SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 19, 2011

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. JEROME C. GORSKI

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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CA 10-00367

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

DANIEL C. OAKES AND LISA M. OAKES,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RAJNIKANT PATEL, M.D., SATISH K. MONGIA, M.D.,
AND KALEIDA HEALTH, AS SUCCESSOR IN INTEREST
TO MILLARD FILLMORE HOSPITALS, DOING BUSINESS
AS MILLARD FILLMORE SUBURBAN HOSPITAL,
DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANT-APPELLANT KALEIDA HEALTH, AS SUCCESSOR IN INTEREST TO MILLARD FILLMORE HOSPITALS, DOING BUSINESS AS MILLARD FILLMORE SUBURBAN HOSPITAL.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (GREGORY T. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT SATISH K. MONGIA, M.D.

BROWN & TARANTINO, LLC, BUFFALO (ANN M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT RAJNIKANT PATEL, M.D.

LAW OFFICE OF FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from a judgment of the Supreme Court, Erie County (Timothy J. Drury, J.), entered December 23, 2009 in a medical malpractice action. The judgment awarded plaintiffs money damages upon a jury verdict.

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

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for the failure of defendants to diagnose and treat Daniel C. Oakes (plaintiff) for a sentinel bleed from a cerebral aneurysm. Following the first trial, the jury returned a verdict finding, inter alia, that defendants, Rajnikant Patel, M.D., Satish K. Mongia, M.D., and Kaleida Health, as successor in interest to Millard Fillmore Hospitals, doing business as Millard Fillmore Suburban Hospital (Kaleida), were negligent and also that Kaleida was vicariously liable for the negligence of third-party defendant Dent Neurologic Institute (Dent). The jury apportioned fault among defendants and awarded plaintiffs damages in various amounts

including, insofar as relevant to this appeal, $1 million to plaintiff for past pain and suffering and $60,000 to plaintiff wife for past loss of services, as well as future damages covering 18 years in the amount of $1 million for plaintiff's future pain and suffering, $1.8 million for plaintiff's future supportive living expenses and $150,000 for plaintiff wife's future loss of services.

Plaintiffs moved to set aside the verdict on damages only based on, inter alia, the ground that certain elements of the award were inadequate. Supreme Court, inter alia, granted the post-trial motion in part and set aside the verdict with respect to damages for past and future pain and suffering, past and future loss of services and future supportive living expenses, and the court ordered a new trial on those elements of damages unless defendants stipulated to an award of $5 million for past pain and suffering and $1.5 million for past loss of services, as well as an award covering 18 years in the amount of $5 million for future pain and suffering, $2 million for future loss of services and $3.9 million for future supportive living expenses.

Also following the jury verdict, Kaleida moved for, inter alia, leave to amend its answer to the amended complaint to include an affirmative defense of release and an affirmative defense pursuant to General Obligations Law § 15-108. According to Kaleida, plaintiffs each executed and filed a proof of claim in a liquidation proceeding in March 2003 against Kaleida's insurer, PHICO Insurance Company (PHICO), that included a release of claims against any PHICO insured. Kaleida filed its own proof of claim in that proceeding in December 2007 with respect to this action against it and, although the deadline to file proofs of claim in the liquidation proceeding was April 1, 2003, Kaleida averred that it had been advised by PHICO that its proof of claim was timely. Kaleida alleged that it did not receive copies of plaintiffs' proofs of claim until May 2008, after the conclusion of the first trial, and that the proposed amendments to its answer would not prejudice plaintiffs. The court denied the motion.

Defendants subsequently refused to stipulate to the court's increased damages, and a new trial on the issue of those damages was conducted. Following the second trial, the jury returned a verdict awarding plaintiff $5.6 million for past pain and suffering and awarding plaintiff wife $1.5 million for past loss of services and society. The jury also awarded future damages covering 17 years in the amount of $4,720,000 for plaintiff's future custodial care and supportive services, $4 million for plaintiff's future pain and suffering, and $150,000 for plaintiff wife's future loss of household services and $750,000 for her future loss of services and society. Defendants thereafter each moved, inter alia, to set aside the verdict on the ground that the award for past and future pain and suffering, past and future loss of services and society and future custodial home care was excessive. Kaleida and Dr. Mongia also contended that they had been prejudiced when the court erred in admitting certain evidence and precluding other evidence, and when plaintiffs' counsel and the court engaged in inappropriate conduct. The court denied those parts of defendants' respective motions to set aside the verdict, and this appeal ensued.

We conclude that the court properly denied that part of Kaleida's motion for leave to amend its answer to the amended complaint to include an affirmative defense of release and an affirmative defense pursuant to General Obligations Law § 15-108. The proofs of claim executed and filed by plaintiffs in the liquidation proceeding with respect to PHICO contained releases with respect to "any and all claims [that] have been or could be made against [a] PHICO insured based on or arising out of the facts supporting the . . . [p]roof of [c]laim up to the amount of the applicable policy limits and subject to coverage being accepted by the Liquidator . . . ." Further, the notice received by plaintiffs in connection with their proofs of claim states that, "[i]f coverage is avoided by the Liquidator, [the] release[s] become[] null and void." Because Kaleida's liability for the negligence of Dent is included in the claims specified to PHICO and because PHICO's liquidators avoided, or announced that they would avoid, coverage of that portion of the claim, plaintiffs' releases were rendered null and void.

We further conclude that defendants were not denied a fair trial based on the alleged inappropriate conduct of plaintiffs' counsel or the court. Any improper remarks by plaintiffs' counsel did not deny defendants a fair trial because " 'they did not constitute a pattern of behavior designed to divert the attention of the jurors from the issues at hand' " (*Kmiotek v Chaba*, 60 AD3d 1295, 1296). Furthermore, although certain actions and statements of the court may have been somewhat intemperate or ill-advised, we conclude that, "overall[,] the conduct complained of was not so egregious as to have deprived the [defendants] of a fair trial" (*Malaty v North Ark. Wholesale Co.*, 305 AD2d 556; *see Sheinkerman v 3111 Ocean Parkway Assoc.*, 259 AD2d 480, *lv dismissed in part and denied in part* 93 NY2d 956).

We further conclude that the jury's verdict on liability in the first trial is not against the weight of the evidence (*see generally Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499), and that the various elements of damages awarded in the second trial do not deviate materially from what would be reasonable compensation (*see* CPLR 5501 [c]).

Finally, we note our agreement with plaintiffs that the court properly granted those parts of their post-trial motion in the first trial to set aside certain elements of the award of damages as inadequate. With respect to the issue of the additur as raised by the dissent (Peradotto, J.), however, we conclude that, because defendants did not challenge the court's additur before, during or after the second trial, and did not raise that issue on appeal, no such issue is properly before us. Indeed, the only contentions raised by defendants on appeal in the "argument" sections of their briefs regarding damages are that the court erred in granting in part plaintiffs' motion to set aside the jury verdict in the first trial on the ground that certain portions of the damages award were inadequate, without addressing the amount of the court's additur with respect thereto, and that the court erred in denying those parts of their motions seeking to set aside the second verdict on the ground that certain portions of the damages award were excessive. We cannot conclude that, by challenging the

court's order setting aside the first verdict in part, defendants thereby implicitly challenged the amount of the court's additur (*see generally Gerbino v Tinseltown USA*, 13 AD3d 1068, 1072). Nor can we agree with our dissenting colleague that references to the amounts of the court's additur in the factual recitation of defendants' briefs on appeal constitute challenges to the court's additur. In any event, even assuming, arguendo, that such challenges are raised in the briefs, they are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We have considered defendants' remaining contentions with respect to both trials and conclude that they are without merit.

LINDLEY, SCONIERS and MARTOCHE, JJ., concur; SMITH, J.P., dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part, because I cannot agree with the majority that specified elements of the award of damages following the second trial are proper. Initially, I agree with the majority that the issue of the additur, which Justice Peradotto in her dissent asserts must be addressed before we review the excessiveness of the second verdict, is not before us. I also agree with the remainder of the majority's determination, including that, contrary to defendants' contention, Supreme Court properly granted those parts of plaintiffs' post-trial motion to set aside the verdict from the first trial with respect to damages for past and future pain and suffering, past and future loss of services and future supportive living expenses on the ground that the award for those elements of damages "deviates materially from what would be reasonable compensation" (CPLR 5501 [c]).

I agree with defendants, however, that the award after the second trial with respect to damages for past and future pain and suffering, past and future loss of services and future custodial care and supportive services also "deviates materially from what would be reasonable compensation" (*id.*). Although plaintiff Daniel C. Oakes sustained severe and life-changing injuries, in my view, an award of $2 million for past pain and suffering, $3.5 million for future pain and suffering, $200,000 for past loss of services, $300,000 for future loss of services, and $3 million for future custodial care and supportive services, with all future awards covering 17 years, is the maximum amount that the jury could have awarded as a matter of law based on the evidence at the second trial (*see generally Angamarca v New York City Partnership Hous. Dev. Fund, Inc.*, ___ AD3d ___ [June 21, 2011]; *Coque v Wildflower Estates Devs., Inc.*, 58 AD3d 44, 56; *Paek v City of New York*, 28 AD3d 207, 208, *lv denied* 8 NY3d 805; *Sawtelle v Southside Hosp.*, 305 AD2d 659, 660). Therefore, I would modify the judgment by vacating the award with respect to damages for past and future pain and suffering, past and future loss of services and future custodial care and supportive services and grant a new trial on those issues unless plaintiffs stipulate to a reduction of the verdict with respect to those elements of damages as indicated.

PERADOTTO, J., dissents and votes to modify in accordance with the following Memorandum: I respectfully dissent because, in my view, the majority's decision improperly fails to address the issue of whether

the court's additur after setting aside the first verdict was appropriate. In my view, any issues concerning the excessiveness of the second verdict should not be addressed unless and until all issues relative to the first verdict are resolved.

As the majority states, plaintiffs commenced this medical malpractice action seeking damages for the failure of defendants to diagnose and treat Daniel C. Oakes (plaintiff) for a cerebral aneurysm. Following the first trial, the jury found that defendants Rajnikant Patel, M.D., Satish K. Mongia, M.D. and Kaleida Health, as successor in interest to Millard Fillmore Hospitals, doing business as Millard Fillmore Suburban Hospital (Kaleida), were negligent and awarded damages in the amount of $5,123,500. As relevant to this appeal, the jury awarded plaintiff $1 million for past pain and suffering, $1 million for future pain and suffering, and $1.8 million for future supportive living expenses, and awarded plaintiff wife $60,000 for past loss of services and $150,000 for future loss of services. The future damages were awarded to cover a period of 18 years. Plaintiffs moved to set aside the verdict on damages only based on, inter alia, the ground that certain parts of the award were inadequate. The court determined that the award for past and future pain and suffering, past and future loss of services and future supportive living expenses deviated materially from what would be reasonable compensation. The court therefore set aside the jury verdict with respect to those categories of damages and ordered a new trial unless defendants stipulated to increase the award to $5 million for past pain and suffering, $5 million for future pain and suffering, $1.5 million for past loss of services, $2 million for future loss of services, and $3.9 million for future supportive living costs, with all future damages awarded to cover a period of 18 years. With that additur, the verdict would have been increased from $5,123,500 to $18,513,500. Defendants rejected the additur and proceeded to a second trial.

On appeal, defendants contend that, inter alia, the court erred in setting aside certain parts of the verdict from the first trial. The order setting aside the first verdict and granting a new trial unless defendants stipulated to an additur of $13.4 million is, of course, brought up for review on this appeal from the judgment entered after the second trial (*see* CPLR 5501 [a] [1]). The majority, however, does not address all of defendants' contentions with respect to the verdict after the first trial. Instead, the majority proceeds directly to the claims concerning the verdict after the second trial, concluding that the damages awarded in the second trial are not excessive. That is error. Rather, we must address the propriety of the court's order setting aside parts of the verdict following the first trial and the appropriateness of the court's additur before addressing any issues raised with respect to the second trial (*see generally Sherry v North Colonie Cent. School Dist.*, 39 AD3d 986; *Zeigler v Neely*, 220 AD2d 345; *Libman v McKnight*, 204 AD2d 856, *lv denied* 84 NY2d 812).

In my view, the court properly set aside the award for past and future pain and suffering, past and future loss of services and future

supportive living expenses inasmuch as the award with respect to those categories of damages deviated materially from what would be reasonable compensation (*see* CPLR 4404 [a]). I conclude, however, that the court's additur with respect to the noneconomic damages was excessive (*see generally Perlin v King*, 36 AD3d 495; *Rivera v Lincoln Ctr. for Performing Arts, Inc.*, 16 AD3d 274; *Carlos v W.H.P. 19*, 301 AD2d 423), inasmuch as the amounts set by the court did not represent "the minimum amount[s] that the jury could have found as a matter of law based on the evidence at trial" (*Camacho v Rochester City School Dist.*, 20 AD3d 916; *see Kmiotek v Chaba*, 60 AD3d 1295, 1297; *Orlikowski v Cornerstone Community Fed. Credit Union*, 55 AD3d 1245, 1247, *lv dismissed* 11 NY3d 915; *see generally* Siegel, NY Prac § 407, at 689 [4th ed]). That is the applicable standard because "the amount of damages to be awarded is primarily a question of fact [and] . . . considerable deference should be accorded to the interpretation of the evidence by the jury" (*Marshall v Lomedico*, 292 AD2d 669, 670 [internal quotation marks omitted]). Further, the successful litigants are "entitled to the benefits of a favorable jury verdict" (*Keyser v KB Toys, Inc.*, 82 AD3d 713, 714; *see McDonald v 450 W. Side Partners, LLC*, 70 AD3d 490, 491-492). In the context of plaintiffs' motion to set aside the damages award as inadequate, it is the defendants who are entitled to that benefit. In my view, $5 million each for past and future pain and suffering and $3.5 million total for past and future loss of services are simply not "the minimum amounts the jury could have awarded as a matter of law based on the evidence at trial" (*Kmiotek*, 60 AD3d at 1297; *see generally Doviak v Lowe's Home Ctrs., Inc.*, 63 AD3d 1348). Defendants therefore were deprived of the opportunity to stipulate to an appropriate additur with respect to the award for past and future pain and suffering and past and future loss of services, and that error is not cured by a second trial on those categories of damages. Indeed, this is not a case in which defendants made the strategic decision not to accept an appropriate additur and to proceed at their peril. Thus, defendants should be afforded the opportunity to stipulate to a proper additur in the context of this appeal (*see generally Perlin*, 36 AD3d at 495; *Rivera*, 16 AD3d 274; *Carlos*, 301 AD2d 423). I would therefore modify the judgment accordingly.

The majority concludes that the additur issue is not properly before us because defendants "did not challenge the court's additur before, during or after the second trial, and did not raise that issue on appeal." I disagree. In opposition to plaintiffs' motion to set aside the verdict on damages only after the first trial, defendants contended that the verdict should stand because the award did not deviate materially from what would be reasonable compensation. That contention necessarily encompasses the argument that an additur in *any* amount would be inappropriate. When the court granted plaintiffs' motion in part, set aside the verdict with respect to certain elements of damages and ordered a new trial on those elements unless defendants stipulated to an additur of more than $13 million, defendants rejected the proposed additur and proceeded to a second trial. I cannot agree with the majority that, in addition to opposing plaintiffs' motion and rejecting the proposed additur, defendants were somehow required to further "challenge" the amount of the additur in order to preserve the

issue for our review. Throughout their briefs on appeal, defendants assert not only that the court erred in setting aside the verdict after the first trial, but they also contend that the court's additur was excessive. Kaleida, for example, states in its brief that it "declined to stipulate to the inordinate additur," noting that the court "ordered a five-fold increase in [plaintiff]'s award for pain and suffering, more than doubled [plaintiff]'s award for supportive living expenses, and increased [plaintiff wife]'s award for loss of consortium by a factor of more than 15." Dr. Mongia similarly notes in his brief that "[t]he trial court's additur was more than four times the amount awarded by the jury as to the particular [elements] of damage[s] it felt to be inadequate." I thus conclude that the issue whether the additur was excessive is properly preserved for our review.

I take no position with respect to the majority's determination that the various elements of damages awarded in the second trial do not deviate materially from what would be reasonable compensation because, in my view, that issue should not be reached until all issues with respect to the first trial have been resolved. I also take no position with respect to defendants' contention that the court erred in precluding the admission of evidence relative to medical causation in the second trial, a contention that the majority does not address.

Entered: August 19, 2011 Patricia L. Morgan
Clerk of the Court

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

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KA 10-01441

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAFAEL WALLACE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (David D. Egan, J.), entered May 20, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 1993 conviction of criminal sale of a controlled substance in the third degree, criminal possession 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 order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: On April 2, 1993 defendant was convicted upon a jury verdict of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). He was sentenced as a second felony offender to an indeterminate term of imprisonment of 10 to 20 years. Defendant was thereafter released on parole, his parole was revoked based upon a violation and he was reincarcerated. On March 19, 2010, while he was incarcerated, defendant applied for resentencing pursuant to CPL 440.46.

Supreme Court erred in denying defendant's application on the ground that defendant was ineligible to apply for resentencing because he was incarcerated at that time based on a parole violation. "[P]risoners who have been paroled, and then reincarcerated for violating their parole, are not for that reason barred from seeking relief under [CPL 440.46]" (*People v Paulin*, ___ NY3d ___, ___ [June 28, 2011]). The court further erred in denying the application on the ground that defendant's prior conviction of burglary in the second degree (Penal Law § 140.25), a class C violent felony offense committed on August 18, 1983, rendered him ineligible for resentencing. Contrary to the conclusion of the court, that offense

does not fall within the definition of an "exclusion offense" (CPL 440.46 [5]), e.g., a violent felony offense for which defendant "was previously convicted within the preceding ten years" (CPL 440.46 [5] [a]). "The phrase 'within the preceding ten years' in CPL 440.46 (5) does not refer to the period between the previous felon[y] and the present felon[ies] but, rather, it refers to the 10-year period preceding the date of filing of the application for resentencing" (*People v Reeb*, 82 AD3d 1620, 1621; *see People v Hill*, 82 AD3d 77, 79-80).

We therefore reverse the order and remit the matter to Supreme Court for further proceedings on defendant's application for resentencing pursuant to CPL 440.46.

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 10-02511

PRESENT: SCUDDER, P.J., FAHEY, CARNI, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIAN JENKINS, DEFENDANT-APPELLANT.

LINDA GEHRON, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), entered August 17, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 2005 conviction of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following Memorandum: Defendant appeals from an order denying his application for resentencing under the 2009 Drug Law Reform Act (CPL 440.46). We agree with defendant that Supreme Court erred in determining that he was ineligible for resentencing because he had previously been released on parole and at the time of his application was reincarcerated for violating his parole (*see People v Paulin*, ___ NY3d ___ [June 28, 2011]). Further, because defendant was incarcerated at the time of his application, the fact that he was subsequently re-released on parole does not render his application moot (*see People v Santiago*, ___ NY3d ___ [June 28, 2011]). We therefore reverse the order and remit the matter to Supreme Court for further proceedings on defendant's application for resentencing pursuant to CPL 440.46.

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 10-01826

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. GATEWOOD, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (ROMOLO CANZANO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered May 6, 2010 pursuant to the 2009 Drug Law Reform Act. The order denied defendant's application to be resentenced upon defendant's 1998 conviction of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46, the 2009 Drug Law Reform Act (DLRA-3). Although defendant is eligible to apply for resentencing under DLRA-3 despite the fact that he had been released from incarceration and was thereafter reincarcerated for violating the conditions of his parole (*see People v Paulin*, ___ NY3d ___ [June 28, 2011]; *People v Wallace*, ___ AD3d ___ [Aug. 19, 2011]), we nevertheless conclude that County Court did not abuse its discretion in determining that substantial justice required denial of his application (*see People v Pipkin*, 77 AD3d 770, *lv denied* 15 NY3d 955). We reject defendant's further contention that the court erred in receiving the limited testimony of the District Attorney regarding his personal knowledge of defendant's criminal history (*see generally* CPL 440.46 [3]; L 2004, ch 738, § 23).

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

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KA 10-00418

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL MYERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

NATHANIEL MYERS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 16, 2010. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and criminal possession of a weapon in the third 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 bench trial of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting him following the same bench trial of criminal contempt in the second degree (§ 215.50 [3]). Defendant failed to preserve for our review his contention in appeal No. 1 that the evidence is legally insufficient to establish that the victim, his ex-wife, sustained a physical injury to support the conviction of assault (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. A person is guilty of assault in the second degree when, "[w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person . . . by means of a deadly weapon or dangerous instrument" (§ 120.05 [2]). Physical injury is defined as "impairment of physical condition or substantial pain" (§ 10.00 [9]). Here, the evidence presented at trial established that defendant struck the victim in the head with a glass liquor bottle, knocking her to the ground. The victim was bleeding from the wound and was taken to the hospital, where she received pain medication, a hematoma on her head was drained, and she received stitches. The victim described the pain after it occurred as "more

than ten" on a scale of 1 to 10. She was prescribed a narcotic drug for pain relief, and she testified that she continued to have pain in the days that followed. She returned to the hospital five more times for further treatment of her wound, and the wound has left a scar. 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 trier of fact to find beyond a reasonable doubt that the victim sustained a physical injury (*see People v Rojas*, 61 NY2d 726; *People v Krotoszynski*, 43 AD3d 450, 452-453, *lv denied* 9 NY3d 962; *People v Holmes*, 9 AD3d 689, 690-691, *lv denied* 3 NY3d 675).

Also with respect to appeal No. 1, viewing the evidence in light of the elements of the crimes of assault in the second degree and criminal possession of a weapon in the third degree in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to those crimes (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the testimony of the two main prosecution witnesses "was not incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925; *see People v Thomas*, 272 AD2d 892, 893, *lv denied* 95 NY2d 858).

Defendant further contends with respect to appeal Nos. 1 and 2 that County Court erred in admitting in evidence three letters allegedly written by defendant to the victim and a recorded telephone conversation between defendant and the victim. We reject that contention. With respect to the letters, "[c]ircumstantial evidence may satisfy the requirement that a writing be authenticated before it may be introduced" (*People v Murray*, 122 AD2d 81, 82, *lv denied* 68 NY2d 916; *see People v Manganaro*, 218 NY 9, 13; *Thomas*, 272 AD2d at 893). Although the victim testified that the letters were not in defendant's handwriting, the People established a sufficient foundation to admit the letters in evidence (*see Thomas*, 272 AD2d at 893). "The letters refer to the crime [of assault] and the circumstances of the prosecution in terms that justify the inference that defendant wrote them" (*id.*; *see People v Bryant*, 12 AD3d 1077, 1079, *lv denied* 4 NY3d 761). In addition, the victim testified that she knew that defendant was the author of the letters based on certain information in the letters, including the nicknames of both the victim and defendant (*see Bryant*, 12 AD3d at 1079; *Murray*, 122 AD2d at 82). With respect to the recorded telephone conversation between defendant and the victim while defendant was incarcerated, the People established a sufficient foundation for its admission in evidence (*see People v Williams*, 55 AD3d 1398, *lv denied* 11 NY3d 901; *see generally People v Ely*, 68 NY2d 520, 527-528). The victim identified the voice on the tape as defendant's voice, and she recalled the conversation. In addition, the deputy in charge of maintaining the recording system at the jail described the procedure for recording telephone conversations and testified that the recording had not been altered in any way. The People thus established " 'that the offered evidence [was] genuine and that there [had] been no tampering with it' "

(*Ely*, 68 NY2d at 527; *see People v Manor*, 38 AD3d 1257, 1258, *lv denied* 9 NY3d 847).

Defendant contends with respect to both appeals that he was denied effective assistance of counsel. We reject that contention. Insofar as he contends that defense counsel was ineffective in failing to seek a missing witness charge, we note that defendant failed to establish the absence of a legitimate explanation for defense counsel's failure to do so (*see People v Benevento*, 91 NY2d 708, 712-713; *People v Maryon*, 20 AD3d 911, 913, *lv denied* 5 NY3d 854). Indeed, "[a]bsent proof that such witness would have provided noncumulative testimony which was favorable to [the prosecution], there was no basis for such a charge" (*People v Thomas*, 299 AD2d 942, 943, *lv denied* 99 NY2d 620 [internal quotation marks omitted]; *see generally People v Savinon*, 100 NY2d 192, 197). Furthermore, contrary to defendant's contention, the fact that defense counsel made a general rather than a specific motion for a trial order of dismissal is of no moment where, as here, a specific motion would have had little or no chance of success (*see People v Hunter*, 70 AD3d 1388, 1389, *lv denied* 15 NY3d 751; *see generally People v Caban*, 5 NY3d 143, 152). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, in his pro se supplemental brief defendant contends with respect to both appeals that the court violated *Crawford v Washington* (541 US 36) when it admitted in evidence at trial various documents and photographs, i.e., medical records of the victim, orders of protection, defendant's prior certificate of conviction, and photographs depicting the victim's injuries. Defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]), and it is without merit in any event. Defendant has not identified any testimonial statements in the victim's medical records that he contends were admitted in violation of *Crawford*. Inasmuch as the victim testified and was available for cross-examination, any statements attributed to her in the medical records would not violate defendant's right of confrontation under the Sixth Amendment to the United States Constitution. In addition, the orders of protection were not testimonial in nature (*see People v Lino*, 65 AD3d 1263, 1264, *lv denied* 13 NY3d 940), and defendant's prior certificate of conviction also was not admitted in violation of *Crawford* (*see People v McCallie*, 37 AD3d 1129, 1130, *lv denied* 8 NY3d 987). Finally, the photographs depicting the victim's injuries are demonstrative rather than testimonial evidence (*see generally Crawford*, 541 US at 51-53).

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

771

KA 10-00419

PRESENT: SMITH, J.P., CENTRA, FAHEY, GORSKI, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL MYERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

NATHANIEL MYERS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 16, 2010. The judgment convicted defendant, upon a nonjury verdict, of criminal contempt in the second degree.

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

Same Memorandum as in *People v Myers* ([appeal No. 1] ___ AD3d ___ [Aug. 19, 2011]).

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

822

KA 09-00154

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAN TABOR, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (MARK C. CURLEY OF COUNSEL), 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. Donalty, J.), rendered July 11, 2008. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts).

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 reversing that part convicting defendant of assault in the second degree under indictment No. I 2008-104 and dismissing that indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the second degree (Penal Law § 120.05 [2]). The charges arose from an incident in 2004, in which defendant struck a male victim and a female victim with a chain, causing physical injury to both victims. In 2004, defendant was indicted on one count of assault in the second degree for the attack upon the female victim (indictment No. I 2004-483), and that matter proceeded to trial in 2005. Both victims testified at trial, and defendant was convicted as charged. We reversed that judgment of conviction on the ground that County Court erred in summarily denying defendant's request to proceed pro se, and we granted defendant a new trial (*People v Tabor*, 48 AD3d 1096).

Prior to commencing the second trial, the People obtained a second indictment in 2008 charging defendant with assault in the second degree with respect to the male victim in the 2004 attack (indictment No. I 2008-104), and the two indictments were joined for trial based on the People's contention that "[b]oth indictments alleged defendant committed the same crime during the same criminal transaction." Defendant now appeals from the judgment of conviction upon the consolidated indictment.

Defendant failed to preserve for our review his contention that the People were barred by CPL 40.40 from prosecuting him in the second trial for the assault upon the male victim because the two assaults were joinable offenses and, when the trial commenced on the first indictment, the People had sufficient evidence to support a conviction of that assault (*see People v Prescott*, 104 AD2d 610, 611, *affd* 66 NY2d 216, *cert denied* 475 US 1150; *see generally People v Biggs*, 1 NY3d 225). We exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that defendant's contention has merit.

"When (a) one of two or more joinable offenses [that are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction] is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the [P]eople of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) . . . a trial of the existing accusatory instrument is commenced . . ., any subsequent prosecution for the uncharged offense is thereby barred" (CPL 40.40 [2]). Thus, CPL 40.40 "prohibits a separate prosecution of joinable offenses that arise out of the same transaction and involve different and distinct elements 'under circumstances wherein no violation of the double jeopardy principle can validly be maintained but the equities nevertheless seem to preclude separate prosecutions' " (*People v Lindsly*, 99 AD2d 99, 101-102, quoting *People v Dean*, 56 AD2d 242, 246, *affd* 45 NY2d 651, *rearg denied* 46 NY2d 940). Here, in their motion to consolidate the two indictments, made after the judgment convicting defendant upon the 2004 indictment was reversed, the People correctly conceded that both assault charges were part of the same criminal transaction. As noted, the male victim also testified at the first trial. "Inasmuch as the [assault] charges were joinable and the People possessed sufficient evidence to sustain those charges at the time of commencement of the prior trial, prosecution of the [assault charge against the male victim] is barred by CPL 40.40" (*People v Cole*, 306 AD2d 558, 560, *lv denied* 100 NY2d 515). We agree with defendant that, "[w]here the evidence against a person is in the prosecutor's hands, he [or she] may not--as a player in a game of chance--deal out indictments one at a time" (*Lindsly*, 99 AD2d at 102). We therefore modify the judgment with respect to indictment No. I 2008-104 accordingly.

We need not address defendant's remaining contention in light of our determination.

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

824

KA 10-01632

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LENNIE D. FRANKLINE, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

LENNIE D. FRANKLINE, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 3, 2009. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree (three counts), predatory sexual assault, criminal sexual act in the first degree (four counts), assault in the second degree, abortion in the second degree and aggravated harassment in the second degree (two counts).

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, inter alia, predatory sexual assault (Penal Law § 130.95 [1] [b]), three counts of kidnapping in the first degree (§ 135.25 [2] [a], [c]), and four counts of criminal sexual act in the first degree (§ 130.50 [1]), defendant contends that the verdict with respect to the kidnapping counts is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that he restrained the victim within the meaning of Penal Law § 135.00 (1). We reject that contention. The victim testified at trial that defendant, her ex-boyfriend, held her against her will in their apartment in excess of two days, and that he repeatedly hit and kicked her while her arms and legs were bound by wire. The victim further testified that defendant then poured gasoline on her and threatened to set her on fire if she did not have anal intercourse with him. She fled from the apartment to safety more than 48 hours later, when defendant left the apartment to obtain food. Although there were periods during which the victim was not physically confined in the apartment, the jury could reasonably have determined that she was effectively restrained from leaving due to her fear of defendant and

his threats of using deadly physical force against her and others if she attempted to leave (*see* § 135.00 [1], [2]; *see generally People v Lotmore*, 276 AD2d 901, 902, *lv denied* 96 NY2d 736). We note that the victim's testimony was amply corroborated by other evidence, including photographs of her various injuries, and that the jury was entitled to credit her testimony over that of defendant, wherein he maintained that he did not restrain the victim in any way and that she consented to the sexual activity (*see People v Brink*, 78 AD3d 1483, 1484, *lv denied* 16 NY3d 742, 828). Thus, viewing the evidence in light of the elements of the counts of kidnapping 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 People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that County Court's *Ventimiglia* ruling, which allowed the People in their direct case to present evidence of subsequent crimes committed by defendant against the same victim in Bronx County, effectively deprived him of his Fifth Amendment rights with respect to the subsequent crimes. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]) and, in any event, that contention lacks merit. The court ruled that the People were not allowed to cross-examine defendant concerning those subsequent crimes in Bronx County in the event that he chose to testify (*see generally People v Betts*, 70 NY2d 289, 291; *People v Sandoval*, 34 NY2d 371), and evidence of those crimes was admissible under *People v Molineux* (168 NY 264, 293-294; *cf. People v Mack*, 234 AD2d 565, 566, *lv denied* 89 NY2d 1096). Given the brutal and sadistic nature of the crimes committed by defendant, and his prior criminal record, we conclude that the sentence is not unduly harsh or severe.

In his pro se supplemental brief, defendant contends that the court erred in refusing to suppress evidence obtained by the police from his apartment. According to defendant, the police obtained the evidence during a search of the apartment to which the victim consented, and she lacked actual or apparent authority to consent to the search. We reject that contention. Although the victim was residing at a friend's house at the time of the search, she had previously lived with defendant in the apartment and had paid the rent for the month in which the search occurred. In addition, she retained a key to the apartment and had left clothing there, and the utilities were still in her name. Under the circumstances, the court properly concluded that the victim had apparent authority to consent to the search (*see People v Adams*, 53 NY2d 1, 8-10, *rearg denied* 54 NY2d 832, *cert denied* 454 US 854; *People v Fontaine*, 27 AD3d 1144, 1145, *lv denied* 6 NY3d 847; *United States v Trzaska*, 859 F2d 1118, 1120, *cert denied* 493 US 839; *see generally Illinois v Rodriguez*, 497 US 177, 188-189).

Defendant's further contentions in his pro se supplemental brief concerning the alleged legal insufficiency of the evidence are unpreserved for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Gray*, 86 NY2d 10, 19), and we have reviewed defendant's remaining contentions therein and conclude that

none has merit.

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court

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

850

CAE 11-01615

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF LAURENCE F. ADAMCZYK,
AGGRIEVED CANDIDATE, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RALPH M. MOHR AND DENNIS E. WARD, COMMISSIONERS,
CONSTITUTING THE ERIE COUNTY BOARD OF ELECTIONS,
RESPONDENTS-RESPONDENTS,
AND GREGORY B. OLMA, OBJECTOR,
RESPONDENT-APPELLANT.

MICHAEL KUZMA, BUFFALO, FOR RESPONDENT-APPELLANT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 11, 2011 in a proceeding pursuant to the Election Law. The order granted the petition.

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

Memorandum: Petitioner commenced this proceeding seeking an order validating his designating petitions filed on July 13, 2011, pursuant to which he sought to be placed on the Democratic Party and Independence Party primary ballots as a candidate for district council member from the Fillmore District of the Common Council of the City of Buffalo. The record before us establishes that, as of November 30, 2010, petitioner moved from 232 Crescent Avenue, which is in the Delaware Council District, to 567 Delaware Avenue, which was then in the Ellicott Council District. On or about June 7, 2011, 567 Delaware Avenue was reapportioned into the Fillmore Council District. The 2011 general election is scheduled for November 8, 2011.

Pursuant to section 3-4 of the Charter of the City of Buffalo, a person is eligible for election or appointment to the Common Council as a district council member only if he or she has resided in the district for which he or she is chosen for at least one year immediately preceding the date of his or her election or appointment. Here, objector-respondent Gregory B. Olma challenged petitioner's designating petitions on the ground that petitioner did not satisfy the one-year residency requirement, and petitioner conceded at a

hearing before respondent Commissioners of the Erie County Board of Elections (hereafter, Board) that he had first moved to the present Fillmore District on November 30, 2010. The Board sustained Olma's objections and invalidated the designating petitions, resulting in the commencement of this proceeding by petitioner. In granting the petition, Supreme Court determined that applying the residency requirement to petitioner would violate his constitutional rights and that the Board had exceeded its ministerial authority in invalidating the designating petitions. We agree with Olma that the court erred in granting the petition.

First, we conclude that the residency requirement is supported by a rational basis and is constitutional as applied to petitioner (*see Matter of Rivera v Erie County Bd. of Elections*, 164 AD2d 976, *lv denied* 76 NY2d 705; *see generally Matter of Walsh v Katz*, ___ NY3d ___, ___ [June 2, 2011]). The fact "[t]hat the [common] council districts have been reapportioned this year provides no exemption from the residence requirement" (*Matter of Reid v Richards*, 89 AD2d 939).

Second, while the authority of the Board to determine the validity of designating petitions is indeed strictly ministerial (*see Schwartz v Heffernan*, 304 NY 474, 480; *Matter of Lucariello v Commissioners of Chautauqua County Bd. of Elections*, 148 AD2d 1012, 1013, *lv denied* 73 NY2d 707), we nevertheless agree with Olma that the Board's invalidation of petitioner's designating petitions in this case was a ministerial act because it was based upon petitioner's concession of facts establishing his failure to satisfy the residency requirement as a matter of law (*see generally Matter of Wicksel v Cohen*, 262 NY 446, 449). Further, even assuming, arguendo, that the Board exceeded its authority, we conclude that petitioner failed to show that he satisfied the residency requirement and thus failed to meet his burden of establishing the validity of his designating petitions (*see Matter of Goldstein v Carlsen*, 59 AD2d 642, 643, *affd for the reasons stated* 42 NY2d 993; *Matter of Collins v Heffernan*, 187 Misc 165, 166; *see generally Matter of Schneeberg v New York State Bd. of Elections*, 51 NY2d 814; *Matter of Mansfield v Epstein*, 5 NY2d 70, 74).

Finally, we note in any event that the reapportionment in fact had no effect on petitioner's eligibility to run for the Common Council from his current address. Because his prior residence was in the Delaware District, petitioner would have been ineligible to run for the Common Council from his current address even if it were still in the Ellicott District, because he had not resided there for more than one year preceding the 2011 election.

Entered: August 19, 2011

Patricia L. Morgan
Clerk of the Court