SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 16, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4260 The People of the State of New York, Ind. 11467/93
Respondent,

-against-

Owen Clarke,
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 (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 25, 2006, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second violent felony offender, to a term of 8 to 16 years, unanimously affirmed.

Defendant raises an ineffective assistance of counsel claim based upon the failure of defense counsel to seek submission of second-degree manslaughter to the jury as a lesser included offense of second-degree murder. On the existing record, we find that defendant has failed to demonstrate "the absence of

strategic or other legitimate explanations" (*People v Rivera*, 71 NY2d 705, 709 [1988]) for counsel's actions, and that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The trial record supports the conclusion that defense counsel had chosen an "all-or-nothing" strategy (*see People v Lane*, 60 NY2d 748, 750 [1983]) in that she opposed the prosecutor's request to charge first-degree manslaughter, and she withdrew her request to submit first- and second-degree assault. The fact that defense counsel requested an intoxication charge is consistent with such a strategy, since intoxication goes to the issue of intent. Defendant would have been entitled to a complete acquittal if the jury found that he was too intoxicated to form an intent to kill or seriously injure the victim, and the record supports the inference that this was counsel's goal.

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

ENTERED: OCTOBER 16, 2008

CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4262-
4262A In re Jancarlos S.,

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 (Pamela Seider Dolgow of counsel), for presentment agency.

Orders of disposition, Family Court, Bronx County (Susan R. Larabee, J.), entered on or about December 6, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he had committed acts which, if committed by an adult, would constitute the crimes of criminal sale of marijuana in the fourth degree and criminal possession of marijuana in the fifth degree and upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute criminal sale of a controlled substance in the third degree and placed him with the Office of Children and Family Services for periods of up to 12 months and 15 months, respectively, unanimously affirmed, without costs.

The placement was a proper exercise of the court's

discretion that constituted the least restrictive alternative consistent with appellant's needs and best interests and the community's need for protection, given the continued criminal behavior committed by appellant while he had a pending case (which included the sale of crack cocaine near a school), appellant's poor school record, and his failure to accept responsibility for his conduct (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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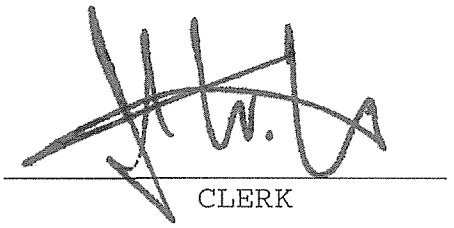
ENTERED: OCTOBER 16, 2008



CLERK

Lippman, P.J., Andrias, Buckley, Renwick, JJ.

4263 2130 Williamsbridge Corp., Index 16073/06
Plaintiff-Appellant,

-against-

Interstate Indemnity Company,
Defendant-Respondent.

Carl F. Lodes, Carmel, for appellant.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered July 6, 2007, which granted defendant's motion for summary judgment dismissing the complaint and declaring it had no duty to defend or indemnify plaintiff in an underlying personal injury action, unanimously affirmed, with costs.

A tenant of the residential building owned by plaintiff allegedly tripped and fell in the lobby on December 28, 2004, suffering personal injury. The tenant's attorneys notified plaintiff of the accident by letter dated March 8, 2005. Plaintiff seeks a declaration and adjudication that its insurance carrier was obligated to insure, defend and indemnify it, and reimburse its expenses in the action brought by the tenant.

The affidavit of plaintiff's president stated that he immediately forwarded the letter from the tenant's attorney to

plaintiff's insurance broker, and when the summons and complaint were served, he personally delivered them to the broker as well. However, the broker did not forward the letter or the summons and complaint to defendant's agent until October 24, 2005, more than seven months after receiving notification of the accident.

An affirmative defense cited plaintiff's failure to comply with a condition precedent in the policy requiring timely notice to defendant of an occurrence, claim or suit. Plaintiff claimed it was unaware that its notice to the broker was insufficient.

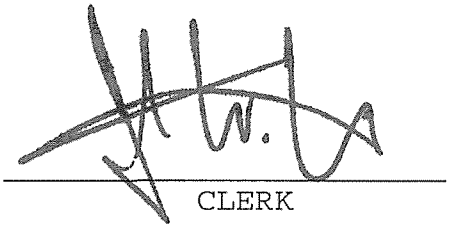
Where a policy of insurance requires that notice of an occurrence be given "as soon as practicable," that means within a reasonable period of time (*Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]). An insured's failure to comply with this condition precedent vitiates the contract. The carrier need not show prejudice before disclaimer based on the lack of timely notice. Even relatively short periods of unexcused delay are unreasonable as a matter of law *(see Power Auth. of State of N.Y. v Westinghouse Elec. Corp.*, 117 AD2d 336 [1986]).

The insured bears the burden of establishing reasonableness of the proffered excuse. That the insured in such circumstances was unaware that notice provided to its broker was insufficient is no excuse (*see Gershow Recycling Corp. v Transcontinental Ins. Co.*, 22 AD3d 460, 462 [2005]). Moreover, the policy contained an

"Important Notice" listing a telephone number for reporting claims, and noting that all other correspondence should be sent to the broker. Plaintiff had only to read the policy to determine how to fulfill the condition precedent.

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

ENTERED: OCTOBER 16, 2008



CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4265 The People of the State of New York, Respondent, Ind. 4779/06

-against-

Dionisio Montanez, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 27, 2007, convicting defendant, upon his plea of guilty, of burglary in the second degree and criminal contempt in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 5 years and 1⅓ to 3 years, respectively, unanimously reversed, on the law, the plea vacated, the full indictment reinstated, and the matter remanded to Supreme Court for further proceedings.

When defendant pleaded guilty to second-degree burglary, the court did not advise him that his sentence would include post-release supervision; accordingly, he is entitled to reversal of the conviction (*see People v Louree*, 8 NY3d 541, 545-546 [2007]; *People v Catu*, 4 NY3d 242, 245 [2005]). Since PRS was a direct consequence of the guilty plea that defendant actually

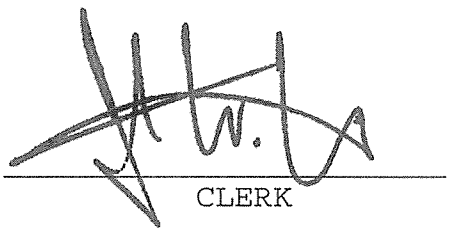
entered and upon which he was actually sentenced, it is of no moment that the court also offered defendant an opportunity to have the felony plea replaced by a misdemeanor disposition not involving PRS, upon certain conditions that defendant ultimately failed to satisfy. Vacatur of the plea, not specific enforcement of the plea agreement, is the appropriate remedy (*People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* __US__, 128 S Ct 2430 [2008]; *People v Van Deusen*, 7 NY2d 744 [2006]), and we reject the People's argument to the contrary.

Penal Law § 70.85, effective June 23, 2008, which permits a defendant to be resentenced to a term of imprisonment without any period of PRS under certain circumstances, is expressly limited in application to those cases in which the sentencing court imposed a determinate sentence but did not "did not explicitly state such a term when pronouncing sentence." In this case, the PRS term was explicitly stated at the time of sentence.

We have considered and rejected the People's remaining arguments.

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

ENTERED: OCTOBER 16, 2008



CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4266 The People of the State of New York, Ind. 763/05
Respondent,

-against-

Ayanna Noel,
Defendant-Appellant.

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

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 24, 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 16, 2008

CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4267 Lawrence A. Omansky, et al., Index 601897/04
Plaintiffs,

-against-

Dru Whitacre, et al.,
Defendants.

- - - - -

Dru Whitacre, et al.,
Third-Party Plaintiffs-Respondents,

-against-

64 North Moore Associates, a New York State Partnership, et al.,
Third-Party Defendants-Appellants.

Stewart Occhipinti, LLP, New York (Frank S. Occhipinti of counsel), for appellants.

Maurice A. Reichman, New York, for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.), entered March 23, 2007, which granted third-party plaintiffs' motion for summary judgment on their first, second, third, fourth and fifth causes of action, dismissed third-party defendants' affirmative defenses, and directed the latter to provide a defense and indemnification for third-party plaintiffs in the main action, unanimously affirmed, with costs.

Based upon the well-settled rule of contract interpretation that a written agreement clear and unambiguous on its face must be enforced according to the plain meaning of its terms without

consideration of extrinsic and parol evidence (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]), the court properly found third-party defendants obligated to indemnify and defend third-party plaintiffs in the main action. The specific arguments -- that third-party plaintiff Dru Whitacre breached a fiduciary obligation to third-party defendants by not disclosing the existence of the main action, and that the court failed to consider the "Special Facts Doctrine" -- were not raised on the summary judgment motion, and may not be raised for the first time on appeal.

Were we to consider these arguments, we would reject them. Although the main action was commenced prior to execution of the Indemnification Agreement, the essential facts with respect to the duty to defend and indemnify present and future litigation brought by these plaintiffs were agreed to prior to initiation of the main action, which was a matter of public record that could have been discovered through the exercise of ordinary diligence (*Auchincloss v Allen*, 211 AD2d 417 [1995]).

Third-party defendants' reliance on *Blue Chip Emerald v Allied Partners* (299 AD2d 278 [2002]) is misplaced. Unlike the parties in *Blue Chip*, here it was the managing partners and members of the limited liability company (third-party defendants) who controlled the sale of Whitacre's commercial unit, the

purchase price was an arm's length transaction, and third-party defendants knew the true value of the Whitacre interest they were buying.

We have considered third-party defendants' remaining arguments and find them without merit.

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

ENTERED: OCTOBER 16, 2008

CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4268 The People of the State of New York, Ind. 6126/05
Respondent,

-against-

Barry Coppin,
Defendant-Appellant.

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

Barry M. Coppin, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Rena Paul of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered October 11, 2006, convicting defendant, after a jury trial, of kidnapping in the second degree, attempted rape in the first degree, criminal sexual act in the first degree and sexual abuse in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 45 years to life, unanimously modified, on the law, to the extent of vacating the sex offender risk level determination without prejudice to future proceedings, and otherwise affirmed.

The verdict was based on legally sufficient evidence and 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, including its evaluation of the effect of the victim's drug use on her perceptions at the time of the crime, and its rejection of defendant's testimony.

Defendant waived his right to be present at a *Sandoval/Molineux* hearing when he refused to be produced in the courtroom (*see People v Spotford*, 85 NY2d 593, 598-599 [1995]; *People v Epps*, 37 NY2d 343, 349-351 [1975], *cert denied* 423 US 999 [1975]). Defense counsel reported to the court that defendant refused to enter the courtroom for any purpose, including the purpose of waiving his right to be present. By sending defense counsel to explain to defendant his right to be present and inform him that the proceedings would continue in his absence if he waived that right, the court did not delegate a judicial function (*see People v Felder*, 17 AD3d 126, 127 [2005], *lv denied* 5 NY3d 788 [2005]). The court, not counsel, made the determination that defendant had waived his right to be present; indeed, counsel objected to the court's ruling that defendant had waived his rights. We also conclude that the court properly exercised its discretion when, citing potential danger to court and Department of Correction personnel, it declined to order defendant forcibly produced for the purpose of advising him of

his right to be present and securing an express waiver of that right.

Defendant's refusal to be produced for sentencing made it impossible for the court to clarify defendant's position as to whether he wished to proceed with counsel or represent himself for that proceeding (*see People v Lineberger*, 98 NY2d 662 [2002]). In any event, given the surrounding circumstances, any violation of defendant's right to counsel at sentencing had no adverse impact, and he is not entitled to the remedy of a remand for resentencing (*see People v Wardlaw*, 6 NY3d 556, 559-561 [2006]), "which would serve no useful purpose." (*People v Adams*, 56 AD3d 243, 244 [2008]).

As the People concede, the court prematurely adjudicated defendant a level three sex offender, without a recommendation from the Board of Examiners of Sex Offenders. We therefore vacate that determination. Such a determination should be made prior to defendant's release from prison in accordance with Correction Law § 168-1.

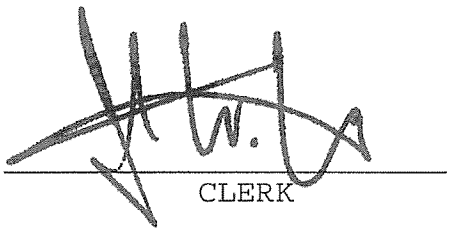
We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

M-4129 - People v Barry Coppin

Motion seeking leave to file pro se reply brief denied.

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

ENTERED: OCTOBER 16, 2008



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Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4269 Andrew Lanzetta, et al., Index 6152/05
Plaintiffs-Appellants,

-against-

Dominick Madori, et al.,
Defendants,

Morgan Washburn, et al.,
Defendants-Respondents.

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, White Plains (Anne Marie Tormay of counsel), for appellants.

Anita Nissan Yehuda, Roslyn Heights, for Morgan Washburn, respondent.

Law Office of John P. Humphreys, New York (Eric P. Tosca and Denise L. Thomas of counsel), for Mari Demauro, respondent.

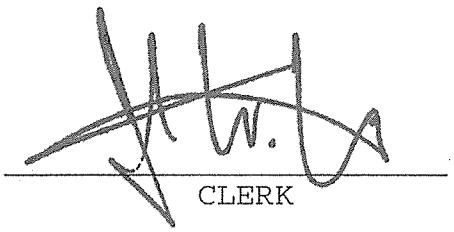
Order, Supreme Court, Bronx County (Patricia A. Williams, J.), entered July 30, 2007, which, in an action for personal injuries, granted the motions of defendants Washburn and Demauro for summary judgment dismissing the complaint and all cross claims as against them and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, without costs.

Defendant Dominick Midori, a teenager, accidentally shot his teenage companion, plaintiff Andrew Lanzetta, in the eye with a paint ball gun that he had left on a prior occasion in their friend defendant Washburn's bedroom closet. The undisputed evidence was that Washburn lacked actual knowledge the paint ball

gun was there, and there was no evidence as to how long the gun was in the closet so as to charge her with constructive notice of its presence (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Although the accident took place in her home during her absence, Washburn's mother, defendant Demauro, was not liable for negligent supervision of her daughter and her daughter's friends, since the accident was unforeseeable in light of her lack of awareness of the presence of the paint ball gun (*see Rios v Smith*, 95 NY2d 647, 652 [2001]; *LaTorre v Genesee Mgt.*, 90 NY2d 576, 581-582 [1997]). Nor was there evidence that Demauro was aware of any dangerous propensities of her daughter's friends (*see Rivers v Murray*, 29 AD3d 884 [2006]).

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

ENTERED: OCTOBER 16, 2008



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Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4270-
4270A In re Yahnlis M. and Another

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

Zahira M.,
Respondent-Appellant,

Carmen M.,
Respondent,

The Administration for Children's Services,
Petitioner-Respondent.

John J. Marafino, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for Administration for Children's Services, respondent.

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

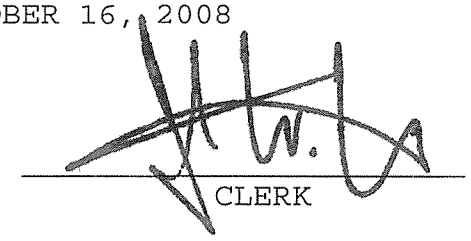
Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 24, 2005, which, insofar as appealed from, after a fact-finding hearing, determined that respondent-appellant severely abused her daughter Yahnlis M. and derivatively severely abused her daughter Kimberly M. and that both children were neglected, unanimously affirmed, without costs.

Appellant mother was not denied her due process right to present a defense when the court denied her application to retain

an expert psychologist to put forth a battered woman syndrome defense. The admission of such expert testimony rests in the sound discretion of the court (*see People v Cronin*, 60 NY2d 430, 433 [1983]) and, on this record, we find no basis to conclude that the court improvidently exercised its discretion. There was no foundation laid or direct evidence offered to support such a defense (*see People v Bryant*, 278 AD2d 7 [2000], *lv denied* 96 NY2d 757 [2001]). Rather, the evidence demonstrated that it was the children, and not the mother, who were the subject of repeated beatings and emotional harm by the mother's live-in companion, co-respondent Carmen M., which included the beating of the children's two-year-old brother that resulted in his death. The evidence also showed that at times the mother inflicted physical abuse upon the children herself (*id.*), and that her failure to obtain prompt medical attention for her deceased son was driven not by fear of Carmen, but by fear of the blame she would receive as the mother of the child and by fear that her children would be removed from the home.

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

ENTERED: OCTOBER 16, 2008



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Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4271 The People of the State of New York, Ind. 3949/05
Respondent,

-against-

Kashawn McLaughlin,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Kaye Scholer LLP, New York (Elisabeth C. Kann of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Catherine G. Patsos of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered February 24, 2006, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

Defendant's challenge to the legal sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Furthermore, 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. Defendant's accessorial liability could be readily inferred from his course of conduct, which included, among other things,

grabbing the victim's bag (*see e.g. Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]).

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

ENTERED: OCTOBER 16, 2008

CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4272 The People of the State of New York, Respondent, Ind. 6383/06 6946/06

-against-

Darnell Johnson, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Dennis Rambaud of counsel), for respondent.

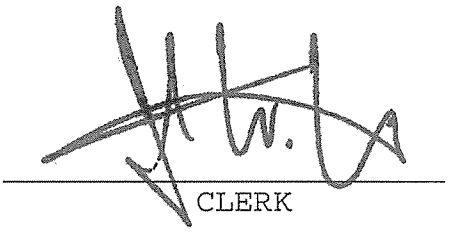
Judgment, Supreme Court, New York County (Rena K. Uviller, J. at plea; Arlene D. Goldberg, J. at sentence), rendered October 22, 2006, convicting defendant of burglary in the second degree and attempted burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 8 years, unanimously modified, on the law, to the extent of reducing the sentence for attempted burglary to 7 years, and otherwise affirmed.

As the People concede, the maximum sentence for a second violent felony offender convicted of attempted burglary in the second degree, a Class D felony, is seven years and we modify accordingly.

We perceive no basis to otherwise reduce the sentences.

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

ENTERED: OCTOBER 16, 2008



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Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4273 Verizon New York, Inc., Index 603280/06
Plaintiff-Respondent,

-against-

Choice One Communications of New York, Inc.,
Defendant-Appellant.

Mintz Levin Cohen Ferris Glovsky and Popeo, P.C., New York (Seth R. Goldman of counsel), for appellant.

Kellog, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C. (Scott H. Angstreich of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 3, 2008, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

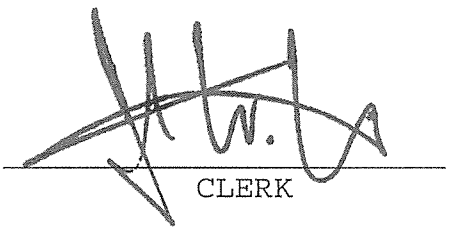
Assuming that plaintiff would have been required to exhaust its administrative remedies by first bringing its claims regarding payment for telecommunication interconnection charges before the Public Service Commission (*see Core Communications, Inc. v Verizon Pa., Inc.*, 493 F3d 333, 342-343 [2007]), the parties' agreement waived such requirement. Waiver was not expressly prohibited by statute (*see Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979]; *cf. Estro Chem. Co. v Falk*, 303 NY 83 [1951]), nor could it have been in view of the implied nature of the claimed exhaustion requirement, and did not violate

public policy. The provisions in the parties' prior interconnection agreement, correctly interpreted by the court (*see Adler v Simpson*, 203 AD2d 691, 692-693 [1994]; *see also Hirsch v Food Resources, Inc.*, 24 AD3d 293, 295 [2005]) and read together so as to give purpose and meaning to each of them (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]), were effective for such purpose.

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

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

ENTERED: OCTOBER 16, 2008



CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4274 The People of the State of New York, Ind. 1799/06
Respondent,

-against-

Kerry Simon,
Defendant-Appellant.

Leavitt, Kerson & Duane, New York (Paul E. Kerson of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Robert H. Straus, J. at hearing; Arlene R. Silverman, J. at jury trial and sentence), rendered May 30, 2007, convicting defendant of criminal sale of a controlled substance in or near school grounds, and sentencing him to a term of 6 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and 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. The officer had an ample opportunity to observe the sale, transmitted a detailed and accurate description, and made a reliable identification.

The court's response to a jury question regarding

defendant's liability for the acts of others was meaningful and appropriately conveyed the applicable legal principles (*see People v Almodovar*, 62 NY2d 126, 131 [1984]). The supplemental instruction sufficiently addressed the precise concern raised by defense counsel during the court's colloquy with counsel regarding the jury's note.

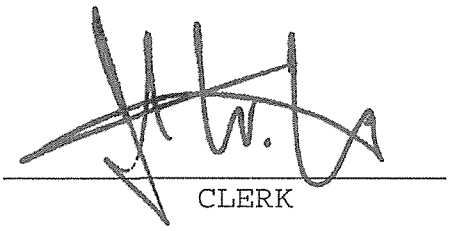
The hearing court properly denied defendant's motion to suppress identification and physical evidence. The observing officer's radioed report containing a detailed description of defendant as a person who had just engaged in a drug transaction provided probable cause for defendant's arrest, and the police recovered money from defendant as incident to the lawful arrest. Defendant's remaining suppression claims, along with his arguments concerning an allegedly repugnant verdict and the court's conduct of the trial, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

Nevertheless, we note our disapproval of this trial Justice's continued penchant for improperly interjecting herself into the proceedings despite our prior expressions of concern (*see e.g. People v Canto*, 31 AD3d 312, 313 [2006], *lv denied* 7 NY3d 900 [2006], and cases cited therein). In this case, the trial Justice inappropriately interrupted the flow of defense

counsel's cross-examination by asking questions in the nature of redirect, and of his summation by making counterarguments. However, this conduct did not rise to the level of affecting the outcome or depriving defendant of a fair trial.

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

ENTERED: OCTOBER 16, 2008



CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4275 Gerald S. Kaufman, et al., Index 601320/01
Plaintiffs-Respondents,

-against-

Irwin B. Cohen,
Defendant-Appellant.

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

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for respondents.

Order, Supreme Court, New York County (Karen Smith, J.), entered March 19, 2008, which, pursuant to a jury verdict, dismissed defendant's affirmative defense of statute of limitations, unanimously affirmed, without costs.

A verdict should only be set aside as against the weight of the evidence where it is palpably wrong and the jury could not have reached its conclusion upon any fair interpretation of the evidence (*see Rivera v 4064 Realty Co.*, 17 AD3d 201 [2005], *lv denied* 5 NY3d 713 [2005]). Here, the evidence presented at trial enabled the jurors to conclude rationally that plaintiffs had neither actual nor inquiry notice of defendant's alleged fraud.

The trial court did not improvidently exercise its discretion when it admitted into evidence the drafts and executed Mortgage Loan Purchase Agreement. The record is replete with

undisputed evidence of Cohen's surreptitious and substantive involvement as a principal in the transaction and in the negotiation of that agreement, demonstrating its relevance to the issues at trial. Nor did the trial court improvidently exercise its discretion when it precluded defendant's expert from testifying about custom and usage regarding "sweat equity" with respect to the subject property. The proposed testimony would have introduced impermissible expert opinion on the issue that was ultimately for the jury's determination, which was not dependent upon technical or other information beyond the ordinary knowledge and experience of the jurors, and thus would not have assisted them in drawing relevant conclusions based upon the facts established at trial.

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

ENTERED: OCTOBER 16, 2008

CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4276 The People of the State of New York, Ind. 5177/03
Respondent,

-against-

Zwadie Nichols,
Defendant-Appellant.

Marianne Karas, Armonk, for appellant.

Zwadie Nichols, appellant pro se.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J. at suppression hearing; Bonnie G. Wittner, J. at jury trial and sentence), rendered March 17, 2005, convicting defendant of rape in the first degree, sexual abuse in the first degree (two counts) and attempted sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. Defendant was not denied his right to counsel at his investigatory lineup, since the police efforts to contact his attorney, consisting of calling the number left by the attorney twice and speaking to his office employee, who was herself unsuccessful in reaching the attorney, were reasonable under the

circumstances (*see People v Cole*, 272 AD2d 131 [2000], *lv denied* 95 NY2d 864 [2000]). In any event, any error was harmless because there was overwhelming evidence of identity and the sole issue at trial was consent.

The trial court properly admitted a portion of defendant's statement to the police following his arrest in this case, in which defendant mentioned a prior incident, even though the other incident could be viewed as an uncharged crime or bad act. Since defendant attacked the victim's credibility by attempting to show that her version of defendant's behavior was implausible, the People were entitled to introduce this very limited evidence, showing that defendant behaved in the same manner on a prior occasion. This evidence helped explain the complainant's testimony about defendant's odd behavior and was not admitted to show propensity. "Had the People been prohibited from introducing that evidence, and thus explaining that it was credible that defendant would act in an abnormal manner, defendant would have been unfairly able to exploit the bizarreness of his acts" (*People v Johnson*, 196 AD2d 449, 452 [1993], *lv denied* 82 NY2d 850 [1993]). The probative value of this evidence greatly outweighed the risk of undue prejudice.

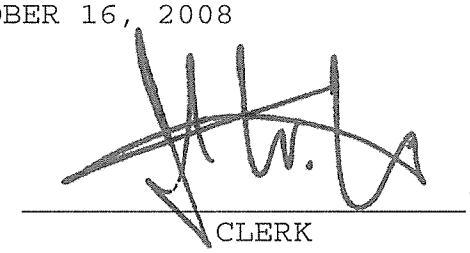
Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve

matters of strategy that are not reflected in the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant's arguments concerning the prosecutor's summation and the absence of a missing witness charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Defendant's pro se argument is also without merit.

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

ENTERED: OCTOBER 16, 2008



CLERK

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

4279N-
4280N Unique Laundry Corp., Index 111267/07
Plaintiff-Appellant,

-against-

Hudson Park NY LLC, et al.,
Defendants-Respondents.

Poltorak & Associates, P.C., Brooklyn (Elie C. Poltorak of counsel), for appellant.

Horing Welikson & Rosen, P.C., Williston Park (Richard T. Walsh of counsel), for respondents.

Order, Supreme Court, New York County (Carol Edmead, J.), entered February 22, 2008, which denied plaintiff's motion to amend the caption and, upon reconsideration, adhered to a prior order denying plaintiff's motion for a preliminary injunction, unanimously reversed, on the law and the facts, with costs, both motions granted, and defendants enjoined from removing plaintiff's property from the premises during the pendency of this action. Appeal from order, same court and Justice, entered September 18, 2007, which, inter alia, denied the preliminary injunction, unanimously dismissed, without costs, as academic in light of the foregoing.

Plaintiff is actually registered with the New York State Department of State as "Unique Laundry Service, Inc." It should

have been permitted to amend the caption to correct its name (*see* CPLR 2001; *Cutting Edge v Santora*, 4 AD3d 867 [2004]).

Plaintiff's motion for a preliminary injunction should also have been granted. Defendants' argument that the contract between plaintiff and nonparty Shaya B. West LLC is void is unavailing. Even if it is unduly favorable to plaintiff, it is not invalid as unconscionable (*see Harold Props. Corp. v Frankel*, 93 AD2d 720 [1983], *mod on other grounds & otherwise affd* 60 NY2d 977 [1983]). The fact that the signature block on the contract calls plaintiff "Unique Laundry Corp." and that plaintiff failed to file a certificate that it was doing business under that name (General Business Law § 130[1][b]) does not prevent plaintiff from recovering, absent any evidence that it intended to defraud (*see e.g. Cohen v OrthoNet N.Y. IPA, Inc.*, 19 AD3d 261 [2005]; *Grand Cent. Art Galleries v Milstein*, 89 AD2d 178, 181-182 [1982]). We note that "Unique Laundry Service" appears at the head of the contract. In any event, defendant Hudson (the current ground lessee) lacks standing to argue that the contract between plaintiff and Shaya (the previous ground lessee) violated the ground lease. There is no evidence that the ground lessor is threatening to terminate its lease with Hudson on the basis that Hudson is honoring a contract in violation of the ground lease. Even if Hudson had standing, and even if Shaya acted ultra vires

by entering into the contract with plaintiff, the contract would not be void (*see 711 Kings Hwy. Corp. v F.I.M.'s Mar. Repair Serv., Inc.*, 51 Misc 2d 373 [1966]; 5 Lord, Williston on Contracts § 11:10, at 518-521 [4th ed]).

The contract between plaintiff and Shaya runs for 18 years and purports to create an interest in real property, but it was not recorded. Therefore, regardless of whether it is a lease, easement, or license (*see Todd v Krolick*, 62 NY2d 836 [1984]), it is "void as against any person who subsequently purchases or acquires . . . the same real property . . . in good faith and for a valuable consideration" (Real Property Law § 291). However, "a purchaser with prepurchase notice, actual or constructive, of an unrecorded instrument or encumbrance is not a good faith purchaser for value and cannot avail himself or [it]self of the benefits of the recording statutes" (*7 Vestry LLC v Department of Fin. of City of N.Y.*, 22 AD3d 174, 184 [2005]). Defendant Wiener (a member of defendant Hudson) handwrote "except for the laundry lease" on the Assignment of Leases and Rents, so he clearly had notice of the contract between plaintiff and Shaya. While defendants assert that they had notice "as of or just prior to the date of closing but after the contract of sale had been fully executed," plaintiff has made a prima facie case sufficient for a preliminary injunction. As the action proceeds, the parties can

develop exactly when defendants had notice of the laundry room contract (*see Terrell v Terrell*, 279 AD2d 301 [2001]).

Plaintiff made a sufficient showing that the laundry room contract was a lease as opposed to a license. While not *determinative* (*see e.g. Linro Equip. Corp. v Westage Tower Assoc.*, 233 AD2d 824, 826 [1996]), the language used in the agreement indicates that plaintiff and Shaya intended it to be a lease (*see e.g. Coinmach Corp. v Harton Assoc.*, 304 AD2d 705 [2003]). Plaintiff had control over the laundry room: it had the only key (until it voluntarily gave a copy to the doorman); the building's superintendent asked plaintiff's permission to install a vending machine in the laundry room (*see e.g. Linro*, 233 AD2d at 826); the agreement specified the amount of rent (*see Coinmach*, 304 AD2d at 706); and the agreement provided that the laundry machines would be installed in a particular building, and was accompanied by a floor plan indicating the laundry room (*see Solon Automated Servs. v Eastwood Mgt. Corp.*, 94 AD2d 961 [1983]; *but see Sebco Laundry Sys. v Oakwood Terrace Hous. Corp.*, 277 AD2d 303 [2000]).

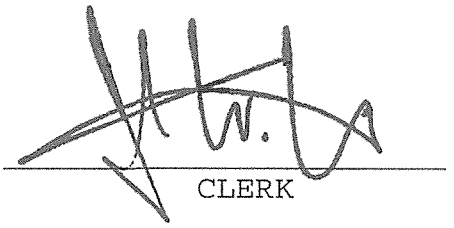
Defendants' argument that the contract should be construed against plaintiff is unpreserved (*see e.g. Douglas Elliman-Gibbons & Ives v Kellerman*, 172 AD2d 307, 308 [1991], *lv denied* 78 NY2d 856 [1991]). Were we to consider this contention, we

would find it unavailing (*see Citibank, N.A. v 666 Fifth Ave. Ltd. Partnership*, 2 AD3d 331 [2003]).

Plaintiff satisfied the irreparable injury requirement for preliminary injunctive relief by explaining why it would become insolvent if denied (*see Polner v Arling Realty Inc.*, 194 Misc 598, 600-601 [1949]; *and see generally Four Times Sq. Assoc. v Cigna Invs.*, 306 AD2d 4, 6 [2003]). Although defendant Hudson might be able to make more money if it entered into a laundry room contract with one of plaintiff's competitors, defendants do not claim that the status quo causes them financial hardship.

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3845 Rafael Diaz Gutierrez, et al., Index 107111/05
Plaintiffs-Respondents,

-against-

L. Raul Bernard, etc., et al.,
Defendants,

Michael Schneider, et al.,
Defendants-Appellants.

Rivera & Colón, LLP, New York (José Luis Torres of counsel), for appellants.

Daniel Cobrinik, New York, for respondents.

Order and judgment (one paper), Supreme Court, New York County (Leland DeGrasse, J.), entered January 3, 2008, vacating, on plaintiffs' motion, an assignment of the contract of sale from defendant Vera to defendant Schneider as a fraudulent conveyance, and directing assignment of the shares and proprietary lease to plaintiff Gutierrez, unanimously reversed, on the law, without costs, the order and judgment (one paper) vacated, and the matter remanded for a hearing in accordance with this decision.

Plaintiffs allege that defendants Vera and Bernard engaged in a fraudulent conveyance under the Debtor and Creditor Law when Vera assigned her contract to purchase a cooperative apartment at an insider's price. While, as we held in our prior decision in this matter, intangible property - here, the contract to purchase

the cooperative apartment - may be subject to execution (*Gutierrez v Bernard*, 27 AD3d 377, 378 [2006], *see also ABKCO Indus. v Apple Films*, 39 NY2d 670 [1976]), an essential prerequisite to a fraudulent conveyance claim is that the debtor actually convey "tangible or intangible property" (Debtor and Creditor Law § 270). Stated another way, "the thing disposed of must be of value, out of which the creditor could have realized all, or a portion of his claim" (*Hoyt v Godfrey*, 88 NY 669, 670 [1882], *see also IDC (Queens) Corp. v Illuminating Experiences*, 220 AD2d 337 [1995]; 30 NY Jur 2d, Creditors' Rights and Remedies § 319).

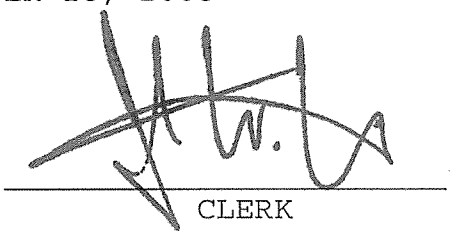
Here, defendants argue that Vera's right to purchase the shares appurtenant to the apartment was challenged by the cooperative, and that the assignment to Michael Schneider was part of the settlement of Vera's lawsuit against the cooperative. Defendants maintain that as a result, Vera's contract was valueless as it could not have been utilized by Vera to purchase the apartment. Plaintiffs, on the other hand, argue that Vera would have prevailed in the underlying lawsuit because she had an absolute right to purchase the apartment based on her contract, the offering plan and the proprietary lease and that the settlement agreement was just a mechanism through which Vera fraudulently conveyed the right to purchase the shares to

Schneider.

It is our view, at this juncture, that an issue of fact exists as to whether the contract was, indeed, of no value to Vera because of the cooperative's refusal to sell the shares to her, or whether the assignment of the contract was nothing more than a means of enabling the conveyance of the shares to someone other than Vera while extinguishing her claims, and whether such conveyance was fraudulent under the Debtor and Creditor Law. We further note that plaintiffs, if they prevail, would stand in Vera's shoes and if it is determined that the conveyance was fraudulent, plaintiffs would acquire, at most, Vera's right to enter into the contract.

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

ENTERED: OCTOBER 16, 2008



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Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4281 The People of the State of New York, Ind. 3695/04
Respondent,

-against-

Michael Dennis,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 19, 2005, convicting defendant, after a jury trial, of robbery in the first degree (two counts), and criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

Defendant abandoned his request for an adverse inference charge concerning a missing police document when he expressly agreed to an alternative remedy fashioned by the court, in which the parties stipulated to the content of the missing document. Under the circumstances of the case, the stipulation was more favorable to defendant than an adverse inference instruction would have been, and the record does not support defendant's present claim that he agreed to the stipulation only as a

fallback position on constraint of the court's denial of the instruction. Accordingly, defendant has not preserved his argument that he was entitled to a sanction for the loss of the document (*see People v Alvarez*, 239 AD2d 263 [1997], *lv denied* 90 NY2d 1009 [1997]) and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. This stipulation was more than adequate to prevent any prejudice to defendant.

The court properly exercised its discretion in permitting the prosecutor to ask questions of a witness on redirect examination that the prosecutor had simply forgotten to ask on direct (*see People v Olsen*, 34 NY2d 349, 353-354 [1974]; *see also People v Kelsey*, 194 AD2d 248 [1994]; *see also People v Whipple*, 97 NY2d 1 [2001]).

The court also properly exercised its discretion in admitting rebuttal testimony that tended to refute defendant's version of the events (*see People v Harris*, 57 NY2d 335, 345 [1982], *cert denied* 460 US 1047 [1983]). Even if some of the testimony was "not technically of a rebuttal nature," the court had discretion to allow it (CPL 260.30[7]), and defendant was not unduly prejudiced.

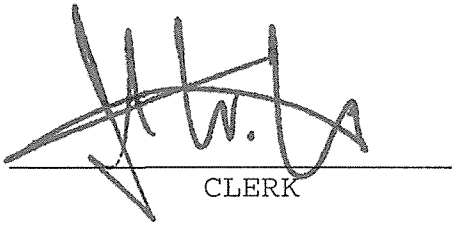
Defendant's challenges to the prosecutor's cross-examination and summation are unpreserved and we decline to review them in

the interest of justice. As an alternative holding, we also reject them on the merits. There was no shifting of the burden of proof in either instance.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4283 In re Tonisha J.,
Petitioner-Appellant,

-against-

Paul P.,
Respondent-Respondent.

Nancy Botwinik, New York, for appellant.

Order, Family Court, New York County (Elizabeth Barnett, Referee), entered on or about August 10, 2007, which, after a hearing, denied petitioner mother's petition for an award of permanent custody and granted respondent father's petition to modify the order of temporary custody and award him sole legal and physical custody of the subject child with scheduled visitation to the mother, unanimously reversed, on the law and the facts, without costs, the father's petition denied and the mother's petition granted, and the matter remanded for further proceedings on the visitation schedule in the best interests of the child.

The decision of the Referee awarding custody to the father lacked a sound and substantial basis (*see Matter of Krebsbach v Gallagher*, 181 AD2d 363 [1992], *lv denied* 81 NY2d 701 [1992]). Although the Referee's statement that the child lived with both the father and mother for the first three or four years of his

life implies that the parents virtually shared custody, it is clear that the mother had primarily raised and nurtured the child since his birth. While there is no dispute that the father properly cares for the child during his scheduled visitation and has an appropriate parent-child relationship with the boy, there is no evidence that he sought a more active role in the child's schooling or health care during his early years. Nor does it appear from the record that he provided the type of financial support for the child that would normally be expected. We recognize that the discord between the parties, which began when the father became involved with another woman and was exacerbated by the mother's ill-considered and misguided behavior toward the father and his fiancee thereafter, may lie at the heart of his conduct in relation to participating in the child's life and providing appropriate support. Nevertheless, he was not the child's primary custodial parent in the early years, and he limited his own participation and assistance.

The mother's past poor judgment and misconduct toward the father and his fiancee, particularly upon learning of the fiancee's pregnancy, appropriately evoked the court's concern. However, the record reflects that the mother has obtained effective assistance in learning how to avoid engaging in such misconduct in the future.

The evidence established that the child was well cared for, had a good relationship with his mother, and was happy. The mother had never caused the child harm, notwithstanding her accidentally burning his ears with a hair-straightening rod, and nothing else in her conduct as evaluated by the forensic social worker demonstrated that she lacked the ability to serve as custodial parent for the child.

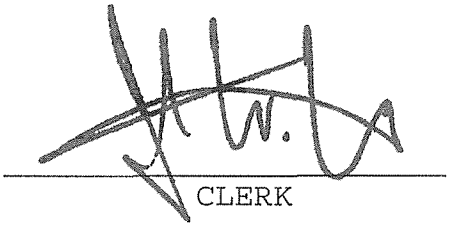
Indeed, the evaluation by the forensic social worker, essentially adopted by the Referee, de-emphasized the mother's accomplishments as custodial parent, while over-emphasizing her flaws. For example, while it was certainly relevant, and unfortunate, that the child had missed many days of preschool, no credit was given to petitioner for having found and enrolled the child in the program in the first place, and for the child's academic success in that program.

While both parties are fit parents, the mother served as primary custodial parent of the child for the approximately four years from his birth to this litigation, and the child was well cared for in all that time. Particularly in view of the mother's demonstrated acceptance and use of therapeutic assistance to improve her conduct in relation to the father and his fiancee, we

are convinced that at this time the best interests of the child demand that she remain the custodial parent, with appropriate visitation to the father.

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

ENTERED: OCTOBER 16, 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 16, 2008.

Present - Hon. David B. Saxe, Justice Presiding
James M. Catterson
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 497/07
Respondent,

-against- 4284

Carlos Vasquez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about December 6, 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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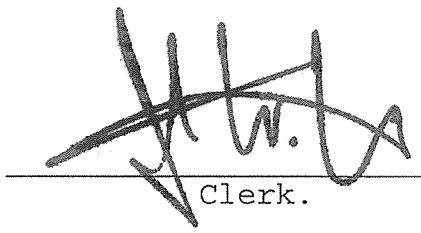


Clerk.

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

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4285 Worth Construction Co., Inc., Index 601029/07
Plaintiff-Appellant,

-against-

TRC Engineers, Inc., et al.,
Defendants-Respondents.

Peckar & Abramson, P.C., New York (Alvin Goldstein of counsel), for appellant.

Proskauer Rose LLP, New York (Claude M. Millman and Gail S. Port of counsel), for respondents.

Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered October 29, 2007, which granted defendants' motion pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint, unanimously affirmed, with costs.

Defendants entered into an agreement called the Exit Strategy Contract (ESC) with nonparty Con Edison by which they assumed responsibility for decommissioning, demolishing and environmental remediation of certain properties owned or leased by Con Edison. The ESC provided for Con Edison to deliver the property at 700 First Avenue (the Waterside site) to defendants on March 1, 2003. Defendants' subcontract with plaintiff, by which plaintiff agreed to carry out the lead paint and asbestos abatement and the decommissioning and demolishing, incorporated the ESC and provided that, in the event of a conflict between the

two, the subcontract would govern. The subcontract provided that "[t]he date of commencement [of plaintiff's work] shall be established by a written notice to proceed issued by the Contractor to the Subcontractor."

The subcontract further provided that, in the event of "Owner Delay," defined in the ESC as delay in the performance of the work "caused by or resulting from: (i) failure of [Con Edison] to comply in a timely manner with any of its covenants in Section 6," plaintiff would be entitled to compensation equal to the cost of demobilizing and remobilizing its forces as a result of such delay, but not to exceed $60,000 and $40,000, respectively, in any single instance, or $300,000 in the aggregate. Among the covenants in Section 6 was the covenant to deliver possession of the Waterside site by March 1, 2003. In addition, plaintiff "assume[d] the risk and Loss-and-Expense of All Delays in the Work ... of any kind or duration whatsoever, whether Owner Delay or otherwise, whether or not within the contemplation of the parties and whether foreseeable or unforeseeable," and "agree[d] that the reimbursement for demobilization and remobilization costs described above and an extension (or extensions) of time under this Section for Owner Delay shall be [its] exclusive remedies for Delay in the performance of the Work."

Plaintiff's allegation that defendants breached the contract by failing to deliver the Waterside site by March 1, 2003 is directly contradicted by the terms of the subcontract, and thus the allegation can not be presumed to be true (*Tectrade Intl. v Fertilizer Dev. and Inv.*, 258 AD2d 349 [1999], *lv denied* 94 NY2d 751 [1999]). Moreover, plaintiff failed to allege any demobilization or remobilization damages, the only damages it was permitted to recover for delay under the subcontract.

Plaintiff argues that, despite the broad no-damages-for-delay clause of the subcontract, it may recover delay damages because the delay in delivering the Waterside site was uncontemplated and breached a fundamental obligation of the subcontract (*see Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). However, the clause at issue, which permits up to $300,000 in compensation for Owner Delay, is an enforceable contractual limitation on liability (*see Obremski v Image Bank, Inc.*, 30 AD3d 1141, 1141 [2006]). The same clause provides, as indicated, that, other than the limited costs of demobilization and remobilization of its forces as a result of Owner Delay, plaintiff bears the cost of all delays, whether within the contemplation of the parties or not and whether foreseeable or not.

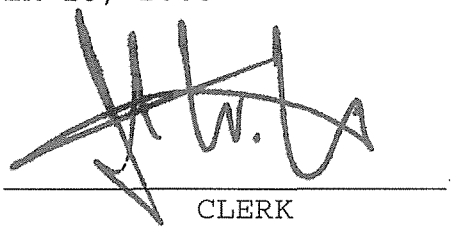
In any event, the record establishes that defendants'

failure to deliver the Waterside site by March 1, 2003 was neither a breach of a fundamental obligation, since the subcontract did not require defendants to deliver the site by that date, nor uncontemplated. By order of the Public Service Commission, Con Edison was "not permitted to divest the Waterside property or to commence decommissioning of the plant until it [was] satisfied that [the East River Generating Station] [was] fully functional, all start-up issues [were] resolved, and Waterside [was] no longer needed to satisfy its statutory obligations." The ESC recognized that the commencement of work at the Waterside site depended on the re-powering of the East River Generating Station; it provided that Con Edison could cancel the Waterside site work "[i]n the event that the application for the repowering of the East River Facility ... [was] not approved ... or if the Con Edison [*sic*] [was] otherwise prevented from repowering the East River Facility and therefore unable to take Waterside out of service."

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

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

ENTERED: OCTOBER 16, 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 16, 2008.

Present - Hon. David B. Saxe, Justice Presiding
James M. Catterson
James M. McGuire
Rolando T. Acosta
Leland G. DeGrasse, Justices.

The People of the State of New York, Ind. 4189/06
Respondent,

-against- 4286

Quentin White,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about February 21, 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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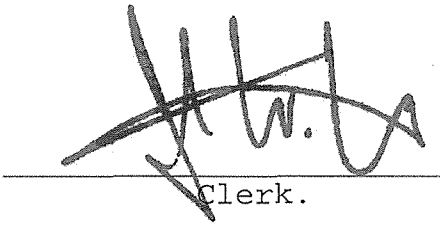


Clerk.

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

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4288 In re Lali L.,

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

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

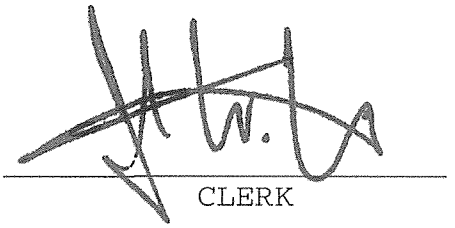
Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about March 20, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fourth degree, and placed him with the Office of Children and Family Services, with initial placement non-secure, for a period of 18 months, unanimously affirmed, without costs.

Appellant's claim that the court improperly denied his request to absent himself, for the purpose of avoiding a suggestive in-court identification, during the identifying witness's hearing testimony is unsupported by the record, which reveals that appellant was actually absent during that witness's testimony.

The placement was a proper exercise of the court's discretion that constituted the least restrictive alternative consistent with the needs of appellant and the community (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), in view of appellant's larcenous conduct, his history of truancy, drug use, behavioral problems, and fighting in school, the recommendations of the evaluating psychiatrist and the Probation Department, and the lack of suitable control at home.

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4290 The People of the State of New York, Ind. 5705/02
Respondent,

-against-

Scott Blue,
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 (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), rendered May 22, 2003, convicting defendant, after a jury trial, of attempted murder in the second degree, robbery in the first degree (five counts), attempted robbery in the first degree (four counts) and criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 50 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In this regard, defendant only challenges his attempted murder conviction. The element of intent to kill was established by evidence that, after attempting to rob one of his victims, defendant fired two shots at the

victim, striking him in the groin and thigh (*see e.g. People v Cabassa*, 79 NY2d 722, 728 [1992], *cert denied sub nom. Lind v New York*, 506 US 1011 [1992]). The location of the *wounds* does not establish the direction of defendant's *aim*, and thus does not imply that defendant sought to avoid striking the victim in the head or upper body (*see People v Butler*, 86 AD2d 811, 815 [1982, Sandler, J., dissenting], *revd on dissenting mem* 57 NY2d 664 [1982]). The jury had ample basis on which to discredit that portion of defendant's statement to the police that he now cites as undermining a finding of homicidal intent. Finally, although the two shots sufficiently established homicidal intent, we also note that very shortly after firing these shots defendant further manifested that intent by repeatedly squeezing the trigger of his weapon in an unsuccessful effort to fire additional shots. There is no merit to any of defendant's procedural arguments for disregarding this additional evidence.

The court properly exercised its discretion in admitting photographs of the victim's wounds which were not gruesome. The photographs were relevant to homicidal intent and serious physical injury, which were elements of charges submitted to the jury (*see People v Wood*, 79 NY2d 958, 960 [1992]; *People v Alvarez*, 3 AD3d 456, 457 [2004], *lv denied* 2 NY3d 761 [2004]), and the People "were not bound to stop after presenting minimum

evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). While a limiting instruction may have been appropriate, defendant declined the court's offer to deliver one.

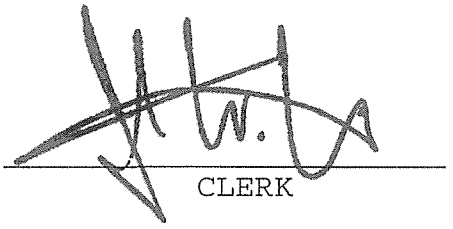
The court properly directed that defendant's sentence for attempted murder run consecutively to his sentence for attempted robbery, arising out of the same incident. The evidence established that defendant committed the crime of attempted robbery and then attempted to kill the victim. Indeed, defendant left the scene of the attempted robbery, returned moments later and shot the victim. Accordingly, the two crimes were separate and distinct acts (*see People v Salcedo*, 92 NY2d 1019 [1998]; *People v Lewis*, 268 AD2d 249 [2000], *lv denied* 95 NY2d 799 [2000]).

Defendant's constitutional challenge to the procedure under which he was sentenced as a persistent violent felony offender is unpreserved and we decline to review it in the interest of

justice. As an alternative holding, we also reject it on the merits (*see Almendarez-Torres v United States*, 523 US 224 [1998]).

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4294-
4295 Wanda Cook, Index 15785/03
Plaintiff-Respondent,

-against-

Castillo Livery Corp., et al.,
Defendants-Respondents,

Walter Laveglia,
Defendant-Appellant.

Rivkin Radler, LLP, Uniondale (Cheryl F. Korman of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Wanda Cook, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for Castillo Livery Corp. and Victor Castillo, respondents.

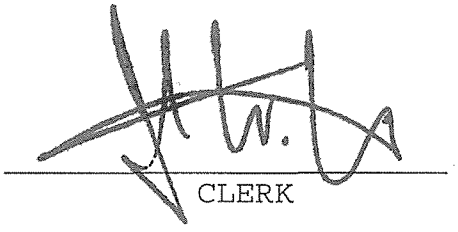
Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J., and a jury), entered January 31, 2008, in an action arising out of a motor vehicle accident, inter alia, awarding plaintiff pre-structured damages in the principal amounts of $190,000 for past pain and suffering and $325,000 for future pain and suffering over 20 years, plus interest, costs and disbursements, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 10, 2007, which denied defendant-appellant's post-trial motion to set aside the verdict on the issue of serious injury, or, in the

alternative, to set aside the damages awards as excessive, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

A fair interpretation of the evidence supports the jury's finding that plaintiff sustained a permanent consequential limitation of use of her right knee (Insurance Law § 5102[d]; *see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). The damages awarded do not deviate materially from what would be reasonable compensation (CPLR 5501[c]; *cf. Schultz v Turner Constr. Co.*, 278 AD2d 76 [2000]; *Garcia v Queens Surface Corp.*, 271 AD2d 277 [2000]; *Cruz v Manhattan & Bronx Surface Tr. Operating Auth.*, 259 AD2d 432 [1999]).

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4296 The People of the State of New York, Respondent, Ind. 1004/03 5245/03

-against-

David Peña, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Proskauer Rose LLP, New York (Jennifer O'Brien of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

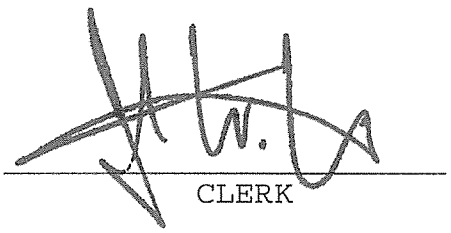
Order, Supreme Court, New York County (Robert H. Straus, J.), entered on or about June 20, 2007, which denied defendant's motion for resentencing under the 2005 Drug Law Reform Act (L 2005, ch 643), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of the application. Defendant's record of increasingly serious crimes, along with his illegal reentry into the United States and resumption of drug trafficking after being deported for such activity, outweighed evidence of his rehabilitation while incarcerated (*see People v Alcaraz*, 46 AD3d 253 [2007]). In denying resentencing, the court properly considered the totality of circumstances and did not

rely solely on defendant's advantageous plea bargain (*see People v Jones*, 50 AD3d 282 [2008]).

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4297 The People of the State of New York, Ind. 3968/02
Respondent,

-against-

Pablo Lacayo,
Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (John A. Barone, J.), rendered June 3, 2005, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 12 years, unanimously modified, on the law, to the extent of vacating the DNA databank fee, and otherwise affirmed.

We perceive no basis for reducing the sentence.

As the People concede, since the crime was committed prior to the effective date of the legislation (Penal Law § 60.35 [1] [a] [v] [former (1)(e)]), providing for the imposition of a DNA databank fee, that fee should not have been imposed.

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

ENTERED: OCTOBER 16, 2008

CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4298 The People of the State of New York, Ind. 5462/02
Respondent,

-against-

Jeffrey Brown,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered April 11, 2005, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the second degree and endangering the welfare of a child, and sentencing him to an aggregate term of 4 years, unanimously affirmed.

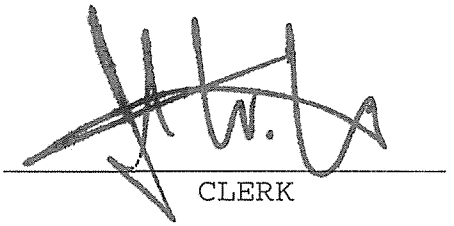
The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The police account of the drug transaction was not implausible.

Defendant's challenge to the prosecutor's summation is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The challenged remark was fair comment on the evidence,

and was a permissible response to the defense summation (*see People v Overlee*, 236 AD2d 133 [1997] *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992] *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4299 In re Courtney K.,
Petitioner-Respondent,

-against-

Edoardo A.,
Respondent-Appellant.

Roger G. Smith, New York, for appellant.

John E. Halpin, New York, for respondent.

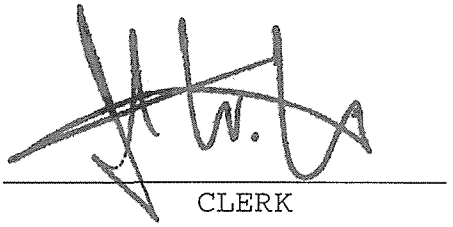
Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about February 25, 2008, which granted petitioner's objections to the Support Magistrate's order calculating respondent father's monthly child support obligation, granted petitioner's request for a continuance to permit further discovery, vacated the child support award and remanded the matter for compliance with petitioner's discovery request, unanimously modified, on the law and the facts, to vacate the finding of respondent's lack of credibility and the direction to continue the hearing, and otherwise affirmed, without costs, and the matter remanded for further proceedings in accordance with the decision herein.

We uphold the vacatur of the Support Magistrate's child support award, but on grounds other than those invoked by Family Court. We conclude that petitioner should have been granted an

adjournment of the hearing, particularly where recently retained counsel made an adequate showing of need. Under the unusual circumstances presented, we find it prudent that the matter be retried de novo.

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4300 The People of the State of New York, Ind. 2377/06
Respondent,

-against-

Gerald Roulette,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County, (Renee A. White, J.), rendered December 21, 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 11 months, unanimously affirmed.

Defendant has failed to preserve his claim that his plea was involuntary because the court did not advise him that the plea would preclude him from obtaining appellate review of the issues raised in his pending suppression motion (*see People v Lopez*, 71 NY2d 662 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we reject this claim on the merits. The colloquy in which the court accepted defendant's guilty plea satisfied all constitutional requirements, and the plea was knowingly, intelligently and voluntarily made (*see*

Boykin v Alabama, 395 US 238 [1969]; *People v Harris*, 61 NY2d 9, 16 [1983]). "[T]rial courts are not required to engage in any particular litany during an allocution in order to obtain a valid guilty plea in which defendant waives a plethora of rights" (*People v Moissett*, 76 NY2d 909, 910-911 [1990]). A guilty plea will effect a forfeiture of the right to appellate review of a wide variety of possible issues (*People v Hansen*, 95 NY2d 227, 230 [2000]). A plea court is not required to list all those issues, or to anticipate that a defendant might be harboring a mistaken subjective belief as to what issues he could still raise on appeal.

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

ENTERED: OCTOBER 16, 2008

CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4301 The People of the State of New York, Respondent, SCI 65764C/04

-against-

Fausto Nunez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

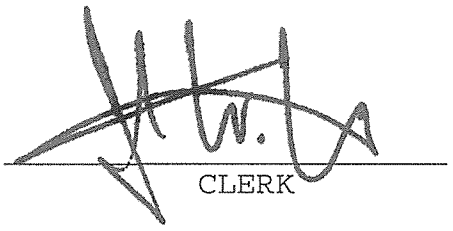
Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Seth L. Marvin, J. at sentence), rendered October 28, 2005, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

At the plea proceeding, the court offered defendant an opportunity to avoid incarceration if he completed a drug treatment program. Then, assuming the satisfaction of other plea conditions, he would be allowed to withdraw his plea to a felony charge and to instead plead guilty to a misdemeanor charge, for which he would be sentenced to time served. It is undisputed that defendant failed to complete the drug treatment program. Accordingly, he was properly sentenced under his plea to a

felony. On appeal, defendant asks that we exercise our interest of justice jurisdiction to allow him to make another attempt to complete a drug treatment program and thus avail himself of the opportunity to withdraw his plea and be sentenced to a non-incarceration alternative. Even assuming that what defendant is asking this Court to do is to vacate his sentence and restore him to his post-plea, pre-sentencing status, we decline to do so. The sentencing court properly exercised its discretion when it determined that defendant was not deserving of another opportunity.

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

ENTERED: OCTOBER 16, 2008



CLERK

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

4302-
4303N In re Deborah Bobian, Index 406539/07
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

Ricardo Elias Morales, New York (Corina L. Leske of counsel), for appellant.

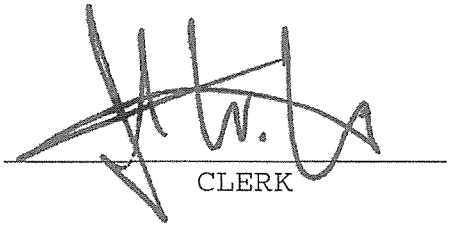
Order, Supreme Court, New York County (Marilyn Shafer, J.), entered April 14, 2008, which, in an article 78 proceeding by petitioner tenant to annul respondent Housing Authority's determination terminating petitioner's tenancy for chronic delinquency in the payment of rent, granted the application to the extent of remanding the matter to the Housing Authority for imposition of a lesser penalty, unanimously reversed, on the law, without costs, the application denied, and the petition dismissed. Appeal from order, same court and Justice, entered on or about January 17, 2008, which directed respondent to put petitioner in possession of a Housing Authority apartment pending determination of this proceeding, unanimously dismissed, without costs, as academic.

At the time this proceeding was commenced, the Housing Authority had already obtained a judgment of possession and

warrant of eviction against petitioner in a nonpayment proceeding in Civil Court. In vacating the Housing Authority's determination and remanding for a lesser penalty, Supreme Court exceeded its authority by effectively nullifying Civil Court's judgment and warrant, which were not subject to collateral attack in Supreme Court absent a showing, not made here, that Civil Court lacked jurisdiction to award possession to the Housing Authority or order petitioner's eviction (*see McLaughlin v Hernandez*, 16 AD3d 344, 346 [2005]).

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

ENTERED: OCTOBER 16, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
Peter Tom
Luis A. Gonzalez
John T. Buckley
James M. Catterson, JJ.

3992
Index 400007/07

x

In re The City of New York, et al.,
Petitioners-Respondents,

-against-

The Patrolmen's Benevolent Association
of the City of New York, Inc., et al.,
Respondents,

The Sergeants' Benevolent Association
of the City of New York, Inc., et al.,
Respondents-Appellants.

x

Appeals from a judgment of the Supreme Court, New York County (Lottie E. Wilkins, J.), entered December 27, 2007, which granted the petition and annulled the determination of respondent New York City Board of Collective Bargaining finding that petitioners violated the collective bargaining agreement with respondent unions.

Certilman Balin Adler & Hyman, LLP, East Meadow (Candace Reid Gladston, Michael C. Axelrod and Donna-Marie Korth of counsel), for union appellants.

Steven C. DeCosta, New York (John F. Wirenius of counsel), for NY Office of Collective Bargaining and Marlene A. Gold, appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein and Larry A. Sonnenshein of counsel), for municipal respondents.

TOM, J.

Petitioners contend that a change in the method of random drug testing utilized by the New York City Police Department (NYPD) for the screening of police officers — from urinalysis to hair analysis — is exempt from collective bargaining because it involves the disciplinary authority of the Police Commissioner, as conferred by New York City Charter § 434 and Administrative Code of the City of New York § 14-115. Under the plain language of the Administrative Code provision, the Commissioner's investigatory authority arises only after written charges have been preferred and reasonable notice of the alleged infraction has been given. Thus, we conclude that no persuasive policy reason has been advanced to require the New York City Office of Collective Bargaining to depart from its prior decisions, which have consistently found that routine drug screening procedures are a mandatory subject of collective bargaining.

On August 1, 2005, NYPD abandoned the use of urinalysis as its preferred method of random drug screening of its members and substituted a type of hair follicle testing known as radioimmunoassay of hair (RIAH). The absence of any consultation with the unions representing NYPD members prior to the adoption

of RIAH analysis resulted in the filing of an improper practice petition with the New York City Office of Collective Bargaining (OCB) by the Detectives Endowment Association on behalf of itself, the Patrolmen's Benevolent Association and the Sergeants Benevolent Association (the unions).[1] The petition alleged that by unilaterally changing the drug testing method, NYPD violated New York City Collective Bargaining Law § 12-306(a)(4) (Administrative Code, tit 12, ch 3).

NYPD's answer to the improper practice petition is not included in the record. However, the answer submitted by the Mayor's Office of Labor Relations to OCB asserted that RIAH testing had been authorized by Patrol Guide Procedure (PGP) No. 205-30, effective January 1, 2000, which made the technique available in connection with the medical examination of probationary police officers who have completed the period of probation, the investigation of officers who are suspected of illegal drug use on the basis of reliable information, and the voluntary screening of officers subject to unsubstantiated allegations of illegal drug use who request permission to be tested.

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[1] The Patrolmen's Benevolent Association and its president have withdrawn their appeal pursuant to stipulation.

The dispute was submitted to OCB's Board of Collective Bargaining for adjudication. In the course of the proceedings, the Board requested that the parties address the implications of the Court of Appeals' decision in *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.* (6 NY3d 563 [2006], *affg* 13 AD3d 879 [2004]), decided while hearings were ongoing. NYPD took the position that "[t]esting procedures . . . and disciplinary consequences are inextricably intertwined, at least in this situation, with the Police Commissioner's disciplinary authority pursuant to City Charter § 434 and Administrative Code § 14-114 [*sic*]."

OCB granted the unions' petition. It found that NYPD violated New York City Collective Bargaining Law § 12-306(a)(4) (Administrative Code, tit 12, ch 3) "by unilaterally changing drug testing procedures, a mandatory subject of bargaining." Relying on *Matter of Nassau County Police Benevolent Assn. (County of Nassau)* (27 PERB ¶ 3054 [1994]) and its own prior decisions, OCB noted that these rulings "recognized a distinction between the *decision* to test [which is not subject to collective bargaining] and the *procedures* used to implement that decision [which are subject to collective bargaining]." OCB found that "even if NYPD's procedures for hair testing are the same as

applied to a subset of employees already subject to such testing, the expansion of the categories of employees to whom the procedures now are applied constitutes a unilateral change in drug screening procedures." The decision concluded, "The procedural matters raised by the Unions . . . are not implicit parts of the disciplinary process . . . [T]he procedures for drug testing are utilized before any basis for discipline is determined by the Commissioner to exist."

The instant article 78 proceeding to annul the OCB determination as arbitrary and capricious (CPLR 7803[3]) was commenced by the City of New York, NYPD, the New York City Mayor's Office of Labor Relations and their respective commissioners. Relying on *Patrolmen's Benevolent Assn.* (6 NY3d at 574), petitioners first argued that public policy vests disciplinary authority over the New York City police force in the Commissioner, and that investigatory procedures employed by the Commissioner, such as interviewing police officers, are not subject to collective bargaining. Because the drug testing procedures at issue are intended "to uncover and deter illegal drug use by members of the NYPD," petitioners concluded, RIAH testing is investigatory in nature, and because it is "'ancillary' or 'tangentially' related to" discipline, it is

"'prohibited from being included in . . . collective bargaining'" (quoting *Patrolmen's Benevolent Assn.*, 13 AD3d at 881).

As their second ground for annulment, petitioners advanced the same argument made by the Mayor's Office of Labor Relations in the proceedings before OCB — that NYPD's use of hair analysis, as provided in PGP No. 205-30, preceded its adoption as the Department's designated drug screening method in August 2005. They noted that RIAH analysis had been conducted on probationary police officers subject to medical examination at the end of the probationary period and on those "as to whom NYPD had a reasonable suspicion for testing" or who voluntarily submitted to testing.

Supreme Court granted the petition, annulling the agency determination and denying a cross motion by OCB that sought to dismiss the proceeding. The court held that it was "arbitrary and capricious for [OCB] to rule that the choice of testing methodology and the implementation of procedures for administering that test were not sufficiently connected to the Police Commissioner's disciplinary authority to exempt those issues from collective bargaining." The court concluded that agency precedents holding the method of drug screening to be an appropriate subject of collective bargaining had been superseded

by the Court of Appeals' decision in *Patrolmen's Benevolent Assn.* (6 NY3d 563 [2006]), reasoning that the Court had endorsed "the principle articulated by the Appellate Division below that even matters which previously may have been considered to be 'ancillary' or only 'tangentially' related to the disciplinary function are in reality essential to the effective administration of discipline" (*see* 13 AD3d at 881). Supreme Court opined that "requiring that drug screening methodologies and practices be submitted to collective bargaining seriously limits the Commissioner's ability to effectively enforce discipline within the New York City Police Department," stating:

> "To say that the Commissioner has the authority to screen for drug use among police officers but must negotiate with those same officers as to which test will be used, to whom it will be administered, when it will be administered, how it will be administered, etc., renders the Commissioner's authority illusory and meaningless in any practical sense."

Public policy strongly favors the use of collective bargaining (*see Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 778 [1976]) and procedures agreed upon by public employers and their employee organizations for the resolution of disputes over the implementation of their

collective bargaining agreement (*Board of Educ. of Union Free School Dist. No. 3 of Town of Huntington v Associated Teachers of Huntington*, 30 NY2d 122, 131 [1972]). "Public employers must, therefore, be presumed to possess the broad powers needed to negotiate with employees as to all terms and conditions of employment. The presumption may, of course, be rebutted by showing statutory provisions which expressly prohibit collective bargaining as to a particular term or condition" (*id.* at 130). Unless NYPD is barred by public policy from negotiating the terms of its drug testing program, it must bargain with the police unions before implementing changes in testing procedures.

Where a well-established mechanism for the resolution of the competing interests of public employees and management is challenged on the ground that it impermissibly intrudes on managerial authority, the first consideration is the nature and extent of the authority claimed to be infringed. Petitioners contend that the investigatory power extended to the Police Commissioner by statute pursuant to his authority to oversee discipline and administer punishment extends to the hair analysis testing at issue. They rely on the disciplinary powers conferred upon the Police Commissioner by New York City Charter § 434(a), which provides: "The Commissioner shall have cognizance and

control of the government, administration, disposition and discipline of the department, and of the police force of the department."

Administrative Code § 14-115(a) affords the Commissioner discretion to punish an officer for misconduct.[2] Section 14-115(b) specifies the procedure to be followed before a penalty is imposed:

> "Members of the force . . . shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner or one of his or her deputies upon . . . reasonable notice to the member or members charged."

Petitioners do not suggest that the control over the Police

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[2] Administrative Code § 14-115(a) provides, in relevant part:

> "The commissioner shall have power, in his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force."

Department vested in the Commissioner by statute precludes collective bargaining with employee organizations. The case law relied upon by petitioners in support of their position merely prohibits, as a matter of public policy, interference with the prerogative of an agency to conduct an investigation. In *Patrolmen's Benevolent Assn.* (6 NY3d at 570), the provisions of the collective bargaining agreement at issue involved procedures pertaining to the investigation and resolution of disciplinary proceedings by the Police Department.[3] In *Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO* (95 NY2d 273 [2000], *affg* 263 AD2d 3 [1999]), relied on by petitioners, the public policy at stake was the Department of Investigation's mandate to ensure the honest workings of the City through criminal investigation of its internal affairs (*see* 263 AD2d at 7-8).

The matter at bar, by contrast, does not implicate the

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[3] In dispute were provisions: "(1) that police officers being questioned in a departmental investigation would have up to four hours to confer with counsel; (2) that certain guidelines for interrogation of police officers would remain unchanged; (3) that a 'joint subcommittee' would 'develop procedures' to assure the timely resolution of disciplinary charges; (4) that a pilot program would be established to refer disciplinary matters to an agency outside the police department; and (5) that employees charged but not found guilty could petition to have the records of disciplinary proceedings expunged. PERB found that all these provisions concerned 'prohibited subjects of bargaining'" (*Patrolmen's Benevolent Assn.*, 6 NY3d at 570).

Police Commissioner's discretion to conduct an investigation into an alleged infraction by a member of the force, a prerogative that arises only after written charges have been preferred (Administrative Code § 14-115[b]). Petitioners attempt to surmount this shortcoming by characterizing routine drug testing as "ancillary" to the Commissioner's disciplinary powers, intimating that hair analysis should not be subject to collective bargaining because it might disclose drug use that would then constitute a basis for disciplinary proceedings. However, the Department's own operational procedures limit the use of such testing to the determination of whether to confer full member status upon probationary officers and the investigation of those full members of the force suspected of illegal drug use. In the former instance, testing is employed in connection with a general investigation into the background of a candidate prior to permanent admission to the police force, the propriety of which is not in question. In the latter instance, testing is performed in the course of a formal investigation into charges brought against a member of the Department that are deemed to be supported by reliable information. Significantly, petitioners point to no instance in which hair analysis has previously been authorized for nonconsensual testing of a full member of the force outside the context of a departmental investigation.

Petitioners seek to avoid their obligation to engage in collective bargaining with respect to routine drug testing of NYPD members by extending the investigatory authority granted to the Commissioner beyond the context of formal disciplinary proceedings to which it is confined. The limitation placed upon the scope of such authority must be construed as reflecting a balance struck by the Legislature between the competing public policy concerns of encouraging collective bargaining with public employees, on the one hand, and committing the discipline of the City's police force to the Commissioner, on the other (*see Patrolmen's Benevolent Assn.*, 6 NY3d at 574 [NYC Charter § 434(a) and Administrative Code § 14-115(a) originally enacted as state statutes]). Nor do we read the Court of Appeals' opinion in *Patrolmen's Benevolent Assn.* as adopting the view that the power of the Police Commissioner to implement procedures without resort to collective bargaining extends to matters that are ancillary or only tangentially related to his disciplinary function (*cf. Patrolmen's Benevolent Assn.*, 13 AD3d at 881).

Accordingly, the judgment of the Supreme Court, New York County (Lottie E. Wilkins, J.), entered December 27, 2007, which granted the petition and annulled the determination of respondent New York City Board of Collective Bargaining finding that

petitioners violated the collective bargaining agreement with respondent unions, should be reversed, on the law, without costs, the petition denied, the determination of the Board of Collective Bargaining reinstated, and the proceeding dismissed.

All concur.

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

ENTERED: OCTOBER 16, 2008