "one-third of the entire legal fee recovered" in the case. Samuel subsequently brought in Steven Pegalis, of Pegalis & Erickson, as co-counsel, and the case was finally settled in May 2005 for \$6.7 million. Legal fees would have been limited to \$805,767.30 under the sliding fee scale in Judiciary Law § 474-a(2), but the trial court awarded enhanced fees of \$1.9 million -- \$1,137,826.41 to Samuel & Ott and \$762,173.59 to Pegalis & Erickson -- due to the complexity and difficulty of the litigation.

When Sinel demanded one-third of the \$1.9 million enhanced fee, Samuel and his firm brought this action alleging that any award to Sinel and his firm would be prohibited by Code of Professional Responsibility DR 2-107, which limits the sharing of legal fees. Sinel counterclaimed for \$588,832.08, amounting to one-third of the enhanced fee plus disbursements. Supreme Court denied summary judgment motions from both sides.

The Appellate Division, First Department modified by granting Sinel's motion, in part, finding he had demonstrated entitlement to a share of the fee, but it split 3-2 on the amount of his award. The majority ruled Sinel was entitled to one-third of the statutory fee and awarded him \$268,589. It said Sinel "made no contribution to the extraordinary services provided by Samuel and Pegalis that resulted in the trial court granting their application for an enhanced award of legal fees over the normal sliding scale. Under the circumstances, allowing Sinel to share in any portion of the enhanced award would result in a fee grossly disproportionate to the services rendered. It would result in defendants, the referring attorneys, being awarded a fee larger than plaintiffs, the attorneys who did the bulk of the work. Clearly, this could not have been the intent of the attorneys when they entered into their agreement nor can it be consistent with this court's obligation to oversee the reasonableness of legal fees...."

The dissenters said they "disagree with the majority's determination not to enforce as written the agreement between Sinel's law firm and Samuel's law firm providing that the former 'will be compensated at the rate of one-third of the entire legal fee recovered for our participation in this matter, upon its conclusion by settlement, verdict or otherwise.' In effectively rewriting the agreement, the majority contradicts controlling and well-settled precedent dealing with such fee agreements and with contract law generally. Moreover, the majority establishes a precedent that will encourage -- and enmesh the judiciary in -- needless and standardless litigation."

For appellants-respondents Druckman & Sinel et al: Brian J. Isaac, Manhattan (212) 233-8100
For respondents-appellants Samuel et al: Barbara D. Goldberg, Great Neck (516) 487-5800

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To be argued Wednesday, February 18, 2009

No. 42 Duffy v Vogel

Eleanor Duffy brought this malpractice action against Dr. James M. Vogel and Dr. Allan J. Jacobs, claiming they failed to diagnose and properly treat her pelvic tumor in 2000. The tumor was detected and removed by other physicians a year later. Before the jury began deliberations, the trial court instructed it to first consider the liability of the named defendants and, only if it found one or both of them liable, to then determine the amount of damages. The jury ultimately rendered a verdict in which it found neither defendant was liable and, despite the court's instructions, went on to find that two non-party physicians were responsible for Duffy's injuries and set the amount of her damages at \$1.5 million.

Plaintiff's counsel complained the verdict was inconsistent and sought to have the jury sent back to reconsider, saying, "The jury clearly intended to award my client a million and a half dollars. They haven't the faintest idea they have not done so." When the court refused the request, plaintiff's counsel asked that the jury be polled. The court denied the request, discharged the jury, and entered judgment for the defendants. Subsequently, the court granted plaintiff's motion to set aside the verdict and declare a mistrial on the ground that parties "have an absolute right to have the jury polled" and it committed reversible error by failing to do so. The court said it "should have had the jury polled to make certain of their intentions."

The Appellate Division, First Department reversed the order, reinstated the verdict and dismissed Duffy's suit in a 3-2 decision. The majority said Duffy had an "absolute right" to have the jury polled, but ruled the trial court's error was harmless. "If failing to poll the jury was merely an error in form and not substance having no impact on the outcome of these proceedings, and neither party has demonstrated prejudice then the interest of justice would not be served by setting this verdict aside," it said. "Here, the objective facts set forth amply demonstrate that polling the jury would not have resulted in a different verdict. That opinion is not based upon intuition; rather it is based upon a fair reading of what transpired in open court and what is unambiguously set forth in the jurors' own handwriting on their verdict sheet. Throughout, each time the jury was asked it stated in no uncertain terms through its foreperson that it was of the collective view that defendants were not liable, and in that view, the jurors were all of the same mind and unanimous."

The dissenters said, "The majority, while in agreement that the right to poll a jury is an absolute right, nevertheless holds that the denial of the absolute right here was harmless error. In other words, a party has a right to poll a jury except when it does not, that is when a court deems that polling a jury would not change the verdict. In my opinion, such a holding is a contradiction in terms which, if allowed to stand, means we have impermissibly converted an absolute right into a conditional one."

For appellant Duffy: Jonathan M. Landsman, Manhattan (212) 949-6100
For respondent Vogel: Steven C. Mandell, Manhattan (212) 593-6700
For respondent Jacobs: Daniel S. Ratner, Manhattan (212) 286-8585

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To be argued Wednesday, February 18, 2009

No. 43 Gorman v Town of Huntington

Norma Gorman brought this action against the Town of Huntington alleging that she was injured when she tripped and fell on a defective sidewalk alongside Saint Anthony of Padua Roman Catholic Church in the hamlet of East Northport in June 2002. The Town moved to dismiss the suit on the ground that prior written notice of the defect had not been filed with the Town Clerk or Superintendent of Highways, as required by town ordinances. Gorman presented evidence that at least one member of the public, Reverend Richard Hoerning of St. Anthony's, was instructed by a Town engineering inspector to send a letter with his concerns about the condition of the sidewalk to the director of the Department of Engineering Services, which was responsible for sidewalk inspection, maintenance and repair. Rev. Hoerning's letter was received by the engineering department in February 2002. The engineering inspector kept indexed files of sidewalk complaints, which included two letters from Rev. Hoerning and a 1995 memorandum from a Town Councilman about problems with the sidewalk at St. Anthony's.

Supreme Court denied the Town's motion to dismiss, ruling that it was "estopped from asserting the defense of lack of prior written notice" because it had "delegated" responsibility for keeping records of such notices to its engineering department. The court said, "Here the Defendant set up its own distinct system within the Town's Department of Engineering Services [and] in so doing has, as a practical matter, given up the statutory defense that would otherwise require notice to either the Town Clerk or the Superintendent of Highways."

The Appellate Division, Second Department affirmed and, upon searching the record, dismissed the Town's affirmative defenses based on lack of prior notice. It said, "[W]e find that where a municipal employee acting within an official capacity instructs a member of the public to convey written notice of a condition to a municipal employee other than those agents designated by local statute, and where such notice is then received by the department responsible for sidewalk-related record keeping and for the actual inspection and repair of the dangerous or defective sidewalk conditions, the municipality is estopped from claiming the absence of prior written notice to the proper statutory designee as a defense in a subsequent action."

The Town argues that its prior written notice requirement "is clear and absolute," requiring notice to the Town Clerk or Superintendent of Highways, and it is irrelevant that it has assigned responsibility for contracting for sidewalk repairs to its Department of Engineering Services. It says, "The Appellate Division's newly created exception to the prior written notice rule sets a troubling precedent which will impact upon every municipality because it renders it impossible for the municipality to know when the exception might be triggered.... It also amounts to the court taking on a role more appropriate for the State Legislature or the Town Board."

For appellant Town: Maureen T. Liccione, Garden City (516) 746-8000
For respondent Gorman: Thomas J. Lavallee, Hauppauge (631) 851-9500

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To be argued Wednesday, February 18, 2009

No. 44 M&B Joint Venture, Inc. v Laurus Master Fund, Ltd.

In February 2004, Laurus Master Fund loaned \$24 million to Penthouse International, Inc. (PHI) in exchange for a mortgage on PHI's townhouse at 14-16 East 67th Street in Manhattan. PHI immediately conveyed the property to its holding company, P.H. Realty Associates, which delivered a deed in lieu of foreclosure to Laurus. PHI defaulted on the loan in August 2004. Laurus obtained a judgment of foreclosure in January 2006 and P.H. Realty conveyed the property to a Laurus subsidiary, 14-16 East 67th Street Holding Corp.

In October 2006, M&B Joint Venture Inc. brought this action against Laurus and its subsidiary, among others, asserting claims for an equitable lien on the townhouse and unjust enrichment. It also filed a notice of pendency against the property. M&B alleged that at the same time PHI was negotiating its loan with Laurus in February 2004, P.H. Realty approached M&B for a \$490,000 bridge loan to enable it to acquire and refinance the townhouse. M&B said it was "understood and agreed" that P.H. Realty would deliver it a promissory note and a security interest in the property, which was to be a second priority mortgage behind Laurus. M&B said it transmitted the loan funds to P.H. Realty's escrow agent, who allegedly released the funds to P.H. Realty without first obtaining the promissory note and mortgage. M&B claims that it was repaid only \$100,000 and that the balance of \$390,000 remains due.

Supreme Court denied Laurus's motions to cancel the notice of pendency and dismiss the complaint. It said, "Here, the pleadings satisfy the requirements for the filing of a notice of pendency pursuant to CPLR 6501 inasmuch as plaintiff properly pled, inter alia, the existence of an equitable lien. Whether plaintiff ultimately prevails on its claim, is of no moment."

The Appellate Division, First Department dismissed the unjust enrichment claim, but otherwise affirmed in a 3-2 decision. The majority said, "There was a basis for the notice of pendency.... The evidence, not only of the bridge loan but also of the conversation with a Laurus official and a Penthouse representative during which Penthouse allegedly agreed to the mortgage on the property and Laurus was made aware of the mortgage, supplemented the allegations of the complaint to sufficiently state a cause of action for an equitable lien...."

The dissenters argued that the complaint should be dismissed and the notice of pendency cancelled. They said, "[W]here extrinsic evidence is used, the standard of review on a CPLR 3211(a)(7) motion is 'whether the proponent of the pleading has a cause of action, not whether he has stated one' (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Here, essential facts alleged in the complaint regarding plaintiff's claim for an equitable lien have been negated beyond substantial question by the extrinsic evidence on this motion.... At bottom, plaintiff had nothing more than an expectation that the loan it advanced to PHI or P.H. Realty would be repaid. That expectation is insufficient to support a claim for an equitable lien...."

For appellants Laurus et al: Hillary Richard, Manhattan (212) 668-1900
For respondent M&B: Richard P. Romeo, Manhattan (212) 661-7100

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To be argued Thursday, February 19, 2009

No. 45 Ferluckaj v Goldman Sachs & Co.

Miliha Ferluckaj was injured in March 2001 while cleaning the interior side of windows on the 29th floor of the office building at 32 Old Slip Road in Manhattan. The floor was leased by Goldman Sachs & Co. and its contractor had nearly completed renovations in preparation for Goldman to move in. Goldman's lease required the building's owner to provide cleaning services and the owner contracted with Ferluckaj's employer, American Building Maintenance Co. (ABM), to do the cleaning. ABM's contract required it to clean the building's windows every three months and further required it, at the owner's request, to clean interior windows prior to a new tenant's occupancy.

The windows Ferluckaj was assigned to clean on the day of her accident rose nine feet above the floor. She took her instructions from her ABM supervisor and was provided with a hand cloth, but no other tools or safety equipment. She testified at her deposition that she knew ABM had a step stool in a supply closet, but she did not ask for it. Instead, she stood on a desk, about three feet tall and a little narrower than the window, in order to reach the top. As she cleaned across the window, she stepped off the end of the desk and fell to the floor. Ferluckaj brought this action against Goldman alleging, among other things, violation of Labor Law § 240(1), which imposes absolute liability on owners, contractors and their agents for failure to provide safety equipment to protect workers from elevation-related risks.

Supreme Court granted Goldman's summary judgment motion to dismiss the claim, saying Ferluckaj "was aware that ABM had stepladders or step stools for use by its cleaning staff, but never requested to use such equipment." It said her decision to stand on the desk was the sole proximate cause of her injury.

The Appellate Division, First Department reinstated the Labor Law § 240(1) claim, issuing a two-justice plurality memorandum, a concurrence and solo dissent. It said Goldman failed to prove Ferluckaj was the sole proximate cause of her accident because it "did not establish as a matter of law that the step stool would have been sufficient to permit plaintiff to avoid the accident...." Further, the court found there was a triable question as to whether Goldman, as a lessee, could be held liable under the statute because it had the right or authority to control the work site. "Goldman argues that it had no authority over plaintiff's window cleaning because the work was being performed strictly pursuant to ABM's agreement with the owner....," the court said. "However, the contract is not dispositive on its face. Accordingly, Goldman did not meet its prima facie burden merely by placing it on the record."

The dissenter said Goldman "is a stranger to the contract [between ABM and the owner], and the injured plaintiff has failed to provide any proof to establish that Goldman either contracted for, or exercised control over, the window cleaning work. Thus, there is no basis upon which liability may be imposed on Goldman, and its cross motion to dismiss plaintiff's Labor Law § 240(1) claim was properly granted."

For appellant Goldman Sachs: Christine Bernstock, Manhattan (212) 490-3000
For respondent Ferluckaj: Michael J. Gaffney, Staten Island (718) 815-6400

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To be argued Thursday, February 19, 2009

No. 46 McLean v City of New York

Charlene McLean, a single working mother, brought this negligence suit against the City of New York after her three-month-old daughter, Briana Hall, was injured in February 2000 while in the care of Patricia Theroulde, the owner and operator of First Steps Family Day Care Center in Manhattan. First Steps had been licensed annually since 1997 by the City Department of Health and Mental Hygiene (DOH), which was responsible for licensing and registration of day care centers in the City under a contract with the State. There had been two prior complaints of child maltreatment brought against Theroulde in 1997 and 1998, both of them substantiated following investigation by the City Administration for Children's Services (ACS).

McLean had placed Briana at First Steps in mid-December 1999, about six weeks before the incident. McLean first sought referrals from ACS and was given a list of registered day care providers in her area, which included Theroulde. Briana was injured on February 3, 2000, when Theroulde's one-year-old son pulled her off a bed onto the floor. Theroulde was in the bathroom bathing another child at the time. Further injury occurred when Theroulde shook Briana in an alleged effort to revive her. Briana suffered traumatic brain injuries and loss of cognitive function. An ACS investigation concluded, among other things, "that since Ms. Theroulde had two prior indicated cases in 1997 and 1998, she shouldn't have been licensed as a Day Care Provider in 1999."

McLean alleges that the City was negligent when it issued a day care registration certificate to Theroulde despite prior substantiated complaints and when it included her day care center on the list of providers that ACS gave to McLean. Supreme Court denied the City's summary judgment motion to dismiss the complaint.

The Appellate Division, First Department affirmed, saying "There were triable issues of fact as to whether the City had an obligation to plaintiffs pursuant to a contract between the State and the City's Department of Health regarding the enforcement of state regulations governing the certification and operation of private home day care centers.... Liability may also exist for negligent acts or omissions involving a protected class of individuals (e.g., children in registered family day care facilities), regardless of whether the alleged acts or omissions were ministerial or discretionary in light of the special duty owed to such children...."

The City argues that it "is not liable for the plaintiff infant's injuries because the City neither placed the infant in Theroulde's care nor advised her mother to place the child with Theroulde; because the statutory scheme pursuant to which plaintiff sued does not create a private right of action; and because no special duty of care or reliance thereon existed between the City and plaintiff."

For appellant City: Assistant Corporation Counsel Edward F.X. Hart (212) 788-0835

For respondent McLean: Brian J. Shoot, Manhattan (212) 732-9000

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To be argued Thursday, February 19, 2009

No. 47 People v Richard Lowe

Manhattan narcotics detectives, acting on a tip from a confidential informant in April 2001, stopped Richard Lowe near the corner of 138th Street and Broadway, frisked him, and found a package of cocaine taped to his leg. When Lowe moved to suppress the evidence, the prosecution sought a protective order to conceal the informant's identity. Supreme Court granted the prosecution's request and held a closed-door Darden hearing, excluding Lowe and his counsel. The court examined the informant, found that he was credible and that disclosure of his identity would pose a grave risk of harm, and sealed the minutes of the hearing. The court denied Lowe's suppression motion after finding, based largely on the Darden hearing, that the informant had a sufficient basis for knowledge that Lowe would be carrying drugs, providing probable cause for the arrest and search. Lowe was convicted of criminal possession of a controlled substance in the first degree and sentenced to ten years in prison.

The Appellate Division, First Department denied Lowe's motion to unseal the minutes of the Darden hearing. In a subsequent decision, the court affirmed Lowe's conviction on a 3-1 vote, ruling the verdict was based on legally sufficient evidence and that the evidence supported the conclusion that the weight of the cocaine exceeded four ounces at the time of Lowe's arrest. The court split on issues relating to the Darden hearing.

The majority said, "Following our in camera review of the minutes of the [Darden] hearing..., we find that the court properly denied defendant's suppression motion, and that disclosure of these minutes, even with redactions, would jeopardize the safety of the confidential informant.... We disagree with the dissent that the informant's basis of knowledge was not established. Without disclosing the exact substance of the Darden hearing testimony, we find that in its totality, the information from the informant provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of narcotics ... and that it further sufficed to establish probable cause to arrest."

The dissenter said, "Contrary to the court's findings, the informant did not have personal knowledge that defendant was in possession of narcotics. As disclosure of the minutes of the hearing might jeopardize the safety of the confidential informant, I am unwilling to explicate the basis for my contrary conclusion." He argued the court should hold the appeal in abeyance and reconsider its refusal to unseal the Darden minutes, requiring the prosecution to "demonstrate anew" that disclosure of the minutes "would jeopardize the informant's safety." Even if the minutes remained sealed, he said, the court should allow additional briefing on a new issue: whether the arrest and search would be illegal, regardless of the informant's basis of knowledge, if the detectives were not aware of the basis for his belief that Lowe was carrying drugs prior to the arrest.

For appellant Lowe: Amy Donner, Manhattan (212) 577-3487

For respondent: Manhattan Assistant District Attorney Marc Krupnick (212) 335-9000