



SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 2, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

970

CAE 09-01640

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, GREEN, AND PINE, JJ.

IN THE MATTER OF ANTHONY PELUSO, ELAINE PELUSO,
ERNESTO LEONETTI AND ANTHONY J. MIGNARELLI,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ERIE COUNTY INDEPENDENCE PARTY, SANDRA J. ROSENWIE, INDIVIDUALLY AND AS ALLEGED CHAIR OF EACH OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE AND EXECUTIVE COMMITTEE OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE, ROBERT C. VACANTI, INDIVIDUALLY AND AS ALLEGED SECRETARY OF EACH OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE AND EXECUTIVE COMMITTEE OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE, C.W. STEWART, INDIVIDUALLY AND AS ALLEGED TREASURER OF EACH OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE AND EXECUTIVE COMMITTEE OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE, RICKY T. DONOVAN, SR., TAMMY L. MARINO, JOHN E. KENNEDY, JR., JOHN L. RYAN, KYLE S. BICKNELL, JOHNATHAN A. LAVELL, FORD J. BECKWITH, MARIANNE LAPORTA, DOLORES L. LIVSEY AND MICHAEL J. ABRAMAO, INDIVIDUALS NAMED ON A CERTIFICATE OF OFFICERS OF ERIE COUNTY INDEPENDENCE PARTY, INDIVIDUALLY AND AS ALLEGED OFFICERS OF ERIE COUNTY INDEPENDENCE PARTY COMMITTEE, RESPONDENTS-APPELLANTS, NEW YORK STATE COMMITTEE OF THE INDEPENDENCE PARTY, FRANK MACKAY, CHAIRMAN, AND WILLIAM BOGARDT, SECRETARY, RESPONDENTS-PETITIONERS-RESPONDENTS, ET AL., RESPONDENTS.

CANTOR, LUKASIK, DOLCE & PANEPINTO, BUFFALO (SEAN E. COONEY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JOHN CIAMPOLI, ALBANY, FOR RESPONDENT-PETITIONER-RESPONDENT NEW YORK STATE COMMITTEE OF THE INDEPENDENCE PARTY.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered July 1, 2009 in a proceeding pursuant to, inter alia, CPLR article 78. The judgment, inter alia, granted the petitions in part and issued an injunction, and the judgment having been reversed by order of this Court entered August 19, 2009 in a memorandum decision (___ AD3d ___), and petitioners and respondents-petitioners on August 25, 2009, having been granted leave to appeal to the Court of Appeals from the order of

this Court (___ NY3d ___), and the Court of Appeals on August 26, 2009 having reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court (___ NY3d ___),

Now, upon remittitur from the Court of Appeals and having considered issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously modified on the law by vacating the injunction, converting the proceeding insofar as it seeks relief pursuant to CPLR article 78 to an action seeking a declaratory judgment and granting judgment in favor of petitioners and respondents-petitioners as follows:

It is ADJUDGED AND DECLARED that, to the extent that the rules of respondent Erie County Committee of the Independence Party promulgated on December 22, 2008 conflict with the rules of respondent-petitioner New York State Committee of the Independence Party as they relate to the nomination and authorization of candidates, they are invalid,

and as modified the judgment is affirmed without costs.

Memorandum: Respondents-appellants (respondents) appeal from a judgment granting the injunctive relief sought by petitioners, i.e., enjoining respondent Erie County Committee of the Independence Party (County Committee) and any other interested respondent from issuing authorizations or nominations that would be in contravention of the rules of respondent-petitioner New York State Committee of the Independence Party (State Committee). As we previously determined, Supreme Court erred in granting an injunction (*see generally Matter of Master v Pohanka*, 44 AD3d 1050, 1053-1054), and we therefore modify the judgment accordingly. In addition, we declined to grant a declaration on the ground that such relief "would be in the nature of an advisory opinion" (*Matter of Peluso v Erie County Independence Party*, ___ AD3d ___, ___ [Aug. 19, 2009]). The Court of Appeals thereafter determined that "[a] declaratory judgment action is an appropriate vehicle to establish and promulgate the rights of the parties on a particular subject matter, including determining the parties' rights under state and local party rules" (*Matter of Peluso v Erie County Independence Party*, ___ NY3d ___ [Aug. 26, 2009]). The Court thus reversed our order and remitted the matter to this Court "for consideration of issues raised but not determined on the appeal" (*id.* at ___). In our prior decision, we noted that certain of respondents' remaining contentions were unpreserved for our review and that all were lacking in merit. Thus, the sole remaining issue before us is the propriety of the declaratory relief sought by petitioners.

Inasmuch as the Court of Appeals stated that a declaratory judgment action is a proper vehicle for "determining the parties'

rights" (*id.* at ___), we conclude that we must convert this proceeding insofar as it seeks relief pursuant to CPLR article 78 to an action seeking a declaratory judgment (see CPLR 103 [c]; see also *Matter of Tupper v City of Syracuse*, 46 AD3d 1343). We therefore further modify the judgment accordingly. We agree with petitioners that the State Committee had the authority pursuant to Election Law § 6-120 (3) to vest its Executive Committee with the authority to issue authorizations in Erie County, thereby stripping the County Committee of that authority (see *Matter of Master v Pohanka*, 10 NY3d 620, 625-626). We further agree with petitioners that there is a conflict between the rules of the County Committee and those of the State Committee, and that the rules of the State Committee, along with the State Committee's resolution of September 21, 2008, vest the State Committee's Executive Committee with exclusive power to act with respect to issuance of authorizations in Erie County (see Rules of NY State Comm of Independence Party, article VI, § 11 [b]; § 12; see also Election Law § 6-120 [3]). To the extent that the rules of the County Committee conflict with the rules of the State Committee as they relate to the nomination and authorization of candidates, we further modify the judgment by granting judgment in favor of petitioners declaring the rules of the County Committee invalid.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

976

TP 09-00344

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF RAMON VENTURA, PETITIONER,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, AND
MICHAEL CORCORAN, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENTS.

RAMON VENTURA, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF
COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered February 5, 2009) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

977

TP 09-00443

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF LUIS RIVERA, PETITIONER,

V

ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES, AND
NORMAN R. BEZIO, DIRECTOR, SPECIAL HOUSING/
INMATE DISCIPLINARY PROGRAMS OF WILLARD
DRUG TREATMENT FACILITY, RESPONDENTS.

LUIS RIVERA, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK K. WALSH OF COUNSEL),
FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered February 27, 2009) to review a determination of respondents. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (see *Matter of Free v Coombe*, 234 AD2d 996).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

978

KA 06-02486

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES WALKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 26, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). His sole contention on appeal is that County Court's *Sandoval* ruling constitutes an abuse of discretion. By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve that contention for our review (see *People v Miller*, 59 AD3d 1124, 1125, *lv denied* 12 NY3d 819; *People v Ponder*, 19 AD3d 1041, 1043, *lv denied* 5 NY3d 809; *People v O'Connor*, 19 AD3d 1154, 1154-1155, *lv denied* 5 NY3d 831). In any event, we conclude that defendant's contention lacks merit.

Contrary to defendant's contention, the record establishes that the court considered the relevant factors in making its ruling. Indeed, in permitting inquiry into defendant's history of theft-related offenses while precluding inquiry into defendant's prior drug-related charges, the court demonstrated its "sensitivity to the particular prejudice that may result when a jury is made aware of the fact that the defendant has previously committed crimes that are similar to the charged crime" (*People v Walker*, 83 NY2d 455, 459). Defendant's prior arrest for robbery and grand larceny, and defendant's conviction, upon a guilty plea, of attempted robbery in

satisfaction of those charges involve "acts of individual dishonesty" (*People v Sandoval*, 34 NY2d 371, 377), and such acts "are particularly relevant to the issue of credibility" (*People v Ellis*, 183 AD2d 534, 535, *affd* 81 NY2d 854; *Sandoval*, 34 NY2d at 376-377). Contrary to the further contention of defendant, the court did not err in permitting inquiry into the robbery and grand larceny charges, despite the fact that defendant's plea of guilty to attempted robbery was in satisfaction of those charges. "A dismissal in satisfaction of a plea is not an acquittal which would preclude a prosecutor from inquiring about the underlying acts of the crime[s] because it is not a dismissal on the merits" (*People v Rivera*, 101 AD2d 981, 982, *affd* 65 NY2d 661; see *People v Torra*, 309 AD2d 1074, 1076, *lv denied* 1 NY3d 581).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

979

KA 04-02915

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SHAHID MUHAMMAD, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Joseph S. Forma, J.), rendered May 24, 2004. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). Defendant was acquitted of, inter alia, criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and he contends that the verdict is repugnant insofar as he was found guilty of the charge of assault but acquitted of the charge of criminal possession of a weapon. We reject that contention. "As long as '[Supreme Court's] charge did not preclude the jury from concluding that defendant initially possessed the loaded pistol without intending to use it unlawfully against another, but decided to fire the gun at [the victim] as events unfolded,' a verdict finding defendant guilty of intentional assault but not guilty of possession with unlawful intent is not repugnant" (*People v Afrika*, 291 AD2d 880, 881, *lv denied* 98 NY2d 648). Contrary to the further contention of defendant, the court properly exercised its discretion in denying his request to present expert testimony on the reliability of eyewitness identification. The victim, the sole eyewitness who identified defendant, testified that he had known defendant for many years, "and there is no reason to believe that the jury required expert testimony in order to evaluate the identification testimony" (*People v Pacheco*, 38 AD3d 686, 688, *lv denied* 9 NY3d 849; *see People v Austin*, 38 AD3d 1246, 1247, *lv denied* 8 NY3d 981). Finally, viewing the evidence in light of the elements of the crime of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and according great deference to the jury's resolution of credibility issues, we conclude

that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

980

KA 07-01500

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LEON F. WRIGHT, III, DEFENDANT-APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalaty, J.), rendered May 15, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]). We reject the contention of defendant that his waiver of the right to appeal was invalid. "[T]he record establishes that County Court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863). Defendant further contends that the court abused its discretion in denying his motion to withdraw his plea because it was coerced and was not knowingly and intelligently entered. Although that contention survives defendant's valid waiver of the right to appeal, we conclude that it is without merit (*see id.*). Indeed, defendant's assertions of innocence and coercion were conclusory and belied by defendant's statements during the plea colloquy (*see People v Worthy*, 46 AD3d 1382, *lv denied* 10 NY3d 773; *People v Adams*, 45 AD3d 1346; *People v Polite*, 259 AD2d 566, 567, *lv denied* 93 NY2d 1025). The contention of defendant that the court erred in denying his motion to dismiss the indictment without conducting a Clayton hearing is forfeited by the plea and does not survive his valid waiver of the right to appeal (*see generally People v Cortes*, 44 AD3d 538, *lv denied* 9 NY3d 1032). The valid waiver by defendant of the right to appeal also encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256; *People v Hidalgo*, 91 NY2d 733, 737). The remaining contention of defendant that he was denied effective assistance of counsel does not survive the plea or the waiver by defendant of the right to appeal because defendant failed to

demonstrate that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance" (*People v Robinson*, 39 AD3d 1266, 1267, lv denied 9 NY3d 869 [internal quotation marks omitted]; see *People v Perillo*, 300 AD2d 1097, lv denied 99 NY2d 618).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

981

KA 08-00399

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HENRY STROHMAN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 1, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of incarceration of 10½ years plus a period of postrelease supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Strohman*, 46 AD3d 1373).

We reject defendant's contention that the proposed new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the proposed new sentence, taking into consideration the magnitude of the crime, defendant's prior criminal history, the advantageous terms of the original plea bargain and the fact that defendant had already obtained one reduction of his sentence for his postindictment cooperation with the police (*see generally People v Boatman*, 53 AD3d 1053; *People v Newton*, 48 AD3d 115, 119-120). We therefore conclude that the court properly exercised its discretion in determining the length of the proposed new sentence. We further reject defendant's contention that the proposed new sentence

was unauthorized as a matter of law. Even assuming, *arguendo*, that defendant's contention is properly raised on an appeal from a specifying order (see L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing parameters of Penal Law § 70.71 (3) (b) (ii).

The present contention of defendant that the court should have granted his motion for recusal because of the court's general bias against drug crimes, as evidenced in a codefendant's case, is not preserved for our review (see CPL 470.05 [2]). The only ground raised by defendant in support of his motion for recusal was that he had filed a complaint with the Judicial Conduct Commission against the court, thereby creating a conflict of interest akin to the mandatory grounds for recusal contained in Judiciary Law § 14. In any event, we reject defendant's contention. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406; see *People v Oehler*, 52 AD3d 955, 956-957, *lv denied* 11 NY3d 792). We perceive no abuse of discretion here. Defendant also failed to preserve for our review his contention that the court erred in denying his motion for recusal because the court's refusal to propose a new sentence lesser than the previously imposed minimum sentence evinced a bias against DLRA-2 and a determination to thwart the ameliorative effects of that legislation. In any event, we reject that contention as well.

We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

982

KA 07-01846

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMAR EXUM, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered August 16, 2006. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (eight counts) and robbery in the second degree (four counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of eight counts of robbery in the first degree (Penal Law § 160.15 [2], [4]) and four counts of robbery in the second degree (§ 160.10 [2] [b]), arising from the armed robbery of a restaurant and some of its occupants. Contrary to the contention of defendant, there was sufficient independent evidence to corroborate the testimony and statements of his alleged accomplices (see CPL 60.22 [1]; see generally *People v Besser*, 96 NY2d 136, 143-144). The People established by the testimony of a witness who was not an accomplice that, shortly before the robbery occurred, defendant was in the company of the two men who committed it. The People further corroborated the accomplice testimony that defendant had ordered and picked up food at the restaurant in order to "case" the restaurant by presenting the testimony of a restaurant employee establishing that a person using defendant's first name ordered and picked up food approximately 30 minutes before the robbery was committed. Further, the testimony of the victims established that the robbers were armed with a handgun and a shotgun, respectively, and that defendant and the two robbers were passengers in the getaway vehicle, which was pulled over by the police immediately following the robbery. In addition, a police officer who responded to the alarm at the restaurant testified that he observed that a sawed-off shotgun was hanging by a cord around the neck of one of the robbers as the robber was removed from the getaway vehicle. We thus conclude that the People presented the

requisite testimony that "tended to connect" defendant with the robbery (*Besser*, 96 NY2d at 141; *cf. People v Knightner*, 11 AD3d 1002, 1004, *lv denied* 4 NY3d 745). Defendant failed to preserve for our review his contention that the verdict is repugnant (*see People v Alfaro*, 66 NY2d 985, 987; *People v Winslow*, 57 AD3d 1464, *lv denied* 12 NY3d 789), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Winslow*, 57 AD3d 1464). The further contention of defendant that he was denied due process based on the People's alleged failure to disclose that one of the accomplices has a youthful offender adjudication involves information outside the record on appeal and must therefore be raised by way of a CPL article 440 motion (*see generally People v Barnes*, 56 AD3d 1171, 1171-1172). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

983

KA 06-01625

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

GERALD ZEINER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Elma A. Bellini, J.), rendered February 8, 2006. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

984

KA 07-02438

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DEMETRIUS MCCRAY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered November 7, 2007. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts) and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the first degree (Penal Law § 160.15 [1], [2]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). County Court properly exercised its discretion in precluding defendant from presenting expert testimony with respect to the reliability of eyewitness identifications. None of the eyewitnesses to the robbery identified defendant as the perpetrator at trial, and thus such expert testimony was not relevant to their testimony (*see generally People v LeGrand*, 8 NY3d 449, 452). Further, even if the eyewitnesses had identified defendant as the perpetrator at trial, we conclude that there is corroborating evidence of his guilt independent of their descriptions of the perpetrator (*see People v Chisolm*, 57 AD3d 223, 223-224, *lv denied* 12 NY3d 782).

Defendant failed to preserve for our review his contention that the court erred in combining the second and third steps of the *Batson* inquiry rather than separately reviewing their merits (*see People v Coleman*, 5 AD3d 1074, 1075, *lv denied* 3 NY3d 638), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Defendant also failed to preserve for our review his further contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the

elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

The court properly determined that a witness who testified with respect to inculpatory statements made by defendant to him while they were incarcerated was not acting as an agent of the government when the statements were made (see *People v Cardona*, 41 NY2d 333, 335; *People v Davis*, 38 AD3d 1170, 1171, lv denied 9 NY3d 842, cert denied ___ US ___, 128 S Ct 713). We reject defendant's further contention that the photo array shown to one of the eyewitnesses to the robbery was unduly suggestive (see generally *People v Chipp*, 75 NY2d 327, 335-336, cert denied 498 US 833). We note in any event that the eyewitness in question did not identify defendant as the perpetrator at trial (see generally *People v Bradley*, 48 AD3d 1145, lv denied 10 NY3d 860). Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct during summation (see *People v Douglas*, 60 AD3d 1377), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Contrary to defendant's further contention, neither defense counsel's failure to object to the alleged instances of prosecutorial misconduct nor any of defense counsel's other alleged shortcomings constituted ineffective assistance of counsel (see *People v Walker*, 50 AD3d 1452, 1453, lv denied 11 NY3d 795, 931). Rather, viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of representation, we conclude that defense counsel provided meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

985

CA 09-00254

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

CNP MECHANICAL, INC., PLAINTIFF-RESPONDENT,

V

ORDER

ALLIED BUILDERS, INC., HARTFORD FIRE INSURANCE
COMPANY, HARTFORD CASUALTY COMPANY AND HARTFORD
ACCIDENT AND INDEMNITY COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered September 10, 2008 in a breach of contract action. The order granted plaintiff's motion for partial summary judgment against defendant Allied Builders, Inc.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also CPLR 5501 [a] [1]*).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

986

CA 09-00255

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

CNP MECHANICAL, INC., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ALLIED BUILDERS, INC., HARTFORD FIRE INSURANCE
COMPANY, HARTFORD CASUALTY COMPANY AND HARTFORD
ACCIDENT AND INDEMNITY COMPANY,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (JAMES W. GRESENS OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

GATES & ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County
(Kenneth R. Fisher, J.), entered September 15, 2008 in a breach of
contract action. The judgment was entered upon the order in appeal
No. 1 and awarded plaintiff the sum of \$70,347.09 against defendant
Allied Builders, Inc.

It is hereby ORDERED that the judgment so appealed from is
unanimously reversed on the law without costs and the motion is
denied.

Memorandum: Plaintiff commenced this action seeking, inter alia,
\$429,332.46 in damages resulting from the alleged breach by defendant
Allied Builders, Inc., the general contractor, of its subcontract with
plaintiff. We agree with defendants that Supreme Court erred in
granting plaintiff's motion seeking partial summary judgment in the
amount of \$62,077.48. In support of its motion, plaintiff submitted a
"Subcontract Summary" (Summary) prepared by defendants' counsel, which
allegedly constituted an admission by defendants that plaintiff was
owed a minimum of \$62,077.48. In opposition to the motion, defendants
submitted evidence that the Summary was prepared for the purpose of
settlement negotiations and was therefore inadmissible as proof of the
amount of damages (see CPLR 4547). We conclude that the court erred
in determining that the Summary was admissible because it contained
readily verifiable facts with respect to the amount owed to plaintiff
pursuant to the subcontract and thus erred in granting plaintiff's
motion based on the Summary. Even assuming, arguendo, that the
Summary was admissible, we further conclude that plaintiff itself
raised an issue of fact with respect to the amount set forth in the

Summary by submitting documents in its reply papers, including its responses to defendants' interrogatories, that conflict with the individual amounts listed in the Summary (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

987

CA 08-00195

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

JOSEPH GENTILE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CAROL GENTILE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

PUSATIER, SHERMAN, ABBOTT & SUGARMAN, KENMORE (STEVEN R. SUGARMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 16, 2008 in a postjudgment divorce action. The order, inter alia, awarded defendant attorney's fees in connection with a prior appeal.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part awarding defendant attorney's fees in connection with the prior appeal and by providing that defendant is awarded the amount of \$20,138.06 for attorney's fees and expenses and as modified the order is affirmed without costs.

Memorandum: On a prior appeal, we concluded that one of the issues to be determined at a subsequent hearing to be conducted by Supreme Court was the amount of attorney's fees to be awarded to defendant in this postjudgment divorce action, based on " 'the extent and value of the services rendered' " (*Gentile v Gentile*, 31 AD3d 1158, 1159). We now agree with plaintiff on this appeal following the hearing that the court erred in awarding defendant attorney's fees in connection with the prior appeal inasmuch as the retainer agreement between defendant and her attorney specifically exempted attorney's fees incurred in connection with appellate services (see *Matter of Castellano v Ross*, 19 AD3d 1020, 1021). The record establishes that attorney's fees in connection with the prior appeal total \$3,860, and we therefore modify the order accordingly. We otherwise affirm the order for reasons stated in the decision at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

988

CA 08-02032

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

JOSEPH GENTILE, PLAINTIFF-APPELLANT,

V

ORDER

CAROL GENTILE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL W. RICKARD, II, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

PUSATIER, SHERMAN, ABBOTT & SUGARMAN, KENMORE (STEVEN R. SUGARMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 7, 2008 in a postjudgment divorce action. The order determined that plaintiff owed defendant maintenance arrears and interest totaling \$107,285 as of June 20, 2008, with per diem interest of \$26.45.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

989

CA 09-00485

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF THE APPLICATION OF
JOHN PELOSE AND TRACY PELOSE, ON BEHALF
OF BRIAN PELOSE, AN INFANT,
PETITIONERS-RESPONDENTS, FOR REVIEW OF
A DETERMINATION OF THE BISHOP GRIMES
JR./SR. HIGH SCHOOL, RESPONDENT-APPELLANT,
DISMISSING THE INFANT FROM ANY FUTURE
ATTENDANCE AT SAID HIGH SCHOOL RELATING
TO THE PROVISIONS OF EDUCATION SERVICES
TO A CHILD WITH A DISABILITY.

MEMORANDUM AND ORDER

HISCOCK & BARCLAY, LLP, SYRACUSE (JAMES P. EVANS OF COUNSEL), FOR
RESPONDENT-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered February 3, 2009 in a CPLR article 78 proceeding. The judgment, inter alia, granted the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the cross motion is granted and the petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking review of the determination to expel their son from respondent school. According to petitioners, respondent failed to undertake certain mandatory procedures related to the individualized education plan established for petitioners' son. Supreme Court granted the petition and vacated the expulsion. The court also denied respondent's cross motion seeking to dismiss the petition, based on respondent's failure to await a manifestation review prior to expelling petitioners' son (see 8 NYCRR 201.4; see also Education Law § 4402 [1] [b] [3] [j]; § 4404 [1] [a]). The court relied on Education Law § 3602-c and the decision of the Court of Appeals in *Board of Educ. of Monroe-Woodbury Cent. School Dist. v Wieder* (72 NY2d 174) in concluding that petitioners' son could not be expelled until such review was held. We now reverse, inasmuch as petitioners failed to exhaust their administrative remedies pursuant to the Education Law prior to seeking judicial review, and "the court has no discretionary power to reach this issue" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, appeal dismissed 81 NY2d 834; see generally *Matter of Semel v Ambach*, 118 AD2d 385, 388). Pursuant to Education Law § 4404 (1), petitioners were entitled to file a complaint and to have an impartial hearing officer review their complaint at a hearing. The

determination of the hearing officer would then be appealable to a "state review officer" (§ 4404 [2]). Only after those two administrative procedures were exhausted would petitioners be permitted to maintain a special proceeding in Supreme Court (§ 4404 [3] [a]).

Were we to reach the merits, we nevertheless would conclude that reversal is required. Education Law § 3602-c (2) (a) provides in relevant part that "[b]oards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent[s]" "[S]uch request[s] shall be reviewed by the committee on special education of the school district of location, which shall . . . assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis" (§ 3602-c [2] [b] [1]). Nothing in section 3602-c mandates that a nonpublic school such as respondent provide any services to students. Rather, that statute places the relevant mandates on the public school district in which the nonpublic school is located to provide services to students attending the nonpublic school (see § 3602-c [2] [a]; see also 20 USC § 1412 [a] [10]). The decision of the Court of Appeals in *Board of Educ. of Monroe-Woodbury Cent. School Dist.* supports that conclusion. In that case, the Court of Appeals addressed the issue of "where the [special] services [for disabled children] are to be offered--whether in the public schools, or in the religiously affiliated private schools" (*id.* at 178). The Court of Appeals held that Education Law § 3602-c "does not mandate that a [school] board can provide special services to private school [disabled] children only in regular classes and programs of the public schools, and not elsewhere" (*id.* at 183). It is implicit from the decision in *Board of Educ. of Monroe-Woodbury Cent. School Dist.* that such services are provided by public rather than nonpublic schools. Thus, the reliance by the court on Education Law § 3602-c and that case is misplaced.

Even assuming that the court instead intended to rely on article 89 of the Education Law, including section 4404, and the relevant provisions of the Individuals with Disabilities Education Act (IDEA) governing the appeal procedures for complaints concerning manifestation determinations (see § 4404 [1] [a]; 20 USC § 1415 [k] [3]), we conclude that such provisions apply to public school districts and not to respondent, a nonpublic school (see generally *St. Johnsburry Academy v D.H.*, 240 F3d 163, 171-172). Indeed, the central purpose of the IDEA (see 20 USC § 1400 [d] [1] [A]) and article 89 of the Education Law (see generally § 4401 [1]) is to afford a "public" education for children with disabilities. Thus, we conclude that respondent was not required either to undertake or to await the outcome of a manifestation review prior to expelling petitioners' son.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

992

CA 09-00459

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

STEPHEN DIMARCO, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

PATRICK J. BOMBARD, INDIVIDUALLY AND AS A MEMBER OF BOMBARD BUICK PONTIAC GMC TRUCK, LLC, BOMBARD CAR CO., INC., BOMBARD BUICK PONTIAC GMC TRUCK, LLC, AND BOMBARD PONTIAC OLDSMOBILE GMC TRUCK, LLC, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

STEPHEN DIMARCO, PLAINTIFF-APPELLANT,

V

PATRICK J. BOMBARD, INDIVIDUALLY AND AS A MEMBER OF 100 MAIN STREET, LLC, 100 MAIN STREET, LLC, BOMBARD CAR CO., INC., AND BOMBARD BUICK PONTIAC GMC TRUCK, LLC, DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

HISCOCK & BARCLAY, LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COTE, LIMPert & VANDYKE, LLP, SYRACUSE (THEODORE H. LIMPert OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundulo, A.J.), entered May 16, 2008. The order, *inter alia*, granted the motion of defendants seeking, *inter alia*, to vacate a settlement agreement.

It is hereby ORDERED that said appeal from the order insofar as it concerned the settlement agreement is unanimously dismissed and the order is otherwise affirmed with costs.

Memorandum: Supreme Court properly granted that part of defendants' motion seeking an order correcting the Referee's final report, inasmuch as the Referee acknowledged that his final report contained an error. We are unable to review plaintiff's further contention that the court erred in granting that part of defendants' motion seeking to vacate the parties' settlement agreement. Plaintiff failed to include the settlement agreement in the record on appeal,

thus rendering the record incomplete, and plaintiff " 'must suffer the consequences' " of submitting an incomplete record (*Cherry v Cherry*, 34 AD3d 1186, 1186).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

994

CA 08-02653

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF THE APPLICATION OF ROSANNA E.
HECKL, OLIVIA J. COREY, CHRISTOPHER M.
COREY AND THOMAS J. COREY,
PETITIONERS-RESPONDENTS-APPELLANTS,

MEMORANDUM AND ORDER

FOR THE APPOINTMENT OF A PERSONAL NEEDS
AND PROPERTY MANAGEMENT GUARDIAN OF AIDA
C., AN ALLEGED INCAPACITATED PERSON,
APPELLANT-RESPONDENT.

PERMCLIP PRODUCTS CORP., INTERVENOR-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR APPELLANT-RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (KEVIN J. CROSS OF COUNSEL), FOR PETITIONERS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered October 1, 2008 in a proceeding pursuant to Mental Hygiene Law article 81. The order and judgment, inter alia, appointed guardians of the person and property of the alleged incapacitated person.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating that part appointing Daniel Walsh coguardian of the person of Aida C. and as modified the order and judgment is affirmed without costs.

Memorandum: The alleged incapacitated person, Aida C. (hereafter, IP) appeals and petitioners cross-appeal from an order and judgment appointing the IP's personal assistant and granddaughter as coguardians of the IP's person and the corporate counsel of intervenor-respondent, Permclip Products Corp. (Permclip), as guardian of the IP's property in this proceeding pursuant to Mental Hygiene Law article 81. As we noted in a prior decision concerning this proceeding, the IP is the mother of petitioners, as well as the president and sole shareholder of Permclip (*Matter of Aida C.*, 44 AD3d 110, 112). In an amended petition, petitioners removed themselves from consideration as guardians of the IP's property and, during the pendency of this proceeding, they proposed that the IP's granddaughter, rather than any of the petitioners, be named guardian of the IP's person inasmuch as petitioners and the IP have been estranged since 2005.

Contrary to the contention of the IP on her appeal, Supreme Court properly denied her motion to dismiss the amended petition and determined that she is incapacitated and requires a guardian to provide for her personal needs as well as a guardian to manage her property (see Mental Hygiene Law § 81.15 [b], [c]). We reject the further contention of the IP that the court erred in appointing her granddaughter as a coguardian of her person. We conclude with respect to petitioners' cross appeal, however, that the court erred in appointing the IP's personal assistant as a coguardian of the IP's person, and we therefore modify the order and judgment accordingly.

Pursuant to Mental Hygiene Law § 81.19 (d), in appointing a guardian the court should consider, inter alia, the social relationship between the IP and the proposed guardian (§ 81.19 [d] [2]); the care provided to the IP at the time of the proceeding (§ 81.19 [d] [3]); the educational and other relevant experience of the proposed guardian (§ 81.19 [d] [5]); the unique requirements of the IP (§ 81.19 [d] [7]); and the existence of any conflicts of interest between the IP and the proposed guardian (§ 81.19 [d] [8]). With respect to the IP's granddaughter, the record establishes that, although the IP mistakenly believes that she does not have grandchildren, the IP and her granddaughter had shared a very close and loving relationship. Although the IP was not aware that she was related to her granddaughter, she enjoyed an evening with her granddaughter and other family members at a restaurant, and the IP invited her granddaughter to visit her at her home. In addition, the record establishes that the IP's granddaughter has experience in caring for two elderly women and has taken a training course with respect to the duties and responsibilities of a guardian of the person. The IP's granddaughter testified at the hearing on the amended petition that she is willing to work with the IP's personal assistant and recognizes her grandmother's dependence upon him. We thus conclude that there is no basis upon which to disturb the court's appointment of the IP's granddaughter as coguardian of the IP's person (see *Matter of Anonymous*, 41 AD3d 346).

As noted, however, we agree with petitioners that the court erred in appointing the IP's personal assistant as coguardian of the IP's person, inasmuch as there is a conflict of interest that prevents him from serving in that capacity (see Mental Hygiene Law § 81.19 [d] [8]). The personal assistant testified that he has worked for the IP for 34 years and has never received a paycheck. He further testified that he resides in the IP's home; the IP provides for his personal needs; and he has limited assets and is dependent upon the IP for his food, clothing and shelter. Furthermore, he testified that he does "pretty much" whatever the IP tells him to do. By way of example, he admitted that he summoned the police at the direction of the IP when her grandchildren came to visit and that, although the police handcuffed the IP's grandson, the personal assistant did not advise the police that the alleged intruders were the IP's grandchildren and that the IP had, the previous evening, invited her grandchildren to visit her. It is undisputed that the personal assistant is the trusted and constant companion of the IP and maintains her home in an "immaculate" condition. Nevertheless, we conclude that he is

disqualified to serve as coguardian of the IP's person based upon a conflict of interest, inasmuch as he is dependent upon the IP to meet his basic needs and he does not exercise independent judgment, but rather simply does what the IP instructs him to do.

We reject the further contention of petitioners on their cross appeal that the court erred in appointing Permclip's corporate counsel as guardian of the IP's property. It is well established that it is within the discretion of the court to appoint a guardian (*see Matter of Wynn*, 11 AD3d 1014, 1015, *lv denied* 4 NY3d 703). Here, the record establishes that Permclip's corporate counsel had worked for Permclip for a few years, and that he arranged to secure in excess of \$2 million that had been left in various unsecured places in the IP's home. Inasmuch as petitioners in the amended petition deferred to their mother's wishes and no longer sought to be named guardians to manage the IP's property, we perceive no reason to disturb the exercise of the court's discretion in appointing Permclip's corporate counsel as guardian with respect to the IP's property (*cf. Matter of Chase*, 264 AD2d 330, 331).

We reject the contention of the IP that the court violated her due process rights by requiring her to testify at the hearing. Although the Mental Hygiene Law is silent on the issue whether the person alleged to be incapacitated (AIP) may be compelled to testify, we note that section 81.11 (c) requires the presence of the AIP at the hearing "so as to permit the court to obtain its own impression of the person's capacity." In addition, we note that we previously rejected the contention of the IP that her Fifth Amendment rights against self-incrimination are implicated in an article 81 proceeding (*see Aida C.*, 44 AD3d at 115; *cf. Matter of A.G.*, 6 Misc 3d 447, 452-453). We likewise conclude that her due process rights are not violated inasmuch as the court is charged with determining her best interests (*see generally Wynn*, 11 AD3d at 1015). We have reviewed the remaining contentions of the parties and conclude that they are without merit.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

997

CA 07-01877

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF TIMMIE L. HAYNES,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

GEORGE ALEXANDER, ACTING CHAIRMAN, NEW YORK
STATE DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

TIMMIE L. HAYNES, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), dated July 27, 2007 in a CPLR article 78 proceeding. The judgment vacated the determination of the Board of Parole and ordered a de novo parole release hearing.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: This appeal by petitioner from a judgment vacating the determination of the Board of Parole and ordering a de novo hearing must be dismissed. Petitioner has since been released to parole supervision and potential discharge, thus rendering the appeal moot, and the exception to the mootness doctrine does not apply herein (see *People ex rel. Mitchell v Unger*, 63 AD3d 1591; *People ex rel. Hampton v Dennison*, 59 AD3d 951, lv denied 12 NY3d 711).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

998

CA 08-01910

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

STANLEY A. GIZOWSKI,
CLAIMANT-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK,
DEFENDANT-APPELLANT-RESPONDENT.
(CLAIM NO. 112634.)

SLIWA & LANE, BUFFALO (PAUL J. CALLAHAN OF COUNSEL), FOR
DEFENDANT-APPELLANT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (SAMUEL J. CAPIZZI OF COUNSEL), FOR
CLAIMANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Court of Claims (Jeremiah J. Moriarty, III, J.), entered July 10, 2008 in a personal injury action. The order denied claimant's motion for partial summary judgment and granted in part and denied in part defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion and as modified the order is affirmed without costs.

Memorandum: Claimant commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he fell from a scaffold. The accident occurred when a portion of the ceiling he was demolishing collapsed and struck a corner of the scaffold, causing claimant to be thrown into the air and to fall to the ground. Addressing first defendant's appeal, we reject the contention of defendant that the Court of Claims erred in denying that part of its cross motion seeking summary judgment dismissing the Labor Law § 240 (1) claim. We further conclude that the court properly denied that part of defendant's cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim insofar as it is premised on defendant's alleged failure to comply with 12 NYCRR 23-3.3 and 23-5.1. The court properly concluded that defendant was not prejudiced by claimant's delay in identifying the alleged violation of those sections of the Industrial Code (see *Ellis v J.M.G., Inc.*, 31 AD3d 1220; *Harris v Rochester Gas & Elec. Corp.*, 11 AD3d 1032, 1033). In any event, we conclude on the merits that defendant failed to meet its burden of establishing its entitlement to judgment as a matter of law with respect to its alleged violation of those sections (see *Clapp v*

State of New York [appeal No. 2], 19 AD3d 1113).

We agree with claimant on his cross appeal, however, that the court erred in denying his motion seeking partial summary judgment on liability with respect to the Labor Law § 240 (1) claim, and we therefore modify the order accordingly. Claimant met his "initial burden of establishing as a matter of law that the injury was caused by the lack of enumerated safety devices, the proper placement and operation of which would have prevented the [ceiling] from falling on [the scaffold] and [claimant] from falling off the [scaffold]" (*Sniadecki v Westfield Cent. School Dist.*, 272 AD2d 955), and defendant failed to raise a triable issue of fact whether claimant's conduct was the sole proximate cause of the accident (see *Evans v Syracuse Model Neighborhood Corp.*, 53 AD3d 1135, 1137; *Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554). Even assuming, arguendo, that defendant is correct that claimant was negligent in his placement of the scaffold and his removal of bracing from the portion of the ceiling that collapsed, we conclude that those actions "render him [merely] contributorily negligent, a defense unavailable under [section 240 (1)]" (*Morin v Machnick Bldrs.*, 4 AD3d 668, 670; see *Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1189). "Because [claimant] established that a statutory violation was a proximate cause of [his] injury, [he] 'cannot be solely to blame for it' " (*Woods v Design Ctr., LLC*, 42 AD3d 876, 877, quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1000.1

CA 08-01937

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

CARL MAIS, PLAINTIFF-RESPONDENT-APPELLANT,

V

ORDER

AJC ASSOCIATES, LP, TOPS MARKETS, LLC., AND
JAVEN CONSTRUCTION COMPANY, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, ROCHESTER (MELANIE S. WOLK OF COUNSEL), FOR
DEFENDANTS-APPELLANTS-RESPONDENTS.

CHRISTIANO GALLANT AND COLETTI, ROCHESTER (ALBERT R. CHRISTIANO OF
COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court,
Monroe County (Matthew A. Rosenbaum, J.), entered March 31, 2008 in a
personal injury action. The order, among other things, denied in part
defendants' cross motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the
attorneys for the parties on May 7, 2009 and filed in the Monroe
County Clerk's Office on June 9, 2009,

It is hereby ORDERED that said appeal and cross appeal are
unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1000

TP 09-00620

PRESENT: SCUDDER, P.J., HURLBUTT, PERADOTTO, GREEN, AND GORSKI, JJ.

IN THE MATTER OF MOHAWK VALLEY ORTHOPEDICS, LLP,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

ANDREA M. CARCONE, RESPONDENT,
AND NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER.

KOWALCZYK, TOLLES, DEERY & HILTON, LLP, UTICA (JOSEPH S. DEERY, JR.,
OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR
RESPONDENT-PETITIONER.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Anthony F. Shaheen, J.], entered February 6, 2009) to annul a determination of respondent-petitioner. The determination found after a fair hearing that petitioner-respondent unlawfully discriminated against respondent based on a disability.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted and petitioner-respondent is directed to pay respondent the following sums: \$7,500 for mental anguish and humiliation and \$2,180 for health insurance premiums, with interest at the rate of 9% per annum commencing September 30, 2008.

Memorandum: Petitioner-respondent (petitioner) commenced this CPLR article 78 proceeding seeking to annul the determination of respondent-petitioner, New York State Division of Human Rights (hereafter, SDHR), that petitioner unlawfully discriminated against respondent, Andrea M. Carcone, (hereafter, complainant), based on a disability, i.e., hypertension. Petitioner discharged complainant approximately six weeks after she was hired and a few days after being notified by complainant that she had been diagnosed with hypertension. The Administrative Law Judge (ALJ) found that complainant established a prima facie case of discrimination and refused to credit the testimony of petitioner's witnesses that petitioner in fact had decided to discharge complainant prior to learning of her medical diagnosis. The "Recommended Order" of the ALJ, which ordered petitioner to pay complainant \$7,500 for mental anguish and

humiliation and \$2,180 for health insurance premiums, was adopted by SDHR's Commissioner, and SDHR cross-petitioned pursuant to Executive Law § 298, seeking enforcement of the order of the Commissioner.

We note at the outset the well-settled proposition that we may not substitute our own judgment for that of the Commissioner, and we thus must confirm the determination where, as here, it is supported by substantial evidence (see *Matter of Woehrling v New York State Div. of Human Rights*, 56 AD3d 1304, 1305). Inasmuch as there is "a rational basis for the Commissioner's determination, the judicial function is exhausted" (*Matter of Argyle Realty Assoc. v New York State Div. of Human Rights*, ___ AD3d ___, ___ [June 30, 2009]).

We reject petitioner's contention that the compensatory damages award of \$7,500 for mental anguish and humiliation is not supported by the evidence. "In reviewing such an award, we must determine[, inter alia,] whether the relief was reasonably related to the wrongdoing [and] whether the award was supported by evidence before [the Commissioner]" (*Woehrling*, 56 AD3d at 1305 [internal quotation marks omitted]). It is well established that "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct" (*Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216; see *Matter of Iroquois Nursing Home, Inc. v New York State Div. of Human Rights*, 55 AD3d 1285, lv denied 12 NY3d 708). Here, complainant testified at the hearing that she was "humiliated" by the discharge inasmuch as she felt that petitioner "attacked" her work ethic and character. She further testified that she was "scared" because she had a recently diagnosed medical condition and did not know how she would afford treatment of the condition without employment and health insurance benefits. We thus conclude on the record before us that the compensatory damages award for mental anguish and humiliation is supported by the evidence (*cf. Woehrling*, 56 AD3d at 1305-1306; *Iroquois Nursing Home, Inc.*, 55 AD3d 1285).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1002

KA 08-01300

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

DAVID WRIGHT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVID WRIGHT, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 19, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree (two counts) and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1003

KA 08-01185

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FABIAN CRUZ-HERNANDEZ, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (KEVIN T. FINNELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 22, 2008. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1005

KA 08-01027

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALLAH REESE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of incarceration of 9½ years plus a period of postrelease supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Reese*, 48 AD3d 1080). Defendant rejected the new sentence and now appeals from the order on remittal. We reject defendant's contention that the proposed new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the proposed new sentence, taking into consideration, inter alia, defendant's criminal history and "heavy" involvement in the instant drug conspiracy (*see generally People v Boatman*, 53 AD3d 1053). We reject defendant's further contention that the proposed new sentence was unauthorized as a matter of law. Even assuming, arguendo, that defendant's contention is properly raised on appeal from a specifying order (*see* L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing parameters of Penal Law § 70.71 (2) (b) (ii). We therefore affirm the order and

remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1006

KA 08-01751

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES H. POWLESS, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

JAMES H. POWLESS, DEFENDANT-APPELLANT PRO SE.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered June 2, 2008. The judgment convicted defendant, upon his plea of guilty, of sodomy in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of sodomy in the first degree (Penal Law former § 130.50 [1]). A guilty plea "generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings" (*People v Fernandez*, 67 NY2d 686, 688). Although "CPL 710.70 (2) carves out a limited exception providing that an order finally denying a motion to suppress evidence may be reviewed on appeal from a final judgment of conviction, even one entered upon a guilty plea," that exception does not apply here because defendant pleaded guilty before County Court issued a suppression ruling, let alone a final suppression order (*id.*; see *People v Graham*, 42 AD3d 933, 933-934, *lv denied* 9 NY3d 876). We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1007

KA 08-00130

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DARIEN LAING, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 24, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence by failing to renew his motion for a trial order of dismissal after presenting evidence (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's contention lacks merit. The People presented legally sufficient evidence establishing that defendant possessed a loaded firearm while walking down an alley adjacent to a nightclub, thereby establishing that his possession of a loaded firearm did not occur in his "home or place of business" (§ 265.03 [3]; *see People v Rodriguez*, 68 NY2d 674, *revg for reasons stated in dissenting op at* 113 AD2d at 343-348; *People v Williams*, 167 AD2d 565). Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a " 'valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally id.* at 348-349; *People v Bleakley*, 69 NY2d 490, 495).

We further reject the contention of defendant that Supreme Court erred in denying his request to submit criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]) as a lesser included offense of criminal possession of a weapon in the second degree (§ 265.03 [3]). Although defendant is correct that criminal possession of a weapon in the fourth degree is in fact a lesser included offense, i.e., it is impossible to possess a loaded firearm not in a person's home or place of business without concomitantly possessing a firearm (see *People v Menchetti*, 76 NY2d 473, 478; *People v Perez*, 128 AD2d 410, lv denied 69 NY2d 1008; see generally *People v Glover*, 57 NY2d 61, 63), there is no reasonable view of the evidence to support a finding that defendant committed the lesser offense but not the greater (see *People v Brandon*, 57 AD3d 1489, lv denied 12 NY3d 814; see generally *Glover*, 57 NY2d at 63). The evidence established that defendant possessed a loaded firearm, not an unloaded firearm, and that the possession of the loaded firearm in the alley did not occur at defendant's home or place of business. Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1008

KA 08-00616

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BILLY R. ADAMS, DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH, FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, J.), rendered November 28, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea without making further inquiry to ensure that the plea was voluntarily entered (*see generally People v Lopez*, 71 NY2d 662, 666). We reject that contention. " '[T]here is no requirement for a uniform mandatory catechism of pleading defendants' " (*People v Seeber*, 4 NY3d 780, 781, quoting *People v Fiumefreddo*, 82 NY2d 536, 543). Upon our review of the record, we conclude that nothing in the plea allocution called into question defendant's admitted guilt or the voluntariness of the plea, and thus the court had no duty to conduct a further inquiry before denying defendant's motion (*see generally Seeber*, 4 NY3d at 781-782; *Lopez*, 71 NY2d at 666).

To the extent that the further contention of defendant that he was denied effective assistance of counsel survives the plea (*see People v Wrobel*, 57 AD3d 1499, *lv denied* 12 NY3d 789), we conclude that his contention lacks merit (*see generally People v Ford*, 86 NY2d 397, 404). "Defense counsel was not required to support defendant's *pro se* motion to withdraw the guilty plea, and we conclude that defense counsel did not take a position adverse to defendant" (*People v Klumpp*, 269 AD2d 798, 799, *lv denied* 94 NY2d 922). We further conclude that the court properly sentenced defendant as a second

felony offender, inasmuch as defendant waived strict compliance with CPL 400.21 when he admitted the predicate felony and did not challenge the predicate felony statement (see *People v Ross*, 26 AD3d 887, *affd* 7 NY3d 905; *People v Maynard*, 294 AD2d 866, *lv denied* 98 NY2d 699). The contention of defendant that the sentence is illegal because the court assessed a DNA databank fee despite the fact that his DNA was already on file likewise is lacking in merit. Contrary to defendant's contention, the databank fee is not a part of the sentence and thus cannot render a sentence illegal (see generally *People v Guerrero*, 12 NY3d 45, 48). Indeed, Penal Law § 60.35 (1) (a) provides that a DNA databank fee shall be levied at sentencing "in addition to any sentence required or permitted by law." We agree with defendant, however, that the order of protection must be amended by limiting its duration to "eight years from the date of the expiration of the maximum term of [the] . . . sentence of imprisonment actually imposed" (CPL 530.13 [former (4) (ii)], taking into account any jail time credit to which defendant is entitled (see *People v Holmes*, 294 AD2d 871, *lv denied* 98 NY2d 730; *People v Viehdeffer*, 288 AD2d 860; see also *People v Wilks*, 284 AD2d 905, *lv denied* 96 NY2d 926). Although defendant raises that contention for the first time on appeal and thus has failed to preserve it for our review (see *People v Nieves*, 2 NY3d 310, 315-317), we nonetheless exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify in the order of protection an expiration date in accordance with CPL 530.13 (former [4] [ii]), the version of the statute in effect when the judgment was rendered on November 28, 2007.

Finally, the bargained-for sentence is not unduly harsh or severe.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1009

KA 05-01142

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TYRONE PRESCOTT, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 7, 2005. The judgment convicted defendant, upon a nonjury verdict, of gang assault in the first degree and assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of gang assault in the first degree (Penal Law § 120.07) and assault in the first degree (§ 120.10 [1]). Viewing the evidence in light of the elements of those crimes (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). " 'The credibility determinations of [Supreme] Court are entitled to great deference . . . , and there is no basis to conclude that the court failed to give the evidence the weight that it should be accorded' " (*People v Woodworth*, 8 AD3d 1010, 1011, *lv denied* 3 NY3d 683; *see People v Burton*, 38 AD3d 1290, *amended on rearg* 41 AD3d 1325). Even assuming, arguendo, that defendant has preserved for our review his contentions concerning the sentencing procedures, we reject those contentions and conclude that he was not denied due process at sentencing (*see generally People v Perry*, 36 NY2d 114, 119). "The standard for determining whether a sentencing has been fairly conducted 'is whether the defendant has been afforded an opportunity to refute those aggravating factors which may have negatively influenced the court' " (*People v Seplow*, 226 AD2d 178, 179, *lv denied* 88 NY2d 969, quoting *Perry*, 36 NY2d at 119; *see People v Dimmick*, 53 AD3d 1113, *lv denied* 11 NY3d 831; *People v Massmann*, 13

AD3d 808, 809). Here, defendant was afforded that opportunity.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1010

KA 08-00844

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

PATRICK NEWSOME, JR., DEFENDANT-APPELLANT.

WAYNE C. FELLE, P.C., WILLIAMSVILLE (WAYNE C. FELLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (PETER J. MARCHÉ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered March 12, 2008. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (three counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1011

CAF 07-01360

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF NIAGARA COUNTY PROBATION
DEPARTMENT, PETITIONER-RESPONDENT,

V

ORDER

DENISE FERRO, RESPONDENT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF
COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Niagara County (David E. Seaman, J.), entered May 8, 2007 in a proceeding pursuant to Family Court Act article 4. The order, among other things, adjudged that respondent willfully failed to obey a child support order and committed her to the Niagara County Jail for a term of six months.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1012

CAF 08-02304

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF JOY L. HERRINGTON,
PETITIONER-APPELLANT,

V

ORDER

ORLIN L. AMES, RESPONDENT-RESPONDENT.

BONITA J. STUBBLEFIELD, PIFFARD, FOR PETITIONER-APPELLANT.

BETZJITOMIR & BAXTER, LLP, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

DAVID E. CODDINGTON, LAW GUARDIAN, HORNELL, FOR JULIA A. AND KENNETH
A.

Appeal from an order of the Family Court, Steuben County
(Marianne Furfure, J.), entered September 30, 2008 in a proceeding
pursuant to Family Court Act article 6. The order, among other
things, awarded sole custody and primary placement of the subject
children to respondent.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1013

CAF 09-00356

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF JOSEPH R. CANZONERI,
PETITIONER-APPELLANT,

V

ORDER

GINA CANZONERI, RESPONDENT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (CHRISTOPHER A. CARDILLO OF COUNSEL), FOR
PETITIONER-APPELLANT.

ANGE & ANGE, BUFFALO (GRACE MARIE ANGE OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered April 30, 2008 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of petitioner to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1014

CAF 07-02683

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF LEWIS J. WHITE, III,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BARBARA J. KNAPP, RESPONDENT-RESPONDENT.

ROBERTA G. WILLIAMS, AUBURN, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered April 16, 2007 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objections to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner father filed the underlying petition seeking to recoup excess child support payments. After hearing from both the father and respondent mother, a Support Magistrate issued an order concluding that the father was owed \$1,050.41 as excess child support payments. The father filed two objections to the Support Magistrate's order, contending that the Support Magistrate "did not allow all of the evidence to be presented showing considerable overpayment" and that the Support Magistrate disregarded prior orders vacating or terminating arrears. Family Court affirmed the order, determining that the father's first objection lacked the requisite specificity (see Family Ct Act § 439 [e]) and that the father's second objection had no merit.

Contrary to the father's contention, we agree with the court that the first objection lacked the requisite specificity inasmuch as it failed to identify any evidence that the Support Magistrate refused to allow (see *id.*; see generally *Matter of Renee XX. v John ZZ.*, 51 AD3d 1090, 1092). We likewise reject the further contention of the father that the Support Magistrate disregarded prior orders. Indeed, in his decision calculating the child support arrears, the Support Magistrate referred to the orders submitted by the father in support of his petition.

The father further contends that the Support Magistrate's findings are against the weight of the evidence and that the father is entitled to recoup sums that the Support Magistrate erroneously deemed to be arrears. Because the father failed to raise those contentions

in his written objections to the Support Magistrate's order, those contentions are not properly preserved (see Family Ct Act § 439 [e]; *Matter of Juneau v Morzillo*, 56 AD3d 1082, 1086; *Renee XX.*, 51 AD3d at 1092).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1015

CA 09-00252

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

THOMAS VERLENI, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF JAMESTOWN, DEFENDANT,
RODNEY L. JOHNSON AND LINDA L. JOHNSON,
DEFENDANTS-RESPONDENTS.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (J. KEVIN LAUMER OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (DAVID G. BROCK OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered September 2, 2008 in a personal injury action. The order granted the motion of defendants Rodney L. Johnson and Linda L. Johnson for summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint against defendants Rodney L. Johnson and Linda L. Johnson is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he allegedly slipped and fell on ice on the sidewalk in front of the home of Rodney L. Johnson and Linda L. Johnson (defendants). We agree with plaintiff that Supreme Court erred in granting the motion of defendants seeking summary judgment dismissing the complaint against them on the ground that there was a storm in progress. In support of their motion, defendants submitted the deposition testimony of defendant husband in which he stated that there was "a light snowfall" and "a dusting of snow on the sidewalk" at the time of plaintiff's fall. That testimony and the remaining submissions of defendants in support of their motion are insufficient to satisfy their burden of "establishing as a matter of law that 'plaintiff's injuries [were] sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter' " (*Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408, quoting *Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735; see *Powell*

v MLG Hillside Assoc., 290 AD2d 345, 345-346).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1016

CA 08-02328

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

TIMOTHY SUPHANKOMUT, AS ADMINISTRATOR OF
THE ESTATE OF AMPHAN PHETDUM, DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

CHI-TEH YU, M.D., MICHAEL HOCKO, M.D.,
JEAN G. HAAR, D.D.S., M.D., BUFFALO MEDICAL
GROUP, P.C., RAYMOND V. PAOLINI, JR., M.D.,
AND BUFFALO OTOLARYNGOLOGY GROUP, P.C.,
DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (AMY C. MARTOCHE OF COUNSEL), FOR
DEFENDANT-APPELLANT CHI-TEH YU, M.D.

RICOTTA & VISCO, BUFFALO (JOHN BLAND OF COUNSEL), BUFFALO, FOR
DEFENDANT-APPELLANT MICHAEL HOCKO, M.D.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MATTHEW J. BATT OF
COUNSEL), FOR DEFENDANTS-APPELLANTS JEAN G. HAAR, D.D.S., M.D. AND
BUFFALO MEDICAL GROUP, P.C.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS RAYMOND V. PAOLINI, JR., M.D. AND BUFFALO
OTOLARYNGOLOGY GROUP, P.C.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Paula L. Feroletto, J.), entered October 3, 2008 in a medical malpractice action. The order, insofar as appealed from, denied defendants' motions to vacate the note of issue and certificate of readiness and denied defendants' application to conduct two nonparty depositions.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions are granted and the note of issue and certificate of readiness are vacated, and the second ordering paragraph is vacated.

Memorandum: Supreme Court erred in denying defendants' motions seeking to vacate the note of issue and certificate of readiness. Defendants sought the relief within 20 days after service of the note of issue and certificate of readiness, and they provided affidavits

establishing that discovery was incomplete when the note of issue and certificate of readiness were filed. Thus, "a material fact in the certificate of readiness [was] incorrect" (22 NYCRR 202.21 [e]; see *Shoop v Augst*, 305 AD2d 1016, 1017; see also *Aviles v 938 SCY Ltd.*, 283 AD2d 935). We therefore reverse the order insofar as appealed from, grant defendants' motions and vacate the note of issue and certificate of readiness, and vacate the second ordering paragraph to permit the further discovery sought by defendants.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1017

CA 09-00343

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

SANDRA A. AUSTIN AND NICKOLAS AUSTIN,
PLAINTIFFS-RESPONDENTS,

V

ORDER

TRI-COUNTY MEMORIAL HOSPITAL, DOING BUSINESS
AS TRI-COUNTY CHEMICAL DEPENDENCY PROGRAM,
ET AL., DEFENDANTS,
AND TONI L. JOHN, DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (FRANK C. CALLOCCHIA OF COUNSEL), FOR
DEFENDANT-APPELLANT.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (ELLEN M. KREBS OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered April 22, 2008 in a personal injury action. The order denied the motion of defendant Toni L. John to dismiss the complaint against her.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1018

CA 08-02426

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

CONRAD F. CROPSEY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF ORLEANS INDUSTRIAL DEVELOPMENT
AGENCY, DOING BUSINESS AS ORLEANS ECONOMIC
DEVELOPMENT AGENCY, AND KENNETH DEROLLER,
DEFENDANTS-RESPONDENTS.

LELAND L. GREENE, GARDEN CITY, FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL S. CERRONE OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Orleans County (James H. Dillon, J.), entered June 19, 2008 in a breach of contract action. The order granted defendants' motion to dismiss certain causes of action against defendant County of Orleans Industrial Development Agency, doing business as Orleans Economic Development Agency, and the complaint against defendant Kenneth DeRoller.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action alleging that defendant County of Orleans Industrial Development Agency, doing business as Orleans Economic Development Agency (COIDA), breached its contract with plaintiff by failing to pay for legal services rendered by plaintiff. Plaintiff also asserted, inter alia, a cause of action against COIDA for libel based on allegedly false statements concerning plaintiff that were included in a resolution of COIDA's executive board, as well as causes of action against COIDA and defendant Kenneth DeRoller, a member of COIDA, for fraud. Contrary to plaintiff's contention, Supreme Court properly granted defendants' motion pursuant to CPLR 3211 (a) (5) and (7) seeking to dismiss 15 causes of action against COIDA and the complaint in its entirety against DeRoller. Thus, the only remaining causes of action are those asserted against COIDA, based on theories of breach of contract and quantum meruit.

We agree with defendants that the cause of action for libel, asserted only against COIDA, and the causes of action for fraud, asserted against both COIDA and DeRoller, in his capacity as an agent for COIDA, were properly dismissed based on plaintiff's failure to include them in the notice of claim (*see De Cicco v Madison County*,

300 AD2d 706, 707 n; see generally General Municipal Law § 50-e; *Rosenbaum v City of New York*, 8 NY3d 1, 10-11). "A condition precedent to commencing a tort action against an industrial development agency is the service of a notice of claim upon it within 90 days after the claim arose" (*Matter of Grant v Nassau County Indus. Dev. Agency*, 60 AD3d 946, 947; see § 50-e [1] [a]; § 880 [2]). Further, "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim" where such a notice of claim is required by law (*Tannenbaum v City of New York*, 30 AD3d 357, 358), and here a notice of claim against DeRoller in his capacity as an agent for COIDA was required. Although we agree with plaintiff that no notice of claim was required with respect to the actions of DeRoller in his individual capacity, we note that plaintiff concedes on appeal that DeRoller could only be liable in his individual capacity with respect to the fraud causes of action. Plaintiff therefore is deemed to have abandoned any contention with respect to DeRoller in his individual capacity with the exception of his liability for fraud (see *Ciesinski v Town of Aurora*, 202 AD2d 984).

Even assuming, arguendo, that the libel and fraud causes of action are not barred by plaintiff's failure to include them in the notice of claim, we would nevertheless conclude that the court properly granted the motion. With respect to the libel cause of action, asserted only against COIDA, we note that the language of the resolution of COIDA's executive board upon which plaintiff premises that cause of action is not " 'reasonably susceptible of a defamatory meaning, [and thus] not actionable' " (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076, quoting *Aronson v Wiersma*, 65 NY2d 592, 594). With respect to the fraud causes of action against both COIDA and DeRoller, in his individual capacity, " '[i]t is well established that a separate cause of action for fraud is not stated where, as here, the alleged fraud relates to the breach of contract' " (*Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 48 AD3d 1220, 1221). Further, plaintiff does not allege that DeRoller engaged in any fraudulent act in his individual capacity and thus has failed to distinguish the causes of action against DeRoller for fraud in his individual capacity from those against him for breach of contract or quantum meruit. The court therefore also properly dismissed the fraud causes of action against DeRoller in his individual capacity (see *id.* at 1220-1221).

Finally, we conclude that the court did not abuse its discretion in denying plaintiff's request for leave to replead the fraud causes of action (see *Boakye-Yiadom v Roosevelt Union Free School Dist.*, 57 AD3d 929, 931).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1019

CA 09-00484

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

BARBARA BIRT, PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

DAVID R. RATKA, JR. AND CHRISTINA L. RATKA,
DEFENDANTS-APPELLANTS-RESPONDENTS.

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (NEIL M. ROBINSON OF COUNSEL),
FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

CLARK & WHIPPLE, LLP, FREDONIA (PETER D. CLARK OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Joseph Gerace, J.H.O.), entered May 21, 2008. The judgment, inter alia, extinguished the restrictive covenant contained in the deed to defendants' property on the condition that defendants modify their deed.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking, inter alia, to enforce a restrictive covenant contained in the deed to defendants' property prohibiting defendants from subdividing property in the Town of Chautauqua (Town) that included a right-of-way over plaintiff's adjacent property. In their answer, defendants asserted a counterclaim seeking to extinguish the restrictive covenant. With the permission of the Town, defendants subdivided their property into two lots and granted only one of the lots a right-of-way over plaintiff's property. On a prior appeal, we affirmed an order denying plaintiff's motion for summary judgment on the complaint and for summary judgment dismissing the affirmative defenses and counterclaim (*Birt v Ratka*, 39 AD3d 1238), and the matter proceeded to trial. Defendants appeal and plaintiff cross-appeals from a judgment that, inter alia, extinguished the restrictive covenant on the condition that defendants modify their deed by restricting use of the right-of-way to defendants and their family members actually residing in the main dwelling.

We agree with defendants that Supreme Court erred in concluding that the restrictive covenant prohibiting subdivision is of actual and substantial benefit to plaintiff. "Pursuant to RPAPL 1951 (1), a restrictive covenant shall not be enforced if, at the time

enforceability of the restriction is brought into question, it appears that 'the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability, either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason.' The party claiming that a restriction is unenforceable bears the burden of proving it" (*New York City Economic Dev. Corp. v T.C. Foods Import & Export Co., Inc.*, 19 AD3d 568, 569; see *Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 433-434; *Orange & Rockland Util. v Philwold Estates*, 52 NY2d 253, 266).

Although plaintiff alleged that the right-of-way was overburdened, defendants established that such allegation was unrelated to the restrictive covenant because there were four dwellings on the property at the time that the restrictive covenant was created and only a single dwelling currently exists on the parcel of property with the right-of-way. Inasmuch as the restrictive covenant cannot be said to prevent defendants from overburdening of the right-of-way, we conclude that the restrictive covenant does not convey an actual or substantial benefit to plaintiff and therefore must be extinguished (see generally *Board of Educ., E. Irondequoit Cent. School Dist. v Doe*, 88 AD2d 108, 115).

We therefore reverse the judgment and remit the matter to Supreme Court to grant judgment in favor of defendants on their counterclaim adjudging that the restrictive covenant is not enforceable by injunction and is extinguished (see RPAPL 1951 [2]).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1020

CA 09-00648

PRESENT: HURLBUTT, J.P., CENTRA, PINE, AND GORSKI, JJ.

ROBERT J. RAY, PLAINTIFF-APPELLANT,

V

ORDER

NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION
AND PAUL KELLY, EXECUTIVE DIRECTOR OF THE
NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION,
DEFENDANTS-RESPONDENTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID H. ELIBOL OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

LEVY RATNER, P.C., NEW YORK CITY (DANIEL ENGELSTEIN OF COUNSEL), AND
CREIGHTON, PEARCE, JOHNSEN & GIROUX, BUFFALO, FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 25, 2008. The order granted the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1021.1

CAF 08-01323

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF JASON A. ARMSTRONG, SR.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HEATHER L. ROBINSON, RESPONDENT-RESPONDENT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR PETITIONER-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-RESPONDENT.

JACQUELINE M. GRASSO, LAW GUARDIAN, BATAVIA, FOR JASON A.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered May 28, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner father contends that Family Court abused its discretion in dismissing his petition seeking visitation with his son. We reject that contention. "The court's determination with respect to the child's best interests 'is entitled to great deference and will not be disturbed where, as here, it is based on careful weighing of the appropriate factors . . ., including the court's firsthand assessment of the character and credibility of the parties and their witnesses' " (*Matter of Michael G. v Letitia M.B.*, 45 AD3d 1405, *lv denied* 10 NY3d 715; *see Matter of Richard C.T. v Helen R.G.*, 37 AD3d 1118).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1021

CA 08-01826

PRESENT: HURLBUTT, J.P., CENTRA, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF THE APPLICATION OF
ARCELORMITTAL LACKAWANNA LLC, AND
ARCELORMITTAL TECUMSEH REDEVELOPMENT INC.,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

CITY OF LACKAWANNA, RESPONDENT-RESPONDENT,
AND CITY OF LACKAWANNA SCHOOL DISTRICT,
INTERVENOR-RESPONDENT-RESPONDENT.

COUNTY OF ERIE, PROPOSED
INTERVENOR-RESPONDENT-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (GREGORY P. KAMMER OF
COUNSEL), FOR PROPOSED INTERVENOR-RESPONDENT-APPELLANT.

PHILLIPS LYTTLE LLP, BUFFALO (JOANNA DICKINSON OF COUNSEL), FOR
PETITIONERS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
RESPONDENT-RESPONDENT.

CARL W. MORGAN, P.C., LACKAWANNA (CARL W. MORGAN OF COUNSEL), FOR
INTERVENOR-RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 9, 2008 in a proceeding pursuant to RPTL article 7. The order, among other things, denied the motion of County of Erie seeking to intervene in the proceeding.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court properly denied the motion of proposed intervenor, County of Erie (County), seeking to intervene in an RPTL article 7 proceeding in which petitioners challenged the tax assessment for certain commercial property. The motion was untimely, in light of the fact that the County was aware that petitioners had commenced seven prior consolidated RPTL article 7 proceedings and had failed to move to intervene in this proceeding until the trial in the consolidated proceedings had begun and the parties had entered into a court-approved stipulation of settlement (*see Rectory Realty Assoc. v Town of Southampton*, 151 AD2d 737; *Matter of Buffalo Mall v Assessor*

of Town of Clarence, 101 AD2d 701).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1022

TP 08-02279

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF ELBERT WELCH, PETITIONER,

V

ORDER

S. KHAHAIFA, SUPERINTENDENT, ORLEANS
CORRECTIONAL FACILITY, RESPONDENT.

ELBERT WELCH, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Orleans County [James H. Dillon, J.], entered October 29, 2008) to review the determinations of respondent. The determinations found after Tier II hearings that petitioner had violated various inmate rules.

It is hereby ORDERED that the determinations are unanimously confirmed without costs and the petition is dismissed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1023

KA 07-01908

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE CLARK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered September 10, 2007. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court's assessment of 15 points under risk factor nine is not supported by the requisite clear and convincing evidence and thus he was not properly classified as a level two risk (*see* § 168-n [3]). We reject that contention. The record establishes that the court properly considered the case summary, which constitutes reliable hearsay, in determining defendant's risk level (*see People v Wragg*, 41 AD3d 1273, *lv denied* 9 NY3d 809; *People v Vacanti*, 26 AD3d 732, *lv denied* 6 NY3d 714). In any event, we note that defendant's presumptive classification as a level two risk would not change even if the court had assessed only the five points that defendant contends should have been assessed, rather than the 15 points assessed (*see generally People v Ferrara*, 38 AD3d 1302, *lv denied* 8 NY3d 815; *People v Lujan*, 34 AD3d 1346, *lv denied* 8 NY3d 805).

Defendant failed to preserve for our review his contention that he was entitled to a downward departure from his presumptive risk level (*see People v Ratcliff*, 53 AD3d 1110, *lv denied* 11 NY3d 708; *People v Regan*, 46 AD3d 1434, 1435). In any event, that contention lacks merit inasmuch as "defendant failed to present clear and convincing evidence of special circumstances justifying a downward

departure" (*Regan*, 46 AD3d at 1435).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1025

KA 06-02135

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

QUAN NGUYEN, ALSO KNOWN AS DAVID NGUYEN,
DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF
COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL
OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County
(John J. Brunetti, A.J.), rendered July 17, 2006. The judgment
convicted defendant, upon a nonjury verdict, of manslaughter in the
second degree.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him
following a nonjury trial of one count of manslaughter in the second
degree (Penal Law § 125.15 [1]) and two counts of endangering the
welfare of a child (§ 260.10 [1], [2]).

Defendant failed to preserve for our review his contention that
Supreme Court erred in admitting certain expert medical testimony
presented by the People on the ground that the testimony lacked a
proper foundation or was speculative (see CPL 470.05 [2]) and, in any
event, that contention lacks merit (see *generally* Prince, Richardson
on Evidence § 7-315 [Farrell 11th ed]).

Contrary to defendant's further contention, viewing the evidence
in light of the elements of the crimes in this nonjury trial (see
People v Danielson, 9 NY3d 342, 349), we conclude that the verdict is
not against the weight of the evidence (see *generally* *People v*
Bleakley, 69 NY2d 490, 495). The court was presented with conflicting
expert testimony concerning the cause of death of the victim, and the
court was entitled to credit the expert testimony presented by the
People (see *People v Fields*, 16 AD3d 142, *lv denied* 4 NY3d 886; see
generally *People v Miller*, 91 NY2d 372, 380). Finally, the sentence

is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1026

KA 07-01778

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HARRY VOGEL, DEFENDANT-APPELLANT.

JOHN A. HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JOHN H. CRANDALL, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered July 10, 2007. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (13 counts), sexual abuse in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of 13 counts of rape in the second degree (Penal Law § 130.30 [1]) and one count each of sexual abuse in the second degree (§ 130.60 [2]) and endangering the welfare of a child (§ 260.10 [1]). County Court properly excluded evidence, under the rape shield law (CPL 60.42), concerning the victim's purchase or use of a home pregnancy test inasmuch as defendant failed to make "a threshold showing of relevance" with respect to that evidence (*People v Williams*, 81 NY2d 303, 314; see *People v Perryman*, 178 AD2d 916, 917, *lv denied* 79 NY2d 1005). The court also properly refused to allow defendant to present the alibi testimony of two witnesses. Defendant failed to file a timely notice of alibi (see CPL 250.20 [1]), or to offer a reasonable excuse for that failure (see *People v Watson*, 269 AD2d 755, 756, *lv denied* 95 NY2d 806; *People v Bembry*, 258 AD2d 921, *lv denied* 93 NY2d 897). Furthermore, on the record before us, we reject defendant's contention that defense counsel's failure to file a timely notice of alibi constituted ineffective assistance of counsel (see *People v Djanie*, 31 AD3d 887, 888, *lv denied* 7 NY3d 866). Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1027

KA 05-01293

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CLEOTIS MERCER, DEFENDANT-APPELLANT.

GIRUZZI LAW OFFICES, UTICA (JOSEPH P. GIRUZZI OF COUNSEL), FOR
DEFENDANT-APPELLANT.

CLEOTIS MERCER, DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered March 23, 2005. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree (two counts), robbery in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentence imposed on count four of the indictment shall run concurrently with the sentences imposed on counts two, three, five, six and seven of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]). We reject defendant's contention that the People should have made the confidential informant available to defendant for questioning. The informant was not an agent of the government as a matter of law (*see People v Cardona*, 41 NY2d 333, 335), and he was not acting as such during the commission of the crime or when he was incarcerated with defendant. County Court did not abuse its discretion in refusing to appoint a handwriting expert to examine the note that defendant allegedly wrote to the informant (*see generally People v Olivares*, 34 AD3d 602, lv denied 9 NY3d 879). Contrary to defendant's further contention, the court properly submitted the annotated verdict sheet to the jury inasmuch as it had been provided to and expressly approved by defense counsel (*see People v Angelo*, 88 NY2d 217, 224). We further conclude that the court did not abuse its discretion in removing defendant from the courtroom during the *Huntley* hearing. The record establishes that

defendant continuously interrupted the court and that the court warned defendant that he would be removed from the courtroom if he continued to act in a disruptive manner (see CPL 260.20; *People v Byrnes*, 33 NY2d 343, 349-350).

Further, defendant was not denied his constitutional right to represent himself. The transcript of the *Huntley* hearing establishes that, after a comprehensive inquiry, the court granted defendant's repeated requests to proceed pro se. When defendant thereafter indicated that he wanted to testify at the *Huntley* hearing, the court directed him to take the witness stand. Defendant, however, unequivocally then stated at least four times that he wanted to be represented by defense counsel again, and the court granted his requests. The record thus establishes that defendant abandoned his requests at the *Huntley* hearing to proceed pro se (see *People v McClam*, 297 AD2d 514, lv denied 99 NY2d 537). The court properly denied defendant's subsequent request to proceed pro se at trial. "The request was untimely and made at an advanced stage of the trial, and the defendant failed to set forth a compelling reason for the request" (*People v Venticinque*, 301 AD2d 619, 619-620, lv denied 100 NY2d 566). We further conclude that defendant was not denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147).

We agree with defendant, however, that the court erred in directing that the sentence imposed on count four of the indictment, criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]), shall run consecutively with the sentences imposed on counts two, three, five, six and seven of the indictment. Here, "the weapon possession was not separate and distinct from the shooting[]" and consecutive sentences thus are prohibited (*People v Hamilton*, 4 NY3d 654, 659; see § 70.25 [2]; *People v Boyer*, 31 AD3d 1136, 1139, lv denied 7 NY3d 865; *People v Rudolph*, 16 AD3d 1151, 1152-1153, lv denied 5 NY3d 809). We therefore modify the judgment accordingly.

We have considered defendant's remaining contentions and conclude that none requires reversal.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1028

KA 07-01769

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CARL BARBER, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered August 22, 2007. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). We reject defendant's contention that the grand jury proceedings were defective, thus requiring reversal, because the prosecutor failed to instruct the grand jury on the agency defense. "[T]he question of whether a particular defense need be charged depends upon its potential for eliminating a needless or unfounded prosecution . . . , e.g., whether, had the [g]rand [j]ury believed that defendant's acts were justified, no indictment would have been returned" (*People v Torrence*, 305 AD2d 1042, 1043, *lv denied* 100 NY2d 625). Here, upon our review of the evidence before the grand jury, we conclude that it did not "so clearly support the defense of agency as to require its submission" (*People v Walker*, 265 AD2d 835, 835, *lv denied* 94 NY2d 831; *see People v Thompson*, 174 AD2d 1007, *lv denied* 78 NY2d 1082; *cf. People v Jenkins*, 157 AD2d 854, 855), and defendant neither testified before the grand jury nor requested that the defense be charged (*see Torrence*, 305 AD2d at 1043; *People v Beverly*, 148 AD2d 922, *lv denied* 74 NY2d 661). Contrary to the further contention of defendant, County Court did not abuse its discretion in denying his motion for substitution of counsel, inasmuch as defendant failed to demonstrate good cause for that relief (*see generally People v Sides*, 75 NY2d 822, 824; *People v Reese*, 23 AD3d 1034, *lv denied* 6 NY3d 779). Contrary to

the further contentions of defendant, he received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147), and the sentence is not unduly harsh or severe. Finally, the record does not support the contention of defendant that he was penalized for exercising his right to go to trial (see *People v Pena*, 50 NY2d 400, 411-412, rearg denied 51 NY2d 770, cert denied 449 US 1087; *People v Laws*, 41 AD3d 1205, 1206-1207, lv denied 9 NY3d 991).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1029

KA 06-01628

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JONATHON DICKERSON, DEFENDANT-APPELLANT.

PHILLIP R. HURWITZ, ROCHESTER, FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered May 18, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). We conclude that County Court did not abuse its discretion in denying the motion of defendant to withdraw his guilty plea without conducting a hearing. "The decision whether to permit a defendant to withdraw a plea rests within the sound discretion of the trial court and only in rare instances will a hearing be granted" (*People v Yell*, 250 AD2d 869, *lv denied* 92 NY2d 863). We further conclude that the court did not err in failing to assign new counsel to represent defendant in connection with the motion to withdraw the plea. Contrary to defendant's contention, there is no evidence in the record that defense counsel took a position that was adverse to that of defendant on the motion (*see People v Barnello*, 56 AD3d 1214, *lv denied* 12 NY3d 780), nor is there any evidence that defense counsel became a witness against him (*see People v Caple*, 279 AD2d 635, 636, *lv denied* 96 NY2d 798).

Defendant further contends that the court erred in refusing to suppress the victim's identification of him from a photo array because the victim was shown a prior photo array several months earlier that also contained defendant's photograph. We reject that contention. "Multiple photo identification procedures are not inherently suggestive" (*People v Chapman*, 161 AD2d 1156, *lv denied* 76 NY2d 854). Here, the identification was not rendered unduly suggestive merely because the witness was shown more than one photo array and defendant's photograph was the only photograph shown in both photo

arrays. The record establishes that different photographs of defendant were used (see *People v Dunlap*, 9 AD3d 434, 435, lv denied 3 NY3d 739; *People v Brennan*, 261 AD2d 914, lv denied 94 NY2d 820), the photographs of defendant appeared in a different location in each photo array (see *Dunlap*, 9 AD3d at 435), and there was a significant lapse of time between the presentations of the photo arrays (see *People v Quinones*, 228 AD2d 796).

Finally, the challenge by defendant to the sufficiency of the evidence before the grand jury is forfeited by his guilty plea (see *People v Edwards*, 55 AD3d 1337, 1338, lv denied 11 NY3d 924; *People v Ware*, 34 AD3d 860, lv denied 8 NY3d 951).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1030

KA 04-00299

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

AARON A. TOMPKINS, DEFENDANT-APPELLANT.

KRISTIN F. SPLAIN, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered September 19, 2003. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree (two counts) and burglary in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]), and two counts each of burglary in the first degree (§ 140.30 [1], [2]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). We conclude that County Court properly refused to suppress defendant's statements to the police despite his representation by counsel in an unrelated criminal proceeding, "inasmuch as there is no evidence in the record that the interrogating police officers had any knowledge . . . of defendant's representation by counsel therein" (*People v Johnson*, 61 NY2d 932, 934; see *People v Ragaglia*, 16 AD3d 1100, lv denied 5 NY3d 793; cf. *People v Burdo*, 91 NY2d 146, 149-150). Contrary to the further contentions of defendant, the record establishes that he knowingly and intelligently waived his *Miranda* rights, and there is no indication that he was threatened or coerced or that the police unlawfully isolated him from supportive adults who attempted to see him (see *People v Salaam*, 83 NY2d 51, 55; *People v Francis*, 49 AD3d 552, 552-553, lv denied 10 NY3d 934).

Contrary to the further contentions of defendant, he was not denied effective assistance of counsel (see generally *People v Baldi*, 54 NY2d 137, 147; *People v Carrasquillo*, 50 AD3d 1547, 1548, lv denied

11 NY3d 735), and the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1031

KA 09-00500

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

STEVEN FORTINO, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD H. DODD, DISTRICT ATTORNEY, OSWEGO (MICHAEL G. CIANFARANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 6, 2007. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1032

CAF 08-02082

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF HOWARD M.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

CHRISTOPHER S. BRADSTREET, LAW GUARDIAN, ROCHESTER, FOR
RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (DAVID VAN VARICK OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered July 25, 2008 in a proceeding pursuant to Family Court Act article 3. The order, among other things, adjudged that respondent is a juvenile delinquent.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the interest of justice and on the law without costs and the petition is dismissed in its entirety.

Memorandum: Respondent appeals from an order adjudicating him a juvenile delinquent based on findings that he committed acts that, if committed by an adult, would constitute the crimes of, inter alia, arson in the third degree (Penal Law § 150.10 [3]) and burglary in the third degree (§ 140.20). We agree with respondent that Family Court's findings were based on the uncorroborated testimony of accomplices, in violation of Family Court Act § 343.2 (1). Indeed, no independent corroborative evidence was offered at the fact-finding hearing (see generally *People v Johnson*, 1 AD3d 891; *People v McGrath*, 262 AD2d 1043), and the evidence introduced by the presentment agency has no "real tendency to connect [respondent] with the commission of the crime[s]" (*People v Kress*, 284 NY 452, 460). Although respondent failed to preserve his contention for our review, we nevertheless review it in the interest of justice (see *Matter of Yadiel Roque C.*, 17 AD3d 1168), and we conclude that the evidence is legally insufficient to support the court's findings (see *Matter of Jonathan S.*, 55 AD3d 1324; see generally *People v Bleakley*, 69 NY2d 490, 495).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1033

CAF 08-00904

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF ALANDREA B.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DONNA B., RESPONDENT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR RESPONDENT-APPELLANT.

JOHN HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, LAW GUARDIAN, UTICA, FOR ALANDREA B.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered January 23, 2007 in a proceeding pursuant to Family Court Act article 10. The order, among other things, directed respondent to comply with the terms and conditions specified in an order of protection.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (see generally *Matter of Abidi v Antohi*, 58 AD3d 726, 727; *Matter of Gonzalez v Gonzalez*, 57 AD3d 896, 897).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1034

CAF 09-00537

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF TAKIYAH S. MASSEY,
PETITIONER-RESPONDENT,

V

OPINION AND ORDER

DAVID A. EVANS, RESPONDENT-APPELLANT.

SEGAL & GREENBERG LLP, NEW YORK CITY (PHILIP C. SEGAL OF COUNSEL), FOR
RESPONDENT-APPELLANT.

DAVID J. PAULSEN, COUNTY ATTORNEY, WATERTOWN (KARI K. ANDERSON OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered November 28, 2008 in a proceeding pursuant to Family Court Act article 5-b. The order, inter alia, denied the objections of respondent to the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Opinion by PERADOTTO, J.: The sole issue presented in this appeal is whether military allowances for food and housing constitute "income" for the purposes of calculating a parent's child support obligation. Respondent father contends that Family Court erred in determining that his basic allowances for housing and subsistence (respectively, BAH and BAS), which he receives as a member of the United States Army, are income for child support purposes. We reject that contention, and we thus conclude that the order should be affirmed.

Facts and Procedural History

Petitioner mother commenced this proceeding seeking a determination that respondent is the father of her then-two-year-old child and seeking an award of child support. After an order of filiation was entered, the parties stipulated that the mother earns \$14,226 per year and that the father receives base pay from the military in the amount of \$22,186.80 per year. The parties further stipulated that, in addition to his base pay, the father receives BAH in the amount of \$10,776 per year and BAS in the amount of \$3,533.16 per year. BAH is a monthly sum paid to members of the military who do not reside in government-supplied housing (see 37 USC § 403 [a] [1];

Army Regulation 37-104-4, § 12-1). The amount of BAH, which is intended to offset the cost of civilian housing, varies according to the member's pay grade, geographic location, and dependency status (see 37 USC § 403 [a] [1]; Army Regulation 37-104-4, § 12-2). BAS is an additional monthly sum paid to active duty members to subsidize the cost of meals purchased for the benefit of the individual member on or off base (see 37 USC § 402 [a] [1]; Army Regulation 37-104-4, § 11-3). The amount of BAS is based upon average food costs as determined by the federal government (see 37 USC § 402 [b]).

In lieu of a formal hearing, the parties submitted memoranda of law on the only remaining issue, i.e., whether and to what extent the court should include BAH and BAS in the income of the father in calculating his child support obligation. The Support Magistrate concluded, inter alia, that BAH and BAS constitute income for child support purposes, reasoning that the allowances are additional resources available to the father and intended to offset the cost of his meals and lodging. The father filed written objections to the order of the Support Magistrate, contending that, inter alia, BAS and BAH do not fall within the Family Court Act's definition of income because the allowances are excluded from income for federal tax purposes and are not for the father's personal use or benefit. The court denied the father's objections and affirmed the order of the Support Magistrate.

Discussion

The specific question of whether military allowances may be included in a parent's income for child support purposes has never been addressed by a New York court. The Child Support Standards Act (CSSA), codified in Domestic Relations Law § 240 and Family Court Act § 413, establishes a formula for calculating a parent's basic child support obligation. One of the primary goals of the legislation is "to establish equitable support awards that provide a 'fair and reasonable sum' for the child's needs within the parents' means" (*Matter of Graby v Graby*, 87 NY2d 605, 609, rearg denied 88 NY2d 875, quoting Family Ct Act § 413 [1] [a]), and to enable children to "share in the economic status of both their parents" (Governor's Approval Mem, Bill Jacket, L 1989, ch 567, at 13). To that end, the amount of child support required by the statute is based in large part on a determination of parental income (see § 413 [1] [c]). Family Court Act § 413 (1) (b) (5) provides that a parent's "income" includes, but is not limited to, gross income as reported on the most recent federal income tax return and, to the extent not reflected in that amount, "income received" from eight enumerated sources such as workers' compensation, disability benefits, unemployment insurance benefits, and veterans benefits.

The statute also affords courts considerable discretion to attribute or impute income from "such other resources as may be available to the parent" (Family Ct Act § 413 [1] [b] [5] [iv]; see also *Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180; *Matter of Hurd v Hurd*, 303 AD2d 928; *Matter of Klein v Klein*, 251 AD2d 733, 735).

Such resources include, but are not limited to,

"meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirectly confer personal economic benefits[and] . . . fringe benefits provided as part of compensation for employment" (§ 413 [1] [b] [5] [iv]).

In our view, the allowances that the father receives from the military fall within the CSSA's broad definition of income. Pursuant to the plain language of the statute, parental income "*shall not be limited to*" taxable income or to the specifically enumerated sources of compensation (Family Ct Act § 413 [1] [b] [5] [emphasis added]). The legislative history of the statute further supports our conclusion that the definition of "income" should be broadly construed to include the allowances at issue. For example, the Governor's Program Bill Memorandum notes that the statute

"[d]efines 'income' as gross income for federal tax purposes *and income from all other sources* (e.g., workers' compensation, disability benefits, unemployment insurance benefits, social security benefits, interest on state and municipal bonds, veterans' benefits, retirement benefits) . . . plus, at the discretion of the court, imputed income" (Bill Jacket, L 1989, ch 567, at 8 [emphasis added]).

The father contends that BAH and BAS do not constitute "income" within the meaning of Family Court Act § 413 (1) (b) (5) because the allowances are excluded from income for federal income tax purposes (see Internal Revenue Code [26 USC] § 134 [a]). We reject that contention. As courts in other states have noted in rejecting similar contentions, the purposes underlying the federal tax code and child support statutes are different. The objective of the former is to calculate an individual's taxable income, while the objective of the latter is to determine the amount that a parent can afford to pay for the support of his or her child (see e.g. *State of La., Dept. of Social Servs. ex rel. D.F. v L.T.*, 934 So 2d 687, 691-692 [La]; *Alexander v Armstrong*, 415 Pa Super 263, 269, 609 A2d 183, 186). As noted above, the CSSA does not limit a parent's income to the amount reported on the parent's income tax return (see Family Ct Act § 413 [b] [5] [i]). To the contrary, the statute gives courts the "discretion to look beyond tax returns to determine actual expenses and income" (Governor's Program Bill Mem, Bill Jacket, L 1989, ch 567, at 11). Notably, veterans benefits are specifically included in the Family Court Act's definition of income, notwithstanding the fact that such benefits are excluded from taxable income under federal law (see § 413 [1] [b] [5] [iii] [E]).

The father further contends that BAH and BAS should be excluded from income for child support purposes because a military member's "pay" does not include military allowances pursuant to 37 USC § 101 (21). There is no merit to that contention. The federal statutory definition of "pay" is not relevant to the issue whether military allowances constitute income for purposes of calculating a member's child support obligation under New York law. In any event, federal law defines "regular compensation" or "regular military compensation" as

"the total of the following elements that a member of a uniformed service accrues or receives, directly or indirectly, in cash or in kind every payday: basic pay, *basic allowance for housing*, *basic allowance for subsistence*; and Federal tax advantage accruing to the aforementioned allowances because they are not subject to Federal income tax" (37 USC § 101 [25] [emphasis added]).

Various federal regulations also support the conclusion that BAH and BAS are part of a member's compensation for military service (see e.g. 33 CFR 55.7 ["[t]otal family income" for purposes of child development services includes "incentive and special pay for service or anything else of value, even if not taxable, that was received for providing services," e.g., BAH and BAS]; 32 CFR 54.4 [allowances for subsistence and housing are included within a member's "disposable earnings" pursuant to 42 USC § 665 for purposes of calculating child support allotments]). Federal law thus recognizes that BAH, BAS and the associated tax advantages of such allowances provide members of the military with a valuable employment benefit that is not reflected in their base pay.

The father also contends that BAH and BAS are not "perquisites" within the meaning of Family Court Act § 413 because the allowances are not for his "personal use" and confer no "personal economic benefits" upon him (§ 413 [1] [b] [5] [iv] [B]). In support of that contention, the father relies on federal tax regulations for the proposition that the value of meals or lodging furnished to an employee for the convenience of his or her employer is excluded from gross income (see 26 CFR 1.61-21 [a] [2]). Even assuming, arguendo, that such regulations are relevant to the issue whether military allowances should be imputed as income for child support purposes under New York law, we note that meals and lodging furnished to an employee or his or her dependents are excluded from income only if "the meals are furnished on the business premises of the employer . . . [and] the employee is required to accept such lodging on the business premises of his [or her] employer as a condition of his [or her] employment" (Internal Revenue Code [26 USC] § 119 [a]). Here, the father receives BAS in the form of additional cash in his paycheck, which can be used to purchase meals or groceries at establishments of his choice, and BAH is applied to the father's choice of dwellings. There is thus no question that the food and housing allowances "directly or indirectly confer personal economic benefits" upon the father (Family Ct Act § 413 [1] [b] [5] [iv] [B]).

In light of the fact that this case presents an issue of first impression under New York law, it is instructive to look to the law of other states for guidance. The father has not cited, nor have we found, any cases holding that military allowances do not constitute income for child support purposes. To the contrary, courts in other states have uniformly held that military allowances are properly included in a parent's income for child support purposes (see e.g. *D.F.*, 934 So 2d at 688 [military allowances for housing and subsistence must be included in a parent's gross income for the purposes of calculating child support]; *State of Neb. on Behalf of Hopkins v Batt*, 253 Neb 852, 865-866, 573 NW2d 425, 435 [district court properly included the nontaxable value of military housing and BAS as income in calculating the parent's child support obligation]; *Hautala v Hautala*, 417 NW2d 879, 881 [SD] [trial court properly included military allowances in parent's income for purposes of computing child support]; see also *Peterson v Peterson*, 98 NM 744, 747-748, 652 P2d 1195, 1198-1199 [military allowances may be garnished for child support payments]). We see no reason to depart from those persuasive cases.

We also reject the alternative contention of the father that the higher housing allowance he receives because he has a wife and a second child should be attributed to his wife and thus excluded from the calculation of his child support obligation for the child in question. The father receives that allowance as additional compensation for his military service (see 37 USC § 101 [25]). The fact that he receives the greater "with dependents" BAH rate (§ 403 [a] [2]) to accommodate the higher costs associated with housing a family does not mean that the difference between the basic rate and the "with dependents" rate is income earned by his wife rather than him. A "dependent" is defined as, inter alia, a spouse or a minor child, including an "illegitimate child" (§ 401 [a], [b] [1] [C]). The CSSA "is based on the principle that children are entitled to share in the income and standard of living of their parents, whether or not the parents are living together" (Letter from Sponsor, Bill Jacket, L 1989, ch 567, at 20). If the child who is the subject of the instant proceeding resided with the father and his new family, she would share in the benefits conferred by the higher BAH that he receives as a result of his dependency status. The parties' daughter should not be deprived of the benefit of that allowance simply because her parents do not live together.

Conclusion

Accordingly, we conclude that the court properly exercised its discretion in including the military allowances received by the father in his income for the purposes of determining his child support obligation and that the order should be affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1035

CAF 08-00721

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF BRAYANNA G. AND MARIAH S.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRYSTAL G., ANTHONY J.G. AND WILLIAM S.,
RESPONDENTS-APPELLANTS.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (EDWARD L. CHASSIN OF
COUNSEL), FOR RESPONDENT-APPELLANT CRYSTAL G.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT ANTHONY J.G.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT WILLIAM S.

ERIC T. DADD, COUNTY ATTORNEY, WARSAW (JAMIE B. WELCH OF COUNSEL), FOR
PETITIONER-RESPONDENT.

EMILY A. VELLA, LAW GUARDIAN, SPRINGVILLE, FOR BRAYANNA G.

STEVEN J. LORD, LAW GUARDIAN, ARCADE, FOR MARIAH S.

Appeals from an order of the Family Court, Wyoming County (Mark H. Dadd, J.), entered March 24, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent parents, the mother and respective fathers of the two children at issue, appeal from an order terminating their parental rights pursuant to Social Services Law § 384-b (4) (c) on the ground of mental retardation. We conclude that petitioner established by clear and convincing evidence, including the testimony of a psychologist, that the mother is "presently and for the foreseeable future unable, by reason of . . . mental retardation, to provide proper and adequate care for [her] child" (*id.*; see § 384-b [6] [b]; *Matter of Josh M.*, 61 AD3d 1366), and that each father, for the same reason, is also unable to provide the requisite care for his child.

Respondent father Anthony J.G. contends that the psychologist's testimony lacked a proper foundation because it was based on

evaluations conducted prior to the filing of the petition against him. Anthony J.G. failed to preserve that contention for our review inasmuch as he failed to object to the testimony on that ground (see generally *Wall v Shepard*, 53 AD3d 1050). In any event, that contention is without merit. In view of the life-long nature of Anthony J.G.'s disabilities, we conclude that Family Court properly admitted the testimony of the psychologist concerning an evaluation conducted prior to the filing of the petition. We note in any event that the court ordered further psychological evaluations of all three respondents at their request, and that the testimony of the psychologist who performed those evaluations, which was presented by respondents, in fact substantiated the testimony of petitioner's psychologist.

Finally, respondents waived their contention that the petitions were improperly filed before the children had been in the care of an authorized agency for the period of one year (see Social Services Law § 384-b [4] [c]), inasmuch as they failed to raise that contention in Family Court and it does not implicate the court's subject matter jurisdiction (see generally *Matter of Renee XX. v John ZZ.*, 51 AD3d 1090).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1036

CA 09-00551

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

ARTHUR BERRY, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

UTICA NATIONAL INSURANCE GROUP, ET AL.,
DEFENDANTS,
AND MCCLUSKY LAW FIRM, LLC, DEFENDANT-RESPONDENT.

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (MATTHEW J. SKIFF OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered November 18, 2008 in a legal malpractice action. The order and judgment granted the motion of defendant McClusky Law Firm, LLC for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, damages arising from the alleged malpractice of McClusky Law Firm, LLC (defendant) in failing to commence a timely action against defendant Utica National Insurance Group (Utica National). Supreme Court properly granted the motion of defendant seeking summary judgment dismissing the complaint against it. "To recover damages for legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney-client relationship" (*Moran v Hurst*, 32 AD3d 909, 910). Defendant met its burden of establishing as a matter of law that it had no attorney-client relationship with plaintiff, and plaintiff failed to raise a triable issue of fact (*see Volpe v Canfield*, 237 AD2d 282, 283, *lv denied* 90 NY2d 802). The unilateral belief of plaintiff that he was defendant's client does not by itself confer that status upon him (*see Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453; *Moran*, 32 AD3d at 911). Further, evidence that plaintiff contacted defendant concerning his dispute with Utica National does not establish the existence of an attorney-client relationship absent further evidence of an "explicit undertaking [by defendant] to perform a specific task" (*Wei Cheng Chang v Pi*, 288 AD2d 378, 380, *lv denied* 99 NY2d 501; *see McGlynn v*

Gurda, 184 AD2d 980, *appeal dismissed and lv denied* 80 NY2d 988).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1037

CA 08-02531

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, AND GREEN, JJ.

HUIBERT M. VRIESENDORP, M.D., CLAIMANT-APPELLANT,

V

ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(Claim No. 109507.)

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG, FORMATO & EINIGER,
LLP, LAKE SUCCESS (SARAH C. LICHTENSTEIN OF COUNSEL), FOR
CLAIMANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered October 28, 2008. The order granted the motion of defendant for summary judgment dismissing the claim and denied the motion of claimant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1039

CA 08-02332

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

SONJA SWEENEY, PLAINTIFF-RESPONDENT,

V

ORDER

PREFERRED MUTUAL INSURANCE COMPANY, DEFENDANT.

JP MORGAN CHASE BANK, N.A., AS INDENTURE
TRUSTEE ON BEHALF OF THE NOTEHOLDERS AND THE
NOTE INSURER OF THE ABFS MORTGAGE LOAN TRUST
2001-4, MORTGAGE BACKED NOTES, APPELLANT.

O'MELVENY & MYERS LLP, WASHINGTON, D.C. (BRIAN P. BROOKS, OF THE
WASHINGTON, D.C. AND CALIFORNIA BARS, ADMITTED PRO HAC VICE, OF
COUNSEL), AND SHAPIRO & DICARO, LLP, ROCHESTER, FOR APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered August 22, 2008. The order granted the application of plaintiff to authorize the release of trust funds to plaintiff and her attorneys.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1043.1

CA 09-01213

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-APPELLANT,

V

OPINION AND ORDER

JOEY BLAIR, RESPONDENT-RESPONDENT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR PETITIONER-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order (denominated order and judgment) of the Supreme Court, Allegany County (Timothy J. Walker, A.J.), entered June 12, 2009 in a proceeding pursuant to Mental Hygiene Law article 10. The order granted respondent's motion to dismiss the petition and ordered respondent's release.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Supreme Court, Allegany County, for a trial in accordance with Mental Hygiene Law § 10.07.

Opinion by PERADOTTO, J.: In this appeal, we are confronted with the issue whether respondent is a detained sex offender within the meaning of Mental Hygiene Law § 10.03 (g) (5). Our resolution of the issue requires consideration of the interplay between articles 9 and 10 of the Mental Hygiene Law and the implications of the decisions of the Court of Appeals in *State of N.Y. ex rel. Harkavy v Consilvio* (7 NY3d 607) (hereafter, *Harkavy I*) and *State of N.Y. ex rel. Harkavy v Consilvio* (8 NY3d 645) (hereafter, *Harkavy II*). Supreme Court concluded that respondent was not a detained sex offender within the meaning of Mental Hygiene Law § 10.03 (g) (5) because he was not "legally detained." We conclude that reversal is required because respondent is a detained sex offender under a plain reading of the statute.

Factual Background and Procedural History

In May 1997, respondent was convicted upon a plea of guilty of one count of sexual abuse in the first degree (Penal Law § 130.65 [3]) and was sentenced to a term of imprisonment, to be followed by a

period of probation. Respondent thereafter violated the conditions of his probation, whereupon his probation was revoked and he was sentenced to a term of imprisonment of 3½ to 7 years on the sexual abuse conviction.

Shortly before he completed serving his prison term, respondent was examined by two physicians from the Office of Mental Health (OMH) for the purpose of determining whether he was subject to involuntary commitment at an OMH facility pursuant to article 9 of the Mental Hygiene Law. The OMH physicians determined that respondent suffered from pedophilia, a mental illness; that he posed a substantial threat of harm to others; and that involuntary hospitalization was warranted. Thereafter, the prison superintendent completed an application for involuntary admission on medical certification, pursuant to Mental Hygiene Law § 9.27. When his prison term expired, in July 2006, respondent was released and was transferred directly to the Central New York Psychiatric Center (CNYPC), where he was involuntarily committed for an initial period of 60 days (see § 9.31 [a]).

In August 2006, OMH notified respondent that it intended to seek court authorization to retain him for an additional six-month period and, on September 5, 2006, CNYPC made an application in Supreme Court for a retention order (see Mental Hygiene Law § 9.33 [a]). In response, respondent requested a hearing to determine the need for his continued involuntary hospitalization, and sought discovery and the appointment of a medical expert.

During the pendency of the article 9 proceeding, the Legislature enacted the Sex Offender Management and Treatment Act, codified as article 10 of the Mental Hygiene Law, which became effective on April 13, 2007 (see L 2007, ch 7). On June 5, 2007, the Court of Appeals issued its decision in *Harkavy II* (8 NY3d at 651-652), determining that convicted sex offenders who were directly transferred to psychiatric hospitals under article 9 at the conclusion of their sentences were entitled to the procedural protections set forth in the newly-enacted article 10. Approximately two weeks after the decision in *Harkavy II* was issued, an OMH case review team referred respondent for a psychiatric evaluation to determine whether he was a "sex offender requiring civil management" under Mental Hygiene Law article 10 (§ 10.05 [e]). The OMH psychiatrist concluded that respondent suffered from a mental abnormality as that term is defined in Mental Hygiene Law § 10.03 (i), i.e., pedophilia, and that he was likely to commit another sex offense in the future.

In October 2007, OMH provided the Attorney General with notice that respondent may be a detained sex offender who was nearing anticipated release (see Mental Hygiene Law § 10.05 [b]) and, on January 10, 2008, the Attorney General commenced this article 10 proceeding by filing a sex offender civil management petition (see § 10.06 [a]). Following a hearing, Supreme Court, Oneida County, determined that there was probable cause that respondent was a sex offender requiring civil management under article 10, and the court set a date for trial. The matter was subsequently transferred to Allegany County, upon respondent's request. While the article 10

proceeding was pending, the article 9 proceeding was discontinued by stipulation of the parties.

Respondent then moved to dismiss the article 10 petition contending, inter alia, that he was not a detained sex offender within the meaning of Mental Hygiene Law § 10.03 (g) (5) because he was not lawfully in the custody of OMH at the commencement of the proceeding. The court granted respondent's motion and ordered respondent's release, based on its conclusion that article 10 applies only to sex offenders who are legally detained. We conclude that the order should be reversed.

Discussion

The Legislature enacted Mental Hygiene Law article 10, which governs the involuntary commitment of certain sex offenders to psychiatric facilities upon the conclusion of their incarceration (§ 10.01 [b]), in response to the decision of the Court of Appeals in *Harkavy I* (see Governor's Program Bill Mem, Bill Jacket, L 2007, ch 7, at 8). In *Harkavy I* (7 NY3d at 610), the Court of Appeals invalidated the practice of involuntarily transferring convicted sex offenders directly from prison to mental health facilities pursuant to Mental Hygiene Law article 9. The Court wrote that, "[i]n the absence of specific statutory authority governing the release of felony offenders from prison to a psychiatric hospital, we hold that the procedures set forth in Correction Law § 402, rather than Mental Hygiene Law article 9, better suit this situation" (*id.*).

In its subsequent decision in *Harkavy II* (8 NY3d at 651), however, the Court of Appeals acknowledged that, in enacting article 10, "the Legislature filled the statutory void, enacting a legislative scheme designed to address the civil confinement of certain classes of inmates completing their terms of imprisonment." The Court held that the petitioners in that case, who were transferred from prison to mental health facilities prior to the enactment of article 10, were nonetheless included within the ambit of the new statutory scheme (*id.* at 651-652). The Court thus remitted the matter to Supreme Court for commitment hearings in accordance with Mental Hygiene Law article 10 (*id.* at 652).

Against this backdrop, we turn to the particular statutory provision at issue on appeal and its application to the facts of this case. Article 10 of the Mental Hygiene Law defines "detained sex offender" in relevant part as

"a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is . . .

* * *

A person convicted of a sex offense who is, or was at any time after September [1, 2005], a patient in a hospital operated by [OMH], and who was admitted

directly to such facility pursuant to article nine of this title or section [402] of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively" (§ 10.03 [g] [5]).

The statute broadly defines an agency with jurisdiction as "that agency which, during the period in question, would be the agency responsible for supervising or releasing such person," including the Department of Correctional Services (DOCS) and OMH (see § 10.03 [a]).

We conclude that respondent falls squarely within the definition of detained sex offender under a plain reading of Mental Hygiene Law § 10.03 (g) (5). Respondent was convicted of sexual abuse in the first degree, a sex offense, and was admitted directly to CNYPC, an OMH hospital, pursuant to Mental Hygiene Law article 9 upon his release from prison on July 19, 2006. Since being admitted to CNYPC in July 2006, respondent has remained continuously in the custody of OMH, an agency with jurisdiction under article 10 (see § 10.03 [a], [g] [5]). Although article 10 was enacted after respondent's initial commitment to CNYPC, the plain language of Mental Hygiene Law § 10.03 (g) (5) evinces the Legislature's intent "to include [respondent] in the population of offenders covered by the new statutory provisions" (*Harkavy II*, 8 NY3d at 652).

In order to circumvent the clear import of Mental Hygiene Law § 10.03 (g) (5), respondent contends that he falls outside the purview of the statute because he was not "legally detained" by OMH. Specifically, respondent contends that his detention was unlawful because: (1) his initial commitment to CNYPC pursuant to article 9 was improper, and (2) his continued retention violated the procedures set forth in article 9. We reject those contentions.

With respect to respondent's initial commitment to CNYPC in July 2006, his situation is no different from that of the petitioners in *Harkavy II*, who were likewise committed directly to OMH facilities at the conclusion of their prison sentences pursuant to article 9 (see *id.* at 648). The Court in *Harkavy II* nonetheless concluded that the petitioners therein were detained sex offenders within the meaning of Mental Hygiene Law § 10.03 (g) (5) (*id.* at 651-652). Indeed, the Court's conclusion in *Harkavy II* is compelled by the plain language of section 10.03 (g) (5), which was clearly intended to include the *Harkavy I* patients - similarly situated to respondent herein - within the class of offenders covered by article 10 (see § 10.03 [g] [5]). Significantly, in both *Harkavy I* and *Harkavy II*, the Court determined that the proper remedy for the unlawful commitments of the petitioners pursuant to article 9 was not their immediate release but, rather, the proper remedy was to conduct prompt commitment hearings in accordance with the applicable statutes (see *Harkavy II*, 8 NY3d at 652; *Harkavy I*, 7 NY3d at 614). As the Court explained in *Harkavy I* (7 NY3d at 614):

"[W]e understand how in an attempt to protect the community from violent sexual predators, the State proceeded under the Mental Hygiene Law. *We do not propose that these petitioners be released, nor do we propose to trump the interests of public safety. Rather, we recognize that a need for continued hospitalization may well exist.* We therefore order that those petitioners remaining in OMH custody be afforded an immediate retention hearing pursuant to article 9 of the Mental Hygiene Law—now controlling—since they are no longer serving a prison sentence" (emphasis added).

In support of his contention that article 10 requires that a patient's detention be "lawful" from its inception, respondent erroneously relies on cases in which an article 10 proceeding was commenced while the respondent was in custody for violating the conditions of an unlawfully imposed period of postrelease supervision (see e.g. *Matter of State of New York v F.E.*, 64 AD3d 497; *People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 59 AD3d 921, lv granted ___ NY3d ___ [Sept. 3, 2009]; *Matter of State of New York v Randy M.*, 57 AD3d 1157, lv denied 11 NY3d 921). Inasmuch as the detained respondent in those cases was not in the lawful custody of DOCS at the time of his transfer to OMH, the respondent was not in the "care, custody, control, or supervision of an agency with jurisdiction" during the relevant time period (Mental Hygiene Law § 10.03 [g]; see e.g. *F.E.*, 64 AD3d at 498 ["DOCS' administrative imposition of [postrelease supervision] having been outside its jurisdiction and therefore null from its inception . . . , respondent was not in DOCS' lawful custody at the time of his transfer to OMH, and thus could not be lawfully transferred by DOCS to OMH"]). Here, there is no question that respondent was lawfully in the custody of DOCS when he was transferred to CNYPC pursuant to article 9. Respondent remained in the custody of OMH, also an agency with jurisdiction, when OMH provided notice to the Attorney General under the newly-enacted Mental Hygiene Law § 10.05 (b).

We reject the further contention of respondent that his continued detention in CNYPC without a hearing or retention order violated the requirements of article 9. To the contrary, we conclude that petitioner complied with the requirements of article 9 and then promptly commenced this article 10 proceeding shortly after the Court of Appeals issued its decision in *Harkavy II*. Prior to the expiration of respondent's initial 60-day period of confinement (see Mental Hygiene Law § 9.31 [a]), OMH timely notified respondent of its intent to seek court authorization to retain him for an additional six-month period (see § 9.33) and made an application in Supreme Court for a retention order. Although the record does not contain a retention order issued upon the application of OMH, article 9 nevertheless authorizes a hospital to "retain the patient for such further period . . . during which the application may be pending" (§ 9.33 [a]). Respondent requested a hearing in September 2006, and the matter was

progressing toward such a hearing when Mental Hygiene Law article 10 was enacted. Although respondent holds petitioner accountable for the delay in the hearing pursuant to article 9, the record does not support his position. Indeed, the submissions of respondent in support of his motion to dismiss reflect that some, if not all, of the delay can be attributed to respondent's requests for discovery and the appointment of an expert.

While respondent's article 9 proceeding was pending, the Court of Appeals held in *Harkavy II* that the newly-enacted article 10 applied to patients, such as respondent, who were transferred directly from prison to an OMH facility under article 9. Notably, the record reflects that OMH began its evaluation of respondent pursuant to article 10 within 17 days of the issuance of the Court's decision in *Harkavy II*. From June 2007, when *Harkavy II* was decided, until October 2007, the parties continued to exchange discovery in the article 9 proceeding. During that same time period, OMH provided the Attorney General with the required notice under Mental Hygiene Law § 10.05 (b), and a case review team determined that respondent was a sex offender requiring civil management pursuant to section 10.05 (g). The Attorney General filed the instant article 10 petition approximately two months after respondent was notified of the findings of the case review team. After a probable cause hearing, the court ordered respondent's continued detention at CNYPC pending trial and scheduled a jury trial, in accordance with Mental Hygiene Law § 10.06 (k) and § 10.07 (a). The article 10 petition was progressing toward trial when respondent filed his motion to dismiss.

Even assuming, arguendo, that the delay in holding a hearing under article 9 was entirely attributable to petitioner and that respondent's detention was thereby prolonged, we conclude that the proper remedy is not dismissal of the petition and respondent's release but, rather, the proper remedy is an expeditious hearing (see *Harkavy II*, 8 NY3d at 652; *Harkavy I*, 7 NY3d at 614; see also *State of N.Y. ex rel. Karur v Carmichael*, 41 AD3d 349, 349-350 [First Department reversed an order that granted the petition for a writ of habeas corpus and directed the immediate release of the petitioner from a psychiatric facility despite the fact that the petitioner was held without legal authority under article 9]; *People ex rel. Noel B. v Jones*, 230 AD2d 809, 811, *lv dismissed* 88 NY2d 1065 [although petitioner was confined without an order authorizing continued retention as required by article 9, dismissal of the retention application or immediate discharge was not the required remedy for the state's failure to comply with the statute]). While we are mindful of the fact that respondent has been confined in an OMH facility since the expiration of his sentence in July 2006, we cannot agree with respondent that he is entitled to dismissal of the petition and immediate release on the facts of this case.

Conclusion

Accordingly, we conclude that the order should be reversed, respondent's motion to dismiss denied, the petition reinstated, and

the matter remitted to Supreme Court for a trial in accordance with

Mental Hygiene Law § 10.07.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1043

CA 08-02176

PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, CARNI, AND GREEN, JJ.

IN THE MATTER OF MANUFACTURERS AND TRADERS TRUST COMPANY (FORMERLY MERCHANTS NATIONAL BANK AND TRUST COMPANY OF SYRACUSE), A COTRUSTEE OF THE DAVID SMALL TRUST UNDER AGREEMENT DATED DECEMBER 28, 1938, PETITIONER-RESPONDENT-APPELLANT, TO RESIGN AS TRUSTEE AND FOR APPROVAL OF ITS ACCOUNTING.

MEMORANDUM AND ORDER

JOAN SMALL FANELLI, JEAN SMALL COFFMAN, JANE SMALL KLINCZAK, SHEILA SMALL ATWATER, JAMES D. SMALL, AND PATRICIA SMALL KELLETT, INDIVIDUALLY AND AS BENEFICIARIES OF THE TRUST OF DAVID SMALL, RESPONDENTS-APPELLANTS-RESPONDENTS.

JOAN SMALL FANELLI, JEAN SMALL COFFMAN, JANE SMALL KLINCZAK, SHEILA SMALL ATWATER, JAMES D. SMALL, AND PATRICIA SMALL KELLETT, INDIVIDUALLY AND AS BENEFICIARIES OF THE TRUST OF DAVID SMALL, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

M&T BANK CORPORATION, AS TRUSTEE OF THE TRUST OF DAVID SMALL, DEFENDANT-RESPONDENT-APPELLANT.

LUSTBERG & FERRETTI, GLENS FALLS (ROBERT M. LUSTBERG OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS AND PLAINTIFFS-APPELLANTS-RESPONDENTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (SAMUEL M. VULCANO OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT AND DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Surrogate's Court, Onondaga County (Peter N. Wells, S.), entered May 15, 2008. The order, among other things, granted that part of the petition of Manufacturers and Traders Trust Company (formerly Merchants National Bank and Trust Company of Syracuse) to resign as cotrustee.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding petitioner-defendant and respondents-plaintiffs counsel fees and as modified the order is affirmed without costs, and the matter is remitted to Surrogate's Court, Onondaga County, for further proceedings in accordance with the following Memorandum: In 1938, David Small (decedent) executed an

irrevocable inter vivos trust (Trust) for the benefit of his surviving children and the surviving issue of his deceased children. Decedent named himself trustee of the Trust, and the life of the Trust was measured by the lives of the two oldest children of decedent and his wife. Following the creation of the Trust, decedent and his wife had four more children. The Trust provided for the distribution of income and principal.

In 1968 decedent commenced a proceeding in Supreme Court seeking to remove himself as trustee. The court appointed decedent's wife and the predecessor to petitioner-defendant, Manufacturers and Traders Trust Company (M&T), as successor trustees. Those trustees thereafter petitioned the court to appoint one of the children, respondent-plaintiff James D. Small, as a third trustee. This action arises out of various transactions and investment decisions involving M&T and the other cotrustees. In 2002 the beneficiaries of the Trust commenced an action alleging that M&T was paying itself commissions on the principal on at least an annual basis since 1968 in violation of the terms of the Trust and that M&T wrongfully invaded and dissipated Trust principal to pay its annual or periodic commissions. They sought an order removing M&T as trustee, directing the return of all fees, commissions and expenses paid to M&T from Trust assets, compensatory and punitive damages, and termination of the Trust. Prior to the resolution of that action, M&T in turn commenced a proceeding in Surrogate's Court seeking settlement of an interim accounting of the Trust and permission to resign as cotrustee of the Trust, along with approval of the interim accounting for the period from May 22, 1968 through December 31, 2003 and approval of the costs and expenses of the legal proceedings from the Trust corpus. The action and proceeding were consolidated, for determination in Surrogate's Court.

M&T then filed a separate petition with the Surrogate, seeking "advice and direction" pursuant to the SCPA. On the appeal and cross appeal from the Surrogate's ensuing decree, this Court concluded that the Trust unambiguously directed that \$10,000 be paid annually to each child, regardless of age (*Matter of Manufacturers & Traders Trust Co. [Small]*, 42 AD3d 936, 937). We further concluded that the Surrogate erred in failing to determine whether the Trust required distribution of an amount equal to the annual fixed appreciation in value of the original issue discount bonds owned by the Trust, and we remitted the matter to Surrogate's Court to determine that issue (*id.* at 938).

Upon remittal, the Surrogate conducted a bench trial and thereafter granted that part of M&T's petition to resign as cotrustee. The Surrogate also determined that the use of Temporary Investment Funds (TIFs) by M&T was reasonable and proper given "the broad investment powers set forth in the Trust." With respect to the original issue discount bonds, the Surrogate determined that the appreciation in value of those bonds was income that was distributable based on the Trust language and EPTL 11A-4.6 (b). The Surrogate further concluded, however, that M&T did not breach its fiduciary duty to respondents-plaintiffs (hereafter, plaintiffs) by selling off those bonds to distribute accretion because there was no credible evidence

that M&T acted without the approval of at least one of the cotrustees. The Surrogate determined that distribution of income generally was one of the paramount goals of decedent.

With respect to commissions collected by M&T, the Surrogate determined that the Trust terms limited M&T to receiving compensation at the statutory rates payable to a sole testamentary trustee. The Surrogate also determined that, because the Trust provided for commissions to be paid at the rates provided by the laws of the State of New York, M&T was entitled to commission rates in effect pursuant to the controlling law at the time those commissions were collected rather than pursuant to the controlling law at the time of the creation of the Trust. The Surrogate directed M&T "to amend its account to set forth its commissions in compliance" with the Surrogate's determination with respect to commissions and to consider various factors when making its calculations. The Surrogate concluded that the amount of the commissions collected by M&T over the years may have exceeded the amount to which it was entitled, and ordered that M&T be "surcharged interest" at the statutory rate set forth in CPLR 5004 on the excess amount collected by it during its management of the trust.

Upon our review of the record, we conclude that there is no evidence that M&T sold Trust assets to pay itself unauthorized annual commissions on principal and thus, contrary to plaintiffs' contention, there is no basis for an award for appreciation/lost investment value damages (*see Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 226-227). We further conclude that the Surrogate properly determined that M&T was entitled to collect commissions at rates allowed by SCPA 2308 as that law evolved. Also contrary to plaintiffs' contention, the opinion of a representative of M&T is not dispositive on the issue of the rate of commissions to which M&T was entitled. Rather, the language of the Trust instrument itself is dispositive (*see Hemingway v Hemingway Found.*, 193 AD2d 559), and here that language does not limit the rate of commission to the rate allowed by New York State Law at the time the Trust was created (*cf. Matter of Lehman v Irving Trust Co.*, 55 NY2d 97, 100-101). We further conclude that the Surrogate properly determined that SCPA 2308, not SCPA 2309, prescribed the proper rate of commissions. The former statute applies to lifetime trusts created on or before August 31, 1956, and here the Trust was created on December 28, 1938.

We further reject plaintiffs' contention that the investment of trust funds into TIFs was in violation of the prudent person rule of investment applicable in the period from 1973 to 1981 (*see Matter of Janes*, 90 NY2d 41, 49, *rearg denied* 90 NY2d 885). That standard, set forth in EPTL 11-2.2 (a) (1) provides that "[a] fiduciary holding funds for investment may invest the same in securities as would be acquired by prudent [persons] of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital" (*see generally Matter of Donner*, 82 NY2d 574). Reading the Trust as a whole, we conclude that one of its objectives is production of income, and there was testimony from M&T's expert to that effect. Thus, the Surrogate did not err in concluding that the placement of

trust funds into TIFs did not violate the objectives of the Trust.

We modify the order, however, with respect to counsel fees. The Surrogate should have granted in part M&T's request for counsel fees based on Paragraph FIFTEENTH of the Trust, which provides that reasonable counsel fees, costs and disbursements and the necessary expenses of the trustee shall be payable from the Trust estate or the income of it as it may be appropriate. Because plaintiffs asserted several unfounded causes of action and objections to the accounting, M&T is entitled to "reasonable counsel fees." We therefore modify the order by awarding M&T counsel fees, and we remit the matter to Surrogate's Court to determine the amount of reasonable counsel fees incurred by M&T in defending against those unfounded causes of action and objections to the accounting. Plaintiffs similarly are entitled to an award of counsel fees and, although the Surrogate had the authority to award them such fees (*see Matter of Garvin*, 256 NY 518, 521), the Surrogate chose not to do so. Plaintiffs would not have incurred certain fees had they not been required to commence the action to obtain the commissions wrongfully collected by M&T. We therefore further modify the order by awarding plaintiffs counsel fees, and we direct the Surrogate on remittal to determine the amount of reasonable counsel fees incurred by them with respect to the cause of action and objection concerning M&T's unauthorized annual commissions on principal.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1045

KA 09-00325

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL BARSKI, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, J.), rendered May 30, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). We agree with defendant that his waiver of the right to appeal is invalid inasmuch as the record fails to "establish that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; see *People v Cain*, 29 AD3d 1157; *People v Popson*, 28 AD3d 870). The contention of defendant that he was denied his right to effective assistance of counsel therefore survives the invalid waiver of the right to appeal (see *People v Campbell*, 62 AD3d 1265), and it survives the plea to the extent that he contends that the plea was infected by the alleged ineffective assistance of counsel (see *People v Gimenez*, 59 AD3d 1088, lv denied 12 NY3d 816; cf. *People v Oliveri*, 49 AD3d 1208, 1209). We nevertheless conclude, however, that defendant's contention lacks merit (see *People v Gross*, 50 AD3d 1577; see generally *People v Ford*, 86 NY2d 397, 404).

Although the further contention of defendant that County Court erred in refusing to suppress his statement to the police on the ground that the statement was made in violation of his right to counsel survives the invalid waiver of the right to appeal (see *People v Ortiz*, 46 AD3d 1409, 1409-1410, lv denied 10 NY3d 769), we conclude that it is without merit. " 'The suppression court's credibility

determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record' " (*People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795). The record of the suppression hearing establishes that, after defendant was informed of his *Miranda* rights at the police station and that he had been implicated in a robbery, defendant asked the investigator, "should I get a lawyer?" The record supports the court's determination that defendant's question "was not an unequivocal assertion of [defendant's] right to counsel when viewed in context of the totality of circumstances, particularly with respect to events following the comment itself" (*People v Powell*, 304 AD2d 410, 411, *lv denied* 1 NY3d 578; *see People v Glover*, 87 NY2d 838, 839). Indeed, following defendant's question, the investigator informed defendant that he could not answer that question, that defendant must make that decision himself, and that he could not provide advice to defendant with respect to that question. Although defendant was silent for several minutes, he then admitted that he had committed the crime. We conclude that defendant thereby "clearly and unambiguously" expressed his desire to continue the interview without the assistance of counsel and thus did not unequivocally invoke his right to counsel before making his statement to the police such that his right to counsel attached (*Glover*, 87 NY2d at 839; *see People v Kuklinski*, 24 AD3d 1036, *lv denied* 7 NY3d 758, 814; *Powell*, 304 AD2d at 410-411).

Defendant failed to preserve for our review his further contention that the plea was involuntarily entered inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Kuras*, 49 AD3d 1196, *lv denied* 10 NY3d 866), and this case does not fall within the narrow exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666). Finally, the further contention of defendant that the court abused its discretion in denying his request for youthful offender status is without merit. Defendant was convicted of an armed felony (*see CPL 1.20 [41] [b]*), and there were no "mitigating circumstances that [bore] directly upon the manner in which the crime was committed" (*CPL 720.10 [3] [i]*; *see CPL 720.10 [2] [a] [ii]*; *People v Crawford*, 55 AD3d 1335, 1336, *lv denied* 11 NY3d 896; *People v Lockwood*, 283 AD2d 987).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1046

KA 06-00401

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CALVIN WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 6, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree and petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In these consolidated appeals, defendant appeals from judgments convicting him following a jury trial of, inter alia, four counts of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to the contention of defendant, Supreme Court properly denied his request for substitution of counsel inasmuch as he failed to demonstrate the requisite good cause for substitution (*see People v Linares*, 2 NY3d 507, 510-512; *see generally People v Sides*, 75 NY2d 822, 824). There is no merit to defendant's contention that the court applied an incorrect standard in determining whether there was good cause for substitution (*see generally People v Medina*, 44 NY2d 199, 207-209). Also contrary to defendant's contention, the sentence imposed in each appeal is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1047

KA 06-00402

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CALVIN WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 6, 2005. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and attempted petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v White* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2009]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1048

KA 06-00403

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CALVIN WHITE, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 6, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (three counts) and petit larceny (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v White* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2009]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1049

KA 07-02441

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HENRY J. JAROCHA, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered October 19, 2007. The judgment convicted defendant, upon a jury verdict, of felony driving while intoxicated (two counts) and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of one count of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3]) and two counts of felony driving while intoxicated (§ 1192 [2], [3]; § 1193 [1] [c] [former (ii)]). We reject defendant's contention that the evidence is legally insufficient to support the conviction of aggravated unlicensed operation of a motor vehicle (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the People presented the order of suspension and revocation with defendant's signature and thus established that defendant knew or had reason to know that his license had been revoked (*see People v Crandall*, 199 AD2d 867, 869, *lv denied* 83 NY2d 803). Also, viewing the evidence in light of the elements of the two counts of felony driving while intoxicated as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, we conclude that County Court did not abuse its discretion in denying defendant's motion for substitution of counsel on the day on which jury selection was scheduled to begin (*see People v Cunningham*, 12 AD3d 1131, 1132, *lv denied* 4 NY3d 829, 5 NY3d 761; *People v Gloster*, 175 AD2d 258, 259, *lv denied* 78 NY2d 1011; *People v*

Terry, 115 AD2d 130, *lv denied* 67 NY2d 890).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1050

KA 07-00512

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EDDIE BROWN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered August 14, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to the contentions of defendant, we conclude that his waiver of the right to appeal is valid (*see People v Lopez*, 6 NY3d 248, 256), and that it is not void as against public policy (*see People v Carmody*, 53 AD3d 1048, *lv denied* 11 NY3d 830). The further contention of defendant that his plea was not knowing, voluntary, or intelligent because he gave only "monosyllabic responses" to County Court's questions in effect constitutes a challenge to the factual sufficiency of the plea allocution and thus is encompassed by the valid waiver of the right to appeal (*see People v Bailey*, 49 AD3d 1258, *lv denied* 10 NY3d 932; *People v Cole*, 42 AD3d 963, *lv denied* 9 NY3d 990). Although the further ground for the contention of defendant that his plea was not knowingly, voluntarily, and intelligently entered "survives his valid waiver of the right to appeal . . . , defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve his contention for our review" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815; *see People v Neal*, 56 AD3d 1211, *lv denied* 12 NY3d 761). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *Neal*, 56 AD3d 1211). To the extent that the contention of defendant that he was denied effective assistance of counsel survives his guilty plea and waiver of the right to appeal (*see People v Gimenez*, 59 AD3d 1088, *lv denied* 12 NY3d 816; *People v Bethune*, 21 AD3d 1316, *lv denied* 6 NY3d

752), we reject that contention (see generally *People v Ford*, 86 NY2d 397, 404).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1051

KAH 09-00172

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CARTY SPENCER, PETITIONER-RESPONDENT,

V

ORDER

MELVIN WILLIAMS, SUPERINTENDENT, WILLARD DRUG
TREATMENT CAMPUS, RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF
COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from a judgment of the Supreme Court, Seneca County
(Dennis F. Bender, A.J.), dated April 2, 2008. The judgment directed
release of petitioner to parole supervision.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs as moot (*see People ex rel. Allen v Dalsheim*, 48 NY2d
971, 972; *Matter of Miller v Glasheen*, 193 AD2d 747, 748).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1052

KA 08-00344

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TERRY L. BEAN, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered December 10, 2007. The judgment convicted defendant, upon a jury verdict, of attempted rape in the first degree (two counts), endangering the welfare of a child (two counts), and unlawfully dealing with a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [2], [4]) and endangering the welfare of a child (§ 260.10 [1]), and one count of unlawfully dealing with a child in the first degree (§ 260.20 [2]). Contrary to the contention of defendant, County Court properly denied his motion, upon renewal, seeking to dismiss the indictment on the ground that the grand jury proceeding was defective. Defendant sought dismissal based on alleged prosecutorial misconduct, contending that "the integrity [of the grand jury proceeding was] impaired" and that he was thereby prejudiced (CPL 210.35 [5]). Dismissal of the indictment on that ground is an "exceptional remedy" that is not warranted in this case (*People v Darby*, 75 NY2d 449, 455). Upon our review of the grand jury proceeding, we conclude that "[t]here is no indication that the People knowingly or deliberately presented false testimony before the [g]rand [j]ury, and thus there is no basis for finding that the integrity of the [g]rand [j]ury proceeding was impaired . . . by the alleged false testimony" (*People v Klosin*, 281 AD2d 951, 951, lv denied 96 NY2d 864).

Defendant failed to renew his motion for a trial order of dismissal after presenting evidence and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence (see *People v Hines*, 97 NY2d 56, 61, rearg denied 97 NY2d 678; *People v*

Griffin, 41 AD3d 1285, 1286, *lv denied* 9 NY3d 923, 990). In any event, that challenge lacks merit (see generally *People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495).

Defendant further contends that the court erred in precluding the testimony of his expert witness who, according to defendant, would have provided general testimony concerning police interrogation techniques and false confessions. The court did not abuse its discretion in determining that the expert's testimony would not be relevant in view of the facts of this case (see generally *People v Young*, 7 NY3d 40, 44-45; *People v Lee*, 96 NY2d 157, 162). The sentence is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit. We note, however, that the certificate of conviction incorrectly recites that defendant was convicted of one of the two counts of attempted rape in the first degree under Penal Law §§ 110.00 and 130.35 (1), and it must therefore be amended to reflect that he was convicted under Penal Law §§ 110.00 and 130.35 (2) (see *People v Saxton*, 32 AD3d 1286; see also *People v Benson*, 265 AD2d 814, 816, *lv denied* 94 NY2d 860, *cert denied* 529 US 1076).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1053

KA 07-02433

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES KOBZA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered September 11, 2007. The judgment convicted defendant, after a jury trial, of course of sexual conduct against a child in the first degree (two counts), rape in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and one count of rape in the first degree (§ 130.35 [4]). We reject the contention of defendant that Supreme Court erred in refusing to suppress two incriminating letters that the police found in a hotel room. Defendant had the burden of establishing that he had a legitimate expectation of privacy in the hotel room that was searched by the police (*see People v Ramirez-Portoreal*, 88 NY2d 99, 108), and he failed to meet that burden. Inasmuch as defendant failed to check out of the hotel by the required time, he "lost his [legitimate] expectation of privacy in the hotel room and its contents, and the [owner] of the hotel had the authority to consent to the search" by the police (*People v D'Antuono*, 306 AD2d 890, lv denied 100 NY2d 593, 641). That search was not rendered illegal by the fact that defendant's tenancy expired while defendant was detained after having been arrested. The officer who conducted the search relied in good faith on the apparent authority of the hotel owner to consent to the search, "and the circumstances reasonably indicated that [the hotel owner] had the requisite authority to consent to the search" (*People v Fontaine*, 27 AD3d 1144, 1145, lv denied 6 NY3d 847). The officer who conducted the search was not required to inquire whether defendant was in police custody at that time because the officer was

not "faced with a situation [that] would cause a reasonable person to question the consenting party's power or control over the premises" to be searched (*People v Adams*, 53 NY2d 1, 10, rearg denied 54 NY2d 832, cert denied 454 US 854). Defendant failed to preserve for our review his further contention that the first two counts of the indictment, which allege course of sexual conduct against a child, are multiplicitous (see *People v Thompson*, 34 AD3d 931, 932, lv denied 7 NY3d 929), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject the contention of defendant that the court erred in refusing to allow him to substitute assigned counsel. "The decision to allow a defendant to substitute counsel is largely within the discretion of the trial court" (*People v Sanchez*, 7 AD3d 645, 646, lv denied 3 NY3d 681), and the court's decision will be upheld where, as here, the defendant's request is merely an attempt to delay the trial (see *People v Sides*, 75 NY2d 822, 824). We agree with defendant, however, that the court erred in admitting testimony concerning defendant's decision not to meet with the police after an initial pre-arrest interview and in allowing the prosecutor to comment on defendant's decision on summation (see generally *People v De George*, 73 NY2d 614, 617-618). Nevertheless, we conclude that there is no reasonable possibility that the error might have contributed to defendant's conviction and thus that the error is harmless beyond a reasonable doubt (see generally *People v Crimmins*, 36 NY2d 230, 237; *People v Brown*, 266 AD2d 838, 838-839, lv denied 94 NY2d 860). We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, the sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction incorrectly reflects that defendant was convicted of rape in the first degree under Penal Law § 130.35 (1), and it thus must be amended to reflect that he was convicted under Penal Law § 130.35 (4) (see *People v Martinez*, 37 AD3d 1099, 1100, lv denied 8 NY3d 947).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1055

CA 08-02587

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

KEVIN J. VIVYAN AND TERRI L. VIVYAN,
PLAINTIFFS-APPELLANTS,

V

MEMORANDUM AND ORDER

ILION CENTRAL SCHOOL DISTRICT, BOARD OF
EDUCATION OF ILION CENTRAL SCHOOL DISTRICT,
AND ILION MEMORIAL POST #920, AMERICAN
LEGION, INC., DEFENDANTS-RESPONDENTS.

DOUGLAS G. ROBERTS, SYRACUSE, FOR PLAINTIFFS-APPELLANTS.

ROEMER WALLENS & MINEAUX, LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Herkimer County (Michael E. Daley, J.), entered September 19, 2008 in a personal injury action. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Kevin J. Vivyan (plaintiff) when he was hit in the head by a ball while watching a baseball game. The game was organized by defendant Ilion Memorial Post #920, American Legion, Inc. and was played at Diss Field, which was owned and operated by defendants Ilion Central School District and Board of Education of Ilion Central School District. Plaintiff was seated in an unscreened bleacher located behind the first baseline when the ball struck him. Although there was a grassy area behind the backstop at home plate, there were no bleachers or other seats there.

We conclude that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint. Although defendants established that they "provide[d] screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 331, *rearg denied* 54 NY2d 831), they failed to establish that "such screening [was] of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game" (*id.*). Indeed, the record

establishes that "there was no seating where there was screening and no screening where there was seating . . . , [and thus] a jury question is presented regarding the alleged negligence of defendant[s] in failing to exercise reasonable and ordinary care to protect spectators from foreseeable dangers" (*Zambito v Village of Albion*, 100 AD2d 739). Contrary to the contention of defendants, the fact that there was space in which individuals could stand behind the backstop does not satisfy their duty of care, in accordance with the standard set forth in *Akins*. Contrary to the further contention of defendants, because they failed to meet their initial burden of establishing as a matter of law that they satisfied their duty of care (*cf. Ray v Hudson Val. Stadium Corp.*, 306 AD2d 264, *lv denied* 2 NY3d 704), the issue whether plaintiff assumed the risk of injury must be determined at trial (*cf. Gilchrist v City of Troy*, 67 NY2d 1034, 1035-1036; *see generally* CPLR 1411).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1058

CAF 09-00232

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF TRACY C.O.,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

DOUGLAS A.F., RESPONDENT-APPELLANT.

BARBARA T. WALZER, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Family Court, Onondaga County (William J. Burke, J.H.O.), entered January 8, 2009 in a proceeding pursuant to Family Court Act article 5. The order directed respondent to submit to a genetic marker test.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings on the petition in accordance with the following Memorandum: Petitioner commenced this paternity proceeding alleging that respondent is the father of one of her children and, at an appearance on the petition, respondent objected to genetic testing. His attorney quoted from Family Court Act § 532, which provides in relevant part that genetic testing shall not be ordered if the court finds that it is not in the best interests of the child to perform such testing, based on the presumption of legitimacy and equitable estoppel. It is undisputed that, at the time of the child's birth, petitioner was married to someone other than respondent. In addition, respondent asserted that, from the time of the child's birth until almost eight years later, when the petition was filed, petitioner and the child lived with a man other than respondent with whom the child had a parent-child relationship. Family Court implicitly denied the objection without a hearing by ordering a genetic marker test. That was error. Although Family Court Act § 532 (a) provides that a court shall order a genetic marker or DNA test "to aid in the determination of whether the alleged father is or is not the father of the child," it further provides in relevant part that "[n]o such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of . . . equitable estoppel, or the presumption of legitimacy" (*id.*). "The courts 'impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship' " (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 327; see *Matter of Greg S. v Keri C.*, 38 AD3d 905).

In determining whether equitable estoppel should apply, "it is the child's best interests that are of paramount concern" (*Matter of Eugene F.G. v Darla D.*, 261 AD2d 958, 958; see *Greg S.*, 38 AD3d at 905; *Matter of Louise P. v Thomas R.*, 223 AD2d 592).

Here, although the court ordered the test based on its belief that the child had a right to know the identity of his biological father, the court's belief "is insufficient to overcome . . . the benefits accruing to the child by preserving his legitimacy" (*Greg S.*, 38 AD3d at 906), as well as the parent-child relationship with petitioner's paramour for many years. On this record, "[t]here was insufficient evidence before the court to determine the child's best interests" (*Eugene F.G.*, 261 AD2d at 959; see *Louise P.*, 223 AD2d at 593). We thus conclude that, before ordering the genetic marker test, the court should have conducted a hearing to determine whether it was in the best interests of the child to do so, based both on equitable estoppel and the presumption of legitimacy (see *Matter of Leon L. v Carole H.*, 210 AD2d 484, 484-485). "If, and only if, the [court] determines that there should not be an estoppel [or application of the presumption of legitimacy] based upon the child's best interests, then the [court] should order genetic marker or DNA tests and reach a determination thereon" (*Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564, 565). In addition, we agree with respondent that the court should have appointed an attorney for the child, as requested by respondent's attorney, before conducting the hearing (see *Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964, 965; *Leon L.*, 210 AD2d at 484-485). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition consistent with this decision.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1059

TP 08-01804

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF PATRICIA GLANVILLE, PETITIONER,

V

MEMORANDUM AND ORDER

CAYUGA COUNTY BOARD OF HEALTH AND ELANE DALY,
PUBLIC HEALTH DIRECTOR, RESPONDENTS.

ABITBOL & CHERRY, LLP, LIVERPOOL (GILLES R.R. ABITBOL OF COUNSEL), FOR
PETITIONER.

FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN, FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark A. Fandrich, A.J.], entered August 25, 2008) seeking, inter alia, to annul a determination of respondents. The determination found after a hearing that petitioner violated the Clean Indoor Air Act and denied her application for a food service permit.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination that she violated the Clean Indoor Air Act (Public Health Law art 13-E) and denying her application for a food service permit. Contrary to the contention of petitioner, her "right to due process . . . was not violated inasmuch as the record establishes that [she] received adequate notice of the allegations against [her] and an opportunity to be heard" (*Matter of Oznor Corp. v County of Monroe*, 60 AD3d 1492, 1493). Also contrary to petitioner's contention, we conclude that the establishment in question is a "food service establishment" within the meaning of the State Sanitary Code (see 10 NYCRR 14-1.20 [a]), and petitioner therefore was required to obtain a food service permit to operate the establishment. Finally, the determination is supported by substantial evidence (see generally *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182; *Matter of 8-Ball Laundry Lounge, Inc. v Tobe*, 55 AD3d 1300).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1060

CA 09-00279

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF KEITH P. LIBOLT AND THE
BROTHERHOOD OF SAINT JOSEPH, INC.,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

TOWN OF IRONDEQUOIT ZONING BOARD OF APPEALS,
DANIEL KRESS, IN HIS CAPACITY AS CODE
ENFORCEMENT OFFICER OF TOWN OF IRONDEQUOIT
AND TOWN OF IRONDEQUOIT, RESPONDENTS-RESPONDENTS.

FIX SPINDELMAN BROVITZ & GOLDMAN, P.C., FAIRPORT (JAMES J. BONSIGNORE
OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE, WELCH & LEONE, LLP, ROCHESTER
(ROBERT S. LENI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 14, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In May 2007, petitioner The Brotherhood of Saint Joseph, Inc. (The Brotherhood), a religious order incorporated under the Not-for-Profit Corporation Law, purchased property located in an R-1 residential district in respondent Town of Irondequoit (Town). Thereafter, The Brotherhood began operating a temporary group housing program designed to facilitate the re-entry into society of men who had recently been incarcerated based on their convictions of nonviolent drug or alcohol related crimes. As a condition of residence at the facility, The Brotherhood required each resident to sign a "Post-Release Transitional Housing Contract" and to pay a per diem fee of \$25. Residents were encouraged, but not required, to attend a religious service of their choice on a weekly basis.

In September 2007, the Town issued a Notice of Violation based upon, inter alia, its determination that petitioners were operating a "halfway house," which was not a permitted use in an R-1 district. Upon petitioners' subsequent appeal to respondent Town Zoning Board of Appeals (ZBA), the ZBA determined that petitioners were not using the property as a single-family residence and that petitioners' use of the

property primarily as a "halfway house" constituted a violation of section 235-3 of the Town's Zoning Law.

We conclude that Supreme Court properly denied the relief sought by petitioners in this CPLR article 78 proceeding, i.e., the annulment of the ZBA's determination, and thus properly implicitly dismissed the petition.

We reject petitioners' contention that the determination was "arbitrary, capricious, an abuse of discretion, and clearly affected by errors of law." Pursuant to section 235-4 (B) of the Town's Zoning Law, a family is defined as "[a]ny number of individuals living together as a single housekeeping unit and doing their cooking on premises, as distinguished from a group occupying a boarding- or rooming house or hotel." It is well settled that, "[u]nder a zoning ordinance which authorizes interpretation of its requirements by the board of appeals, specific application of a term of the ordinance to a particular property is . . . governed by the board's interpretation, unless unreasonable or irrational" (*Matter of Frishman v Schmidt*, 61 NY2d 823, 825). We conclude that the ZBA's determination that petitioners did not use the property as a single-family residence or a church within the meaning of sections 235-4 and 235-8, respectively, of the Town's Zoning Law is not arbitrary or capricious, an abuse of discretion, or affected by errors of law, and we further conclude that the determination is supported by substantial evidence (*see generally Matter of Wind Power Ethics Group v Zoning Bd. of Appeals of Town of Cape Vincent*, 60 AD3d 1282; *Matter of Carrier v Town of Palmyra Zoning Bd. of Appeals*, 30 AD3d 1036, 1037, lv denied 8 NY3d 807).

Contrary to the further contention of petitioners, the ZBA's interpretation of the Zoning Law did not place an unconstitutional restraint on their exercise of religion. The ZBA's determination was in furtherance of the compelling governmental interest in maintaining the R-1 district as a single-family residential zone, and the cause of action alleging the violation of the Religious Land Use and Institutionalized Persons Act of 2000 must fail, inasmuch as it cannot be said that the ZBA's determination, i.e., the denial of permission to operate a "Transitional Housing" facility under contract with "clients" who pay a per diem fee of \$25 per day for a room, "imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" (42 USC § 2000cc [a] [1]; *see Third Church of Christ, Scientist, of N.Y. City v City of New York*, 617 F Supp 2d 201, 208-209 [SD NY]). Finally, we reject the contention of petitioners that the ZBA erred in determining that their use of the property did not constitute the continuation of a prior nonconforming use (*see Matter of P.M.S. Assets v Zoning Bd. of Appeals of Vil. of Pleasantville*, 98 NY2d 683, 685).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1061

CA 08-00963

PRESENT: SMITH, J.P., CENTRA, CARNI, AND PINE, JJ.

DEBORAH A. DEURO-NAUGHTON AND CHARLES J.
NAUGHTON, CLAIMANTS-APPELLANTS,

V

ORDER

STATE OF NEW YORK, NEW YORK STATE PARK POLICE,
NEW YORK STATE OFFICE OF PARKS, RECREATION AND
HISTORIC PRESERVATION AND NIAGARA FRONTIER
STATE PARKS COMMISSION, DEFENDANTS-RESPONDENTS.
(CLAIM NO. 111334.)

JOHN J. DELMONTE, NIAGARA FALLS, FOR CLAIMANTS-APPELLANTS.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MICHAEL S. BUSKUS OF
COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Court of Claims (Michael E. Hudson,
J.), entered April 3, 2008 in a personal injury action. The judgment
dismissed the claim.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs for reasons stated in the decision
at the Court of Claims.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1063

CA 09-00342

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

JAMIE BRUMFIELD, PLAINTIFF-RESPONDENT,

V

ORDER

AMERICAN TRANSIT INSURANCE COMPANY,
DEFENDANT-APPELLANT.

DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (GREGORY V. PAJAK OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered September 11, 2008 in a breach of contract action. The order denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1064

CA 08-02620

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

WILLIAM C. THAYER, PLAINTIFF-RESPONDENT,

V

ORDER

SEAN W. BROOKS, DEFENDANT-APPELLANT.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (JEFFREY EARL HURD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LOCKWOOD & GOLDEN, UTICA (LAWRENCE W. GOLDEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered September 23, 2008 in a personal injury action. The order, insofar as appealed from, denied defendant's motion to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance of appeal signed by the attorneys for the parties on July 8, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1066

CA 08-01735

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

DANIEL C. BRYNDLE, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

SAFETY-KLEEN SYSTEMS, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HOGAN WILLIG, ATTORNEYS AT LAW, AMHERST (JOHN B. LICATA OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

RICOTTA & VISCO, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered November 15, 2007 in a breach of contract action. The order, insofar as appealed from, granted that part of the cross motion of defendant for leave to amend its answer to include an additional affirmative defense.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court neither abused nor improvidently exercised its discretion in granting that part of the cross motion of defendant for leave to amend its answer. "Leave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757; see CPLR 3025 [b]; *Fahey v County of Ontario*, 44 NY2d 934, 935), and "the denial of leave to amend is not an abuse of discretion where . . . the proposed amendment[] manifestly lack[s] merit or [is] palpably insufficient on [its] face" (*Dec v Auburn Enlarged School Dist.*, 249 AD2d 907, 908 [internal quotation marks omitted]). "Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293; see *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23-24, rearg denied 55 NY2d 801). Although the delay of defendant in seeking leave to amend its answer was lengthy, " '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959; see *McFarland v Michel*, 2 AD3d 1297,

1300).

Here, plaintiff failed to identify any prejudice arising from the proposed amendment (see *Corsale v Pantry Pride Supermarket*, 197 AD2d 659, 660-661), and the evidence submitted by defendant in support of its cross motion established that its proposed additional defense that plaintiff's claims were discharged in bankruptcy is not patently without merit (see *Debicki v Schultz*, 212 AD2d 988).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1067

CA 08-02170

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

DANIEL C. BRYNDLE, PLAINTIFF-APPELLANT,

V

ORDER

SAFETY-KLEEN SYSTEMS, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HOGAN WILLIG, ATTORNEYS AT LAW, AMHERST (JOHN B. LICATA OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

RICOTTA & VISCO, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered October 3, 2008 in a breach of contract action. The order, insofar as appealed from, granted defendant's motion to compel plaintiff to accept service of the amended answer.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1068.1

KA 09-00453

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

NOOR MUHINA, DEFENDANT-RESPONDENT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 24, 2009. The order granted that part of the omnibus motion of defendant to dismiss the indictment as facially defective.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the motion to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: On this appeal by the People from an order granting that part of defendant's omnibus motion to dismiss the indictment as facially defective, we conclude that reversal is required on the ground that County Court erred in determining that the time frame alleged for the crimes was unreasonably excessive. An essential function of an indictment is "to provide the defendant with sufficient information regarding the nature of the charge and the conduct which underlies the accusation to allow him or her to prepare or conduct a defense" (*People v Morris*, 61 NY2d 290, 293; see CPL 200.50 [7] [a]). "The notice requirement . . . is met if[,] in addition to stating the elements of the [crimes], 'the indictment contains such description of the [crimes] charged as will enable [defendant] to make his [or her] defense and to plead the judgment in bar of any further prosecution for the same crime[s]' " (*Morris*, 61 NY2d at 295). An indictment should not be dismissed as defective under CPL 200.50 if it provides "a reasonable approximation, under the circumstances of the individual case, of the date or dates involved" (*Morris*, 61 NY2d at 292).

Here, defendant was charged with predatory sexual assault against a child (Penal Law § 130.96), course of sexual conduct against a child in the first degree (§ 130.75 [1] [a]), and endangering the welfare of a child (§ 260.10 [1]), each of which is a continuing offense to which

"the usual requirements of specificity with respect to time do not apply" (*People v Green*, 17 AD3d 1076, 1077, *lv denied* 5 NY3d 789; see *People v Keindl*, 68 NY2d 410, 421, *rearg denied* 69 NY2d 823; *People v Palmer*, 7 AD3d 472, *lv denied* 3 NY3d 710; *People v McLoud*, 291 AD2d 867, 868, *lv denied* 98 NY2d 678; *People v Colf*, 286 AD2d 888, 888-889, *lv denied* 97 NY2d 655). "The period of two years alleged in the indictment was sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and 'to protect [his] right not to be twice placed in jeopardy for the same conduct' " (*McLoud*, 291 AD2d at 868; see generally *People v Merrill*, 55 AD3d 1333, *lv denied* 11 NY3d 928; *Green*, 17 AD3d at 1077; *Palmer*, 7 AD3d 472).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1068

CA 09-00676

PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF LEAGUE FOR THE HANDICAPPED,
INC., PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

SPRINGVILLE GRIFFITH INSTITUTE CENTRAL
SCHOOL DISTRICT AND BOARD OF EDUCATION,
SPRINGVILLE GRIFFITH INSTITUTE CENTRAL
SCHOOL DISTRICT, RESPONDENTS-RESPONDENTS.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (LINDA H. JOSEPH OF
COUNSEL), FOR PETITIONER-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JEFFREY C. STRAVINO OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 23, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking to annul the negative declaration pursuant to article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]) issued by the Board of Education for the Springville Griffith Institute Central School District (respondent) in connection with respondents' proposal to construct a new transportation center near a facility operated by petitioner. Contrary to petitioner's contention, we conclude that respondent did not violate the substantive and procedural aspects of SEQRA in issuing the negative declaration, and thus we affirm the judgment dismissing the petition. Although petitioner is correct that "[a] lead agency improperly defers its duties when it abdicates its SEQRA responsibilities to another agency or insulates itself from environmental decisionmaking" (*Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 234), we cannot agree with petitioner that respondent did so here by relying upon expert consultants in making its determination. "Nothing in SEQRA bars an agency from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400,

427), and here respondent's reliance on the information and advice provided by consultants was reasonable. Based on the evidence in the record before us, we agree with Supreme Court that respondent "identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination" (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417). Contrary to petitioner's further contention, there is no substantial evidence issue to be determined in this proceeding inasmuch as there was no "hearing held . . . at which evidence was taken[] pursuant to direction by law" (CPLR 7803 [4]; see *Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 769-772, lv dismissed 6 NY3d 890, 7 NY3d 708; see generally *Matter of Sasso v Osgood*, 86 NY2d 374, 384 n 2).

Petitioner's contention with respect to the possible impact of the proposal on a sole source aquifer was not raised in the petition (see *Matter of Town of Rye v New York State Bd. of Real Prop. Servs.*, 10 NY3d 793, 795; *Matter of Berich v Ithaca Police Benevolent Assn., Inc.*, 23 AD3d 904, 905) and, indeed, is raised for the first time on appeal. Thus, that contention is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We have considered petitioner's remaining contentions and conclude that they are without merit.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1069

TP 09-00361

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

IN THE MATTER OF MICHAEL MELENDEZ, PETITIONER,

V

ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT.

MICHAEL MELENDEZ, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered February 12, 2009) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1070

KA 08-00641

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES D. DIETZ, DEFENDANT-APPELLANT.

MICHAEL B. JONES, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered March 3, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [3]), defendant contends that County Court erred in imposing the agreed-upon sentence rather than a reduced sentence, based on his alleged violation of the terms and conditions of the plea agreement. Although we agree with defendant that his contention survives his waiver of the right to appeal (see *People v Ibrahim*, 48 AD3d 1095), defendant did not object at sentencing or move to withdraw his plea and thus failed to preserve his contention for our review (see CPL 470.05 [2]). In any event, defendant's contention is without merit. The court stated during the plea proceeding that it would "consider the possibility" of a reduced sentence if defendant admitted his responsibility and was truthful with the Probation Department. The record establishes, however, that defendant did not accept responsibility for the crime inasmuch as, after pleading guilty to having oral sex with a child under the age of 11, he stated at sentencing and during an interview with the Probation Department that he did not have sex with the victim until she was 14 or 15 years old. Thus, defendant did not admit his responsibility for his actions (see *People v Hicks*, 98 NY2d 185, 189).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1072

KA 06-00789

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DANA BUCKMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 1, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). Although defendant sought to suppress oral statements that he made to the police, he contends for the first time on appeal that County Court erred in refusing to suppress the statements on the ground that they were the product of physical coercion. Defendant thus failed to preserve that contention for our review (*see People v Poole*, 55 AD3d 1354, *lv denied* 11 NY3d 929; *People v Brooks*, 26 AD3d 739, 740, *lv denied* 6 NY3d 846, 7 NY3d 810; *People v Zeito*, 302 AD2d 923, *lv denied* 99 NY2d 634). In any event, defendant's contention is without merit. There was no evidence adduced at the *Huntley* hearing that defendant's purported injuries rendered the statements the product of physical coercion and thus involuntary (*see generally People v Shepard*, 13 AD3d 1223, 1224, *lv denied* 4 NY3d 803; *People v Howard*, 256 AD2d 1170, *lv denied* 93 NY2d 874). We likewise conclude that the statements were not the product of physical coercion and thus involuntary based on defendant's alleged heroin withdrawal during the police interview. "Heroin withdrawal will not render an oral statement inadmissible unless the withdrawal 'has risen to the degree of mania' " (*People v Dlugos*, 237 AD2d 754, 756, *lv denied* 89 NY2d 1091, quoting *People v Adams*, 26 NY2d 129, 137, *cert denied* 399 US 931), and here the record is devoid of any evidence of mania.

Contrary to the further contention of defendant, he failed to meet his ultimate burden of proving that the photo array was unduly

suggestive based on the fact that he was the only individual depicted with light-colored eyes (see *People v Bell*, 19 AD3d 1074, lv denied 5 NY3d 803, 850). Indeed, there was no testimony adduced at the *Wade* hearing that the eyewitnesses had described defendant as having light-colored eyes (see *id.*). Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1073

KAH 07-01507

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ROBERT C. HINTON, JR., PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR
PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered May 9, 2007. The judgment dismissed the petition for a writ of habeas corpus.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: In appeal No. 1, petitioner appeals from a judgment dismissing his petition for a writ of habeas corpus. We affirm. "[I]t is well settled that a writ of habeas corpus is an improper vehicle for [raising] a claim of ineffective assistance of appellate counsel" (*People ex rel. Hendy v Leonardo*, 173 AD2d 992, lv denied 78 NY2d 857, rearg dismissed 82 NY2d 703). The remaining issues raised in the petition were raised or could have been raised on direct appeal or by way of a postjudgment motion pursuant to CPL article 440 (see *People ex rel. Smith v Burge*, 11 AD3d 907, lv denied 4 NY3d 701; *People ex rel. Mammarello v Donnelly*, 286 AD2d 937). Moreover, "habeas corpus relief does not lie where[, as here, the] petitioner would not be entitled to immediate release even if his [or her] contentions had merit" (*People ex rel. Gloss v Costello*, 309 AD2d 1160, 1160-1161, lv denied 1 NY3d 504; see also *Mammarello*, 286 AD2d 937). Contrary to the further contention of petitioner, Supreme Court did not abuse its discretion in denying his application for assigned counsel inasmuch as "the petition 'lacked any justiciable basis upon which a writ of habeas corpus could be sustained' " (*People ex rel. Brown v Murray*, 284 AD2d 987, 988; see generally *People ex rel. Williams v La Vallee*, 19 NY2d 238, 240-241). Petitioner's further contention that this proceeding should be converted into one pursuant to CPLR article 78 is not properly before us because it is raised for

the first time in petitioner's reply brief (see generally *O'Sullivan v O'Sullivan*, 206 AD2d 960).

In appeal No. 2, petitioner appeals from an order denying his motion for "reconsideration." Because petitioner failed to allege any new facts or to demonstrate a change in the law, his motion is not one for leave to renew (see CPLR 2221 [e] [2]). Rather, his motion is one for leave to reargue, and no appeal lies from an order denying a motion for leave to reargue (see *Pfeiffer v Jacobowitz*, 29 AD3d 661, 662). In any event, motions for leave to reargue or to renew "have no application to a judgment determining a special proceeding" (*People ex rel. Seals v New York State Dept. of Correctional Servs.*, 32 AD3d 1262, 1263).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1074

KAH 07-01800

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ROBERT C. HINTON, JR., PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR
PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered June 15, 2007. The order denied the motion of petitioner for leave to reargue.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Same Memorandum as in *People ex rel. Hinton v Graham* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2009]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1076

KA 07-02645

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MICHAEL CZORA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL C. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. FLAHERTY, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered December 7, 2007. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of burglary in the second degree (Penal Law § 140.25 [2]) and, upon his plea of guilty, of grand larceny in the fourth degree (§ 155.30 [4]). We reject the contention of defendant that his identification at the police station by one of the victims should have been suppressed. The record establishes that the encounter between the witness and defendant at the police station was inadvertent and thus, contrary to the contention of defendant, his right to due process was not thereby violated (*see People v Strudwick*, 170 AD2d 969, 970, *lv denied* 77 NY2d 1001). Viewing the evidence in light of the elements of the crime of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also reject defendant's contention that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that Supreme Court erred in refusing to recuse itself because the court had participated in a preliminary hearing during which evidence was presented that was determined by the court to be inadmissible at trial. We reject that contention. "[T]he record contains no suggestion that the [court's] impartiality might reasonably be challenged" (*People v Bibbs*, 177 AD2d 1056, 1056-1057, *lv denied* 79 NY2d 918), and thus the court did not abuse its discretion in refusing to recuse itself (*see generally People v Moreno*, 70 NY2d 403, 405-406). We have considered defendant's remaining contentions and

conclude that they are without merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1078

KA 07-00938

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAWAHI D. WOFFORD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW J. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered July 17, 2006. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]), arising from an incident in which he entered an apartment and stole property. Defendant contends that the conviction is not supported by legally sufficient evidence because the fingerprint identification evidence, which was the sole direct proof identifying him as the perpetrator, did not establish that he entered the apartment on the specific date charged in the indictment. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury based on the evidence at trial (*see generally People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). Based on the testimony of tenants in the apartment building where the victim resided, a rational juror could have found that defendant's fingerprints found on one of the bedroom windows and a bowl from which personal property was taken were left by the perpetrator on the date specified in the indictment.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1079

CA 08-01469

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, AND GORSKI, JJ.

JUSTINE THOMPSON, PLAINTIFF-RESPONDENT,

V

ORDER

MICHAEL COOPER, ESQ., STEPHEN BARNES, ESQ.,
INDIVIDUALLY AND DOING BUSINESS AS THE BARNES
FIRM AS SUCCESSORS IN INTEREST TO CELLINO &
BARNES, AND ROSS CELLINO, INDIVIDUALLY AND AS
PARTNER IN THE LAW FIRM OF CELLINO & BARNES,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

S. ROBERT WILLIAMS, PLLC, SYRACUSE (MICHELLE RUDDEROW OF COUNSEL), AND
BURKE & BURKE, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 7, 2008 in a legal malpractice action. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1080

CA 08-01470

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, AND GORSKI, JJ.

JUSTINE THOMPSON, PLAINTIFF-RESPONDENT,

V

ORDER

MICHAEL COOPER, ESQ., STEPHEN BARNES, ESQ.,
INDIVIDUALLY AND DOING BUSINESS AS THE BARNES
FIRM AS SUCCESSORS IN INTEREST TO CELLINO &
BARNES, ROSS CELLINO, INDIVIDUALLY AND AS
PARTNER IN THE LAW FIRM OF CELLINO & BARNES,
AND CELLINO & BARNES, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

S. ROBERT WILLIAMS, PLLC, SYRACUSE (MICHELLE RUDDEROW OF COUNSEL), AND
BURKE & BURKE, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered July 1, 2008 in a legal malpractice action. The order adopted the order entered March 7, 2008 with respect to the motion of defendant Cellino & Barnes.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1081

CA 08-02667

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

PAMELA J. LAPE, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DANIEL E. LAPE, DEFENDANT-APPELLANT.

GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI & PRIORE, LLP, UTICA (JANET M. RICHMOND OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEVITT & GORDON, ESQS., NEW HARTFORD (DEAN L. GORDON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Anthony F. Shaheen, J.), entered November 19, 2009 in a divorce action. The order, inter alia, directed the parties to sell the marital residence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the directive that the parties shall be equally and jointly responsible for the expenses associated with the marital residence after October 1, 2007 and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from a postjudgment order in this divorce action that, inter alia, granted that part of plaintiff's cross motion seeking an order directing the parties to sell the marital residence and to divide the net sale proceeds equally. In addition, Supreme Court directed that the parties shall be equally and jointly responsible for the expenses associated with the marital residence after October 1, 2007. We reject defendant's contention that the court erred in ordering the sale of the marital residence. According to the parties' stipulation, which was incorporated but not merged into the judgment of divorce, plaintiff was required to refinance the parties' home equity loan in her own name and to pay defendant a \$40,000 distributive award within 90 days of the date on which the parties entered into the stipulation. The stipulation further provided that, in the event that plaintiff was unable to do so despite her good faith efforts, the marital residence was to be sold and the net sale proceeds were to be equally divided. The record establishes that plaintiff made a good faith effort to refinance the home equity loan but was unable to complete that refinancing within the 90-day period set forth in the stipulation because of a previously unknown title problem. Thus, pursuant to the clear terms of the stipulation, the parties were required to sell the marital residence.

We agree with defendant, however, that the court erred in directing that the parties shall be equally and jointly responsible for the expenses associated with the marital residence after October 1, 2007, and we therefore modify the order accordingly. The stipulation provided that defendant would be responsible for one half of such expenses only until he moved out of the marital residence. Because the parties' stipulation is an independent contract subject to the principles of contract law and the terms of the stipulation are unambiguous (see *Hannigan v Hannigan*, 50 AD3d 957, 957-958; *Stevens v Stevens*, 11 AD3d 791, 792), we conclude that the court erred in fashioning a remedy outside the four corners of the stipulation (see generally *Kosnac v Kosnac*, 60 AD3d 636, 637; *Ross v Ross*, 16 AD3d 713, 714).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1082

CA 09-00610

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

LEGACY DEVELOPMENT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

VICTOR LIBERATORE AND V.V.M.M., LLC,
DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

LEWANDOWSKI & ASSOCIATES, WEST SENECA (BRIAN N. LEWANDOWSKI OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 22, 2009 in a breach of contract action. The order denied defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this breach of contract action seeking specific performance of the purchase and sale agreement pursuant to which defendants agreed to convey to plaintiff a parcel of real property in fee simple and free and clear from all liens or other encumbrances. As the result of a title examination, plaintiff discovered that the property was separated from the main road by a one-foot-wide easement. According to plaintiff, defendants then failed to "perform the necessary steps to convey a good and marketable title"

Supreme Court erred in denying defendants' motion for summary judgment dismissing the complaint. We reject plaintiff's contention that title to the property was unmarketable because the property was not accessible by the main road. A marketable title "is one [that] can be readily sold or mortgaged to a person of reasonable prudence, the test of the marketability of a title being whether there is an objection thereto such as would interfere with the sale or with the market value of the property" (*Regan v Lanze*, 40 NY2d 475, 481). Here, defendants established that the main road in question was not the only means of accessing the property, inasmuch as the property was accessible by way of several driveways on an adjoining street (*cf. Pollak v State*, 41 NY2d 909, 910). We therefore conclude that title to the property was marketable because there was in fact legal access

to the property, although it may not have been plaintiff's preferred route (see *Janian v Barnes*, 294 AD2d 787, 789).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1084

CA 09-00336

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

DAWN M. PELLAM, PLAINTIFF-RESPONDENT,

V

ORDER

TIMOTHY DOUGHTY, ET AL., DEFENDANTS,
STROEHMANN BAKERIES, L.C., GEORGE WESTON
BAKERIES, INC., AND GEORGE WESTON LIMITED,
DEFENDANTS-APPELLANTS.

HAGELIN KENT LLC, BUFFALO (MICHAEL T. HAGELIN OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered October 30, 2008 in a personal injury action. The order denied the motion of defendants Stroehmann Bakeries, L.C., George Weston Bakeries, Inc., and George Weston Limited to dismiss the complaint against them for failure to state a cause of action.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 11, 2009 and filed in the Erie County Clerk's Office on May 22, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1085

CA 09-00488

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
TOWN OF EVANS, PETITIONER-APPELLANT,

AND

MEMORANDUM AND ORDER

TOWN OF EVANS POLICE BENEVOLENT ASSOCIATION,
RESPONDENT-RESPONDENT.

COUGHLIN & GERHART, L.L.P., BINGHAMTON (KEITH A. O'HARA OF COUNSEL),
FOR PETITIONER-APPELLANT.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph G. Makowski, J.), entered January 7, 2009. The order and judgment, among other things, denied the petition for a permanent stay of arbitration.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the petition in part and permanently staying arbitration with respect to sections 9.01, 10.01 and 12.01 of the collective bargaining agreement and as modified the order and judgment is affirmed without costs.

Memorandum: Petitioner appeals from an order and judgment denying its petition for a permanent stay of arbitration pursuant to CPLR 7503 (b). Respondent filed a demand for arbitration concerning petitioner's determination that a disabled police officer receiving benefits pursuant to General Municipal Law § 207-c was not entitled to accrue holiday, vacation, personal, or sick time pursuant to the terms of the collective bargaining agreement (CBA) between petitioner and respondent. Contrary to the contention of petitioner, respondent's demand for arbitration concerned holiday compensation as well as "other provisions as may be shown [to be] relevant," and our review of the propriety of the order and judgment on appeal is not limited to the issue of holiday compensation. We agree with petitioner, however, that Supreme Court erred in denying those parts of the petition for a permanent stay of arbitration with respect to the disputed holiday, vacation and personal time accruals (*see generally Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO*, 8 NY3d 513), and we therefore modify the order and judgment accordingly. "[T]he benefits provided to a police officer under General Municipal Law § 207-c are exclusive, and a CBA will not be construed to

implicitly expand such benefits" (*Matter of Town of Niskayuna [Fortune]*, 14 AD3d 913, 914, lv denied 5 NY3d 716; see *Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 694-695). "In order to be entitled to additional benefits, the CBA must expressly provide that such benefits are applicable to disabled police officers receiving General Municipal Law benefits" (*Town of Niskayuna*, 14 AD3d at 914). Here, the provisions of the CBA concerning holiday, vacation and personal time benefits are "entirely silent as to whether the contractual rights accorded regular duty [police officers] in the CBA are applicable to disabled [police officers] on General Municipal Law [§ 207-c] status" (*Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO*, 94 NY2d at 694). In contrast, however, the CBA contains a provision with respect to sick time accruals expressly stating that "[o]fficers who are absent from work due to disability arising from injuries sustained in the course of employment, shall continue to accumulate sick leave" The court therefore properly denied that part of the petition for a permanent stay of arbitration with respect to the disputed sick time accruals.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1088

CA 09-00331

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

CHRIS FITCH, PLAINTIFF-APPELLANT,

V

ORDER

BRIAN J. MEAD, DEFENDANT-RESPONDENT.

MARTIN J. KEHOE, III, ALBANY, FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 22, 2008. The judgment dismissed the amended complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1089

CA 09-00250

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

KANSAS STATE BANK OF MANHATTAN,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

HARRISVILLE VOLUNTEER FIRE DEPARTMENT, INC.
AND DANKO EMERGENCY EQUIPMENT CO.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF
COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

SCHWERZMANN & WISE, P.C., WATERTOWN (LUCY GERVISS OF COUNSEL), FOR
PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Lewis County (Joseph D. McGuire, J.), entered January 30, 2009 in a breach of contract action. The judgment, *inter alia*, granted in part defendants' motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, *inter alia*, damages for the breach of a lease purchase agreement (agreement) by defendant Harrisville Volunteer Fire Department, Inc. (HVFD) and for the tortious interference by defendant Danko Emergency Equipment Co. (Danko) with the agreement. Pursuant to the agreement, HVFD was to obtain financing from plaintiff for the purchase of a tanker fire truck manufactured by Danko and sold by a third-party distributor. We reject the contention of defendants on their appeal that Supreme Court erred in denying that part of their motion for summary judgment seeking a determination that the agreement is unenforceable. Pursuant to the agreement, and at HVFD's direction, plaintiff wired the amount of \$110,000 to the third-party distributor identified by HVFD. Although HVFD may have been the victim of a fraudulent scheme by the distributor (*see Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co.*, 55 AD3d 1108, 1109), the payment by plaintiff at HVFD's direction constituted consideration and performance of the agreement notwithstanding the fact that HVFD did not receive any benefit as a result of the transaction (*see Holt v Feigenbaum*, 52 NY2d 291, 300).

With respect to plaintiff's cross appeal, we reject the contention of plaintiff that the court erred in denying that part of

its cross motion for summary judgment on the sixth cause of action, seeking a determination that Danko tortiously interfered with the agreement with HVFD. "An essential element of such a claim is that the breach of contract would not have occurred but for the activities of the defendant" (*Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204, *lv denied* 99 NY2d 508). Here, it is undisputed that HVFD communicated to plaintiff its intention to breach the agreement in November 2005, before Danko proposed an alternate financial arrangement to HVFD and Danko and HVFD entered into an indemnification agreement in March 2006. Thus, the court erred in concluding that Danko procured HVFD's breach of the agreement by entering into the indemnification agreement. Nevertheless, even in the event that it can be said that Danko tortiously interfered with the agreement, we agree with the court that such tortious interference was excusable, inasmuch as Danko acted with just cause in protecting its financial interest in the fire truck (*see Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682, 687, *rearg denied* 25 NY2d 896).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1090

CA 09-00273

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

MORRIS E. RICHARDSON, DOING BUSINESS AS LATTA
ROAD NURSING HOME A, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

THOMAS G. BRYANT, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

BANSBACH ZOGHLIN P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered April 10, 2008 in an action pursuant to Debtor and Creditor Law article 10. The order, inter alia, granted the cross motion of defendant Thomas G. Bryant for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action pursuant to Debtor and Creditor Law article 10 seeking to set aside conveyances that allegedly were, inter alia, "fraudulent as to plaintiff." Supreme Court properly granted the cross motion of Thomas G. Bryant (defendant) for summary judgment dismissing the complaint against him. Plaintiff alleges in the complaint that defendant was engaged in fraudulent transfers with defendant's father that rendered defendant's father unable to pay a future debt owed to plaintiff, but plaintiff has abandoned that allegation on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984). Instead, plaintiff contends that the court erred in granting defendant's motion because there is an issue of fact whether defendant engaged in fraudulent transfers that rendered defendant's stepmother, rather than defendant's father, unable to pay her own future debt to plaintiff. We do not address that contention inasmuch as it is based on a cause of action not alleged in the complaint (see *Dominguez v Lafayette-Boynton Hous. Corp.*, 240 AD2d 310, 312-313).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1091

CA 09-00513

PRESENT: SCUDDER, P.J., MARTOCHE, PERADOTTO, CARNI, AND GORSKI, JJ.

IN THE MATTER OF THE APPLICATION OF ADAM
URBANSKI, AS PRESIDENT OF THE ROCHESTER
TEACHERS ASSOCIATION, AND PAULA GIVENS,
PETITIONERS-APPELLANTS,

V

MEMORANDUM AND ORDER

CITY OF ROCHESTER, ROBERT J. DUFFY, AS MAYOR
OF CITY OF ROCHESTER, LOIS J. GIESS, AS
PRESIDENT OF CITY COUNCIL OF CITY OF ROCHESTER,
BOARD OF EDUCATION OF ROCHESTER CITY SCHOOL
DISTRICT AND ROCHESTER CITY SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

JAMES R. SANDNER, LATHAM (FREDERICK K. REICH OF COUNSEL), FOR
PETITIONERS-APPELLANTS.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (MICHELE ROMANCE
CRAIN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS CITY OF ROCHESTER,
ROBERT J. DUFFY, AS MAYOR OF CITY OF ROCHESTER, AND LOIS J. GIESS, AS
PRESIDENT OF CITY COUNCIL OF CITY OF ROCHESTER.

CHARLES G. JOHNSON, ROCHESTER (MICHAEL E. DAVIS OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS BOARD OF EDUCATION OF ROCHESTER CITY SCHOOL
DISTRICT AND ROCHESTER CITY SCHOOL DISTRICT.

Appeal from a judgment (denominated order) of the Supreme Court,
Monroe County (William P. Polito, J.), entered May 9, 2008 in a
proceeding pursuant to CPLR article 78. The judgment, inter alia,
dismissed the amended petition against respondents City of Rochester,
Robert J. Duffy, as Mayor of City of Rochester, and Lois J. Giess, as
President of City Council of City of Rochester.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78
proceeding seeking, inter alia, to compel respondents City of
Rochester (City), the City's Mayor and the President of the City
Council (collectively, City respondents) to appropriate funding for
respondents Rochester City School District (School District) and the
Board of Education of the Rochester City School District
(collectively, School District respondents) for the 2007-2008 fiscal
year, pursuant to Education Law § 2576 (5-b). The City budgeted a

total of \$119,100,000 to the School District, \$108,061,200 of which was to be funded by real estate taxes and the remaining \$11,038,800 of which was designated as "City School District Innovation Fund Funded by Sales Tax." The petition challenged the City's determination that the " 'city amount' " of the 2007-2008 budget was only \$108,061,200 (Education Law § 2576 [5-b] [a] [ii]), the amount funded by real estate taxes. According to petitioners, the correct "city amount" was \$119,100,000, the total amount paid by the City to the School District in 2006-2007 (see § 2576 [5-b] [b]), and it was improper to fund any portion of that \$119,100,000 through sales taxes because, pursuant to Education Law § 2576 (5-b) (a) (i) and (ii), the " 'city amount' " must be funded by " 'city funds,' " which cannot include county sales tax revenues shared with the City. The School District respondents in turn asserted a cross claim against the City respondents alleging, inter alia, that they were in violation of the "Maintenance of Effort Statute" by providing only \$108,000,000 for 2007-2008 rather than the \$119,100,000 provided in the prior base year.

As relevant on appeal, Supreme Court granted that part of the motion of the City respondents to dismiss the amended petition against them on the ground that petitioners did not have standing to challenge the issue raised, and did not suffer any damage as a result thereof. The court denied that part of the motion of the City respondents to dismiss the cross claim of the School District respondents asserted in their amended answer. Respondents, however, thereafter entered into a stipulation of discontinuance with respect to the cross claim of the School District respondents whereby they agreed, inter alia, that the correct "city amount" for the 2007-2008 fiscal year was \$119,100,000 and that the School District respondents' cross claim was moot and thus was withdrawn.

We reject the City respondents' contention that this appeal by petitioners has been rendered moot based on the stipulation of discontinuance. In that stipulation, respondents agreed that "the initial base year, city amount, including city payments to bond and note holders for debt service payments of the . . . School District under Education Law § 2576, [(5-b) (a)] (ii) as of June 30, 2007 was the sum of \$119.1 million" Pursuant to Education Law § 2576 (5-b) (a) (ii), however, the " 'city amount' " cannot include "city payments to bond or note holders for debt service payments of such district"

Nevertheless, we conclude that the court properly granted that part of the motion of the City respondents to dismiss the amended petition against them. As the court properly determined, petitioners lack standing to challenge the 2007-2008 City budget. Because the City paid the School District \$119,100,000 for the 2007-2008 fiscal year, petitioners failed to demonstrate that "they have suffered an injury in fact" (*Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 92 NY2d 579, 587; see generally *Matter of Graziano v County of Albany*, 3 NY3d 475, 479). Further, petitioner Paula Givens does not have taxpayer standing pursuant to General Municipal Law § 51. "[A] taxpayer action pursuant to section 51 of the General

Municipal Law lies 'only when the acts complained of are fraudulent, or a waste of public property in the sense that they represent a use of public property or funds for entirely illegal purposes' . . .[, and a] failure to observe . . . statutory provisions does not constitute the fraud or illegality necessary to support a taxpayer action pursuant to section 51" (*Mesivta of Forest Hills Inst. v City of New York*, 58 NY2d 1014, 1016). Finally, because the City's budget appropriation could be challenged by the School District, Givens does not have common-law taxpayer standing (see *Transactive Corp.*, 92 NY2d at 589; *Boryszewski v Brydges*, 37 NY2d 361, 364).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1092

KA 08-00842

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RUFUS KEARSE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of 11½ years plus a period of post release supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Kearse*, 46 AD3d 1436).

We reject defendant's contention that the proposed new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the proposed new sentence, taking into consideration the magnitude of the crime and defendant's role in the drug trafficking operation in question, defendant's prior criminal history, and the advantageous terms of the plea bargain (*see generally People v Boatman*, 53 AD3d 1053; *People v Anonymous*, 33 AD3d 336). We thus conclude that the court properly exercised its discretion in determining the length of the proposed new sentence. We further reject defendant's contention that the proposed new sentence was unauthorized as a matter of law. Even assuming, arguendo, that

defendant's contention is properly raised on an appeal from a specifying order (see L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing parameters of Penal Law § 70.71 (3) (b) (ii). We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1094

KA 05-02810

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TONY J. CLARK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered November 14, 2005. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, assault in the first degree (Penal Law § 120.10 [1]), the sole contention of defendant is that he was denied his statutory right to a speedy trial. We reject that contention. The People established that they exercised due diligence pursuant to CPL 30.30 (4) (e) by presenting evidence that they were diligent and made reasonable efforts to secure the presence of defendant, who was in federal prison, on scheduled court dates. Thus, any periods of delay resulting from defendant's failure to appear in court on those dates are not chargeable to the People (*see People v Newborn*, 42 AD3d 506, lv denied 10 NY3d 962; *see also People v Garrett*, 207 AD2d 948, 948-949). Any time otherwise chargeable to the People was within the six months allowed by CPL 30.30 (*see generally Newborn*, 42 AD3d at 507).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1095

KA 08-01557

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KENNETH JACKSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered June 10, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of stolen property in the fifth degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a bench trial of criminal possession of stolen property in the fifth degree (Penal Law § 165.40) and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant was acquitted of burglary in the third degree (§ 140.20). Viewing the evidence in light of the elements of criminal possession of stolen property in the fifth degree (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict with respect to that count is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[D]efendant's knowledge that property is stolen may be proven circumstantially, and the unexplained or falsely explained recent exclusive possession of the fruits of a crime allows a [trier of fact] to draw a permissible inference that defendant knew the property was stolen" (*People v Landfair*, 191 AD2d 825, 826, *lv denied* 81 NY2d 1015; *see People v Jackson*, 282 AD2d 830, 832-833, *lv denied* 96 NY2d 902). We thus conclude that Supreme Court was entitled to infer from the circumstantial evidence presented by the People that defendant knowingly possessed stolen property for his own benefit (*see* § 165.40; *see generally People v Zorcik*, 67 NY2d 670, 671), and it cannot be said that the court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his further contention that the verdict is inconsistent insofar as the court found him guilty of criminal possession of stolen property based on his possession of a bicycle but acquitted him of the burglary during which that bicycle was stolen (*see generally People v Alfaro*, 66 NY2d 985, 987; *People v Putt*, 303 AD2d 992). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1096

KA 06-03040

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

EBONY SIPLIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered June 28, 2006. The judgment convicted defendant, upon a jury verdict, of aggravated cruelty to animals.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of aggravated cruelty to animals (Agriculture and Markets Law § 353-a [1]). The conviction arises out of defendant's treatment of a three-month-old pit bull. Contrary to defendant's contention, County Court properly allowed an investigator from the Humane Society to testify with respect to defendant's improper care of another dog several months prior to the incident in question inasmuch as evidence of the prior incident was relevant to establish intent and the absence of mistake or accident (*see People v Brown*, 57 AD3d 1461, 1463, *lv denied* 12 NY3d 814; *see generally People v Allweiss*, 48 NY2d 40, 46-47; *People v Molineux*, 168 NY 264, 293-294).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1098

KA 06-01907

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRIAN SHAW, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 3, 2006. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [2]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to the contention of defendant, his confession was not rendered involuntary by undue "psychological pressure," and County Court thus properly refused to suppress the confession. In support of his contention, defendant relies primarily on his own testimony at the *Huntley* hearing. The court's determination to discredit that testimony is entitled to deference (see *People v Prochilo*, 41 NY2d 759, 761), and we see no basis to disturb it (see *People v Thompson*, 59 AD3d 1115, 1116, *lv denied* 12 NY3d 852, 860). We reject defendant's further contention that certain inconsistencies in the testimony of the police witnesses at the suppression hearing demonstrate that such testimony was "tailored to meet constitutional objections" and thus that the court erred in crediting that testimony. In any event, we conclude that those minor inconsistencies do not undermine the court's credibility determination in favor of those witnesses (see generally *People v Childres*, 60 AD3d 1278, 1279). We also reject the contention of defendant that he was advised of his *Miranda* rights in a manner that did not enable him to understand those rights. Upon our review of the transcript of the suppression hearing, we conclude that "[t]he People met 'their initial burden of establishing the legality of the police conduct and defendant's waiver of rights,' and defendant failed to establish that he did not waive

those rights, or that the waiver was not knowing, voluntary and intelligent" (*People v Grady*, 6 AD3d 1149, 1150, lv denied 3 NY3d 641; see *People v Caballero*, 23 AD3d 1031, 1032, lv denied 6 NY3d 846).

Contrary to the further contention of defendant, the court properly denied his request to dismiss a sworn juror as "grossly unqualified to serve in the case" (CPL 270.35 [1]). Although the juror initially expressed some concern over the defense of extreme emotional disturbance, he ultimately assured the court in unequivocal terms that he would be fair and impartial and would follow the court's instructions (see generally *People v Buford*, 69 NY2d 290, 297-299; *People v Buchholz*, 23 AD3d 1093, 1094, lv denied 6 NY3d 846). Defendant failed to preserve for our review the majority of his contentions concerning the alleged instances of prosecutorial misconduct (see CPL 470.05 [2]), and we conclude that, in any event, "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Cox*, 21 AD3d 1361, 1364, lv denied 6 NY3d 753 [internal quotation marks omitted]). We have considered defendant's remaining contention and conclude that it is without merit.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1099

KA 06-00967

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

SENNA SMITH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered April 3, 2006. The judgment convicted defendant, upon her plea of guilty, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that the search warrant application failed to set forth sufficient facts to justify the issuance of the warrant and thus that all evidence seized as a result of the search should have been suppressed. We reject that contention. County Court properly concluded that the warrant application set forth sufficient facts justifying the issuance of the warrant (*see People v Parris*, 83 NY2d 342; *People v Flowers*, 59 AD3d 1141).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1100

KA 08-00152

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAURICE PEOPLES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered January 14, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). Defendant failed to preserve for our review his contention that County Court erred in failing to instruct the jury that a witness was an accomplice as a matter of law, thus requiring corroboration of the testimony of that witness (*see People v Fortino*, 61 AD3d 1410, 1411; *People v Montanez*, 57 AD3d 1366, 1367, *lv denied* 12 NY3d 857; *People v Taylor*, 57 AD3d 1518, *lv denied* 12 NY3d 822). "In any event, the failure of the court to give that instruction is of no moment, inasmuch as the testimony of the witness was in fact amply corroborated" (*Fortino*, 61 AD3d at 1411; *see People v Smith-Merced*, 50 AD3d 259, *lv denied* 10 NY3d 939; *People v White*, 81 AD2d 486, 488-489). Defendant also failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct on summation (*see CPL 470.05 [2]; People v Romero*, 7 NY3d 911; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), and that contention is without merit in any event. Contrary to defendant's final contention, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1101

CA 09-00474

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

SUNSHINE IMAGING ASSOCIATION/WNY MRI, AS
ASSIGNEE OF CAROL L. VANCHERI, ET AL.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GOVERNMENT EMPLOYEES INSURANCE COMPANY, ALSO
KNOWN AS "GEICO," DEFENDANT-RESPONDENT.

LAW OFFICE OF J. MICHAEL HAYES, BUFFALO (J. MICHAEL HAYES OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (DAVID H. FRECH OF COUNSEL),
FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 25, 2008. The order denied plaintiff's motion for summary judgment and granted defendant's motion to sever the causes of action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff, as assignee of 14 patients to whom it provided radiological services, commenced this action seeking to recover no-fault benefits pursuant to the contract between each patient and defendant insurer. We conclude that Supreme Court properly denied plaintiff's motion for summary judgment on the amended complaint. Although plaintiff made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that the prescribed statutory billing forms were received by defendant and that defendant's payment of no-fault benefits to plaintiff was overdue (see *A.B. Med. Servs., PLLC v Liberty Mut. Ins. Co.*, 39 AD3d 779, 780; *LMK Psychological Servs., P.C. v Liberty Mut. Ins. Co.*, 30 AD3d 727, 728), defendant raised a triable issue of fact by submitting its denial of claim forms setting forth that the services for which plaintiff sought to recover no-fault benefits were not medically necessary (see *Countrywide Ins. Co. v 563 Grand Med., P.C.*, 50 AD3d 313, 314; *A.B. Med. Servs., PLLC*, 39 AD3d at 780-781). Contrary to plaintiff's contention, defendant is not precluded from denying the claims after the services were rendered on the ground of lack of medical necessity. Plaintiff's assignors were entitled only to reimbursement for medically "necessary" expenses (Insurance Law § 5102 [a] [1]; see 11 NYCRR 65-1.1 [d]), and plaintiff assignee is subject

to that lack of medical necessity defense (see *Long Is. Radiology v Allstate Ins. Co.*, 36 AD3d 763, 765).

Contrary to plaintiff's further contention, the court did not abuse its discretion in granting defendant's motion to sever the 14 causes of action. "The decision whether to grant severance 'rests soundly in the discretion of the trial court and, on appeal, will be affirmed absent a demonstration of abuse of discretion or prejudice to a substantial right' " (*Rapini v New Plan Excel Realty Trust, Inc.*, 8 AD3d 1013, 1014; see *Soule v Norton*, 299 AD2d 827, 828). Although this action was commenced "by a single assignee against a single insurer and all [causes of action] allege the erroneous nonpayment of no-fault benefits . . . , they arise from [14] different automobile accidents on various dates in which the [14] unrelated assignors suffered diverse injuries and required different medical treatment" (*Poole v Allstate Ins. Co.*, 20 AD3d 518, 519).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1102

CA 08-02627

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

IN THE MATTER OF FIROOZ N. TABRIZI, M.D.,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

FAXTON-ST. LUKE'S HEALTH CARE,
RESPONDENT-RESPONDENT.

PETER M. HOBAICA, LLC, UTICA (GEORGE E. CURTIS OF COUNSEL), FOR
PETITIONER-APPELLANT.

NAPIERSKI, VANDENBURGH & NAPIERSKI, LLP, ALBANY (KIMBERLY E. KENEALY
OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered September 30, 2008. The order denied petitioner's application for an injunction pursuant to Public Health Law § 2801-c.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner (hereafter, plaintiff) commenced this CPLR article 78 proceeding seeking to compel respondent (hereafter, defendant) to reinstate his full clinical privileges at defendant's hospital. Supreme Court converted the proceeding into an action for an injunction pursuant to Public Health Law § 2801-c and then refused to grant an injunction, concluding that there was a rational basis for the suspension and that plaintiff had been afforded his full procedural rights pursuant to the applicable law and defendant's bylaws. We affirm.

Upon reviewing an application for an injunction pursuant to Public Health Law § 2801-c, the court's inquiry is limited to determining whether the purported grounds for suspending or restricting a physician's practice privileges "were reasonably related to the institutional concerns set forth in the statute, whether they were based on the apparent facts as reasonably perceived by the administrators, and whether they were assigned in good faith" (*Fried v Straussman*, 41 NY2d 376, 383, *rearg denied* 41 NY2d 1009; *see Bhard-Waj v United Health Servs., Hosps.*, 303 AD2d 824, 825; *Jones v Yonkers Gen. Hosp.*, 143 AD2d 885). It is not within the province of the court to determine whether a defendant was in fact justified in suspending the plaintiff's clinical privileges or whether the allegations against the plaintiff were in fact accurate (*see Fried*, 41 NY2d at 382-383).

Based on the record before us, including the transcript of plaintiff's fair hearing, we agree with the court that defendant's reasons for suspending plaintiff's clinical privileges were properly related to the concern of defendant for the safety of its patients (see § 2801-b [1]). In addition, defendant's actions were undertaken in good faith, i.e., in response to a telephone call from a physician affiliated with an insurance company who expressed concern over plaintiff's care of a patient insured by that company.

We reject plaintiff's contention that the court improperly dismissed the action, sua sponte, in the absence of a motion to dismiss by defendant. Although the court in its bench decision stated that the action was dismissed, the court also stated that it was denying "injunctive relief." In any event, having denied the relief sought in the action, it is of no moment whether the court stated in its bench decision that the action was dismissed.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1103

CA 09-00338

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

THE BALK FAMILY TRUST, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

JOHN SCHMIDT, KATHLEEN SCHMIDT,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

PETER E. CORNING, AUBURN, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered January 29, 2009 in an action pursuant to RPAPL 871. The judgment, inter alia, denied the motion of defendant John Schmidt for summary judgment on his counterclaim.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is granted and judgment is granted in favor of defendant John Schmidt as follows:

It is ADJUDGED and DECLARED that defendant John Schmidt has the right of yearly renewal of the lease in question during his lifetime,

and the cross motion is denied and the injunction is vacated.

Memorandum: Plaintiff's predecessor in title, Paulette Carlson Smith, commenced this action pursuant to RPAPL 871 seeking, inter alia, an injunction directing defendants John Schmidt (Schmidt) and Kathleen Schmidt to remove an encroaching structure from property leased by Smith's predecessor in title, Walter F. Manchester, to Schmidt in 1987. The written lease between Manchester and Schmidt was for a term of one year and provided that "[t]he [lessee] shall have the right to renew this Lease Agreement yearly upon the same terms and conditions." When Manchester died in 2005 and the property was devised to Smith, she notified Schmidt of the termination of the lease in May 2006. Smith thereafter commenced this action and plaintiff, upon purchasing the property from Smith, was substituted as the plaintiff herein. Supreme Court denied the motion of Schmidt for summary judgment on his counterclaim seeking a declaration that he "has a perpetual right of renewal of the lease at issue during his

lifetime," and the court granted plaintiff's cross motion for, *inter alia*, summary judgment on the complaint. We reverse.

We agree with defendants that "the only practical and reasonable construction of the language of [the renewal provision] requires a finding that [Manchester and Schmidt] intended the lease to be renewable for successive [one-year] terms during [Schmidt's] lifetime[]" (*Farone v Mintzer*, 133 AD2d 1009, 1010; see *Gleason v Tompkins*, 84 Misc 2d 174, 178-179; see also *DeSantis v Kessler*, 83 AD2d 766). Plaintiff contends that the court properly relied on *DeSantis* in support of its decision because here, as in *DeSantis*, the parties to the lease intended to limit the lessee's right of renewal to the period during which the lessor was the owner of the property (see *id.* at 766-767). We reject that contention inasmuch as, unlike the lease in *DeSantis*, the lease in this case contains no indication that the parties thereto intended that the lessor would have the option of terminating the lease at the end of each renewal term, either by selling the property to the lessee if he or she exercised the option to purchase the property at fair market value or by selling the property to a third party. Thus, because the lease is binding both by its terms and as a matter of law on both Smith, Manchester's devisee, and plaintiff, Smith's grantee, Schmidt has a valid right of yearly renewal of the lease during his lifetime.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1106

CA 09-00057

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

BOBBI LYNN DEROSIA, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

GASBARRE & SZATKOWSKI ASSOCIATION, ARTHUR
GASBARRE, JOHN GASBARRE, RICHARD GASBARRE,
ANN MARIE SZATKOWSKI, GASBARRE ASSOCIATES LLC,
AND GASBARRE & SZATKOWSKI ASSOCIATES,
DEFENDANTS-RESPONDENTS.

DAMON MOREY LLP, BUFFALO (STEVEN M. ZWEIG OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW
A. LENHARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered September 12, 2008 in a personal injury action. The judgment and order granted the motion of defendants for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the judgment and order so appealed from is unanimously reversed on the law without costs, the motion is denied and the amended complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice in a parking lot on property owned by defendant Gasbarre & Szatkowski Associates. We conclude that Supreme Court erred in granting defendants' motion for summary judgment dismissing the amended complaint.

"In seeking summary judgment dismissing the [amended] complaint, defendant[s] had the initial burden of establishing that [they] did not create the alleged dangerous condition and did not have actual or constructive notice of it" (*Pelow v Tri-Main Dev.*, 303 AD2d 940, 940-941). Defendants are correct that the amended complaint, as amplified by the bill of particulars, alleges only that they had constructive notice of the allegedly dangerous condition and does not allege that they had actual notice of the allegedly dangerous condition or that they created it. We agree with plaintiff, however, that defendants failed to meet their burden of establishing that they lacked constructive notice of the condition in question.

It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant[s] . . . to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendants failed to establish that the ice was not visible upon a reasonable inspection (*cf. Ferington v Dudkowski*, 49 AD3d 1267; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857). In support of their motion, defendants submitted, inter alia, the deposition testimony of plaintiff in which she stated that she could not see the ice at 11:00 P.M., when she fell. She also testified, however, that half of the lights in the area of the parking lot where she fell were not functioning. Thus, contrary to the contention of defendants, they failed to establish as a matter of law that plaintiff was unable to see the ice because it was not visible. Rather, by their own submissions in support of the motion, defendants raised an issue of fact whether the ice was merely difficult to see because of the lighting conditions, "i.e., whether the condition was visible and apparent [upon a reasonable inspection] and had existed for a sufficient length of time before plaintiff's accident to permit defendant[s] to discover and remedy it" (*Merrill v Falletti Motors, Inc.*, 8 AD3d 1055; see *Duman v City of Buffalo*, 269 AD2d 848).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1108

CA 09-00547

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

IN THE MATTER OF THE ARBITRATION BETWEEN
ROCHESTER POLICE LOCUST CLUB, INC.,
PETITIONER-APPELLANT,

ORDER

AND

CITY OF ROCHESTER, RESPONDENT-RESPONDENT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF
COUNSEL), FOR PETITIONER-APPELLANT.

THOMAS S. RICHARDS, CORPORATION COUNSEL, ROCHESTER (YVETTE CHANCELLOR
GREEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered June 24, 2008 in a proceeding pursuant to CPLR article 75. The order denied the petition and vacated the arbitration award.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 4, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1109

CA 08-02053

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

PAUL RUDAT, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MARK COLF EXCAVATING CONTRACTING, INC.,
JAMES ROSE AND MARYANN ROSE,
DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO, GANNON,
ROSENFARB, MOSCOWITZ, NEW YORK CITY (JENNIFER B. ETTENGER OF COUNSEL),
FOR DEFENDANT-RESPONDENT MARK COLF EXCAVATING CONTRACTING, INC.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS JAMES ROSE AND MARYANN ROSE.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered September 11, 2008 in a personal injury action. The order granted the respective motions of defendants for summary judgment dismissing the amended complaint against them and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as the result of diving into a pond located on property owned by defendants James Rose and Maryann Rose and constructed by defendant Mark Colf Excavating Contracting, Inc. Supreme Court properly granted the respective motions of defendants for summary judgment dismissing the amended complaint against them. Defendants met their initial burdens of establishing that "plaintiff's act of diving headfirst into water [that] he knew to be shallow was an unforeseeable superseding event absolving the defendants of any liability" (*Donohoe v Town of Babylon*, 246 AD2d 576; see *Olsen v Town of Richfield*, 81 NY2d 1024, 1026; *Howard v Poseidon Pools*, 72 NY2d 972, 974-975; *Smith v Stark*, 67 NY2d 693, 694), and plaintiff failed to raise a triable issue of fact (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1112

CA 09-00427

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

ALY SHARAKY, PLAINTIFF-APPELLANT,

V

ORDER

REID PETROLEUM CORP., DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

MUSCATO, DIMILLO & VONA, L.L.P., LOCKPORT (A. ANGELO DIMILLO OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

SEAMAN, JONES, HOGAN & BROOKS, LLP, LOCKPORT (MORGAN L. JONES, JR., OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered September 10, 2008 in a breach of contract action. The order denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1113

CA 09-00558

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

AARON M. MCGEE AND ERIN E. CARR,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V

MEMORANDUM AND ORDER

DALE H. VAN ERDEN, INDIVIDUALLY AND AS
OWNER/OPERATOR OF VENTURE FARMS, LLC,
JOEL RIEHLMAN, INDIVIDUALLY AND AS
OWNER/OPERATOR OF VENTURE FARMS, LLC,
VENTURE FARMS, LLC, AND MICHAEL RIESE,
DEFENDANTS-APPELLANTS-RESPONDENTS.

LINDENFELD LAW FIRM, P.C., CAZENOVIA (JANA K. MCDONALD OF COUNSEL),
FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 20, 2008 in a personal injury action. The order denied defendants' motion for summary judgment and plaintiffs' cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Aaron M. McGee (plaintiff) when he fell to the ground from the rafters of a barn while installing hurricane clips. The barn was allegedly owned by defendant Venture Farms, LLC (Venture Farms). Defendants moved for summary judgment dismissing the amended complaint on the ground that workers' compensation benefits were plaintiffs' exclusive remedy. Plaintiffs cross-moved for partial summary judgment on liability with respect to the Labor Law § 240 (1) causes of action on the ground that plaintiff was an independent contractor, not an employee of Venture Farms, and thus was not barred by the exclusive remedy provisions of the Workers' Compensation Law from bringing this action. Supreme Court determined that there was a triable issue of fact whether plaintiff was an employee of Venture Farms at the time of the accident and thus denied the motion and cross motion.

We conclude that the court erred in deciding the motion and cross motion absent a determination by the Workers' Compensation Board (Board) whether plaintiff was an employee of Venture Farms and thus entitled to workers' compensation benefits (see *Valenziano v Niki Trading Corp.*, 21 AD3d 818, 820; *Augustine v Sugrue*, 305 AD2d 437; *Hofrichter v North Shore Univ. Hosp. v Syosset*, 271 AD2d 649). "[P]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the . . . Board and . . . it is therefore inappropriate for the courts to express views with respect thereto pending determination by the [B]oard" (*Botwinick v Ogden*, 59 NY2d 909, 911; see *O'Rourke v Long*, 41 NY2d 219, 228; *Ransier v Auburn Mem. Hosp.*, 1 AD3d 896, 897; *Rivera v Lopez*, 167 AD2d 953). Where, as here, there is an issue of fact whether an injured plaintiff is an employee within the meaning of the Workers' Compensation Law, he or she "may not choose the courts as the forum for the resolution" of that issue (*O'Rourke*, 41 NY2d at 228; see *Nunes v Window Network, LLC*, 54 AD3d 834, 835; *Rivera*, 167 AD2d 953). We therefore reverse the order and remit the matter to Supreme Court to determine the motion and cross motion after final resolution of a prompt application to the Board to determine the rights, if any, of plaintiffs to benefits under the Workers' Compensation Law.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1115

KA 08-01194

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

TIMOTHY C. DARRISAW, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 12, 2008. The judgment convicted defendant, upon a jury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on count two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]). In accordance with our decision in *People v Pacer* (21 AD3d 192, *affd* 6 NY3d 504), we conclude that the "Affidavit of Regularity/Proof of Mailing" (affidavit) prepared by an employee of the Department of Motor Vehicles (DMV) constituted testimonial evidence that did not fall within the business records exception to the hearsay rule (see CPLR 4518 [a]; CPL 60.10). The affidavit served as "a direct accusation of an essential element of the crime" (*Pacer*, 6 NY3d at 510) and, indeed, it was the only evidence suggesting that defendant had the requisite notice of his driver's license suspensions. Defendant's opportunity to cross-examine a DMV employee who was not directly involved in sending out suspension notices and who had no personal knowledge of defendant's driving record was insufficient to protect defendant's Sixth Amendment right of confrontation (see *Crawford v Washington*, 541 US 36). We therefore reverse the judgment and grant a new trial on count two of the indictment.

We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1116

KA 06-00966

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEYVIO H. OWENS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered March 16, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to preserve for our review his contention that County Court failed to take into account the five days of jail time credit to which he is entitled in determining the duration of the order of protection (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Bentley*, 63 AD3d 1624; *People v Ortiz*, 43 AD3d 1348, *lv denied* 9 NY3d 1008). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1117

KAH 08-01156

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
PHILIP KLOSIN, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

JAMES L. BERBARY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF
COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court,
Erie County (M. William Boller, A.J.), entered March 10, 2008. The
judgment dismissed the petition for a writ of habeas corpus.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Supreme Court properly dismissed the petition for a
writ of habeas corpus. The contentions of petitioner could have been
raised on his direct appeal from the judgment of conviction or by way
of a CPL 440.10 motion, and thus habeas corpus relief is not available
(see *People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, lv denied 12
NY3d 714; *People ex rel. Smith v Burge*, 11 AD3d 907, lv denied 4 NY3d
701).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1118

KA 05-00992

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN J. PARKS, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered October 26, 2004. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). Defendant failed to renew his motion for a trial order of dismissal after presenting evidence and thus failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Contrary to defendant's further contention, defense counsel was not ineffective in failing to renew the motion for a trial order of dismissal (*see People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922), nor was she ineffective in failing to make objections that "would have been unavailing" (*People v Guerrero*, 22 AD3d 266, 267, *lv denied* 5 NY3d 882). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 147). The "unspecified, general objections" by defense counsel to the prosecutor's comments during summation failed to preserve for our review the contention of defendant on appeal that those comments were improper and deprived him of a fair trial (*People v Romero*, 7 NY3d 911, 912). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see CPL 470.15 [6] [a]*). Finally, the

sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1119

KA 06-02143

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PHILLIP NELSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 28, 2006. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of rape in the second degree (Penal Law § 130.30 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw the plea based on defendant's claims of innocence and mistake. We conclude that defendant's contention is preserved for our review only insofar as it is based on defendant's protestations of innocence. Following the plea, defense counsel informed the court that defendant denied his guilt and that it was defense counsel's understanding that defendant wished to withdraw his plea. Contrary to the People's contention, we deem that statement sufficient to preserve for our review the contention of defendant with respect to his claim of innocence. We nevertheless reject that contention. "Here, defendant's belated and conclusory allegations of innocence in support of the motion are belied by the plea colloquy" (*People v Kimmons*, 39 AD3d 1180, 1180; see *People v Klein*, 11 AD3d 959).

With respect to defendant's claim of mistake, defendant contends that the court should have permitted him to withdraw his plea because, at the time he entered the plea, he was unaware that he would lose custody of his daughter as a consequence of the plea. Defendant failed to raise that claim at the time of his motion, however, and thus has not preserved it for our review (see generally *People v Mackey*, 77 NY2d 846; *People v Mesquite*, 234 AD2d 395, lv denied 89 NY2d 1013). We decline to exercise our power to review that claim as

a matter of discretion in the interest of justice (see CPL 470.15 [6]
[a]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1120

KA 06-01931

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ERIC P. DAVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered May 24, 2006. The judgment convicted defendant, after a nonjury trial, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1121

KA 07-02527

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PATRICK ANDERSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered September 12, 2006. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is otherwise affirmed.

Memorandum: Defendant appeals from a judgment revoking his sentence of probation imposed upon his conviction, following his plea of guilty, of unlawful imprisonment in the second degree (Penal Law § 135.05), and sentencing him to a one-year term of imprisonment. Inasmuch as " 'defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot' " (*People v Bald*, 34 AD3d 1362). Even assuming, arguendo, that defendant's contention is not moot, "we [would] decline to reduce the sentence to 364 days to enable defendant to avoid deportation" (*People v Soroka*, 28 AD3d 1219, 1220, *lv denied* 7 NY3d 818).

Contrary to defendant's further contention, "[t]he People properly presented the requisite residuum of competent legal evidence and thus met their burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation" (*People v Van Every*, 26 AD3d 777, 777 [internal quotation marks omitted]). The contention of defendant that defense counsel was ineffective in failing to object to the condition of his probation requiring sex offender treatment is not properly before us inasmuch as defendant failed to appeal from the underlying judgment of conviction (*see People v Grzywaczewski*, 61 AD3d 699; *People v Postula*, 50 AD3d 1581, *lv denied* 10 NY3d 938; *see also People v Satiro*, 28 AD3d 497).

Finally, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided meaningful representation at the probation revocation hearing (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1122

KA 05-02293

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JAMES D. BARKLEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered September 28, 2005. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). We conclude that County Court "was within its discretion" at trial in discharging a sworn juror based on a medical emergency involving the juror's spouse (*People v Tisdale*, 270 AD2d 917, *lv denied* 95 NY2d 839; *see People v Aponte*, 28 AD3d 672, *lv denied* 7 NY3d 785; *People v McCullin*, 248 AD2d 277, *lv denied* 92 NY2d 928). The court made the requisite "reasonably thorough inquiry" in determining that the juror was unavailable for continued service (CPL 270.35 [2] [a]), and properly placed on the record its reasons for discharging the juror after permitting the prosecutor and defense counsel to be heard on the matter (*see* CPL 270.35 [2] [b]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1123

KA 07-01409

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

BRANDON J. ALLEN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM CLAUSS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered July 5, 2006. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [4]), defendant contends that County Court erred in ordering restitution inasmuch as it was not part of the plea agreement. We agree. Although defendant failed to preserve that contention for our review (*see People v Cooke*, 21 AD3d 1339), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the court should have afforded defendant the opportunity to withdraw his plea before ordering him to pay restitution (*see Cooke*, 21 AD3d 1339). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1124

CA 09-00367

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

TERRENCE L. QUIGG AND NANCY L. QUIGG,
PLAINTIFFS-RESPONDENTS,

V

ORDER

THOMAS J. MURPHY AND HAROLD L. JACOBS,
DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (KEVIN P. RYAN OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

KENNY & KENNY, PLLC, SYRACUSE (ERIN K. SKUCE OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 3, 2008 in a personal injury action. The order, insofar as appealed from, granted in part the motion of plaintiffs to set aside the jury verdict.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1126

CA 09-00446

PRESENT: HURLBUTT, J.P., FAHEY, GREEN, AND PINE, JJ.

PARRIS H. PALMER, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

PORTIA L. HORTON AND LAIDLAW TRANSIT, INC.,
DEFENDANTS-RESPONDENTS.

SIEGEL, KELLEHER & KAHN, LLP, BUFFALO (TIMOTHY G. O'CONNELL OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LONG FIRM, LLP, BUFFALO (WILLIAM A. LONG, JR., OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered September 29, 2008 in a personal injury action. The order, insofar as appealed from, denied that part of the motion of plaintiff seeking partial summary judgment on the issue of negligence.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he was struck by a bus owned by defendant Laidlaw Transit, Inc. and operated by defendant Portia L. Horton. Supreme Court properly denied that part of plaintiff's motion seeking partial summary judgment on the issue of negligence (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Even assuming, arguendo, that plaintiff met his initial burden on the motion, we conclude on the record before us that defendants raised triable issues of fact whether any negligence on their part contributed to the accident and whether plaintiff used reasonable care in proceeding into the intersection in which the accident occurred (*see generally Thoma v Ronai*, 82 NY2d 736, 737; *Zuckerman*, 49 NY2d at 562). Thus, there remains an issue of fact with regard to the respective negligence, if any, on the part of plaintiff and defendants. We reject plaintiff's contention that defendants submitted Horton's affidavit in opposition to the motion in "an attempt to raise feigned issues of fact" (*Dietzen v Aldi Inc. [New York]*, 57 AD3d 1514, 1514). In addition, any inconsistency between the deposition testimony of Horton submitted in support of the motion and her affidavit presents a credibility issue to be resolved at trial (*see id.; Knepka v Tallman*, 278 AD2d 811). Contrary to plaintiff's further contention, it cannot be said that the court should have disregarded the affidavit of defendants' accident reconstruction

expert as speculative (*cf. Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1128

CA 09-00442

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

SURF CITY ENTERPRISES OF SYRACUSE, INC.,
PLAINTIFF-RESPONDENT,

V

ORDER

LAURA VANWERT, DANA MORAN,
HEATHER COLLURA, AND THE DAILY ORANGE CORP.,
DEFENDANTS-APPELLANTS.

DAVIS WRIGHT TREMAINE LLP, NEW YORK CITY (CHRISTOPHER J. ROBINSON OF
COUNSEL), AND MACKENZIE HUGHES LLP, SYRACUSE, FOR
DEFENDANTS-APPELLANTS.

LAW OFFICES OF PAT KELLY, ESQ., PLANO, TEXAS (PAT KELLY OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered May 5, 2008. The order, insofar as appealed from, denied in part defendants' motion to dismiss the complaint.

Now, upon reading and filing the stipulation of withdrawal signed by the attorneys for the parties on July 9, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1129

CA 09-00578

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

IN THE MATTER OF DAVID HALL,
CLAIMANT-RESPONDENT,

V

MEMORANDUM AND ORDER

MADISON-ONEIDA COUNTY BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, ALSO KNOWN AS
MADISON-ONEIDA COUNTY BOCES,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
RESPONDENT-APPELLANT.

R. ROBERT SOSSEN, JR., UTICA, FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered June 16, 2008. The order granted claimant's application for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Supreme Court did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). "The court is vested with broad discretion to grant or deny [such an] application" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965) and, although claimant failed to offer a reasonable excuse for his failure to serve the notice of claim within the statutory 90-day period (see § 50-e [1] [a]), that failure " 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]' " (*Hale v Webster Cent. School Dist.*, 12 AD3d 1052, 1053; see *Matter of LaMay v County of Oswego*, 49 AD3d 1351, 1352, lv denied 10 NY3d 715). Here, claimant "made a persuasive showing that [respondent] . . . 'acquired actual knowledge of the essential facts constituting the claim' . . . [and respondent has] made no particularized or persuasive showing that the delay caused [it] substantial prejudice" (*Wetzel Servs. Corp.*, 207 AD2d 965).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1130

CA 09-00586

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

IN THE MATTER OF DAVID HALL,
CLAIMANT-RESPONDENT,

V

ORDER

MADISON-ONEIDA COUNTY BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, ALSO KNOWN AS
MADISON-ONEIDA COUNTY BOCES,
RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (REBECCA A. CRANCE OF COUNSEL), FOR
RESPONDENT-APPELLANT.

R. ROBERT SOSSEN, JR., UTICA, FOR CLAIMANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County
(Samuel D. Hester, J.), entered July 1, 2008. The amended order
granted claimant's application for leave to serve a late notice of
claim.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs (*see Moody v Sorokina*, 56 AD3d 1246, 1247).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1131

CA 09-00553

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

LAURIE CARMER AND LAWRENCE CARMER,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

ODD FELLOWS, ET AL., DEFENDANTS,
AND ODD FELLOWS HOME ASSOCIATION OF THE
STATE OF NEW YORK, DEFENDANT-APPELLANT.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WOODBURY (RICHARD LILLING OF
COUNSEL), FOR DEFENDANT-APPELLANT.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (CRAIG H.
BERNHARDT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 18, 2008 in a personal injury action. The amended order denied the motion of defendant Odd Fellows Home Association of the State of New York to dismiss the amended complaint against it.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint against defendant Odd Fellows Home Association of the State of New York is dismissed.

Memorandum: Plaintiffs commenced this action in August 2007 seeking damages for injuries sustained by Laurie Carmer (plaintiff) when she fell in December 2004. The original summons and complaint named Odd Fellows and Rebecca Nursing Home, Inc. (correctly, Odd Fellow and Rebekah Rehabilitation and Health Care Center, Inc. [Health Care Facility]) as a defendant, as well as " 'John Doe' intended to designate the person and/or entity owning the premises commonly known as 104 Old Niagara Road, Lockport, New York." Although the original complaint alleged that plaintiff fell at 104 Old Niagara Road, the record contains a bill of particulars dated September 27, 2007 alleging that plaintiff fell at 124 Old Niagara Road. It is undisputed that the Health Care Facility owns the property at 104 Old Niagara Road and that the property at 124 Old Niagara Road is owned by Odd Fellows Home Association of the State of New York (Home Association). In March 2008, the Health Care Facility moved to dismiss the action against it, and plaintiffs cross-moved to amend the complaint to substitute the Home Association for "John Doe" as a defendant, pursuant to CPLR 1024. Supreme Court "adjourned" the

motion and granted the cross motion and, on April 2, 2008, plaintiffs filed an amended summons and amended complaint naming the Home Association as a defendant. The Home Association then moved to dismiss the amended complaint against it as time-barred. We conclude that the court erred in denying the Home Association's motion.

"[A] summons served in a 'John Doe' form is jurisdictionally sufficient only if the actual defendants are 'adequately described and would have known, from the description in the complaint, that they were the intended defendants' " (*Lebowitz v Fieldston Travel Bur.*, 181 AD2d 481, 482; see generally *City of Mount Vernon v Best Dev. Co.*, 268 NY 327, 331, rearg denied 268 NY 708). The "John Doe" description in the original complaint did not describe "John Doe" as the owner of 124 Old Niagara Road. We thus conclude that it is "jurisdictionally defective" with respect to the Home Association (*Opont v Duclair Realty Corp.*, 190 AD2d 781, 782; see *Olmsted v Pizza Hut of Am., Inc.*, 28 AD3d 855, 856; *Lebowitz*, 181 AD2d at 482-483).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1132

CA 08-01483

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

IN THE MATTER OF THE ESTATE OF HELEN T.
STASKIEWICZ, DECEASED, ELIZABETH WALKER,
ADMINISTRATOR, RESPONDENT;

MEMORANDUM AND ORDER

JENNIFER HYATT AND KATHY HYATT,
CLAIMANTS-APPELLANTS.

RICE, REID, BRODERICK & WATTENGEL, NIAGARA FALLS (PAUL H. REID, JR.,
OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

Appeal from an order of the Surrogate's Court, Niagara County (Sara S. Sperrazza, A.S.), entered May 6, 2008. The order, among other things, awarded attorneys fees to the attorney for respondent against claimant Jennifer Hyatt.

It is hereby ORDERED that said appeal insofar as taken by claimant Kathy Hyatt is unanimously dismissed and the order is modified on the law by vacating the attorneys fees awarded to the attorney for respondent against claimant Jennifer Hyatt in the amount of \$3,647.50 and as modified the order is affirmed without costs.

Memorandum: Claimants appeal from an order of Surrogate's Court that, inter alia, determined that there was no credible evidence to justify modification of a prior order issued by the Surrogate. We note at the outset that the appeal insofar as taken by claimant Kathy Hyatt must be dismissed. She may not appeal from the order inasmuch as she was in default when the initial order was entered, and there is no indication in the record that she moved to vacate the order entered upon her default prior to seeking the instant relief (*see generally Brannigan v Dubuque*, 199 AD2d 851, 851-852). We thus address the merits of the appeal only with respect to Jennifer Hyatt (claimant).

A court is vested with the authority and discretion to vacate the terms of a settlement placed on the record in open court based upon the repeated failure of a party to comply with the terms thereof (*see Handler v 1050 Tenants Corp.*, 24 AD3d 231, 232; *see also Teitelbaum Holdings v Gold*, 48 NY2d 51, 54-55), and we conclude that the Surrogate did not abuse that discretion in this case. We modify the order, however, by vacating the attorneys fees awarded to the attorney for respondent against claimant in the amount of \$3,647.50. The order fails to meet the requirements set forth in 22 NYCRR 130-1.2 to justify the imposition of sanctions (*see Matter of Schermerhorn v Quinette*, 28 AD3d 822, 823; *Dwaileebe v Six Flags Darien Lake*, 21 AD3d

1282, 1282-1283).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1133

CA 09-00433

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

IN THE MATTER OF ROBERT P. MEEGAN, JR.,
INDIVIDUALLY AND AS PRESIDENT OF BUFFALO
POLICE BENEVOLENT ASSOCIATION, AND
BUFFALO POLICE BENEVOLENT ASSOCIATION,
PETITIONERS-RESPONDENTS,

V

MEMORANDUM AND ORDER

BYRON W. BROWN, AS MAYOR OF CITY OF BUFFALO,
MCCARTHY GIPSON, AS COMMISSIONER OF POLICE,
AND CITY OF BUFFALO, RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR
RESPONDENTS-APPELLANTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL),
FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated judgment and order) of the Supreme Court, Erie County (John A. Michalek, J.), entered May 29, 2008 in a CPLR article 78 proceeding. The judgment, inter alia, directed respondents to fill certain vacancies in the Buffalo Police Department within 45 days of the date on which the vacancy was created.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, respondents' motion is granted and the petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to fill certain vacancies in the Buffalo Police Department within 45 days of the date on which the vacancy was created pursuant to a memorandum of agreement (agreement) between petitioner Buffalo Police Benevolent Association (PBA) and respondent City of Buffalo (City). The agreement, which modified the parties' collective bargaining agreement (CBA), required the City to maintain a minimum number of police officers in the ranks of detective, lieutenant, and captain. The "45-day rule" set forth in the agreement provided that, "[i]n the event the minimum for a rank position falls below the stated minimum, the vacancy shall be filled within 45 days of the created vacancy."

We conclude that Supreme Court erred in denying respondents' motion to dismiss the petition. As the City correctly contends, the

failure of petitioners to exhaust their administrative remedies pursuant to the CBA precludes them from seeking relief under CPLR article 78 (see *Matter of Plummer v Klepak*, 48 NY2d 486, 489-490, cert denied 445 US 952; *Matter of Hall v Town of Henderson*, 17 AD3d 981, lv denied 5 NY3d 714; *Matter of Chyu v County of Chautauqua*, 115 AD2d 989). "It is the rule in New York that once it is established that a petitioner is obligated to arbitrate his [or her] grievance under an applicable collective bargaining agreement, his [or her] failure to do so operates as a bar to [a CPLR] article 78 proceeding" (*Matter of Prey v County of Cattaraugus*, 79 AD2d 205, 207). Article XI of the CBA provides that "[a]ny grievance or dispute . . . between the parties regarding the application, meaning or interpretation of this [CBA] shall be settled" in accordance with a four-step grievance procedure, culminating in binding arbitration. There is no question that the issues raised by petitioners in this proceeding fall within the broad scope of the grievance procedure established by the CBA and, indeed, the PBA has previously grieved alleged violations of the 45-day rule in accordance with Article XI.

Contrary to the contention of petitioners, we conclude that they failed to establish the futility of participating in the grievance procedure and that they therefore were excused from exhausting their administrative remedies (see *Matter of Amorosano-LePore v Grant*, 56 AD3d 663, 665; see generally *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57). Indeed, in previously arbitrated disputes arising out of the City's alleged violation of the 45-day rule, the PBA has received the remedy that it sought, i.e., retroactive pay for police officers appointed to vacancies outside the 45-day time period. Also without merit is the further contention of petitioners that their participation in the grievance procedure would be futile because an arbitrator lacks the authority to direct the City to appoint a particular individual from the applicable civil service eligibility list. In support of that contention, petitioners assert that only the courts may order such appointments, but in fact the courts similarly lack the authority to order the appointment of any particular individual to a vacant position (see generally Civil Service Law § 61; *Matter of Andriola v Ortiz*, 82 NY2d 320, 324, cert denied 511 US 1031).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1136.1

KA 08-02244

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

SAMMY L. SWIFT, DEFENDANT-RESPONDENT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR APPELLANT.

SAMMY L. SWIFT, DEFENDANT-RESPONDENT PRO SE.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered August 18, 2008. The order granted the motion of defendant pursuant to CPL 440.10 (1) (g) to vacate the judgment convicting him of murder in the second degree and robbery in the first degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied and the judgment of conviction is reinstated.

Memorandum: On a prior appeal, we affirmed a judgment convicting defendant upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [1]; *People v Swift*, 241 AD2d 949, *lv denied* 91 NY2d 881, 1013). The People appeal from an order granting defendant's motion to vacate the judgment of conviction on the ground of newly discovered evidence (see CPL 440.10 [1] [g]), i.e., post-trial DNA test results indicating that the blood found at the crime scene was exclusively that of the victim. We agree with the People that the DNA test results are not "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]). At the trial, the People presented evidence that blood at the crime scene was consistent with both the victim's blood type and defendant's blood type. Although the People relied upon that evidence to corroborate the testimony of defendant's accomplices (see *Swift*, 241 AD2d 949), we conclude that the remaining nonaccomplice evidence tends to connect defendant to the robbery and murder and is sufficient "to assure that the accomplices have offered credible probative evidence" (*People v Breland*, 83 NY2d 286, 293). The contention of defendant in his pro se supplemental brief that the sister of the accomplices was herself an accomplice

whose testimony required corroboration was not raised in the motion and thus is not properly before us (*see generally People v Goodell*, 221 AD2d 1009, *lv denied* 88 NY2d 848). We have considered the remaining contentions of defendant in his pro se supplemental brief and conclude that they are lacking in merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1136

CA 09-00301

PRESENT: HURLBUTT, J.P., FAHEY, PERADOTTO, GREEN, AND PINE, JJ.

SHERIDAN CAR WASH, INC., DOING BUSINESS AS
DR. HUGGS CAR WASH, PLAINTIFF-RESPONDENT,

V

ORDER

MOUNTAIN VALLEY INDEMNITY COMPANY,
DEFENDANT-APPELLANT.

SHERIDAN CAR WASH, INC., DOING BUSINESS AS
DR. HUGGS CAR WASH, PLAINTIFF,

V

BROWN & BROWN OF NEW YORK, INC., DEFENDANT.

METHFESSEL & WERBEL, P.C., NEW YORK CITY (FREDRIC P. GALLIN OF
COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK T. GAGLIONE, P.C., AMHERST (FRANK T. GAGLIONE OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County
(Christopher J. Burns, J.), entered April 25, 2008. The order, among
other things, granted plaintiff's motion for partial summary judgment
against defendant Mountain Valley Indemnity Company.

Now, upon reading and filing the stipulation discontinuing appeal
signed by the attorneys for the parties on April 17 and 24, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed
without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1137

KA 08-01029

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

LINWOOD WILLIAMS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order, inter alia, granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of 13½ years plus a period of post release supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Williams*, 45 AD3d 1377).

We reject defendant's contention that the proposed new sentence is harsh and excessive. The court, upon remittal, properly set forth in its decision the reasons for the proposed new sentence, taking into consideration the magnitude of the crime, defendant's prior criminal history, the advantageous terms of the plea bargain, defendant's arrest on new drug charges after being released on bail pending sentencing, and any efforts toward rehabilitation made by defendant during his incarceration (*see generally People v Boatman*, 53 AD3d 1053). We thus conclude that the court properly exercised its discretion in determining the length of the proposed new sentence. We further reject defendant's contention that the proposed new sentence

was unauthorized as a matter of law. Even assuming, *arguendo*, that defendant's contention is properly raised on an appeal from a specifying order (see L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing parameters of Penal Law § 70.71 (4) (b) (ii).

We reject the further contention of defendant that the court erred in denying his motion for recusal. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406; see *People v Oehler*, 52 AD3d 955, 956-957, *lv denied* 11 NY3d 792; *People v Weekes*, 46 AD3d 583, 584-585, *lv denied* 10 NY3d 845; *People v Crane*, 294 AD2d 867, *lv denied* 98 NY2d 767). We perceive no abuse of discretion here, and we reject the contention of defendant that the court's refusal to propose a new sentence lesser than the previously imposed minimum sentence evinced a bias against DLRA-2 and a determination to thwart the ameliorative effects of that legislation (see *People v Strohman*, ___ AD3d ___ [Oct. 2, 2009]). We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Finally, the appeal by defendant from a subsequent order denying his *pro se* motion for leave to reargue his prior recusal motion is not before us on this appeal inasmuch as counsel was not assigned to represent defendant on his appeal from that order. We note in any event that no appeal lies from an order denying leave to reargue (see *People v Auslander*, 169 AD2d 853, 854).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1138

KA 07-02336

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT HALTER, DEFENDANT-APPELLANT.

CHRISTINE M. COOK, SYRACUSE, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 7, 2007. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant failed to preserve for our review his contention concerning the duration of the order of protection (see *People v Nieves*, 2 NY3d 310, 315-317) and, in any event, that contention is without merit. County Court properly specified an expiration date in the order of protection that was no more than eight years after the expiration of the term of the determinate sentence imposed, in accordance with CPL 530.12 (former [5]), the version of the statute in effect when the judgment was rendered on August 7, 2007 (see generally *People v Vega*, 49 AD3d 1185, lv denied 10 NY3d 965; *People v Stone*, 49 AD3d 1314, lv denied 10 NY3d 965). Finally, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1139

KA 06-01411

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ISAAC A. JONES, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 21, 2005. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree and criminal possession of a weapon in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]) and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [former (4)]).

Contrary to defendant's contention, County Court properly admitted the statements of the victim made shortly after the shooting under the excited utterance exception to the hearsay rule inasmuch as the statements were made while she was under the extraordinary stress of her injuries (*see People v Cotto*, 92 NY2d 68, 78-79). Also contrary to defendant's contention, the court properly admitted in evidence the victim's statements made immediately prior to the shooting under the present sense impression exception to the hearsay rule. A witness for the People testified that she heard the victim say to defendant, "Boy, put this thing down. You don't know if it has a safety on it or not." Shortly thereafter, the witness heard a gunshot in the victim's apartment. The statements constitute a present sense impression, because they were made while the declarant was perceiving "the event as it was unfolding" (*People v Vasquez*, 88 NY2d 561, 574), and they were sufficiently corroborated by defendant's statement to the police (*see id.* at 575-576).

Finally, the court did not err in imposing consecutive sentences (*see People v Salcedo*, 92 NY2d 1019, 1021-1022), and the sentence is

not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1142

KA 08-00841

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MAURICE KEARSE, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered March 28, 2008 pursuant to the 2005 Drug Law Reform Act. The order granted defendant's application for resentencing upon defendant's 2004 conviction of criminal possession of a controlled substance in the second degree and specified the sentence that would be imposed.

It is hereby ORDERED that the order so appealed from is unanimously affirmed and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from an order pursuant to the 2005 Drug Law Reform Act ([DLRA-2] L 2005, ch 643, § 1) granting his application for resentencing upon his conviction of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [former (1)]) and specifying that County Court would impose a determinate sentence of eight years plus a period of post release supervision of five years. We previously reversed an order granting defendant's application for resentencing, and we remitted the matter to County Court to determine defendant's application in compliance with DLRA-2 (*People v Kearse*, 46 AD3d 1456).

We reject defendant's contention that the proposed new sentence is harsh and excessive. The court upon remittal properly set forth in its decision the reasons for the proposed new sentence, taking into consideration the magnitude of the crime, defendant's prior criminal history, and the advantageous terms of the plea bargain (*see People v Lerario*, 50 AD3d 1396, *lv denied* 10 NY3d 961; *see generally People v Boatman*, 53 AD3d 1053). We thus conclude that the court properly exercised its discretion in determining the length of the proposed new sentence. We further reject defendant's contention that the proposed new sentence was unauthorized as a matter of law. Even assuming, *arguendo*, that defendant's contention is properly raised on an appeal

from a specifying order (see L 2005, ch 643, § 1), we conclude that the proposed new sentence falls within the sentencing parameters of Penal Law § 70.71 (3) (b) (ii). We therefore affirm the order and remit the matter to County Court to afford defendant an opportunity to withdraw his application for resentencing before the proposed new sentence is imposed, as required by DLRA-2 (see *Boatman*, 53 AD3d at 1054).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1143

KA 07-02575

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

WILLIE J. SINGLETON, DEFENDANT-APPELLANT.

JOHN E. TYO, SHORTSVILLE, FOR DEFENDANT-APPELLANT.

WILLIE J. SINGLETON, DEFENDANT-APPELLANT PRO SE.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (CATHERINE A. WALSH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, J.), rendered November 27, 2007. The judgment convicted defendant, upon a jury verdict, of failing to register as a sex offender.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of failing to register as a sex offender, a class D felony inasmuch as it is his second conviction of this offense (Correction Law § 168-f [3]; § 168-t). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). By failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention that the ruling constitutes an abuse of discretion (*see People v Hawkes*, 39 AD3d 1209, 1211, *lv denied* 9 NY3d 844, 845; *People v O'Connor*, 19 AD3d 1154, *lv denied* 5 NY3d 831). In any event, "the proof of defendant's guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant had it not been for [the alleged] error. Thus, [the alleged] error is harmless" (*People v Arnold*, 298 AD2d 895, 896, *lv denied* 99 NY2d 580; *see generally People v Crimmins*, 36 NY2d 230, 241-242). The sentence is not unduly harsh or severe.

Defendant failed to preserve for our review the contentions in his pro se supplemental brief with respect to his adjudication as a level three sex offender, the allegedly improper admission in evidence of his certificate of conviction establishing his prior failure to

register, and the timeliness of his arraignment (see CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We have reviewed the remaining contentions of defendant in his pro se supplemental brief and conclude that they are without merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1145

KA 07-00820

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ERIC YOUNG, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 2, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that County Court erred in denying his alleged "motion" to withdraw his plea on the ground that the plea was not knowingly, voluntarily and intelligently entered. Of the three grounds raised in support of his contention on appeal, defendant preserved only one of them for our review, and we decline to exercise our power to review the two unpreserved grounds as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). The ground that is preserved for our review is that defendant lacked the mental ability to enter a plea of guilty. At sentencing, defense counsel advised the court that defendant had "mental issues" and that he "felt coerced into entering the plea," whereupon the court specifically addressed issues relating to defendant's competency. We note that, although defendant made no formal motion to withdraw the plea, the court was given " 'the opportunity to address the perceived error and to take corrective measures' " (*People v Louree*, 8 NY3d 541, 545). We conclude on the record before us, however, that nothing in the record of the plea proceeding establishes that defendant's alleged mental illness "so stripped [defendant] of orientation or cognition that he lacked the capacity to plead guilty" (*People v Alexander*, 97 NY2d 482, 486). "A history of prior mental illness or treatment does not itself call into question defendant's competence" (*People v Taylor*, 13 AD3d 1168, 1169, lv denied 4 NY3d 836; see *People v*

Williams, 35 AD3d 1273, 1275, *lv denied* 8 NY3d 928), and defendant's responses to the court's inquiries appeared to be informed, competent and lucid (see *People v Hayes*, 39 AD3d 1173, 1175, *lv denied* 9 NY3d 923; *People v Beaty*, 303 AD2d 965, *lv denied* 100 NY2d 559). We thus conclude that defendant's plea was properly entered.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1146

KA 08-01693

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JAMES COBLE, ALSO KNOWN AS JAMMER JONES,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF
COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered April 23, 2008. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1147

CAF 08-01568

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF SANDRA MARY CHRYSLER,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LEONARD ADAM FABIAN, SR., AND LAURIE TERESA
FABIAN, RESPONDENTS-RESPONDENTS.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SHIRLEY K. DUFFY OF
COUNSEL), FOR PETITIONER-APPELLANT.

LEONARD ADAM FABIAN, SR., AND LAURIE TERESA FABIAN, RESPONDENTS-
RESPONDENTS PRO SE.

FRANCIS I. WALTER, LAW GUARDIAN, SYRACUSE, FOR CORY K.

Appeal from an order of the Family Court, Onondaga County (Bryan R. Hedges, J.), entered June 2, 2008 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner mother appeals from an order dismissing, without prejudice, her petition seeking modification of a custody order entered upon the consent of the parties, i.e., the mother, her cousin and her cousin's husband, in October 2005. We reject the contention of the mother that Family Court erred in failing to conduct a hearing to determine whether a transfer of custody to her was in the best interests of the child. "A party seeking a change in an established custody arrangement must show 'a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Di Fiore v Scott*, 2 AD3d 1417). Although the petition alleged that the mother had obtained suitable housing and employment and that the 13-year-old child wished to reside with her, the mother advised the court at the time of the court appearance on the petition that she was not employed, and the Law Guardian advised the court that the child wished to remain with respondents. We therefore conclude that the mother failed to make a sufficient evidentiary showing to warrant a hearing (*see Matter of Mindy L.H. v Steve W.H.*, 37 AD3d 1145, *lv denied* 8 NY3d 814). Furthermore, we note that the court "was fully familiar with relevant background facts regarding the parties and the child from several past proceedings," and thus a hearing on the petition was not necessary to determine its

merits (*Matter of Walberg v Rudden*, 14 AD3d 572).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1148

CAF 08-02165

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF TIFFANEY E. DAVIS,
PETITIONER-APPELLANT,

V

ORDER

NATHANIEL DAVIS, SR., RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (ROBERT P. RICKERT OF
COUNSEL), FOR PETITIONER-APPELLANT.

CHARLES E. LUPIA, LAW GUARDIAN, SYRACUSE, FOR NATHANIEL D., JR.

Appeal from an order of the Family Court, Onondaga County
(Charles J. Major, J.H.O.), entered October 3, 2008 in a proceeding
pursuant to Family Court Act article 6. The order denied the petition
seeking permission for the parties' child to relocate with petitioner
to Virginia.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs (*see Matter of Dukes v McPherson*,
50 AD3d 1529).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1149

CAF 08-01477

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF THE ADOPTION OF DEJA J.

CONSTANCE G. AND DONELL G., SR.,
PETITIONERS-RESPONDENTS;

ORDER

RYAN W.J., RESPONDENT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR RESPONDENT-APPELLANT.

CONSTANCE G. AND DONELL G., SR., PETITIONERS-RESPONDENTS PRO SE.

MARYBETH D. BARNET, LAW GUARDIAN, CANANDAIGUA, FOR DEJA J.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered February 1, 2008 in an adoption proceeding. The order determined that the consent of respondent to the adoption of his child is not required.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Family Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1150

CAF 08-01247

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF SETH M. AND TRYSTON M.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, MEMORANDUM AND ORDER
PETITIONER-RESPONDENT;

MARGO B., RESPONDENT-APPELLANT.

DENNIS A. GERMAIN, WATERTOWN, FOR RESPONDENT-APPELLANT.

CARACCIOLI & NELSON, PLLC, WATERTOWN (KATHRYN G. WOLFE OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 29, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by remitting the matter to Family Court, Jefferson County, for further proceedings in accordance with the memorandum and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order adjudicating her children who are the subject of this proceeding to be permanently neglected and terminating her parental rights with respect to them. We note at the outset that the mother contends for the first time on appeal that Family Court erred in accepting her consent to the finding of permanent neglect without conducting a further inquiry into her capacity to consent and thus failed to preserve that contention for our review (*see Matter of Bert M.*, 50 AD3d 1509, *lv denied* 11 NY3d 704; *cf. Matter of Jeffrey M.*, 6 AD3d 1156). In any event, we conclude that her contention lacks merit.

Contrary to the mother's further contention, the court did not abuse its discretion in declining to conduct an in camera interview of the two children at issue during the dispositional hearing (*see generally Matter of Crystal Q.*, 173 AD2d 912, 913, *lv denied* 78 NY2d 855).

Finally, as petitioner correctly concedes, the court erred in determining that it lacked the authority to permit post-termination visitation between the mother and the two children at issue (*see Matter of Josh M.*, 61 AD3d 1366, 1367; *Bert M.*, 50 AD3d at 1511; *Matter of Kahlil S.*, 35 AD3d 1164, *lv dismissed* 8 NY3d 977). We

therefore modify the order by remitting the matter to Family Court to determine, following a further hearing, if necessary, whether post-termination contact between the mother and the two children is in the best interests of those children (see *Bert M.*, 50 AD3d at 1511).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1154

CA 09-00431

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

NANCY ROSE STORMER, P.C., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF ONEIDA AND ONEIDA COUNTY DEPARTMENT
OF SOCIAL SERVICES, DEFENDANTS-RESPONDENTS.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF
COUNSEL), FOR PLAINTIFF-APPELLANT.

LINDA M.H. DILLON, COUNTY ATTORNEY, UTICA (KURT D. PARRY OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 24, 2008 in a breach of contract action. The order denied the motion of plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is granted, and

It is further ORDERED that judgment be entered in favor of plaintiff and against defendants in the amount of \$339,291.25, together with interest at the rate of 9% per annum, commencing April 9, 2006.

Memorandum: Plaintiff, a law firm, commenced this action alleging, inter alia, that defendants breached their 2005 and 2006 contracts with plaintiff pursuant to which plaintiff secured reimbursement for certain of defendants' Medicaid expenditures referred to as "620/621 claims." We agree with plaintiff that Supreme Court erred in denying its motion for summary judgment on the breach of contract cause of action inasmuch as it established its entitlement to judgment as a matter of law with respect thereto, and defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to the contention of defendants, we conclude that the contracts are unambiguous with respect to plaintiff's authority to negotiate a settlement on their behalf with the State of New York concerning the 620/621 claims. It is well settled that "[t]he interpretation of an unambiguous contractual provision is 'a function for the court' " (*Pyramid Brokerage Co. of Buffalo, Inc. v Atlas Auto*

Glass, Inc., 39 AD3d 1176, 1177, quoting *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56), and "[t]he proper inquiry in determining whether a contract is ambiguous is 'whether the agreement on its face is reasonably susceptible of more than one interpretation' " (*Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 922-923, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573). "To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] 'is the only construction which can fairly be placed thereon' " (*Jellinick v Naples & Assoc.*, 296 AD2d 75, 78-79; see *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 891). Here, plaintiff met that burden. Pursuant to the plain wording of both contracts, plaintiff was to "[p]rovide all legal representation necessary to properly substantiate and administratively process such 620/621 claims . . . [and n]egotiate with any appropriate agencies and offices." The contracts further provided that defendants "shall pay [plaintiff] for such services at a rate of 25% [of defendants'] share of all recoveries, reimbursements or offsets received by [defendants]." We thus agree with plaintiff that the only reasonable interpretation of that language is that plaintiff was required to negotiate with the State of New York on defendants' behalf, and that defendants were required to pay plaintiff 25% of the amount that they received in the settlement of their 620/621 claims. We therefore reverse the order, grant the motion and direct that judgment be entered in favor of plaintiff and against defendants in the amount of \$339,291.25, together with interest at the rate of 9% per annum, commencing April 9, 2006. Pursuant to the contracts, payment was due 15 days from the date on which plaintiff submitted its request for payment and, here, plaintiff submitted its request for payment on March 25, 2006 (see CPLR 5001 [b]; see also *Eisen v Feder*, 47 AD3d 595, 596-597).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1157

CA 09-00623

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

WEST FLATT ASSOCIATES, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CHRISTOPHER A. MAGGIULLI AND UPSTATE
METROLOGY, INC., DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY L. TURNER OF COUNSEL),
FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), entered July 22, 2008 in a breach of contract action. The order granted defendants' motion seeking dismissal of the complaint and partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff landlord commenced this action seeking damages for the alleged breach of a commercial lease by defendant tenants. Supreme Court properly granted defendants' motion seeking dismissal of the complaint pursuant to CPLR 3211 as well as partial summary judgment pursuant to 3212 (g) to the extent that the complaint seeks recovery of "rent, common area maintenance, utilities and/or taxes subsequent to May 8, 2007." The lease provided that, in the event of defendants' breach, plaintiff could "on five (5) days notice[] terminate [the] lease and the term thereof shall automatically cease and terminate at the expiration of such five (5) day period as if said date were set forth in this lease as the termination date" Plaintiff exercised that option, and the lease was thereby amended to terminate on May 8, 2007. Defendants may be held liable for rent and associated fees for the period subsequent to the termination date of the lease only in the event that "the parties clearly contracted to make the defaulting tenant[s] liable [therefor] after such termination" (*Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221, 222; see generally *Holy Props. v Cole Prods.*, 87 NY2d 130, 134). The parties did not so contract in this case and, thus, "what survives after the termination of [the] lease is not a liability for rents [and associated fees], but a liability for

damages" (*Benderson v Poss*, 142 AD2d 937, 938).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1158

CA 09-00515

PRESENT: SCUDDER, P.J., SMITH, CARNI, PINE, AND GORSKI, JJ.

ALLEN BRINK, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ANTHONY J. COSTELLO & SON DEVELOPMENT, LLC,
U.S. AIRPORTS DEVELOPMENT, INC., AND ANTHONY J.
COSTELLO & SON (LYNETTE) DEVELOPMENT, LLC,
DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (SHELDON W. BOYCE OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 4, 2008 in a personal injury action. The order denied defendants' motion for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the amended complaint to the extent that the amended complaint, as amplified by the bill of particulars and supplemental bill of particulars, alleges that defendants created or had actual or constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action alleging that he was injured when a door located in a building owned by defendants fell on him when he opened it. It is undisputed that the door was mounted on hinges and that, when plaintiff pushed the bar on the door in order to exit the building, the door came off the hinges mounted to the door frame and fell onto plaintiff. We conclude that Supreme Court erred in denying that part of defendants' motion for summary judgment dismissing the amended complaint to the extent that the amended complaint, as amplified by the bill of particulars and supplemental bill of particulars, alleges that defendants created the allegedly dangerous condition or had actual or constructive notice of it. Defendants met their burden of establishing their entitlement to judgment as a matter of law with respect to those allegations, and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore modify the order accordingly.

We conclude, however, that the court properly denied that part of defendants' motion to the extent that plaintiff relies on the doctrine of *res ipsa loquitur* in contending that the case should be submitted to a trier of fact to determine the issue of defendants' negligence based on the application of that doctrine. "In a proper case, under the doctrine of *res ipsa loquitur*, the law allows a [trier of fact] to consider the circumstantial evidence and infer that the defendant was negligent in some unspecified way" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 205-206). When viewing the circumstantial evidence, we conclude on the record before us that there is an issue of fact with respect to defendants' negligence, rendering summary judgment inappropriate (*see id.* at 211-212). It is well established that the doctrine of *res ipsa loquitur* may apply to the issue of negligence only in the event that the plaintiff presents evidence of three conditions that would afford a rational basis that " 'it is more likely than not' " that an injury was caused by the defendant's negligence: that the event is "of a kind that ordinarily does not occur in the absence of someone's negligence"; that the event was caused by an instrumentality within the exclusive control of the defendant; and that the event was not "due to any voluntary action or contribution on the part of the plaintiff" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494).

We agree with the First Department that a door mounted on hinges would not generally fall when opened, in the absence of someone's negligence (*see Lukasinski v First New Amsterdam Realty, LLC*, 3 AD3d 302, 303; *Pavon v Rudin*, 254 AD2d 143). Furthermore, the record establishes that there is a question of fact whether the instrumentality, i.e., the door, was within the exclusive control of defendants (*see generally Pavon*, 254 AD2d at 146). Plaintiff merely opened the door, and thus he is not liable for the accident (*see id.* at 145). Although defendants presented evidence that a witness believed that a gust of wind caught the door, causing it to separate from the frame, plaintiff "need not conclusively eliminate the possibility of all other causes of the [accident]" in order to rely on the doctrine of *res ipsa loquitur* in presenting the issue of negligence to the trier of fact (*Kambat*, 89 NY2d at 494).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1160

KA 06-03281

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEVIN EATMON, DEFENDANT-APPELLANT.

NELSON S. TORRE, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (RAYMOND C. HERMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Timothy J. Drury, J.), rendered January 11, 2006. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]). We reject the contention of defendant that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered (*see generally People v Lopez*, 6 NY3d 248, 256). "No particular litany is required for an effective waiver of the right to appeal" (*People v McDonald*, 270 AD2d 955, *lv denied* 95 NY2d 800; *see People v Moissett*, 76 NY2d 909, 910-911), and the responses of defendant to County Court's questions during the plea allocution establish that he understood the proceedings and was voluntarily waiving the right to appeal (*see People v Tantaio*, 41 AD3d 1274, 1275, *lv denied* 9 NY3d 882). The general waiver by defendant of the right to appeal encompasses his challenges to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833), and the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1161

KA 08-00887

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JEFFREY A. SCHLAU, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (GARY M. ERTEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 23, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]) and criminal possession of a controlled substance in the seventh degree (§ 220.03). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to the count of criminal possession of stolen property because the contention advanced in his motion for a trial order of dismissal concerning that count " 'was not specifically directed at the ground advanced on appeal' " (*People v Townsley*, 50 AD3d 1610, 1611, lv denied 11 NY3d 742). In any event, we conclude that the evidence is legally sufficient with respect to that count (*see generally People v Bleakley*, 69 NY2d 490, 495). Further, viewing the evidence in light of the elements of that count as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally id.; People v Bleakley*, 69 NY2d 490, 495). Finally, contrary to defendant's further contention, Supreme Court's "*Sandoval* compromise . . . reflects a proper exercise of the court's discretion" (*People v Thomas*, 305 AD2d 1099, lv denied 100 NY2d 600).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1162

KA 08-00620

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

FREDERICK A. BELL, III, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered March 6, 2008. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1163

KA 07-02074

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

STEVEN D. CRANDALL, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 24, 2007. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We reject the contention of defendant that County Court erred in refusing to suppress his statement to the police. "In concluding that defendant's statement to the police was voluntarily made . . ., the suppression court was entitled to credit the testimony of [the] police witness[] that defendant was advised of his *Miranda* rights and knowingly, voluntarily and intelligently waived those rights" (*People v Brooks*, 26 AD3d 739, 740, *lv denied* 6 NY3d 846, 7 NY3d 810). Defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus failed to preserve for our review his challenge to the factual sufficiency of the plea allocution with respect to the amount of money stolen (*see People v Lopez*, 71 NY2d 662, 665; *People v Stuart*, 19 AD3d 1167, *lv denied* 5 NY3d 810). This case does not fall within the narrow exception to the preservation requirement (*see Lopez*, 71 NY2d at 666).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1164

KA 08-01254

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

MARK A. THOMPSON, DEFENDANT-APPELLANT.

JAY D. CARR, OLEAN, FOR DEFENDANT-APPELLANT.

EDWARD M. SHARKEY, DISTRICT ATTORNEY, LITTLE VALLEY (LORI PETTIT RIEMAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cattaraugus County Court (Larry M. Himelein, J.), entered May 14, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 et seq.), defendant contends that County Court erred in assessing points against him for a history of substance abuse and that the People failed to establish by clear and convincing evidence that his risk of repeat offense was moderate. We reject that contention. The court's risk level assessment is supported by the reliable hearsay contained in the case summary and the presentence report (see generally *People v Ramos*, 41 AD3d 1250, lv denied 9 NY3d 809; *People v Jordan*, 31 AD3d 1196, lv denied 7 NY3d 714). Although defendant further contends that the People failed to establish by clear and convincing evidence that he failed to accept responsibility for his criminal behavior, the record in fact reflects that the court did not assess any points against him based on that risk factor.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1165

KA 08-01263

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

JESSIE B. JACKSON, III, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, ALBION, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Orleans County Court (Matthew J. Murphy, A.J.), entered May 2, 2008. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at County Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1166

KA 06-03421

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID A. WITHERSPOON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Joan S. Kohout, A.J.), rendered July 11, 2006. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, assault in the second degree and unlawfully dealing with a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of, inter alia, rape in the first degree (Penal Law § 130.35 [2]) and, in appeal No. 2, he appeals from a judgment convicting him following the same trial of criminal sale of a controlled substance in the fifth degree (§ 220.31).

Viewing the evidence in light of the elements of the crime of rape in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to infer that defendant engaged in nonconsensual sexual intercourse with the victim, in light of the evidence that the victim was physically unable to respond to defendant's advances after consuming a drink that had been laced with a prescription sleeping pill (*see People v Smith*, 16 AD3d 1033, 1034, *affd* 6 NY3d 827, *cert denied* 548 US 905; *People v Williams*, 40 AD3d 1364, 1366, *lv denied* 9 NY3d 927). " '[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury' " (*People v Sorrentino*, 12 AD3d 1197, 1197, *lv denied* 4 NY3d 748), and the testimony of the victim with respect to the issue of penetration " 'was not so inconsistent or unbelievable as to render it incredible as a matter of law' " (*People v Johnson*, 56

AD3d 1172, 1173, *lv denied* 11 NY3d 926). The further contention of defendant that the evidence before the grand jury was legally insufficient with respect to the rape count "is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence" (CPL 210.30 [6]; *see People v Prindle*, 63 AD3d 1597). Likewise, there is no merit to defendant's contention that the date of the crimes specified in the indictments was not sufficiently specific (*see People v Furlong*, 4 AD3d 839, 840-841, *lv denied* 2 NY3d 739; *see generally People v Keindl*, 68 NY2d 410, 416-417).

We further conclude that there is no merit to the contention of defendant that he was denied a fair trial by prosecutorial misconduct. Defendant's general objection to a comment of the prosecutor on summation is insufficient to preserve for our review defendant's present contention with respect to that comment (*see People v Tonge*, 93 NY2d 838; *People v Beggs*, 19 AD3d 1150, *lv denied* 5 NY3d 803), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to defendant's contention that concerns an outburst in which the prosecutor threw a water bottle during defense counsel's cross-examination of the victim, we note that defense counsel was also at fault for the incident (*see generally People v Edwards*, 134 AD2d 609), and we conclude in any event that County Court's instruction to the jury to disregard the incident was sufficient to alleviate any prejudice to defendant (*see generally People v Young*, 55 AD3d 1234, 1236, *lv denied* 11 NY3d 901). There is no support in the record for defendant's contention that the prosecutor had coached the victim to give certain responses during defense counsel's cross-examination of her, in order to impede the cross-examination (*see generally People v White*, 168 AD2d 962, 963, *lv denied* 77 NY2d 968). Finally, we conclude that defendant was not denied a fair trial by prosecutorial misconduct based on a heated exchange between the prosecutor and defense counsel while defense counsel was cross-examining a witness, particularly in view of the fact that defense counsel was an equal participant in the exchange (*see generally Edwards*, 134 AD2d 609).

Contrary to defendant's further contention, the court properly refused to suppress a statement made by defendant to the police during the search of his home. Any alleged deficiency in the CPL 710.30 notice is of no moment inasmuch as defendant sought to suppress the statement and the court, following a *Huntley* hearing, determined that it was admissible (*see* CPL 710.30 [3]; *People v Kirkland*, 89 NY2d 903, 904-905; *People v Rivera*, 306 AD2d 186, 187, *lv denied* 100 NY2d 598). We perceive no basis to disturb the court's resolution of credibility issues at that hearing (*see generally People v Prochilo*, 41 NY2d 759, 761), and we reject the contention of defendant that he was in custody when he made the statement and thus that his statement should have been suppressed because he had not received his *Miranda* warnings (*see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *People v Lavere*, 236 AD2d 809, *lv denied* 90 NY2d 860). Inasmuch as the statement was spontaneous, it cannot be said that it was the product of interrogation (*see People v Jacobson*, 60 AD3d 1326, 1327,

lv denied 12 NY3d 916), or that it was obtained in violation of defendant's right to counsel (see *People v Fortino*, 61 AD3d 1410, 1411; *People v Adams*, 244 AD2d 897, 898-899, *lv denied* 91 NY2d 887, 888).

We also reject the contention of defendant that the court erred in admitting in evidence a buccal swab collected from him, sample evidence collected from an open bottle found near the scene of the crimes, and results of the testing of that sample evidence. Defendant's challenges to the admission in evidence of the buccal swab and the results of the testing of the sample evidence are not preserved for our review (see generally *People v Caswell*, 56 AD3d 1300, 1303, *lv denied* 11 NY3d 923, 12 NY3d 781; *People v Cooper*, 147 AD2d 926, *lv denied* 74 NY2d 738), and we decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Moreover, there is no merit to defendant's contention that the court erred in admitting the sample evidence itself. " 'Where, as here, the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence, any deficiencies in the chain of custody go to the weight of the evidence and not its admissibility' " (*Caswell*, 56 AD3d at 1303; see *People v Hawkins*, 11 NY3d 484, 494).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1167

KA 06-03422

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID A. WITHERSPOON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Joan S. Kohout, A.J.), rendered July 11, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Same Memorandum as in *People v Witherspoon* ([appeal No. 1] ____ AD3d ____ [Oct. 2, 2009]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1168

KA 09-00249

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER T. WALKER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered November 1, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Niagara County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from two judgments convicting him, respectively, upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and upon his plea of guilty of attempted criminal possession of a controlled substance in the fifth degree (§§ 110.00, 220.06 [5]). We agree with defendant that reversal and vacatur of the pleas is required because County Court sentenced him to postrelease supervision as a component of each sentence but failed to advise him at the time of the plea proceedings of the period of postrelease supervision that would be imposed at sentencing (*see People v Louree*, 8 NY3d 541, 545-546; *People v Catu*, 4 NY3d 242, 245; *People v Dean*, 52 AD3d 1308, *lv denied* 11 NY3d 736). In light of our determination, we need not address defendant's remaining contentions.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1169

KA 09-00428

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

CHRISTOPHER T. WALKER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THOMAS J. EOANNOU, BUFFALO (JEREMY D. SCHWARTZ OF COUNSEL), FOR
DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Peter L. Broderick, Sr., J.), rendered November 1, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Niagara County Court for further proceedings on the superior court information.

Same Memorandum as in *People v Walker* ([appeal No. 1] ___ AD3d ___ [Oct. 2, 2009]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1170

KA 07-02596

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

JIMMY VELASQUEZ, ALSO KNOWN AS JOSE COLON,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF
COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (J. MICHAEL MARION OF
COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 26, 2007. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). We reject the contention of defendant that Supreme Court erred in denying his repeated requests for substitution of assigned counsel. "Defendant did not indicate that there was 'a serious possibility of good cause for substitution' but, rather, made only vague assertions that defense counsel was not in frequent contact with him and did not aid in his defense" (*People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d 866, 11 NY3d 790; *see People v Sides*, 75 NY2d 822, 824). Contrary to the further contention of defendant, the court properly sentenced him as a persistent violent felony offender (*see People v Thomas*, 56 AD3d 1240, *lv denied* 12 NY3d 763).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1173

CA 08-02034

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, AND GREEN, JJ.

WESTERN NEW YORK LAND CONSERVANCY, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

JOHN S. CULLEN AND CULLENWOOD FARMS, LLC,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

MCGEE & GELMAN, BUFFALO (MICHAEL R. MCGEE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY
RUPP, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered July 18, 2008 in a trespass action. The order and judgment, among other things, awarded judgment in favor of plaintiff and against defendants in the amount of \$631,296.18.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Western New York Land Conservancy, Inc. (Land Conservancy), the defendant in action No. 1 and the plaintiff in action No. 2, commenced action No. 2 seeking compensatory and punitive damages for, inter alia, the trespass of John S. Cullen and Cullenwood Farms, LLC (Cullenwood Farms), the defendants in action No. 2 (hereafter, defendants), upon its property. The Land Conservancy and Cullenwood Farms, the plaintiff in action No. 1, own adjoining properties. A trial was held, and Supreme Court directed a verdict on liability in favor of the Land Conservancy with respect to defendants' trespass on the property of the Land Conservancy by cutting down trees and making two cut-throughs on its property, as well as cutting down trees and encroaching on its property by enlarging a pond. Following a jury trial on damages, the Land Conservancy was awarded \$98,181 in compensatory damages and \$500,000 in punitive damages.

Defendants contend that the court erred in precluding them from "contending at trial, eliciting or introducing evidence, or suggesting to the jury" that they had permission to excavate the Land Conservancy property or to install landscaping there, inasmuch as such evidence would be relevant on the issue of the Land Conservancy's entitlement

to punitive damages. Even assuming, arguendo, that the court erred in precluding that evidence, we conclude that the error is harmless because " 'the result would have been the same if the evidence had not been improperly [precluded]' " (*Corsaro v Mt. Calvary Cemetery*, 258 AD2d 969, 969-970; see generally *Duncan v Mount St. Mary's Hosp. of Niagara Falls* [appeal No. 3], 272 AD2d 862, lv denied 95 NY2d 760). The proposed evidence would not have established that defendants received permission to excavate the Land Conservancy's property and to extend a pond over it, or to cut down trees and to plant non-native trees in their place. We reject defendants' further contention that the award of compensatory damages was based on speculation, particularly in view of the fact that the Land Conservancy was prevented from more accurately calculating its compensatory damages because of defendants' conduct in removing the trees and stumps (see *Matter of Rothko*, 43 NY2d 305, 323). We further conclude that the award of compensatory damages was not against the weight of the evidence (see *Fareway Hgts. v Hillock*, 300 AD2d 1023, 1024-1025).

We reject defendants' contentions that the award of punitive damages was not warranted, was excessive, and was violative of defendants' right to due process. Addressing first the issue whether punitive damages were warranted, we note that, "[i]n order to recover punitive damages for trespass on real property, [a plaintiff has] the burden of proving that the trespasser acted with actual malice involving an intentional wrongdoing, or that such conduct amounted to a wanton, willful or reckless disregard of plaintiff[']s rights" (*Ligo v Gerould*, 244 AD2d 852, 853; see *Golonka v Plaza at Latham*, 270 AD2d 667, 670). The jury properly concluded that Cullen's conduct was sufficiently egregious to warrant punitive damages. The evidence established that Cullen acted intentionally and with no regard for the rights of the Land Conservancy. He used the Land Conservancy's property for transporting construction materials onto his property, in order to avoid ruining his own driveway or creating a new driveway on his western property. After the Land Conservancy placed a chain blocking access to the first cut-through that he made, he had a second cut-through made by again cutting down numerous trees and laying down stone. With respect to the pond encroachment, there was evidence that Cullen's contractor refused to enlarge the pond because it would extend onto the property of the Land Conservancy. Cullen informed the contractor that, in the event that the Land Conservancy became aware of the trespass, he had an attorney "who loved to fight" and that he could "drag this out for a while." Cullen then hired another contractor to excavate the Land Conservancy's property. The fact that the total acreage damaged by Cullen was small in relation to the total amount of land held by the Land Conservancy does not diminish Cullen's wrongful conduct, nor does that fact render the wrongful conduct less egregious. We further conclude that an award of punitive damages was particularly appropriate under the circumstances of this case, in order "to punish the wrongdoer and to deter repetition of such behavior in the future" (*Strader v Ashley*, 61 AD3d 1244, 1248, lv dismissed ___ NY3d ___ [Sept. 1, 2009], citing *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489).

With respect to the issues whether the punitive damages award was

excessive or violative of defendants' due process rights, we note that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor" (*BMW of N. Am., Inc. v Gore*, 517 US 559, 562 [internal quotation marks omitted]). The three factors to consider in evaluating whether an award is grossly excessive are "the degree of reprehensibility . . . ; the disparity between the harm or potential harm suffered . . . and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases" (*id.* at 575; see *Guariglia v Price Chopper Operating Co., Inc.*, 38 AD3d 1043, 1044, lv denied 9 NY3d 801; *Sawtelle v Waddell & Reed*, 304 AD2d 103, 108-109). Upon our review of the punitive damages award, we conclude that it was not excessive, and that it was not violative of defendants' due process rights. Indeed, we conclude that the award "bears a reasonable relation to the harm done and the flagrancy of the conduct causing it" (*Fareway Hgts.*, 300 AD2d at 1025 [internal quotation marks omitted]). We have considered defendants' remaining contentions and conclude that they are without merit.

On its cross appeal, the Land Conservancy contends that the court erred in refusing to treble the award for tree damage, pursuant to RPAPL 861 (1). A plaintiff may recover "treble the stumpage value of the tree or timber or two hundred fifty dollars per tree, or both and for any permanent and substantial damage caused to the land or the improvements thereon as a result" of the destruction of any tree (*id.*). The term stumpage value is defined as "the current fair market value of a tree as it stands prior to the time of sale, cutting, or removal" (RPAPL 861 [3]). Here, the court properly refused to award treble damages because the Land Conservancy failed to present the requisite evidence with respect to stumpage value, and instead presented evidence of restoration costs.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1174

CA 09-00070

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, AND GREEN, JJ.

CULLENWOOD FARMS, LLC, PLAINTIFF-APPELLANT,

V

ORDER

WESTERN NEW YORK LAND CONSERVANCY, INC.,
DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

WESTERN NEW YORK LAND CONSERVANCY, INC.,
PLAINTIFF-RESPONDENT,

V

JOHN S. CULLEN AND CULLENWOOD FARMS, LLC,
DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)
(APPEAL NO. 2.)

MCGEE & GELMAN, BUFFALO (MICHAEL R. MCGEE OF COUNSEL), FOR PLAINTIFF-
APPELLANT AND DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (R. ANTHONY
RUPP, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PLAINTIFF-
RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 24, 2008 in a trespass action. The order, among other things, precluded defendants John S. Cullen and Cullenwood Farms, LLC from introducing certain evidence at trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (see CPLR 5501 [a] [1]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1176

CA 09-00210

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

RICHARD E. COOGAN, SR., AS TEMPORARY
ADMINISTRATOR OF THE ESTATE OF ANTHONY M.
COOGAN, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL A. D'ANGELO, KYLE BALL,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

LAW OFFICE OF JOHN J. FROMEN, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP
(EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOERGEN & MANSON, WILLIAMSVILLE (JOSEPH G. GOERGEN, II, OF COUNSEL),
FOR DEFENDANT-RESPONDENT DANIEL A. D'ANGELO.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JEFFREY F.
BAASE OF COUNSEL), FOR DEFENDANT-RESPONDENT KYLE BALL.

Appeal from an order of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered October 14, 2008 in a wrongful death action. The order granted the motion of defendant Daniel A. D'Angelo for summary judgment and the cross motion of defendant Kyle Ball for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for the wrongful death of his son (decedent), who was fatally injured while riding his all-terrain vehicle (ATV) on property owned by defendant Daniel A. D'Angelo. Decedent and defendant Kyle Ball were operating their ATVs on a path located on D'Angelo's property when decedent struck a metal cable that was strung across the path.

Supreme Court properly granted the motion of D'Angelo seeking summary judgment dismissing the complaint and all cross claims against him on the ground that he is immune from liability for negligence based on the recreational use statute (General Obligations Law § 9-103). D'Angelo met his initial burden on the motion inasmuch as it is undisputed that decedent was engaged in one of the activities enumerated in that statute at the time of the accident (see § 9-103 [1] [a]), and D'Angelo established that his property was suitable for use by recreational motor vehicles (see *Blair v Newstead Snowseekers*,

Inc., 2 AD3d 1286, 1288-1289, *lv denied* 2 NY3d 704; see also *Morales v Coram Materials Corp.*, 51 AD3d 86, 90). Plaintiff failed to raise a triable issue of fact with respect to the applicability of the statute to defeat the motion. We reject his contention that D'Angelo is not entitled to the protection of the statute because its purpose is to encourage property owners to open their land to the public for recreational purposes, and D'Angelo sought to deny access to his property. "It is now well settled that General Obligations Law § 9-103 applies to landowners who open their land to recreationalists, as well as to those who attempt to prevent members of the public from using their lands" (*White v City of Troy*, 290 AD2d 605, 607, *lv denied* 98 NY2d 602; see *Bragg v Genesee County Agric. Socy.*, 84 NY2d 544, 551). Thus, the fact that D'Angelo posted his property with no trespassing signs or erected a physical barrier to prevent access to his land does not deprive him of the protection of the statute (see *Hardy v Gullo*, 118 AD2d 541, 542, *lv denied* 69 NY2d 601; see also *White*, 290 AD2d at 607). Further, we note that plaintiff did not contend in opposition to the motion that D'Angelo willfully or maliciously failed "to guard, or to warn against, a dangerous condition," i.e., the existence of the cable (§ 9-103 [2] [a]), and therefore did not attempt to raise an issue of fact with respect to the applicability of that statutory exception (see generally *Morales*, 51 AD3d at 90-91).

The court also properly granted the cross motion of Ball for summary judgment dismissing the complaint and all cross claims against him on the ground that he had no duty to warn decedent of the existence of the cable. Plaintiff contends that the deposition testimony of Ball concerning the facts and circumstances of decedent's accident is inadmissible under the Dead Man's Statute (CPLR 4519) and thus may not be considered in support of Ball's cross motion (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 313; *Walsh v Town of Cheektowaga*, 237 AD2d 947, 948, *lv dismissed* 90 NY2d 889). Even assuming, arguendo, that plaintiff is correct, we conclude that Ball nonetheless met his initial burden by establishing as a matter of law that he owed no duty of care to decedent (see generally *Ostrowski v Baldi*, 61 AD3d 1403, *lv denied* 13 NY3d 701). Specifically, Ball established that he did not own the property where the accident occurred (see *id.*), and that he neither created nor contributed to the allegedly dangerous condition on the property, which is adjacent to property occupied by Ball and owned by his parents (see *Haymon v Pettit*, 9 NY3d 324, 328, *rearg denied* 10 NY3d 745; see also *Cleary v Harris Hill Golf Ctr., Inc.*, 23 AD3d 1142).

In opposition to the cross motion, plaintiff failed to raise a triable issue of fact whether Ball voluntarily assumed a duty to decedent at the time of the accident (see generally *Heard v City of New York*, 82 NY2d 66, 72-73, *rearg denied* 82 NY2d 889). The suggestion by Ball to decedent that they ride their ATVs beyond the confines of the property owned by Ball's parents and the fact that Ball led decedent to D'Angelo's property, knowing that there was a path there that was sometimes blocked by a cable, is insufficient as a matter of law to establish that Ball voluntarily assumed a duty to

warn decedent of dangerous conditions on D'Angelo's property. The cases upon which plaintiff relies are distinguishable inasmuch as, here, plaintiff fails even to allege that Ball directed or otherwise instructed decedent to proceed down the path where the accident occurred (*cf. Gauthier v Super Hair*, 306 AD2d 850; *Thrane v Haney*, 264 AD2d 926; *Cohen v Heritage Motor Tours*, 205 AD2d 105).

Finally, plaintiff's reliance on the *Noseworthy* doctrine in opposition to the cross motion is misplaced. Pursuant to that doctrine, a plaintiff in a wrongful death action "is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence" (*Noseworthy v City of New York*, 298 NY 76, 80). "[T]hat doctrine may not be invoked unless plaintiff first makes a showing of facts from which negligence may be inferred" (*Barile v Carroll*, 280 AD2d 988, 988), and here plaintiff failed to make that showing with respect to Ball.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1179

CA 09-00458

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

ABDUL AHMED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

JACK G. SMITH CORP., DEFENDANT-RESPONDENT.

JOHN J. LAVIN, P.C., BUFFALO (JOHN J. LAVIN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PATRICK W.H. WESP, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 15, 2008 in a breach of contract action. The order and judgment granted defendant's motion and dismissed the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking specific performance of a contract for the sale of property, alleging that defendant had improperly refused to convey title to the property to plaintiff. Supreme Court properly granted the motion of defendant to dismiss the complaint based on the affirmative defense that, by its express terms, the contract was not binding because it was not signed by the escrow agent, thus rendering specific performance unavailable (*see King v Littman*, 22 AD3d 917, 919; *cf. Manning v Michaels*, 149 AD2d 897, 898). Contrary to plaintiff's contention, there is no evidence in the record before us that defendant waived the contractual provision requiring the signature of the escrow agent.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1180

CA 09-00571

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND GREEN, JJ.

DIANA M. BOCCIO, PLAINTIFF-RESPONDENT,

V

ORDER

CITY OF BUFFALO, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

ALISA A. LUKASIEWICZ, CORPORATION COUNSEL, BUFFALO (CARMEN J. GENTILE
OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 6, 2008 in a personal injury action. The order denied the motion of defendant City of Buffalo for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1181

CA 08-02616

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND GREEN, JJ.

IN THE MATTER OF THE ACCOUNTING BY ANGELO
MANTIONE, AS EXECUTOR OF THE ESTATE OF
JOSEPHINE M. DEGRACE, ALSO KNOWN AS JOSEPHINE MEMORANDUM AND ORDER
DEGRACE, ALSO KNOWN AS JOSEPHINE DIGRACE,
DECEASED, PETITIONER-RESPONDENT;

EVELYN BONITO, OBJECTANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL B. JONES OF COUNSEL),
FOR OBJECTANT-APPELLANT.

RICHARD O. ROBINSON, P.C., BUFFALO (RICHARD O. ROBINSON OF COUNSEL),
FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County
(Barbara Howe, S.), entered September 16, 2008. The order denied the
objections of objectant to the accounting filed by the executor of
decedent's estate.

It is hereby ORDERED that the order so appealed from is
unanimously affirmed without costs.

Memorandum: The objectant in this proceeding appeals from an
order denying her objections to the accounting filed by the executor
of decedent's estate. Surrogate's Court concluded that the objectant
failed to acquire an interest in a joint account opened by decedent in
her name and that of the objectant and that the executor, as
decedent's attorney-in-fact, had not wrongfully converted the
objectant's interest in the account by withdrawing the entire balance.
We affirm. Although there is a presumption that parties to a joint
account are entitled to an equal share of the account (see Banking Law
§ 675 [b]), that presumption was rebutted by evidence establishing
that decedent "established the account for convenience and not with
the intention of conferring a present beneficial interest on the
[objectant]" (*Matter of Friedman*, 104 AD2d 366, 367, *affd* 64 NY2d
743).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1183

CA 09-00697

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND GREEN, JJ.

DAVID DALE, INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF VIRGINIA DALE, DECEASED,
PLAINTIFF-APPELLANT,

MEMORANDUM AND ORDER

V

WALETTA GENTRY, DEFENDANT-RESPONDENT.

DAVID DALE, PLAINTIFF-APPELLANT PRO SE.

NESPER, FERBER & DIGIACOMO, LLP, AMHERST (GABRIEL J. FERBER OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered June 2, 2008 in a breach of contract action. The order and judgment denied the motion of plaintiff to compel discovery and granted that part of the cross motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages arising from the alleged breach by defendant of a contract for the purchase of residential real property from the estate of plaintiff's decedent. Supreme Court properly denied plaintiff's motion to compel discovery and granted that part of defendant's cross motion seeking summary judgment dismissing the complaint. The court providently exercised its discretion in declining to accept the papers that were untimely submitted by plaintiff in support of his motion (see CPLR 2214 [c]; *Moore v Long Is. Coll. Hosp.*, 273 AD2d 365). Further, the court properly decided the cross motion despite defendant's failure to attach copies of the pleadings to the cross motion papers. The record establishes that defendant thereafter submitted copies of the pleadings to the court, and the order and judgment on appeal recites that they were before the court when it decided the cross motion (see *Haveron v Kirkpatrick*, 34 AD3d 1297). With respect to the merits of the cross motion, the court properly concluded that defendant met her burden of establishing that the contract in question, by its express terms, never became effective (see generally *Farago v Burke*, 262 NY 229, 231-232; *Chatterjee Fund Mgt. v Dimensional Media Assoc.*, 260 AD2d 159; *Textron, Inc. v Parkview Equities*, 159 AD2d 989), and plaintiff failed to raise a triable issue of fact (see generally

Fuller v Martin, 109 AD2d 1060).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1184

CA 08-02316

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND GREEN, JJ.

PAULA BELLES, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

UNITED CHURCH OF WARSAW AND UNITED CHURCH
OF WARSAW CONGREGATIONAL AND PRESBYTERIAN, INC.,
ALSO KNOWN AS UNITED CHURCH OF WARSAW,
DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MARY QUINN WYDYSH OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (DAVID W. OLSON OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 26, 2008 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendants had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell down a stairwell on property owned by defendants. According to plaintiff, the stairs were frequently wet and slippery, although she could not recall whether there was any ice on the stairs when she fell. We conclude that Supreme Court erred in denying defendants' motion for summary judgment dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendants had actual notice of the allegedly dangerous condition of the stairwell (see *James v Steinmiller*, 62 AD3d 1260), and we therefore modify the order accordingly.

We further conclude, however, that the court properly denied the motion to the extent that the complaint, as amplified by the bill of particulars, alleges that defendants created or had constructive notice of the allegedly dangerous condition (see *Brown v Linden Plaza Hous. Co., Inc.*, 36 AD3d 742). In support of their motion, defendants

failed to submit any evidence concerning inspection or maintenance of the stairwell (see generally *Rivers v May Dept. Stores Co.*, 11 AD3d 963). Indeed, defendants submitted the deposition testimony of the owner and operator of the company responsible for snow removal from defendants' stairs and sidewalks at the time of the incident, and he testified that he observed water dripping onto the stairwell from the roof on a regular basis for the two years preceding plaintiff's fall.

Contrary to defendants' contention, the fact that plaintiff could not identify what caused her to fall does not require dismissal of the complaint in its entirety (cf. *Garvin v Rosenberg*, 204 AD2d 388). Defendants submitted the deposition testimony of plaintiff in which she testified that the metal on the stairs was slippery when wet and that she fell down the stairs when they were wet. Although plaintiff could not recall whether there was snow, ice, or puddles on the stairs when she fell, defendants' own submissions raised a triable issue of fact with respect to proximate cause (cf. *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1185

KA 06-01291

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HADJI S. HILL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered April 12, 2006. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his plea was not knowingly, voluntarily or intelligently entered because, during the plea colloquy, he raised a possible justification defense and negated the intent element of the crime. Even assuming, arguendo, that defendant preserved those contentions for our review by his pro se motion to withdraw the plea, we conclude that they are lacking in merit. First, we conclude that County Court conducted the requisite further inquiry to ensure that "there was no possibility of a justification defense" (*People v Lopez*, 71 NY2d 662, 668; see *People v Winchester*, 38 AD3d 1336, 1337, lv denied 9 NY3d 853). Second, with respect to the contention of defendant that he negated the intent element of the crime during the plea colloquy, we note that, when defendant failed to admit that he intended to cause the victim to sustain a serious physical injury, the court conducted what was in effect a limited *Alford* colloquy with respect to the intent element, thus rendering unnecessary an admission of intent by defendant. The People marshaled the evidence concerning defendant's intent to cause serious physical injury, defendant acknowledged that evidence, and then voluntarily entered the plea. " '[A]n *Alford* plea may only be allowed when it is the product of a voluntary and rational choice and there is strong evidence of defendant's guilt before the court' " (*People v Ryan*, 59 AD3d 751, 751-752). Here, although the plea was not expressly characterized as

an *Alford* plea, both of those conditions were met in this case, and it cannot be said that defendant "failed to appreciate that his responses to County Court's inquiries would, in fact, constitute a plea of guilty" (*id.* at 751; see generally *Matter of Silmon v Travis*, 95 NY2d 470, 475; *People v Spulka*, 285 AD2d 840, 841, *lv denied* 97 NY2d 643; *People v Davis*, 197 AD2d 921, *lv denied* 82 NY2d 848).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1186

KA 06-01725

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ALTON L. MORRISON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (KIMBERLY F. DUGUAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LORETTA S. COURTNEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered May 22, 2006. The judgment convicted defendant, after a nonjury trial, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of assault in the second degree (Penal Law § 120.05 [7]). Viewing the evidence in light of the elements of the crime (*see generally People v Danielson*, 9 NY3d 342, 348-349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). " 'Great deference is to be accorded to the fact-finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697), and we see no reason to disturb Supreme Court's determination to credit the testimony of the victim that defendant "jumped" him in the victim's cell because defendant suspected the victim of being a "rat." Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1187

KA 07-01027

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

KEITH D. NORMAN, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered February 15, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision imposed for criminal possession of a weapon in the third degree to a period of three years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [former (2)]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant contends that his arrest was not based upon probable cause and that County Court therefore erred in refusing to suppress physical evidence seized as a result of that arrest. We reject that contention. Where hearsay information forms at least in part the basis for probable cause, the information must satisfy " 'the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted' " (*People v Flowers*, 59 AD3d 1141, 1142; see *People v Rios*, 11 AD3d 641, 642, lv denied 4 NY3d 747). Here, the statements of the unnamed informant, together with the police officer's personal observations of defendant, provided the officer with probable cause to arrest defendant. According to the evidence presented at the suppression hearing, the officer observed a green van pursuing two men on a moped, which was being driven at 2:00 A.M. without its headlight on. The officer pursued both the van and the moped and located them on a nearby street, whereupon he heard a gunshot. The moped was driven

toward and around the officer without stopping, and the driver of the van then approached the officer and informed him that the men on the moped had fired a gun at him. The officer pursued the moped until it struck a curb. Defendant, the passenger, fell off the moped and fled on foot.

The People established the reliability of the unnamed informant, i.e., the driver of the van, by establishing that his information " 'was received in a direct face-to-face encounter in which [the officer was] able to observe [his] facial expressions and emotional state' " (*Rios*, 11 AD3d at 642). In addition, the officer's own observations of defendant, including his flight upon being pursued by the officer, further established the reliability of the informant (see generally *People v Lee*, 258 AD2d 352, lv denied 93 NY2d 900; *People v Spearman*, 226 AD2d 180, lv denied 88 NY2d 886; *People v Sloan*, 178 AD2d 624, lv denied 79 NY2d 953). Contrary to the further contention of defendant, the recovery of the gun discarded during his flight was lawful inasmuch as the officer's pursuit and detention of defendant were lawful (see *People v Leung*, 68 NY2d 734, 736; *Sloan*, 178 AD2d 624).

As the People correctly concede, however, the court erred in imposing a five-year period of postrelease supervision for criminal possession of a weapon in the third degree, a class D violent felony offense (see Penal Law § 70.02 [1] [former (c)]; § 70.45 [former (2)]). We therefore modify the judgment by reducing the period of postrelease supervision imposed for that offense to a period of three years, the maximum allowed (see *People v Childres*, 60 AD3d 1278, 1279, lv denied 12 NY3d 913; *People v Brown*, 52 AD3d 1237, lv denied 10 NY3d 956). The sentence as modified is not unduly harsh or severe.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1188

KA 06-00669

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

RAUL LAZCANO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MATTHEW CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered February 6, 2006. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in refusing to suppress a knife seized from his jacket pocket during a pat-down search. We agree. Although "a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to the burden of *going forward* to show the legality of the police conduct in the first instance" (*People v Berrios*, 28 NY2d 361, 367 [internal quotation marks omitted]; see *People v Hernandez*, 40 AD3d 777, 778). Here, the People failed to meet that burden. They established that the police were justified in stopping defendant and conducting the pat-down search (see *People v McGiboney*, 62 AD3d 812; *People v Hethington*, 258 AD2d 919, *lv denied* 93 NY2d 971), but they failed to establish that the officer who conducted the pat-down search was justified in reaching into defendant's pocket and seizing the knife. That officer did not testify at the suppression hearing, and the testimony of the officer who witnessed the pat-down search was insufficient to establish that the search of defendant's pocket was legal (see *People v Barreto*, 161 AD2d 305, 307, *lv denied* 76 NY2d 852; cf. *Matter of Jose R.*, 88 NY2d 863, 865; see generally *People v Diaz*, 81 NY2d 106, 109). We nevertheless conclude that there is no reasonable possibility that the court's error in refusing to suppress the knife might have contributed to the conviction, and thus the error is harmless beyond a reasonable doubt (see generally *People v Crimmins*, 36 NY2d 230, 237; *People v Freeman*, 46 AD3d 1375, 1377, *lv*

denied 10 NY3d 840).

The court also erred in permitting the People to present testimony on rebuttal that the court had refused to allow them to present on their direct case. Defendant did not "open the door" to that rebuttal testimony when he testified on direct examination by defense counsel, and the court erred in permitting the People to "range[] beyond the defendant's direct examination 'in order to lay a foundation for the tainted evidence on rebuttal' " (*People v Rahming*, 26 NY2d 411, 418, quoting *People v Miles*, 23 NY2d 527, 543, *cert denied* 395 US 948). We conclude, however, that the court's error in admitting the rebuttal testimony is harmless (*see People v Sulayao*, 58 AD3d 769, 770-771, *lv denied* 12 NY3d 822; *People v Gant*, 291 AD2d 912, *lv denied* 98 NY2d 675; *see generally Crimmins*, 36 NY2d at 241-242). Finally, contrary to defendant's contention, the court properly exercised its discretion in refusing to allow defense counsel to cross-examine the victim with respect to her alleged drug use (*see People v Foley*, 257 AD2d 243, 254, *affd* 94 NY2d 668, *cert denied* 531 US 875; *see generally People v Freeland*, 36 NY2d 518, 525).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1189

KA 06-02130

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

VERNAL A. LOGAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (PATRICK H. FIERRO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 12, 2006. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, and driving on the left in a no passing zone.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1190

KA 07-00799

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

HORACE JONES, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NANCY A. GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 30, 2006. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of imprisonment of 2 to 6 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Defendant contends that Supreme Court erred in refusing to suppress the evidence obtained during a traffic stop of the vehicle in which he was a passenger based on his allegedly unlawful detention during that stop. We reject that contention. While on patrol in an area known for drug activity, a police officer observed the vehicle pull over, pick up defendant, and then circle the area. Following a lawful traffic stop for a suspended registration, "the officer had an objective, credible reason to request information from defendant[, another passenger] and the driver concerning their identities and the origin, destination and purpose of their trip" (*People v Dewitt*, 295 AD2d 937, 938, lv denied 98 NY2d 709, 767). Defendant was unable to produce any identification, the driver and other passenger in the car did not know defendant's name, and the officer was unable to hear defendant's responses to his questions. We thus conclude that the officer's request that defendant step out of the vehicle was "reasonable in view of the totality of the circumstances" (*People v Alvarez*, 308 AD2d 184, 187, lv denied 1 NY3d 567, 3 NY3d 657). Even assuming, arguendo, that the officer's request was actually a common-law inquiry, we further conclude that the officer had sufficient information to support "a

founded suspicion that criminality [was] afoot" (*People v Hollman*, 79 NY2d 181, 185). We reject defendant's further contention that the officer's justification for the traffic stop was exhausted once the driver explained that her insurance had lapsed because she had recently changed insurance companies. At that time, the officer had not yet issued the driver a traffic ticket and had not yet conducted any further investigation with respect to the information received from the driver and passengers (*cf. People v Banks*, 85 NY2d 558, 562, *cert denied* 516 US 868).

We agree with defendant, however, that the enhanced sentence is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to an indeterminate term of imprisonment of 2 to 6 years (*see* CPL 470.15 [6] [b]).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1191

KA 06-02483

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ROBERT HILL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered April 26, 2006. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1192

KA 09-00417

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

ORDER

SHYTRECE TAMIKA BANKS, DEFENDANT-RESPONDENT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (LESLIE E. SWIFT OF COUNSEL), FOR APPELLANT.

VAN HENRI WHITE, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (John R. Schwartz, A.J.), dated April 2, 2008. The order reduced the sole count in the indictment charging defendant with criminal possession of stolen property in the fourth degree to criminal possession of stolen property in the fifth degree.

Now, upon reading and filing the stipulation discontinuing appeal signed by the attorneys for the parties on May 7 and 18, 2009 and by defendant on May 18, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1193

KA 07-01226

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DENNIS BELL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (GRAZINA MYERS OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (ELIZABETH CLIFFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered June 7, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), defendant contends that he was deprived of a fair trial by prosecutorial misconduct during summation. We agree with defendant that the prosecutor improperly vouched for the credibility of the witnesses to the shooting (*see People v Pagan*, 2 AD3d 879, 880; *People v Dunbar*, 213 AD2d 1000, *lv denied* 85 NY2d 972), and that the error was compounded when Supreme Court allowed the prosecutor to enhance the effect of her improper comments by using computer slides. We also agree with defendant that, during her summation, the prosecutor mischaracterized one of the photographs admitted in evidence (*see generally People v Hernandez*, 185 AD2d 147, *lv denied* 80 NY2d 930). Nevertheless, we conclude that those instances of misconduct during the prosecutor's summation did not deprive defendant of his fundamental right to a fair trial. Rather, we conclude that the evidence of defendant's guilt is overwhelming and that there is no reasonable possibility that the error might have contributed to defendant's conviction (*see People v Elliot*, 294 AD2d 870, *lv denied* 98 NY2d 696). Defendant failed to object to the remainder of the comments on summation that he now contends were improper, and his contention with respect to those comments therefore is not preserved for our review (*see CPL 470.05 [2]; People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803). We decline to exercise our power to

review his contention with respect to those comments as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). Finally, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1196

CAF 08-01679

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF ISAAC L.T.F., TURIQ F.,
IYISHA O.-D.F., AND IYLEAH L.F.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT;

ORDER

ISAAC F., RESPONDENT-RESPONDENT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF
COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR ISAAC L.T.F., TURIQ F.,
IYISHA O.-D.F., AND IYLEAH L.F.

Appeal from an order of the Family Court, Monroe County (Patricia
E. Gallaher, J.), entered July 31, 2008 in a proceeding pursuant to
Family Court Act article 6. The order, among other things, extended
the suspended judgment for an additional period of one year.

It is hereby ORDERED that said appeal is unanimously dismissed
without costs as moot.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1197

CAF 09-00391

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF SHARDE H.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

ORDER

ARDETH L. HOUDE, LAW GUARDIAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (TIMOTHY M. LEXVOLD
OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered October 27, 2008 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent in the custody of the New York State Office of Children and Family Services for a period of 12 months.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1198

CAF 08-01243

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF KELLY A. TODD,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

WAYNE L. JOHNSON, RESPONDENT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF
COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Oswego County (James M. Metcalf, J.), entered May 7, 2008 in a proceeding pursuant to Family Court Act article 4. The order found respondent in willful violation of a prior order of child support and committed respondent to a term of incarceration.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent father appeals from an order finding him in willful violation of a prior child support order and committing him to an intermittent term of incarceration of six months in jail. Contrary to the father's contention, Family Court properly confirmed the Support Magistrate's finding of a willful violation (see Family Ct Act § 439 [a]; *Matter of Paige v Paige*, 50 AD3d 1542). Petitioner mother presented prima facie evidence of a willful violation of the support order by establishing that the father failed to pay support as ordered (see *Matter of Powers v Powers*, 86 NY2d 63, 69; *Paige*, 50 AD3d at 1542), and the father then failed to meet his burden of establishing his inability to pay (see *Powers*, 86 NY2d at 69-70; *Matter of Valerie Q. v Arturo H.*, 48 AD3d 1049; *Matter of Livingston County Child Support Collection Unit v Grimmelt*, 306 AD2d 930). Indeed, he presented no evidence that he made any efforts to obtain employment (see *Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452; *Matter of Moore v Blank*, 8 AD3d 1090, 1091, lv denied 3 NY3d 606; *Matter of Leslie v Rodriguez*, 303 AD2d 1016, 1017). We reject the further contentions of the father that the court was biased against him (see *Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060, 1061; see also *Matter of Angie M.P.*, 291 AD2d 932, 933, lv denied 98 NY2d 602), and that the sentence is excessive. We have considered the father's remaining contentions and conclude that they are without merit.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1200

CA 09-00413

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

JOHN RANNE AND LINDA RANNE,
PLAINTIFFS-RESPONDENTS,

V

ORDER

NELSON HUFF, ET AL., DEFENDANTS,
AND GROVE MANUFACTURING COMPANY, A DIVISION
OF KIDDE, INC., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JOSEPH L. MOONEY OF COUNSEL), FOR
DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered June 16 2008 in a personal injury action. The order denied the motion of defendant Grove Manufacturing Company, a Division of Kidde, Inc., for a bifurcated trial.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed with the Court on July 30, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1202

CA 09-00617

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

MALIKA F. NELSON, PLAINTIFF-RESPONDENT,

V

ORDER

MICHAEL J. SANTINI, DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (STEVEN J. PALUCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Harold L. Galloway, J.), entered December 9, 2008 in a personal injury action. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1203

CA 09-00576

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

BARBARA PADILLA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KINGA M. VERCZKY-PORTER, M.D., MILLARD
FILLMORE HOSPITAL AND KALEIDA HEALTH, DOING
BUSINESS AS MILLARD FILLMORE HOSPITAL,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (VICTOR ALAN OLIVERI OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROSENTHAL, SIEGEL & MUENKEL, LLP, BUFFALO (ELLEN M. KREBS OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 20, 2008 in a medical malpractice action. The order denied the motion of defendants for summary judgment and granted the cross motion of plaintiff for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the third cause of action and the claim for punitive damages against defendant Kinga M. Verczky-Porter, M.D., and dismissing the complaint against defendants Millard Fillmore Hospital and Kaleida Health, doing business as Millard Fillmore Hospital, and by denying the cross motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking compensatory and punitive damages for psychological injuries she sustained as the result of an alleged sexual relationship with defendant Kinga M. Verczky-Porter, M.D. (Dr. Porter), a resident physician who rendered care to plaintiff at an outpatient clinic on numerous occasions for over a year. Dr. Porter was employed by defendants Millard Fillmore Hospital and Kaleida Health, doing business as Millard Fillmore Hospital (collectively, Kaleida defendants). Plaintiff alleged that, after her last visit to Dr. Porter on May 25, 2001, she was contacted by Dr. Porter at home and Dr. Porter initiated a sexual relationship with her that continued until late June 2001, when Dr. Porter moved out of state. Plaintiff further alleged that they continued to communicate by telephone and e-mail for several months, and that the relationship ended in December

2001. In this action, commenced by plaintiff on November 25, 2003, plaintiff asserted two causes of action against all defendants for medical malpractice and breach of fiduciary duty. In addition, she asserted a cause of action against Dr. Porter for intentional or reckless infliction of emotional distress, and a cause of action against the Kaleida defendants for negligent hiring and supervision. Supreme Court thereafter denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for leave to amend the complaint to add a cause of action for negligent infliction of emotional distress against Dr. Porter "[if] the court finds that [the c]omplaint alleges an intentional tort alone"

Addressing first those parts of the complaint concerning Dr. Porter, we reject the contention of defendants that the court erred in denying that part of their motion with respect to the medical malpractice cause of action against her (*see generally Doe v Eppel*, 280 AD2d 911; *Marpe v Dolmetsch*, 246 AD2d 723). Although in support of the motion defendants submitted the affidavit of a physician who asserted that Dr. Porter's treatment of the various ailments of plaintiff was proper, the physician did not address the allegations of negligence stemming from the alleged sexual relationship between Dr. Porter and plaintiff, as set forth in plaintiff's bill of particulars (*see S'Doia v Dhabhar*, 261 AD2d 968). Defendants also failed to meet their initial burden of establishing that any alleged negligence stemming from that relationship was not a proximate cause of plaintiff's injuries (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

We agree with defendants, however, that the court erred in denying that part of their motion with respect to the intentional or reckless infliction of emotional distress cause of action against Dr. Porter and in granting plaintiff's cross motion, and we therefore modify the order accordingly. The intentional or reckless infliction of emotional distress cause of action is time-barred and thus that part of the motion seeking summary judgment dismissing it should have been granted (*see Dana v Oak Park Marina*, 230 AD2d 204, 209-210; *Goldner v Sullivan, Gough, Skipworth, Summers & Smith*, 105 AD2d 1149, 1151). With respect to the cross motion, we note the well-settled principle that leave to amend a pleading should not be granted where the proposed cause of action is "totally devoid of merit" (*Probst v Cacoulidis*, 295 AD2d 331, 332; *see Hogarth v City of Syracuse* [appeal No. 1], 238 AD2d 887, *lv dismissed* 90 NY2d 935, *lv denied* 93 NY2d 812; *Boccio v Aspin Trucking Corp.*, 93 AD2d 983). "Although physical injury is no longer a necessary element of [the proposed] cause of action for negligent infliction of emotional distress, such a cause of action generally must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety" (*Johnson v New York City Bd. of Educ.*, 270 AD2d 310, 312; *see Andrewski v Devine*, 280 AD2d 992, 993; *Ben-Zvi v Kronish Lieb Weiner & Hellman*, 278 AD2d 167). Here, the proposed cause of action fails to allege that Dr. Porter's conduct unreasonably endangered plaintiff's physical safety or caused

plaintiff to fear for her physical safety (see *Kenneth S. v Berkshire Farm Ctr. & Servs. for Youth*, 36 AD3d 1092, 1094; *Andrewski*, 280 AD2d at 993; *Ben-Zvi*, 278 AD2d 167).

With respect to those parts of the complaint concerning the Kaleida defendants, we conclude that they are entitled to summary judgment dismissing the complaint against them, and we therefore further modify the order accordingly. We note that the allegations in the medical malpractice cause of action against them and the negligent hiring and supervision cause of action are based on their allegedly negligent supervision of Dr. Porter. The Kaleida defendants met their initial burden with respect to those causes of action by establishing that they "acted with reasonable care in . . . supervising the employee, and plaintiff has failed to tender any admissible evidence to the contrary" (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933-934). There is no evidence in the record before us that the Kaleida defendants were aware of Dr. Porter's alleged sexual relationship with plaintiff, or that Dr. Porter's actions were reasonably foreseeable (see *Garcia v Montefiore Med. Ctr.*, 293 AD2d 264). The affidavit of plaintiff's expert submitted in opposition to the motion is based solely on speculation and thus is insufficient to defeat those parts of the motion with respect to the medical malpractice cause of action against the Kaleida defendants as well as the negligent hiring and supervision cause of action (see *Judith M.*, 93 NY2d at 934; *Travis v United Health Servs. Hosps., Inc.*, 23 AD3d 884, 885). The breach of fiduciary duty cause of action against the Kaleida defendants is duplicative of the two aforementioned causes of action and thus the same reasoning applies to that cause of action as well, requiring its dismissal (see generally *Adamski v Lama*, 56 AD3d 1071, 1072-1073; *Guiles v Simser*, 35 AD3d 1054, 1054-1055).

Finally, we agree with defendants that the court erred in denying that part of their motion for summary judgment dismissing the sole remaining claim for punitive damages, which is based on the cause of action for breach of fiduciary duty against Dr. Porter, and we therefore further modify the order accordingly. The conduct of Dr. Porter did not meet the "very high threshold of moral culpability" to support a claim for punitive damages with respect to her alleged breach of her fiduciary duty to plaintiff (*Giblin v Murphy*, 73 NY2d 769, 772; see generally *Jakobsen v Wilfred Labs.*, 99 AD2d 525, 527).

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1206

CA 08-02597

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

JOSEPH DELLERBA, PLAINTIFF-APPELLANT,

V

ORDER

CYNTHIA R. MORGAN, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA
(ANTHONY J. BRINDISI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GREENE, HERSHDORFER & SHARPE, SYRACUSE (LORRAINE RANN MERTELL OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered September 16, 2008 in a personal injury action. The order, among other things, granted the motion of defendant Cynthia R. Morgan for summary judgment dismissing the complaint and cross claims against her.

Now, upon reading and filing the stipulation to discontinue appeal signed by the attorneys for the parties on August 25 and 31, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1207.1

CA 09-00970

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF JACQUELYN KREINHEDER,
AS ADMINISTRATRIX OF THE ESTATE OF LEAH
JONES-KREINHEDER, DECEASED,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MATTHEW WITHIAM-LEITCH, M.D., ET AL.,
DEFENDANTS,
DENNIS M. WEPPNER, M.D., DEFENDANT-APPELLANT.

FELDMAN, KIEFFER & HERMAN, LLP, BUFFALO (JAMES E. EAGAN OF COUNSEL),
FOR DEFENDANT-APPELLANT.

KRAMER, DILLOF, LIVINGSTON & MOORE, NEW YORK CITY (MATTHEW GAIER OF
COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered February 19, 2009 in a medical malpractice action. The order, insofar as appealed from, denied the motion of defendant Dennis M. Weppner, M.D. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action as administratrix of the estate of her daughter (decedent) seeking damages for the wrongful death of decedent as a result of injuries that occurred during her birth. Dennis M. Weppner, M.D. (defendant) moved for summary judgment dismissing the complaint against him contending, inter alia, that he was not in any way involved in the delivery of decedent. We conclude that Supreme Court properly denied the motion inasmuch as defendant failed to meet his initial burden of establishing his entitlement to judgment as a matter of law. Although defendant asserted in a supporting affidavit that he did not play any role in the delivery, that he did not recall reviewing a fetal monitor strip, and that he did not consult with one of the codefendants, the medical records submitted in support of the motion in fact describe defendant's involvement in the delivery on three occasions and otherwise contradict the statements in defendant's affidavit (see *Brown v LaFontaine-Rish Med. Assoc.*, 295 AD2d 167; *Gomez v Doctors Med. Ctr.*, 266 AD2d 506; *Rotundo v S & C Magnetic Resonance Imaging*, 255 AD2d 573). Contrary to defendant's contention, we further conclude that there are triable issues of fact whether there was an

implied physician-patient relationship between defendant and decedent (see *Campbell v Haber*, 274 AD2d 946, 946-947).

Even assuming, arguendo, that defendant met his initial burden on the motion, we conclude that plaintiff raised a triable issue of fact with respect to defendant's participation in the allegedly erroneous interpretation of the fetal monitor strip and the allegedly negligent delivery (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff submitted the deposition testimony of a physician who is also a named defendant in which he testified that he consulted with defendant concerning the fetal monitor strip shortly before the delivery and that he called for defendant to assist with the delivery after decedent's head had been delivered and he had determined that there was a shoulder dystocia. Plaintiff also submitted the deposition testimony of the attending nurse, who testified that she was certain that defendant attended the delivery after he was called to the delivery room to assist the aforementioned physician.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1207.2

CAF 09-00241

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF SHANIA L., CHEYANN L.,
EDDIE B., JR., SKYLER B., AND VICTOR B.

MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

KELLY L., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, BUFFALO, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, LAW GUARDIAN, THE LEGAL AID BUREAU OF BUFFALO, INC.,
BUFFALO (CHARLES D. HALVORSEN OF COUNSEL), FOR SHANIA L., CHEYANN L.,
EDDIE B., JR., SKYLER B., AND VICTOR B.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered December 31, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

It is hereby ORDERED that said appeal is unanimously dismissed without costs.

Memorandum: Respondent mother appeals from an order of disposition that, inter alia, terminated her parental rights with respect to her five children pursuant to Social Services Law § 384-b based upon a finding that she had permanently neglected them. The record establishes that the mother failed to appear at the fact-finding proceeding and that her attorney did not participate therein, and the only issues raised on appeal concern the underlying factual findings. Thus, the appeal must be dismissed inasmuch as the factual findings were entered upon the mother's default (*see Matter of Cynthia Hope A.*, 36 AD3d 803; *Matter of Sandra J.*, 25 AD3d 360; *cf. Matter of Isaiah H.*, 61 AD3d 1372; *see generally* CPLR 5511).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1207

CA 09-00372

PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, GREEN, AND GORSKI, JJ.

IN THE MATTER OF SUSAN SCHEFF,
PETITIONER-RESPONDENT,

V

ORDER

JEFFREY TAUB, RESPONDENT-APPELLANT.

WILLIAM R. HITES, BUFFALO, FOR RESPONDENT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (PATRICK C. O'REILLY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

JAMES KREUZER, LAW GUARDIAN, BUFFALO, FOR HAILEY M.T.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 23, 2008. The order, inter alia, denied the motion of respondent to vacate certain default orders.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties and by the Law Guardian on September 11, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1209

KA 06-01052

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID HILL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John R. Schwartz, A.J.), rendered February 27, 2006. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]). We reject defendant's contention that County Court failed to apprehend the extent of its discretion in imposing a period of postrelease supervision. " 'The court's statement . . . with respect to the imposition of a five-year period of postrelease supervision does not, without more, indicate that the court erroneously believed that it lacked discretion to impose a shorter period' " (*People v Burgess*, 23 AD3d 1095, lv denied 6 NY3d 810). We also reject defendant's contention that the period of postrelease supervision imposed was unduly harsh or severe. "Defendant was sentenced in accordance with the plea bargain and should be bound by its terms" (*People v McGovern*, 265 AD2d 881, lv denied 94 NY2d 882).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1210

TP 09-00560

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF JOHN GORDON, PETITIONER,

V

ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, AND LIEUTENANT HEAD,
RESPONDENTS.

JOHN GORDON, PETITIONER PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF
COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered October 14, 2008) to review a determination of respondents. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1211

KA 08-01556

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

SEAN REFERMAT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 30, 2008. The judgment convicted defendant, upon his plea of guilty, of criminally negligent homicide.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1212

KA 06-01634

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

ROBERT E. BUSH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered February 7, 2006. The judgment convicted defendant, after a nonjury trial, of rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of rape in the third degree (Penal Law § 130.25 [2]). Contrary to the contention of defendant, his right of confrontation was not violated by the admission in evidence of a certified abstract of a registration record of the New York State Department of Motor Vehicles. The "various indicia of testimoniality" are not present in the registration record (*People v Rawlins*, 10 NY3d 136, 151). Rather, the registration record contains only objective facts, its contents are not directly accusatory, and it does not reflect "the exercise of 'fallible human judgment' " (*People v Freycinet*, 11 NY3d 38, 41). Similarly, the accompanying affidavit refers only to the authenticity of the registration record and its use in the regular course of business, and it contains no statement concerning the role of the registration record in the case against defendant (*cf. People v Pacer*, 6 NY3d 504, 510-512).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1213

KA 06-01296

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

ORDER

ARIEL CUBERO, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 31, 2006. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on September 16, 2009 and by the attorneys for the parties on September 16 and 17, 2009,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1214

KA 06-00788

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

MEMORANDUM AND ORDER

PRINCE R. CLARK, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 22, 2006. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts) and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury trial of, inter alia, two counts each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). We reject the contention of defendant that County Court abused its discretion in denying his motion to sever his trial from that of his codefendant. "The 'core of each defense [was not] in irreconcilable conflict with the other and . . . there [was no] significant danger, as both defenses [were] portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt' " (*People v Bolling*, 49 AD3d 1330, 1332, quoting *People v Mahboubian*, 74 NY2d 174, 184; see *People v Cardwell*, 78 NY2d 996, 997-998). Although at least one comment made by the codefendant's attorney on summation was unfavorable to defendant, that single display of hostility did not warrant severance (see *People v Watkins*, 10 AD3d 665, 665-666, lv denied 3 NY3d 761). Also contrary to the contention of defendant, he did not establish his entitlement to severance on the ground that he would have been subjected to prejudicial cross-examination by the attorney for his codefendant had defendant testified (see generally *People v McGee*, 68 NY2d 328, 333). "At no stage of the proceedings [did] defendant

establish[] that his potential testimony would have given the codefendant an incentive to impeach his credibility" (*People v Frazier*, 309 AD2d 534, 534, lv denied 1 NY3d 571).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1215

CAF 08-00735

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF EMMERAN M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMMERAN M., RESPONDENT-APPELLANT.

WARD NORRIS HELLER & REIDY LLP, ROCHESTER (MARGARET E. DOUGHERTY OF
COUNSEL), FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (PAUL N. HUMPHREY OF
COUNSEL), FOR PETITIONER-RESPONDENT.

KATHLEEN M. CONTRINO, LAW GUARDIAN, NORTH TONAWANDA, FOR EMMERAN M.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.), entered March 20, 2008 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order of disposition that, *inter alia*, terminated his parental rights, respondent father contends that Family Court abused its discretion in refusing to issue a suspended judgment. We reject that contention. Petitioner established that, over the course of more than a year and six months, the father made little to no effort to visit the child and that, during visitation, he made minimal efforts to interact with the child (*see Matter of Lenny R.*, 22 AD3d 240, *lv denied* 6 NY3d 708; *Matter of Jason J.*, 283 AD2d 982). Petitioner further established that the father failed to complete a court-ordered substance abuse treatment program or to attend court-ordered domestic violence counseling (*see Matter of Melissa DD.*, 45 AD3d 1219, 1221, *lv denied* 10 NY3d 701). We thus conclude that the court properly determined that a suspended judgment would not serve the best interests of the child (*see Matter of Ada M.R.*, 306 AD2d 920, 921, *lv denied* 100 NY2d 509; *see generally Matter of Michael B.*, 80 NY2d 299, 310-311).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1216

CAF 08-00047

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF DOMINICK L.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

THOMAS N. MARTIN, LAW GUARDIAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (ALECIA SPANO OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Marilyn L. O'Connor, J.), entered December 4, 2007 in a proceeding pursuant to Family Court Act article 3. The order adjudged that respondent is a juvenile delinquent and placed respondent in the custody of the New York State Office of Children and Family Services.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision adjudicating respondent a juvenile delinquent based upon the finding that he committed an act that, if committed by an adult, would constitute the crime of reckless endangerment in the second degree and dismissing count four of the petition and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on findings that he committed acts that, if committed by an adult, would constitute the crimes of reckless endangerment in the second degree (Penal Law § 120.20), attempted assault in the third degree (§§ 110.00, 120.00 [1]), harassment in the first degree (§ 240.25) and menacing in the second degree (§ 120.14 [2]). We agree with respondent that the evidence is legally insufficient to establish that he created a substantial risk of serious physical injury to another person and thus is legally insufficient with respect to the charge of reckless endangerment (see generally *Matter of David H.*, 69 NY2d 792, 793-794). We therefore modify the order accordingly.

We conclude, however, that the evidence, when viewed in the light most favorable to the presentment agency (see *id.* at 793; *Matter of Brandon S.M.*, 43 AD3d 1371), is legally sufficient with respect to the remaining crimes of attempted assault, harassment, and menacing (see generally *Matter of Zachary R.F.*, 37 AD3d 1073; *Matter of Katrina W.*, 277 AD2d 949). We reject respondent's further contention that Family

Court's findings with respect to the remaining crimes are against the weight of the evidence (see *Matter of Travis D.*, 1 AD3d 968, 969; see generally *People v Bleakley*, 69 NY2d 490, 495).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1218

CAF 08-00404

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF MARTIN N. SAVAGE,
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

JULIANNE COTA, RESPONDENT-APPELLANT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, APPELLANT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT.

WILLIAM L. KOSLOSKY, LAW GUARDIAN, UTICA, APPELLANT PRO SE.

COHEN & COHEN LLP, UTICA (RICHARD A. COHEN OF COUNSEL), FOR
PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oneida County (David A. Murad, A.J.), entered December 18, 2007 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, awarded petitioner primary physical custody of the parties' child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother and the Law Guardian appeal from that part of an order awarding petitioner father primary physical custody of the parties' child, thus modifying the divorce judgment with respect to custody as well as a prior order of custody. We affirm. Family Court's determination that the best interests of the child thereby would be served is entitled to deference (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173-174) and, based on our review of the hearing transcript, we conclude that the court's determination was "the product of 'careful weighing of [the] appropriate factors' " (*Matter of McLeod v McLeod*, 59 AD3d 1011, 1011), and has a sound and substantial basis in the record (*see Matter of Krug v Krug*, 55 AD3d 1373; *Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060). We reject the mother's contention that the court relied too heavily on the child's race in determining the issue of custody (*see generally Matter of Davis v Davis*, 240 AD2d 928, 928-929; *Lee v Halayko*, 187 AD2d 1001). Finally, contrary to the further contention of the mother and the Law Guardian, we conclude that the gaps in the hearing transcript resulting from inaudible portions of the audio tape recording are not so significant as to preclude meaningful review of the order on appeal

(*cf. Matter of Jordal v Jordal*, 193 AD2d 1102).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1219

CAF 08-01792

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF SHAKIRRAH C.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

THOMAS N. MARTIN, LAW GUARDIAN, ROCHESTER, FOR RESPONDENT-APPELLANT.

DANIEL M. DELAUS, JR., COUNTY ATTORNEY, ROCHESTER (ALECIA SPANO OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered June 16, 2008 in a proceeding pursuant to Family Court Act article 3. The order adjudged that respondent is a juvenile delinquent and placed respondent on probation.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent appeals from an order adjudicating her to be a juvenile delinquent based on the finding that she committed an act that, if committed by an adult, would constitute the crime of resisting arrest (Penal Law § 205.30). Contrary to respondent's contention, "the evidence presented at the hearing, when viewed in the light most favorable to the presentment agency . . . , is legally sufficient to prove beyond a reasonable doubt that respondent committed the acts alleged in the petition" (*Matter of Aron B.*, 46 AD3d 1431, 1431 [internal quotation marks omitted]).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1223

CA 08-01603

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

CYNTHIA B. HURD, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

MICHAEL O. HURD, DEFENDANT-RESPONDENT.

WELCH & ZINK, CORNING (COLLEEN G. ZINK OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

WENDY LEE GOULD, BATH, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Alex R. Renzi, A.J.), entered May 9, 2008. The order dismissed the complaint for failure to state a cause of action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the complaint is reinstated.

Memorandum: Plaintiff appeals from an order in which Supreme Court sua sponte dismissed her complaint for failure to state a cause of action. We note at the outset that, because the order did not determine a motion made on notice, it is not appealable as of right (*see Sholes v Meagher*, 100 NY2d 333, 335; *Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, *lv denied* 10 NY3d 710), and plaintiff did not seek leave to appeal (*see Mary L.R.*, 48 AD3d 1088). Nevertheless, under the circumstances of this case, we treat the notice of appeal as an application for leave to appeal, and we grant the application in the interest of justice (*see Spada v Sepulveda*, 306 AD2d 270, 270; *Sena v Nationwide Mut. Fire Ins. Co.*, 198 AD2d 345, 345-346; *see generally* CPLR 5701 [c]).

With respect to the merits of the appeal, we agree with plaintiff that the court erred in dismissing the complaint for failure to state a cause of action in the absence of a request by defendant for such relief (*see Abinanti v Pascale*, 41 AD3d 395, 396; *Grimes v Kaplin*, 305 AD2d 1024; *Sena*, 198 AD2d at 346; *see generally* *McLearn v Cowen & Co.*, 60 NY2d 686, 689). Indeed, in doing so, the court "thereby depriv[ed] plaintiff] of [her] opportunity to lay bare [her] proof . . . and render[ed] meaningful appellate review of the propriety of the court's determination on the merits impossible" (*Sena*, 198 AD2d at 346). "[U]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances," and no such extraordinary circumstances are present in this case (*Myung Chun v North Am. Mtge.*

Co., 285 AD2d 42, 46; see *Rienzi v Rienzi*, 23 AD3d 450; cf. *Wehringer v Brannigan*, 232 AD2d 206, lv dismissed 89 NY2d 980, 1087). We therefore reverse the order and reinstate the complaint.

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1224

CA 08-02075

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

DOLE FOOD COMPANY, INC. AND DOLE FRESH FRUIT
COMPANY, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

LINCOLN GENERAL INSURANCE COMPANY, LEONARD'S
EXPRESS, INC., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

LITCHFIELD CAVO LLP, NEW YORK CITY (EDWARD FOGARTY, JR., OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL),
FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 17, 2008. The order, inter alia, granted plaintiffs' motion for a default judgment against defendants Lincoln General Insurance Company and Leonard's Express, Inc.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the cross motion is granted and plaintiffs are directed to accept service of the answer of defendants Lincoln General Insurance Company and Leonard's Express, Inc. dated May 14, 2008.

Memorandum: In this declaratory judgment action, Lincoln General Insurance Company and Leonard's Express, Inc. (collectively, defendants) appeal from an order granting plaintiffs' motion for a default judgment against them based on their failure to serve a timely answer and denying their cross motion seeking to compel plaintiffs to accept service of their late answer (see CPLR 3012 [d]). We agree with defendants that Supreme Court abused its discretion in granting the motion and in denying the cross motion. "A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff[s] establish a right to a declaration" and, here, plaintiffs did not establish their entitlement to the declaration sought (*Merchants Ins. Co. of N.H. v Long Is. Pet Cemetery*, 206 AD2d 827 [internal quotation marks omitted]; cf. *New York Mut. Underwriters v Baumgartner*, 19 AD3d 1137, 1141).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1227

KA 09-00984

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V

MEMORANDUM AND ORDER

GLENN D. HATCH, DEFENDANT-RESPONDENT.

JOHN C. TUNNEY, DISTRICT ATTORNEY, BATH (TAYLOR YORK OF COUNSEL), FOR APPELLANT.

CHRISTOPHER A. BARTON, ELMIRA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Steuben County Court (Marianne Furfure, J.), entered March 27, 2009. The order denied the motion of the People to reinstate the count of reckless endangerment in the first degree.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Memorandum: The People appeal from an order denying their motion to reinstate a count of reckless endangerment in the first degree (Penal Law § 120.25). County Court had previously reduced that count, on defendant's motion, to reckless endangerment in the second degree (§ 120.20). We affirm. In reviewing the legal sufficiency of the evidence before the grand jury, "[t]he reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted—and deferring all questions as to the weight or quality of the evidence—would warrant conviction" (*People v Swamp*, 84 NY2d 725, 730). Here, we conclude that the evidence presented to the grand jury would not warrant a conviction of reckless endangerment in the first degree, inasmuch as it does not support a finding that defendant acted with "an utter disregard for the value of human life" (*People v Suarez*, 6 NY3d 202, 214; see *People v Feingold*, 7 NY3d 288, 296). Defendant's actions in driving a vehicle off a street and "doing donuts" with the vehicle in an open field at night with the headlights on do not constitute the "hallmarks of wanton recklessness necessary to demonstrate 'circumstances evincing a depraved indifference to human life' " (*People v Dudley*, 31 AD3d 264, 264, *lv denied* 7 NY3d 866; *cf. People v Gomez*, 65 NY2d 9, 10-12; *People v Mooney*, 62 AD3d 725; *People v Robinson*, 16 AD3d 768, 769-770, *lv denied* 4 NY3d 856). Further, although there was evidence that defendant drove in the general direction of two witnesses, we conclude that such evidence is insufficient to establish that defendant's conduct created a grave risk of death to those witnesses (*cf.*

Robinson, 16 AD3d at 769-770; *People v Williams*, 158 AD2d 253, 253-254, lv denied 75 NY2d 971).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1228.1

CA 09-00687

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF CITY OF UTICA URBAN
RENEWAL AGENCY, PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

TIMOTHY DOYLE, RESPONDENT-RESPONDENT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR
PETITIONER-APPELLANT.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (John W. Grow, J.), entered December 22, 2008 in a proceeding pursuant to CPLR article 75. The order denied the amended petition seeking a permanent stay of arbitration.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition is granted and arbitration is permanently stayed.

Memorandum: Petitioner agency (hereafter, agency) commenced this CPLR article 75 proceeding seeking a permanent stay of arbitration with respect to its termination of respondent as its executive director. We note at the outset that, although respondent is correct that the agency failed to comply with CPLR 7503 (c) by filing the petition within 20 days of respondent's service of the demand for arbitration, we nevertheless conclude that the proceeding was properly before Supreme Court because "[a]n untimely application to stay arbitration may . . . be granted if the agreement for which arbitration is sought is facially illegal or if upon facial examination of the agreement, a court may conclude that it would be against public policy to permit arbitration of the issue sought to be arbitrated" (*Matter of Land of the Free v Unique Sanitation*, 93 NY2d 942, 943). The agreement containing the arbitration clause is an employment contract between the predecessor members of the agency and respondent. We conclude that the court should have granted the amended petition on the ground that public policy prohibits the predecessor members of the agency from binding its present successor members to the terms of the employment agreement between the predecessor members and respondent, thus rendering the instant arbitration clause invalid. The agency is a "corporate governmental agency" (General Municipal Law § 553 [2]), and it is empowered by

statute to appoint an executive director (see § 554 [7]). Pursuant to the term limits rule, the predecessor members of the agency were prohibited "from contractually binding [their] successors in areas relating to governance unless specifically authorized by statute or charter provisions to do so" (*Matter of Karedes v Colella*, 100 NY2d 45, 50). Here, the appointment of an executive director is unquestionably an "area[] relating to governance" (*id.*; see *Matter of Lake v Binghamton Hous. Auth.*, 130 AD2d 913, 914), and there is no charter or statute authorizing the predecessor members to appoint an executive director (see *Karedes*, 100 NY2d at 50). The predecessor members of the agency, who were either elected officials or political appointees (see § 616), had changed completely between the date on which the agreement was executed and the date on which it was terminated. Thus, the agreement concerning respondent's employment and containing the arbitration clause was void as against public policy and thus was not binding on the successor members of the agency (see *Lake*, 130 AD2d at 914).

Entered: October 2, 2009

Patricia L. Morgan
Clerk of the Court

MOTION NO. (1184/97) KA 09-01231. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT V ANTHONY HENDERSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, GREEN, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1116/99) KA 99-00063. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SAMUEL L. MCNEAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1752/00) KA 99-05535. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL SHAW, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., SMITH, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (969/02) KA 00-00810. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LLOYD E. BARKER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, CENTRA, AND CARNI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (330/04) KA 01-02565. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN K. WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., GREEN, PINE, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (298/06) KA 03-01815. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HENRY HOLIFIELD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., MARTOCHE, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (788/06) KA 04-02067. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL GAFFNEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, AND, GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1437/06) OP 06-01392. -- IN THE MATTER OF SEPHORA K. DAVIS, PETITIONER, V JOAN S. KOHOUT, AS ACTING LIVINGSTON COUNTY COURT JUDGE, AND THOMAS E. MORAN, AS LIVINGSTON COUNTY DISTRICT ATTORNEY, RESPONDENTS. -- Motion for reargument, clarification or leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1033/07) KA 05-00228. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDWIN MORALES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: MARTOCHE, J.P., SMITH, PERADOTTO, GREEN, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1125/07) KA 06-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN E. AKIN, DEFENDANT-APPELLANT. -- Motion for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P. J., HURLBUTT, FAHEY, GREEN, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1172/07) KA 05-02316. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PHILIP FELICE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CENTRA, AND FAHEY, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (5/08) KA 06-03550. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GLEN MACLEAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, GREEN, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (710/08) KA 04-02291. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO BROADNAX, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (712/08) KA 06-00530. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER M. DIAZ, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1007/08) KA 07-01184. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JACK VANDEVIVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: HURLBUTT, J.P., SMITH, CENTRA, FAHEY, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (1584/08) TP 08-01313. -- IN THE MATTER OF ELIZABETH L. WINKLER, PETITIONER, V NEW YORK STATE DIVISION OF HUMAN RIGHTS, THE FITNESS

INSTITUTE AND PILATES STUDIO, RICHARD WILLIAMSON AND JULIE WILLIAMSON,
RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of
Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, AND GORSKI, JJ.
(Filed Oct. 2, 2009.)

MOTION NO. (1684/08) CA 08-01307. -- HEARTWOOD FORESTLAND FUND, III, L.P.,
PLAINTIFF-APPELLANT, V CROOKED LAKE PRESERVE, LLC, AND BERNARD J. RYAN,
DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of
Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, FAHEY, PERADOTTO, AND
PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NOS. (22.1-22.2/09) CA 07-02552. -- DAVID P. RICKICKI AND PATRICIA
RICKICKI, PLAINTIFFS-APPELLANTS, V BORDEN CHEMICAL, DIVISION OF BORDEN,
INC., ET AL., DEFENDANTS, UNIMIN CORPORATION AND U.S. SILICA COMPANY,
DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) MICHAEL C. CROWLEY AND SHARON M.
CROWLEY, PLAINTIFFS-APPELLANTS, V C-E MINERALS, INC., ET AL., DEFENDANTS,
NYCO MINERALS COMPANY, UNIMIN CORPORATION, U.S. SILICA COMPANY, MEYERS
CHEMICALS, MALVERN MINERALS COMPANY, FERRO CORPORATION, CHARLES B. CHRYSTAL
CO., INC., AND UNIMIN SPECIALTY MINERALS, INC., DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.) (APPEAL NO. 1.) CA 07-01668. -- DAVID P. RICKICKI AND
PATRICIA RICKICKI, PLAINTIFFS-APPELLANTS, V BORDEN CHEMICAL, DIVISION OF
BORDEN, INC., ET AL., DEFENDANTS, UNIMIN CORPORATION AND U.S. SILICA
COMPANY, DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) MICHAEL C. CROWLEY AND
SHARON M. CROWLEY, PLAINTIFFS-APPELLANTS, V C-E MINERALS, INC., ET AL.,
DEFENDANTS, NYCO MINERALS COMPANY, UNIMIN CORPORATION, U.S. SILICA COMPANY,
MEYERS CHEMICALS, MALVERN MINERALS COMPANY, FERRO CORPORATION, CHARLES B.

CHRYSTAL CO., INC., AND UNIMIN SPECIALTY MINERALS, INC.,

DEFENDANTS-RESPONDENTS. (ACTION NO. 2.) (APPEAL NO. 2.) -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, CENTRA, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (322/09) CA 08-00492. -- IN THE MATTER OF ROBERT P. MEEGAN, JR., INDIVIDUALLY AND AS PRESIDENT OF BUFFALO POLICE BENEVOLENT ASSOCIATION, AND BUFFALO POLICE BENEVOLENT ASSOCIATION, PETITIONERS-RESPONDENTS-APPELLANTS, V BYRON W. BROWN, MAYOR OF CITY OF BUFFALO, CITY OF BUFFALO AND BUFFALO FISCAL STABILITY AUTHORITY, RESPONDENTS-APPELLANTS-RESPONDENTS.

(PROCEEDING NO. 1.) IN THE MATTER OF JOSEPH E. FOLEY, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., LOCAL 282, IAFF, AFL-CIO-CLC, AND BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., LOCAL 282, IAFF, AFL-CIO-CLC, PETITIONERS-RESPONDENTS, V BYRON W. BROWN, MAYOR OF CITY OF BUFFALO, CITY OF BUFFALO AND BUFFALO FISCAL STABILITY AUTHORITY, RESPONDENTS-APPELLANTS. (PROCEEDING NO. 2.) BUFFALO TEACHERS FEDERATION, INC., NYSUT, BUFFALO EDUCATIONAL SUPPORT TEAM, NYSUT, TRANSPORTATION AIDES OF BUFFALO, NYSUT, AFSCME LOCAL 264, AND PROFESSIONAL, CLERICAL AND TECHNICAL EMPLOYEES ASSOCIATION, PLAINTIFFS-RESPONDENTS, V BUFFALO BOARD OF EDUCATION FOR CITY SCHOOL DISTRICT OF CITY OF BUFFALO AND BUFFALO FISCAL STABILITY AUTHORITY, DEFENDANTS-APPELLANTS. (ACTION NO. 1.) -- Motions for leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., CENTRA, CARNI, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (392/09) KA 07-00821. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V HENRY SCOTT, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (393/09) KA 07-00913. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HENRY SCOTT, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (408/09) CA 08-01175. -- INNOVATIVE TRANSMISSION & ENGINE COMPANY, LLC, AND D.R. WATSON HOLDINGS, LLC, PLAINTIFFS-APPELLANTS, V RICHARD S. MASSARO, JR., RICHARD S. MASSARO, SR., JAMES RAIA, A.P. BERSOHN AND CO., LLC, CPAS, RAIA, BREDEFELD & ASSOCIATES, P.C., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (435/09) CA 08-01418. -- FIRST BAPTIST CHURCH OF OLEAN, ALSO KNOWN AS FIRST BAPTIST CHURCH, PLAINTIFF-RESPONDENT, V JOHN S. GREY, JENNIFER L. GREY, DEFENDANTS-RESPONDENTS, AMERICAN STATES INSURANCE COMPANY, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PERADOTTO, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (478/09) CA 08-02152. -- CATHERINE BARNES AND SCOTT BARNES, PLAINTIFFS-RESPONDENTS, V DEAN E. FIX, DAVID S. BRODERICK, AS ADMINISTRATOR

OF THE ESTATE OF HARRISON W. CALEB, JR., DECEASED, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, CARNI, GREEN, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (498/09) CA 08-01936. -- BRIAN PETERS, PLAINTIFF-APPELLANT, V THE KISSLING INTERESTS, INC., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (519/09) KA 06-03542. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SCOTT R. MACDONALD, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (528/09) CA 08-01230. -- CHARLES SCAPARO AND DARLENE SCAPARO, PLAINTIFFS-APPELLANTS-RESPONDENTS, V VILLAGE OF ILION, ET AL., DEFENDANTS, HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANT-RESPONDENT, AND OUR LADY QUEEN OF APOSTLES CHURCH OF ST. MARY OF MOUNT CARMEL/S.S. PETER AND PAUL, DEFENDANT-RESPONDENT-APPELLANT. (ACTION NO. 1.) ANTHONY YERO AND CYNTHIA YERO, PLAINTIFFS-APPELLANTS-RESPONDENTS, V VILLAGE OF ILION, ET AL., DEFENDANTS, HERKIMER COUNTY INDUSTRIAL DEVELOPMENT AGENCY, DEFENDANT-RESPONDENT, AND OUR LADY QUEEN OF APOSTLES CHURCH OF ST. MARY OF MOUNT CARMEL/S.S. PETER AND PAUL, DEFENDANT-RESPONDENT-APPELLANT. (ACTION NO. 2.) -- Motion for reargument denied; motion for leave to appeal to the

Court of Appeals granted. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (558/09) CA 08-01565. -- MICHAEL J. SCARBOROUGH, JR., AS ADMINISTRATOR OF THE ESTATE OF MICHAEL J. SCARBOROUGH, SR., DECEASED, PLAINTIFF-RESPONDENT-APPELLANT, V NAPOLI, KAISER & BERN, LLP, JEFFREY R. GUZMAN, STEVEN KRENTSEL, DEFENDANTS-APPELLANTS-RESPONDENTS, RANDOLPH D. JANIS, MELINDA RUTH ALEXIS AND WILSON, ELSEY, MOSKOWITZ, EDELMAN & DICKER LLP, AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF BRADLEY C. ABBOTT, DECEASED, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NOS. (608-609/09) CA 08-01700. -- VILLAGE OF ILION, VILLAGE OF HERKIMER, VILLAGE OF FRANKFORT, AND TOWN OF FRANKFORT, AS MUNICIPAL CORPORATIONS AND ON BEHALF OF THEIR CONSTITUENT TAXPAYERS, PLAINTIFFS-APPELLANTS, V COUNTY OF HERKIMER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE HERKIMER COUNTY SELF-INSURANCE PLAN, VILLAGE OF DOLGEVILLE, VILLAGE OF MIDDLEVILLE, VILLAGE OF MOHAWK, VILLAGE OF WEST WINFIELD, TOWN OF COLUMBIA, TOWN OF DANUBE, TOWN OF GERMAN FLATS, TOWN OF HERKIMER, TOWN OF LITCHFIELD, TOWN OF LITTLE FALLS, TOWN OF MANHEIM, TOWN OF NEWPORT, TOWN OF STARK, TOWN OF WARREN, TOWN OF WINFIELD, AND CITY OF LITTLE FALLS, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) CA 08-02120. -- VILLAGE OF ILION, VILLAGE OF HERKIMER, VILLAGE OF FRANKFORT, AND TOWN OF FRANKFORT, AS MUNICIPAL CORPORATIONS AND ON BEHALF OF THEIR CONSTITUENT TAXPAYERS, PLAINTIFFS-APPELLANTS, V COUNTY OF HERKIMER, INDIVIDUALLY AND AS

ADMINISTRATOR OF THE HERKIMER COUNTY SELF-INSURANCE PLAN,
DEFENDANT-RESPONDENT, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for
reargument or clarification denied. PRESENT: HURLBUTT, J.P., CENTRA,
PERADOTTO, GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (612/09) CA 08-01913. -- IN THE MATTER OF LOCKPORT SMART GROWTH,
INC., DOROTHY STOCKTON, THOMAS WALKER, JOSEPH P. STUART, JR., JAMES EMMERT,
JOAN A. GRIGG, AND JOANNE WOODSIDE, PETITIONERS-APPELLANTS, V TOWN OF
LOCKPORT, TOWN OF LOCKPORT PLANNING BOARD, RICHARD FORSEY, ROBERT
BALCERZAK, MORRIS WINGARD, DAVID KINYON, WALTER THORMAN, RODNEY CONRAD,
WILLIAM FEW, AND ROBERT LANGDON, IN THEIR CAPACITIES AS MEMBERS OF TOWN OF
LOCKPORT PLANNING BOARD, WAL-MART STORES, INC., WAL-MART REAL ESTATE
BUSINESS TRUST, AND LOCKPORT L.L.C., RESPONDENTS-RESPONDENTS. (PROCEEDING
NO. 1.) IN THE MATTER OF LOCKPORT SMART GROWTH, INC., JOAN A. GRIGG, AND
JAMES EMMERT, PETITIONERS-APPELLANTS, V TOWN OF LOCKPORT ZONING BOARD OF
APPEALS, EUGENE NENNIS, IN HIS OFFICIAL CAPACITY AS TOWN OF LOCKPORT
BUILDING INSPECTOR, WAL-MART STORES, INC., LOCKPORT L.L.C., AND WAL-MART
REAL ESTATE BUSINESS TRUST, RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 2.)
-- Motion for reargument or leave to appeal to the Court of Appeals denied.
PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ. (Filed
Oct. 2, 2009.)

MOTION NOS. (614-615/09) CA 08-01829. -- PAUL THOMAS ZULAWSKI, JR.,
PLAINTIFF-APPELLANT, V RICHARD TAYLOR, PATRICIA HARTNER, DONALD G. POWELL,
ESQ., ZDARSKY, SAWICKI & AGOSTINELLI, DEFENDANTS-RESPONDENTS, ET AL.,
DEFENDANT. (APPEAL NO. 1.) CA 08-01929. -- PAUL THOMAS ZULAWSKI, JR.,

PLAINTIFF-APPELLANT, V RICHARD TAYLOR, PATRICIA HARTNER, DONALD G. POWELL,
ESQ., ZDARSKY, SAWICKI & AGOSTINELLI, DEFENDANTS-RESPONDENTS, ET AL.,
DEFENDANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to
the Court of Appeals denied. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO,
GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (615.1/09) CA 08-02582. -- CAYUGA INDIAN NATION OF NEW YORK,
PLAINTIFF-APPELLANT, V CAYUGA COUNTY SHERIFF DAVID S. GOULD AND SENECA
COUNTY SHERIFF JACK S. STENBERG, DEFENDANTS-RESPONDENTS, ET AL.,
DEFENDANTS. -- Motion for stay denied; motion for leave to appeal to the
Court of Appeals granted. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO,
GREEN, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (630/09) CA 08-02453. -- LARRY C. HOLLY AND SANDRA HOLLY,
PLAINTIFFS-RESPONDENTS, V COUNTY OF CHAUTAUQUA AND E.E. AUSTIN & SON, INC.,
DEFENDANTS-APPELLANTS. -- Motion for reargument denied; motion for leave to
appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., SMITH,
FAHEY, CARNI, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (647/09) CA 08-01855. -- IN THE MATTER OF DESTINY USA
DEVELOPMENT, LLC AND PYRAMID COMPANY OF ONONDAGA, PETITIONERS-RESPONDENTS,
V NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND ALEXANDER B.
GRANNIS, AS COMMISSIONER OF NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the
Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE,
AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (651/09) CA 07-02219. -- EUGENE MARGERUM, ANTHONY HYNES, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATTHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, AND DAVID DENZ, PLAINTIFFS-RESPONDENTS, V CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, AND LEONARD MATARESE, INDIVIDUALLY AND AS COMMISSIONER OF HUMAN RESOURCES FOR CITY OF BUFFALO, DEFENDANTS-APPELLANTS. -- Motion and cross motion to renew denied without prejudice; motion and cross motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, CENTRA, PINE, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (665/09) CA 08-02502. -- RUDOLPH V. HEROD AND ARLENE HEROD, PLAINTIFFS-RESPONDENTS, V MICHAEL C. MELE, COUNTY OF ORLEANS, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (717/09) TP 08-02230. -- IN THE MATTER OF JULIET A. PADULO, AS VOLUNTARY ADMINISTRATOR OF THE ESTATE OF ADA J. ROMEO, DECEASED, PETITIONER, V KELLY REED, COMMISSIONER, MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, RICHARD F. DAINES, M.D., COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, AND MARK LACIVITA, DIRECTOR OF ADMINISTRATION, OFFICE OF ADMINISTRATIVE HEARINGS, RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: MARTOCHE, J.P., SMITH, CENTRA, FAHEY, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (738/09) CA 08-02578. -- IN THE MATTER OF THE APPLICATION OF

FAXTON-ST. LUKE'S HEALTHCARE, INC., PETITIONER-RESPONDENT, PURSUANT TO ARTICLE 81 OF THE MENTAL HYGIENE LAW FOR THE APPOINTMENT OF A GUARDIAN OF THE PERSON AND PROPERTY OF CAESAR A., AN ALLEGED INCAPACITATED PERSON. ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (768/09) TP 08-01893. -- IN THE MATTER OF ORLANDO RIOS, PETITIONER, V NORMAN BEZIO, DIRECTOR, SPECIAL HOUSING UNIT, MIDSTATE CORRECTIONAL FACILITY, RESPONDENT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (826/09) CA 08-01601. -- ANTHONY FOSTER, TERRIL ELLIS AND ARNOLD PENDER, PLAINTIFFS-RESPONDENTS, V DEALMAKER, SLS, LLC, AND MATTHEW J. MCCARGAR, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, CARNI, AND PINE, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (848/09) CA 08-02303. -- JOHN K. SABUNCU AND DEBBIE E. SABUNCU, PLAINTIFFS-APPELLANTS, V THANNEY & ASSOCIATES CPAS, P.C. AND GREGG GENOVESE, C.P.A., DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (859/09) KA 08-01165. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V STANLEY A. BROWN, DEFENDANT-APPELLANT. -- Motion for reargument and leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (870/09) CA 08-00553. -- IN THE MATTER OF DEPUTY JOSEPH D. RAYMOND, SR., PETITIONER-APPELLANT, V KEVIN E. WALSH, SHERIFF, COUNTY OF ONONDAGA, COUNTY OF ONONDAGA AND ONONDAGA COUNTY SHERIFF'S OFFICE, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (887/09) CA 09-00226. -- TRACY L. WILLIAMS, PLAINTIFF-RESPONDENT, V MARTIN JOHNSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (904/09) CA 08-02604. -- RONALD SPANOS AND MARIANNE SPANOS, PLAINTIFFS-RESPONDENTS, V MICHAEL R. FANTO AND MICHAEL FANTO, DEFENDANTS-APPELLANTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN, PINE, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (910/09) CA 08-02200. -- IN THE MATTER OF HARTFORD/NORTH BAILEY HOMEOWNERS ASSOCIATION, BY FRANK S. PASZTOR, ITS PRESIDENT, PETITIONER-APPELLANT, V ZONING BOARD OF APPEALS OF THE TOWN OF AMHERST, WAL-MART STORES, INC. AND BENDERSON DEVELOPMENT CO., INC., RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 1.) IN THE MATTER OF

HARTFORD/NORTH BAILEY HOMEOWNERS ASSOCIATION, BY FRANK S. PASZTOR, ITS
PRESIDENT, PETITIONER-APPELLANT, V PLANNING BOARD OF THE TOWN OF AMHERST,
WAL-MART STORES, INC. AND BENDERSON DEVELOPMENT CO., INC.,
RESPONDENTS-RESPONDENTS. (PROCEEDING NO. 2.) -- Motion for leave to appeal
to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, GREEN,
PINE, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (928/09) KAH 08-00644. -- THE PEOPLE OF THE STATE OF NEW YORK EX
REL. DEXTER WASHINGTON, PETITIONER-APPELLANT, V HAROLD GRAHAM,
SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. --
Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA,
PERADOTTO, AND GREEN, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (964/09) CA 08-00110. -- MICHAEL A. DAVIS, CLAIMANT-APPELLANT, V
STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 106740.) -- Motion for
leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P.,
FAHEY, CARNI, PINE, AND GORSKI, JJ. (Filed Oct. 2, 2009.)

KA 08-00224. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON
P. BEAMAN, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed.
Counsel's motion to be relieved of assignment granted (*see People v
Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Ontario County
Court, Frederick G. Reed, J. - Aggravated Unlicensed Operation of a Motor
Vehicle, 1st Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH,
AND CENTRA, JJ. (Filed Oct. 2, 2009.)

MOTION NO. (83/09) CAF 08-00595. -- IN THE MATTER OF MARIA F. AND EDUARDO

**F. ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;
JAMES F., RESPONDENT-APPELLANT.** -- Motion for leave to appeal to the Court
of Appeals denied. PRESENT: MARTOCHE, J.P., FAHEY, GREEN, AND PINE, JJ.
(Filed Oct. 2, 2009.)

**KA 06-03651. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT,
V WILLIAM KINCHEN, DEFENDANT-APPELLANT.** -- Order unanimously affirmed.
Counsel's motion to be relieved of assignment granted (*see People v
Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Monroe County Court,
Alex R. Renzi, J. - Termination of sentence pursuant to Executive Law §
259-j [3-a]). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND
CENTRA, JJ. (Filed Oct. 2, 2009.)

**KA 07-01129. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMIE A.
KING, DEFENDANT-APPELLANT.** -- Judgment unanimously affirmed. Counsel's
motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d
38 [1979]). (Appeal from Judgment of Supreme Court, Monroe County, Francis
A. Affronti, J. - Robbery, 2nd Degree). PRESENT: SCUDDER, P.J., HURLBUTT,
MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)

**KA 08-01813. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSE
LEBRON, DEFENDANT-APPELLANT.** -- Judgment unanimously affirmed. Counsel's
motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d
38 [1979]). (Appeal from Judgment of Wyoming County Court, Penny M.
Wolfgang, J. - Attempted Promoting Prison Contraband, 1st Degree).
PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed
Oct. 2, 2009.)

KAH 08-01539. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. VICTOR MANTILLA, PETITIONER-APPELLANT, V JAMES T. CONWAY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)

KA 06-01596. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V COREY OLIVER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Monroe County Court, Stephen R. Sirkin, J. - Criminal Sale Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)

KAH 08-01692. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. TIMOTHY THORSEN, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT -- Order unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Order of Supreme Court, Wyoming County, Mark H. Dadd, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)

KA 08-01891. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC P. WILLIAMS, ALSO KNOWN AS PAUL WILLIAMS, DEFENDANT-APPELLANT. -- Judgment

unanimously affirmed. Counsel's motion to be relieved of assignment granted (see *People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Genesee County Court, Robert C. Noonan, J. - Criminal Possession of Controlled Substance, 5th Degree). PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ. (Filed Oct. 2, 2009.)