SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 2, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Tom, Williams, McGuire, Freedman, JJ.

4092-
4093 In re Shaun B., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Taishawn B.,
Respondent-Appellant,

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

Simpson Thacher & Bartlett LLP, New York (Agnes Dunogué of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

Lawyers for Children, Inc., New York (Nancy Dunbar of counsel), Law Guardian.

Order, Family Court, New York County (Jody Adams, J.), entered on or about September 15, 2006, insofar as it brings up for review the fact-finding determination that respondent mother had abused and neglected another child, not her own and not the subject of these proceedings, and thereby derivatively neglected the subject children, unanimously reversed, on the law and the

facts, without costs, the findings of abuse and neglect vacated, and the petition dismissed.

The court erred in finding respondent legally responsible for the care of her boyfriend's child, Kyla (*see* Family Court Act § 1012[a]), who had made only sporadic visits to the apartment shared by respondent and her boyfriend. The child was never left in respondent's sole care and was at all times in the care of her father, including when the abuse took place, at which time respondent was sleeping (*see Matter of R./C. Children*, 303 AD2d 172 [2003]; *Matter of Faith GG.*, 179 AD2d 901 [1992], *lv denied* 80 NY2d 752 [1992]).

Moreover, there was no evidence adduced at the fact-finding hearing from which it reasonably could be concluded that respondent had any reason whatsoever to apprehend that her boyfriend might injure Kyla, let alone that he might injure her by shaking her (*see Matter of P. Children*, 272 AD2d 211, 211-212 [2000], *lv denied* 95 NY2d 770 [2000] [evidence insufficient to support a finding of abuse or neglect against father, where mother lost her temper and struck her son, because "(t)here was no showing that (father) had prior reason to know that the child was in danger"]). In addition, there was no evidence adduced at the fact-finding hearing that respondent had any involvement in or knowledge of either the tibia fracture sustained by Kyla or the prior shaking incident, which according to the undisputed

evidence did not occur during any period of time in which Kyla was in respondent's apartment.

Respondent's conduct was at all times reasonable; she did not in any way contribute to the abuse of her boyfriend's child (*see Matter of Miranda O.*, 294 AD2d 940 [2002]; *Matter of Evelyn X.*, 290 AD2d 817, 820 [2002]), *appeal dismissed* 98 NY2d 666 [2002]; *Matter of Robert YY.*, 199 AD2d 690, 692 [1993]). These determinations require reversal of the derivative findings of abuse and neglect as to the subject children (*Matter of Anjanne J.*, 44 AD3d 407 [2007]). Given our conclusion that the fact-finding determination must be reversed and the petition dismissed, the appeal from the placement order has been rendered academic.

All concur. Williams and McGuire, JJ. also concur in a separate memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring)

I agree in every respect with the memorandum reversing the fact-finding determinations that respondent mother had abused and neglected Kyla, the infant daughter of her boyfriend, and had derivatively neglected the subject children. I write separately, however, to emphasize certain of the stark deficiencies in the evidence and to make a larger albeit obvious point about this troubling case.

First, there was not a shred of evidence adduced at the fact-finding hearing from which a rational trier of fact could come to the conclusion that is essential to any finding of abuse with respect to Kyla: that respondent had any rational reason to apprehend that her boyfriend might injure Kyla, let alone that he might, intentionally, recklessly or negligently, injure her by shaking her. Nor was there evidence from which a rational trier of fact could conclude that on the night in question respondent had any knowledge or reason to know that her boyfriend had, as he ultimately admitted, shaken Kyla during the second night of the two successive days and nights in which Kyla was in respondent's apartment with her boyfriend. To the extent Family Court may have relied on evidence that Kyla had sustained a fractured tibia, the evidence was uncontradicted that the injury occurred some two or more weeks before the two days and nights in which Kyla was in respondent's apartment with the boyfriend.

Family Court also appears to have based its finding against respondent that Kyla was a neglected child on, among other things, respondent's admissions that she smoked marihuana and was not enrolled or regularly participating in a drug treatment program. This, too, was manifestly erroneous. In the first place, there was no evidence at all at the fact-finding hearing that respondent regularly smoked marihuana. Rather, apart from a single positive test result for marihuana - a test that was taken *after* the subject children had been removed from respondent's home - the only evidence on this subject was testimony from a detective that respondent "had admitted that she had smoked marihuana." No testimony from the detective or anyone else at the fact-finding hearing indicated when or how often respondent smoked marihuana, let alone that she regularly smoked marihuana. Second, there was no evidence at all at the fact-finding hearing of "a link or causal connection" between respondent's use of marihuana "and the circumstances that allegedly produce[d] the child's impairment or imminent danger of impairment" (*Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]; *see also Matter of Anastasia G.*, 52 AD3d 830 [2008] [holding that evidence was insufficient to support a finding of neglect where caseworker testified that father admitted that he used drugs, but "no evidence was elicited as to . . . the duration, frequency, or repetitiveness of his drug use, or whether he was ever under the influence of drugs

while in the presence of the subject child," and there was no evidence that the subject child's "physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired"]).

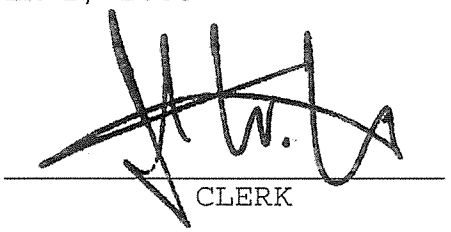
In my view, moreover, no rational trier of fact could conclude from the evidence at the hearing that respondent was legally responsible for the care of Kyla. In this regard, it bears emphasizing that the undisputed evidence at the hearing was that Kyla, who was born on January 5, 2003, was not often in respondent's home during the period of little more than two months before she was shaken, that respondent had never been left alone with Kyla, and that the last time Kyla had been in the apartment before the night in question was on February 14, about four weeks before, and even then only for a few hours.

In my view, the findings of abuse and neglect reflect a gross miscarriage of justice. Whether it was a gross miscarriage of justice is not a matter that needs to be decided to resolve this appeal. It nonetheless is relevant to our disposition of this appeal because of our supervisory authority over the trial courts. Our Family Courts have extraordinarily difficult jobs in handling large case loads of challenging cases under the additional burden of knowing the profound importance both of the responsibilities entrusted to them and the consequences of the decisions they must make for the parents and children involved.

That already great burden is all the more weighty in harrowing cases like this one in which an infant suffers severe injuries as a result of a parent's actions, here the father's admitted conduct of having shaken his infant daughter. To the end of seeking to avoid another gross miscarriage of justice like this one, I would not resolve this appeal without underscoring the following: the fundamental and critically important requirement that findings of abuse and neglect must be based on reasonable conclusions from the evidence adduced at a fact-finding hearing, not on the basis of conjecture and speculation that fills evidentiary gaps, applies in all cases.

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4155 The People of the State of New York, Ind. 4328/05
Respondent,

-against-

David Jenkins,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

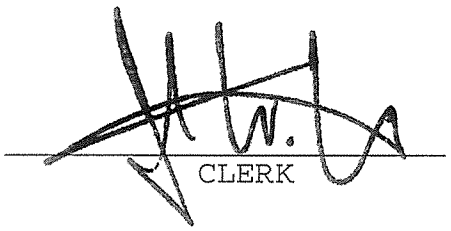
Judgment, Supreme Court, New York County (Edwin Torres, J. at suppression hearing; Lewis Bart Stone, J. at plea and sentence), rendered December 22, 2006, convicting defendant of robbery in the first degree, and sentencing him to a term of 8 years, unanimously affirmed.

Defendant's written waiver, his colloquy with the plea court, and his extensive consultations with his attorney establish that he made a valid and enforceable waiver of the right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]). The court neither coerced the waiver nor conflated the right to appeal with the rights automatically waived by pleading guilty. Although defendant raises the issue of his mental competence in connection with his challenge to the validity of his appeal waiver, he expressly declines to seek vacatur of his plea on the ground of mental

incapacity. In any event, we conclude that defendant was mentally competent to plead guilty and waive his right to appeal. This valid waiver forecloses review of defendant's suppression and excessive sentence claims. As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), we reject those claims on the merits.

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

ENTERED: OCTOBER 2, 2008



Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4156 In re Police Officer Manuel Gomez, Index 110690/06
Petitioner,

-against-

Raymond W. Kelly, as Police Commissioner
of the City of New York, et al.,
Respondents.

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

Determination of respondent Police Commissioner, dated May 18, 2006, finding petitioner guilty of five departmental charges of misconduct and imposing a one-year dismissal probation and 30-day vacation forfeiture, unanimously modified, on the law, to the extent of vacating the penalty, and remitting the matter to respondent for the imposition of an appropriate lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Emily Jane Goodman, J.], entered May 22, 2007) otherwise disposed of by confirming the remainder of the determination, without costs.

Substantial evidence supports the findings that petitioner violated his commanding officer's order to terminate his involvement with the District Attorney's office in a criminal investigation; failed to take possession of drugs during a police

department integrity test; failed to voucher his helmet, mace and shield before leaving for active military duty; retrieved his service handgun before the official date of his discharge from active military duty; and failed to report a domestic incident to the department. There is no basis to disturb the hearing officer's rejection of petitioner's explanations for these actions (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

We find that the penalty is excessive in light of the mitigating circumstances, i.e., petitioner's several tours of active military duty, including a year in Afghanistan for which he was decorated, and the substantial pay lost in connection with his military service (*see Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 233 [1974]; *see also Matter of Ryngala v Codd*, 57 AD2d 808 [1977]).

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

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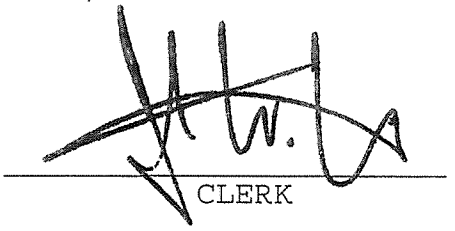

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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4157 In re Mykle Andrew P.,

A Dependent Child Under the
Age of Eighteen Years,

Antonio P.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about August 17, 2007, which, to the extent appealed from, upon a finding of permanent neglect, terminated respondent's parental rights to the subject child and committed the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence established that the agency satisfied its statutory obligation to make diligent efforts to encourage and strengthen the parental relationship by providing referrals to parenting skills and anger management programs, scheduling visitation, helping respondent find adequate housing

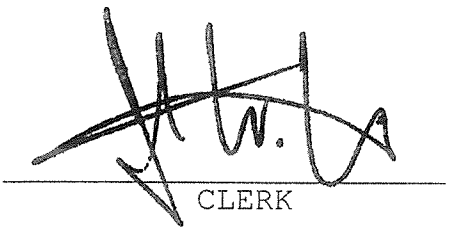
and suitable employment, and encouraging him to attend psychological programs, and that respondent failed to plan for the child's future by failing to commit to individual counseling during the relevant period, to complete an anger management program, and to obtain housing (*see* Social Services Law § 384-b[7][a], [c]; *Matter of Star Leslie W.*, 63 NY2d 136, 142-143 [1984]; *Matter of Elizabeth Amanda T.*, 52 AD3d 376 [2008]).

That the termination of respondent's parental rights is in the child's best interests was established by a preponderance of the evidence, which showed, inter alia, that the child had been in foster care for more than three years at the time of the dispositional hearing and that his foster parents, who have been addressing his special needs, want to adopt him (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [2006]). Even crediting respondent's assertions that he completed an anger management program and obtained employment after the finding of neglect was made, such relatively recent efforts to comply with the agency's recommendations are insufficient to warrant an alternative

disposition, such as a suspended judgment (*see Matter of Charles Curbelo C.*, 12 AD3d 270 [2004], *lv denied* 4 NY3d 706 [2005]).

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4158 Nubia Jasmine Morales, Index 15748/04
Plaintiff-Appellant, 2058/05

-against-

Pedro P. Morales,
Defendant,

Jamal Pollard, et al.,
Defendants-Respondents.

[And Another Action]

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Burke Lipton McCarthy & Gordon, White Plains (Kevin T. D'Arcy of counsel), for Jamal Pollard and Professional Transportation Corp., respondents.

Paul F. McAloon, P.C., New York, for Sandoval respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about October 4, 2007, which, insofar as appealed from in this action for personal injuries arising out of a multi-vehicle accident, granted the motion of defendants Everett Sandoval and Eric M. Sandoval and the cross motion of defendants Jamal Pollard and Professional Transportation Corp. for summary judgment dismissing plaintiff Nubia Morales' complaint (Action No. 1, Index No. 15748/04) and all cross claims as against them, unanimously affirmed, without costs.

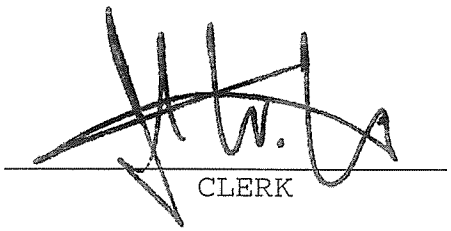
Defendants satisfied their prima facie burden of entitlement to summary judgment based on the deposition testimony of Eric

Sandoval and Pollard, who each stated that, due to a lane closure, they came to a complete stop before the vehicle in which plaintiff was a passenger and driven by plaintiff's father Pedro Morales struck Pollard's van, thereby propelling the van forward into Sandoval's car (*see Sorge v North Star Waste, LLC*, 48 AD3d 386 [2008]; *Agramonte v City of New York*, 288 AD2d 75 [2001]). In opposition, plaintiff failed to provide a non-negligent explanation for the rear-end collision sufficient to establish an issue of fact regarding the negligence of Sandoval and Pollard (*see Ferguson v Honda Lease Trust*, 34 AD3d 356 [2006]). The Morales' speculative claims of hearing a noise and that Pollard's van had struck Sandoval's car before they collided with Pollard's van, are insufficient to overcome the clear testimony from the front two drivers that both vehicles were at a stop prior to being hit in the rear (*see Macauley v ELRAC, Inc.*, 6 AD3d 584 [2004]). Furthermore, plaintiff's affidavit submitted in opposition to the motion and cross motion contradicts her earlier deposition testimony and was properly disregarded as

tailored to avoid the consequences of that earlier testimony (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [2008]; *Israel v Fairharbor Owners, Inc.*, 20 AD3d 392 [2005]).

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4159-
4160 The People of the State of New York, Ind. 2162/04
Respondent, 4205/04

-against-

Randy Miles,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Cahill Gordon & Reindel, LLP, New York (Whitney M. Smith of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nikki D. Faldman of counsel), for respondent.

Judgments, Supreme Court, Bronx County (Martin Marcus, J. at hearing; Thomas Farber, J. at plea, trial and sentence), rendered October 6, 2005, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and convicting him, upon his plea of guilty, of robbery in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant failed to meet his step-three burden of demonstrating that the facially race-neutral explanations given by the prosecutor were a pretext for racial discrimination (*see People v Payne*, 88 NY2d 172, 183 [1996]). After the prosecutor explained that she challenged the

panelists at issue because of their inattentive demeanor during her voir dire examination, defense counsel merely made the observation that he did not personally notice any inattentiveness. Although the court admitted that it was unable to either confirm or contradict the prosecutor's observation of inattentive demeanor because it had not been watching the panelists during the prosecutor's questioning, it expressly credited the prosecutor and found that the demeanor-based reasons she provided for the challenges in question were not pretextual. This factual determination is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). We do not read *Snyder v Louisiana* (__ US __, 128 S Ct 1203 [2008]) as absolutely prohibiting a trial court from accepting a demeanor-based reason as nonpretextual unless the court personally observes the demeanor trait cited by the challenging party (*but see Haynes v Quarterman*, 526 F3d 189, 198-200 [5th Cir 2008]). Here, we conclude that the court satisfied *Snyder*'s concerns when it made an express factual finding that the prosecutor "credibly relied on demeanor in exercising a strike." (128 S Ct at 1209).

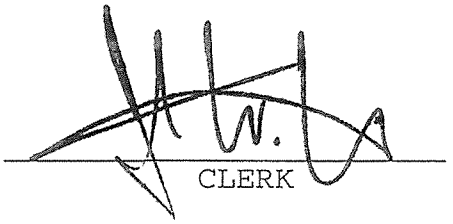
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its resolution of any discrepancies between a police

witness's testimony and his paperwork. Probable cause for defendant's arrest was established by testimony that he met a detailed description of a person who had just made an apparent drug sale.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. There was ample evidence of defendant's intent to sell, including evidence warranting the conclusion that he made several contemporaneous drug sales.

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

ENTERED: OCTOBER 2, 2008



Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4161-
4161A In re Verna Eggleston, as Commissioner of Social Services of the City of New York, Petitioner, Index 500132/05

-against-

Gloria N., A Person Alleged to be Incapacitated, Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane G. Temkin of counsel), for appellant.

Order and judgment (one paper), Supreme Court, New York County (Lottie E. Wilkins, J.), entered June 11, 2008, which, to the extent appealed from, upon reargument of a prior order granting the appointed guardian's motion for additional powers pursuant to Mental Hygiene Law §§ 81.21 and 81.22, adhered to the original determination and granted the guardian the power to place respondent in a skilled nursing facility or residential care facility and the power to cause respondent to be evaluated to determine the suitability or need for admission to a mental hygiene facility, unanimously reversed, on the law and the facts, without costs, and those portions of the order vacated. Appeal from the order, same court and Justice, entered September 21, 2007, unanimously dismissed, without costs, as superseded by the appeal from the later order.

Under the circumstances of this case, it is reasonable to

maintain respondent in the community, preferably in her apartment; placing her in a skilled nursing or residential care facility is not the least restrictive form of intervention (*see* Mental Hygiene Law § 81.22[a][9]; *Matter of Jospe*, 2003 NY Slip Op 50588U [2003]). Moreover, since the guardian never sought to place respondent in such a facility and respondent was not given notice or an opportunity to be heard on the issue, the court's sua sponte order granting the guardian that power deprived respondent of her right to due process (*see Matter of Rhodanna C.B.*, 36 AD3d 106 [2006]).

Under article 81 of the Mental Hygiene Law, the court lacked the authority to grant the power to cause respondent to be evaluated for admission to a mental hygiene facility (*see* Mental Hygiene Law § 81.22[b][1]; § 9.03; *Matter of Farbstein (Beth Israel Med. Ctr.)*, 163 Misc 2d 26 [1994]).

M-4002 ***In re Verna Eggleston, etc. v Gloria N., etc.***

Motion seeking leave to amend caption granted.

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

ENTERED: OCTOBER 2, 2008

CLERK

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4162 In re Ariel C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about August 9, 2007, which adjudicated respondent a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence. Although the victim was unable to identify appellant as the person who took her cell phone, and although Family Court Act § 343.2 requires that the testimony of an accomplice be corroborated, the record supports the court's implicit finding that the identifying witness was not an accomplice within the

meaning of the statute. The evidence did not establish that the witness was an accomplice as a matter of law (*see People v Caban*, 5 NY3d 143, 152-153 [2005]). The witness denied any participation in the crime, and provided an innocent explanation for each of his actions during the incident. There is no basis for disturbing the court's decision to credit that testimony (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

ENTERED: OCTOBER 2, 2008

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4163 The People of the State of New York, Ind. 1920/07
Respondent,

-against-

Willie Anthony,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Judgment, Supreme Court, New York County (Brenda Soloff J.), rendered on or about August 10, 2007, 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.

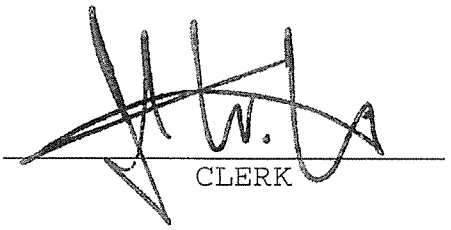
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4164 The People of the State of New York, Respondent,

-against-

Collier Gillyard, Defendant-Appellant.

Ind. 6692/05

Richard M. Greenberg, Office of the Appellate Defender, New York (Robert L. Whitener of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

Judgment, Supreme Court, New York County (Micki A. Scherer, J. on severance motion; Bruce Allen, J. at jury trial and sentence), rendered November 9, 2006, convicting defendant of robbery in the second degree, grand larceny in the fourth degree and criminal impersonation in the first and second degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 9 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The record establishes that defendant impersonated a police officer in two incidents, approximately one month apart, and forcibly took property from the victim in the first incident. With respect to the first incident, there is no basis for disturbing the jury's determinations concerning credibility. With respect to the second incident, defendant's argument that he did not actually

impersonate a police officer is without merit.

The court properly admitted into evidence a "universal" handcuff key recovered from defendant during his pretrial incarceration approximately one month after the second incident. Defendant's possession of the key demonstrated his access to and familiarity with handcuffs, which were involved in both crimes (*see e.g. People v Pimental*, 48 AD3d 321 [2008], *lv denied* 10 NY2d 843 [2008]). The lapse of time was not so great as to render this evidence excessively remote (*see People v Del Vermo*, 192 NY 470, 481-482 [1908]). Even if viewed as evidence of an uncharged crime, its probative value exceeded its prejudicial effect, which was minimized by the court's limiting instructions.

We have considered and rejected defendant's arguments concerning the prosecutor's summation and the court's denial of defendant's severance motion.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 2, 2008

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4166-
4166A Marquetis Castillo Sosa, Index 7524/04
Plaintiff-Appellant,

-against-

Tudor Place Associates, Limited Partnership, et al.,
Defendants-Respondents.

Shapiro Law Offices, Bronx (Jason S. Shapiro of counsel), for appellant.

Kaufman Borgeest & Ryan, LLP, Valhalla (Jacqueline Mandell of counsel), for Tudor Place Associates, Limited Partnership, respondent.

Conway, Farrell, Curtin & Kelly P.C., New York (Jonathan T. Uejio of counsel), for 1184 Realty Associates, LLC, respondent.

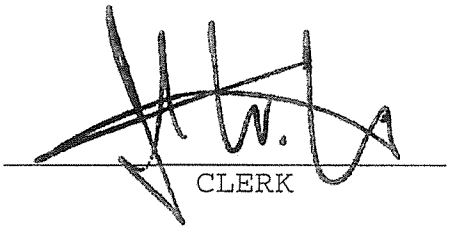
Order, Supreme Court, Bronx County (Allison Y. Tuitt, J.), entered August 27, 2007, which, to the extent appealable, granted defendants' motion to dismiss the complaint and denied plaintiff's motion to renew earlier orders of preclusion, unanimously affirmed, without costs. Order, same court and Justice, entered on or about December 24, 2007, which, to the extent appealable, can be construed as denying plaintiff's motion to renew the August 27 order, unanimously affirmed, without costs.

Dismissal of the complaint is appropriate where a plaintiff repeatedly and willfully disobeys court orders for discovery (*see Jones v Green*, 34 AD3d 260 [2006]). Since plaintiff herein

repeatedly failed to schedule or appear for a medical examination, it was not an improvident exercise of discretion for the court to preclude medical testimony and dismiss the complaint. Without this evidence, plaintiff is unable to establish damages at trial.

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

ENTERED: OCTOBER 2, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on October 2, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Luis A. Gonzalez
Eugene Nardelli
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York,
Respondent,

Ind. 4552/02
5675/04

-against-

4167-
4167A

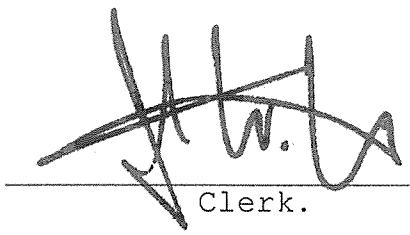
Donna Hill,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about April 17, 2007,

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 judgments so appealed from be and the same are hereby affirmed.

ENTER:



Clerk.

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

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4168 The People of the State of New York, Respondent, Ind. 6155/05

-against-

Jesse Soller, etc., Defendant-Appellant.

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

Jesse Soller, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Michelle Echeverria of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered August 1, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony offender, to an aggregate term of 4 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The evidence included, among other things, defendant's possession of prerecorded buy money, and his explanation for that circumstance is unpersuasive.

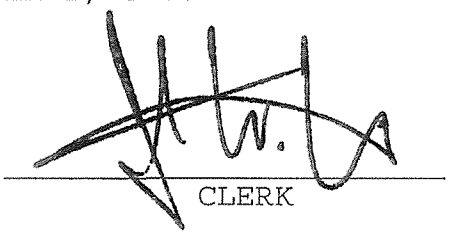
The court's *Sandoval* ruling balanced the appropriate factors

and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]). The court permitted only a limited inquiry into defendant's substantial criminal record, and we do not find the convictions at issue to be excessively stale.

Defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant's remaining pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: OCTOBER 2, 2008



CLERK

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4169-
4169A Jenel Management Corp., et al., Index 602142/03
Plaintiffs-Respondents-Appellants,

-against-

Pacific Insurance Company,
Defendant-Appellant-Respondent.

Law Offices of Charles J. Siegel, New York (Christopher A. South of counsel), for appellant-respondent.

Max W. Gershweir, New York, for respondents-appellants.

Orders, Supreme Court, New York County (Jane S. Solomon, J.), entered February 15, 2007 and January 24, 2008, which, inter alia, declared that, in connection with an underlying action for personal injuries, plaintiff insurer and defendant are co-primary insurers of plaintiff insurer's coplaintiffs herein, and denied certain items of damages claimed by plaintiff insurer, unanimously modified, on the law, to award plaintiff insurer $7,059.25 in attorneys' fees it incurred in prosecuting third-party claims against defendant's insured in the underlying action, and otherwise affirmed, without costs.

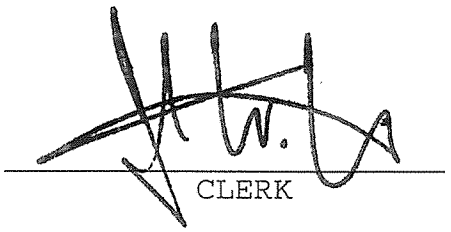
At issue is whether the stairwell area where the underlying accident occurred is covered by the additional insured clause in the policy procured by the underlying plaintiff's employer from defendant herein, which clause extends coverage to plaintiff insurer's coplaintiffs herein, the employer's landlord and the

managing agent of the building. Coverage exists because the underlying claim arose out of the "maintenance or use" of the leased premises, within the meaning of the additional insured clause, where the accident occurred in the course of an activity necessarily incidental to the operation of the space leased by the employer, and in a part of the premises that was necessarily used for access in and out of the leased space (*see ZKZ Assoc. v CNA Ins. Co.*, 89 NY2d 990 [1997]; *New York Convention Ctr. Operating Corp. v Cerullo World Evangelism*, 269 AD2d 275, 276 [2000]). We note that this result is consistent with the lease, which required the employer to procure insurance against any liabilities "on or about the demised premises or any appurtenances thereto." The concededly excess policies that defendant would have the court review raise no priority-of-coverage issues (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, __ [2008], 2008 NY Slip Op 03150, *3; *cf. BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]). The coplaintiffs' third-party claims against the employer were an essential component of their defense of the main underlying action, and, accordingly, plaintiff insurer is entitled to reimbursement of the $7,059.25 in attorneys' fees it incurred in

prosecuting those claims (*see Perchinsky v State of New York*, 232 AD2d 34, 39 [1997], *lv denied sub nom. Perchinsky v Granny G. Prods.*, 93 NY2d 812 [1999]; *Springstead v Ciba-Geigy Corp.*, 27 AD3d 720 [2006]).

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4170 The People of the State of New York, Respondent, Ind. 5161/04

-against-

Terry Pearson, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (David M. Cohn of counsel), for respondent.

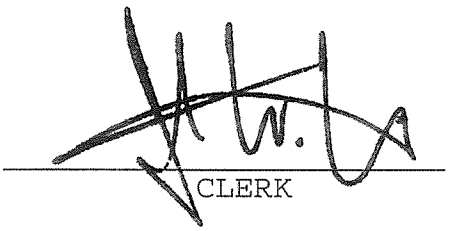
Judgment, Supreme Court, New York County (Michael R. Ambrecht, J.), rendered October 18, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 7 years, unanimously reversed, as a matter of discretion in the interest of justice, the plea vacated, and the matter remanded for further proceedings.

During the plea allocution, the court did not inform defendant of any of the rights that he was waiving as a result of his guilty plea (*see Boykin v Alabama*, 395 US 238 [1969]), and it also neglected to inform him of the enhanced sentence he potentially faced if he failed to successfully complete a period of interim probation (*see People v Achaibar*, 49 AD3d 389 [2008], *lv denied* 19 NY3d 931 [2008]). The court's inquiry consisted of determining that defendant would accept the plea agreement

whereby he would undergo a period of "intensive probation supervision" prior to sentencing, that he was aware that a plea would give him a felony conviction, and that he admitting having possessed an unlicensed firearm. Thus, the record fails to establish that defendant intelligently and voluntarily entered his plea. Although defendant did not preserve these issues, we reach them in the interest of justice in view of the extreme deficiency of the plea allocution (*see People v Colon*, 42 AD3d 411 [2007]).

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4171 Dennis M. Dodge, Jr., etc., et al., Index 603026/07
Plaintiffs-Respondents,

-against-

William Lynch, etc., et al.,
Defendants-Appellants.

Howard R. Birnbach, Great Neck, for appellants.

Leavitt, Kerson and Duane, New York (Alexandra Mishail of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered May 28, 2008, after a nonjury trial, awarding plaintiff JCM Vending, Inc. the principal sum of $60,016 in an action for fraud and misrepresentation, unanimously affirmed, with costs.

Plaintiff JCM Vending, Inc. entered into a contract with defendant Billy D's Vending, Inc., dated April 2, 2007, to purchase said defendant's vending machine route - consisting of 31 machines located at the law firm of Simpson Thacher & Bartlett ("STB") and 21 additional machines located in various buildings in Manhattan - and a Ford van for the sum of $117,500. Pursuant to the terms of the contract, JCM paid $55,000 at closing and agreed to pay the balance in monthly installments, in accordance with the terms of a promissory note executed simultaneously with the contract. At the same time, JCM and plaintiff Dennis M. Dodge, Jr., its president, also executed an Affidavit of

Confession of Judgment for the full amount due on the promissory note.

In June, 2007, plaintiffs learned that STB was terminating its account and, on or about September 11, commenced this action based on fraudulent inducement, alleging that defendants, Billy D's Vending and its president, William Lynch, knew that STB was dissatisfied with defendants' services and fraudulently failed to disclose that information to plaintiffs. Meanwhile, on September 10, defendant Billy D's obtained a judgment by confession in Supreme Court, Richmond County.

There is no merit to defendants' contention that this action is barred by the judgment by confession, since the nature or object of this action is different from that in the action in which the confession of judgment was rendered (*see Cicero v Great Am. Ins. Co.*, 53 AD3d 461 [2008]; *Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-07 [1929]).

Defendants' claim that J.H.O. Gammerman lacked jurisdiction to try the case because he did not obtain the requisite consent of the parties (*see* CPLR § 4317[a]) is similarly without merit in view of defendants' acquiescence to J.H.O. Gammerman's assertion of authority and willing participation in the proceedings (*see Law Offs. of Sanford A. Rubenstein v Shapiro Baines & Saasto*, 269 AD2d 224, 225 [2000], *lv denied* 95 NY2d 757 [2000]).

Finally, there was sufficient evidence that defendants knew

that there was a problem with the STB account and concealed this knowledge from plaintiffs, and defendants had a duty to disclose this knowledge to plaintiffs (*see Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [2005]).

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 2, 2008

Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4172 The People of the State of New York, Respondent, Ind. 159/04 3552/99

-against-

David O'Kane, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Marc Krupnick of counsel), for respondent.

Judgments, Supreme Court, New York County (Arlene R. Silverman, J.), rendered July 8, 2004, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree and criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for an adjournment of the suppression hearing, which was about to commence, in order to permit him to proceed with retained counsel, and there was no violation of defendant's right to retain counsel of his own choosing (*see People v Arroyave*, 49 NY2d 264, 270- 271 [1980]). Defendant, who had been represented by assigned counsel for several months, stated that he believed his family had hired a lawyer. However,

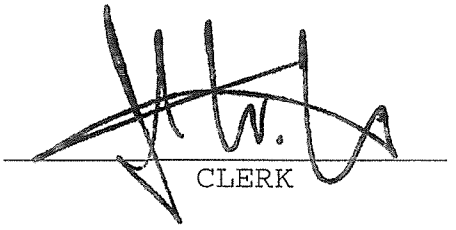
no such attorney ever appeared or contacted the court.

The court properly denied defendant's suppression motion. In a drug-prone location, a trained and experienced narcotics officer observed what he recognized as drug activity when defendant handed unidentified objects to three individuals lined up in front of him. Furthermore, when the officer approached, defendant made a spontaneous statement that could reasonably be construed as evincing consciousness of guilt. These factors provided probable cause for defendant's arrest (*see e.g. People v Stephens*, 41 AD3d 342 [2007], *lv denied* 9 NY3d 964 [2007]).

Defendant's arguments concerning his motion to withdraw his plea, including his constitutional claims, are without merit.

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4173 In re Prince T. Alarape, Index 105387/07
Petitioner,

-against-

New York City Department of Housing Preservation and Development (HPD), et al.,
Respondents.

Law Office of Sharon A. Telford, Brooklyn (Sharon A. Telford of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

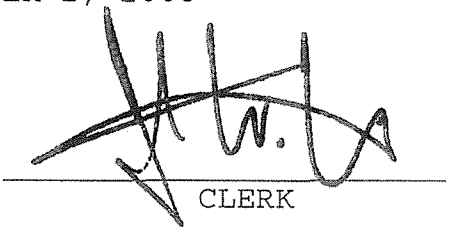
Determination of respondent HPD, dated September 1, 2006, terminating petitioner's housing subsidy on the ground that he misrepresented his resident adult son's employment status and the overall household income in a 2006 recertification application, unanimously confirmed, the petition denied, and this proceeding (transferred to this Court by order of Supreme Court, New York County [Marcy S. Friedman, J.], entered August 23, 2007), dismissed, without costs.

Termination of petitioner's subsidy for violation of the regulations governing the voucher assistance program for low-income housing, under Section 8 of the United States Housing Act of 1937 as amended (42 USC § 1437f), was supported by substantial evidence. The penalty imposed was not so disproportionate to the

offense as to be shocking to one's sense of fairness (*see Matter of Gerena v Donovan*, 51 AD3d 502 [2008]).

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

ENTERED: OCTOBER 2, 2008



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Lippman, P.J., Gonzalez, Nardelli, Acosta, DeGrasse, JJ.

4174N In re Joan Hansen & Company, Inc., Index 107114/05
Petitioner-Respondent,

-against-

Everlast World's Boxing
Headquarters Corp.,
Respondent-Appellant.

Schlacter & Associates, New York (Jed R. Schlacter of counsel), for appellant.

Phillips Nizer LLP, New York (George Berger of counsel), for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered March 14, 2008, which denied respondent's motion for a permanent stay of arbitration proceedings between the parties, unanimously affirmed, without costs.

The court correctly found that the relief sought by petitioner is a clarification, rather than a modification, of the final arbitration award issued April 14, 2005 and confirmed by a judgment entered March 1, 2006, and therefore that the time limitations of CPLR 7509 and 7511 do not bar petitioner's application (*see Matter of Beleggingsmaatschappij Wolfje, B.V. v AES Ecotek Europe Holdings, B.V.*, 21 AD3d 858 [2005]).

Contrary to respondent's contention, the application does not present a new issue which could not properly be considered by the arbitrators, since, during the arbitration proceeding, respondent's defense to petitioner's claim of breach of the

parties' representation agreement was based on the very provision that is at issue in the application.

We have considered respondent's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 2, 2008

CLERK

Tom, J.P., Mazzarelli, Friedman, Williams, Moskowitz, JJ.

4120 Terrence Brown, Index 109918/05
Plaintiff-Respondent,

-against-

Hermia Nelson,
Defendant-Appellant.

Lambert & Shackman, PLLC, New York (Steven Shackman of counsel), for appellant.

Townsend & Valente, LLP, New York (Francis L. Valente, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 10, 2007, which, after a nonjury trial, granted plaintiff's motion for a mandatory injunction and directed defendant to demolish and remove a brick garage wall and a skylight on her property, unanimously modified, on the law, to the extent of vacating the injunction in favor of plaintiff as to the skylight, and otherwise affirmed, without costs.

The trial court's issuance of a mandatory injunction directing defendant to remove the garage wall was proper. The evidence demonstrates that the garage wall encroached on plaintiff's property by several inches, and defendant failed to establish that she had obtained a prescriptive easement. The encroachment interfered with plaintiff's full use and enjoyment of his property, and defendant offered no evidence that removal of the garage wall would cause undue hardship to her. The

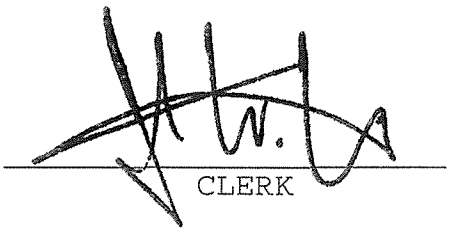
evidence establishes that the benefit to plaintiff if the injunction were granted and the irreparable harm to him if the injunction were not granted substantially outweighed the injury to defendant if the injunction were granted (*see Matter of Angiolillo v Town of Greenburgh*, 21 AD3d 1101, 1104 [2005]). We reject defendant's argument that plaintiff's claim regarding the wall is time-barred. Real Property Actions and Proceedings Law § 611 does not apply to this case because there is no abutting wall on plaintiff's property. Moreover, defendant waived the defense by failing to plead it or move for dismissal on that ground (CPLR 3211[e]).

However, we find that the injunction mandating removal of the skylight was not warranted. Plaintiff's own expert testified unequivocally that after the skylight was moved in response to the Department of Building's notice of violation, it no longer encroached on plaintiff's property.

We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 2, 2008



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Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4140 The People of the State of New York, Respondent,

-against-

Kenny Webb,
Defendant-Appellant.

Ind. 648/05

Glenn A. Garber, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Gliner of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 15, 2006, convicting defendant, after a jury trial, of murder in the second degree and robbery in the first and second degrees, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The court's original instruction on causation conveyed to the jury the appropriate rules to apply (*see People v Drake*, 7 NY3d 28 [2006]). The instructions were in accordance with the principles set forth in *People v Griffin* (80 NY2d 723, 726-727 [1993], *cert denied* 510 US 821 [1993]) concerning the relationship between intervening medical malpractice and criminal liability. The court did not place any undue restrictions on the concept of an intervening act that could break the chain of causation. In the main, the court's supplemental instruction also correctly stated the law. Certain language of that

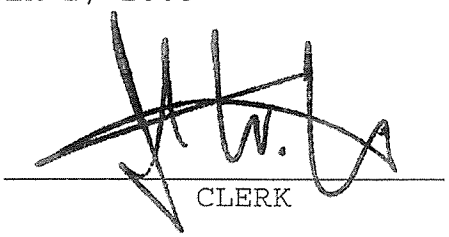
instruction, however, in which the court cited examples in which intervening medical occurrences would break the causal chain, could be construed as defining a definitive rather than an illustrative set of examples. Even assuming the supplemental instruction was to that extent erroneous, any error in this respect was harmless in light of the overwhelming evidence that the victim's death could not be attributed solely to allegedly negligent medical treatment (*see People v Smalls*, 55 NY2d 407, 417 [1982]; *cf. People v Griffin*, 80 NY2d at 728 [any error in excluding testimony of defense witness on cause of death did not prejudice defendant]).

Defendant's contention that in the absence of any attack on the credibility of the accomplice, Romero, the "truth-telling" provisions of the cooperation agreement between Romero and the prosecution were improperly referred to by the prosecutor in his opening statement and improperly elicited on direct examination of Romero, is not preserved for review as defendant did not object that the "truth-telling" provisions were improperly referred to and elicited (*see* CPL 470.05[2]). Nor are defendant's challenges to the prosecutor's summation preserved for review (*see People v Collins*, 12 AD3d 33, 36 [2004]). We decline to review either of those claims in the interest of justice. As an alternative holding, we also reject them on the

merits. With respect to the first of these claims, we note that defense counsel made clear during jury selection that the defense was attacking the credibility of the accomplice.

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

ENTERED: OCTOBER 2, 2008



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