SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 12, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2647 The People of the State of New York, Respondent, Ind. 5958/05

-against-

Curtis Hinds, Defendant-Appellant.

- - - -

2648 The People of the State of New York, Respondent, Ind. 5958/05

-against-

Gilbert St. Rose, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for Curtis Hinds, appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for Gilbert St. Rose, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgments, Supreme Court, New York County (Carol Berkman, J.), rendered November 2, 2006, convicting each defendant, after a jury trial, of grand larceny in the first degree, grand larceny in the second degree (four counts), grand larceny in the third degree (seven counts), forgery in the second degree (seven counts), criminal possession of a forged instrument in the second

degree (eight counts), identity theft in the first degree (six counts) and scheme to defraud in the first degree, and sentencing defendant Hinds to an aggregate term of 10 to 25 years and sentencing defendant St. Rose to an aggregate term of 12½ to 25 years, unanimously modified, on the law, to the extent of vacating the convictions of first degree grand larceny, and dismissing that count as to both defendants, and otherwise affirmed.

Defendants oversaw an extensive enterprise in which they stole people's identities, opened fraudulent bank accounts in the victims' names, and transferred money from the victims' legitimate bank accounts to the fraudulent ones they controlled. The indictment alleged, among other things, eight incidents of grand larceny in the second and third degrees, based upon the transfer of funds from five separate legitimate bank accounts into five separate fraudulent accounts, after which the stolen funds were withdrawn. The indictment also alleged three instances of grand larceny in the second degree, based upon the deposit of stolen checks issued to an advertising firm into a fraudulent account defendants had opened in the firm's name in order to steal the funds.

Count one of the indictment charged defendants with grand larceny in the first degree which requires that the stolen property's value exceed $1 million (Penal Law § 155.42).

Defendants contend that their convictions for first degree grand larceny should be vacated because the prosecution achieved the statutory monetary threshold by improperly aggregating the amounts taken from five individuals on eight different occasions and one advertising firm on three different occasions. The People assert that aggregation was proper because defendants' thefts were made "pursuant to a single intent and one general fraudulent plan" (*People v Cox*, 286 NY 137, 145 [1941]).

In *Cox*, the Court of Appeals held that aggregation was permissible and "that the People may prosecute for a single crime a defendant who, pursuant to a single intent and one general fraudulent plan, steals in the aggregate as a felon and not as a petty thief" (286 NY 145).

We find that the record does not support the People's theory. Defendants stole money from the bank accounts of five individuals after creating fraudulent checking accounts in the victims' names. They also fraudulently opened a bank account in an advertising firm's name, and then deposited checks stolen from that firm and withdrew the funds. The transactions that the prosecution sought to aggregate occurred in different boroughs over several months and in a variety of ways, including ATM withdrawals, clothing purchases, and a wire transfer of funds to a jewelry store. Thus, as the thefts in issue did not occur at the same time and place, and were not otherwise shown to have

been committed pursuant to a single intent and a common fraudulent scheme, we conclude that the first count of the indictment charging defendants with grand larceny in the first degree must be dismissed.

Defendants argue that many of the counts in the indictment must be dismissed because the trial court lacked geographic jurisdiction. It is well settled that a "defendant has the right at common law and under the State Constitution to be tried in the county where the crime was committed unless the Legislature has provided otherwise" (*People v Ribowsky*, 77 NY2d 284, 291 [1991]). However, "unlike territorial jurisdiction which goes to the very essence of the State's power to prosecute and which may never be waived, questions relating only to the proper place for the trial are waivable" (*People v McLaughlin*, 80 NY2d 466, 471 [1992]). "[F]ailure to request a jury charge on venue . . . amounts to waiver" (*People v Greenberg*, 89 NY2d 553, 556 [1997]). Although, in their motion to dismiss at the close of the People's case, defendants argued that court lacked jurisdiction as to the fraudulent bank accounts opened in Brooklyn, they failed to request a jury charge on this issue. Defendants thus waived the issue (*See id.; People v Kronberg*, 277 AD2d 182, 183 [2000], *lv denied* 96 NY2d 785 [2001]), and we decline to review it in the interest of justice.

We find that St. Rose did not preserve his claim that the

court's fact-finding procedures were inadequate to establish that he was malingering, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We conclude that there exists record support for the court's determination that St. Rose waived or forfeited his right to be present during a portion of the trial (*see People v Cooks*, 28 AD3d 362 [2006], *lv denied* 7 NY3d 787 [2006]).

We perceive no basis for reducing the sentences on the remaining convictions.

We have considered and rejected defendants' remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1561 Carl Finn, Index 400866/08
Petitioner-Respondent,

-against-

N.Y.S. Division of Human
Rights (Bronx),
Respondent-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about June 4, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September, 15, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: OCTOBER 12, 2010

CLERK

Tom, J.P., Sweeny, Catterson, Moskowitz, DeGrasse, JJ.

2358-
2359 Abacus Federal Savings Bank, Index 600872/07
Plaintiff-Respondent,

-against-

ADT Security Services, Inc., et al.,
Defendants-Appellants,

Holmes Protection of New York,
Inc., et al.,
Defendants.

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Shook, Hardy & Bacon LLP, New Jersey (Charles Carson Eblen of the bar of the State of New Jersey admitted pro hac vice, of counsel), for ADT Security Services, Inc., appellant.

Lester Schwab Katz & Dwyer LLP, New York (Dennis M. Rothman of counsel), for Diebold Incorporated, Inc., appellant.

Port & Sava, Garden City (George S. Sava of counsel), for respondent.

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Orders, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered July 31, 2009, which denied so much of the motions of defendants ADT and Diebold as sought to dismiss the causes of action for breach of contract and gross negligence, unanimously reversed, on the law, with costs, the motions granted in their entirety, and the amended complaint dismissed against these defendants. The Clerk is directed to enter judgment accordingly.

This action arises out of an overnight burglary of plaintiff's bank and vault in 2004. On the date of the loss, ADT was obligated by written agreements to provide a central station

burglar alarm system to protect plaintiff's premises. At the same time, Diebold was obligated by a separate agreement to monitor the signals of ADT's reporting system, and to provide the equipment necessary to perform such monitoring as well as additional security alarm equipment for redundant central station security monitoring. The breach-of-contract cause of action alleges these defendants' failures to provide security protection, to check the system to ensure its viability, and to notify plaintiff and the police upon receipt of alarms, suspicious signals or abnormalities within the system. The gross negligence cause of action is based upon the same failures coupled with the fact that the burglars were able to carry out their crime without interruption over an extended period of time.

Both defendants moved for dismissal of the gross negligence claims on the ground that plaintiff did not allege a breach of any duty independent of defendants' contractual obligations, and dismissal of the contract claims on the basis of the risk allocation provisions of the respective agreements. Diebold further asserted that its alleged failure to receive or act upon alarm signals did not constitute gross negligence as a matter of law, and that plaintiff lacked standing to assert claims for losses sustained by its safe deposit customers. The court denied these portions of the motions, finding the allegations facially sufficient for gross negligence and sufficient as a basis for the

breach-of-contract claim. We disagree.

The agreements contained provisions that effectively exonerated these defendants from liability for their own negligence or limited the damages recoverable therefrom to nominal sums. Such contractual provisions are generally enforceable under New York law, although as a matter of public policy, a party may not contractually insulate itself from liability caused by its own grossly negligent conduct (*see Colnaghi U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993]). Gross negligence, when invoked to pierce a contractual limitation of liability, must smack of intentional wrongdoing (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]) by evincing a reckless indifference to the rights of others (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). This Court has consistently held that an alarm company's delayed or inadequate response to an alarm signal, without more, is not gross negligence (*see e.g. Hartford Ins. Co. v Holmes Prot*ection *Group*, 250 AD2d 526, 528 [1998]; *Consumers Distrib. Co. v Baker Protective Servs.*, 202 AD2d 327 [1994], *lv denied* 84 NY2d 811 [1994]). Similarly, plaintiff's allegations that these defendants provided an inadequate security system, which they also failed to inspect, amount to nothing more than

claims of ordinary negligence as opposed to gross negligence (*see e.g. David Gutter Furs v Jewelers Protection Servs.*, 79 NY2d 1027 [1992]).

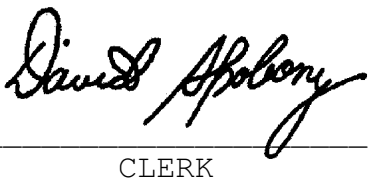
Plaintiff cites *Sommer* for the proposition that an alarm company can be held liable in tort for its gross failure to perform contractual services. In *Sommer*, the Court held that a fire alarm company could be held liable in tort for its gross failure to perform its contractual services properly. As the Court of Appeals explained, *Sommer* was based upon reasoning that the fire alarm company's duty, separate and apart from its contractual obligations, arose from the very nature of its services - to protect people and property from physical harm (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 317 [1995]). Noting the catastrophic consequences that could flow from the fire alarm company's failure to perform its contractual obligations with due care, the *Sommer* court cited the central fire station requirement set forth in the Administrative Code (now § 27-972 [f] and [g]) as a reflection of the public interest in the careful performance of the fire alarm services contract (*see New York Univ.*, 87 NY2d at 317). By contrast, no public interest is implicated here or in *Gutter Furs*, a case decided the same day as *Sommer*. We, thus, find no basis for tort liability in this case.

Under its agreement with Diebold, plaintiff was required to

insure the premises and their contents against perils that included theft, and to look solely to its insurer for recovery in the event of a loss, waiving all such claims against Diebold. This waiver-of-subrogation provision constitutes a defense to all of plaintiff's claims, including gross negligence (*see Great Am. Ins. Co. of N.Y. v Simplexgrinnell LP,* 60 AD3d 456 [2009]). Although plaintiff's agreement with ADT did not contain a waiver-of-subrogation provision, it did require plaintiff to obtain its own insurance to cover the loss. In light of our holding, it is unnecessary to reach defendants' additional argument that plaintiff lacks standing to assert claims based upon losses sustained by its safe deposit customers (*see Mehlman v 592-600 Union Ave. Corp.,* 46 AD3d 338, 343 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

2882 In re Uptown Holdings, LLC, et al.,
Petitioners,

-against-

City of New York, et al.,
Respondents.

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Feerick Lynch MacCartney, PLLC, South Nyack (J. David MacCartney, Jr., of counsel), for petitioners.

Michael A. Cardozo, Corporation Counsel, New York (Fred Kolikoff of counsel), for respondent.

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Petition, pursuant to Eminent Domain Procedure Law (EDPL) § 207, to annul the determination of respondent City of New York Department of Housing Preservation and Development (HPD), issued June 12, 2009, which authorized the condemnation of petitioners' properties, denied, the determination confirmed, and the proceeding dismissed, without costs.

HPD complied with EDPL 202 by commencing publication of the notice of its public hearing at least 10 days before such hearing; it was not required to complete its publication of the notice more than 10 days before the hearing (*see Rodrigues v Town of Beekman*, 120 AD2d 724 [1986], *appeal dismissed* 69 NY2d 822 [1987]; *Matter of Legal Aid Socy. of Schenectady County v City of Schenectady*, 78 AD2d 933 [1980]).

Petitioners may raise the argument that their due process

right to be heard was violated (*see* EDPL 207[C][1]). However, their contention that that right was violated by respondents' failure to disclose the developer and its plan is unavailing, since "[t]he constitutional requirement with respect to notice in eminent domain proceedings concerns the opportunity to be heard on the issues of compensation and public use" (*Fifth Ave. Coach Lines v City of New York*, 11 NY2d 342, 348 [1962]). In any event, respondents disclosed the developer and its plans before the EDPL hearing. To the extent petitioners are complaining that respondents did not disclose the developer until after the 2008 amendment to the Harlem-East Harlem Urban Renewal Plan (HEHURP) was approved, their argument is unavailing, since that issue was litigated and decided in petitioners' CPLR article 78 proceeding (*see East Harlem Alliance of Responsible Merchants v City of New York*, 2010 NY Slip Op 30023[U] [Sup Ct, NY County Jan. 7, 2010]).

Petitioners also contend that their right to be heard was violated by the designation of HPD, rather than respondent New York City Economic Development Corporation (EDC), as the condemnor; they claim that HPD was designated to circumvent the review by the Borough Board that New York City Charter § 384(b)(4) would have required had EDC been designated as the condemnor. However, they do not allege that review by the Borough Board would have given them a greater right to be heard than does the EDPL procedure. In any event, the issue whether

respondents circumvented New York City Charter § 384(b)(4) by designating HPD rather than EDC was litigated and decided in petitioners' article 78 proceeding (*see East Harlem*, 2010 NY Slip Op 30023[U]).

Even if we were to find that the land is not substandard (*compare Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235 [2010]; *Matter of Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511 [2009]), the land may still be taken in eminent domain if "it is proved that its taking was for another public purpose and, if there was also a private benefit involved, that the public purpose was dominant" (*Yonkers Community Dev. Agency v Morris*, 37 NY2d 478, 482 [1975], *appeal dismissed* 423 US 1010 [1975]).

Relying on *Kelo v New London* (545 US 469 [2005]), petitioners contend that the public benefits are illusory and speculative because there is no carefully considered, integrated development plan to which a developer is contractually bound. However, *Kelo* does not say that land may be condemned only if there is such a plan. Moreover, the Court of Appeals' decision in *Matter of Aspen Cr. Estates, Ltd. v Town of Brookhaven* (12 NY3d 735 [2009], *cert denied* ___ US __, 130 S Ct 96 [2009]) suggests that such a plan is not required.

Petitioners also rely on *Matter of 49 WB, LLC v Village of Haverstraw* (44 AD3d 226 [2007], *overruled in part on other*

grounds by Hargett v Town of Ticonderoga, 13 NY3d 325 [2009]) for the proposition that the public benefits in the case at bar are illusory. However, the facts in *49 WB* are very different from those in the instant proceeding.

Petitioners complain that it is possible that no affordable housing will be built. While HPD's determination and findings do not require affordable housing, both the City Planning Commission's approval of the 2008 amendment to the HEHURP and the Final Environmental Impact Statement (FEIS) for the project said that 650 units of low- and moderate-income housing would be included, and respondents' press release announcing the project said that more than 600 affordable housing units would be included. In any event, "the creation of low income housing . . . is not constitutionally required . . . as an element of a land use improvement project that does not entail substantial slum clearance" (*Goldstein*, 13 NY3d at 530).

The FEIS for the project included four alternatives: a no-action alternative, which is required by 6 NYCRR 617.9(b)(5)(v); an as-of-right alternative; a no-impact alternative; and a bus depot expansion alternative. This is a reasonable range of alternatives (*see generally Matter of County of Orange v Village of Kiryas Joel*, 44 AD3d 765, 769 [2007]).

Petitioners are correct that the no-action analysis in the FEIS is flawed; it seems unlikely (*cf.* 6 NYCRR 617.9[b][5][v])

that no development would occur until 2016 if the project were not approved. However, the as-of-right and no-impact alternatives contemplate organic development. Thus, the FEIS overall considered the development that would occur without the project.

While the as-of-right and no-impact alternatives both contemplate the displacement of existing businesses (i.e., petitioners), petitioners' contention that "there were better alternatives . . . is not a basis to invalidate the FEIS" (*Matter of Coalition Against Lincoln W., Inc. v Weinshall*, 21 AD3d 215, 222 [2005], *lv denied* 5 NY3d 715 [2005]).

Contrary to the claims petitioners made in their opening brief, the FEIS examined the impacts of the bus depot in its new proposed off-site location, and it mentioned negative impacts as well as positive ones. We decline to consider the arguments petitioners made for the first time in their reply brief (*see e.g. Shia v McFarlane*, 46 AD3d 320 [2007]).

All concur except Catterson, J., who concurs in a separate memorandum as follows:

CATTERSON, J. (concurring)

In my view, the record amply demonstrates that the neighborhood in question is not blighted, that whatever blight exists is due to the actions of the City and/or is located far outside the project area, and that the justification of under-utilization is nothing but a canard to aid in the transfer of private property to a developer. Unfortunately for the rights of the citizens affected by the proposed condemnation, the recent rulings of the Court of Appeals in Matter of Goldstein v. New York State Urban Dev. Corp., 13 N.Y.3d 511, 893 N.Y.S.2d 472, 921 N.E.2d 164 (2009) and Matter of Kaur v. New York State Urban Dev. Corp., 15 N.Y.3d 235, --- N.E.2d ---- (2010), have made plain that there is no longer any judicial oversight of eminent domain proceedings. Thus, I am compelled to concur with the majority.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Saxe, Nardelli, DeGrasse, Manzanet-Daniels, JJ.

2993 Joan Lizardo, an Infant Under the Age of Fourteen Years, by His Mother and Natural Guardian, Maria Brito, et al., Plaintiffs-Respondents, Index 350578/07

-against-

Board of Education of the City of New York, et al., Defendants-Appellants.

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Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 15, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The infant plaintiff, a fourth grader, was injured during a kickball game in physical education class, when another student collided with him. He described the incident at his deposition as follows:

> "I was playing short stop. I was in the field. I was between second and third, and there was a kid trapped in the middle. I had the ball and he was running in the baseline. And then he didn't want to get out, so he went – he fell on top of me. He was just charging into me, and then I fell down. He landed in the wrong

> place and then I twisted my ankle, and then I went in. He went to second and I was, like near second."

Although his affidavit, submitted in opposition to defendants' motion, is not identical to this summary, and both differ from the teacher's observations, none of these differences creates a material issue of fact that precludes the conclusion we reach here as a matter of law.

Even accepting as true plaintiffs' factual assertions regarding the event, their claim that the teacher was negligent in failing to properly supervise the children and failing to instruct them on the rules of the game must be rejected as a matter of law.

While "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision," they are not "insurers of safety" and cannot be held liable "for every thoughtless or careless act by which one pupil may injure another" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). The spontaneous act of one student running directly into another student in an effort to avoid being tagged or called out exemplifies such a thoughtless or careless act.

Courts are frequently presented with negligence claims against school districts where students have suddenly, whether accidentally or purposefully, knocked down other students during

a variety of school activities, such as organized athletic games, recreational activities, and safety drills. For instance, in *Opalek v West Islip Union Free School Dist.* (1 AD3d 491, 491, 492 [2003]), the defendants were awarded summary judgment because "the infant plaintiff's injury resulted from a spontaneous and unforeseeable collision with a fellow student during a physical education class" and "the incident could not have been anticipated in the reasonable exercise of [the defendants'] legal duty to the infant." Similarly, in *Francisquini v New York City Bd. of Educ.* (305 AD2d 455 [2003]), a seven-year-old girl was injured when a boy was pushed into her by another boy, causing her to fall off a jungle gym. The Second Department set aside the verdict in favor of the plaintiff, because there was no showing "that the defendant's supervision was inadequate or that the defendant's conduct was the proximate cause of the happening of the accident" (*id.* at 456).

The principle that the school cannot be liable for the "spontaneous and unforeseeable act committed by a fellow . . . student" has also been relied on where high school students participating in school athletic activities have been injured in collisions with other students (*see e.g. Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 609 [2004] [citation and internal quotation marks omitted] [high school student participating in a "frisbee relay race" in physical education class ran into or

pushed another student from behind while both were trying to catch the same frisbee]; *Sangineto v Mamaroneck Union Free School Dist.*, 282 AD2d 596 [2001]).

The present matter is not different from the foregoing cases. Even accepting as true every factual assertion made by the infant plaintiff, there is no evidence in the record that the collision was anything other than a sudden, impulsive act that could not reasonably have been foreseen or prevented.

The affidavit plaintiff submitted, by a "Sports Liability Consultant" and "Board Certified Forensic Examiner with a 'Fellow Designation' of the American College of Forensic Examiners," fails to support the claim of negligence. Even assuming for the sake of argument that the opinion of a "Sports Liability Consultant" could appropriately be treated as that of an objective expert, his assertions would not justify a finding of liability. The assertions that the incident might have been prevented by closer supervision and that it might have been prevented by instructions specifically informing the children that it is against the rules to run directly into an opposing player are valid only in retrospect. Nothing in the record supports the notion that the teacher had any reason, before the incident, to think that the students needed to be reminded that the game of kickball, which they had been playing for years, does not include full contact or tackling. Nor is there any reason to

accept the expert's bare assertion that the incident would have been preventable by the teacher's watching play more closely.

Characterizing this particular kickball game as not played "properly" because of the number of students on the field also cannot support liability. Unlike formal league play, elementary school gym classes need not comport exactly with the games' formal rules. For one thing, a degree of adaptation is necessary to allow all members of the class to participate, rather than limiting play to a designated number of players. In any event, the teacher's duty of supervision is the same as that of a reasonably prudent parent (*see Ohman v Board of Educ. of City of N.Y.*, 300 NY 306, 309 [1949]), and does not require strict compliance with formal rules of play. Nor is there any reason to believe that reducing the number of players in the field would have prevented the base runner from charging into the infant plaintiff at that decisive moment, however "close" supervision might have been.

To impose liability based on the gym teacher's failure to blow her whistle and stop play before the collision occurred presupposes that the teacher could have anticipated well in advance that the base runner was going to run directly into another student. The conduct that caused the injury here was simply too impulsive to permit the teacher to take action to prevent it.

Not only did the teacher have no duty to sit the children down and review the rules before beginning play, but, in addition, there is no reason to believe that it would have made any difference if she had. The undisputed testimony established that the children had been playing kickball since at least second grade. It cannot be seriously suggested that the base runner knocked the infant plaintiff down because he incorrectly thought the rules authorized it. It was simply an act for which defendants may not be held liable.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3326 The People of the State of New York, Ind. 343/08
Respondent,

-against-

Lenin Lebron,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

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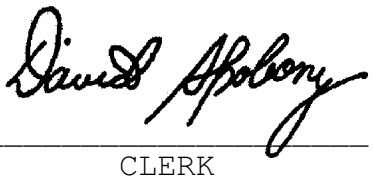
Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered April 16, 2009, convicting defendant, after a jury trial, of attempted robbery in the first and second degrees, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

Defendant's challenge to the court's response to a juror's note is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the court provided a meaningful response that was nearly identical to the one requested by defense counsel. Defendant's ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters outside the record concerning

counsel's strategy in requesting the response at issue (*see People v Love*, 57 NY2d 998 [1982]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3327 Joanne Feaster, Index 308385/08
Plaintiff-Respondent,

-against-

Thami Boulabat, et al.,
Defendants-Appellants.

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Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

Shayne, Dachs, Corker, Sauer & Dachs, Mineola (Jonathan A. Dachs of counsel), for respondent.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered April 20, 2010, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to meet their initial burden of establishing prima facie that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Their examining orthopedist found limitations in range of motion in plaintiff's cervical and lumbar spines and both knees, and opined that these were attributable to degenerative changes. However, plaintiff testified that she had been asymptomatic before her car accident, and her orthopedic surgeon opined in a report submitted by defendants that plaintiff's injuries were causally related to the accident. Moreover, defendants' orthopedist's opinion that,

while plaintiff may have sustained injuries to her cervical and lumbar spines and left knee in the accident, these injuries had resolved, is belied by the limitations in range of motion that he found in those areas (*see Pommells v Perez*, 4 NY3d 566, 577-578 [2005]; *Linton v Nawaz*, 62 AD3d 434, 438-439 [2009], *affd* 14 NY3d 821 [2010]). In view of defendants' failure to establish their prima facie case, we need not consider the sufficiency of plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Glynn v Hopkins*, 55 AD3d 498, 498 [2008]).

The report of defendants' orthopedist suggesting that plaintiff's injuries had resolved was based on an examination of plaintiff performed almost one year after the subject accident and was thus insufficient to show that plaintiff did not sustain a 90/180-day injury (*see Toussaint v Claudio*, 23 AD3d 268, 268 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3328 The People of the State of New York, Respondent, SCI. 4522/07

-against-

Victor Gonzalez,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about May 8, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

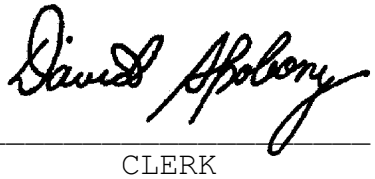
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3329 In re Joshua Hezekiah B.,

A Dependent Child Under The
Age of Eighteen Years, etc.,

Edgar B., Sr.,
Respondent-Appellant,

New York City Administration
for Children's Services,
Petitioner-Respondent.

_____

Bahn Herzfeld & Multer, LLP, New York (Richard L. Herzfeld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

_____

Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about July 13, 2009, which, based on a factual determination dated May 5, 2009, finding that respondent Edgar B., Sr. had neglected the subject child, placed him in respondent's custody, with 12 months supervision, unanimously affirmed, without costs.

Review of the record reveals that a subsequent order of Family Court (Clark V. Richardson, J.), entered on or about December 1, 2009, vacated the order of disposition and released the child to respondent (his maternal grandfather and legal

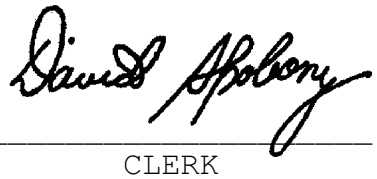
custodian) "nunc pro tunc July 13, 2009." However, we conclude that to the extent respondent challenges the ruling that he neglected the child, such vacatur does not render the instant appeal dismissible as academic, as the adjudication of neglect stands as a permanent stigma that may impact respondent's standing in any future proceedings (*see Matter of Amber C.*, 38 AD3d 538, 540 [2007], *lv denied* 11 NY3d 728 [2008]; *Matter of Daqwuan G.*, 29 AD3d 694, 695 [2006]).

A preponderance of the evidence clearly showed respondent to have neglected the child by failing to feed him properly, leading to a medical diagnosis of failure to thrive, and by failing to provide the child with proper medical care and treatment for such condition (*see* Family Ct Act § 1012[f][i][A]; *Matter of Samantha M.*, 56 AD3d 299 [2008], *lv denied* 11 NY3d 716 [2009]; *Matter of Kayla C.*, 19 AD3d 692 [2005]; *Matter of Michael S.*, 224 AD2d 277 [1996]). Although the court at fact-finding erred by refusing to qualify respondent's witness as an expert pediatrician (*see Karasik v Bird*, 98 AD2d 359, 362 [1984]), the error was harmless; the witness, not having examined the child until May 13, 2008, was incompetent to render an opinion as to whether he had been neglected as of May 12, when the neglect petition was filed. The court did not err in refusing to admit irrelevant medical records compiled after that filing, and because the medical evidence could be "readily understandable to an average [finder of fact]"

(*Rodriguez v Saal*, 43 AD3d 272, 276 [2007]), expert testimony was unnecessary to find that the child suffered from failure to thrive caused by improper feeding and denial of adequate medical care and treatment (*see Mack v Lydia E. Hall Hosp.*, 121 AD2d 431, 433 [1986]). The court did properly admit evidence that before the petition's filing, respondent failed to ensure the child's receiving of prescribed medical treatment for his failure to thrive (*Samantha M.*, 56 AD3d at 300).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3330 The People of the State of New York, Ind. 367/08
Respondent,

-against-

Alvin Walker,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York(Allen J. Vickey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about October 16, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED:

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CLERK

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3331-
3331A Stephen Thomas Moran, Index 113837/08
Plaintiff-Respondent,

-against-

Justine Clare Moran,
Defendant-Appellant.

_____

Justine Clare Moran, Astoria appellant pro se.

Wolfson & Carroll, New York (Corey M. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 15, 2009, which granted plaintiff's motion for appointment of a receiver for the purpose of effectuating the sale of the marital residence pursuant to the parties' separation agreement, unanimously reversed, on the law and on the facts, without costs, and the matter remanded for further proceedings consistent herewith. Appeal from order, same court and Justice, entered March 3, 2010, unanimously dismissed, without costs, as academic.

In this plenary action commenced to enforce a provision of a separation agreement prior to commencement of a divorce action, the husband moved for an order appointing a receiver to effect the sale of the marital residence. The separation agreement provided that the wife would receive ownership of the marital

residence on condition that she refinance the property by a certain date or sell it. The agreement provided that, if refinancing were not obtained by the specified date, the property would immediately be listed with a broker selected by the wife in her "sole discretion" and required her to "use efforts reasonably calculated to produce the best sales price available in the market for the expeditious sale of the Real Property."

In support of the motion, plaintiff's counsel averred that defendant had willfully obstructed the sale of the marital residence by selecting a listing price $200,000 higher than the property's fair market value and refusing to discuss a floor price at which the property would be sold. Plaintiff's counsel relayed opinions of a broker who told him what the property was worth, but offered no evidence in admissible form to establish market value. In opposition, defendant stated she had selected the proposed listing price following discussion with the broker she selected, who submitted an affidavit stating the price was reasonable and that he had potential buyers who were interested in viewing the property at that price.

The court issued interim orders directing the husband to have the property appraised and appointing an independent appraiser. The wife never received a copy of the independent appraisal, which the court represented was consistent with the husband's appraisal. The court found that the wife had violated

the separation agreement by listing the property at a price grossly in excess of any appraised value, and therefore granted plaintiff's motion. Following settlement of an order on notice, the court issued an order appointing a receiver to effectuate the sale of the property, which authorized the receiver to list the property with any licensed real estate broker at a listing price $44,000 over the appraised value and to accept an offer at the appraised value within the first 60 days and at a price $50,000 below the appraised value after 120 days.

It is well-settled that, prior to entry of a judgment altering the legal relationship between spouses by granting divorce, separation or annulment, courts may not direct the sale of marital property held by spouses as tenants by the entirety, unless the parties have consented to sell (*see Kahn v Kahn,* 43 NY2d 203 [1977]; *Adamo v Adamo*, 18 AD3d 407 [2005]; *Jancu v Jancu*, 241 AD2d 316 [1997]). When the parties have agreed to sell marital property prior to entry of a divorce judgment, the court "must respect conditions placed on a party's consent to the sale of such property" (*Harrington v McManus*, 303 AD2d 368, 368 [2003]), and cannot set conditions on the sale which were not agreed to by the parties (*see Harrilal v Harrilal,* 128 AD2d 502, 503-504 [1987]; *Shammah v Shammah,* 22 Misc 3d 822, 829 [Sup Ct, Nassau County 2008]). The court's order directing a sale of the marital property through a broker chosen by a receiver, and at a

price set by the court, improperly overrode the parties' agreement that the wife would have "sole discretion" to select a broker, and supplied price terms that were not agreed to by the parties in the separation agreement.

Moreover, plaintiff failed to make a clear evidentiary showing warranting the drastic remedy of appointment of a receiver, which is to be invoked only where necessary for the protection of the parties, and upon a clear showing of a danger of irreparable loss (*see Matter of Armienti & Brooks*, 309 AD2d 659 [2003]; *Serdaroglou v Serdaroglou*, 209 AD2d 606 [1994]). Plaintiff did not show that he would suffer irreparable loss if a receiver were not appointed, and did not dispute that defendant was maintaining the property and making all required mortgage payments, so that appointment of a receiver was not warranted (CPLR 6401). Assuming plaintiff established he was entitled to specific enforcement of the sale agreement, that could be accomplished through a remedy less extreme and costly to defendant than appointment of a third-party receiver.

The case primarily relied on by plaintiff in support of the motion, *Trezza v Trezza* (32 AD3d 1016 [2006]), provides no support for the relief granted in the instant case, since it was a post-judgment enforcement action in which a former spouse was appointed receiver for the limited purpose of effectuating the sale of the former marital residence, at a price within the range

agreed to by the parties, and upon a showing that the former husband had willfully obstructed the sale by refusing to execute a contract of sale at the agreed price (*see also Stern v Stern*, 282 AD2d 667, 669 [2001]; see CPLR 5106). In this case, the court appointed a receiver with broad authority to sell the property at a price not agreed to by the parties, and the evidence did not establish willful obstruction by the wife, but only disagreement as to the reasonable value of the property.

Reversal is also required because, although the parties did not object to the court's orders directing an appraisal and appointing an independent appraiser (*see* Domestic Relations Law § 237; 22 NYCRR 202.18), they did not stipulate to be bound by the results of the appraisals. The court, therefore, was required to afford the parties the opportunity to review the appraisals, cross-examine the appraisers and offer additional evidence on valuation (*see Kesseler v Kesseler,* 10 NY2d 445, 451-452 [1962]*; Banker v Banker*, 56 AD3d 1105, 1107-1108 [2008]). In no event could the court rely on an appraisal report that was not provided to the parties and not made part of the record (see *Samuelsen v Samuelsen*, 124 AD2d 650, 651-652 [1986]).

Defendant's additional contention that the motion court lacked jurisdiction over the instant action is without merit, since the Supreme Court is a court of plenary jurisdiction (NY Const, art VI, §7). Plaintiff properly commenced a plenary

action to enforce the separation agreement, since no matrimonial action was then pending (*see Singer v Singer*, 261 AD2d 531, 532 [1999]). The court did not improvidently exercise its discretion by denying defendant's request, made after it had rendered an oral decision on the motion, to transfer this case to the matrimonial part presiding over the divorce action that she commenced during the pendency of this motion (*see Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 68 AD3d 520 [2009]). However, following remand, if the divorce action is still pending, this matter should be reassigned to the matrimonial part in the interests of judicial economy and efficiency.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3332 The People of the State of New York, Ind. 4806/07
Respondent,

-against-

Rod Brown,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Christopher G. Froelich of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered July 30, 2008, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth and seventh degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of 2½ years, unanimously affirmed.

The People's summation did not deprive defendant of a fair trial. The remarks challenged by defendant generally constituted evidence-based arguments as to why the jury should credit the testimony of the prosecution witnesses and discredit that of defendant; these arguments were responsive to the defense

summation and did not shift the burden of proof (*see People v Dais*, 47 AD3d 421, 422 [2008], *lv denied* 10 NY3d 809 [2008]; *People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1998]).

The People established a sufficient chain of custody for the drugs seized from defendant, providing reasonable assurances of their identity and substantially unchanged condition (*see People v Julian*, 41 NY2d 340 [1977]). Any deficiencies in the chain of custody went to the weight and not the admissibility of the evidence (*see People v White*, 40 NY2d 797, 799-800 [1976]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3333 The People of the State of New York, Respondent, Ind. 6026/04

-against-

Luis Arroyo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel) and Shearman & Sterling LLP, Washington, D.C. (Amanda Robin Kosonen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew Seewald of counsel), for respondent.

_____

Order, Supreme Court, New York County (William A. Wetzel, J.), entered on or about July 9, 2008, which denied defendant's CPL 440.10 motion to vacate his judgment of conviction on the ground of ineffective assistance of counsel, unanimously affirmed.

Defendant was convicted of shooting and permanently disabling one victim, and, in a prior related incident, of forcibly entering an apartment for the purpose of assaulting an occupant, who was the shooting victim's cousin. Defendant asserts that his trial counsel rendered ineffective assistance by failing to interview the burglary victim's friend, who would have allegedly provided helpful testimony on several issues, by failing to investigate a potential alibi defense regarding defendant's alleged presence at a laundromat at the time of the

shooting, and by failing to conduct sufficient trial preparation and cross-examination of witnesses. However, we find that defendant received effective assistance under both the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]), and that no hearing on the CPL article 440 motion was necessary.

With regard to the burglary victim's friend, we conclude that regardless of whether counsel should have interviewed her, defendant has not shown that she would have provided exculpatory or otherwise helpful testimony. Initially, we note that although factual allegations in support of a 440 motion may be made on information and belief (CPL 440.30[1]), the absence of an affidavit by the potential witness delineating, in her own words, the testimony she might have given weakens defendant's position on the motion. According to an investigator's affidavit, the potential witness would have testified that she had a conversation with the burglary victim shortly after the shooting, in which the burglary victim gave the potential witness the "impression" that she had told the police defendant had shot her cousin. Defendant claims that a chain of inferences leads from this "impression" to the conclusion that the burglary victim (who undisputedly was not a witness to the shooting) may have influenced her cousin to name defendant falsely as the person who shot him. However, the potential witness's testimony would have

been too speculative to have undermined the shooting victim's testimony, and it may not have been admissible, given issues of hearsay and relevance. Defendant also asserts that the potential witness would have cast doubt on whether the burglary incident actually involved an unlawful entry. However, this witness was not present during that incident, and her testimony about defendant's presence at the apartment on prior occasions had little or no relevance.

As for counsel's failure to investigate the possibility that defendant may have been at a nearby laundromat at the time of the shooting, counsel explained in an affidavit submitted by the People in opposition to the motion that he never pursued an alibi defense because defendant told him he was guilty. Since an attorney may not assist a client in presenting false evidence (*Nix v Whiteside*, 475 US 157, 166 [1986]), counsel had an objectively reasonable explanation for his actions. Furthermore, defendant has not shown that an investigation by counsel had any reasonable possibility of yielding useful evidence. Although defendant has presented some evidence that the laundromat may have had a surveillance camera in operation at the time, his assertion that his presence may have been captured on videotape or remembered by an unidentified witness is extremely speculative. Moreover, evidence that defendant was in this laundromat at the time of the shooting would have had little

alibi value because of the close proximity between the two locations.

Defendant has not substantiated his claim of inadequate trial preparation. The trial record establishes that counsel conducted reasonably competent cross-examinations of prosecution witnesses, and that there are reasonable strategic justifications for the omissions cited by defendant.

We conclude that the various deficiencies alleged by defendant in his motion and on this appeal, whether viewed individually or collectively, did not deprive defendant of a fair trial, affect the outcome of the case, or cause defendant any prejudice. Regardless of whether counsel's omissions were "unprofessional errors," there is no "probability sufficient to undermine confidence in the outcome" (*Strickland*, 466 US at 694]) that, but for these errors, the verdict would have been more favorable to defendant with regard to either the shooting incident or the burglary.

Finally, the court properly exercised its discretion in denying the motion without holding a hearing. The trial record and the parties' submissions were sufficient to decide the motion, and there was no factual dispute requiring a hearing (*see People v Satterfield*, 66 NY2d 796, 799-800 [1985]). In particular, with regard to the issue of whether it was reasonable to avoid presenting an alibi defense, defendant never

specifically denied admitting his guilt to his counsel, and the court had sufficient information upon which to resolve that issue without a hearing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Sweeney, Moskowitz, Acosta, Román, JJ.

3334 In re Toyie Fannie J.,
and Another,

Children Under The Age of
Eighteen Years, etc.,

Toyie D.H.,
Respondent-Appellant,

Harlem Dowling Westside Center for Children,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Law Office of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Tamara A. Steckler, Legal Aid Society, New York (Amy Hausknecht of counsel), Law Guardian.

_____

Orders of disposition, Family Court, Bronx County (Allen Alpert, J.), entered on or about September 1, 2009, which, upon findings of permanent neglect, terminated respondent mother's parental rights to the subject children and transferred custody of the children to petitioner agency and the Commissioner of Social Services of the City of New York for purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to plan for the children's future, notwithstanding the petitioning agency's

diligent efforts (Social Services Law § 384-b[7][a]; *see Matter of Sheila G.*, 61 NY2d 368, 380-381 [1984]). Although the agency provided referrals for a mental health evaluation, made arrangements for regular visitations, and met with respondent to review her service plan and discuss the importance of compliance, respondent's visits with the children were sporadic, and she failed to timely comply with the agency's referrals for a mental health evaluation (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]; *Matter of Jonathan M.*, 19 AD3d 197 [2005], *lv denied* 5 NY3d 798 [2005]; *Matter of Lamikia Shawn S.*, 276 AD2d 279 [2000]; *Matter of Emily A.*, 216 AD2d 124 [1995]).

A preponderance of evidence establishes that termination of respondent's parental rights was in the children's best interests (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). A suspended judgment was not warranted because, although respondent did ultimately provide the agency with a copy of a mental health evaluation, she still had not commenced counseling, and there was no evidence that she had a realistic, feasible plan to care for

the children (*see Matter of Rayshawn F.*, 36 AD3d 429 [2007]; *Matter of Antoine M.*, 7 AD3d 399 [2004]; *Matter of Tiffany R.*, 7 AD3d 297 [2004]; *Matter of Darzell Levar D.*, 6 AD3d 239 [2004]; *Matter of Charlene Lashay J.*, 280 AD2d 320 [2001]; *cf. Matter of Christian Lee R.*, 9 AD3d 275 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3335 Carol Salter, Index 103934/08
Plaintiff-Respondent,

-against-

Sears, Roebuck and Co., et al.,
Defendants-Appellants,

General Transportation Services, Inc., et al.,
Defendants.

[And A Third-Party Action]

_____

Marshall, Conway, Wright & Bradley, P.C., New York (Lauren Turkel of counsel), for appellants.

Law Offices of Alan M. Greenberg, New York (Robert J. Menna of counsel), for respondent.

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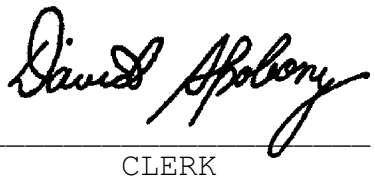
Order, Supreme Court, New York County (Debra A. James, J.), entered January 8, 2010, which denied the motion of defendants Sears, Roebuck and Icon Health Fitness for a protective order to the extent of directing them to answer interrogatories regarding prior incidents with respect to other treadmills that Icon manufactured and marketed during the period in which it manufactured the subject treadmill, unanimously modified, on the law and the facts, to limit the scope of the interrogatories to be answered to those regarding prior incidents involving sudden acceleration, and otherwise affirmed, without costs.

Plaintiff asserts that she was injured as a result of the

sudden acceleration of a treadmill manufactured by Icon. Thus, the disclosure she seeks of information about incidents in which other Icon treadmills suddenly accelerated is warranted (*see Bertocci v Fiat Motors of N. Am.*, 76 AD2d 779 [1980]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3336 The People of the State of New York, Ind. 4682/76
Respondent,

-against-

Steven Walker,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

_____

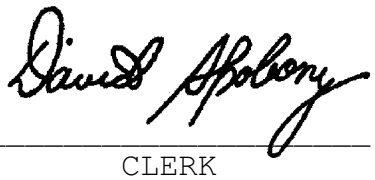
Order, Supreme Court, New York County (A. Kirke Bartley, J.), entered on or about April 10, 2007, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 points for defendant's failure to accept responsibility for his sex offense. The circumstances of defendant's plea and sentencing, viewed as a whole, do not demonstrate a genuine acceptance of responsibility

(*see People v Marinconz*, 178 Misc 2d 30, 34-35 [Sup Ct NY County 1998]). The record also supports the court's conclusion that a discretionary upward departure would have been appropriate in any event.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3339 The People of the State of New York, Ind. 1385/09
Respondent,

-against-

Victor Matos,
Defendant-Appellant.

_____

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams, of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered September 22, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously affirmed.

The court properly received a switchblade knife in evidence. The officer testified that it was the same knife he recovered from defendant and that it was in the same condition as it was when he recovered it. This was a sufficient foundation for admission of this nonfungible item (*see generally People v Connelly*, 35 NY2d 171, 174 (1974); in any event, the People also established a proper chain of custody. Defendant's suggestion

that, by placing a piece of tape on the knife and then removing it the officer may have somehow rendered an inoperable switchblade knife operable is highly speculative.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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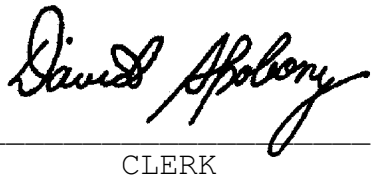


CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3340-
3340A In re Okslen Acupuncture, P.C., et al., Petitioners-Appellants, Index 603651/08

-against-

Eric R. Dinallo Superintendent of Insurance State of New York, et al., Respondents-Respondents.

_____

The Zuppa Firm PLLC, Brooklyn (Raymond J. Zuppa, Jr., of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Cecelia C. Chang of counsel), for Eric R. Dinallo, respondent.

Rivkin Radler LLP, Uniondale (Harris J. Zakarin of counsel) for State Farm Mutual Automobile Insurance Company, respondent.

Cozen O'Connor, New York (Jacob C. Cohn of counsel) for Autoone Insurance Company and General Assurance Company, respondents.

Wiley Rein LLP, Washington, DC (Thomas W. Brenner of the Bar of the State of the District of Columbia, admitted pro hac vice, of counsel), and Littler Mendelson P.C., New York (Andrew P. Marks of counsel), for National Insurance Crime Bureau, respondent.

_____

Orders, Supreme Court, New York County (Lewis Bart Stone, J.), entered July 2, 2009, which, in an article 78 proceeding brought by a medical provider assigned no-fault benefit claims and an injured person eligible for no-fault benefits seeking, inter alia, (1) to compel respondent Superintendent of Insurance to audit and investigate the claims practices of respondent insurers, take appropriate action to remedy misconduct, and

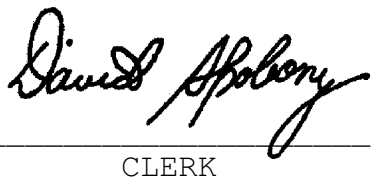
publish all findings, (2) to compel respondent National Insurance Crime Bureau (NICB) to cease all investigative activities on behalf of respondent insurers until it becomes licensed under General Business Law article 7, and (3) to compel respondent insurers to take action necessary to insure that their no-fault Special Investigative Unit investigators are qualified under 11 NYCRR 86.6(c), granted respondents' cross motions to dismiss the petition and directed entry of a judgment dismissing the proceeding, unanimously affirmed, without costs.

The petition was correctly dismissed as against respondent Superintendent on the ground that it seeks to compel discretionary acts (*see Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]; *LMK Psychological Servs., P.C. v State Farm Mut. Auto. Ins. Co.*, 12 NY3d 217, 223 [2009]; *Sightseeing Tours of Am., Inc. v Air Pegasus Heliport, Inc.*, 40 AD3d 354 [2007], *lv denied* 9 NY3d 817 [2008]). Although Insurance Law § 309 requires the Superintendent to undertake periodic examinations of insurance companies, it appears that the scope of an examination and remedies to be employed to correct misconduct are left entirely to the Superintendent's discretion (*cf.* Insurance Law § 310, § 311); certainly, petitioner points to nothing in the Insurance Law requiring the Superintendent to investigate particular matters or take specific remedial action based on the findings of an examination. As against the insurers and NICB, a

not-for-profit organization funded by the insurance industry, the petition was correctly dismissed in the absence of allegations that petitioners are employees or members of these private parties affected by the discharge of their rules or bylaws (*see Matter of De Petris v Union Settlement Assn.*, 86 NY2d 406, 411 n [1995]; *cf. Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 536-537, 541-542 [1990]). We have considered petitioners' other arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, Román, JJ.

3342 The People of the State of New York, Respondent, Ind. 1565/03

-against-

Alfredo Arvelo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

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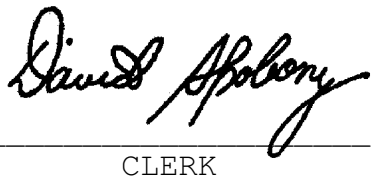
Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about May 28, 2008, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 points for defendant's failure to accept responsibility for his sex offense. Although defendant pleaded guilty to that crime, he refused to be interviewed by the Department of Probation which indicates a failure of genuine acceptance of responsibility. Furthermore, while the court did not use the phrase upward departure, its ruling includes statements which indicate that it believed defendant's overall criminal record to be so serious as to warrant a discretionary level three adjudication aside from

defendant's point score. The record supports that conclusion, and we affirm the level three adjudication on that basis as well (*see People v Larkin*, 66 AD3d 592, 593 [2009], *lv denied* 14 NY3d 704 [2010]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



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Mazzarelli, J.P., Sweeny, Acosta, Román, JJ.

3343N Mt. McKinley Insurance Company, etc., et al., Plaintiffs, Index 602454/02

-against-

Corning Incorporated, Defendant-Appellant,

AIU Insurance Company, et al., Defendants,

Century Indemnity Company, etc., et al., Defendants-Respondents.

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Dickstein Shapiro LLP, New York (Edward Tessler of counsel), for appellant.

O'Melveny & Myers LLP, New York (Tancred V. Schiavoni of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2009, which, to the extent appealed from, granted the cross motion of respondents Century Indemnity Company *et al.* to compel discovery and denied appellant Corning Incorporated's assertion of the "common interest" privilege for certain communications with asbestos claimants made in connection with strategy and preparation for Bankruptcy Plan confirmation hearings, unanimously affirmed, with costs.

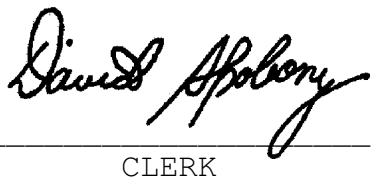
In this action seeking a declaratory judgment establishing entitlement to insurance coverage for defense and/or indemnification, the IAS court did not abuse its discretion in

ordering the subject documents produced (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [2003]). The court properly held that Corning failed to establish that the subject documents were protected by the common interest privilege, as the negotiations indicated that the parties remained in adversarial positions, and that there was no reasonable expectation of confidentiality (*see In re Quigley*, 2009 Bankr. LEXIS 1352 at *31 [Bankr SD NY 2009].

We have considered Corning's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010



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Gonzalez, P.J., Andrias, Acosta, Renwick, Abdus-Salaam, JJ.

3251 The People of the State of New York, Ind. 2915/06
Respondent,

-against-

Jean Paul Donoso,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered October 11, 2007, affirmed.

Opinion by Renwick, J. All concur.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, J.P.
Richard T. Andrias
Rolando T. Acosta
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

Ind. 2915/06
3251

_____x

The People of the State of New York,
Respondent,

-against-

Jean Paul Donoso,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of Supreme Court, New York County (Edwin Torres, J.), rendered October 11, 2007, convicting him, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender.

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea and Susan Alexrod of counsel), for respondent.

RENWICK, J.

Defendant was indicted and convicted of criminal possession of a controlled substance in the fifth degree. The charge stems from his arrest in a dance club in Manhattan after a club employee observed him give a patron a pill of methylenedioxy-methamphetamine (an hallucinogenic drug more commonly known as ecstasy). Upon being called by the club management, the police arrested defendant after searching him and recovering a plastic bag containing 16 ecstasy pills. The dispositive issue in this appeal concerns whether and to what extent the trial court's failure to inform counsel of the verbatim content of a jury note during deliberations is subject to the rules of preservation.

At trial, in charging the jury, the court submitted the count of criminal possession of a controlled substance in the fifth degree, and the lesser included offense of criminal possession of a controlled substance in the seventh degree. The court instructed the jury to consider the lesser included count only if the jury found defendant not guilty on the first count. However, during their deliberations, the jurors sent out a written note, which read as follows:

> "1) No consensus on charge 1 2) We came on a consensus on charge 2. Can we have a con[s]ensus on charge 2 without a con[s]ensus on char[g]e 1? What is our next step?"

Upon receipt of the note, the court advised the parties, "They have a consensus on count two, but no verdict on count one," adding, "They shouldn't have gone to count two." There is no indication in the transcript that the court showed the note to the attorneys or read it aloud to them prior to reconvening the jury. When the jurors were reconvened, the court advised them:

> "I'm in receipt of this note, no consensus on charge, that's one. Two, we came to a consensus on charge two. Can we have a consensus on charge two without a consensus on charge one?"

The court responded as follows:

> "Yes. Although this flies in the face of what I told you, vis-à-vis the second count. That you are to -- if you find him not guilty then you go onto count two. But obviously you don't have a verdict on count one."

Next, the court asked, "So what is our next step?" and answered, "The next step is that you resume deliberations on charge one." At that point, the jury left the courtroom and continued to deliberate. Soon thereafter, the jury reached a verdict and found defendant guilty of the greater offense of fifth-degree criminal possession of a controlled substance. At no time did defense counsel object to the procedure employed by the court with respect to this note, or to the court's response thereto.

Two weeks later, during sentencing, defense counsel moved to

set aside the verdict on the ground that the trial court's response to the jury note was error. The trial court denied the motion without explanation, other than to say, "I don't know what is in their mind." On appeal, defendant contends that the trial court's response to the jurors' inquiry was a "mode of proceedings" error (*see People v Tabb*, 13 NY3d 852 [2009]) not requiring preservation and warranting reversal. For the reasons explained below, we find there was neither a mode of proceedings error nor a preserved claim.

The governing statute, CPL 310.30, provides:

> "At any time during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. Upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper."

As the Court of Appeals elucidated in *People v O'Rama* (78 NY2d 270, 277 [1991]), the trial court's core responsibility under the statute is both to give meaningful notice to counsel of the specific content of the jurors' request -- in order to ensure

counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response -- and to provide a meaningful response to the jury. To those ends, the court outlined the following procedure (at 277-278) for dealing with jury notes:

> "[W]henever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. Such a step would ensure a clear and complete record, thereby facilitating adequate and fair appellate review. After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. . . . [T]he trial court should ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate *before* the jury is exposed to the potentially harmful information. Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry and, in cases where the communication was sent by an individual juror, the rest of the jury panel can appreciate the purpose of the court's response and the context in which it is being made [emphasis in original]."

In *O'Rama* and its progeny, the Court of Appeals has made it abundantly clear that it was not the court's intention "to mandate adherence to a rigid set of procedures, but rather to delineate a set of guidelines calculated to maximize participation by counsel at a time when counsel's input is most meaningful, i.e., before the court gives its formal response"

(*id.* at 278; *see also People v Kisoon*, 8 NY3d 129, 134 [2007]). Accordingly, not all departures from the *O'Rama* procedure constitute mode of proceedings errors requiring reversal despite the lack of preservation or prejudice to the defense (*compare People v Starling*, 85 NY2d 509, 516 [1995] and *People v DeRosario*, 81 NY2d 801, 803 [1993], *with Kisoon*, 8 NY3d at 134-135 and *O'Rama*, 78 NY2d at 277-278).

On the one hand, a defendant need not object to the trial court's improper handling of a jury note in order to challenge the court's procedure on appeal if the court's actions had the effect of "preventing defense counsel from participating meaningfully in this critical stage of the trial" *(id. at* 129). For example, the jury in *O'Rama*, after three days of deliberations, sent a note to the court, indicating it was deadlocked. In response, the trial court delivered an *Allen* charge (*Allen v United States*, 164 US 492, 501-502 [1896]), but before deliberations could resume, the court received another note from one of the jurors, stating, in pertinent part,"We are split down the middle *HELP* 6/6." The court then called the jury and counsel back to the courtroom, but declined to read the note aloud, instead summarizing that it "indicates that there are continued disagreements among the jurors," but not mentioning that the note contained a breakdown of the vote. The court then

delivered a second *Allen* charge.

Similarly, in *Kisoon* the trial court kept counsel in the dark with regard to a jury note containing a breakdown of the voting. The note, in pertinent part, stated, "We are 10 guilty to 2 not guilty on all three counts." The court, however, simply told counsel that the note indicated the jury was deadlocked and did not mention that the court was paraphrasing the contents of the note. Nor did the court make counsel aware that it was withholding the breakdown of the votes. In both *Kisoon* and *O'Rama*, the Court held that a mode of proceedings error had occurred because, by not telling the parties that the notes contained a breakdown of the votes, the defendants were deprived of an opportunity to consider whether the breakdown of the votes was meaningful, thus preventing them from "fram[ing] intelligent suggestions for the fairest and least prejudicial response" (*Kisoon*, 8NY3d at 134; *O'Rama*, 78 NY2d at 277).

On the other hand, the Court of Appeals has held that when defense counsel is given notice of the substance of the contents of a jury note and has knowledge of the substance of the court's intended response, counsel must object in order to preserve the

claim for appellate review (*Starling*, 85 NY2d at 516; *see e.g. People v Snider*, 49 AD3d 459, *lv denied 11 NY3d 795 [2008]; People v Campbell, 48 AD3d 204, lv denied* 10 NY3d 860 [2008]; *People v Williams*, 38 AD3d 429, 430-431, *lv denied* 9 NY3d 965 [2007]).

People v Starling (85 NY2d 509, *supra*) aptly illustrates this point. There, the defendant was on trial for several narcotics related offenses. During deliberations, the jury sent out a series of notes. In the first, they asked for the definition of sale, and the court read that note to the parties before responding. In the second, the jury asked for a rereading of one of the charges in the indictment as well as the definition of intent. In the third, the jury again asked for a rereading of the definition of intent. In response to both the second and third notes, the trial judge did not show them to trial counsel in advance but instead reread them to the jury while answering them. The defendant voiced no objection. On appeal, the defendant complained that by this procedure, the court failed to comply with *O'Rama*. In finding the claim unpreserved, the Court of Appeals distinguished the situation from that in *O'Rama,* where -- by completely withholding the contents of the note from defense counsel -- the trial judge had deprived the defense of the opportunity to participate in formulating the court's

response. In *Starling*, on the other hand, the trial court, by rereading the notes to the jury, gave defense counsel notice of the contents of the note, and counsel already had knowledge of the substance of the court's responses from the previous reading of the charges.

The recent Court of Appeals pronouncement in *People v Kadarko* (14 NY3d 426 [2010], *revg* 56 AD3d 102 [2008]) further illustrates the point that an *O'Rama* departure is not a mode-of-proceedings error when defense counsel is concomitantly given notice of the contents of a jury note and has knowledge of the substance of the court's intended response. In *Kadarko*, the jury sent out a note reporting it was "divided" and indicating its division on each of five robbery counts (e.g., "7/14/04 8 to 4"). The trial judge informed counsel of the note's general content but did not disclose the numerical breakdowns, believing the jury had erred in revealing them. Neither counsel objected to the judge's withholding the information. After giving an *Allen* charge and sending the jury back to deliberate, the judge decided to show the note to counsel. Neither counsel objected to not having seen it sooner, or sought any corrective action. The jury eventually convicted the defendant of one count.

On appeal, relying on *O'Rama*, a majority of this Court (56 AD3d 102) held that the trial judge had in effect committed a

mode of proceedings error (see dissenting opinion at 109, 114). The Court of Appeals unanimously disagreed (14 NY3d at 429-430): "Although the [trial] court's decision not to read the entire note until after the jury had resumed deliberations may have been error, it was not a mode of proceedings error." This is because -- in contrast to *Kisson* and *O'Rama* -- the trial court in *Kadarko* did not keep the parties in the dark. Rather, the court told counsel that the note contained a numerical breakdown, which it would not disclose. Nor was the error preserved, since the judge informed counsel that the note gave divisions among jurors as to each robbery count and advised counsel that specific breakdown of numbers would be withheld until after the jury resumed deliberations, and counsel did not object to the judge's handling of the note either before or after its contents were revealed.

In the instant case, as in *Starling* and *Kadarko*, the trial court's departure from the *O'Rama* directives deprived defendant of nothing substantive. Although the court did not read the note verbatim, it did apprise defense counsel of the substance of the note (i.e., the jury wanted to know if it could have a consensus on charge two without reaching a consensus on charge one) before responding. In addition, defense counsel was advised what the court's response would have been (i.e., to instruct the jurors to resume deliberations on count one). While the court's failure to

read the note verbatim deprived defense counsel of knowledge that the jury had explicitly requested -- "So what's our next step?" -- the failure is an error of no moment for it affected nothing (see the dissenting opinion in *Kadarko*, 56 AD3d at 113), and it did not deprive defense counsel of an opportunity for input on how to respond to the note.

Indeed, when the trial court proposed the exact question the jury had asked in the note, it immediately revealed its intention to instruct the jurors to resume deliberations on count one, and counsel raised no objection to the course of action. Under the circumstances, it cannot be said that the trial court prevented defense counsel, as in *Kisson* and *O'Rama*, from having any input in formulating the court's response to the jury note. Rather, as in *Starling* and *Kadarko*, defense counsel remained silent at a time when he was aware of the court's action dealing with the note. Therefore, this case is not within the *O'Rama* exception to traditional preservation rules.

Accordingly, the judgment of Supreme Court, New York County (Edwin Torres, J.), rendered October 11, 2007, convicting defendant, after a jury trial, of criminal possession of a

controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2 years, should be affirmed.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 12, 2010

CLERK