SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 18, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4070 The People of the State of New York, Ind. 4404/05
Respondent,

-against-

Mario Metellus,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jessica Slutsky of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered April 20, 2007, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 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. Defendant's conduct clearly established that he entered the premises in question with the intent to steal.

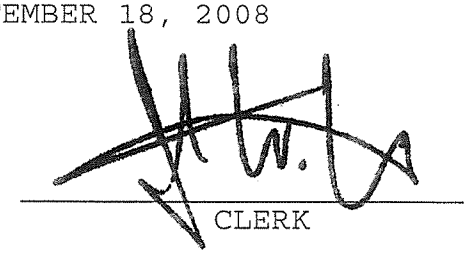
The court properly exercised its discretion when it denied defendant's request to introduce extrinsic evidence of an allegedly prior inconsistent statement made by the complaining witness. The subject matter of the alleged inconsistency was essentially collateral, and it had little or no probative value with regard to any issue other than general credibility (*see People v Aska*, 91 NY2d 979, 981 [1998]; *see also People v Duncan*, 46 NY2d 74, 80-81 [1978], *cert denied* 442 US 910 [1979]). In any event, any error in the court's ruling was harmless. Since defendant never asserted a constitutional right to introduce this evidence, his present constitutional claim is unpreserved (*People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

Since defendant assured the court that he had no problem with the use of a single interpreter for both himself and the complaining witness, he failed to preserve his present claim that differences between his language and that of the witness necessitated the use of separate interpreters, and we decline to review it in the interest of justice. As an alternative holding, we find there is no evidence in the record that defendant was

prejudiced in any way by the use of a single interpreter (*see People v Cinero*, 243 AD2d 330 [1997], *lv denied* 91 NY2d 870 [1997]).

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

ENTERED: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4071 565 Tenants Corp., Index 570166/07
Petitioner-Respondent,

-against-

Jan Adams,
Respondent-Appellant.

Jonathan Fisher, New York, for appellant.

Stiefel & Cohen, New York (George Stiefel of counsel), for respondent.

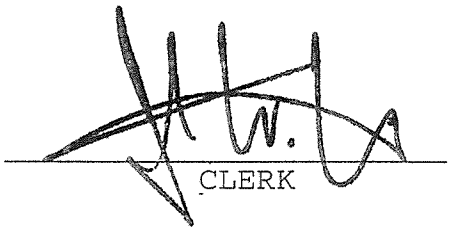
Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered December 10, 2007, which reversed an order of the Civil Court, New York County (Gerald Lebovits, J.), entered on or about December 15, 2005, vacating the Marshal's notice of eviction in a holdover proceeding, and reinstated the notice of eviction, unanimously affirmed, with costs.

The Appellate Term correctly held that under the terms of the parties' stipulation, tenant's admitted presence in the apartment at the time his dog defecated on the floor required that the mess be immediately cleaned up. Tenant's claim that the dog must have defecated while he and his girlfriend were in another area of the apartment and in a hurry to make a plane, and that they were unaware of the mess until they returned from vacation three weeks later, is unavailing (*see Hotel Cameron, Inc. v Purcell*, 35 AD3d 153 [2006]), especially in view of the

clause that the stipulation was to be applied with "zero tolerance" and that no violation was to be deemed "de minimus" (*sic*) (*see 1029 Sixth v Riniv Corp.*, 9 AD3d 142, 149 [2004], *appeals dismissed* 4 NY3d 795 [2005]).

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

ENTERED: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4072 The People of the State of New York, Ind. 4756/06
Respondent,

-against-

Kareem Green, also known as
Kareem Ousmane,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Linklaters, New York (Bridget D. Farrell 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 May 29, 2007, convicting defendant, after a jury trial, of tampering with physical evidence and sale of an imitation controlled substance, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

Defendant's legal sufficiency argument concerning his tampering with physical evidence conviction is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also find that the verdict was based on legally sufficient evidence. Furthermore, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's course of conduct supports the inference that when he put an unknown object into

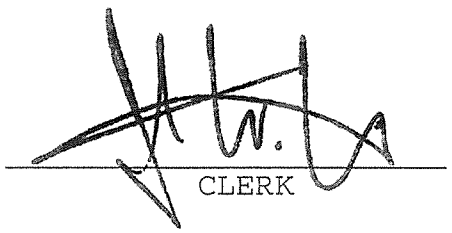
his mouth, he was aware that he was about to be arrested, and supports the additional inference that the object was contraband or evidence that defendant intended to prevent the police from discovering.

Defendant's statutory right to be present at material stages of the trial was not violated by his absence from sidebar conferences at which counsel exercised challenges to potential jurors, inasmuch as the questioning of prospective jurors was conducted in defendant's presence in open court and he was afforded an opportunity to consult with counsel prior to counsel's exercise of those challenges (*see People v Mieles*, 254 AD2d 436 [1998], *lv denied* 92 NY2d 1051 [1998]; *People v Smith*, 205 AD2d 458 [1994], *lv denied* 84 NY2d 872 [1994]). Defendant's absence from such sidebars had no effect on his opportunity to defend in light of the fact that his attorney was only performing the ministerial task of exercising the challenges to which defendant had agreed. Since only legal and administrative

matters were discussed at the sidebars at issue, defendant's presence was not required (*see People v Velasco*, 77 NY2d 469, 473 [1991]; *People v Haywood*, 280 AD2d 282, 282-283 [2001]).

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

ENTERED: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4073-
4073A Clark Construction Corporation, Index 122662/00
Plaintiff-Respondent,

Marc E. Elliot, et al.,
Plaintiffs,

-against-

BLF Realty Holding Corp., et al.,
Defendants-Appellants.

Epstein Becker & Green, P.C., New York (Barry A. Cozier of counsel), for appellants.

Jeffrey S. Ween & Associates, New York (Jeffrey S. Ween of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Kornreich, J.), entered January 24, 2008, which, upon reargument, adhered to a prior ruling denying defendants' motion for partial summary judgment on the second and third causes of action in the third amended complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 29, 2007, denying defendants' earlier motion for partial summary judgment, unanimously dismissed, without costs, as superseded by the appeal from the later order.

In our prior decision reinstating plaintiffs' breach of contract claims (28 AD3d 367 [2006], *lv denied* 7 NY3d 717 [2006]), we implicitly rejected defendants' reliance on the Martin Act (General Business Law art 23-A) as a basis for summary

dismissal. Because the existence of the two additional tenants has been apparent throughout the litigation, there was no new evidence calling for additional consideration. The motion court correctly found that our ruling on the prior appeal constituted law of the case (*see J-Mar Serv. Ctr., Inc. v Mahoney, Connor & Hussey*, 45 AD3d 809 [2007]; *City of New York v Stringfellow's of N.Y.*, 268 AD2d 216 [2000], *affd* 96 NY2d 51 [2001]). Defendants had a full and fair opportunity to litigate when they made their prior motions, but declined to avail themselves of that opportunity.

The court also correctly determined that there are issues of fact as to whether the oral contract with Clark Construction was a private or public offering (*see generally People v Landes*, 84 NY2d 655 [1994]; General Business Law §§ 352-e[1][a], 352-eeee).

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

ENTERED: SEPTEMBER 18, 2008

CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4074 Maneesha Jindal, Index 350150/07
Plaintiff-Respondent,

-against-

Sanjay Jindal,
Defendant-Appellant.

Ira E. Garr, New York, for appellant.

Cohen & Prizer, Carle Place (Linda A. Prizer of counsel), for respondent.

Order, Supreme Court, New York County (Rosalyn Richter, J.), entered December 28, 2007, which, to the extent appealed from, denied defendant's cross motion for summary judgment dismissing the complaint on the ground that the durational residency requirement of Domestic Relations Law § 230 has not been satisfied and on the ground of forum non conveniens, unanimously affirmed, without costs.

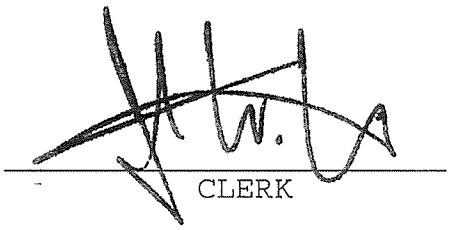
The durational residency requirement set forth in Domestic Relations Law § 230(5) is satisfied by evidence that for two years prior to commencement of the action, plaintiff, although spending a portion of the statutorily relevant period in India, maintained a permanent residence in New York and returned there with regularity (*see Weslock v Weslock*, 280 AD2d 278 [2001], *lv dismissed* 96 NY2d 824 [2001]; *Wildenstein v Wildenstein*, 249 AD2d 12 [1998]; *Davis v Davis*, 144 AD2d 621 [1988]). We also note that there is support in the record for the conclusion that

plaintiff returned to India in order to accompany defendant in dealing with matters involving his family.

Defendant's request to dismiss the action on the basis of forum non conveniens was also properly denied since the matter has a substantial nexus with New York and defendant failed to demonstrate that India would be the preferable forum (*see Wittich v Wittich*, 210 AD2d 138, 139 [1994]).

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

ENTERED: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4075 The People of the State of New York, Ind. 3468/06
Respondent,

-against-

Tyrell Baum,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Weil, Gotshal & Manges LLP, New York (David R. Singh of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene R. Silverman, J.), rendered December 5, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 6 years, unanimously affirmed.

After sufficient inquiry, the court properly discharged a sworn juror after she stated that she lived in the neighborhood where the crime and defendant's arrest occurred, and that she was worried that the possibility of encountering defendant would prevent her from rendering a fair verdict. Although the juror's responses were contradictory, the totality of her statements coupled with the court's evaluation of her worried demeanor, as specifically described by the court on the record, established

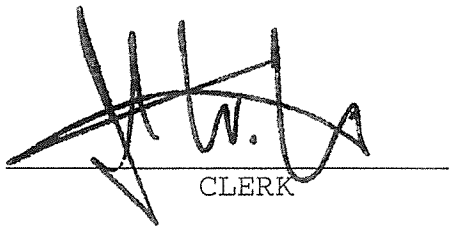
that she was grossly unqualified (*see People v Wilson*, 295 AD2d 272 [2002], *lv denied* 98 NY2d 714 [2002]; *People v Carrasco*, 262 AD2d 50 [1999], *lv denied* 93 NY2d 1015 [1999]). Defendant's procedural claims concerning the trial court's resolution of this issue are without merit (*see People v Buford*, 69 NY2d 290, 298-290 [1987]).

The challenged portions of the prosecutor's summation do not warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The prosecutor did not improperly vouch for the credibility of the police witnesses. Rather, the prosecutor's remarks were a proper response to defense counsel's credibility arguments (*see People v Sims*, 162 AD2d 384, 385 [1990], *lv denied* 76 NY2d 990 [1990]). However, the prosecutor improperly denigrated the integrity of defense counsel by stating that counsel was "speaking out of both sides of her mouth" during summation (*see People v LaPorte*, 306 AD2d 93, 95 [2003]). The prosecutor also improperly shifted the burden of proof to defendant by stating on two occasions that defense counsel "needed" the jury to believe that the People's witnesses were lying, thereby implying "that the jury was entitled to acquit only if it disbelieved the evidence actually presented" (*People v Levy*, 202 AD2d 242, 245 [1994]). Nevertheless, these improper remarks were isolated, and any error

was harmless in light of the overwhelming evidence of defendant's guilt, which included the recovery of buy money from his person.

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

ENTERED: SEPTEMBER 18, 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 September 18, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
David B. Saxe
David Friedman
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 5935/06
Respondent,

-against- 4076

Xavier Llop,
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 (Micki A. Scherer, J.), rendered on or about March 14, 2007,

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

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

ENTER:

Clerk.

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

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4079 In re Billy R.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Ann E. Scherzer of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about July 23, 2007, which adjudicated appellant a juvenile delinquent, upon her admission that she committed an act which, if committed by an adult, would have constituted the crime of criminal possession of a controlled substance in the fifth degree, and placed her with the Office of Children and Family Services for a period of 18 months, unanimously affirmed, without costs.

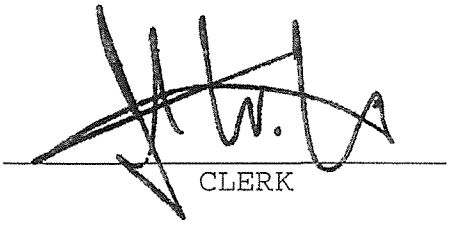
Appellant abandoned that portion of her suppression motion that sought a *Mapp/Dunaway* hearing when she failed to call the court's attention to the fact that this aspect of the motion remained unresolved (*see People v Berry*, 15 AD3d 233 [2005], *lv denied* 4 NY3d 883 [2005]). The court never denied this branch of the motion; rather, it made other rulings regarding the search warrant, whereupon appellant entered an admission without asking

the court to rule on the outstanding branch of the motion. In this situation, the court's failure to make a ruling is not deemed a denial (*see e.g. People v Brimage*, 214 AD2d 454 [1995], *lv denied* 86 NY2d 732 [1995]).

The court properly denied the branch of the suppression seeking a hearing pursuant to *People v Darden* (34 NY2d 177 [1974]), since probable cause could be established through the observations made by a detective, without resort to information received from a confidential informant (*see People v Edwards*, 95 NY2d 486, 493 [2000]).

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

ENTERED: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4080-
4081 The People of the State of New York, Ind. 3857/05
Respondent,

-against-

Curtis Hill,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Renee A. White, J. at initial suppression motion and denial of application to reopen suppression hearing; Roger S. Hayes, J. at hearing; Arlene R. Silverman, J. at plea and sentence), rendered February 8, 2006, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, and order, same court (Arlene R. Silverman, J.), entered on or about February 7, 2008, which denied his CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. The police lawfully arrested defendant based on probable cause to believe he had just sold a large quantity of drugs, and all the evidence at issue in this case was obtained as incident

to that lawful arrest. One of the elements of probable cause was defendant's statement that he was carrying $4000, a sum that corresponded to the amount involved in the suspected transaction. We find nothing unlawful about the manner in which the police obtained defendant's statement about the $4000. During a lawful car stop, a chain of suspicious conduct and circumstances involving defendant and the other occupants provided the police with, at least, a founded suspicion of criminality that permitted them to ask defendant about the bulges in his clothing, and, upon receiving a reply that the bulges were money, to ask how much. While the police also frisked defendant before he stated how much money he was carrying, that frisk was justified because the attendant circumstances provided reasonable suspicion that defendant was carrying a weapon (*see People v Mims*, 32 AD3d 800 [2006]). In any event, regardless of the legality of the frisk, we conclude that defendant's reference to $4000 was not the product of such frisk.

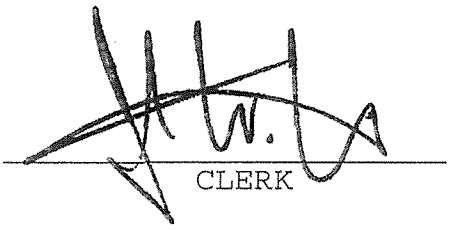
Defendant's initial suppression motion did not encompass certain drugs recovered from his person following his arrest. During the hearing, defense counsel sought to expand the hearing to include those drugs, and the hearing court referred the matter to the initial motion court, which denied the application. Since we conclude defendant's arrest was lawful, we likewise conclude the police lawfully recovered drugs from defendant's person.

Therefore, defendant was not prejudiced by his attorney's decision not to include those drugs in the initial motion, which was based on defendant's statement to counsel that he did not possess those drugs. Furthermore, by the time of the application in question, the hearing court had already made a correct determination as to probable cause, and a reopened hearing would have served no useful purpose.

The court properly exercised its discretion in denying defendant's CPL 440.10 motion without a hearing (*see People v Satterfield*, 66 NY2d 796, 799-800 [1985]). To the extent that defendant is raising other claims of ineffective assistance of counsel, we find them without merit.

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

ENTERED: SEPTEMBER 18, 2008



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Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4082-
4082A The People of the State of New York, Ind. 54525C/05
Respondent, 1970/03

-against-

Praboodiya Autar,
Defendant-Appellant.

Campos & Wojszwilo, New York (Richard Wojszwilo of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bryan C. Hughes of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered September 25, 2007, convicting defendant, after a jury trial, of two counts of operating a motor vehicle while under the influence of alcohol, and sentencing him to concurrent terms of 2⅓ to 7 years, and judgment of resentence, same court (Joseph Fisch, J.), rendered October 3, 2007, convicting defendant, upon his plea of guilty, of violation of probation, revoking his prior sentence of probation and resentencing him to a consecutive term of 1⅓ to 4 years, unanimously affirmed.

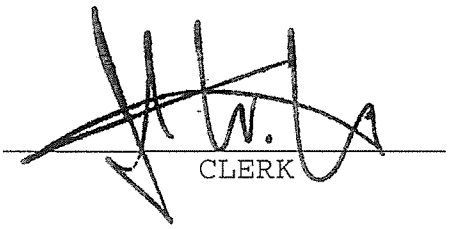
By failing to object, by objecting on a different ground than the one raised on appeal, or by failing to request any further relief after his objections were sustained, defendant failed to preserve any of his present challenges to the prosecutor's opening statement and summation, and we decline to review them in the interest of justice. As an alternative

holding, we also reject them on the merits (*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]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 18, 2008



Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4084 In re Go West Entertainment, Inc., Index 103482/08
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

Mehler & Buscemi, New York (Martin P. Mehler of counsel), and Greenberg Traurig, LLP, New York (Israel Rubin of counsel), for petitioner.

Thomas J. Donohue, New York (Donald T. Martin of counsel), for respondent.

Determination by respondent, dated March 5, 2008, which revoked petitioner's liquor license, directed forfeiture of its $1000 bond and imposed a $20,000 civil penalty, unanimously confirmed, the petition denied and this proceeding (transferred to this Court by order of Supreme Court, New York County [Walter B. Tolub, J.], entered on or about March 11, 2008), dismissed, without costs.

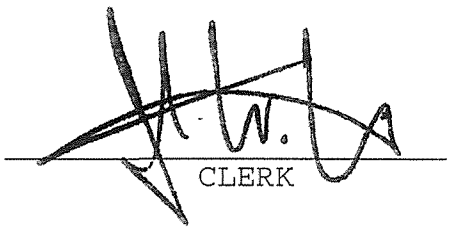
The administrative determination sustaining the charge of suffering or permitting the premises to become disorderly, in violation of Alcoholic Beverage Control Law § 106(6) and the Rules of the State Liquor Authority (9 NYCRR) § 48.2, was supported by substantial evidence. There is ample evidence in the record that petitioner's management was aware, or should have been aware, of prostitution occurring on the premises. The

penalty is not excessive (*see Matter of La Maison De Sade v New York State Liq. Auth.*, 276 AD2d 415 [2000]; *Matter of X.S.P.O., Inc. v New York State Liq. Auth.*, 240 AD2d 182 [1997]).

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

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

ENTERED: SEPTEMBER 18, 2008



Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4085 The People of the State of New York, Ind. 4284/04
Respondent,

-against-

Juan Familia,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered on or about April 17, 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.

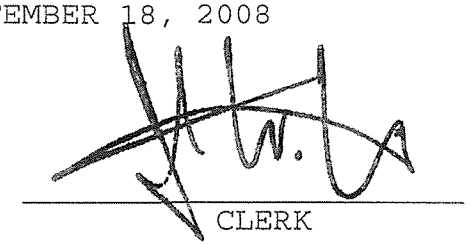
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4086-
4086A Gary V. Mattis, et al., Index 26831/02
Plaintiffs-Appellants,

-against-

Keen, Zhao, et al.,
Defendants,

Michael Palmeri, M.D., et al.,
Defendants-Respondents.

Bruce G. Clark & Associates, P.C., Port Washington (Diane C. Cooper of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Lori Semlies of counsel), for respondents.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 10, 2008, which, insofar as appealable and appealed from, denied sub silentio plaintiffs' motion to renew an order, same court and Justice, entered on or about October 18, 2007, inter alia, granting the motion of defendants Ginsberg and Sound Shore Medical Center of Westchester (Sound Shore) for summary judgment dismissing the complaint as against them, unanimously reversed, on the law and the facts, without costs, the motion to renew granted, and upon renewal, Ginsberg's and Sound Shore's motion for summary judgment denied and the complaint reinstated as against them. Appeal from the October 18, 2007 order unanimously dismissed, without costs, as academic in view of the foregoing.

Plaintiff Gary Mattis injured his left shoulder in a motor vehicle accident. Surgery was performed at Sound Shore with anesthesia being administered by Ginsberg, who was not an employee of Sound Shore. The surgery was successful and plaintiff initially awoke from the anesthesia and was responsive in the operating room. However, by the time he arrived at the recovery room or shortly thereafter, he was unresponsive, had an elevated heart rate, was hyperventilating, and began seizing.

The initial motion for summary judgment dismissing the complaint as against, inter alia, Ginsberg and Sound Shore was properly granted. Defendants met their initial burden of establishing that they did not deviate from accepted medical practice in the treatment of plaintiff, or that they in any way proximately caused his injuries (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Plaintiffs' opposition to the motion failed to raise a triable issue inasmuch as the affirmation from their medical expert was unaffirmed, unsigned and redacted the name of the expert. Although CPLR 3101(d)(1)(i) permits a party to omit the names of medical experts in an action for medical malpractice (*see e.g. Vega v Mount Sinai-NYU Med. Ctr. & Health Sys.*, 13 AD3d 62, 63 [2004]), plaintiffs failed to explain why the affirmation was unsigned and redacted and did not provide the court with an unredacted version of the affirmation "to ensure

that the purported expert in fact exist[s]" (*Kruck v St. John's Episcopal Hosp.*, 228 AD2d 565, 566 [1996]).

However, the motion court's sub silentio denial of the motion to renew was error. Plaintiffs set forth additional facts supporting a theory of liability for medical malpractice under the doctrine of res ipsa loquitur. Plaintiffs submitted a revised affirmation from their medical expert explaining in greater detail the expert's basis for concluding that Ginsberg departed from good and accepted medical practice and how this departure resulted in the brain damage suffered by plaintiff. Plaintiffs also submitted an affirmation from their attorney explaining the reason why the identity of the expert was redacted and offering to provide the court with an unredacted version for in camera review. Counsel further stated that the initial failure to provide the court with an explanation as to why the expert's affirmation was unsigned and redacted was inadvertent and attributable to the fact that counsel took over the case from plaintiffs' prior attorney after defendants had moved for summary judgment.

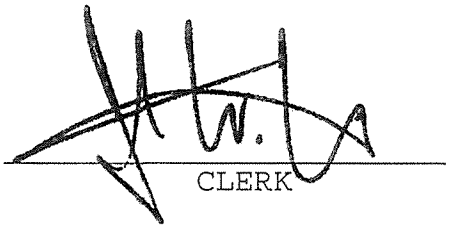
Although motions to renew should be based on newly discovered facts that could not have been offered on the prior motion, courts have discretion to relax this requirement and grant the motion in the interest of justice (*see Mejia v Nanni*, 307 AD2d 870, 871 [2003]). Because plaintiffs' attorney

affirmation properly explains why their medical expert's affirmation was unsigned and redacted, it is admissible pursuant to CPLR 3101(d)(1)(i) (*see Thomas v Alleyne*, 302 AD2d 36, 38 [2002]). Moreover, the evidence raises triable issues of fact as to all elements of res ipsa loquitur. Plaintiffs' medical expert explained that the deprivation of oxygen to plaintiff's brain is an event that would not ordinarily occur unless there was negligence on the part of the anesthesiologist; plaintiff was under Ginsberg's and other Sound Shore personnel's exclusive control before, during and after the surgery; and there is no evidence that plaintiff, having just come out of surgery and still emerging from the anesthesia, did anything to contribute to his condition (*see States v Lourdes Hosp.*, 100 NY2d 208, 211 [2003]).

We have considered the remaining contentions of Ginsberg and Sound Shore and find them unavailing.

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

ENTERED: SEPTEMBER 18, 2008



CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4087 The People of the State of New York, Ind. 49467C/05
Respondent,

-against-

David Saunders,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Frances Y. Wang of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered April 17, 2007, convicting defendant, after a jury trial, of murder in the second degree, manslaughter in the second degree and criminal possession of a weapon in the second degree, and sentencing him, respectively, to consecutive terms of 25 years to life and 5 to 15 years, concurrent with a term of 15 years on the weapon conviction, unanimously affirmed.

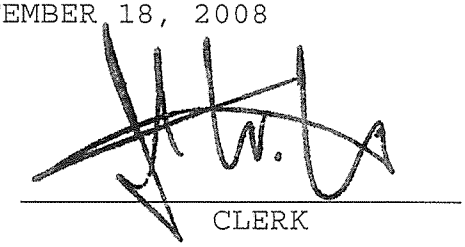
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Rayam*, 94 NY2d 557 [2000]). The evidence supports the conclusion that defendant acted intentionally as to one victim but

recklessly as to the other.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 18, 2008



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Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4088 The People of the State of New York, Respondent,

-against-

Cesar Alvarez, Defendant-Appellant.

Ind. 2463/03

Alan Katz, Garden City, for appellant.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 21, 2004, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

Since the court's reference to numerical majorities did not result in a constitutionally deficient jury instruction, counsel's failure to object to that reference did not deprive defendant of effective assistance. Although the court employed language that we disapproved in *People v Johnson* (11 AD3d 224 [2004]), it did so only in the context of the requirement of a unanimous verdict. The jury could not have been misled as to the People's burden, which the court consistently defined as beyond a reasonable doubt (*see People v Henderson*, 50 AD3d 525 [2008]; *People v Gortspujuls*, 44 AD3d 368 [2007], *lv denied* 9 NY3d 1006 [2007]).

The court's adverse inference charge concerning the

prosecution's loss or destruction of certain notes of a witness interview was sufficient to prevent any prejudice to defendant (*see People v Martinez*, 71 NY2d 937, 940 [1988]), and the court properly exercised its discretion in declining to include the additional language requested by defendant.

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 18, 2008

CLERK

Mazzarelli, J.P., Andrias, Saxe, Friedman, Acosta, JJ.

4089N Robert E. Kodsi, Index 109620/07
Plaintiff-Appellant,

-against-

Steven T. Gee, et al.,
Defendants-Respondents.

Law Offices of Sanford F. Young, P.C., New York (Sanford F. Young of counsel), for appellant.

Kaufman & Kahn, LLP, New York (Robert Kahn of counsel), for respondents.

Order, Supreme Court, New York County (Carol Edmead, J.), entered May 1, 2008, which, to the extent appealed from, denied plaintiff's cross motion for an order protecting the confidentiality of certain documents and granted defendants' motion directing their unprotected production, unanimously modified, on the law, the motion denied and the cross motion granted with respect to plaintiff's tax returns, as indicated herein, and otherwise affirmed, without costs.

Domestic Relations Law § 235(1) mandates that all papers filed in a matrimonial matter be designated as confidential. That did not require the court, in this legal malpractice action, to issue an order protecting from outside disclosure all documents requested by defendants that were submitted in connection with the underlying divorce action. The instant malpractice action alleges that defendants failed to secure an

uncontested divorce, causing plaintiff to sustain substantial economic damages. The shield afforded by § 235 must, in this instance, give way to the disclosure of relevant evidence needed for the defense against such claims, including records filed in the divorce proceeding that may provide evidence to rebut plaintiff's contentions of liability and the extent of his financial loss (*see Janecka v Casey*, 121 AD2d 28 [1986]).

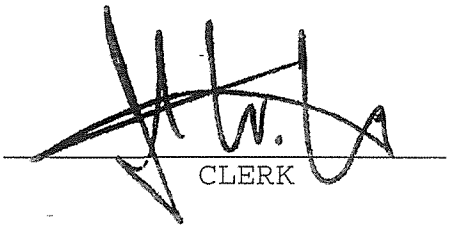
The court did abuse its discretion, however, to the extent it denied an order to protect the confidentiality of plaintiff's tax returns -- specifically, his federal and state returns and W-2 statements for the years 2002-2007. Given the policy disfavoring disclosure of tax returns (*see Williams v New York City Hous. Auth.*, 22 AD3d 315 [2005]), plaintiff's cross motion should have been granted (*see e.g. Foley v Kaplan*, 162 AD2d 155 [1990]).

The court is directed to issue an order adopting the language of plaintiff's proposed order, providing that plaintiff's tax returns alone shall be designated as "confidential" documents protected from disclosure, discussion or use by anyone except counsel for the named parties, consultants, experts or investigators retained to assist in the preparation and presentation of the claims or defenses, any person who prepared each particular document or to whom copies were addressed or delivered, court personnel, and disciplinary

committees. The order should further require that before disclosing the tax returns to others, defendants must first provide plaintiff with the name, address and occupation of each proposed recipient, and if plaintiff objects and the parties are unable to resolve the dispute, defendants must seek a ruling from the court.

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

ENTERED: SEPTEMBER 18, 2008



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Milton L. Williams
John W. Sweeny, Jr.
James M. Catterson
Karla Moskowitz, JJ.

2813
Index 105989/04

x

In re New York State Rifle
and Pistol Association, Inc.,
Petitioner-Respondent,

-against-

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

x

Respondents appeal from a judgment of the Supreme Court, New York County (Doris Ling-Cohan, J.), entered November 6, 2006, directing them to furnish digital identification, at petitioner's expense, of all current pistol licensees in New York City.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams, Kristin M. Helmers and Leonard Koerner of counsel), for appellants.

McMahon, Martine & Gallagher, LLP, New York (Patrick W. Brophy of counsel), for respondent.

CATTERSON, J.

In this article 78 proceeding, we reverse a judgment that granted the petitioner's request for a list, in digital format, of the names and addresses of all pistol licensees in the City of New York, redacted to delete current and former police, corrections officers and government employees as provided in Public Officers Law (POL) § 89(7). We find that the respondent Commissioner is exempt from having to comply with the petitioner's Freedom of Information Law (FOIL) request because respondent met its burden of providing specific proof of the petitioner's intent to use the requested material for the impermissible purposes of fund-raising and/or commercial gain. [1]

On July 12, 2002, the petitioner made a FOIL request, seeking, in digital format, a list of the names and addresses of all pistol licensees in the City of New York. The respondent agreed to supply physical documents, provided the petitioner paid for the copying. The petitioner agreed, but renewed its request

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[1]We take judicial notice that, effective August 6, 2008, section 89(2)(b)(iii) is amended to delete the prohibition against releasing such lists for "commercial" purposes, and in order to facilitate the enforcement of its remaining protections, a new sentence is added to section 89(3)(a) requiring anyone requesting names and addresses to provide written certification that such person will not use such lists for solicitation or fund-raising purposes. This requirement was not in effect when petitioner made the request at issue here.

for the information in digital format, if available. The respondent then provided the petitioner with documents that included the name and borough of residence of pistol licensees, but not the street address. The petitioner accepted the documents without challenge or appeal.

One year later, on July 12, 2003, the petitioner made another request for the names and addresses of pistol licensees, in digital format. On August 6, 2003, the respondent denied this request, stating that it does not index the information in digital format and advised the petitioner of its right to appeal.

On September 5, 2003, the petitioner filed its appeal with the Records Access Appeals Officer. The petitioner argued that the respondent did indeed have the requested information in digital format and provided evidence from an "anonymous informant," which it claimed showed the digital/computer capabilities of the Department.

On December 17, 2003, the respondent's Records Access Appeals Officer denied the petitioner's request stating that: (1) it was duplicative of a prior request; (2) disclosure of the material would create an unwarranted invasion of personal privacy pursuant to Public Officers law §87(2)(b) and §89(2)(b); and (3) the information did not exist in digital format.

On April 15, 2004, the petitioner commenced the instant article 78 proceeding. The petitioner articulated its rationale for the request as a desire to communicate with pistol licensees in the City in order to disseminate information, and rally opposition to the City Council's efforts to enact gun control legislation.

In a decision and judgment, dated October 16, 2006, the court granted the petition and directed the respondent to provide, in digital form, the names and home addresses of current pistol license holders, redacted to delete current and former police and corrections officers and government employees who are exempt from disclosure under POL § 89(7).

For the reasons set forth below, this Court reverses. Section 89(2)(b)(iii) of the Public Officers Law provides in pertinent part that a FOIL request may be denied upon an agency's showing there would be an unwarranted invasion of privacy stemming from, inter alia, the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes". See FN 1, supra. The burden at all times rests with the agency to justify any denial of access to requested records. See Matter of Data Tree, LLC v. Romaine, 9 N.Y.3d 454, 462, 849 N.Y.S.2d 489, 494, 880 N.E.2d 10, 15 (2007). If a FOIL request is denied, the agency "must show that the

requested information 'falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.'" Id. at 462-463, 849 N.Y.S.2d at 494, quoting Capital Newspapers Div. Of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566, 505 N.Y.S.2d 576, 578, 496 N.E.2d 665, 667 (1986).

Here, the Police Commissioner persuasively argues that even absent formal discovery in this administrative proceeding, it may be readily inferred from the available record that the petitioner intends to use the Police Commissioner's digital file of names and addresses of pistol licensees for fund-raising purposes. The petitioner is an organization comprised of dues-paying members, whose purpose is to unite those who are interested in advocating, inter alia, their constitutional right to bear arms, and by numbers alone to form an influential body. Regardless of one's views on the substantive constitutional issues or the role of firearms in our collective cultural consciousness, the petitioner has acknowledged that a primary self-sustaining function of its organization is to "raise money for its operations."

While FOIL does not require a party requesting information to show any particular need or purpose for records which are demanded, a petitioner's motive or purpose in seeking the records becomes relevant if the petitioner's intended use of the requested material would run afoul of the FOIL exemptions

outlined in Public Officers Law § 89(b)(2). See FN 1, supra; see also Matter of Data Tree, LLC v Romaine, 9 N.Y.3d at 463, 849 N.Y.S.2d at 494-495.

At minimum, given the nature and format of the information sought and the petitioner's organizational purpose, a reasonable inference can be drawn that the petitioner sought a copy of the digital list to both advertise, and build its not-for-profit organization by soliciting new members. The petitioner's assertion that its FOIL request was "chiefly motivated" by a desire to communicate with pistol licensees about important issues is not inconsistent with the petitioner's underlying purpose of increasing its membership. The petitioner's organization depends upon the support of dues-paying members to disseminate its message. Without the financing from dues, the petitioner would lack the financial wherewithal to fulfill its purpose.

Direct-mail membership solicitation by a not-for-profit organization consisting of rifle and shotgun permitees has been determined, in similar circumstances, to constitute fund-raising within the meaning of Public Officers Law § 89(2)(b)(iii). See

e.g., Matter of Federation of N.Y. Rifle & Pistol Clubs v. New York City Police Department, 73 N.Y.2d 92, 538 N.Y.S.2d 226, 535 N.E.2d 279 (1989). The fact that here, unlike Matter of Federation of N.Y. Rifle & Pistol Clubs, the petitioner has not expressly stated its intent to use the sought-after list to solicit members is immaterial, as the petitioner here inexplicably withheld comment on such alleged intended use.

Thus, the Police Commissioner met his burden of articulating a particular and specific justification for denying the petitioner's FOIL request (i.e., petitioner's likely use of the digital list of names and addresses for fund-raising purposes). Notably, the petitioner offered no direct response to this assertion in the proceedings below, which might raise a factual issue as to intent. On this record, then, it is reasonable for the Police Commissioner to infer that the petitioner intends to use the names and addresses on the digital list for fund-raising purposes. See e.g., Matter of Seigel, Fenchel & Peddy v. Central Pine Barrens Joint Planning & Policy Commn., 251 A.D.2d 670, 671-672, 676 N.Y.S.2d 191, 193-194 (1998), lv. denied, 93 N.Y.2d 804, 689 N.Y.S.2d 429 (1999).

To the extent the petitioner argues that, unlike in Federation of N.Y. Rifle & Pistol Clubs, the invasion of privacy exemption does not apply here as the data requested was already a

matter of public record as per Penal Law § 400.00(5) (citing Matter of Kwitny v. McGuire, 53 N.Y.2d 968, 441 N.Y.S.2d 659, 424 N.E.2d 546 [1981]), that assertion is misplaced. The invasion of privacy argument here is not founded upon a claim of unauthorized public disclosure of the licensees' names and addresses, but upon the invasive use of the digital list to solicit the licensees for fund-raising purposes. In applying for their pistol licenses, the licensees may have agreed to the public disclosure of certain personal information, but there is no evidence that they agreed to a general waiver of privacy rights, such as might subject them to fund-raising solicitation by a private organization.

If the petitioner seeks the names and addresses of the licensees, it may visit the agency, review submitted license applications, and copy what information it deems pertinent for its fund-raising purposes. It may not compel the agency to assist it with its fund-raising objectives by requesting the agency's digital list of licensees' names and addresses.

The Court's holding in Kwitny is distinguishable from the instant application as there was no issue of solicitation for fund-raising purposes. Moreover, here, a denial of the petitioner's FOIL request does not result in the withholding of official information helpful to the public in making intelligent, informed choices with respect to both the direction and scope of

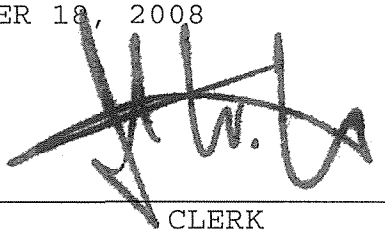
governmental activities. See generally, Public Officers Law § 84; Matter of Federation of N.Y. Rifle & Pistol Clubs, 73 N.Y.2d at 97, 538 N.Y.S.2d at 228-229.

Accordingly, the judgment of the Supreme Court, New York County (Doris Ling-Cohan, J.), entered November 6, 2006, directing respondents to furnish digital identification, at petitioner's expense, of all current pistol licensees in New York City should be reversed, on the law, without costs, the petition denied and the proceeding dismissed.

All concur.

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

ENTERED: SEPTEMBER 18, 2008



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