SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 9, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4149 The People of the State of New York, Respondent, Ind. 10359/87

-against-

Anthony Rampino,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about March 8, 2006, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act (L 2004, ch 738), unanimously reversed, on the law, and the matter remanded to a different Justice for a de novo determination.

As the People concede, a remand to Supreme Court is necessary given that Supreme Court erroneously denied defendant his statutory right to an opportunity for a hearing on his application for resentencing. We direct that the motion be heard before a different Justice because the appearance of fairness and impartiality has been compromised by the actions of the Justice

to whom defendant's application was assigned (*see Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 40 AD3d 415, 421 [2007] [directing that matter be reassigned to another Justice where party had "raise[d] a reasonable concern about the appearance of impartiality"]).

The following constitutes the relevant portion of the record on the date the resentencing application was to be heard:

> "The Court: I was just told that [defendant] is in Elmhurst Hospital complaining of chest pains.
>
> "So I don't have any - I've thought about this case considerably.
>
> "I'm denying the application for altering his sentence. I don't know whether we're actually going to get him here in the courtroom. And so you folks can do with this situation as you choose.
>
> "The application is denied. If the First Department tells me to do it again, that's fine. This case is finished. Okay. Have a nice day."

Nothing in the record warrants the conclusion that defendant was feigning chest pains, and Supreme Court made no such suggestion.

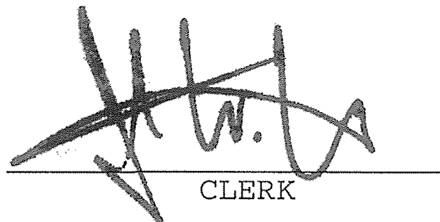
The mandate of the governing statute is unequivocal. It specifies that the court "shall offer an opportunity for a hearing and bring the applicant before it" (L 2004, ch 738, § 23). This Court's case law at the time of Supreme Court's oral ruling was no less unequivocal in construing "[t]he plain language of the statute" as mandating defendant's production

(*People v Figueroa*, 21 AD3d 337, 339 [2005], *lv denied* 6 NY3d 753 [2005]). After inexplicably denying defendant his statutory right, Supreme Court issued a written decision denying the application.

We need not discuss the substantive reasons articulated by Supreme Court in its subsequent written decision. It is enough to note that Supreme Court made numerous findings adverse to defendant's application. Defendant should not be required to overcome the hurdle of persuading the same Justice that he also erred in making these findings.

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

ENTERED: OCTOBER 9, 2008



CLERK

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4217 The People of the State of New York, Ind. 6196/05
Respondent,

-against-

Gerald Jones,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Lucy Jane Lang of counsel), for respondent.

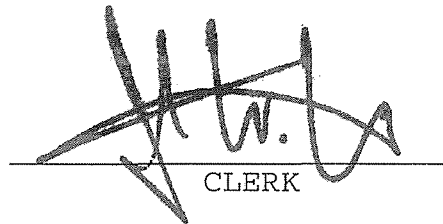
Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered July 19, 2006, convicting defendant, after a jury trial, of petit larceny, and sentencing him to a term of 1 year, unanimously affirmed.

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 credibility and identification. We do not find that the jury acted irrationally when it convicted defendant of larceny but acquitted him of the more serious charges (*see People v Rayam*, 94 NY2d 557, 562 n [2000]; *People v Jacobs*, 13 AD3d 98 [2004], *affd* 6 NY3d 188 [2005]). Moreover, it was defense counsel who requested submission of petit larceny, arguing that "[t]here is a reasonable view of the evidence that would allow the jury to conclude that property was taken but that no force was used," and

thereby implicitly waiving the principal argument raised on appeal (*cf. People v Ford*, 62 NY2d 275, 283 [1984][waiver of right to complain of improper submission of lesser included offense]).

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

ENTERED: OCTOBER 9, 2008



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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4218 The People of the State of New York, Respondent, SCI 4986/04

-against-

Hector Castro, 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 (Robert Stolz, J. on plea; Laura Ward, J. at sentence), rendered on or about September 13, 2006, 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.

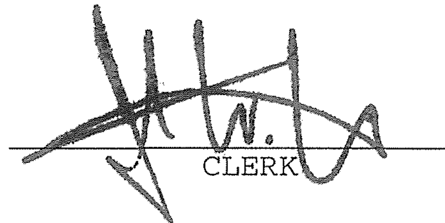
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 9, 2008



Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4220 Roder Beltre, Index 111734/05
Plaintiff-Appellant,

-against-

The Heights Management Company, LLC, et al.,
Defendants-Respondents.

Siler & Ingber LLP, Garden City (Robert M. Brinen of counsel), for appellant.

Law Offices of Safranek, Cohen & Krolian, White Plains (Michael L. Safranek of counsel), for respondents.

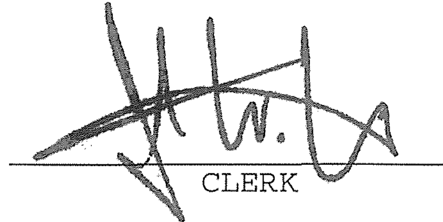
Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered August 10, 2007, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

There is no support in the record for plaintiff's claim that the standing water in the bathtub resulting from the recurrently clogged drain caused the tub to become dangerously slippery and, in any event, plaintiff testified that he never complained to the building superintendent that the bathtub was inordinately slippery (*see Seaman v State of New York*, 45 AD3d 1126, 1127 [2007]; *Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 326-327 [2006]).

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

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

ENTERED: OCTOBER 9, 2008



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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4221 The People of the State of New York, Respondent, Ind. 4720/05

-against-

Roberto Rodriguez, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), and Heller Ehrman LLP, New York (Zakiyyah T. Salim of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered February 21, 2008, convicting defendant, after a jury trial, of persistent sexual abuse and public lewdness, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

From the time of his arrest until the completion of his final statement, defendant insisted on discussing his case with the police and pressing them for information. Defendant repeatedly asked what he was being accused of, and the detective answered his question by stating that the victim was reading a book on the train and that defendant had taken out his erect, naked penis and rubbed it on her arm. We need not determine whether that statement by the detective was the functional equivalent of interrogation requiring *Miranda* warnings (*see*

People v Rivers, 56 NY2d 476, 480 [1982]; *People v Frost*, 16 AD3d 351 [2005], *lv denied* 5 NY3d 762 [2005]; *compare People v Lanahan*, 55 NY2d 711 [1981]). In any event, any error in admitting the statement defendant thereafter made was harmless, as there was no reasonable possibility that it affected the verdict (*see People v Crimmins*, 36 NY2d 230, 237 [1975]). Defendant's subsequent pre-*Miranda* statements in his cell were entirely spontaneous, and not the result of any police conduct.

Defendant's argument that his later, post-*Miranda* statements should have been suppressed as a continuous chain of events, tainted by the initial, improper "interrogation" is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Regardless of whether there was any prior interrogation, the post-*Miranda* statements were sufficiently attenuated, since there was a pronounced break between the statements in question, and defendant had demonstrated an unqualified desire to speak to the detective (*see People v White*, 10 NY3d 286, 291 [2008]; *People v Paulman*, 5 NY3d 122, 130-131 [2005]).

Defendant's claim that his counsel provided ineffective assistance by failing to argue that the post-*Miranda* statements

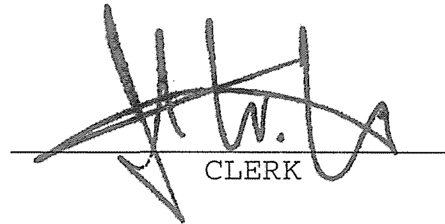
should have been suppressed as part of a continuing chain of events is not properly before us (*see People v Love*, 57 NY2d 998 [1982]).

M-4061 ***People v Roberto Rodriguez***

Motion seeking leave to strike page 10 of defendant's reply brief granted.

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

ENTERED: OCTOBER 9, 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 9, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. McGuire
Karla Moskowitz
Dianne T. Renwick, Justices.

---x

The People of the State of New York,
Respondent,

Ind. 2760/06

-against-

4224

Ronald Richardson,
Defendant-Appellant.

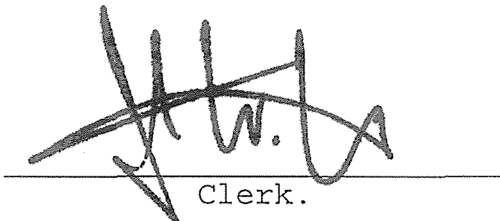
---x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered on or about June 28, 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 judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

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

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4227 Casey DeSouza, Index 7970/06
Plaintiff-Appellant,

-against-

Eugene M. Hamilton, et al.,
Defendants-Respondents.

Leonard Silverman, New York, for appellant.

Fiedelman & McGaw, Jericho (Andrew Zajac of counsel), for Eugene M. Hamilton, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for Djeli Diallo, respondent.

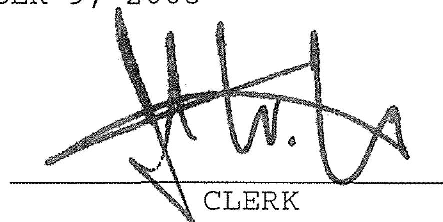
Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 19, 2007, which granted defendants' motion for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), unanimously affirmed, without costs.

No issue of fact as to permanence or significance is raised by plaintiff's physician's March 27, 2007 affirmation in opposition discussing and attaching contemporaneous reports of his examinations of plaintiff on February 1, 2005, three days after the accident, June 3, 2005, and March 2, 2007. Although the affirmation states that plaintiff ceased treatment on June 3, 2005, after four months of physical therapy, by which time plaintiff "had reached the maximum benefit of therapeutic treatment for her [disc] injuries," such that any further

treatment would have been merely "palliative," the June 3, 2005 contemporaneous report recommended that plaintiff continue physical therapy three times a week. "[A] plaintiff who terminates therapeutic measures following the accident . . . must offer some reasonable explanation for having done so" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Here, the explanation offered contradicts the earlier recommendation to continue physical therapy, and can not be accepted under the circumstances presented (*see Gonzalez v A.V. Managing, Inc.*, 37 AD3d 175 [2007]). In addition, there is no medical evidence substantiating plaintiff's claim that a prior injury to her left shoulder had resolved by the time of the accident (*see Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [2007]), and no objective medical evidence whatsoever of a serious injury to plaintiff's right knee. Plaintiff's 90/180 day claim lacks medical substantiation of her claim that her injuries were such as to require her confinement to home for some four months following the accident (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]).

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

ENTERED: OCTOBER 9, 2008



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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4228 The People of the State of New York, Respondent, Ind. 2702/06

-against-

Peter D'Agostino, Defendant-Appellant.

Patrick J. Brackley, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered October 19, 2007, convicting defendant, upon his plea of guilty, of criminal possession of marijuana in the first degree, and sentencing him to a term of 3 years, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Defendant made a valid waiver of his right to appeal. Therefore, the only claims raised on this appeal that would survive the waiver are defendant's challenges to the voluntariness of his plea and the effectiveness of his representation by counsel in connection with the plea (*see People v Parilla*, 8 NY3d 654, 660 [2007]). However, we find that the plea was voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]), that the court properly denied defendant's motion to

withdraw it (*see People v Frederick*, 45 NY2d 520 [1978]), and that counsel provided effective assistance (*see People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant agreed to a disposition whereby he would plead guilty to the sole count of the indictment and receive a sentence of two and one-half years. The court also imposed other conditions, including a requirement that defendant surrender the tenancy of his apartment, which had been an instrumentality of the crime, and which, in any event, was already the subject of a civil eviction proceeding. The court also warned defendant that if he failed to acquiesce in his eviction prior to sentencing, the court could impose any sentence authorized by law, up to the maximum of five and one-half years.

Subsequently, defendant, represented by new counsel, moved unsuccessfully to withdraw his plea. Since defendant had failed to surrender his apartment (from which he was ultimately evicted), the court sentenced him to three years instead of two and one-half years.

In his plea withdrawal motion, and on appeal, defendant's principal argument is that his plea was rendered involuntary because the court misled him into believing that his only options were to accept the offered disposition or go to trial, whereas a third option was to plead guilty to the indictment "unconditionally," pursuant to CPL 220.10(2). He similarly

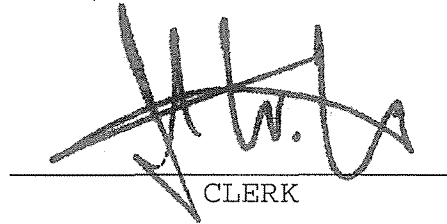
argues that his counsel provided ineffective assistance by failing to correct this misimpression. Even assuming that defendant was unaware of the third option, defendant has not shown how he was prejudiced by that lack of knowledge. While under an unconditional plea the court would not have been able to insist that defendant surrender his tenancy (which, as noted, defendant did not in fact surrender, and which he lost by way of Civil Court proceedings), such a plea would have permitted the court to impose any prison sentence up to the maximum permitted by law. There is no reason to believe that defendant was interested in a plea that did nothing to limit his sentencing exposure; rather, it was evident during the extended plea negotiations that defendant sought to significantly reduce his prison term. Likewise, there is no reason to believe that defendant would have been in any better position had he chosen to plead guilty unconditionally. We have considered and rejected defendant's remaining arguments concerning these matters.

Defendant's waiver of his right to appeal forecloses review

of his claims regarding the suppression proceedings and his procedural claims regarding his sentencing. 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 9, 2008



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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4230 In re Tayquan B.,

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

Jamall F.,
Respondent-Appellant,

Harlem Dowling-Westside Center for
Children and Family Services,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

George E. Reed, Jr., White Plains, Law Guardian.

Order of disposition, Family Court, Bronx County (Carol A. Stokinger, J.), entered on or about September 25, 2007, which, insofar as appealed from, terminated respondent father's parental rights to the subject child upon a finding that he violated the terms of a suspended judgment, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the determination that, following the grant of a suspended judgment, respondent violated its terms and conditions (*see Matter of Lourdes O.*, 52 AD3d 203 [2008]). The record demonstrates that respondent missed a substantial number of scheduled visits with the child and

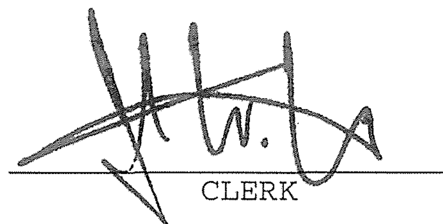
failed to undergo a psychiatric evaluation (*see id*; *Matter of Joshua Justin T.*, 208 AD2d 469 [1994]).

The agency established by a preponderance of the evidence that the best interests of the child would be served by terminating respondent's parental rights so as to facilitate the child's adoption by his foster family, where he has experienced stability and where his emotional, academic and social needs were met (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Furthermore, the teenage child expressed a clear desire to remain with the foster family, and while respondent may have completed an anger management program and attended some individual counseling, the evidence shows that he continued to exhibit aggressive and abusive behavior towards the child, foster mother and agency employees.

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

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

ENTERED: OCTOBER 9, 2008



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Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4231 The People of the State of New York, SCI 785/05
Respondent,

-against-

Louis Caiola,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Ana Vuk-Pavlovic of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Malancha Chanda of counsel), for respondent.

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about June 1, 2006, 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.

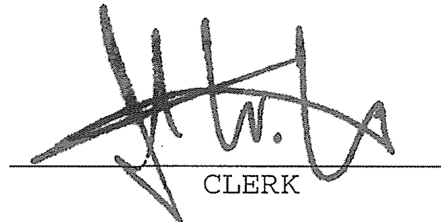
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 9, 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 9, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. McGuire
Karla Moskowitz
Dianne T. Renwick, Justices.

____x

The People of the State of New York, Ind. 5061/05
Respondent,

-against- 4232

Arnaldo Rivera,
Defendant-Appellant.

____x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about January 3, 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 judgment so appealed from be and the same is hereby affirmed.

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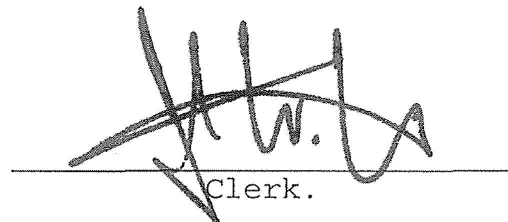


Clerk.

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

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4233 Jennifer O'Connor, Index 6180/06
Plaintiff-Appellant,

-against-

Consolidated Edison Company of New York, Inc.,
Defendant-Respondent.

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

Richard W. Babinecz, New York (Helman R. Brook of counsel), for respondent.

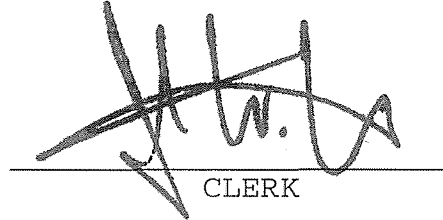
Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about October 30, 2007, which, in an action for personal injuries sustained in a slip and fall on an ice patch in a public roadway abutting a vacant lot owned by defendant, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

No issue of fact exists as to whether the ice patch was created by defendant's structures on defendant's abutting lot that allegedly diverted the flow of rain water from the lot (*see Roark v Hunting*, 24 NY2d 470, 475 [1969]). Log structures on the lot intended as retaining walls to manage the flow of rain water down the sloping lot did not contain the water. It does not appear, however, from plaintiff's expert's affidavit or report that this failure resulted in anything more than the water taking the natural course it would have taken down the slope and onto

the street had the structures never been placed on the lot. Since defendant had no duty "to adopt measures to prevent the flowage of surface water from [its] premises" in the first place (*see Tremblay v Harmony Mills*, 171 NY 598, 601 [1902]), it cannot be held liable for having adopted measures that were merely ineffective. We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: OCTOBER 9, 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 9, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
Eugene Nardelli
James M. McGuire
Karla Moskowitz
Dianne T. Renwick, Justices.

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x

The People of the State of New York,
Respondent,

Ind. 667/07

-against-

4234

Ernest Robinson,
Defendant-Appellant.

---

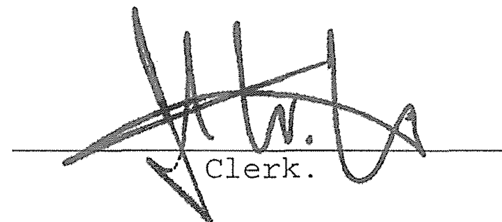
x

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about November 13, 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 judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

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

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4236 The People of the State of New York, Ind. 3043/06
Respondent,

-against-

Gregory Archie,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about rendered May 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.

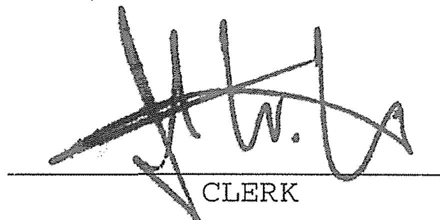
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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 9, 2008



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OCT 9 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Peter Tom
Milton L. Williams
James M. McGuire
Helen E. Freedman, JJ.

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Ind. 3629/04

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The People of the State of New York,
Respondent,

-against-

James Kadarko,
Defendant-Appellant.

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Defendant appeals from a judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 2, 2006, convicting him, after a jury trial, of robbery in the first degree, and imposing sentence.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won and Allen H. Saperstein of counsel), for respondent.

TOM, J.

Defendant was tried on an indictment charging him with five counts of robbery in the first degree and five counts of robbery in the third degree in connection with the separate robberies of three men delivering Chinese food. The robberies of the three victims were committed, severally, on August 3 and 9, 2004, on July 14 and 26, 2004 and on July 20, 2004. During the course of deliberations, the jury sent several notes to the court, one of which stated, "Would like to know how to proceed, considering that we are COMPLETELY SPLIT on all counts. Deliberation and re-reading of testimony has not seemed to change this division." The note was read into the record. Since it was a Friday afternoon, the court excused the jurors for the weekend. The court informed counsel that it had intended to deliver an *Allen* charge but, because one juror had already left the courthouse, it was simply directing the jurors to return after the weekend.

After the jury resumed deliberations the following Monday, another note was received late in the morning, which stated, "Want to reiterate that (even after continued discussion this morning) we are split on ALL of the counts in this case. We feel that we have heard and considered each other's arguments but have made little or no progress. How should we proceed?"

In response, the court delivered an *Allen* charge. After the

jurors withdrew to resume their deliberations, the court apologized for not affording counsel an opportunity to comment on the jury note, explaining that it was "basically very similar to the note we received on Friday." Both sides agreed that the *Allen* charge was an appropriate response to the inquiry.

At 4:15 in the afternoon, a second note was received, which read:

> "Are still divided as follows regarding alleged robberies on:

7/14/04	8 to 4
7/26/04	11 to 1
7/20/04	10 to 2
8/3/04	11 to 1
8/9/04	11 to 1"

The court did not read the note into the record, but gave the following summary of its contents:

> "we the jury are still divided as follows: Regarding the alleged robberies on 7/14/04 and actually gives what the split is. That's why I'm not showing anybody. It does not indicate how it goes, but it's giving numbers and then it just repeats the rest of the dates giving a split as to each robbery date. Out of the five there are three different splits. No indication as to which way they go . . . Again, I didn't show this to counsel because it's an open debate as to whether this is appropriate to let you see what those numbers are at this time."

Defense counsel than asked the court to declare a hung jury, to which the prosecutor voiced opposition, noting that the jurors had only deliberated for nine hours. The court then delivered a

second *Allen* charge, sending the jurors back to deliberate further, after which it showed the note to counsel.

At 2:29 P.M. on the following day, the jurors sent a final note stating that they had reached "a decision on ONE of the charges; however, due to our strong beliefs and convictions--we are deadlocked on ALL OTHER charges." After the note, which is not at issue, was read by counsel, the court declared its intention to accept a split verdict and discharge the jury. The prosecutor responded by stating for the record that the jurors had deliberated for 12 hours, and defense counsel said nothing. The jurors returned a verdict finding defendant guilty of the robbery of August 9, 2004, count nine of the indictment, and were undecided on the remaining counts.

On appeal, defendant contends that the court erred in responding to the jury's first Monday note declaring that they were deadlocked by neither reading the note to the parties nor affording them an opportunity to be heard with respect to the appropriate response before delivering an *Allen* charge. Similarly, defendant contends that the court erred in responding to the jury's second deadlock note of the day setting forth the numerical split in their votes on the various counts by neither reading the note verbatim nor soliciting counsel's suggestions before delivering a second *Allen* charge.

As a procedural rule, where a jury requests instruction regarding any matter relevant to its deliberations, "the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, . . . must give such requested information or instruction as the court deems proper" (CPL 310.30). Upon entertaining a substantive juror inquiry, "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" (*People v Kisoon*, 8 NY3d 129, 134 [2007]). In this context, notice that is "meaningful" is "notice of the actual specific content of the jurors' request" (*People v O'Rama*, 78 NY2d 270, 277 [1991]). A court gives meaningful notice when it reads the jury note into the record in the presence of counsel prior to recalling the jury to the courtroom, provides opposing counsel with an opportunity to recommend an appropriate response, informs counsel of the court's intended response and, finally, reads the note in open court so that the jury can assess the accuracy with which its inquiry was conveyed to the court and the context and purpose of the court's response (*id.* at 277-278, citing *United States v Ronder*, 639 F2d

931, 934 [1981]). Significantly, both *O'Rama* and *Kisoon* concern the failure to specifically disclose to counsel the actual contents of a note quantifying the split among jurors.

In *O'Rama*, which likewise construed CPL 310.30, the Court of Appeals stated 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" (78 NY2d at 278). Departure from the guidelines is permitted for what the Court termed "special circumstances," under which "the choice of methods to be used to address particular idiosyncratic situations is . . . entrusted to the sound discretion of the trial courts" (*id.*). By way of example, the Court cited situations in which disclosure would be inappropriate because the substance of the note is personal to a particular juror or because the views expressed therein would exacerbate tensions among the members of the panel (*id.*).

In *Kisoon,* the Court of Appeals cautioned that, in general, "failure to read the note verbatim deprive[s] counsel of the opportunity to accurately analyze the jury's deliberations and frame intelligent suggestions for the court's response" (8 NY3d at 135). Furthermore, such an omission constitutes "a failure to

fulfill the court's core responsibility" and is not subject to the normal rule requiring a defendant to preserve an error for appellate review by raising a timely objection (*id.*). The Court concluded its discussion by "underscor[ing] the desirability of adherence to the procedures outlined in *O'Rama*" (*id.*).

A practical construction of the case law, as we view it, is that in addressing any substantive juror inquiry the procedure outlined in *O'Rama* should be followed (*cf. People v Figueroa*, 48 AD3d 324, 326 [2008]), except when "particular idiosyncratic situations" can only be addressed by resort to improvised methods (*see O'Rama*, 78 NY2d at 278). Consistent use of the procedure has the salutary effect of avoiding misunderstanding concerning the interpretation of a jury's communication, the answers proposed by opposing counsel and the propriety of the court's response (*cf. People v Fishon*, 47 AD3d 591, 592-593 [2008], *lv denied* 10 NY3d 958 [2008] ["unrecorded colloquy"]). It also assists counsel in making a sufficient record of the proceedings to enable appellate review (*cf. People v Williams*, 50 AD3d 472, 473 [2008], *lv denied* 10 NY3d 940 [2008]). In those "particular idiosyncratic situations" that warrant departing from the guidelines, the record should clearly reflect the "special circumstances" requiring the court to modify or tailor the procedure "to ensure the integrity of the deliberative process"

(*O'Rama*, 78 NY2d at 278).

We perceive no such special circumstances in the matter at bar. The court's methodology in formulating the responses asserted to constitute error represents a departure from the procedure specified in *O'Rama*. However, we note that the court's delivery of an *Allen* charge in response to the first disputed jury note was preceded by the disclosure to counsel, on the preceding Friday, that it had been the court's intention to give an *Allen* charge in response to a similar note, received that afternoon, likewise indicating that the jury was deadlocked. Thus, the occasion provided the parties with the requisite opportunity to make alternative recommendations. Moreover, the *Allen* charge was expressly approved by both defense counsel and the prosecutor, after its delivery, as the appropriate response to the disputed note. Even if counsel had not been provided with an opportunity to be heard and the asserted error could thus be said to implicate the mode of proceedings, thereby obviating the preservation requirement (*see Kisoon*, 8 NY3d at 135), a defendant will not be heard to assign as error on appeal a response to which he specifically assented at trial. The affirmative expression of approval by defendant in this matter constituted a ratification of the court's chosen procedure and effected a

waiver of any objection (*cf. People v Gajadhar*, 9 NY3d 438 [2007], *affg* 38 AD3d 127 [2007] [waiver of trial by jury of 12 requires compliance with constitutionally mandated procedure]).

Defendant did not, however, express consent to the court's response to the second note, and the failure to read it verbatim to counsel before delivering another *Allen* charge is reversible error. Discussion of the note was confined to whether the court should declare the jury deadlocked, and the court's decision to give a second *Allen* charge was reached without any input from defense counsel.

Because the jury note did not specify whether the numerical split among the jurors with respect to the various robbery counts was in favor of conviction or acquittal, the People argue that this information was equivocal at best and that any prejudice sustained by defendant was de minimis. The dissenter adopts the People's conclusion that because the court summarized the contents of the note prior to delivering its response and showed the note to the parties after the jurors resumed their deliberations, defendant was required to preserve any asserted error in the procedure by stating his objection.

This matter is indistinguishable from *Kisoon* and *O'Rama*. A "Trial Judge's summary of the 'substance' of an inquiry cannot serve as a fair substitute for defense counsel's own perusal of

the communication, since it is defense counsel who is best equipped and most motivated to evaluate the inquiry and the proper responses in light of the defendant's interests" (*O'Rama*, 78 NY2d at 277). Thus, the court's failure to disclose the "actual specific content of the jurors' request" (*id.*) deprived defendant of the opportunity to meaningfully participate in formulating a response (*cf. People v Starling*, 85 NY2d 509, 516 [1995] [entire contents of jurors' notes read in open court]). By averting defendant's input "into the court's response to an important, substantive juror inquiry" (*O'Rama*, 78 NY2d at 279-280) before giving its response (*id.* at 278), the court failed to fulfill its "core responsibility . . . to give meaningful notice to counsel of the specific content of the jurors' request" (*Kisoon*, 8 NY3d at 134), and reversal is required irrespective of the absence of objection (*id.* at 135; *cf. People v DeRosario*, 81 NY2d 801 [1993] ["defense counsel was present, was given notice, and participated in formulating the responses to the written jury queries"]). Contrary to the dissenter's contention, the court's omission renders consideration of whether defendant sustained prejudice immaterial, and reversal is mandated.

In view of this disposition, it is unnecessary to reach defendant's remaining contentions.

Accordingly, the judgment of the Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 2, 2006, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of 12 years, should be reversed, on the law, and the matter remanded for a new trial.

All concur except McGuire, J. who dissents in an Opinion.

McGUIRE, J. (dissenting)

In this case, the trial judge momentarily stumbled before all but immediately righting his slip, an error that prompted no objection and cannot reasonably be thought to have affected the fairness of the trial or the conduct of the defense. Indeed, the specific information in the jury's note that the judge briefly withheld -- after alerting the parties to the fact that the information was in the note -- was so equivocal that it could not reasonably have been acted upon by the parties. Accordingly, although I certainly agree that the judge should not have stumbled, I cannot agree that the technical error that occurred in this case is one that is so momentous as to be a mode of proceedings error constituting "a failure to fulfill the court's core responsibility" (*People v Kisoon*, 8 NY3d 129, 135 [2007]) that need not be preserved for appellate review.

As the Court of Appeals has made clear, "some departures from the procedures outlined in [*People v*] *O'Rama*[, 78 NY2d 270 (1991)] may be subject to rules of preservation" (*People v Kisoon*, 8 NY3d at 135). But "a failure to fulfill the court's core responsibility is not [subject to rules of preservation]" (*id.*). Thus, in *People v DeRosario* (81 NY2d 801 [1993]), the trial court erred when, after answering specific written inquiries from the jury, the court engaged in several oral

colloquies with the jury that included "substantive discussions regarding reasonable doubt and constructive and actual possession, matters not part of the original written queries from the jury" (*id.* at 802). Moreover, "[t]he manner in which these discussions [regarding reasonable doubt and constructive and actual possession] were conducted did not allow defense counsel ... to participate in the formulation of the responses" (*id.* at 802-803). Notwithstanding that the court thus deprived defense counsel of an opportunity to participate in the formulation of the court's responses to the jury, the Court "reject[ed] defendant's contention that no preservation was necessary" (*id.* at 802). Because defense counsel "was present, was given notice, and participated in formulating the responses to the written jury queries," the Court "conclud[ed] under these circumstances that traditional preservation rules are required" (*id.*).

One of the procedures outlined in *O'Rama* "calculated to maximize participation by counsel at a time when counsel's input is most meaningful" (78 NY2d at 278) is that a substantive written communication from the jury "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" (*id.* at 277-278). And "[a]fter the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest

appropriate responses" (*id.* at 278). But in *People v Starling* (85 NY2d 509 [1995]), the trial court did not mark the note as an exhibit and did not give counsel a full opportunity to suggest appropriate responses. Rather, with respect to two separate substantive notes from the jury, the court read the contents of the notes to counsel at the same time the notes were read to the jury and then proceeded to respond to the notes (*id.* at 514). The Court of Appeals distinguished *O'Rama*, "where the trial court [completely] withheld from counsel the contents of a juror's note" before responding to it (*id.* at 516). Stressing that defendant "did not lodge any objection to the manner of proceeding or to the substance of the court's responses" (*id.* at 514), the Court held that the claim of error was not preserved for review: "counsel's silence at a time when any error by the court could have been obviated by timely objection renders the claim unpreserved and unreviewable here" (*id.* at 516).

In this case, the trial court received a note that both stated that the jury was deadlocked and gave the specific breakdown of the votes on each count, but, notably, gave no indication of whether the votes were to acquit or convict. The trial court did not show the note to the parties before responding to it. However, the court did paraphrase the note and everything the court said about its contents was accurate. That

is, the court expressly informed the parties that while the note stated that the jury was deadlocked and what the vote was on each count, it did not indicate whether any vote was for acquittal or guilt. The court's error was one of omission in that the court did not -- or, more accurately, at least initially did not -- tell the parties what the votes were.

As is evident, this case is plainly distinguishable from *Kisoon* (*supra*) in which the trial court did not tell the parties that the note reported what the votes were on each count. In that case, moreover, the note did state what the split was in terms of guilty and not guilty votes. Thus, counsel was completely deprived of an opportunity to consider whether the contents of the note specifying the votes was meaningful information that might inform a suggested response. Of course, moreover, counsel could not have objected to the court's failure to inform the parties about specific information in a note of which counsel had no knowledge at all. It also bears emphasis that if the trial court here had accurately told the parties what the votes were on each count without physically showing the note to the parties, defendant would not have any claim for reversal of his conviction (*People v Starling*, 85 NY2d at 516).

Defendant voiced no objection at all to the court's statement that it had not shown the note itself to the parties

"because it's an open debate as to whether [it] is appropriate to let you see what those numbers are at this time."[1] Although the court asked if either side wished to "make a record" on the matter, at no time before the court responded to the note did defendant ask to see the note or to be informed about what the votes were on each count.[2] That failure is all the more

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[1]Particularly given that the trial in this case took place before *Kisoon* was decided, the trial court's initial conclusion that the parties should not be apprised of the specific but equivocal votes is understandable enough. As all criminal trial practitioners know, juries are commonly if not invariably instructed that "in any note that you send me do not tell me what the vote of the jury is on any count" (CJI2d[NY] Sample Full Charges and Sample Verdict Sheets, Final Instructions, Jury Deliberations Rule 4). The jury in this case apparently was not given such an instruction. In any event, that instruction is consistent with what this Court said in a case in which the jury was split 10 to 2 for acquittal but the trial judge erroneously told the parties he had reliable information that the jury was split 10 to 2 for conviction: "It is, of course, very basic that jury deliberations are to be conducted in absolute secrecy and, accordingly, that the status of their deliberations is not to be divulged by anyone ... prior to the announcement of the verdict" (*Matter of Randall v Rothwax,* 161 AD2d 70, 75 n 1 [1990], *affd* 78 NY2d 494 [1991], *cert denied sub nom. Morgenthau v Randall*, 503 US 972 [1992]). It now appears, however, that although an instruction to the jury that it should not disclose the vote in any note is proper, the parties nonetheless must be informed about the vote if the jury disregards the instruction.

[2]After the court stated why it had not shown the actual note to the parties and invited counsel to make a record, the prosecutor stated "the numbers really I guess are inconsequential for defense and I to see those." At no point during the ensuing colloquy did defense counsel voice any disagreement with the prosecutor's conclusion that the various votes were inconsequential. To be sure, after the prosecutor next stated that it was up to the court "whether or not you want to show

significant in this case because there is good reason to believe that if an objection or request to see the note had been registered, the court would have shown the parties the note. After all, after responding to the note the court apparently reconsidered its initial position and sua sponte allowed the parties to see the note. But whether the court in fact would have shown the parties the note in response to a timely protest is irrelevant. No case holds that a prediction about whether the trial court would have corrected an error in response to a timely protest has any bearing on whether a claim of error is preserved in the absence of such a protest. Another critical aspect of this case is that even when the court, immediately after responding to the note, sua sponte did an about face and showed the note to the parties, defendant did not object that he should

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them" -- another statement with which defense counsel never disagreed -- the prosecutor went on to state that "[w]e like to see them." But the "we" to whom the prosecutor referred cannot reasonably be thought to include defense counsel. After all, there were two prosecutors trying the case and defense counsel never chimed in at any time and stated that he, too, wanted to see "the numbers." Moreover, the court's initial ruling that the actual note with the votes should not be shown to the attorneys preceded the prosecutor's request to see "the numbers." Accordingly, there is no basis for concluding that the court's initial ruling and the prosecutor's statement preserved defendant's current claim for appellate review (*see People v Colon*, 46 AD3d 260, 263 [2007] [holding that CPL 470.05[2] requires a "causal nexus" between a "protest" by a party and the question "expressly decided" by the trial court]).

have seen the note earlier. Nor, having become aware of the specific but equivocal votes on each count, did defendant ask the court to do anything or even suggest that he would have asked the court to do other than as the court did when it responded to the note.

I think it self-evident that no good reason exists for trial counsel's failure to object. In any event, that failure to object is utterly inconsistent with defendant's appellate claim that, albeit temporarily, he was deprived of critical information that might have guided him in suggesting how the court should respond to the note. Tellingly, but not surprisingly, when defendant's appellate counsel was asked at oral argument if she could think of one substantive reason why trial counsel would not have objected, counsel could not provide one.

To conclude that defendant's failure to object is of no significance, and to accept defendant's current claim of error -- that he is entitled to reversal of the conviction and a new trial precisely because he should have been apprised of the specific but equivocal votes that he never asked for -- would encourage gamesmanship and waste the scarce judicial and other public resources expended in trying defendant. Avoiding precisely those unseemly and imprudent results is the central purpose of preservation requirements. Thus, in *People v Dekle* (56 NY2d 835

[1982]), the defendant voiced no objection to the court's charge on elements of the offense charged but contended on appeal that the instructions were erroneous. In rejecting that appellate claim, the Court stated as follows:

> "There is neither constitutional nor jurisprudential error in permitting guilt to be determined under a penal statute as construed by the common assumption of both attorneys and the court. To hold otherwise is to encourage gamesmanship and waste judicial resources in order to protect a defendant against a claimed error protection against which requires no more than a specific objection on his part" (*id.* at 837).

Here, too, the common assumption of the attorneys was that the specific but equivocal information about the votes was unnecessary. Given that defense counsel was almost immediately thereafter provided with exactly that information and again neither protested nor requested that the court take any action in light of that information, the reasoning of *Dekle* applies here with at least equal force.

The initial failure of the court to show the parties the note or relate all of its contents is an error of no moment for it affected nothing. In cases such as *Kisoon* where the trial court failed to alert the parties to the existence of specific contents of the note, it is reasonable to conclude that the court's error "prevent[ed] defense counsel from participating

meaningfully in [a] critical stage of the trial" (*People v O'Rama*, 78 NY2d at 279). But under the particular facts of this case, it would be wholly speculative to conclude that the trial court's brief slip was meaningful.

Indeed, any such speculation is squarely contradicted by defense counsel's failure to object at any time, his failure to suggest that receiving the specific information shortly after it was briefly withheld would have had any bearing on how he would have suggested the court respond to the note, and his failure to ask the court to do anything after he received the information. Defense counsel asked for a mistrial after being told everything about the note except for the specific but equivocal information about the vote. If counsel would not have asked for a mistrial had that information been made known to him, defendant was not prejudiced because the court did not grant the motion. If counsel nonetheless would have sought a mistrial, defendant also was not prejudiced. After all, it is manifestly unreasonable to suppose that the court would have granted the motion on the basis of that equivocal information (which, of course, was known to the court). Thus, any conceivable claim of prejudice must be premised on the notion that defendant might have sought some other relief from the court *and* on the notion that the brief delay in receiving that equivocal information somehow prevented

defendant from seeking that relief. Not surprisingly, we are left to wonder both what that other relief might have been and how the delay could have impaired defendant's ability to seek it.

For these reasons, the trial court's error deprived defendant of nothing of substance and thus was but a technical error that did not affect any of defendant's substantial rights. Accordingly, in my view the majority's holding cannot be reconciled with the Legislature's command that "appellate court[s] *must* determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties" (CPL 470.05[1] [emphasis added]). To do otherwise is a "failure to fulfill [a] ... core responsibility" (*People v Kisoon*, 8 NY3d at 135) of appellate courts that is itself tantamount to an appellate mode of proceedings error. Defendant was convicted of a serious crime after a fair, albeit not a perfect, trial that did not deprive him of any constitutional right (*see People v Henry,* 95 NY2d 563, 565 [2000] ["The Constitution guarantees a defendant a fair trial, not a perfect one"]). The majority nonetheless deprives the People of a fairly obtained conviction despite both the fairness of the trial and the important finality interest served by the requirement of a timely objection (*see People v Michael,* 48 NY2d 1, 6 [1979] ["the very real interest of the State in achieving finality in a

criminal prosecution mandates that ... objections be timely raised"]).

The majority does not take issue with me on the trivial and inconsequential nature of the trial judge's quickly corrected slip or make any effort to suggest any concrete respect in which defendant was prejudiced. Rather, adopting defendant's appellate position, the majority simply asserts that "the court's omission renders consideration of whether defendant sustained prejudice immaterial." This assertion, however, assumes that the court committed a mode of proceedings error. If the court did commit such an error, I certainly would agree that whether defendant sustained prejudice is immaterial. But in determining whether the brief slip is a mode of proceedings error, it makes no sense to regard its trivial and inconsequential nature as immaterial. The majority cites no authority supporting the curious proposition, which is in any event inconsistent with the mandate of CPL 470.05(1), that in determining whether an error is so fundamental as to be a mode of proceedings error, its trivial and inconsequential nature is irrelevant.

Nor is defendant entitled to any relief on account of the court's handling of the earlier note that was received as deliberations recommenced on the morning of Monday, September 25, 2006. That note simply reiterated the jury note received on the

afternoon of Friday, September 22, 2006. Both notes stated that the jury was deadlocked. The note on Friday was received at the beginning of the afternoon session, and the trial minutes begin with the trial court asking "Either side want to be heard on this note before I bring the jury in?", to which defense counsel replied "No, your honor." Viewed in light of the presumption of regularity (*People v Velasquez*, 1 NY3d 44, 48 [2003]), this strongly indicates that there had already been an off-the-record discussion of Friday's note with defense counsel, who was apprised of the note's contents (*see People v Salas*, 47 AD3d 513 [2008], *lv denied* 10 NY3d 844 [2008]).

When sending the jury home for the weekend, the court stated that it would charge the jurors when they returned for further deliberations on Monday morning. Thereafter, the court told counsel that it had intended to give an *Allen* charge, but had decided otherwise. When court reconvened the following Monday, the jury sent out a new note claiming to be deadlocked, whereupon the trial court gave an *Allen* charge. The parties were then given an opportunity to raise any concerns, and defense counsel stated that he had no objection to the Court's actions.

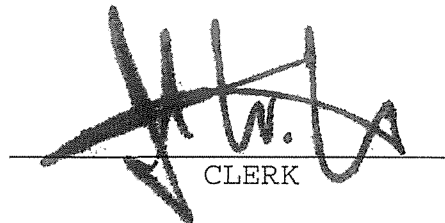
Under these particular circumstances, where the first note on Monday merely reiterated the note on Friday, which defense counsel read and discussed with the court, and where the court's

response to Monday's first note was the same as it had proposed in response to Friday's note, counsel received meaningful notice and an opportunity to participate in the subsequent charging decision, satisfying the court's core duties under CPL 310.20 (*see People v O'Rama*, 78 NY2d at 278 [permitting a modification of standard procedures when responding to a jury note for "special circumstances"]).

Defendant's claim concerning the admission of uncharged crimes evidence is not preserved for review and I would not review it in the interest of justice. As an alternative holding, I would rule that the challenged evidence properly was admitted as it clearly was relevant to the witness' ability to identify defendant. Defendant's other claims also are both unpreserved and without merit.

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

ENTERED: OCTOBER 9, 2008



CLERK