
# *SUPREME COURT OF THE STATE OF NEW YORK*

## *APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

FEBRUARY 11, 2026

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. NANCY E. SMITH

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED FEBRUARY 11, 2026

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| _____ | 448 | KA 24 00153 | PEOPLE V JAMES CURTIN II |
| _____ | 688 | KA 23 01776 | PEOPLE V AARON WELCH |
| _____ | 784 | KA 24 00488 | PEOPLE V DEMETRIUS WILLIAMS |
| _____ | 791 | CA 24 00607 | ROBERT MATTISON V STATE OF NEW YORK THRUWAY AUTHOR |
| _____ | 794 | CA 24 01673 | SHARON E. TURNER V JAMES A. VOROS |
| _____ | 796 | CA 25 00048 | ROBERT MATTISON V STATE OF NEW YORK |
| _____ | 822 | OP 25 00623 | DANIEL STROLLO V ANDRAE EVANS |
| _____ | 825 | KA 19 01303 | PEOPLE V JIMMIE WRIGHT |
| _____ | 859 | CA 24 01872 | DARLENE MILLER V JOHN ROSS MCGRATH, M.D. |
| _____ | 881 | KA 24 00454 | PEOPLE V HUNTER ARMSTRONG |
| _____ | 894 | KA 23 01288 | PEOPLE V BLAINE BRINSON |
| _____ | 895 | KA 23 01884 | PEOPLE V BLAINE BRINSON |
| _____ | 906 | CAF 24 01742 | Mtr of RAGNAR B.-N. |
| _____ | 908 | CA 24 01118 | SHARON WASHER V THE MEMORIAL HOSPITAL OF WILLIAM F |
| _____ | 909 | CA 24 01322 | DEBORAH M. V LEAH KAUFMAN, M.D. |
| _____ | 911 | KA 24 00801 | PEOPLE V STEPHEN E. SWANTON |
| _____ | 912 | KA 22 00913 | PEOPLE V DARIEN GOVAN |
| _____ | 913 | KA 23 01041 | PEOPLE V DARIEN GOVAN |
| _____ | 914 | KA 24 00207 | PEOPLE V DARIEN GOVAN |
| _____ | 916 | KA 23 02008 | PEOPLE V ROBERT A. HAWKEY |
| _____ | 917 | KA 24 00313 | PEOPLE V KENTON J. JONES-WATKINS |
| _____ | 918 | KA 24 01312 | PEOPLE V DIONEDRE B. WYATT |
| _____ | 921 | CAF 24 01503 | JULIE A. VITO V KYLE A. DUGAN |
| _____ | 922 | CAF 24 01504 | JULIE A. VITO V KYLE A. DUGAN |
| _____ | 923 | CA 25 00266 | JOHN H. V STATE OF NEW YORK |

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|---|---|---|---|
| _____ | 927 | CA 24 01875 | JEFFREY HIERRO V DANIEL F. MARTUSCELLO III |
| _____ | 931 | CA 24 01480 | ADRIAN ROGERS V DS RESTORATION & RESIDENTIAL SE RV |
| _____ | 932 | CA 24 01984 | ADRIAN ROGERS V DS RESTORATION & RESIDENTIAL SERVI |
| _____ | 933 | CA 25 00547 | LASHAWNA NUCIOLA V ROCHESTER REGIONAL HEALTH |
| _____ | 943 | KA 22 01867 | PEOPLE V ERIC K. KHAUKA |
| _____ | 944 | CAF 25 00163 | Mtr of ALEJANDRO G.-P. |
| _____ | 945 | CAF 25 00164 | Mtr of NEYMAR G.-P. |
| _____ | 946 | CAF 24 00844 | MATTHEW OLMSTED V DESIREE OLMSTED |
| _____ | 947 | CA 24 01530 | DONNA FINO V MACY'S RETAIL HOLDINGS, INC. |
| _____ | 948 | OP 25 00654 | TOWN OF FREMONT V NEW YORK STATE BOARD ON ELECTRI |
| _____ | 949 | CA 24 01935 | TROY BLACKCHIEF V PATRICK J. PRIM, III |
| _____ | 955 | KA 22 01569 | PEOPLE V JERMAINE BAKER |
| _____ | 959 | KA 24 00423 | PEOPLE V CHET DEWOLF |
| _____ | 965 | TP 25 00703 | ALEXANDER KATES V DANIEL F. MARTUSCELLO, III |
| _____ | 969 | KA 25 00187 | PEOPLE V JOSHUA TAYLOR |
| _____ | 971 | KA 25 00731 | PEOPLE V JACK DAVIES |
| _____ | 976 | CAF 24 01397 | Mtr of AMIYAH C. |
| _____ | 977 | CAF 24 01642 | BRENDA L. HERNANDEZ V JASON P. MCGOWAN |
| _____ | 979 | CA 24 01609 | STACY A. LAMPACK V RICHARD A. ANDREWS |
| _____ | 980 | CA 25 00140 | STACY A. LAMPACK V RICHARD A. ANDREWS |
| _____ | 984 | TP 25 00255 | THOMAS A. MILLER V SEAN C. MAHAR |
| _____ | 986 | KAH 23 01235 | ROBERTO CONCEPCION V AMY TITUS |
| _____ | 987 | CA 24 01798 | FREDERICK DRISCOLL V NY DISTRICT ASSEMBLIES OF GOD |
| _____ | 988 | CA 25 00544 | KYLE K. JAROSZ V SIDELINES SPORTS |
| _____ | 989 | CA 24 01895 | MELBA HICKS V UNITRIN ADVANTAGE INSURANCE COMPANY |
| _____ | 991 | KA 24 01070 | PEOPLE V STEVEN SEARLES |
| _____ | 994 | KA 24 01140 | PEOPLE V ASHTON O. |
| _____ | 998 | CAF 24 01706 | LaLISA CRAIG V ADAM THOMAS, SR. |
| _____ | 999 | CA 25 00643 | FRANCES GREGG V COMMUNITY CARE COMPANIONS, INC. |
| _____ | 1001 | CA 25 00079 | CUBA LAKE COMMITTEE FOR FAIR ASSESS MENTS V TOWN OF CUBA |

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| _____ | 1002 | CA 24 01909 | JOHN BLAIR V CYNTHIA T. DOYLE |
| _____ | 1003 | CA 24 01527 | DARWIN S. PUTNAM V PATSY D. PUTNAM |
| _____ | 1006 | KA 24 01223 | PEOPLE V JERWIE L. SINGLETON |
| _____ | 1007 | KA 23 00679 | PEOPLE V LAWREN GOINS |
| _____ | 1009 | KA 23 02078 | PEOPLE V SCOTT A. MEYER |
| _____ | 1010 | KA 23 01779 | PEOPLE V KEVIN J. WEBER |
| _____ | 1012 | CAF 24 01332 | THOMAS J. COATES, SR. V BRIANNA L. HODGE |
| _____ | 1 | KA 22 01523 | PEOPLE V EDGAR TOLENTINO |
| _____ | 2 | KA 23 01489 | PEOPLE V RYAN J. LAWS |
| _____ | 3 | KA 23 01605 | PEOPLE V RAFAEL MARTINEZ |
| _____ | 8 | CAF 25 00067 | NICHOLAS J. MACRINA V ELLISSA M. MERRITT |
| _____ | 12 | CA 23 01604 | JOSEPH D. BURGDORF V BETSY ROSS REHABILITATION CEN |
| _____ | 13 | CA 25 00955 | PETER C. LOMTEVAS V CITY OF SCHENECTADY |
| _____ | 14 | CA 25 00583 | DEBRA D. SMITH V THOMAS P. AZZARELLA |
| _____ | 19 | KA 24 00906 | PEOPLE V TYLOR J. FELIX |
| _____ | 22 | KA 23 00822 | PEOPLE V SAMIERE WILLIAMS |
| _____ | 24 | KA 24 00658 | PEOPLE V TYLOR J. FELIX |
| _____ | 33 | CA 25 01084 | KIMBERLY ALECKI V TECH PARK OWNER, LLC |
| _____ | 34 | CA 25 00153 | GREENIDGE GENERATION, LLC V NEW YORK STATE DEPART |
| _____ | 37 | CA 24 01765 | NIAGARA METALS, LLC V CITY OF BUFFALO ZONING BOAR |
| _____ | 40 | KA 19 00449 | PEOPLE V RAY JONES, III |
| _____ | 41 | KA 24 00711 | PEOPLE V KENTE BELL |
| _____ | 42 | KA 24 01346 | PEOPLE V CALVIN CAMPBELL |
| _____ | 43 | KA 25 00506 | PEOPLE V JAHMERE A. DAVIS |
| _____ | 45 | KA 22 01435 | PEOPLE V KEITH RODNEY |
| _____ | 46 | KA 22 02025 | PEOPLE V DEVON A. WRIGHT |
| _____ | 47 | KA 23 01090 | PEOPLE V TIMOTHY COBB |
| _____ | 50 | CAF 24 01639 | BRYANA O'BRIEN V JAMIE FRAZZINI |
| _____ | 51 | CAF 25 00532 | ERIE COUNTY ATTORNEY V ZYAIR M. |
| _____ | 52 | CAF 24 00295 | Mtr of DAX S. |

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| _____ | 55 | CA 24 01835 | BRIAN DOWD V JEFFREY KLAY |
| _____ | 57 | CA 25 00282 | DANIELLE DILL, PSY.D. V BRIAN S. |
| _____ | 61 | KA 24 01452 | PEOPLE V LORENZO ROBINSON |
| _____ | 63 | KA 22 00171 | PEOPLE V TAJI HUNT |
| _____ | 65 | KA 23 00330 | PEOPLE V DARRELL HOLLOWAY |
| _____ | 66 | KA 22 01442 | PEOPLE V CRAIG STANFORD |
| _____ | 67 | KA 20 00010 | PEOPLE V ANTHONY BURRIS |
| _____ | 68 | KA 22 00974 | PEOPLE V CHRISTOPHER WALSH |
| _____ | 71 | KA 22 01652 | PEOPLE V JOSHUA RICHARDSON |
| _____ | 72 | CAF 24 01506 | OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES V ASH H. |
| _____ | 73 | CAF 25 00616 | JEFFREY R. HARPER, ESQ. V BRENT M. SNOW |
| _____ | 76 | CA 24 01298 | JAMES R. CAPUTO V NATHAN HOLT |
| _____ | 78 | CA 25 00549 | MINER REALTY AND PROPERTY MANAGEMEN V EDWARD LOCKHART |
| _____ | 80 | CA 25 00831 | KARIM COURGI V CUSHMAN & WAKEFIELD, INC. |
| _____ | 80.1 | CAF 24 01501 | Mtr of NOAH P. |
| _____ | 86 | KA 23 00877 | PEOPLE V JOSEPH T. CASTIGLIONE |
| _____ | 87 | CAF 25 00116 | CHRISTINE VILLANI V RICHARD WENDIG |
| _____ | 99 | TP 25 01227 | MAMADOU BARRY V DANIEL F. MARTUSCELLO, III |
| _____ | 101 | KA 25 00294 | PEOPLE V MICHAEL J. DESINO |
| _____ | 111 | CA 24 01526 | HOYTE'S CONCRETE PRODUCTS, INC. V JOHN DIANGELO |
| _____ | 112 | CA 24 01456 | VICTORIA H. WEINKE V ASBESTOS CORPORATION, LTD. |
| _____ | 113 | CA 24 01815 | MATTINA PROPERTY MANAGEMENT, INC. V GABRIELLE MATTINA-ALFIERI |
| _____ | 120 | KA 24 01359 | PEOPLE V WAYNE J. ELLISON, JR. |
| _____ | 122 | KA 22 01816 | PEOPLE V OZELLEON PRINGLE |
| _____ | 129 | CA 25 00365 | JAMES NIMS, III V JAMES T. RILEY, M.D. |

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

**1**

**KA 22-01523**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND GREENWOOD, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDGAR TOLENTINO, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Stacey Romeo, A.J.), rendered July 18, 2022. The judgment convicted defendant upon a guilty plea of murder 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 murder in the second degree (Penal Law § 125.25 [3]). Defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We agree with defendant that his waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver, however, is "inaccurate and misleading insofar as it purports to impose 'an absolute bar to the taking of a direct appeal' and to deprive defendant of his 'attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal' " (*People v Nesmith*, 235 AD3d 1239, 1239 [4th Dept 2025], *lv denied* 43 NY3d 964 [2025], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Ocasio*, 222 AD3d 1364, 1364-1365 [4th Dept 2023]; *People v Fernandez*, 218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]). Although County Court's oral colloquy remedied the written waiver's mischaracterization of the waiver as an absolute bar to the taking of an appeal, the court's verbal statements did nothing to counter the other inaccuracies set forth in the written appeal waiver, including the purported waiver of all state and federal postconviction challenges (*see People v Mason*, 236 AD3d 1354, 1355 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]; *see also Nesmith*, 235 AD3d at 1240; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]). Contrary to

defendant's contention, however, his sentence is not unduly harsh or severe.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**2**

**KA 23-01489**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND GREENWOOD, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN LAWS, DEFENDANT-APPELLANT.

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BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered August 2, 2023. The judgment convicted defendant upon a plea of guilty 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 upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]).

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). County Court's oral colloquy did not mischaracterize the waiver of the right to appeal as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; *see People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). To the extent that defendant contends that the written waiver form he executed was defective, the oral colloquy, which followed the appropriate model colloquy, "cured th[e] [alleged] defect[s]" (*People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025] [internal quotation marks omitted]; *see People v Tandle*, 238 AD3d 1503, 1504 [4th Dept 2025], *lv denied* 43 NY3d 1059 [2025]; *Williams*, 228 AD3d at 1317).

Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *Tandle*, 238 AD3d at 1504).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**3**

**KA 23-01605**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND GREENWOOD, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAFAEL MARTINEZ, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MICHELLE MAEROV OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered April 4, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance 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 criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Swiderski*, 217 AD3d 1416, 1417 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction and the uniform sentence and commitment form incorrectly state that defendant was sentenced as a second felony offender in County Court, and they must be amended to reflect that he was actually sentenced as a second felony drug offender in Supreme Court (*see People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**8**

**CAF 25-00067**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND GREENWOOD, JJ.

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IN THE MATTER OF NICHOLAS J. MACRINA,
PETITIONER-RESPONDENT-APPELLANT,

V ORDER

ELLISSA M. MERRITT (ALSO KNOWN AS SALM),
RESPONDENT-APPELLANT-RESPONDENT.

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IN THE MATTER OF ELLISSA M. MERRITT (ALSO KNOWN AS SALM),
PETITIONER-APPELLANT-RESPONDENT,

V

NICHOLAS J. MACRINA, RESPONDENT-RESPONDENT-APPELLANT.

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PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT-RESPONDENT AND PETITIONER-APPELLANT-RESPONDENT.

GETNICK LIVINGSTON ATKINSON & PRIORE, LLP, UTICA (THOMAS L. ATKINSON OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT AND RESPONDENT-RESPONDENT-APPELLANT.

SCOTT BIELICKI, CHITTENANGO, ATTORNEY FOR THE CHILD.

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Appeal and cross-appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered November 18, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint legal custody of the subject child with primary physical residence to petitioner-respondent Nicholas J. Macrina.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**12**

**CA 23-01604**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND GREENWOOD, JJ.

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JOSEPH D. BURGDORF, PLAINTIFF-APPELLANT,

V ORDER

BETSY ROSS NURSING AND REHABILITATION CENTER, INC., DOING BUSINESS AS BETSY ROSS NURSING AND REHABILITATION CENTER, YVETTE HULETT, JOEL P. AMIDON, M.D., HELEN NORINE, STEPHANIE HOWLAND, MICHELLE STEPHENS, SECURITY GUARD JANE ROE, MAINTENANCE RICHARD ROE, MAINTENANCE DEBBIE DOE, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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JOSEPH D. BURGDORF, PLAINTIFF-APPELLANT PRO SE.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JOHN P. COGHLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered July 20, 2023. The order and judgment, among other things, denied plaintiff's motion for leave to amend his complaint.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**13**

**CA 25-00955**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND GREENWOOD, JJ.

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PETER C. LOMTEVAS, PLAINTIFF-APPELLANT,

V ORDER

CITY OF SCHENECTADY, MAXINE L. BARASCH, AS CORPORATION COUNSEL, MARYANN ALLI, AS PERSONNEL AND BENEFITS ADMINISTRATOR, ANTHONY FERRARI, AS COMMISSIONER OF FINANCE AND ADMINISTRATION OF CITY OF SCHENECTADY AND GARY R. MCCARTHY, AS MAYOR OF CITY OF SCHENECTADY, DEFENDANTS-RESPONDENTS.

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PETER C. LOMTEVAS, PLAINTIFF-APPELLANT PRO SE.

GIRVIN & FERLAZZO, P.C., ALBANY (THOMAS H. FISHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Schenectady County (Paul E. Davenport, J.), entered October 17, 2024. The order granted the motion of defendants to dismiss the complaint and dismissed the complaint.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**14**

**CA 25-00583**

PRESENT: CURRAN, J.P., MONTOUR, SMITH, AND GREENWOOD, JJ.

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DEBRA D. SMITH, PLAINTIFF-APPELLANT,

V ORDER

THOMAS P. AZZARELLA, DEFENDANT-RESPONDENT.

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DEBRA D. SMITH, PLAINTIFF-APPELLANT PRO SE.

DANIEL J. SPERRAZZA, BUFFALO, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered September 9, 2024. The order, among other things, denied the application of plaintiff for an award of attorney's fees.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**19**

**KA 24-00906**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLOR J. FELIX, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered May 23, 2024. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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, upon his plea of guilty, of grand larceny in the third degree (Penal Law § 155.35 [1]). We reject defendant's contention that the waiver of the right to appeal is invalid. We conclude that, "[a]lthough the written waiver included a misleading heading, the oral colloquy, together with the remainder of the written waiver, 'was sufficient to support a knowing and voluntary waiver under the totality of the circumstances' " (*People v Hopkins*, 221 AD3d 1436, 1436 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]; *see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant's challenge to the severity of his sentence is encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**22**

**KA 23-00822**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMIERE WILLIAMS, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Stacey Romeo, A.J.), rendered July 19, 2022. The judgment convicted defendant upon a plea of guilty of murder in the second degree and criminal possession of a weapon 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 his plea of guilty of one count of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

Contrary to defendant's contention, we conclude that the oral colloquy, together with the written waiver of the right to appeal, " 'was sufficient to support a knowing and voluntary waiver under the totality of the circumstances' " (*People v Jones*, 239 AD3d 1475, 1476 [4th Dept 2025]; *see People v Hannah T.*, 240 AD3d 1260, 1261 [4th Dept 2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Defendant, relying on *People v Sutton* (184 AD3d 236, 244-245 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]), also contends that the waiver is invalid because it was included as part of the plea agreement as offered by County Court and the court failed to sufficiently articulate the reasons for its demand. This Court, however, has not adopted the rule created by the Second Department (*see People v Gaines*, 239 AD3d 1350, 1350 [4th Dept 2025]; *People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). In any event, the court here, unlike the trial court in *Sutton*, "included the appeal waiver as a condition of the plea offer prior to accepting defendant's plea and articulated on the record that the appeal waiver was required in order for defendant to secure the benefit of the sentencing limitation promised by the

court" (*Figueroa*, 230 AD3d at 1583; *see Gaines*, 239 AD3d at 1350). Contrary to defendant's further contention, a waiver of the right to appeal is not unconscionable per se (*see People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *see generally Thomas*, 34 NY3d at 557), nor was it unconscionable for the court to demand a waiver of the right to appeal as a condition of a favorable plea bargain (*see e.g. Gaines*, 239 AD3d at 1350; *Figueroa*, 230 AD3d at 1583).

Defendant's valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Brinkman*, 240 AD3d 1431, 1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]), and we decline to reduce the sentence pursuant to our interest of justice jurisdiction (*cf. Hannah T.*, 240 AD3d at 1262).

Defendant's contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal "only insofar as defendant contends that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney['s] allegedly poor performance" (*People v Richards*, 239 AD3d 1330, 1331 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025] [internal quotation marks omitted]; *see People v Molski*, 179 AD3d 1540, 1540-1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]; *People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). "Where, as here, a defendant contends that [they were] denied the right to effective assistance of counsel guaranteed by both the Federal and New York State Constitutions, we evaluate the claim using the state standard, which affords greater protection than its federal counterpart" (*People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see People v Stultz*, 2 NY3d 277, 282-284 [2004], *rearg denied* 3 NY3d 702 [2004]). Under the state standard, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Kates*, 162 AD3d 1627, 1631 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019]). "In the context of a guilty plea, a defendant has been afforded meaningful representation when [they] receive[ ] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see Kates*, 162 AD3d at 1631; *People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]). Here, defense counsel secured a favorable plea bargain for defendant, and nothing in the record casts doubt on the apparent effectiveness of defense counsel (*see Ford*, 86 NY2d at 404; *People v Smith*, 198 AD3d 1347, 1348 [4th Dept 2021]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**24**

**KA 24-00658**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLOR J. FELIX, DEFENDANT-APPELLANT.

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ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS, BANASIAK LAW OFFICE, PLLC, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (Arthur B. Williams, J.), rendered April 2, 2024. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the second degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of endangering the welfare of a child under count 2 of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal mischief in the second degree (Penal Law § 145.10) and endangering the welfare of a child (§ 260.10 [1]). The conviction arises from an incident during which defendant ran his pickup truck into the back of a pickup truck operated by the complainant. The complainant's six-year-old son was riding as a passenger in the back seat of his truck.

Contrary to defendant's contention, County Court did not err in denying that part of his omnibus motion seeking to dismiss the indictment on statutory speedy trial grounds. "CPL 30.30 requires dismissal of a felony indictment where the People are not ready for trial within six months of the commencement of the criminal action" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]; *see* CPL 30.30 [1] [a]). On a motion to dismiss an indictment on statutory speedy trial grounds (*see* CPL 30.30 [1]; 210.20 [1] [g]), "a defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]). The defendant meets that burden " 'by alleging only that the prosecution failed to declare readiness within the statutorily prescribed time period' " (*People v*

*Goode*, 87 NY2d 1045, 1047 [1996]; *see People v Santos*, 68 NY2d 859, 861 [1986]). Here, although defendant alleged in support of the motion that the People's failure to disclose certain material discoverable under CPL 245.20 rendered their certificate of compliance illusory and, thus, the People should be deemed not ready for trial, defendant failed to allege "the commencement date of the criminal action, that the statutorily prescribed time period was six months, or that an unexcused delay of more than six months had elapsed since the commencement of the action" (*People v Cotto*, 240 AD3d 1311, 1312 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *cf. People v Agee*, 235 AD3d 1247, 1248 [4th Dept 2025]). Defendant thus " 'failed to satisfy his initial burden under CPL 30.30 of alleging that the prosecution [did not] declare readiness within the statutorily prescribed time period' " (*Cotto*, 240 AD3d at 1312-1313).

Defendant's contention that the evidence is legally insufficient to support his conviction of endangering the welfare of a child is not preserved for our review inasmuch as defendant's motion for a trial order of dismissal was not "specifically directed at th[e] ground[ ]" now raised on appeal, i.e., that there is no evidence that defendant was aware that the child was in the complainant's vehicle (*People v Moore*, 232 AD3d 1299, 1300 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of th[at] crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence" (*Moore*, 232 AD3d at 1300 [internal quotation marks omitted]).

A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Where an acquittal would not have been unreasonable, we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). Here, we conclude that an acquittal would not have been unreasonable with respect to the endangering the welfare of the child count. Furthermore, viewing the evidence in light of the elements of that crime as charged to the jury (*see id.* at 349), we conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt of endangering the welfare of a child, and we therefore modify the judgment accordingly. There was no evidence presented at the trial from which the jury could reasonably infer that defendant was aware that the child was in the complainant's vehicle (*cf. People v Turner*, 172 AD3d 1768, 1771 [3d Dept 2019], *lv denied* 34 NY3d 939 [2019]; *see generally People v Pelt*, 157 Misc 2d 90, 93 [Crim Ct, Kings County 1993]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining

contention and conclude that it does not warrant further modification or reversal of the judgment.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**33**

**CA 25-01084**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, AND NOWAK, JJ.

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KIMBERLY ALECKI, PLAINTIFF-RESPONDENT,

V ORDER

TECH PARK OWNER, LLC, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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BARCLAY DAMON LLP, ROCHESTER (EARL R. STORRS, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Erin S. Skinner, J.), entered February 27, 2025, in a personal injury action. The order denied the motion of defendant Tech Park Owner, LLC, to vacate a default 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: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**34**

**CA 25-00153**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, AND NOWAK, JJ.

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IN THE MATTER OF GREENIDGE GENERATION, LLC,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, ACTING COMMISSIONER SEAN MAHAR,
IN HIS CAPACITY AS ACTING COMMISSIONER,
SENECA LAKE GUARDIAN, THE COMMITTEE TO PRESERVE
THE FINGER LAKES, AND SIERRA CLUB,
RESPONDENTS-RESPONDENTS.

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BARCLAY DAMON LLP, ALBANY (YVONNE E. HENNESSEY OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN LUSIGNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ACTING COMMISSIONER SEAN MAHAR, IN HIS CAPACITY AS ACTING COMMISSIONER.

EARTHJUSTICE, NEW YORK CITY (LISA K. PERFETTO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS THE COMMITTEE TO PRESERVE THE FINGER LAKES, AND SIERRA CLUB.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (PHILIP H. GITLEN OF COUNSEL), FOR RESPONDENT-RESPONDENT SENECA LAKE GUARDIAN.

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Appeal from a judgment (denominated judgment and order) of the Supreme Court, Yates County (Vincent M. Dinolfo, J.), entered November 14, 2024, in a proceeding pursuant to CPLR article 78. The judgment, inter alia, annulled the denial of petitioner's application to renew its Clean Air Act Title V permit.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 28, 2025,

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**37**

**CA 24-01765**

PRESENT: LINDLEY, J.P., BANNISTER, OGDEN, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF NIAGARA METALS, LLC,
ALSO KNOWN AS DIAMOND HURWITZ SCRAP, LLC,
THOMAS FISHER, TIMOTHY W. EICK, ANDREW BANKOWSKI,
IRENE ISCH, TIMOTHY AND JOYCE RODGERS AND
MARSHA EICK, PETITIONERS-APPELLANTS,

V ORDER

CITY OF BUFFALO ZONING BOARD OF APPEALS,
ET AL., RESPONDENTS,
AND AIM ERIE RECYCLING, LLC, RESPONDENT-RESPONDENT.

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PHILLIPS LYTLE LLP, BUFFALO (LINDSEY E. HAUBENREICH OF COUNSEL), FOR PETITIONERS-APPELLANTS.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, NEW YORK CITY (JAY COHEN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ROBERT E. QUINN, ACTING CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Amy C. Martoche, J.), entered September 16, 2024, in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted in part the motion of respondent Aim Recycling Erie, LLC, to dismiss the petitions.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**40**

**KA 19-00449**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAY JONES, III, DEFENDANT-APPELLANT.

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MICHAEL JOS. WITMER, ROCHESTER, FOR DEFENDANT-APPELLANT.

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered January 24, 2019. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, criminal sexual act in the third degree, rape in the third degree, sexual abuse in the third degree, use of a child in a sexual performance, promoting a sexual performance by a child and endangering the welfare of a child.

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

Memorandum: In this prosecution arising from allegations that defendant sexually abused a female child (victim) over a period of years during the victim's childhood, defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96), criminal sexual act in the third degree (former § 130.40 [2]), rape in the third degree (former § 130.25 [2]), sexual abuse in the third degree (§ 130.55), use of a child in a sexual performance as a sexually motivated felony (§§ 130.91, 263.05), promoting a sexual performance by a child as a sexually motivated felony (§§ 130.91, 263.15), and endangering the welfare of a child (§ 260.10 [1]). We affirm.

Defendant contends that the indictment was "jurisdictionally defective" because the 6½-year time period set forth in the count alleging predatory sexual assault against a child is excessive. We conclude that defendant's contention is not properly characterized as raising a jurisdictional defect; instead, defendant's contention constitutes a challenge to the factual sufficiency of the allegations (*see People v Carter*, 147 AD3d 1514, 1515 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *see generally People v Iannone*, 45 NY2d 589, 600-601 [1978]). That challenge is not preserved for our review inasmuch as that part of defendant's omnibus motion seeking to dismiss

the indictment constituted only a general motion, which did not advance the specific claim now raised on appeal (*see People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]; *People v Carey*, 92 AD3d 1224, 1224 [4th Dept 2012], *lv denied* 18 NY3d 992 [2012]), and County Court did not "expressly decide[ ] the question raised on appeal" in response to defendant's motion (CPL 470.05 [2]). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Carey*, 92 AD3d at 1224-1225).

Defendant also contends that the court should have suppressed any evidence that was seized from his residence during the execution of a search warrant issued for that property. By failing to seek a ruling on that part of his omnibus motion challenging the search warrant for the residence and by failing to object to any admission of the seized evidence at trial, defendant abandoned his challenge to that search warrant (*see People v Smith*, 147 AD3d 1527, 1528 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Mulligan*, 118 AD3d 1372, 1376 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]). Defendant's related contention that a search warrant for a social media account was issued without probable cause and was overbroad is not preserved for our review inasmuch as defendant failed to raise that contention in his motion papers or before the suppression court (*see People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *People v Woodring*, 48 AD3d 1273, 1275 [4th Dept 2008], *lv denied* 10 NY3d 846 [2008]). 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 Myles*, 216 AD3d 1419, 1421-1422 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *Woodring*, 48 AD3d at 1275).

Defendant further contends that the court erred in admitting in evidence, over his foundation objection, two photographs depicting social media messages sent to the victim, asserting that the People failed to properly authenticate that the messages were sent by defendant. We reject that contention. Although there was no Internet service provider or other technical evidence regarding the social media messages, the messages were properly authenticated, through circumstantial evidence, as having been sent by defendant (*see People v McKoy*, 217 AD3d 1396, 1397 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Pierre*, 41 AD3d 289, 291 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]). The testimony of the victim and her mother, the latter of whom photographed the messages after she was shown them on the victim's tablet, established that defendant's social media account username was saved on the victim's tablet under his nickname in relation to her and that defendant's personalized avatar appeared with the messages (*see McKoy*, 217 AD3d at 1397; *People v Kingsberry*, 194 AD3d 843, 844 [2d Dept 2021], *lv denied* 37 NY3d 993 [2021]; *People v Serrano*, 173 AD3d 1484, 1488 [3d Dept 2019], *lv denied* 34 NY3d 937 [2019]). The identity of the sender of the messages was also "sufficiently authenticated by the content of the . . . messages" (*People v Mencel*, 206 AD3d 1550, 1552 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; *see McKoy*, 217 AD3d at 1397; *People v Green*, 107

AD3d 915, 916 [2d Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *Pierre*, 41 AD3d at 291). Moreover, " '[t]he credibility of the authenticating witness[es] goes to the weight to be accorded the evidence, not to its admissibility' " and, to the extent that defendant suggests that someone else could have sent the messages from the social media account associated with him, "the likelihood of that scenario 'presented a factual issue for the jury to resolve' " (*McKoy*, 217 AD3d at 1397-1398; *see People v Tucker*, 200 AD3d 1584, 1586 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]; *Serrano*, 173 AD3d at 1488). To the extent that defendant contends that the People failed to establish a proper foundation for the social media messages on other grounds, we conclude that defendant's contention is not preserved for our review inasmuch as defendant failed to object to the admission of the messages on those grounds (*see People v Minutolo*, 215 AD3d 1260, 1260-1261 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *People v Byrd*, 214 AD3d 1321, 1323 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]), 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 defendant's contention that the court erred in permitting the testimony of two witnesses under the prompt outcry exception to the hearsay rule (*see People v Stuckey*, 50 AD3d 447, 448 [1st Dept 2008], *lv denied* 11 NY3d 742 [2008]; *People v Rodriguez*, 284 AD2d 952, 952 [4th Dept 2001], *lv denied* 96 NY2d 924 [2001]; *see generally People v McDaniel*, 81 NY2d 10, 16-18 [1993]). We also reject defendant's contention that the court erred in permitting the People to introduce *Molineux* evidence related to defendant's prior acts of domestic violence against the victim's mother (*see People v Cuadrado*, 227 AD3d 1174, 1180-1181 [3d Dept 2024], *lv denied* 42 NY3d 969 [2024]).

Defendant further asserts that the court erroneously precluded him from cross-examining the victim about a prior sexually transmitted infection diagnosis, thereby depriving him of his rights to confront witnesses and present a defense. Although the People initially moved in limine to preclude such evidence, the court reserved decision after argument and indicated that it would not rule "unless and until the issue becomes ripe" during trial. Defendant, however, did not object to the court's course of action, nor did he seek to elicit or introduce such evidence at trial, and we thus conclude that defendant's contention is not preserved for our review (*see People v Cruz-Rivera*, 174 AD3d 1512, 1513 [4th Dept 2019], *lv denied* 34 NY3d 1127 [2020]; *People v Billip*, 65 AD3d 430, 430-431 [1st Dept 2009], *lv denied* 13 NY3d 834 [2009]). 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]; *Billip*, 65 AD3d at 431).

Next, defendant contends that the evidence is legally insufficient to support the conviction with respect to the counts of use of a child in a sexual performance as a sexually motivated felony and promoting a sexual performance by a child as a sexually motivated felony because the People were unable to produce the video on which

those counts were predicated. Defendant failed to preserve that contention for our review because he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Schultz*, 266 AD2d 919, 919 [4th Dept 1999], *lv denied* 94 NY2d 906 [2000]; *People v Farbman*, 231 AD2d 588, 588 [2d Dept 1996], *lv denied* 89 NY2d 863 [1996]). In any event, that contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), including the victim's testimony that defendant used his cell phone to record a video of her performing oral sex on him, a photograph of a social media message sent by defendant to the victim in which defendant referred to that footage, and the evidence that defendant saved the video to a social media application designed to hide videos in an encrypted, password-protected folder, we conclude that the evidence is legally sufficient to support the conviction with respect to the aforementioned counts (*see People v Burke*, 287 AD2d 512, 514 [2d Dept 2001], *lv denied* 97 NY2d 679 [2001]; *Farbman*, 231 AD2d at 588; *see also People v Keane*, 240 AD3d 1424, 1426 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025], *reconsideration denied* 44 NY3d 1028 [2025]).

With respect to defendant's contention that the verdict is against the weight of the evidence, we conclude at the outset that "a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury's credibility findings with respect to the testimony of the victim and the People's other witnesses" (*People v Harrell*, 235 AD3d 1294, 1297 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025] [internal quotation marks omitted]; *see People v Roman*, 107 AD3d 1441, 1442 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Nevertheless, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) and "affording the requisite 'great deference to the jury given its opportunity to view the witnesses' " (*Roman*, 107 AD3d at 1442), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Here, "[t]he jury was entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of defendant's witness[ ]," and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]; *see Harrell*, 235 AD3d at 1298). Contrary to defendant's assertion, we conclude that there was nothing about the victim's trial testimony that was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Mercado-Gomez*, 206 AD3d 1643, 1644 [4th Dept 2022] [internal quotation marks omitted]). In addition, defendant's contention concerning the lack of forensic evidence corroborating the victim's testimony is unavailing inasmuch as "the testimony of [the victim] can be enough to support a conviction" (*People v Goodson*, 144 AD3d 1515, 1516 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017] [internal quotation marks omitted]; *see Mercado-Gomez*, 206 AD3d at 1644-1645; *see also People v Hackett*, 166 AD3d 1483, 1485 [4th Dept 2018], *lv denied* 32 NY3d 1204 [2019], *reconsideration denied* 33 NY3d 949 [2019]).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel's purported failures to adequately challenge and respond to the testimony of the People's expert regarding child sexual abuse accommodation syndrome (CSAAS). We reject that contention. "There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]) and, here, defense counsel had no legitimate basis for arguing that the expert's testimony constituted improper bolstering (*see People v Young*, 206 AD3d 1631, 1633 [4th Dept 2022]; *People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; *People v Englert*, 130 AD3d 1532, 1533-1534 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015], *lv denied* 26 NY3d 1144 [2016]). To the extent that defendant asserts that defense counsel was ineffective in failing to adequately cross-examine the expert, we conclude that defendant's assertion lacks merit. The record establishes that defense counsel, on cross-examination of the expert, elicited acknowledgments that the expert "could give no evidence with respect to the ultimate issue of the case, i.e., defendant's guilt" (*Young*, 206 AD3d at 1633 [internal quotation marks omitted]), and defendant's "simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" to demonstrate that he was denied effective assistance of counsel (*People v Flores*, 84 NY2d 184, 187 [1994]; *see Young*, 206 AD3d at 1633). To the extent that defendant's assertion that defense counsel was ineffective in failing to secure opposing CSAAS testimony is reviewable on direct appeal, we conclude that it lacks merit inasmuch as defendant "has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence" (*Meyers*, 188 AD3d at 1734 [internal quotation marks omitted]; *see Young*, 206 AD3d at 1633; *Englert*, 130 AD3d at 1533). To the extent that defendant asserts that CSAAS lacks scientific validity and that defense counsel should have presented evidence to that effect either through a rebuttal expert or during cross-examination of the People's expert, we note that such "challenges to [defense] counsel's preparedness depend on matters dehors the record and are not reviewable on direct appeal" (*People v Nicholson*, 26 NY3d 813, 832 [2016]).

We reject defendant's related contention that defense counsel was ineffective in failing to cross-examine police investigators at greater length about their efforts to access the contents of defendant's cell phone, including the video. Defense counsel asked the investigators questions designed to cast doubt on the thoroughness of the investigation and highlighted the lack of evidence against defendant obtained by the investigators, and defense counsel could have reasonably determined that asking additional questions would have undermined that part of the defense strategy seeking to show that the police failed to conduct a thorough investigation (*see People v Mastin*, 232 AD3d 1268, 1270 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]; *People v Pratt*, 162 AD3d 1202, 1204 [3d Dept 2018], *lv denied* 32 NY3d 940 [2018]). Finally, we reject defendant's contention that defense counsel was ineffective in failing to impeach the victim with ostensible prior inconsistent statements or to highlight on summation

purported contradictions in the victim's testimony inasmuch as such arguments would have had " 'little or no chance of success' " (*Caban*, 5 NY3d at 152).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**41**

**KA 24-00711**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENTE BELL, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 5, 2023. The judgment convicted defendant, upon a guilty plea, of attempted murder in the second degree (three 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 his plea of guilty, of three counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant's contention, we conclude on this record that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Littlejohn*, 243 AD3d 1287, 1287-1288 [4th Dept 2025]; *see also People v Zukic*, 240 AD3d 1192, 1193 [4th Dept 2025], *lv denied* 44 NY3d 995 [2025]). Defendant's valid waiver of the right to appeal forecloses our review of his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**42**

**KA 24-01346**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN CAMPBELL, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

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Appeal from a resentence of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 28, 2024. Defendant was resentenced upon a conviction of assault in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]) and now appeals from the resentence. We affirm.

Assuming, arguendo, that defendant's waiver of the right to appeal is invalid or otherwise does not encompass his challenge to the severity of the resentence (*see People v Odle*, 233 AD3d 1502, 1503 [4th Dept 2024], *lv denied* 43 NY3d 965 [2025]; *People v Knorr*, 195 AD3d 1573, 1574 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]; *see generally People v Jirdon*, 159 AD3d 1518, 1519 [4th Dept 2018]), we nevertheless conclude that the resentence is not unduly harsh or severe.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**43**

**KA 25-00506**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAHMERE A. DAVIS, DEFENDANT-APPELLANT.

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THOMAS L. PELYCH, HORNELL, FOR DEFENDANT-APPELLANT.

ASHLEY J. WILLIAMS, DISTRICT ATTORNEY, GENESEO, FOR RESPONDENT.

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Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered January 16, 2025. 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.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**45**

**KA 22-01435**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH RODNEY, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER, EASTON THOMPSON KASPEREK SHIFFRIN LLP (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN P. GREEN, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

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Appeal from a resentence of the Monroe County Court (Richard M. Healy, A.J.), rendered August 22, 2022. Defendant was resentenced upon a conviction of murder in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant was convicted upon a jury verdict of six counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of murder in the second degree (Penal Law § 125.25 [1]). Defendant now appeals from a resentence pursuant to which County Court set aside the verdict with respect to all six counts of criminal possession of a weapon in the second degree inasmuch as defendant was not criminally responsible for those crimes by reason of infancy (CPL 310.85; Penal Law § 30.00), vacated the sentences imposed thereon, and resentenced defendant to an indeterminate term of 15 years to life imprisonment on his conviction of murder in the second degree. Inasmuch as "the resentence occurred more than 30 days after the original sentence and the only notice of appeal is from the resentence, defendant's appeal is from the resentence only" (*People v Coble*, 17 AD3d 1165, 1165 [4th Dept 2005], *lv denied* 5 NY3d 787 [2005]; *see* CPL 450.30 [3]; *People v Shorter*, 236 AD3d 1357, 1358 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Lett*, 42 AD3d 970, 970 [4th Dept 2007], *lv denied* 9 NY3d 962 [2007]). Defendant's contentions on appeal regarding the original judgment are thus " 'not properly before us inasmuch as there is no notice of appeal from the original judgment in the record . . . , nor is there otherwise any indication in the record that an appeal from that judgment was perfected' " (*People v Dexter*, 71 AD3d 1504, 1504 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]; *see People v Parrilla*, 227 AD3d 1419, 1419 [4th Dept 2024]; *People v Williams*, 163 AD3d 1420, 1421 [4th Dept 2018]). Inasmuch as defendant does not raise any contentions regarding the resentence, we dismiss the appeal (*see*

*People v Lewis*, 232 AD3d 1316, 1316 [4th Dept 2024]; *Parrilla*, 227 AD3d at 1419-1420).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**46**

**KA 22-02025**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON A. WRIGHT, DEFENDANT-APPELLANT.

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

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered November 22, 2022. The judgment convicted defendant upon his plea of guilty of attempted assault in the first degree, assault in the third degree and criminal sexual act 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 attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), criminal sexual act in the second degree (former § 130.45 [1]), and assault in the third degree (§ 120.00 [1]), defendant contends that his waiver of the right to appeal is unenforceable, that County Court erred in denying him youthful offender status, and that his sentence is unduly harsh and severe. We affirm.

Contrary to defendant's contentions, a waiver of the right to appeal is not unconscionable per se, it is not improper for the People to demand a waiver of the right to appeal as a condition of a plea bargain, and an appeal waiver is not rendered unenforceable due to circumstances inherent to the plea bargaining process in general (*see People v Thomas*, 34 NY3d 545, 557 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). Inasmuch as the record here establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent, we conclude that the waiver is valid (*see generally People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). Defendant's valid appeal waiver forecloses our review of his challenge to the court's

discretionary decision to deny youthful offender status, any request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender, and his challenge to the severity of the sentence (*see People v Malcolm*, 231 AD3d 1503, 1504 [4th Dept 2024], *lv denied* 43 NY3d 931 [2025]; *see also People v Burch*, 234 AD3d 1246, 1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]; *People v Stackhouse*, 214 AD3d 1303, 1303 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]).

We note, however, that both the certificate of disposition and uniform sentence and commitment form in the record transpose the sentences imposed for assault in the third degree and criminal sexual act in the second degree and must be amended to reflect the correct sentence for each crime (*see generally People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**47**

**KA 23-01090**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY COBB, DEFENDANT-APPELLANT.

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

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered May 25, 2023. The judgment convicted defendant upon a nonjury 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]). Defendant contends that the evidence is legally insufficient to establish that he knew or had reason to know that his license was revoked. Even assuming, arguendo, that defendant preserved his contention for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. "The felony offense of first-degree aggravated unlicensed operation has a mens rea element. To be convicted, a defendant must know or have reason to know that [their] driving privileges have been revoked, suspended or otherwise withdrawn by the Commissioner of Motor Vehicles" (*People v Pacer*, 6 NY3d 504, 508 [2006]; *see* Vehicle and Traffic Law § 511 [1] [a]; [2] [a] [ii]; [3] [a] [i]). A defendant's mens rea can be proved circumstantially (*see generally People v Feingold*, 7 NY3d 288, 296 [2006]).

Here, the People presented the testimony of a police witness who stated that, when he asked defendant for his license, defendant responded that it was "f***ed up." The People also presented the testimony of an employee of the New York State Department of Motor Vehicles who stated that defendant's driver's license was revoked due to a prior conviction for driving while intoxicated as reflected on the driving abstract, which was admitted in evidence. The evidence,

viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that defendant knew or had reason to know that his driver's license was revoked (*see People v Holloman*, 151 AD3d 1872, 1872 [4th Dept 2017]; *People v Strauss*, 136 AD3d 1340, 1341 [4th Dept 2016]; *People v Lindsey*, 129 AD3d 1482, 1484 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that, although a different verdict would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**50**

**CAF 24-01639**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF BRYANA O'BRIEN,
PETITIONER-RESPONDENT-RESPONDENT,

V ORDER

JAMIE FRAZZINI, ALSO KNOWN AS JAMIE DOMMELL,
RESPONDENT-PETITIONER-APPELLANT.

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CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-PETITIONER-APPELLANT.

MINDY L. MARRANCA, BUFFALO, FOR PETITIONER-RESPONDENT-RESPONDENT.

DEBORAH K. JESSEY, CLARENCE, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Thomas DiMillo, A.J.), entered September 27, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner-respondent sole custody of the subject child.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**51**

**CAF 25-00532**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF ZYAIR M., RESPONDENT-APPELLANT.
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ERIE COUNTY ATTORNEY, PETITIONER-RESPONDENT. MEMORANDUM AND ORDER

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DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CRISTIANA RAFIDI OF COUNSEL), FOR RESPONDENT-APPELLANT.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO (ROBIN S. ENGLER OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Erie County (Kara A. Buscaglia, J.), dated March 10, 2025, in a proceeding pursuant to Family Court Act article 3. The order, inter alia, revoked an order of disposition placing respondent on probation and placed him in a residential facility for a period of up to 12 months.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the interest of justice by striking the phrase "with no detention time credit" and substituting therefor the phrase "with 28 days of detention time credit," the New York State Office of Children and Family Services is directed to immediately release respondent from its custody if he has not already been released, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 3, respondent appeals from an order that, inter alia, revoked a prior order of disposition placing respondent on probation and placed him in a residential facility for a period of up to 12 months. Respondent contends that Family Court erred in failing to credit him with the 28 days that he spent in detention pending disposition of this matter. Although respondent failed to preserve that contention for our review (*see Matter of Michael A.*, 151 AD3d 566, 566 [1st Dept 2017]), we nevertheless exercise our power to review it in the interest of justice (*see generally People v Williams*, 49 AD3d 1183, 1184 [4th Dept 2008]).

Family Court Act § 353.3 (5) requires that, "[i]f the respondent has been in detention pending disposition, the initial period of placement ordered . . . shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the needs and best interests of the respondent or the need for protection of the community." "[A]bsent a specific finding that such credit would not serve the interests of the

juvenile or the community, the credit for time in predisposition detention automatically accrues" (*Matter of Miranda C.*, 103 AD3d 891, 893 [2d Dept 2013]). Inasmuch as the court made no such finding here, respondent is statutorily entitled to the 28-day credit. We therefore modify the order accordingly. Moreover, because the application of the 28-day credit results in the expiration of the 12-month period of placement, we direct the New York State Office of Children and Family Services to immediately release respondent from its custody if he has not already been released (*see id.* at 894). In light of our determination, respondent's contentions challenging the procedural and factual propriety of the residential placement are academic (*see id.*; *see generally Matter of Timar P. [James B.]*, 217 AD3d 1591, 1593 [4th Dept 2023]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**52**

**CAF 24-00295**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF DAX S. AND REMI S.
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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SUNSHINE P., RESPONDENT-APPELLANT.

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CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

WILLIAM R. HITES, BUFFALO, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered January 4, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject children on the ground of permanent neglect, transferred guardianship and custody of the children to petitioner, and freed the children for adoption. We affirm.

Contrary to the mother's contention, Family Court did not abuse its discretion in declining to enter a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *see Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]; *see also* Family Ct Act § 633). It "is only appropriate where the parent has clearly demonstrated that [they] deserve[ ] another opportunity to show that [they have] the ability to be a fit parent" (*Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456 [4th Dept 2019] [internal quotation marks omitted]). "The determination of whether to grant a suspended judgment must be based solely on the best interests of the child" (*id.*; *see* § 631).

Here, the record establishes that the mother had admitted that she neglected the children by reason of her substance use and her failure to engage in substance abuse counseling and treatment. Her

service contract required her to engage in a substance abuse program, but she had not done so for over a year at the time of the dispositional hearing. The mother admitted that she continued to drink alcohol and had overdosed on some substance just a month before she testified. She also denied needing treatment for substance abuse.

A suspended judgment "is not warranted where the parent has not made sufficient progress in addressing the issues that led to the child[ren]'s removal from custody" (*Matter of Nolin X.A.C. [Nicky C.]*, 240 AD3d 1388, 1388 [4th Dept 2025]; *see Matter of London J. [Niaya W.]*, 138 AD3d 1457, 1457-1458 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]; *Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). The court's determination that it would not be appropriate to give the mother additional time through a suspended judgment is entitled to great deference (*see Nolin X.A.C.*, 240 AD3d at 1389; *Matthew S., Jr.*, 169 AD3d at 1456). The children had been in the care of the foster parents for almost two years by the time of the dispositional hearing, and the children had bonded with the foster parents and were doing well. We conclude that the court properly determined that a suspended judgment was unwarranted (*see Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1183 [4th Dept 2024], *lv denied* 42 NY3d 904 [2024]) and that termination of the mother's parental rights was in the best interests of the children (*see Nolin X.A.C.*, 240 AD3d at 1389).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**55**

**CA 24-01835**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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BRIAN DOWD AND SUSAN DOWD, PLAINTIFFS-APPELLANTS,

V ORDER

JEFFREY KLAY, DEFENDANT-RESPONDENT.

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VINAL & VINAL, P.C., BUFFALO (OLIVIA M. MULLEN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HURWITZ FINE P.C., BUFFALO (BRIAN M. WEBB OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Edward Pace, J.), dated October 23, 2024. The order, inter alia, granted the cross-motion of defendant for summary judgment dismissing 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: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**57**

**CA 25-00282**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF DANIELLE DILL, PSY.D,
EXECUTIVE DIRECTOR OF CENTRAL NEW YORK
PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V ORDER

BRIAN S., RESPONDENT-APPELLANT.

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ELIZABETH S. FORTINO, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered January 21, 2025. The order authorized the administration of medication to respondent over his objection.

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: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**61**

**KA 24-01452**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO ROBINSON, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (KRYSTIAN P. OPALINSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered August 22, 2024. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Defendant contends that Supreme Court erred in refusing to suppress tangible evidence and statements that were obtained after the police unlawfully stopped and frisked him pursuant to an insufficiently corroborated anonymous 911 call. We reject that contention. Generally, "[a]n anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains . . . information suggestive of criminal behavior" (*People v Moore*, 6 NY3d 496, 499 [2006]; *see Florida v J.L.*, 529 US 266, 272 [2000]; *People v William II*, 98 NY2d 93, 99 [2002]) or is corroborated by "confirmatory observations of the police" (*People v Argyris*, 24 NY3d 1138, 1140 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]; *see also People v Williams*, 177 AD3d 1312, 1313 [4th Dept 2019]). "[T]he appropriate test" in evaluating whether there is reasonable suspicion to engage in a level three encounter based on an anonymous tip "is whether an anonymous tip is sufficiently reliable to provide reasonable suspicion under *the totality of the circumstances*" (*People v Leighton R.*, — NY3d —, —, 2025 NY Slip Op 06534, *4 [2025] [emphasis added]). Further, although that "approach involves an analysis of the *Aguilar-Spinelli* reliability and basis of knowledge

factors, allowance must be made in applying them for the lesser showing required to meet the reasonable suspicion standard" (*id.* [internal quotation marks omitted]; *see Alabama v White*, 496 US 325, 328-329 [1990]). In other words, strict adherence to *Aguilar-Spinelli* is mandatory only in the probable cause context and is not required to establish reasonable suspicion (*see Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *3-4). Indeed, "reasonable suspicion [may be] established by a 911 call from an anonymous individual and the confirmatory observations by the police of information provided by the caller that was noncriminal in nature" (*id.* at —, 2025 NY Slip Op 06534, *3; *see Argyris*, 24 NY3d at 1140-1141; *People v Tantao*, 178 AD3d 1391, 1393 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]).

Here, we conclude that the record at the suppression hearing with respect to the anonymous tip, and the steps taken by the police to corroborate it before stopping and frisking defendant, was sufficient to establish reasonable suspicion permitting the level three police encounter at issue here. Specifically, the police officer who first approached defendant during the encounter (first officer) testified that she received a dispatch report concerning a 911 call about a menacing in progress that involved a man brandishing a gun. The dispatcher provided that officer with a detailed description of, inter alia, the suspect's appearance—that he was a Black man with a white beard, wearing a baseball cap and a black jacket with reflectors. The dispatcher also indicated that the suspect was accompanied by another man who was wearing, inter alia, orange shoes. Within a minute of receiving the dispatch, the first officer and her partner responded to the scene, which was only a half mile away from their prior location. As they arrived, the dispatcher informed them that the suspect reportedly had a handgun in his front right pocket. The officers almost immediately encountered defendant and another man on the scene, both of whom precisely matched the description provided by the dispatcher. The officers thereupon stopped defendant, and the first officer began a pat-down frisk of his body, starting on the right side of his pants. During the brief pat-down, the first officer immediately discovered the gun, noting that its handle was sticking out of defendant's pocket.

Under those facts, i.e., where "[t]he police were able to corroborate [the] information [contained in the 911 call] within one minute of receiving the dispatch and [were] within [close proximity of] the reported location, [where] they observed a . . . suspect matching the description provided," the police had reasonable suspicion to engage in a level three encounter inasmuch as, here, "[t]he *contemporaneous* nature of the report is substantial . . . and weighs in favor of the [911] caller's veracity" (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *4 [emphasis added]). We further note that the 911 caller's report of a man brandishing a gun "necessarily [constituted a] claim[ of] personal knowledge of the crime" (*id.*). Under these circumstances, "[t]he police were duty-bound to investigate the radio report of [an armed menacing], and they could not ignore their own contemporaneous observation of [an individual] matching the caller's description and location" (*id.*).

Defendant also contends that Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). We have rejected identical contentions in prior cases, holding that *Bruen* "had no impact on the constitutionality of New York State's criminal possession of a weapon statutes" (*People v Mancuso*, 225 AD3d 1151, 1153 [4th Dept 2024], *lv denied* 43 NY3d 964 [2025] [internal quotation marks omitted]; *see People v Brinson*, 240 AD3d 1376, 1378 [4th Dept 2025]), and we perceive no reason to reach a different conclusion here. Indeed, we note that the Court of Appeals recently held "that *Bruen* did not render the state's entire gun licensing scheme unconstitutional" inasmuch as the specific portion of the scheme that it invalidated is "severable" (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**63**

**KA 22-00171**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJI HUNT, DEFENDANT-APPELLANT.

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ADAM AMIRAULT, BUFFALO, FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 1, 2021. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment, entered following a jury trial on a consolidated indictment, convicting him of criminal possession of a controlled substance in the seventh degree (Penal Law former § 220.03). Defendant contends that County Court erred in refusing to dismiss the consolidated indictment on statutory speedy trial grounds (*see* CPL 30.30), arguing that the People's total period of unreadiness for trial exceeded six months.

Contrary to defendant's contention, we conclude that the court properly determined that the period of delay between February 6, 2020 and February 13, 2020 was not chargeable to the People. Although defendant is correct that, during that time, which was prior to the consolidation of indictment Nos. I 2019-247 and I 2020-123, the People did not possess a laboratory report establishing a weight of the controlled substance in question as required for the second count of indictment No. I 2019-247, the People "could have proceeded to trial on the other charge[ ] in [that] indictment" (*People v Brown*, 269 AD2d 809, 809 [4th Dept 2000], *affd* 96 NY2d 80 [2001] [internal quotation marks omitted]; *see People v Terry*, 225 AD2d 306, 307 [1st Dept 1996], *lv denied* 88 NY2d 886 [1996]).

We agree with defendant, however, that we have no power to review the court's determination that the People are chargeable with the delay between January 15, 2020 and February 6, 2020, or, for that matter, its determination that 145 days total are chargeable to the

People from the commencement of the proceeding until March 2, 2020 (*see People v Session*, 206 AD3d 1678, 1681 [4th Dept 2022]; *see also* CPL 470.15 [1]).

Defendant further contends that the court erred in failing to charge the People with two additional periods of delay, i.e., the period between September 22, 2020 and October 22, 2020, and the period between October 22, 2020 and November 13, 2020. The court, however, did not explicitly rule on the issues whether either or both of those periods were attributable to the People, and thus we are precluded from reviewing those issues on appeal (*see Session*, 206 AD3d at 1682). If both of those periods are attributed to the People, then they would exceed the applicable six-month period of 184 days (*see* CPL 30.30 [1] [a]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine that part of defendant's supplemental omnibus motion seeking dismissal of the consolidated indictment pursuant to CPL 30.30 by ruling on the abovementioned outstanding issues (*see Session*, 206 AD3d at 1682; *see generally People v Ballowe*, 173 AD3d 1666, 1668 [4th Dept 2019]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**65**

**KA 23-00330**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRELL HOLLOWAY, ALSO KNOWN AS DARRELL J. HOLLOWAY, ALSO KNOWN AS SNOOP, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ABIGAIL D. WHIPPLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered December 13, 2022. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance 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 upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Contrary to defendant's contention, a waiver of the right to appeal is not unconscionable per se (*see People v Wilson*, 244 AD3d 1802, — [4th Dept 2025]; *People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *see also People v Thomas*, 34 NY3d 545, 557-558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Further, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see Brinkman*, 240 AD3d at 1432). The valid waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Hoose*, 236 AD3d 1294, 1296 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**66**

**KA 22-01442**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG STANFORD, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

CRAIG STANFORD, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AERON SCHWALLIE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 22, 2021. The judgment convicted defendant upon his plea of guilty 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 his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

At the outset, although defendant purportedly waived his right to appeal, we conclude that there is no reason for us to address his contention in his main brief that the waiver is invalid inasmuch as defendant's substantive contentions—both in his main brief and in his pro se supplemental brief—would survive even a valid waiver of the right to appeal or are forfeited by the plea (*see People v Crosby*, 195 AD3d 1602, 1603 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]).

Defendant contends in his main and pro se supplemental briefs that Supreme Court erred in denying his pro se motion seeking substitution of counsel. Initially, we note that his contention " 'is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea' " (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). Regardless, we conclude that defendant abandoned his request for new counsel "when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*People v Wellington*, 169 AD3d

1440, 1441 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019]; *see Crosby*, 195 AD3d at 1604; *People v Barr*, 169 AD3d 1427, 1427-1428 [4th Dept 2019], *lv denied* 33 NY3d 1028 [2019]). At the plea colloquy, defendant made no statements expressing dissatisfaction with counsel, and we note that at no time did the court issue an ultimatum to defendant to either "plead guilty with present counsel or proceed to trial with present counsel" (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]).

Defendant's contention in his pro se supplemental brief that the court erred in denying his challenge to the legal sufficiency of the evidence before the grand jury is forfeited by the guilty plea (*see People v Hill*, 188 AD3d 1756, 1757 [4th Dept 2020], *lv dismissed* 37 NY3d 965 [2021], *reconsideration denied* 37 NY3d 1096 [2021]; *People v Rowe*, 158 AD3d 1265, 1266-1267 [4th Dept 2018], *lv denied* 31 NY3d 1017 [2018]; *see generally People v Hansen*, 95 NY2d 227, 233 [2000]). Additionally, defendant's contention in his pro se supplemental brief that "he was denied[, inter alia,] due process based upon" instances of judicial misconduct was also "forfeited as a result of his guilty plea" (*People v Alsaifullah*, 162 AD3d 1483, 1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]), and, regardless, defendant failed to preserve that contention for our review (*see People v Tohafijian*, 216 AD3d 1410, 1413 [4th Dept 2023], *lv denied* 40 NY3d 937 [2023]; *People v Price*, 129 AD3d 1484, 1484 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015]; *People v Brown*, 120 AD3d 1545, 1545-1546 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

We have considered the remaining contention in defendant's pro se supplemental brief, and we conclude that it does not warrant modification or reversal of the judgment.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**67**

**KA 20-00010**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY BURRIS, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JONATHAN GARVIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

PERRY DUCKLES, ACTING DISTRICT ATTORNEY, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 25, 2019. The judgment convicted defendant upon his plea of guilty of attempted 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 his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Supreme Court abused its discretion in denying his motion to withdraw the guilty plea. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Long*, 183 AD3d 1275, 1276 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020], *reconsideration denied* 35 NY3d 1095 [2020] [internal quotation marks omitted]; *see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). Inasmuch as defendant tendered no such evidence on his motion, we perceive no abuse of discretion (*see Long*, 183 AD3d at 1276; *Davis*, 129 AD3d at 1614).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**68**

**KA 22-00974**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER WALSH, DEFENDANT-APPELLANT.

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CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DAVID D. BASSETT OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 16, 2022. 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 following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Contrary to defendant's contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). Two witnesses at trial testified that they saw a man holding a handgun. Believing that man to be firing a handgun at a nearby vehicle, one of those witnesses drove her own vehicle into the man to stop him. It was undisputed that the man that witness struck was defendant. Although a handgun was not recovered, we conclude that the witnesses' testimony and police testimony with respect to the shell casings found at the scene, as well as corroborating video and physical evidence, established that defendant possessed a loaded handgun at the time of the incident (*see People v Magee*, 182 AD3d 996, 997 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). To the extent there was conflicting testimony about whether defendant possessed the handgun, we conclude that it merely "presented an issue of credibility for the jury to resolve" (*People v Ross*, 214 AD3d 1319, 1320 [4th Dept 2023] [internal quotation marks omitted]).

Defendant further contends that he was denied a fair trial because the prosecutor engaged in misconduct during summation. Defendant correctly concedes that he failed to preserve his contention with respect to the majority of the alleged instances of misconduct (*see generally People v King*, 224 AD3d 1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]). In any event, we conclude that any "improper remarks by the prosecutor were not so pervasive or egregious as to deny defendant a fair trial" (*King*, 224 AD3d at 1314 [internal quotation marks omitted]; *see People v Hawley*, 112 AD3d 968, 969 [2d Dept 2013], *lv denied* 23 NY3d 963 [2014]).

Defendant relatedly contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged instances of prosecutorial misconduct. As noted above, defendant was not deprived of a fair trial by those instances, and we therefore further conclude that "defense counsel's failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel" (*People v Fick*, 167 AD3d 1484, 1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019] [internal quotation marks omitted]). Contrary to defendant's further contention, defense counsel was not ineffective for failing to request a missing witness charge at trial regarding the driver of the vehicle at which defendant was allegedly firing (*see generally People v Spagnuolo*, 173 AD3d 1832, 1833 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]) inasmuch as such a request would have had "little or no chance of success" (*People v Lawrence*, 192 AD3d 1686, 1688 [4th Dept 2021] [internal quotation marks omitted]; *see People v Ross*, 118 AD3d 1413, 1416 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014]).

Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**71**

**KA 22-01652**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA RICHARDSON, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RYAN M. BERGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 20, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of 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 his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). We have rejected identical contentions in prior cases, holding that *Bruen* "had no impact on the constitutionality of New York State's criminal possession of a weapon statutes" (*People v Mancuso*, 225 AD3d 1151, 1153 [4th Dept 2024], *lv denied* 43 NY3d 964 [2025] [internal quotation marks omitted]; *see People v Brinson*, 240 AD3d 1376, 1378 [4th Dept 2025]), and we perceive no reason to reach a different conclusion here. Indeed, we note that the Court of Appeals recently held "that *Bruen* did not render the state's entire gun licensing scheme unconstitutional" inasmuch as the specific portion of the scheme that it invalidated is "severable" (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**72**

**CAF 24-01506**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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IN THE MATTER OF ASH H. AND EMMERSON H.

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OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

VICTORIA M., RESPONDENT-APPELLANT.

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AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (AMY CHADWICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

AMY L. HALLENBECK, MEXICO, FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered June 14, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

Now, upon reading and filing the stipulation of discontinuance signed by the respondent on November 6, 2025, and by the attorneys for the parties on November 23 and December 2, 2025,

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**73**

**CAF 25-00616**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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IN THE MATTER OF JEFFREY R. HARPER, ESQ.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRENT M. SNOW, RESPONDENT-APPELLANT,
AND BRANDIE SALISBURY, RESPONDENT-RESPONDENT.

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MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

KAMAN BERLOVE LLP, ROCHESTER (GARY MULDOON OF COUNSEL), FOR PETITIONER-RESPONDENT.

ANDREW J. DIPASQUALE, ROCHESTER, FOR RESPONDENT-RESPONDENT.

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Appeal from a decision of the Family Court, Wayne County (Arthur B. Williams, J.), entered October 10, 2024, in a proceeding pursuant to Family Court Act article 6. The decision, among other things, modified the visitation provisions of a prior order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father purports to appeal from a document denominated "Memorandum-Decision" that modified the visitation provisions of a prior order of custody and visitation. We dismiss the appeal. "[N]o appeal lies from a [mere] decision" (*Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; *see Garcia v Town of Tonawanda*, 194 AD3d 1479, 1479-1480 [4th Dept 2021]). The document here is, on its face, a mere decision (*see generally* CPLR 2219 [a]), and it states in the penultimate sentence that petitioner "shall draft and submit a proposed [o]rder consistent with this decision" (*see Pino v Harnischfeger*, 42 AD3d 980, 982 [4th Dept 2007]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**76**

**CA 24-01298**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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JAMES R. CAPUTO, PLAINTIFF-APPELLANT,

V ORDER

NATHAN HOLT, OWEN BILLET, PREMIUM MORTGAGE CORPORATION, DONALD CHENEY, ESQ., CHENEY LAW FIRM, PLLC, ABAR ABSTRACT CORPORATION, MONROE COUNTY CLERK'S OFFICE, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

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JAMES R. CAPUTO, PLAINTIFF-APPELLANT PRO SE.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NATHAN HOLT, OWEN BILLET, PREMIUM MORTGAGE CORPORATION AND ABAR ABSTRACT CORPORATION.

CHENEY LAW FIRM, PLLC, CANANDAIGUA (DAVID D. BENZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DONALD CHENEY, ESQ., AND CHENEY LAW FIRM, PLLC.

MATTHEW SCHWARTZ, COUNTY ATTORNEY, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR DEFENDANT-RESPONDENT MONROE COUNTY CLERK'S OFFICE.

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Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered July 30, 2024. The order, inter alia, granted the motions of defendants Monroe County Clerk's Office, Donald Cheney, Esq., and Cheney Law Firm, LLC, to dismiss the complaint against them and granted the motion of defendants Nathan Holt, Owen Billet, Premium Mortgage Corporation and ABAR Abstract Corporation for summary judgment dismissing the complaint against them.

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: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**78**

**CA 25-00549**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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IN THE MATTER OF MINER REALTY AND
PROPERTY MANAGEMENT, LLC, PETITIONER-RESPONDENT,

V ORDER

EDWARD LOCKHART, RESPONDENT-APPELLANT.

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LEGAL SERVICES OF CENTRAL NEW YORK, INC., UTICA (THOMAS J. MOROSCO OF COUNSEL), FOR RESPONDENT-APPELLANT.

MANGANO LAW OFFICE, PLLC, SYRACUSE (KEVIN A. BARONE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Oneida County Court (Robert Bauer, J.), entered March 25, 2025. The order affirmed a judgment of the Rome City Court.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**80.1**

**CAF 24-01501**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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IN THE MATTER OF NOAH P.

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ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ASHLEY P., RESPONDENT, AND
ANTHONY F., RESPONDENT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTINA CAGNINA, SYRACUSE, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered September 9, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondents.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. We affirm.

Contrary to the father's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[ ] to overcome problems that prevent the discharge of the child into their care, and informing the parent[ ] of [the] child's progress" (*Matter of Jemma M. [Ashley M.]*, 237 AD3d 1569, 1569-1570 [4th Dept 2025], *lv denied* 44 NY3d 908 [2025] [internal quotation marks omitted]; *see* § 384-b [7] [f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Zander W. [Lisa M.]*, 222 AD3d 1395, 1396 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i]) that it exercised diligent efforts

to encourage and strengthen the father's relationship with the child (*see Jemma M.*, 237 AD3d at 1570; *Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner provided the father with referrals to appropriate services, supervised the father's visitation with the child, communicated with the father frequently regarding his progress toward reunification, emphasized the importance of living apart from respondent mother, advised the father that—in addition to completing the recommended services—he must also implement the skills he learned through such services, and regularly updated the father on the child's well-being. Petitioner was not required, under the circumstances of this case, to establish that it also investigated alternative placements with relatives (*cf. Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539-1540 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]).

Contrary to the further contention of the father, we conclude that, despite petitioner's diligent efforts, the father failed to plan for the child's future (*see* Social Services Law § 384-b [7] [a]). To " 'plan for the future of the child' " means to "take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (§ 384-b [7] [c]). Notably, the plan must be "realistic and feasible" (*id.*) and, "[a]t a minimum, parents must take steps to correct the conditions that led to the removal of the child from their home" (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986] [internal quotation marks omitted]). Here, the evidence established that the father failed to make progress in a clinical visitation program, failed to make progress in the recommended domestic violence program, failed to engage in mental health treatment, failed to accept responsibility for his actions that led to the child's removal, failed to progress to unsupervised visitation with the child, and failed to develop a realistic plan to provide an adequate and stable home for the child (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]). Although the father attended some of the services that he was referred to, he failed to "benefit from the services offered and utilize the tools or lessons learned in those classes in order to successfully plan for the [child's] future" (*Matter of Albina H. [John H.]*, 229 AD3d 1169, 1170 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024] [internal quotation marks omitted]; *see Matter of Tori-Lynn L. [Troy L.]*, 227 AD3d 1455, 1458 [4th Dept 2024]).

The father also contends that Family Court erred in relying on portions of certain exhibits containing the progress and visitation notes from petitioner and the agency that supervised visitation with the child because such portions did not meet the foundational requirements of the business records exception to the hearsay rule (*see* CPLR 4518 [a]). The father's only objection to the exhibits in question, however, concerned the admissibility of certain hearsay statements contained within the exhibits—regardless of whether the exhibits themselves qualified as business records—and that objection was sustained. We thus conclude that he did not preserve his current contention for our review (*see Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 965 [3d Dept 2015]; *Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322 [4th Dept 2010]). In any event, even assuming, arguendo,

that the court erred in relying upon the alleged inadmissible evidence, we conclude that the error is harmless inasmuch as "the record otherwise contains ample evidence supporting [the] [c]ourt's determination" (*Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017] [internal quotation marks omitted]; *see Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

Finally, we reject the father's contention that the court abused its discretion in refusing to enter a suspended judgment (*see Matter of Tumario B. [Valerie L.]*, 83 AD3d 1412, 1412 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]; *Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]). A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; *see* Family Ct Act § 633), and may be warranted where the parent has made sufficient progress in addressing the issues that led to the child's removal from custody (*see generally Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; *Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]). Here, the evidence at the dispositional hearing established that the father had made no progress in addressing the issues that led to the removal of the child and that he still had only supervised visits with the child. We therefore conclude that the court properly determined that a suspended judgment was unwarranted, and that the best interests of the child would be served by freeing the child for adoption, thereby "provid[ing] him with prospects for permanency and some sense of the stability he deserve[s]" (*Matter of Raine QQ.*, 51 AD3d 1106, 1107 [3d Dept 2008], *lv denied* 10 NY3d 717 [2008]; *see Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1311 [4th Dept 2021], *lv denied* 38 NY3d 901 [2022]; *Elijah D.*, 74 AD3d at 1847).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**80**

**CA 25-00831**

PRESENT: CURRAN, J.P., BANNISTER, SMITH, OGDEN, AND DELCONTE, JJ.

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KARIM COURGI, INDIVIDUALLY AND AS A MEMBER OF SYRACUSE HOUSING LLC, POINT GROVE LLC, BELLEVUE APTS LLC, AND BRADFORD HEIGHTS LLC, PLAINTIFF-APPELLANT,

V ORDER

CUSHMAN & WAKEFIELD 1, INC., PYRAMID BROKERAGE COMPANY, INC., AND JOHN CLARK, DEFENDANTS-RESPONDENTS.

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GALLI LAW, PLLC, SYRACUSE (ANTHONY C. GALLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (ELIZABETH A. HOFFMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered November 20, 2024. The order, among other things, granted defendants' motion to dismiss the complaint in its entirety.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 30, 2026,

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**86**

**KA 23-00877**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, GREENWOOD, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH T. CASTIGLIONE, DEFENDANT-APPELLANT.

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CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, SPECIAL PROSECUTOR, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered April 17, 2023. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant was convicted upon his plea of guilty of driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]) and was sentenced to a period of probation. Defendant now appeals from a judgment revoking the sentence of probation and sentencing him, upon a determination that he violated the conditions of probation, to an indeterminate term of incarceration.

Contrary to defendant's contention, the People established by a preponderance of the evidence that he violated a condition of his probation (*see* CPL 410.70 [3]; *People v Bailey*, 181 AD3d 1243, 1244 [4th Dept 2020]). Although the People did not offer into evidence the terms and conditions of probation, County Court later stated when rendering its determination that it took judicial notice of them (*see generally People v Williams*, 164 AD3d 845, 845-846 [2d Dept 2018]; *People v Hill*, 148 AD3d 1469, 1470 [3d Dept 2017], *lv denied* 29 NY3d 1080 [2017]). Based on the evidence presented at the hearing, the court determined that defendant was aware of those terms and conditions and that he violated them "by absconding and fail[ing] to report to probation as required" (*see People v Pruett*, 191 AD3d 1423, 1423 [4th Dept 2021], *lv denied* 36 NY3d 1099 [2021]; *Bailey*, 181 AD3d at 1244).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**87**

**CAF 25-00116**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, GREENWOOD, AND HANNAH, JJ.

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IN THE MATTER OF CHRISTINE VILLANI,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD WENDIG, RESPONDENT-RESPONDENT.

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SALCEDO APPEALS PLLC, UTICA (STEVEN B. SALCEDO OF COUNSEL), FOR PETITIONER-APPELLANT.

GERALD J. VELLA, SPRINGVILLE, FOR RESPONDENT-RESPONDENT.

LYLE T. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILD.

BRIDGET A. MCCUE-MARSHALL, RANDOLPH, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Cattaraugus County (Deborah J. Scinta, R.), entered January 10, 2025, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied that part of the petition seeking permission for petitioner to relocate with her daughter to Florida.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals, as limited by her brief, from an order insofar as it denied that part of her petition seeking permission to relocate with her daughter (child) to Florida. We affirm.

Contrary to the mother's contention, we conclude that Family Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that she did not meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests, and we further conclude that the court's determination has " 'a sound and substantial basis in the record' " (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *see generally Matter of Rodriguez v Young*, 232 AD3d 1279, 1279 [4th Dept 2024], *lv denied* 43 NY3d 902 [2025]; *Matter of Martin v Martin*, 221 AD3d 1557, 1558 [4th Dept 2023]). "A parent seeking permission for a child to relocate with [them] has the burden of establishing by a preponderance of the evidence that the proposed relocation is in the

child's best interests" (*Matter of Murphy v Peace*, 72 AD3d 1626, 1626 [4th Dept 2010]). "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Tropea*, 87 NY2d at 739). The relevant factors to be considered include, but are not limited to, "[a] each parent's reasons for seeking or opposing the move, [b] the quality of the relationships between the child and the custodial and noncustodial parents, [c] the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, [d] the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and [e] the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*id.* at 740-741). "[N]o single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" (*id.* at 738), and " 'a court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1769 [4th Dept 2016]).

Here, we conclude that the record supports the court's determination that it is not in the best interests of the child to allow the mother to relocate with her to Florida, where the mother wishes to live with her fiancée. Indeed, based on the evidence adduced at the hearing on the mother's petition, the court properly concluded that the mother "failed to establish that the child's life would 'be enhanced economically, emotionally and educationally' by the proposed relocation" (*Hill*, 125 AD3d at 1434; *see Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]). The record establishes that the child has lived in New York her whole life, and that she had connections to the community in which she grew up, and engaged in activities that were not available in Florida. The record also reflects that respondent father owns his own business and home, whereas the mother does not own her own home and has not worked since 2018, when she separated from the father. Thus, there was a sound and substantial basis for the court to conclude that, economically speaking, it would be in the child's best interests to remain with the father in New York. Further, although the mother presented some evidence that the child would be emotionally enriched by moving to Florida—i.e., she had already made a few friends there—that enrichment would come at the expense of her relationship with the father, who she would not see as often, to the detriment of the child's emotional condition. In a similar vein, we note that allowing the mother to relocate the child to Florida would also separate her from her sibling—who lives with the father in New York—and that, generally speaking, "sibling relationships should not be disrupted unless there is some overwhelming need to do so," which is not the case here (*Matter of Curry v Reese*, 145 AD3d 1475, 1476 [4th Dept 2016] [internal quotation marks omitted]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Salerno v Salerno*, 273 AD2d 818, 819 [4th

Dept 2000]). Additionally, although the mother testified that the child could receive a superior education upon relocation, "she failed to offer any proof from which [the court] reasonably could conclude that the [Florida] school system was a significant improvement over the school system in [New York]" (*Matter of Hirschman v McFadden*, 137 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016] [internal quotation marks omitted]; *see Matter of Jiggetts v Thomas*, 237 AD3d 1573, 1574 [4th Dept 2025]).

Although the mother argues that her request for a relocation is justified inasmuch as she needs a "fresh start," away from New York, to free herself from the father's allegedly dysfunctional and harassing behavior—which she asserts severely affected her mental health—we note that the need for a fresh start, standing alone, is insufficient to warrant relocation (*see Gasdik v Winiarz*, 188 AD3d 1760, 1762 [4th Dept 2020]; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [4th Dept 2006], *lv denied* 6 NY3d 714 [2006]). Further, it is unclear how relocating to Florida would, in actuality, resolve that problem inasmuch as, even if the mother moved to Florida, she would still have to communicate with the father about the child, and would still have to coparent with him. The record shows that the parents already struggle with communication while residing in the same state, and it is reasonable to conclude that removing the child to Florida would not ameliorate any problems with the parents' communication issues or their ability to successfully coparent the child.

Although the record establishes that the child has a close relationship with the mother, it also establishes that she had a good relationship with the father. The record is equally clear, however, that neither parent is very supportive of the other parent's relationship with the child. Indeed, the evidence at the hearing raised serious concerns about whether the mother would allow the child to communicate with the father if she was allowed to relocate to Florida. Moreover, the record supports the conclusion that the mother is not capable of ensuring that the child will continue to have a close relationship to the father if she relocated—for example, the amount of parenting time that she proposed for the father would be insufficient to maintain the current relationship between the child and the father (*see generally Hirschman*, 137 AD3d at 1613).

The mother also contends that the court erred in excluding from evidence at the hearing certain evidence relating to the father's alleged past abuse of the mother. Even assuming, arguendo, that the court erred in excluding the evidence in question, we conclude that any such error is harmless (*see generally Matter of Higgins v Higgins*, 128 AD3d 1396, 1397 [4th Dept 2015]; *Matter of Newman v Duffy*, 125 AD3d 1474, 1475 [4th Dept 2015]). Specifically, the challenged evidence relates to just one of the *Tropea* factors and, even if that factor weighs in the mother's favor, the other factors weigh against

the conclusion that it would be in the child's best interests to allow her to relocate to Florida.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**99**

**TP 25-01227**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF MAMADOU BARRY, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, RESPONDENT.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (TAYLOR A. SUTTON OF COUNSEL), FOR RESPONDENT.

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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, Wyoming County [Donald G. O'Geen, A.J.], entered July 16, 2025) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated certain incarcerated individual rules. After Supreme Court transferred this proceeding to this Court pursuant to CPLR 7804 (g), the Attorney General advised this Court that respondent has issued an administrative order reversing the determination and that all references to the disciplinary proceeding have been expunged from petitioner's record. Because petitioner has obtained the relief that he could be granted in this proceeding, the proceeding is dismissed as moot (*see Matter of Smith v Annucci*, 173 AD3d 1685, 1685 [4th Dept 2019]; *Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**101**

**KA 25-00294**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. DESINO, DEFENDANT-APPELLANT.

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THOMAS L. PELYCH, HORNELL, FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered November 13, 2024. The judgment convicted defendant upon his plea of guilty of criminal possession of a forged instrument 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 criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We affirm.

At the outset, we conclude that there is no reason for us to address defendant's contention that his waiver of the right to appeal is invalid, inasmuch as defendant's substantive contention challenging the plea would survive even a valid waiver of the right to appeal (*see People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *see also People v Thompson*, 219 AD3d 1666, 1667 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; *People v Brown*, 151 AD3d 1951, 1951-1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

Defendant contends that his plea was not knowingly, intelligently, and voluntarily entered because he did not understand the plea proceeding due to his limited education, the complexity of the rights he was forfeiting, and his lack of sufficient time to discuss the matter with counsel. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that contention (*see People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *Brown*, 151 AD3d at 1952). We

conclude in any event that defendant's contention is belied by his statements during the plea colloquy (*see Brown*, 151 AD3d at 1952).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**111**

**CA 24-01526**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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HOYTE'S CONCRETE PRODUCTS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN DIANGELO, ALSO KNOWN AS RICHARD JOHN DIANGELO,
DEFENDANTS-RESPONDENTS.

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CROSSMORE AND TIFFANY, ITHACA (KIRSTIN TIFFANY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 28, 2024, in an action for replevin. The order, insofar as appealed from, dismissed the complaint.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following memorandum: Plaintiff, as limited by its brief, appeals from an order entered following a nonjury trial insofar as it dismissed the complaint. Supreme Court's written decision fails to set forth "the facts it deem[ed] essential" to its determination (CPLR 4213 [b]). Under the circumstances, we conclude that the case must be held and that the decision must be reserved, and we remit the matter to Supreme Court to make the requisite findings of fact (*see State Bank of Tex. v Kaanam, LLC*, 170 AD3d 1498, 1498 [4th Dept 2019]; *Chavoustie v Stone St. Baptist Church of Chaumont*, 163 AD2d 856, 856 [4th Dept 1990]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**112**

**CA 24-01456**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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VICTORIA H. WEINKE AND RICHARD L. CARLSON,
CO-EXECUTORS OF THE ESTATE OF THOMAS L. CARLSON,
DECEASED, PLAINTIFFS,

V ORDER

ASBESTOS CORPORATION, LTD., A CORPORATION OF
THE PROVINCE OF QUEBEC, ET AL., DEFENDANTS.
(ACTION NO. 1.)

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MERLE C. CHAPIN AND IRENE CHAPIN, HIS SPOUSE, PLAINTIFFS,

V

ASBESTOS CORPORATION, LTD., A CORPORATION OF THE PROVINCE
OF QUEBEC, ET AL., DEFENDANTS.
(ACTION NO. 2.)

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ARLENE M. DIERMYER, ADMINISTRATOR OF THE ESTATE OF
JAMES R. DIERMYER, SR., DECEASED AND INDIVIDUALLY
AS THE SURVIVING SPOUSE OF JAMES R. DIERMYER, SR.,
PLAINTIFF,

V

ASBESTOS CORPORATION, LTD., A CORPORATION OF THE PROVINCE
OF QUEBEC, ET AL., DEFENDANTS.
(ACTION NO. 3.)

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NANCY A. MATIKOSH, EXECUTOR OF THE ESTATE OF SAMUEL
MATIKOSH, JR., DECEASED, AND INDIVIDUALLY AS THE SURVIVING
SPOUSE OF SAMUEL MAKITOSH, JR., PLAINTIFF,

V

ASBESTOS CORPORATION, LTD., A CORPORATION OF THE PROVINCE
OF QUEBEC, ET AL., DEFENDANTS.
(ACTION NO. 4.)

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NANCY M. MUIR, AS EXECUTOR OF THE ESTATE OF JOSEPH L.
MUIR, DECEASED, PLAINTIFF-RESPONDENT,

V

AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR BY
MERGER TO BUFFALO PUMPS, INC., ET AL., DEFENDANTS.

(ACTION NO. 5.)
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KENNETH C. ZUHR AND CAROL ANN ZUHR, HIS SPOUSE, PLAINTIFFS,

V

ASBESTOS CORPORATION, LTD., A CORPORATION OF THE PROVINCE OF QUEBEC, ET AL., DEFENDANTS.
(ACTION NO. 6.)
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HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.

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CLYDE & CO US LLP, NEW YORK CITY (PETER J. DINUNZIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered August 23, 2024, in a personal injury action. The order, inter alia, denied the motion of defendant Hedman Resources Limited to vacate a judgment obtained in action No. 5.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs *(see Richards v Hedman Resources Ltd.*, 204 AD3d 1407, 1407-1409 [4th Dept 2022]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**113**

**CA 24-01815**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, NOWAK, AND DELCONTE, JJ.

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MATTINA PROPERTY MANAGEMENT, INC.,
PLAINTIFF-APPELLANT,

V ORDER

GABRIELLE A. MATTINA-ALFIERI, ALSO KNOWN AS
GABRIELLE A. MATTINA, JAMES S. ALFIERI,
CO-ADMINISTRATOR OF THE ESTATE OF JAMES J.
BENJAMIN ALFIERI, AND AMY FRANCES
MILLARD, CO-ADMINISTRATOR OF THE ESTATE OF JAMES J.
BENJAMIN ALFIERI, DEFENDANTS-RESPONDENTS.

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LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered September 10, 2024, in an action to quiet title. The order granted the motion of James S. Alfieri and Amy Frances Millard to dismiss the complaint against them.

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**120**

**KA 24-01359**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE J. ELLISON, JR., DEFENDANT-APPELLANT.

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J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE, NEW YORK PROSECUTORS TRAINING INSTITUTE, ALBANY (BRIDGET RAHILLY STELLER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered June 13, 2024. The judgment convicted defendant upon a 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 County Court should have dismissed the indictment pursuant to CPL 30.30 as a sanction for the People's failure to comply with their discovery obligations under CPL article 245. Although the court adjourned the trial and imposed other sanctions on the People pursuant to CPL 245.80 for their belated disclosure of certain evidence, defendant contends that dismissal of the indictment was the only appropriate sanction given the nature and scope of the People's discovery violations. By pleading guilty, however, defendant forfeited his discovery-related contention (*see People v Weems*, 240 AD3d 1411, 1411 [4th Dept 2025]; *People v Adams*, 232 AD3d 1302, 1303 [4th Dept 2024], *lv denied* 42 NY3d 1078 [2025]; *People v Robinson*, 225 AD3d 1266, 1268 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]). In any event, defendant's contention lacks merit because the speedy trial requirements of CPL 30.30 do not apply to homicide charges (*see* CPL 30.30 [3] [a]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**122**

**KA 22-01816**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OZELLEON PRINGLE, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RYAN M. BERGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 7, 2022. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), reckless endangerment in the first degree and 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 upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), reckless endangerment in the first degree (§ 120.25), and assault in the second degree (§ 120.05 [2]). Defendant's conviction stems from his conduct in firing gunshots at a person inside a motor vehicle. The victim sustained gunshot wounds to his lower right back and upper right leg.

We reject defendant's contention that the waiver of the right to appeal is invalid. The oral colloquy, together with the written waiver, "was sufficient to support a knowing and voluntary waiver under the totality of the circumstances" (*People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Drake*, 195 AD3d 1442, 1442 [4th Dept 2021], *lv denied* 37 NY3d 991 [2021], *reconsideration denied* 37 NY3d 1059 [2021]).

Defendant contends that County Court erred in refusing to adjudicate him a youthful offender. Although ordinarily a valid waiver of the right to appeal forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status (*see People v Pacherille*, 25 NY3d 1021, 1023-1024 [2015]),

defendant expressly reserved his right to challenge that determination on appeal.

Inasmuch as defendant was convicted of armed felony offenses, "the court was required to make a threshold determination whether defendant was an eligible youth pursuant to CPL 720.10 (3) before considering the range of factors pertinent to a youthful offender determination" (*People v Glover*, 239 AD3d 1459, 1461 [4th Dept 2025], *lv denied* 44 NY3d 982 [2025]). A youth convicted of an armed felony offense is an eligible youth "if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution" (CPL 720.10 [3]). Here, defendant was the sole participant in the crime, and we agree with the court that there were no mitigating circumstances bearing directly on the manner in which the crime was committed (*see People v Rivera*, 202 AD3d 1480, 1481 [4th Dept 2022], *affd* 41 NY3d 936 [2023]; *People v Blackshear*, 208 AD3d 1635, 1636 [4th Dept 2022], *lv denied* 39 NY3d 961 [2022]). Contrary to defendant's contention, his "background . . . and drug habit do not pertain to [his] direct manner in the commission of the crime" (*People v Garcia*, 84 NY2d 336, 342 [1994]; *see People v Marshall*, 214 AD3d 1360, 1361 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023]).

The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Entered: February 11, 2026 Ann Dillon Flynn
Clerk of the Court

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

**129**

**CA 25-00365**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, GREENWOOD, AND HANNAH, JJ.

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JAMES NIMS, III, AND SABRINA NIMS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES T. RILEY, M.D., SAMARITAN MEDICAL CENTER,
JEFFERSON ANESTHESIOLOGIST SERVICES, P.C.,
SUSAN M. WALKER, FNP-C, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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O'CONNOR FIRST, BINGHAMTON (RACHEL E. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT JAMES T. RILEY, M.D.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR DEFENDANT-APPELLANT SAMARITAN MEDICAL CENTER.

BROWN, GRUTTADARO & PRATO, PLLC, ROCHESTER (JOHN M. CONIGLIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS JEFFERSON ANESTHESIOLOGIST SERVICES, P.C. AND SUSAN M. WALKER, FNP-C.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (CHARLES L. FALGIATANO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeals from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 3, 2024. The order denied the motions of defendants Jefferson Anesthesiologist Services, P.C., Susan M. Walker, FNP-C, James T. Riley, M.D. and Samaritan Medical Center for summary judgment dismissing the complaint against them.

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

Memorandum: In this medical malpractice action seeking damages for injuries that plaintiff James Nims, III, allegedly sustained as a result of defendants' negligence in, inter alia, failing to timely diagnose a deep vein thrombosis and to provide appropriate treatment for that condition, defendants Susan M. Walker, FNP-C (Walker) and Jefferson Anesthesiologist Services, P.C. (Jefferson); defendant James T. Riley, M.D.; and defendant Samaritan Medical Center appeal from an order denying their respective motions for summary judgment dismissing the complaint against them. We affirm.

In moving for summary judgment in a medical malpractice action, a defendant has "the initial burden of establishing either that there

was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]). We conclude that defendants met their initial burden on their respective motions with respect to the alleged deviations from the accepted standard of medical care, and the burden thus " 'shift[ed] to . . . plaintiff[s] to demonstrate the existence of a triable issue of fact . . . as to the elements on which . . . defendant[s] met the prima facie burden' " (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). In opposition, however, plaintiffs submitted the affirmation of a pain management expert and the affirmation of an expert vascular surgeon, both of which "squarely oppose[d]" the affirmations of defendants' experts, resulting in "a classic battle of the experts that is properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Thomas v Eckhert*, 229 AD3d 1237, 1239 [4th Dept 2024]).

We have considered the remaining contentions of Walker and Jefferson and conclude that they lack merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**448**

**KA 24-00153**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, GREENWOOD, AND NOWAK, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAMES CURTIN, II, DEFENDANT-APPELLANT.

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NICHOLAS T. TEXIDO, BUFFALO, FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (MEREDITH M. MOHUN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered January 10, 2024. The appeal was held by this Court by order entered July 25, 2025, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (240 AD3d 1295 [4th Dept 2025]).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 9 and 15, and November 10, 2025,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**688**

**KA 23-01776**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, GREENWOOD, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON WELCH, DEFENDANT-APPELLANT.

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CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (MICHAEL A. LABELLA OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Oneida County Court (Robert Bauer, J.), dated September 30, 2022. The order, inter alia, dismissed without prejudice the application of defendant for resentencing pursuant to CPL 440.47.

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

Memorandum: Defendant appeals from an order that, inter alia, dismissed without prejudice his application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47 [2] [d]). The DVSJA grants "courts discretion to impose less severe sentences on certain defendants who were victims of domestic violence at the time of their crimes" (*People v Krista M.G.*, 228 AD3d 1300, 1301 [4th Dept 2024], *lv denied* 42 NY3d 1036 [2024]; *see* CPL 440.47; Penal Law § 60.12). Under CPL 440.47, a defendant who committed certain qualifying crimes prior to the effective date of the DVSJA and whose sentence meets certain requirements may seek resentencing in the court in which their sentence was imposed.

As relevant here, CPL 440.47 (2) (c) provides that an application for resentencing "must include at least two pieces of evidence corroborating the [defendant's] claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual[,] or psychological abuse inflicted by a member of the same family or household as the [defendant] as such term is defined in [CPL 530.11 (1)]." Paragraph (d) of CPL 440.47 (2) mandates that a court "dismiss the application without prejudice" when it determines that the defendant has not complied with the provisions of paragraph (c) of section 440.47 (2).

Here, defendant pleaded guilty in 2014 to two counts of murder in the second degree (Penal Law § 125.25 [1]) and was sentenced to

consecutive terms of 20 years to life in prison on each count. The first murder victim was defendant's ex-girlfriend, whom defendant stabbed 13 times in her head, face, and neck, among other places. The second murder victim was a man residing at the same apartment as the ex-girlfriend, who intervened in an attempt to help the ex-girlfriend when defendant was stabbing her. Neither victim was armed, and neither presented any threat to defendant, who was upset that his ex-girlfriend had ended their relationship and was seeing another man.

After serving approximately nine years of his sentence, defendant applied for resentencing pursuant to the DVSJA. In support of his application alleging that he was a victim of domestic violence, defendant submitted, among other things, an affidavit in which he claimed that various people, including the two victims, had subjected him to bullying and psychological and physical abuse for months prior to the murders. The People opposed the application, contending that defendant was not entitled to a hearing under CPL 440.47 (2) (e) because he failed to submit sufficient proof as required under subdivision (2) (c) to corroborate his claim that he was a victim of domestic violence when he committed the murders. County Court summarily "denied without prejudice" defendant's application after determining that he did not include "at least two pieces of evidence corroborating his claim that he was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual[,] or psychological abuse inflicted by a member of the same family or household as himself as defined in CPL [ ]530.11 (1)."

As a preliminary matter, we agree with defendant that he may appeal from that part of the order dismissing his application for resentencing without prejudice. We conclude that the order constitutes "an order denying resentencing," from which an appeal may be taken as of right (CPL 440.47 [3] [a]). Although we recognize that the Third Department has held otherwise, interpreting the statutory phrase "an order denying resentencing" to mean an order denying resentencing *after a hearing*, rather than an order summarily dismissing an application for resentencing without prejudice (*see People v Melissa OO.*, 234 AD3d 101, 103-106 [3d Dept 2024]; *People v James QQ.*, 232 AD3d 1137, 1138 [3d Dept 2024], *lv denied* 43 NY3d 964 [2025]), we do not read the statute so restrictively. As a remedial statute, the DVSJA should be "liberally construed to carry out the reforms intended and to promote justice" (McKinney's Cons Laws of NY, Statutes § 321; *see generally People v Brown*, 25 NY3d 247, 251 [2015]). "A liberal construction . . . is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law" (*Matter of Dewine v State of N.Y. Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92 [4th Dept 2011] [internal quotation marks omitted]; *see* McKinney's Cons Laws of NY, Statutes § 321, Comment).

As the Third Department recognized in *Melissa OO.* (234 AD3d at 106 n 5), its reading of CPL 440.47 (3) would insulate from judicial review orders that improperly dismiss applications that meet the evidentiary provisions of subdivision (2) (c), leaving defendants who

are deserving of hearings with no legal recourse except to refile their applications, which could be improperly and repeatedly denied again. Such a narrow construction of CPL 440.47 is not compelled by the statutory language and is contrary to well established rules of construction for remedial statutes (*see Brown*, 25 NY3d at 251; *Dewine*, 89 AD3d at 92; *see also People v Sosa*, 18 NY3d 436, 440-441 [2012]). If the legislature intended to deprive defendants of the right to appeal from summary denials of applications for resentencing under the DVSJA, it should have "clearly expressed" such a limitation through unambiguous language in CPL 440.47 (3) (a) (*Brown*, 25 NY3d at 251 [internal quotation marks omitted]). Given that the legislature did not expressly exclude orders summarily dismissing applications for resentencing from the phrase "an order denying resentencing" under CPL 440.47 (3) (a), we will not read in that limitation inasmuch as it would be "at odds with the broad objectives of the remedial enactment" of the DVSJA (*Sosa*, 18 NY3d at 441).

Our statutory interpretation, i.e., that an order dismissing an application for resentencing for failure to comply with the evidentiary provisions under CPL 440.47 (2) (c) is tantamount to "an order denying resentencing" under CPL 440.47 (3) (a), is also supported by language in the statute providing that a defendant may request appointment of counsel "on *any appeals* regarding [their] application for resentencing pursuant to this section" (CPL 440.47 [3] [emphasis added]).

With respect to the merits, however, we conclude that the court properly denied defendant's application without a hearing inasmuch as defendant failed to submit at least two pieces of evidence corroborating his claim that he was subjected to substantial physical, sexual, or psychological abuse inflicted by a member of his family or household (*see* CPL 440.47 [2] [c]). In support of his application, defendant submitted 68 pages of text messages, primarily of those between him and the ex-girlfriend he murdered, the presentence report, and a photograph showing scratches on his neck allegedly caused by his ex-girlfriend. As the court properly determined, none of the items proffered by defendant corroborated his claim that he had been the victim of "*substantial* physical, sexual[,] or psychological abuse" (*id.* [emphasis added]). Thus, defendant was not entitled to a hearing and the court properly dismissed his application without prejudice (*see People v White*, 226 AD3d 1054, 1055 [2d Dept 2024], *lv denied* 42 NY3d 931 [2024]; *People v James NN.*, 224 AD3d 1014, 1016 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]).

All concur except MONTOUR, J., who dissents and votes to dismiss the appeal in the following memorandum: I respectfully dissent because I disagree with the majority's conclusion that defendant may appeal from that part of the order dismissing without prejudice his application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47 [2] [d]). I am instead persuaded by the thorough statutory analysis undertaken by the Third Department in *People v Melissa OO.* (234 AD3d 101, 103-106 [3d Dept 2024]), which compellingly shows that the legislature has not authorized an appeal from such an order. I would therefore dismiss

the appeal in this case.

"Appealability of determinations adverse to a defendant cannot be presumed because 'a defendant's right to appeal within the criminal procedure universe is purely statutory' " (*People v Nieves*, 2 NY3d 310, 314 [2004], quoting *People v Stevens*, 91 NY2d 270, 278 [1998]). Thus, "no appeal lies 'from a determination made in a criminal proceeding unless one is provided by the CPL' " (*Stevens*, 91 NY2d at 277), and, "in the absence of a statute expressly authorizing a criminal appeal, there is no right to appeal in a criminal case" (*People v De Jesus*, 54 NY2d 447, 449 [1981], *rearg denied* 55 NY2d 1038 [1982]). Here, the part of the order dismissing defendant's application for resentencing without prejudice "is not appealable to this Court as of right under the general statutory provisions authorizing appeals to intermediate appellate courts under CPL 450.10 nor is the order of dismissal one for which defendant could seek permission to appeal to this Court under CPL 450.15" (*Melissa OO.*, 234 AD3d at 103). Consequently, defendant's right to appeal depends upon whether CPL 440.47 expressly authorizes an appeal from an order dismissing without prejudice an application for resentencing pursuant to the DVSJA (*see Melissa OO.*, 234 AD3d at 103).

In that regard, " '[t]he DVSJA, without diminishing the gravity of an offense, permits courts to impose alternative, less severe sentences in certain cases involving defendants who are victims of domestic violence' " (*People v Wendy B.-S.*, 229 AD3d 1317, 1318 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]; *see* CPL 440.47; Penal Law § 60.12). Pursuant to step one of the statutory procedure, "[a] defendant who is confined while serving a sentence of a certain length for an offense committed prior to the effective date of the DVSJA and is eligible for an alternative sentence may request to apply for resentencing in accordance with Penal Law § 60.12" (*Wendy B.-S.*, 229 AD3d at 1318). "If the court finds that [the defendant] has not met the requirements to apply for resentencing . . . , the court shall notify [the defendant] and *dismiss [their] request without prejudice*" (CPL 440.47 [1] [d] [emphasis added]). If, however, "the court finds that the defendant has met the requirements to apply for resentencing, the court must notify the defendant that they may submit an application for resentencing" (*Wendy B.-S.*, 229 AD3d at 1318; *see* CPL 440.47 [1] [c]). At step two of the statutory procedure, the defendant's "application for resentencing must include certain pieces of evidence pursuant to the provisions of CPL 440.47 (2) (c)" (*Wendy B.-S.*, 229 AD3d at 1318). If the court finds that the defendant has not satisfied those evidentiary provisions, "the court shall *dismiss the application without prejudice*" (CPL 440.47 [2] [d] [emphasis added]). If, however, the court finds that the defendant has complied with those provisions, it must at step three of the statutory procedure "conduct a hearing to aid in making its determination of whether the [defendant] should be resentenced in accordance with [Penal Law § 60.12]" (CPL 440.47 [2] [e]). When, after such a hearing, "the court determines that the [defendant] should be resentenced . . . , the court shall notify the [defendant] that, unless [they] withdraw[ ] the application or appeal[ ] from such order, the court will enter an order vacating the sentence originally

imposed and imposing the new sentence" (CPL 440.47 [2] [g]). Conversely, when "the court determines that the [defendant] should not be *resentenced* . . . , the court shall inform [the defendant] of its decision and shall enter an order to that effect" (CPL 440.47 [2] [f] [emphasis added]).

The appeal subdivision of the statute then provides, in relevant part, that an appeal may be taken as of right "from an order *denying resentencing*," as well as "from a new sentence imposed under" the DVSJA on the ground that the term of the new sentence is "harsh or excessive" or "unauthorized as a matter of law" and "from an order specifying and informing [the defendant] of the term of the determinate sentence the court would impose upon resentencing on the ground that the term of the proposed sentence is harsh or excessive" (CPL 440.47 [3] [emphasis added]). The legislature thus expressly authorized an appeal as of right from a post-hearing order *denying resentencing*, imposing a new sentence, or specifying the term of the new sentence that would be imposed (*see id.*; *Melissa OO.*, 234 AD3d at 105). The legislature, however, did not authorize an appeal as of right from an order *dismissing a request* without prejudice under step one or *dismissing an application* without prejudice under step two (*see Melissa OO.*, 234 AD3d at 105; *compare* CPL 440.47 [1] [d]; [2] [d], *with* [2] [f]; [3]).

"Where, as here, the [l]egislature specifically provides for appealability of certain orders but not others, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (*Melissa OO.*, 234 AD3d at 106 [internal quotation marks omitted]). The plain meaning of the statutory language differentiating between an order dismissing a request or an application without prejudice and an order denying resentencing (*compare* CPL 440.47 [1] [d]; [2] [d], *with* [2] [f]; [3] [a]) demonstrates that "the [l]egislature intended a different result as to the appealability of orders dismissing [a request or an application] without prejudice under step one or step two[, respectively,] and an order denying [resentencing] on the merits after a hearing under step three" (*Melissa OO.*, 234 AD3d at 106). The courts "must give effect to that intention" (*id.*). As applied to the order from which defendant seeks to appeal here, I agree with the Third Department that, inasmuch as the legislature " 'failed to provide for an appeal from the [dismissal] of an application for resentencing pursuant to [Penal Law § 60.12 and CPL 440.47 (2) (c)], no [such] appeal was intended' " (*id.*, quoting *De Jesus*, 54 NY2d at 449). Given that " '[a]ppeals in criminal cases are strictly limited to those authorized by statute,' " I conclude that the present appeal "is not properly before this Court and must be dismissed" (*id.*, quoting *People v Bautista*, 7 NY3d 838, 838-839 [2006]).

I also reject the notion—advanced by the majority here—that any other portion of the statute warrants a different conclusion. Subsequent language in the appeal subdivision of the statute undoubtably states that a defendant may request assigned counsel "for the preparation of and proceedings on any appeals regarding [their]

application for resentencing pursuant to this section" (CPL 440.47 [3]). Under a plain reading of the assigned counsel clause, however, the term "any appeals" (*id.*) clearly refers back to any of the types of appeals expressly authorized earlier in the appeal subdivision of the statute (*see Harbor View at Port Washington Home Owners Assn., Inc. v W.J. Harbor Ridge, LLC*, 74 AD3d 748, 749 [2d Dept 2010]; *State Univ. Constr. Fund v Kipphut & Neuman Co.*, 159 AD2d 1003, 1005 [4th Dept 1990]). The assigned counsel clause thus provides an opportunity for the defendant to exercise a particular right *within* an authorized appeal, but that clause cannot be read as independently providing for a type of appeal that the earlier authorizing language does not.

Relatedly, in construing statutory language, "the familiar principle[ ] of *ejusdem generis*" (*People v Illardo*, 48 NY2d 408, 416 [1979] [internal quotation marks omitted]) requires that the courts "limit general language of a statute by specific phrases which have preceded the general language" (McKinney's Cons Laws of NY, Statutes § 239; *see* § 238; *Illardo*, 48 NY2d at 416). Therefore, the arguably more generalized language located later in the subdivision allowing a defendant to request the assignment of counsel in any appeal "regarding [an] application for resentencing" cannot be read to overrule the more specific preceding language authorizing appeals as of right only, as relevant here, "from an order denying resentencing" (CPL 440.47 [3]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 238). Stated differently, the legislature authorized an appeal "from an order denying resentencing" under the DVSJA and such an appeal certainly falls within the later more generalized description of one "regarding [an] application for resentencing" (CPL 440.47 [3]), but applicable principles of statutory construction dictate that the later language in the assigned counsel clause cannot be read as expanding the universe of appealable orders beyond those specifically authorized earlier in the subdivision (*see* McKinney's Cons Laws of NY, Book 1, Statutes §§ 238, 239; *Illardo*, 48 NY2d at 416).

Furthermore, I disagree with the majority's application of the canon of construction for remedial statutes. "While [the DVSJA] is a remedial statute and as such, should be interpreted broadly, this maxim does not allow [the courts] to stretch the statute beyond its intended coverage" (*Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 766 [1997], *rearg denied* 91 NY2d 922 [1998]). Indeed, "even a remedial statute must be given a meaning consistent with the words chosen by the [l]egislature" because "those words define the scope of the remedy that the [l]egislature deemed appropriate," and "the role of the courts is to give effect not only to the remedy, but also to the words that delimit the remedy" (*Enright v Eli Lilly & Co.*, 77 NY2d 377, 385 n 1 [1991], *rearg denied* 77 NY2d 990 [1991], *cert denied* 502 US 868 [1991]). Inasmuch as the plain language of the DVSJA unambiguously limits appeals as of right from those orders expressly delineated in CPL 440.47 (3) and does not authorize such an appeal from an order dismissing without prejudice an application for resentencing, the courts must give effect to that limitation and refrain from extending the statute to authorize appeals beyond those authorized by the legislature (*see People v Brenda WW.*, — NY3d —, — n 8, 2025 NY Slip Op 03643, *4 n 8 [2025]).

Nor are the courts permitted to cast aside the statute that the legislature wrote by declaring that it is irrational or illogical for the legislature to restrict appeals under the DVSJA to orders denying resentencing on the merits following a hearing. For starters, the legislature could, in fact, have rationally determined that it did not want to overburden the appellate courts with appeals from orders dismissing applications for resentencing without prejudice when the defendants in such circumstances have an available remedy at the trial court level, i.e., filing a new application that satisfies the evidentiary provisions of the statute (*see Melissa OO.*, 234 AD3d at 106). The legislature may have logically trusted that trial courts—placed in the role of gatekeepers under the structure of the DVSJA—would appropriately apply the statute and evaluate the evidence presented on applications for resentencing. Regardless, contrary to the majority's tacit assertion, "the plain language of the statute is *not* ambiguous, and thus [the courts] are bound to follow it" and cannot impose their own views of the statute that they believe that the legislature should have drafted (*People v Talluto*, 39 NY3d 306, 314 [2022] [emphasis omitted]). As the Third Department insightfully pointed out, although "the failure to provide for the statutory right to appeal from an order dismissing a defendant's DVSJA resentencing application without prejudice could insulate from appellate review certain trial court determinations where a defendant has exhausted [their] potential universe of evidentiary submissions[,] . . . it is entirely within the province of the [l]egislature to provide a remedy to permit appeals in these circumstances" (*Melissa OO.*, 234 AD3d at 106 n 5). Indeed, although there is no indication here that the statute as written does not function as the legislature intended, "if the wording of the statute has created an unintended consequence, . . . it is the prerogative of the legislature, not this Court, to correct it" (*Talluto*, 39 NY3d at 314 [internal quotation marks omitted]).

For all of the foregoing reasons, I conclude that defendant's appeal must be dismissed.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**784**

**KA 24-00488**

PRESENT: CURRAN, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS WILLIAMS, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (JERRY MARTI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered May 19, 2022. 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: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The prosecution stems from defendant's possession of a firearm and his use of that firearm to shoot a victim in the neck outside of a house party.

Viewing the evidence in light of the elements of the crimes of which defendant was convicted as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject his contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, a different verdict with respect to those crimes would have been unreasonable in light of the multiple eyewitness accounts and the surveillance footage admitted at trial (*see generally Danielson*, 9 NY3d at 348).

Contrary to defendant's further contention, County Court did not err in imposing consecutive sentences. When a defendant is charged with "simple" weapon possession (Penal Law § 265.03 [3]), "[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751 [2013];

*see People v Malloy*, 33 NY3d 1078, 1080 [2019]). Here, the evidence at trial establishes that, on the night of the shooting, defendant and others at the house party were outside several minutes before defendant pulled out the gun and shot the victim, and thus the evidence "support[s] the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to [cause the victim serious physical injury]" (*Malloy*, 33 NY3d at 1080; *see People v Clinton*, 222 AD3d 1427, 1429 [4th Dept 2023], *lv denied* 41 NY3d 1017 [2024]; *People v Porteous*, 219 AD3d 757, 759 [2d Dept 2023], *lv denied* 40 NY3d 1081 [2023]).

Defendant further contends that he received ineffective assistance of counsel based upon, inter alia, defense counsel's failure to request a *Molineux* instruction and his failure to object to statements made by the prosecutor during summation. " 'Although the failure to request limiting instructions may constitute ineffective assistance of counsel if the error were so serious that defendant did not receive a fair trial' " (*People v Orcutt*, 51 AD3d 1404, 1405 [4th Dept 2008]), here, defense counsel may have had a strategic reason for failing to request a *Molineux* limiting instruction inasmuch as he may not have wished to draw further attention to the admitted *Molineux* evidence (*see People v Case*, 197 AD3d 985, 988 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]). Even assuming, arguendo, that any of the prosecutor's comments during summation exceeded the bounds of propriety, we conclude that they were "not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013] [internal quotation marks omitted]). Inasmuch as we conclude "that the prosecutor either did not engage in misconduct, or that any error did not deny defendant a fair trial, we conclude that defendant was not denied effective assistance of counsel based on counsel's failure to object" (*People v Garrow*, 171 AD3d 1542, 1547 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]). Upon our review of all of defendant's allegations of error concerning the representation provided by defense counsel, we conclude that defendant " 'failed to satisfy the well-settled, high burden of showing that he was deprived of a fair trial and meaningful representation sufficient to warrant a reversal' " (*Case*, 197 AD3d at 988, quoting *People v Flores*, 84 NY2d 184, 189 [1994]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**791**

**CA 24-00607**

PRESENT: CURRAN, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

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ROBERT MATTISON AND HEATHER MATTISON,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK AND NEW YORK STATE
THRUWAY AUTHORITY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Court of Claims (J. David Sampson, J.), entered March 14, 2024. The order denied the application of claimants seeking, in effect, permission to file a late claim.

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

Same memorandum as in *Mattison v State of New York* ([appeal No. 2] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

All concur except CURRAN and HANNAH, JJ., who dissent and vote to affirm in the same dissenting memorandum as in *Mattison v State of New York* ([appeal No. 2] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**794**

**CA 24-01673**

PRESENT: CURRAN, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

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SHARON E. TURNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. VOROS, DEFENDANT-APPELLANT.

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LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered September 30, 2024, in a premises liability action. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this premises liability action seeking to recover damages for injuries that she sustained when she fell off the back landing of a home owned by defendant. Defendant appeals from an order that denied his motion for summary judgment dismissing the complaint. We reverse.

Plaintiff's deposition testimony, submitted by defendant on his motion, established that plaintiff rented the property in question from defendant and had resided there from 1999 through the time the incident occurred in March 2018. The back landing for the premises served as the main entrance to the residence. During the time plaintiff resided at the premises, there had not been, prior to her fall, any incidents, falls or complaints involving the back landing. Plaintiff also testified that the condition of the back landing had not changed while she resided there. Although there were marks on the landing suggesting that posts had been placed in the landing at one time, there had never been handrails on the back landing while plaintiff resided at the premises.

On the day of the incident, plaintiff exited the residence onto the landing, intending to take a walk. There were trash and recycling bins on the step between the landing and the walkway that were obstructing plaintiff's path and, when plaintiff attempted to move

them, she fell. Plaintiff did not recall how she fell, but testified that before the fall her feet did not slip, twist or wobble. Plaintiff testified that, at the time of her fall, her feet did not trip or get caught on the concrete.

We conclude that defendant met his initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendant's evidence, including plaintiff's deposition testimony and the expert affidavit of a registered architect, established that no dangerous or defective condition existed on the property at the location where plaintiff fell and that the landing "was in compliance with the applicable codes" (*Corbett v Adelphia W. N.Y. Holdings, LLC*, 45 AD3d 1293, 1294 [4th Dept 2007]; *see Mann v AutoZone Northeast, Inc.*, 148 AD3d 1646, 1646 [4th Dept 2017]; *Zammiello v Senpike Mall Co.*, 300 AD2d 1124, 1125 [4th Dept 2002]), and defendant also "demonstrat[ed] that plaintiff could not identify the cause of her fall without engaging in speculation" (*Conners v LMAC Mgt. LLC*, 189 AD3d 2071, 2072 [4th Dept 2020]; *see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1769-1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]).

We disagree with our dissenting colleagues that defendant's expert affidavit is insufficient to establish that the landing was in a reasonably safe condition. Defendant's expert set forth his experience and explained that his opinions were based on a reasonable degree of architectural, engineering, and building science certainty. During his investigation, defendant's expert relied on materials that he averred are normally relied upon by experts in the field, including surveys, construction reports, inspection reports, and code books, and he personally visited the premises to "observe and inspect the subject exterior steps" at issue in this matter. During his review, he "found [that, inasmuch as] the subject steps [were] only configured with two risers . . . , no handrails were required." Defendant's expert also measured the subject steps and adjacent landing. Upon his review of the subject steps and landing, defendant's expert found that they met the requisite conditions of being structurally sound, in good repair, properly anchored and capable of supporting imposed loads. Moreover, it was only after observing, inspecting, and measuring the relevant subject steps and landing and making the aforementioned findings that he concluded that the exterior steps and landing were not a fall hazard or otherwise in a defective, deteriorated, unsafe, hazardous or unlawful condition.

We further conclude that plaintiff failed to raise a triable issue of fact in opposition to the motion (*see Westermeyer v Whelan*, 214 AD3d 1307, 1307 [4th Dept 2023]). Plaintiff's expert affirmation made only conclusory and speculative assertions with respect to the conclusion that a dangerous condition existed and "failed to recite the manner in which the [expert] came to [that] conclusion[ ]" (*Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277 [4th Dept 2005] [internal quotation marks omitted]; *see Griffith v ETH NEP, L.P.*, 140 AD3d 451, 452 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]), and plaintiff's expert affirmation similarly made only conclusory and speculative assertions with respect to causation (*see Conners*, 189

AD3d at 2073; *Giardina v Lippes*, 77 AD3d 1290, 1291 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]). Plaintiff's expert affirmation was therefore insufficient to raise a triable issue of fact (*see Westermeyer*, 214 AD3d at 1307; *Corbett*, 45 AD3d at 1294-1295; *see also Mann*, 148 AD3d at 1646), and plaintiff's opposition papers were otherwise insufficient to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

All concur except BANNISTER and DELCONTE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. Contrary to defendant's contention, we have repeatedly held that "compliance with regulations or a building code is not dispositive on the issue of negligence" (*Schneider v Corporate Place, LLC*, 149 AD3d 1503, 1505 [4th Dept 2017]), and thus the mere fact that a defendant has established their "compliance with such codes does not necessarily preclude a jury from finding that [a compliant step or entryway] was part of or contributed to any inherently dangerous condition existing in the area of [a plaintiff's] fall" (*Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1042 [4th Dept 2013] [internal quotation marks omitted]; *see Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032 [4th Dept 2004]).

Here, it was defendant's burden on his motion for summary judgment dismissing the complaint to establish that "there was no dangerous or defective condition existing on the property at the location where plaintiff fell and that the [steps and landing] 'w[ere] in compliance with the applicable codes' " (*Westermeyer v Whelan*, 214 AD3d 1307, 1307 [4th Dept 2023]; *see Corbett v Adelphia W. N.Y. Holdings, LLC*, 45 AD3d 1293, 1294 [4th Dept 2007]). We agree with the majority that defendant submitted ample evidence establishing that his premises complied with the relevant building codes. Defendant's architectural expert, in his affidavit, addressed the enumerated code sections with which defendant's property was compliant; then, however, without referring to any further facts, he concluded that "there is no merit to [plaintiff's] allegations that [defendant] was negligent, careless and/or reckless." Thus, our reading of that affidavit is that defendant's expert relied solely on the lack of code violations in reaching his conclusion, and failed to address the fact that the steps and landing were unguarded or the fact that there was evidence that railings were once guarding the steps and landing. In other words, the expert failed to specifically address whether a dangerous or defective condition existed even in the absence of any code violations. The conclusory statement in the affidavit of defendant's expert that the area of the exterior steps here—despite admittedly lacking handrails—was nonetheless not in a "defective, deteriorated, unsafe, hazardous and/or unlawful condition" failed to satisfy defendant's initial burden of establishing as a matter of law that his property was in a reasonably safe condition (*see Gorman v Mooney's 9*, 239 AD3d 1260, 1261 [4th Dept 2025]; *Bamrick*, 5 AD3d at 1032). Inasmuch as we conclude that defendant failed to satisfy his initial burden, we conclude that the motion was properly denied, regardless of the sufficiency of plaintiff's opposing papers (*see Gorman*, 239 AD3d

at 1261; *Schneider*, 149 AD3d at 1505), and we would, therefore, affirm.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**796**

**CA 25-00048**

PRESENT: CURRAN, J.P., BANNISTER, OGDEN, DELCONTE, AND HANNAH, JJ.

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ROBERT MATTISON AND HEATHER MATTISON,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK AND NEW YORK STATE
THRUWAY AUTHORITY, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Court of Claims (J. David Sampson, J.), entered November 26, 2024. The order, in effect, granted claimants' motion for leave to renew and, upon renewal, adhered to a prior determination to deny claimants' application for permission to file a late claim.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the application is granted upon condition that claimants shall file the proposed claim against defendants within 30 days of the date of entry of the order of this Court.

Memorandum: Claimants were allegedly injured when they were thrown from a capsizing boat during an underground boat tour at the Lockport Caves in Lockport, New York. Claimants filed an application seeking, in effect, permission to file a late claim against, among others, defendants, i.e., the State of New York (State) and the New York State Thruway Authority, pursuant to Court of Claims Act § 10 (6), alleging, inter alia, that defendants had a duty to inspect the premises, including all caves, tunnels, waterways, and boats. In appeal No. 1, claimants appeal from an order that, inter alia, denied claimants' application with respect to defendants. In appeal No. 2, claimants appeal from an order that, in effect, granted their motion for leave to renew with respect to the order in appeal No. 1 and, upon renewal, adhered to the prior determination to deny claimants' application with respect to defendants.

At the outset, we note that, in deciding claimants' motion for leave to renew, the Court of Claims considered new evidence and rejected the substantive arguments raised by claimants. Therefore,

although the order in appeal No. 2 does not state as much, it is clear to this Court that the court, in effect, granted claimants' motion for leave to renew and, upon renewal, adhered to its original determination. We therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Cayuga Nation v Parker* [appeal No. 2], 229 AD3d 1065, 1066 [4th Dept 2024]; *Manes v State of New York*, 182 AD3d 1012, 1013 [4th Dept 2020], *lv denied* 35 NY3d 913 [2020]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Addressing claimants' contentions in appeal No. 2, we conclude that the court abused its discretion in adhering to its prior determination to deny the application to file a late claim against defendants. It is well settled that "[a] determination by the Court of Claims to grant or deny [an application] for permission to file a late . . . claim lies within the broad discretion of that court and should not be disturbed absent a clear abuse of that discretion" (*Phillips v State of New York*, 179 AD3d 1497, 1498 [4th Dept 2020] [internal quotation marks omitted]; *see Malkan v State of New York*, 145 AD3d 1601, 1601-1602 [4th Dept 2016], *lv denied* 29 NY3d 907 [2017]). Court of Claims Act § 10 (6) "enumerates six factors to be weighed . . . in connection with a late claim [application]: (1) whether the delay was excusable; (2) whether the State had notice of the essential facts constituting the claim; (3) whether the State had an opportunity to investigate the circumstances underlying the claim; (4) whether the claim appears to be meritorious; (5) whether the delay resulted in substantial prejudice to the State; and (6) whether the [applicant] has another available remedy. This list is not exhaustive and the presence or absence of any one factor is not dispositive; rather, the [c]ourt in its discretion balances these factors in making its determination" (*Booker v State of New York*, 84 Misc 3d 590, 593 [Ct Cl 2024]; *see Bay Terrace Coop. Section IV v New York State Employees' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979, 981 [1982]).

Here, the court considered the requisite statutory factors and reasonably concluded that three of them heavily favored claimants, i.e., notice, opportunity to investigate, and lack of substantial prejudice to defendants (*see* Court of Claims Act § 10 [6]; *see also Malkan*, 145 AD3d at 1602). Upon our consideration of those factors and the remaining factors outlined in Court of Claims Act § 10 (6), we conclude that the court abused its discretion in denying claimants' application with respect to defendants (*see generally Phillips*, 179 AD3d at 1498).

With respect to the factor weighed most heavily by the court against claimants, i.e., whether they demonstrated the appearance of a meritorious claim, we note that claimants need not establish a prima facie case at this stage of the proceedings (*see Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1, 11-12 [Ct Cl 1977]). Rather, a claim has the appearance of merit if it is "not . . . patently groundless, frivolous or legally defective, and the record as a whole . . . give[s] reasonable cause to believe that a valid cause of action exists" (*Calverley v State of New York*, 187 AD3d 1426, 1427 [3d Dept 2020] [internal quotation marks omitted]; *see generally*

*Santiago v State of New York*, 218 AD3d 1268, 1270 [4th Dept 2023]). Here, claimants presented evidence in support of their application that defendants may have conducted inspections of the area and the boat, particularly after a similar accident occurring years prior. Claimants also presented in support of the their motion for leave to renew an affidavit of a former Director of Engineering for the City of Lockport (City) who averred, based on his personal knowledge and City maps, that the State owned the underground caves. While defendants submitted evidence in opposition to claimants' application, such evidence created a factual issue whether defendants bore responsibility for the area where the accident occurred (*see generally Tucholski v State of New York*, 122 AD3d 612, 612-613 [2d Dept 2014]). Thus, we conclude that claimants' submissions on the application and motion for leave to renew were sufficient, at this stage in the proceedings, to demonstrate that there "appears to be merit to their claim within the meaning of Court of Claims Act § 10 (6)" (*id.* at 612; *see Marcus v State of New York*, 172 AD2d 724, 724-725 [2d Dept 1991]).

Additionally, we agree with claimants that they do not necessarily have another available remedy (*see generally Marcus*, 172 AD2d at 725). Finally, while claimants may not have provided a convincing excuse for failing to timely file their claim based on law firm failure (*see Matter of Schunk v Town of York*, 200 AD3d 1669, 1670 [4th Dept 2021]), the delay here was minimal (*see Schnier v New York State Thruway Auth.*, 205 AD3d 958, 959 [2d Dept 2022]; *Matter of Smith v State of New York*, 63 AD3d 1524, 1524-1525 [4th Dept 2009]).

All concur except CURRAN and HANNAH, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the orders in both appeals. Initially, we note our disagreement with the majority's conclusion that, in appeal No. 2, the Court of Claims "in effect . . . granted" claimants' motion for leave to renew. In both the body of the court's decision and order, and in its sole decretal paragraph, the court unequivocally stated that it was denying that motion. Additionally, both claimants and defendants frame their contentions on appeal around the fact that the court denied claimants' motion for leave to renew, and at no time in their briefs or at oral argument did the parties even suggest that leave to renew had been granted.

Regardless, in appeal No. 2, we agree with defendants that claimants' renewal motion was properly denied because it did not rely on any new facts as specifically required by CPLR 2221 (e) (2). " '[N]ew facts' means 'facts that were unavailable at the time of [the] prior motion' " (*Angelhow v Chahfe*, 174 AD3d 1285, 1288 [4th Dept 2019]; *see Schilling v Malark*, 13 AD3d 1153, 1154 [4th Dept 2004]). Here, claimants made no argument before the court, and make no argument on appeal, that the facts upon which they relied in support of their renewal motion were "new facts" within the meaning of CPLR 2221 (e) (2) and, thus, they have failed to even allege that they had a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). In the absence of a reasonable justification to offer "new facts," the court could not exercise its discretion to grant claimants' motion for leave to renew

(*Fusion Funding v Loftti Inc.*, 216 AD3d 1416, 1417 [4th Dept 2023]; *see 2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 206 AD3d 1607, 1608 [4th Dept 2022]; *see also Mura v Mura*, 133 AD3d 1324, 1325-1326 [4th Dept 2015]).

In appeal No. 1, we would affirm the order for reasons stated in the court's decision.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**822**

**OP 25-00623**

PRESENT: MONTOUR, J.P., SMITH, GREENWOOD, NOWAK, AND KEANE, JJ.

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IN THE MATTER OF DANIEL STROLLO, IN HIS OFFICIAL CAPACITY AS THE SPECIAL DISTRICT ATTORNEY OF MONROE COUNTY, PETITIONER,

V MEMORANDUM AND ORDER

ANDRAE EVANS, RESPONDENT.

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DANIEL E. STROLLO, SPECIAL DISTRICT ATTORNEY, ROCHESTER, FOR PETITIONER.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (NICHOLAS P. JACOBSON OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to Public Officers Law § 36 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to remove respondent as the Supervisor of the Town of Irondequoit.

It is hereby ORDERED that said proceeding is dismissed without costs.

Memorandum: Petitioner commenced this proceeding to remove respondent from public office pursuant to Public Officers Law § 36. Inasmuch as respondent no longer holds public office, the proceeding is moot (*see Matter of Kalodukas v Berentsen*, 121 AD3d 1476, 1477 [3d Dept 2014]; *Matter of Warren v Bielecki*, 92 AD3d 1244, 1244 [4th Dept 2012]; *Matter of Copp v Lankford*, 283 AD2d 980, 980 [4th Dept 2001]).

All concur except KEANE, J., who is not participating.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**825**

**KA 19-01303**

PRESENT: LINDLEY, J.P., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMIE WRIGHT, DEFENDANT-APPELLANT.

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EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered May 13, 2019. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that Supreme Court erred in refusing to instruct the jury on the lesser included offense of manslaughter in the second degree. A court "may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater [offense]" (CPL 300.50 [1]). It is undisputed that manslaughter in the second degree (Penal Law § 125.15 [1]) is a lesser included offense of murder in the second degree (§ 125.25 [1]), the charge for which defendant was originally indicted (*see People v Colon*, 219 AD3d 1675, 1675 [4th Dept 2023], *lv denied* 40 NY3d 1080 [2023]; *see generally* CPL 1.20 [37]) and, thus, " 'the question simply is whether on *any* reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count and still find

him guilty on the lesser one' " (*People v Hull*, 27 NY3d 1056, 1058 [2016]; *see People v Ott*, 200 AD3d 1642, 1643 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert denied* — US —, 143 S Ct 403 [2022]). Here, the incident occurred during an altercation between numerous individuals, and given that the victim was some distance away from the other ongoing fighting when defendant ran up to the victim from behind and hit him in the head with a baseball bat with such force to fracture his skull into multiple pieces, we conclude that there is no reasonable view of the evidence that would support a finding that defendant acted recklessly rather than intentionally (*see generally People v Green*, 56 NY2d 427, 434-435 [1982], *rearg denied* 57 NY2d 775 [1982]).

We reject defendant's contention that defense counsel was ineffective by failing in the pretrial omnibus motion to seek suppression of the identification testimony as unreliable inasmuch as that argument would have had little or no chance of success (*see People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *People v Rivera*, 71 NY2d 705, 709 [1988]). There is no merit to defendant's remaining allegations of ineffective assistance of counsel (*see generally People v Caban*, 5 NY3d 143, 152 [2005]).

All concur except OGDEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent because, in my view, Supreme Court erred in declining to charge manslaughter in the second degree as a lesser included offense. I would therefore reverse the judgment and dismiss the indictment without prejudice to the People to re-present any appropriate charges to another grand jury (*see People v Collier*, 303 AD2d 1008, 1009 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]).

A court "may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater" (CPL 300.50 [1]).

Here, manslaughter in the second degree (Penal Law § 125.15 [1]) is a lesser included offense of murder in the second degree, the charge for which defendant was originally indicted (§ 125.25 [1]; *see People v Rivera*, 23 NY3d 112, 120 [2014]; *People v Colon*, 219 AD3d 1675, 1675 [4th Dept 2023], *lv denied* 40 NY3d 1080 [2023]; *see generally* CPL 1.20 [37]). The question therefore is whether there is a reasonable view of the evidence, examined in the light most favorable to defendant, to support a finding that he committed reckless manslaughter and not intentional murder (*see Rivera*, 23 NY3d at 120-121). Viewing the evidence in the light most favorable to defendant, as we must (*see id.*), I conclude that there is a reasonable view of the evidence supporting the conclusion that defendant acted recklessly, i.e., he was aware of and consciously disregarded a substantial and unjustifiable risk but did not intend to cause the death of another person (*see* Penal Law §§ 15.05 [3]; 125.15 [1]; 125.25 [1]; *see generally People v Holloway*, 130 AD2d 933, 933 [4th

Dept 1987], *lv denied* 70 NY2d 751 [1987]), and defendant was thus entitled to that charge. This is particularly true inasmuch as the jury acquitted defendant of murder in the second degree and instead convicted him of the lesser included offense of manslaughter in the first degree (§ 125.20 [1]; *see generally People v McIntosh*, 162 AD3d 1612, 1615-1616 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]). I therefore conclude that the court erred in refusing to charge the jury with the requested lesser included charge of manslaughter in the second degree (*see People v Diaz*, 66 AD2d 752, 752 [1st Dept 1978]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**859**

**CA 24-01872**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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DARLENE MILLER AND JAMES MILLER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOHN ROSS MCGRATH, M.D., KALEIDA HEALTH, INC.,
BUFFALO GENERAL MEDICAL CENTER, GATES VASCULAR
INSTITUTE, WNY RADIOLOGY ASSOCIATES, LLC,
CARLA A. FREDERICK, M.D., AND UBMD INTERNAL MEDICINE,
DEFENDANTS-RESPONDENTS.

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GOLDSTEIN GRECO, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS JOHN ROSS MCGRATH, M.D. AND WNY RADIOLOGY ASSOCIATES, LLC.

EAGAN & HEIMER, PLLC, BUFFALO (NEAL A. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CARLA A. FREDERICK, M.D. AND UBMD INTERNAL MEDICINE.

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Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered October 24, 2024. The order granted in part the motions of defendants for summary judgment dismissing the complaint and any cross-claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendants John Ross McGrath, M.D., and WNY Radiology Associates, LLC, with respect to claims based on allegations that John Ross McGrath, M.D., performed the bronchial artery embolization procedure without first having the data that a completed bronchoscopy would have provided him, failed to ensure that the bronchial artery embolization procedure was medically indicated, and failed to timely issue a post-procedure note and reinstating those claims against John Ross McGrath, M.D., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this negligence and medical malpractice action to recover damages for injuries sustained by Darlene Miller (plaintiff) in the course of a bronchial artery embolization (BAE) procedure. Plaintiff presented to defendant Buffalo General Medical Center (Buffalo General) complaining that she was coughing up blood. Defendant Carla A. Frederick, M.D., a

pulmonologist employed by defendant UBMD Internal Medicine (UBMD), consulted on plaintiff's care. Frederick scheduled a bronchoscopy to locate the source of plaintiff's bleeding, but plaintiff's condition apparently improved and she was discharged without undergoing the bronchoscopy. Plaintiff returned to Buffalo General the next day after her condition worsened, and Frederick advocated for an urgent BAE procedure. Defendant John Ross McGrath, M.D., an interventional radiologist and employee of defendant WNY Radiology Associates, LLC (WNYRA), performed the BAE procedure. During or following that procedure, plaintiff suffered a spinal stroke resulting in significant injuries. No bronchoscopy was performed before the BAE procedure. McGrath left the hospital immediately after the BAE procedure concluded and had not yet written a post-surgical note by the time that plaintiff's condition precipitously worsened.

McGrath and WNYRA (collectively, WNYRA defendants) moved for summary judgment dismissing the complaint and any cross-claims against them, as did Frederick and UBMD (collectively, UBMD defendants). Plaintiffs now appeal from an order that, inter alia, granted those motions in part.

As an initial matter, plaintiffs' counsel consented to the dismissal of plaintiffs' claims that McGrath deviated from the standard of care by his failure to perform a bronchoscopy instead of a BAE procedure, his failure to look at imaging without haste, and his failure to obtain informed consent from plaintiff. Inasmuch as no appeal lies from that part of an order entered on consent, those contentions are not properly before this Court (*see Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1617 [4th Dept 2016]).

We agree with plaintiffs that Supreme Court erred in granting that part of the WNYRA defendants' motion with respect to claims that McGrath performed the BAE procedure without first having the data that a completed bronchoscopy would have provided him, failed to ensure that the BAE procedure was medically indicated, and failed to timely issue a post-procedure note, and we therefore modify the order accordingly. "[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]). "[T]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden" (*id.* [internal quotation marks omitted]).

Here, the WNYRA defendants met their initial burden on the motion with respect to the issues of deviation from the accepted standard of care and proximate causation through the submission of McGrath's deposition testimony and his expert physician affidavit, which, taken together, were "detailed, specific and factual in nature" and addressed each negligence claim raised in plaintiffs' bill of particulars (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1469

[4th Dept 2020] [internal quotation marks omitted]). The burden thus shifted to plaintiffs "to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that [McGrath's] departure from that standard of care was a proximate cause of the [alleged] injur[ies]" (*Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022] [internal quotation marks omitted]; *see Bubar*, 177 AD3d at 1359).

We conclude that plaintiffs raised triable issues of fact with respect to both deviation from the standard of care and proximate causation relating to certain aspects of McGrath's pre-procedure decision to perform the BAE procedure. Specifically, plaintiffs submitted an expert physician affidavit opining that McGrath deviated from the applicable standard of care by performing the BAE procedure without first having the data that a completed bronchoscopy would have provided and by failing to ensure that the BAE procedure was medically indicated. The expert further opined that McGrath should have known that the BAE procedure was not indicated or medically justified and if not for McGrath's negligence in that regard, the injuries suffered by plaintiff during the procedure would not have resulted. We further conclude that plaintiffs raised triable issues of fact with respect to McGrath's failure to prepare a timely post-procedure note. Plaintiffs' expert opined that McGrath deviated from the applicable standard of care by failing to prepare a timely post-procedure note and that the absence of a timely note hindered and delayed the evaluation of plaintiff's status by those who treated her after the procedure. Thus, with respect to those claims against McGrath, we conclude that plaintiffs' expert affidavit resulted in "a classic battle of the experts that is properly left to a jury for resolution" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]).

Contrary to plaintiffs' further contentions, we conclude that the court properly granted that part of the UBMD defendants' motion with respect to claims that Frederick failed to coordinate with medical providers prior to the BAE and that she failed to follow up with plaintiff after the procedure. The UBMD defendants met their initial burden through the affirmation of their expert, who averred that it was reasonable and within the standard of care for Frederick to rely on McGrath to determine whether a BAE was appropriate and that, as a consulting provider, Frederick would not have been expected to stay on or take charge of monitoring plaintiff after that procedure. Plaintiffs failed to raise an issue of fact in opposition inasmuch as their expert's opinions were conclusory and failed to explain how the alleged failures were proximate causes of plaintiff's injuries (*see O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1141 [4th Dept 2009], *appeal dismissed* 13 NY3d 834 [2009]).

We have considered plaintiffs' remaining contentions and conclude that they are without merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**881**

**KA 24-00454**

PRESENT: WHALEN, P.J., SMITH, GREENWOOD, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HUNTER ARMSTRONG, DEFENDANT-APPELLANT.

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KEEM APPEALS, PLLC, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 25, 2024. The judgment convicted defendant upon his plea of guilty of kidnapping 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 kidnapping in the first degree (Penal Law § 135.25 [2] [a]). We reject defendant's contention that Supreme Court erred in determining that the identification of defendant by the victim was confirmatory. "A court's invocation of the 'confirmatory identification' exception is . . . tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" (*People v Rodriguez*, 79 NY2d 445, 450 [1992]; *see People v Colon*, 196 AD3d 1043, 1045 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). Here, the People met their burden of establishing that the identification of defendant by the victim was confirmatory by presenting the testimony of a police detective and the recording of defendant's interview with law enforcement, which established that the victim knew defendant well enough to consider him as "an older brother figure" (*see Colon*, 196 AD3d at 1045; *People v Gambale*, 158 AD3d 1051, 1052 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]).

Defendant failed to preserve for our review his contention that his guilty plea was not knowing, voluntary and intelligent inasmuch as he withdrew his motion to withdraw his plea and did not thereafter move to vacate the judgment of conviction (*see People v Lorenz*, 120 AD3d 1528, 1529 [4th Dept 2014], *lv denied* 24 NY3d 1045 [2014]). This case does not fall within the rare exception to the preservation rule

set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

Defendant's contention that he was denied effective assistance of counsel is based on matters outside the record, and thus "a CPL 440.10 proceeding is the appropriate forum for reviewing [defendant's] claim[ ]" (*People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]).

Finally, we note that both the certificate of disposition and the uniform sentence and commitment form erroneously reflect that defendant was convicted and sentenced at a term of Onondaga County Court, and those documents must therefore be amended to reflect that he was convicted and sentenced at a term of Supreme Court, Onondaga County (*see People v Savino*, 239 AD3d 1452, 1454 [4th Dept 2025]; *People v Daniqua S.D.*, 92 AD3d 1226, 1227 [4th Dept 2012]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**894**

**KA 23-01288**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BLAINE BRINSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered March 6, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In appeal No. 1, 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]). In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL 440.10 to vacate the judgment of conviction in appeal No. 1.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence on the issue of defendant's possession of the subject handgun (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, when the police initiated a traffic stop of the vehicle defendant was driving, defendant led police on a pursuit that ended when defendant's vehicle struck another vehicle. Defendant then fled on foot. The front-seat passenger, the only other person in defendant's vehicle, was impeded from leaving the vehicle due to collision damage. When the passenger ultimately exited the vehicle, an officer observed a handgun in the passenger's waistband. In the course of arresting the passenger, the arresting officer observed the subject handgun on the front armrest between the driver's seat and the passenger's seat. According to expert testimony at trial, a DNA sample taken from the handgun revealed a mixture of contributors, with defendant's DNA being the major component. Based

on the circumstances surrounding the recovery of the subject handgun and the corroborating DNA evidence, we conclude that the verdict is not against the weight of the evidence on the issue of possession (*see People v Campbell*, 128 AD3d 1401, 1401-1402 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]; *People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]; *cf. People v Hunt*, 185 AD3d 1531, 1533 [4th Dept 2020]).

Defendant further contends in appeal No. 1 that Supreme Court erred in denying that part of his motion seeking to dismiss the indictment pursuant to CPL 30.30 on the ground that the People's failure to turn over certain discovery material rendered the initial certificate of compliance invalid. Defendant specifically contended that the People possessed or were deemed to be in possession of the identified material before they filed the initial certificate of compliance (*cf. People v Campbell*, 243 AD3d 1221, 1221-1222 [4th Dept 2025]). The court orally denied the motion one day after it was filed and before the People filed their response. The court did not specifically address defendant's contention that, prior to filing the initial certificate of compliance, the People possessed or were deemed to be in possession of the material pursuant to CPL 245.20 (former [1]) and (former [2]), and it did not address whether the People had exercised due diligence as required by CPL 245.50 (former [1]) before filing that certificate of compliance.

We agree with defendant that the court erred in denying his motion without determining those issues. CPL 245.20 (1) addresses the "initial discovery" that the People must provide to a defendant, automatically and without specific request. The initial discovery obligations implicate speedy trial rights through the application of CPL 245.50 (3), which requires the People to file a valid certificate of compliance before stating trial readiness. In order to file a valid certificate of compliance, the People must "state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" (CPL 245.50 [former (1)]). As relevant here, the People were required to disclose material "in the possession, custody or control of the prosecution" (CPL 245.20 [former (1)]), and "all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution" (CPL 245.20 [former (2)]). Here, the court failed to address whether the People were in possession of or were deemed to be in possession of initial discovery before they filed the initial certificate of compliance or, if they were, whether the People nevertheless exercised due diligence before filing the initial certificate of compliance. Thus, as the People correctly concede, we must hold the case, reserve decision, and remit the matter in appeal No. 1 to Supreme Court to determine the abovementioned outstanding issues, upon further submissions if warranted, and, if the court concludes that the initial certificate of compliance was invalid, to determine whether the People were nevertheless ready within the requisite time period (*see generally People v Mosley*, 243 AD3d 1345,

1346-1347 [4th Dept 2025]; *People v Walker*, 228 AD3d 1318, 1320 [4th Dept 2024]).

In light of our determination, we do not address defendant's remaining contentions in appeal No. 1 or his contention in appeal No. 2.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**895**

**KA 23-01884**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BLAINE BRINSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (RYAN P. ASHE OF COUNSEL), FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered October 17, 2023. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the case is held, and the decision is reserved.

Same memorandum as in *People v Brinson* ([appeal No. 1] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**906**

**CAF 24-01742**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND DELCONTE, JJ.

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IN THE MATTER OF RAGNAR B.-N.

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ONEIDA COUNTY DEPARTMENT OF FAMILY AND COMMUNITY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GARY B.-N., RESPONDENT-APPELLANT.

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JOHN ROWLEY, SPENCER, FOR RESPONDENT-APPELLANT.

WALTER BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered July 2, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. We conclude that the appeal must be dismissed inasmuch as the father's contentions are directed at the order finding permanent neglect, which "was entered on consent of [the father] and thus is beyond appellate review" (*Matter of Raymond H. [Dana C.]*, 186 AD3d 1125, 1126 [4th Dept 2020] [internal quotation marks omitted]; *see Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1665 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]; *Matter of Bryan W.*, 299 AD2d 929, 930 [4th Dept 2002], *lv denied* 99 NY2d 506 [2003]). We note that a party may challenge whether the consent to the entry of the finding of permanent neglect was given knowingly, voluntarily and intelligently by preserving the contention through a motion to vacate the finding of permanent neglect or to withdraw their consent (*see Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Matter of Dah'Marii G. [Cassandra G.]*, 156 AD3d 1479, 1480 [4th Dept 2017]; *Matter of Xavier O.V. [Sabino V.]*, 117 AD3d 1567, 1567 [4th

Dept 2014], *lv denied* 24 NY3d 903 [2014]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**908**

**CA 24-01118**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND DELCONTE, JJ.

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SHARON WASHER, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF LUTHER WASHER, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE MEMORIAL HOSPITAL OF WILLIAM F. AND
GERTRUDE F. JONES, INC., ET AL., DEFENDANTS,
THOMAS F. TAYLOR, M.D., AND ASSOCIATED RADIOLOGISTS
OF THE FINGER LAKES, P.C., DEFENDANTS-APPELLANTS.

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THE TARANTINO LAW FIRM, LLP, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL),
FOR DEFENDANTS-APPELLANTS.

THE FITZGERALD FIRM P.C., BUFFALO (BRIAN P. FITZGERALD OF COUNSEL),
FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered June 26, 2024. The order, insofar as appealed from, denied the motion of defendants Thomas F. Taylor, M.D., and Associated Radiologists of the Finger Lakes, P.C., for summary judgment dismissing the amended complaint and any cross-claims against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Thomas F. Taylor, M.D. and Associated Radiologists of the Finger Lakes, P.C. and dismissing the amended complaint against those defendants insofar as it asserts that defendant Thomas F. Taylor, M.D. was negligent in failing to order a CT scan and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice and wrongful death action, plaintiff alleges, inter alia, that defendant Thomas F. Taylor, M.D. was negligent in connection with his reading and report of chest x-rays taken when plaintiff's decedent sought treatment at an emergency room for pain following several falls, that a proper reading and report should have resulted in the more timely detection and treatment of decedent's lung cancer, and that defendant Associated Radiologists of the Finger Lakes, P.C. (Associated Radiologists), was vicariously liable for Taylor's negligence. Taylor and Associated Radiologists (collectively, defendants) appeal from an order that, inter alia, denied their motion for summary judgment dismissing the amended complaint and any cross-claims against them.

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]). "To meet that burden, a defendant must submit in admissible form factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020] [internal quotation marks omitted]; *see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). " '[T]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden' " (*Bubar*, 177 AD3d at 1359).

We agree with defendants that Supreme Court erred in denying that part of their motion seeking dismissal of the amended complaint insofar as it asserts that Taylor "negligently fail[ed] to order a CT scan of [decedent's] chest." We conclude that defendants met their initial burden of establishing entitlement to judgment as a matter of law with respect to that claim (*see Nesterenko v Hall*, 239 AD3d 1314, 1315 [4th Dept 2025]). By not submitting the requisite expert medical response in opposition to defendants' showing, plaintiff failed to raise a triable issue of fact with respect to that claim (*see id.*; *see also Webb v Scanlon*, 133 AD3d 1385, 1387 [4th Dept 2015]). We therefore modify the order accordingly.

Contrary to defendants' further contention, the court did not err in denying their motion insofar as it sought summary judgment dismissing the remainder of the amended complaint against them. With respect to the issue of deviation from the standard of care, although defendants met their initial burden on the motion by submitting the affidavit of an expert who opined that Taylor correctly read the chest x-rays and reported his findings to decedent's treating providers in the emergency department, we conclude that plaintiff's expert raised a triable issue of fact sufficient to defeat the motion (*see generally Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). With respect to the issue of proximate cause, we conclude that defendants failed to meet their initial burden and thus the burden never shifted to plaintiff on that issue (*see Bubar,* 177 AD3d at 1359).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**909**

**CA 24-01322**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, SMITH, AND DELCONTE, JJ.

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Z.M., AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN DEBORAH M., AND DEBORAH M., INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V ORDER

LEAH KAUFMAN, M.D., ET AL., DEFENDANTS, CROUSE HOSPITAL, AIWA ONO, M.D., KHANH-HEIN TRAN, M.D., AND XUE CHI, M.D., DEFENDANTS-APPELLANTS.

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GALE GALE & HUNT, LLC, FAYETTEVILLE (KEVIN T. HUNT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MERSON LAW, PLLC, NEW YORK CITY (EMILY C. VAUGHT OF COUNSEL), HASAPIDIS LAW OFFICES, SOUTH SALEM (ANNETTE G. HASAPIDIS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered July 22, 2024. The order, among other things, denied in part that part of a motion seeking summary judgment dismissing the complaint against defendants Crouse Hospital, Aiwa Ono, M.D., Khanh-Hein Tran, M.D. and Xue Chi, M.D.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 30 and February 2, 2026,

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**911**

**KA 24-00801**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN E. SWANTON, DEFENDANT-APPELLANT.

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FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER, FOR RESPONDENT.

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Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered May 9, 2024. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [4]), and two counts of criminal use of a firearm in the first degree (§ 265.09 [1] [a], [b]). County Court directed that the sentences for murder in the second degree and assault in the second degree were to run consecutively to each other, and concurrently with the sentences for the other crimes of which defendant was convicted.

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In particular, contrary to defendant's contention, the jury's rejection of the justification defense is not contrary to the weight of the evidence (*see People v Hollis*, 219 AD3d 1686, 1688-1689 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). The jury could reasonably have found, based on the testimony of the People's witnesses and the physical evidence, that the victims were not using or attempting to use deadly physical force when defendant shot them (*see generally People v St. John*, 215 AD3d 1267, 1268 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023]).

We agree with defendant, however, that the court erred in directing that the sentence for the count of assault in the first degree run consecutively to the sentence imposed on the count of murder in the second degree because the murder was the predicate felony for the felony assault (*see* Penal Law § 70.25 [2]; *People v Brown*, 204 AD3d 1390, 1394 [4th Dept 2022], *lv denied* 39 NY3d 985 [2022]; *People v Miller*, 148 AD3d 1689, 1690 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). We therefore modify the judgment by directing that all of the sentences imposed shall run concurrently.

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or further modification of the judgment.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**912**

**KA 22-00913**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIEN GOVAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARIEN GOVAN, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered November 18, 2021. The judgment convicted defendant upon his plea of guilty of attempted murder in the second 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 upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). In appeal Nos. 2 and 3, defendant appeals by permission of this Court from orders denying his motions pursuant to CPL 440.10 to vacate the judgment in appeal No. 1.

In his pro se supplemental brief, defendant contends in appeal No. 1 that the waiver of the right to appeal was not made knowingly, intelligently, and voluntarily and, in his main brief, he contends in appeal No. 1 that the waiver does not encompass any suppression issues because Supreme Court stated that defendant was waiving "certain" motions or suppression decisions, thus implying that some suppression decisions survived the waiver. Even assuming, arguendo, that the waiver of the right to appeal is invalid (*see People v Spratt*, 239 AD3d 1325, 1325 [4th Dept 2025], *lv denied* 44 NY3d 984 [2025]) and therefore does not encompass defendant's challenges in his main and pro se supplemental briefs in appeal No. 1 to the court's suppression rulings, we conclude, for the following reasons, that those challenges are without merit.

Defendant contends in his main and pro se supplemental briefs that the People failed to meet their burden of establishing the lack of undue suggestiveness in the photo array procedure inasmuch as defendant was the only person in jail clothing. We reject that contention. Defendant wore a green and white striped shirt that was visible on only one shoulder, and there were no markings on the shirt to indicate that it was a jail uniform. As the court noted, a witness looking at defendant's photograph would not necessarily conclude that he was wearing jail garb. The photographs in the array depicted men similar in age, race, hairstyles, and physical features (*see People v Mead*, 41 AD3d 1306, 1307 [4th Dept 2007], *lv denied* 9 NY3d 963 [2007]). Because "the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection," the photo array itself was not unduly suggestive (*People v Quinones*, 5 AD3d 1093, 1093 [4th Dept 2004], *lv denied* 3 NY3d 646 [2004]; *see People v Holmes*, 210 AD3d 1510, 1511 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023]; *People v Powell*, 26 AD3d 795, 795 [4th Dept 2006], *lv denied* 7 NY3d 793 [2006]).

Defendant failed to preserve for our review his further contention in his pro se supplemental brief that the procedure used by the police in presenting the photo array was unduly suggestive (*see People v Lundy*, 165 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *People v VanVleet*, 140 AD3d 1633, 1634 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016]). In any event, contrary to defendant's contention, the police employed a "blind or blinded" procedure inasmuch as one investigator prepared the photo array and a second investigator, who did not know which person in the array was the suspect or where the suspect was in the array, administered the photo array (*see* CPL 60.25 [1] [c] [i], [ii]; *People v Moss*, 232 AD3d 1327, 1327-1328 [4th Dept 2024]; *People v Tyme*, 222 AD3d 783, 784 [2d Dept 2023], *lv denied* 41 NY3d 944 [2024]). Although the second investigator had viewed a surveillance video depicting the crime prior to the photo array identification procedure, he testified that the video did not have enough clarity for him to identify the suspect.

We reject defendant's further contention in his pro se supplemental brief that his statements should have been suppressed as a result of his intoxication. Defendant preserved his contention for our review only with respect to statements he made to the arresting officers and not the investigator who conducted the interview with defendant. In any event, we conclude that defendant did not provide a factual record sufficient to enable us to review his contention inasmuch as the body-worn camera footage of the two arresting officers, which was admitted in evidence at the suppression hearing and reviewed by the court, was not provided to this Court (*see People v Brady*, 192 AD3d 1557, 1558-1559 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Smith*, 93 AD3d 1345, 1346 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]; *see generally People v Kinchen*, 60 NY2d 772, 773-774 [1983]). Based only on the testimony from the officers, we agree with the court that defendant was not intoxicated to a degree of mania or of being unable to understand the meaning of his

statements (*see People v Mineccia*, 185 AD3d 1407, 1408 [4th Dept 2020]; *People v Iddings*, 23 AD3d 1132, 1133 [4th Dept 2005], *lv denied* 6 NY3d 776 [2006]).

We also reject defendant's contention in his pro se supplemental brief that the court erred in refusing to suppress physical evidence without conducting a hearing on the legality of the arrest. A motion to suppress may be summarily denied if the motion papers do not allege a ground constituting a legal basis for the motion, or the sworn allegations of fact do not as a matter of law support the ground alleged (*see* CPL 710.60 [3] [a], [b]; *People v Collier*, 238 AD3d 1530, 1531 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]). Here, the court did not abuse its discretion in denying, without an evidentiary hearing, that part of defendant's omnibus motion seeking to suppress a gun recovered after defendant discarded it in a park (*see Collier*, 238 AD3d at 1531).

Defendant next contends in his pro se supplemental brief in appeal No. 1 that he was denied the right to testify before the grand jury. Assuming again, arguendo, that the waiver of the right to appeal is invalid (*see Spratt*, 239 AD3d at 1325), we conclude that defendant's contention is forfeited by his plea of guilty (*see People v Goodwin*, 238 AD3d 1333, 1334-1335 [3d Dept 2025], *lv denied* 43 NY3d 1055 [2025]; *People v Lafferty*, 227 AD3d 1480, 1481-1482 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024], *reconsideration denied* 42 NY3d 1036 [2024]; *People v Escalera*, 121 AD3d 1519, 1520 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]).

We reject defendant's contention in his main and pro se supplemental briefs in appeal No. 2 that the court erred in summarily denying his first CPL 440.10 motion seeking to vacate the judgment on the ground that his guilty plea was not knowingly, voluntarily, and intelligently entered because defense counsel coerced him into pleading guilty. Defendant's "unsupported, self-serving assertions . . . are contradicted by the transcript of the plea proceeding, at which defendant indicated that he agreed to plead guilty of his own free will and that no one had coerced him to enter the plea" (*People v Witkop*, 114 AD3d 1242, 1243 [4th Dept 2014], *lv denied* 23 NY3d 1069 [2014]; *see* CPL 440.30 [4] [d] [i]). Under these circumstances and considering defendant's further statements during the plea colloquy, we conclude that there is no reasonable possibility that the allegation is true (*see* CPL 440.30 [4] [d] [ii]; *People v McCullough*, 144 AD3d 1526, 1527-1528 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Atkins*, 107 AD3d 1465, 1466 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]). The court therefore properly denied defendant's first CPL 440.10 motion without a hearing because "the motion could be determined on the trial record and defendant's submissions on the motion" (*People v Satterfield*, 66 NY2d 796, 799 [1985]).

Finally, we have reviewed defendant's remaining contentions raised in his pro se supplemental brief with respect to appeal Nos. 2 and 3 and conclude that they do not warrant modification or reversal

of the orders.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**913**

**KA 23-01041**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIEN GOVAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARIEN GOVAN, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered May 4, 2023. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Govan* ([appeal No. 1] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**914**

**KA 24-00207**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIEN GOVAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (ALEXANDER PRIETO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DARIEN GOVAN, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered January 3, 2024. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Govan* ([appeal No. 1] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**916**

**KA 23-02008**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. HAWKEY, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 13, 2023. The judgment convicted defendant upon his plea of guilty of disseminating indecent material to minors in the first degree as a sexually motivated felony.

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 disseminating indecent material to minors in the first degree as a sexually motivated felony (Penal Law §§ 130.91, former 235.22), defendant contends that the supplemental sex offender victim fee should be vacated, for two reasons. First, defendant contends that the fee should not have been imposed inasmuch as he was convicted of an offense contained in article 235 of the Penal Law (*see* § 60.35 [1] [b]). Second, defendant contends that the fee should be vacated inasmuch as County Court failed to pronounce its imposition at sentencing. Assuming, arguendo, that preservation is not required under the circumstances of this case (*cf. People v Guerrero*, 45 AD3d 313, 313 [1st Dept 2007], *affd* 12 NY3d 45 [2009]; *see generally People v Conceicao*, 26 NY3d 375, 381-382 [2015]; *People v Carrington*, 238 AD3d 893, 894 [2d Dept 2025]), we conclude that defendant's contentions lack merit. Here, defendant's conviction results from an offense contained in article 130 of the Penal Law, and thus the supplemental sex offender victim fee is mandated pursuant to Penal Law § 60.35 (1) (b) (*see generally People v Adames*, 227 AD3d 483, 483 [1st Dept 2024], *lv denied* 42 NY3d 969 [2024]; *People v Bradshaw*, 210 AD3d 44, 47-48 [2d Dept 2022], *lv denied* 39 NY3d 1153 [2023], *reconsideration denied* 40 NY3d 996 [2023]). Moreover, inasmuch as the supplemental sex offender victim fee is not part of the sentence, the court was not required to "pronounce [it] in . . . defendant's presence during sentencing" (*Guerrero*, 12 NY3d at 47).

We note that the uniform sentence and commitment form fails to indicate that defendant's conviction of disseminating indecent material to minors in the first degree was as a sexually motivated felony, and it must be amended accordingly (*see People v Bullard-Daniel*, 203 AD3d 1630, 1633 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *see generally People v Brown*, 166 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**917**

**KA 24-00313**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENTON J. JONES-WATKINS, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Yates County (Jason L. Cook, J.), rendered January 9, 2024. The judgment convicted defendant upon a plea of guilty of aggravated criminal contempt.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of aggravated criminal contempt (Penal Law § 215.52 [3]), defendant contends that his waiver of the right to appeal is invalid because he provided monosyllabic answers to Supreme Court's questions during the waiver colloquy, and that his guilty plea was involuntarily entered because he gave monosyllabic responses to many questions during the plea colloquy. We affirm.

Initially, we conclude that defendant validly waived his right to appeal. The court's explanation of the appeal waiver tracked the appropriate model colloquy (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and, contrary to defendant's contention, the waiver was not rendered invalid by defendant's monosyllabic responses during the waiver colloquy (*see People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *People v Burch*, 234 AD3d 1246, 1246-1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]).

Defendant's contention that his monosyllabic responses to the court's inquiries during the plea colloquy rendered his plea involuntary "is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by the valid waiver of the right to appeal" (*People v Tapia*, 158 AD3d 1079, 1079 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018] [internal quotation marks omitted]; *see People v Kosmetatos*, 178 AD3d 1433, 1433-1434 [4th Dept 2019], *lv*

*denied* 35 NY3d 994 [2020]; *People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]). In any event, it is well settled that a defendant's monosyllabic responses to the court's questions during a plea colloquy do not render the resulting plea invalid (*see People v Stehm*, 227 AD3d 1463, 1464 [4th Dept 2024]; *People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**918**

**KA 24-01312**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIONEDRE B. WYATT, DEFENDANT-APPELLANT.

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SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (STEPHANIE M. STARE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GRAZINA HARPER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered June 5, 2024. 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 modified on the law by remitting the matter to Monroe County Court for a suppression hearing and as modified the judgment is affirmed in accordance with the following 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]). The conviction arises from an encounter during which a police officer discovered a gun in defendant's front pocket while in a gas station convenience store after the officer received information from a 911 call that a person matching defendant's description was observed with a cell phone or a gun.

Defendant contends that his conviction is not supported by legally sufficient evidence because the People failed to establish that the gas station convenience store was not defendant's place of business. We reject that contention. Here, the evidence at trial established that defendant possessed the weapon outside of the gas station convenience store and, thus, even assuming, arguendo, that the gas station convenience store was defendant's place of business, we conclude that the evidence of possession outside of the gas station convenience store is legally sufficient to support the conviction (*see People v Anderson*, 236 AD3d 1424, 1425 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]; *People v Hawkins*, 110 AD3d 1242, 1242-1243 [3d Dept 2013], *lv denied* 22 NY3d 1041 [2013]). We further reject defendant's contention that his conviction is not supported by legally sufficient evidence because the People failed to prove that he did not have a license for the gun. Defendant, and not the People, had the burden of

asserting, as a defense, that he possessed an appropriate firearms license, and defendant did not do so (*see People v David*, 41 NY3d 90, 96 [2023]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that defense counsel was ineffective by failing to move to suppress the gun on the ground that the police encounter was unlawful (*see People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). Here, suppression of the gun would have been dispositive of the sole count of the indictment of which defendant was convicted (*see Carter*, 142 AD3d at 1343; *see also People v Evans*, 243 AD3d 1338, 1339 [4th Dept 2025]).

To prevail on his claim of ineffective assistance of counsel, defendant "must demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to pursue colorable claims," and "[o]nly in the rare case will it be possible, based on the trial record alone, to deem [defense] counsel ineffective for failure to pursue a suppression motion" (*People v Carver*, 27 NY3d 418, 420 [2016] [internal quotation marks omitted]; *see People v Roots*, 210 AD3d 1532, 1533-1534 [4th Dept 2022]). We conclude that the record establishes that defense counsel could have presented a colorable argument that the police officer's actions were either not justified at the inception of the encounter or otherwise not reasonably related in scope to the circumstances presented (*see De Bour*, 40 NY2d at 215). Here, the officer's encounter with defendant was based on a 911 call from a security guard at a nearby restaurant who said that he observed a man who had what "looks like a black phone, but then again . . . looks like a gun." The security guard provided a description of the individual, and the guard said that he could not be sure, but that he thought the man might have been part of a dispute that had taken place at the restaurant earlier in the day. Notably, County Court held a *Huntley* hearing at which the arresting officer testified, but the testimony of the officer as well as his body cam footage, which was admitted at the hearing, presented a " 'close [question] under [the] complex *De Bour* jurisprudence' " regarding the legality of the police encounter (*Carter*, 142 AD3d at 1343, quoting *People v Clermont*, 22 NY3d 931, 934 [2013]).

We further conclude from this record that defense counsel's failure to seek suppression of the gun was not part of a legitimate pretrial strategy. The record reflects that defense counsel, or at least stand-in counsel, requested a probable cause hearing, but then failed to follow through with that request. Further, the court informed defendant on two occasions leading up to the *Huntley* hearing that he would have the chance to challenge the legality of the police encounter. There is no discernible reason why that hearing could not have been expanded to afford defense counsel an opportunity to make such a challenge had defense counsel merely requested permission to do

so.

In light of the foregoing, we conclude that " 'defendant is entitled to a suppression hearing' with respect to the legality of the police encounter" (*Carter*, 142 AD3d at 1343, quoting *People v Bilal*, 27 NY3d 961, 962 [2016]), and we therefore conditionally modify the judgment by remitting the matter to County Court for further proceedings (*see id.*; *see generally Clermont*, 22 NY3d at 934; *Evans*, 243 AD3d at 1339). In the event that defendant prevails at the suppression hearing, the judgment is reversed and the indictment is dismissed and, if the People prevail, then the judgment "should be amended to reflect that result" (*Clermont*, 22 NY3d at 932; *see Evans*, 243 AD3d at 1339; *People v Layou*, 114 AD3d 1195, 1198-1199 [4th Dept 2014]; *see also People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016]).

We reject defendant's contention that the sentence is unduly harsh and severe. Finally, we have considered defendant's remaining contention and conclude that it does not warrant further modification or reversal of the judgment.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**921**

**CAF 24-01503**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF JULIE A. VITO, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KYLE A. DUGAN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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HAYDEN M. DADD, CONFLICT DEFENDANT, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated September 6, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal and physical custody of the subject children.

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

Memorandum: In these consolidated appeals arising from proceedings pursuant to Family Court Act article 6 and article 8, respondent father appeals, in appeal No. 1, from an order of fact-finding and disposition that, among other things, granted petitioner mother sole legal and physical custody of the subject children, with supervised visitation to the father. In appeal No. 2, the father appeals from an order of protection issued against him. The two orders were issued on the same day following a combined hearing on the petitions.

Contrary to the father's contention with respect to both appeals, Family Court did not abuse its discretion in denying his request for an adjournment. It is well settled that "[t]he granting [or denial] of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Anthony M.*, 63 NY2d 270, 283 [1984]; *see Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]), and we perceive no basis to conclude that the court abused its discretion in denying the father's belated request to adjourn the proceedings on the morning of the hearing.

Contrary to the father's contention in appeal No. 2, the record supports the court's conclusion that the mother met her burden of

establishing by a preponderance of the evidence that he committed acts constituting the family offense of harassment in the second degree (*see* Penal Law § 240.26 [1]; *Matter of Mathis v Robinson*, 233 AD3d 1524, 1525 [4th Dept 2024], *lv denied* 43 NY3d 904 [2025]; *Matter of Harvey v Harvey*, 214 AD3d 1462, 1463 [4th Dept 2023]). Here, the court credited the testimony of the maternal aunt, who testified that she observed the father physically and verbally berate the mother and the children and, on one occasion, observed the father grab the mother by the neck. Inasmuch as "[t]he determination whether respondent committed a family offense [is] a factual issue for the court to resolve, and [the] court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record" (*Matter of Martin v Flynn*, 133 AD3d 1369, 1370 [4th Dept 2015] [internal quotation marks omitted]), we perceive no reason to disturb the court's conclusion here.

Finally, we reject the father's contention in appeal No. 1 that the court erred in requiring that his visitation be supervised. "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Muriel v Muriel*, 228 AD3d 1345, 1347 [4th Dept 2024] [internal quotation marks omitted]; *see Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]), and that determination "will not be disturbed as long as there is a sound and substantial basis in the record to support it" (*Matter of Procopio v Procopio*, 132 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 915 [2015] [internal quotation marks omitted]). Here, the court's determination to impose supervised visitation is supported by a sound and substantial basis in the record.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**922**

**CAF 24-01504**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF JULIE A. VITO, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KYLE A. DUGAN, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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HAYDEN M. DADD, CONFLICT DEFENDANT, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated September 6, 2024, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Same memorandum as in *Matter of Vito v Dugan* ([appeal No. 1] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**923**

**CA 25-00266**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF JOHN H., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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TODD G. MONAHAN, LITTLE FALLS, FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered February 7, 2025, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

At an annual review hearing, the State has the burden to prove, by clear and convincing evidence, that the individual who is the subject of the hearing is currently a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). A person may be found to be a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes [them] to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]; *see Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]).

Petitioner failed to preserve for our review his contention that

respondent failed to establish by sufficient evidence that he suffers from a mental abnormality, inasmuch as he did not move for a directed verdict on the specific grounds raised on appeal (*see Matter of John R. v State of New York*, 242 AD3d 1571, 1572 [4th Dept 2025]; *see generally Matter of State of New York v Robert R.*, 217 AD3d 1413, 1414 [4th Dept 2023]). To the extent that petitioner contends that the weight of the evidence does not support Supreme Court's finding that he suffers from a mental abnormality (*see* Mental Hygiene Law § 10.03 [i]), we reject that contention. Here, respondent's evidence at the hearing consisted of, inter alia, the report and testimony of a licensed psychologist who opined that petitioner suffered from narcissistic personality disorder, as well as other specified paraphilic disorders, which predispose him to commit sex offenses and result in his having serious difficulty in controlling such conduct (*see Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1135 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]; *Matter of Akgun v State of New York*, 148 AD3d 1613, 1613-1614 [4th Dept 2017]).

We similarly reject petitioner's contention that the determination that he remains a dangerous sex offender requiring confinement is otherwise against the weight of the evidence (*see* Mental Hygiene Law § 10.03 [e]). Respondent's expert concluded that, as a result of petitioner's mental condition, disease, or disorder, he had such a strong predisposition to commit sex offenses and such an inability to control his behavior that he is likely to commit sex offenses if not confined to a secure treatment facility. Among other things, the testimony at the hearing established that petitioner made little progress in sex offender treatment, that he continued to hold cognitive distortions and had not yet developed either the skills to manage his paraphilic interests or a comprehensive plan for avoiding his risk for recidivism in the community, and that he generally lacked insight into his condition (*see Matter of Kerry K. v State of New York*, 225 AD3d 1122, 1124 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; *Matter of Francisco R. v State of New York*, 214 AD3d 1409, 1410 [4th Dept 2023]). Notably, petitioner did not present any evidence refuting the opinion of respondent's expert with regard to petitioner's mental abnormality or whether he remains a dangerous sex offender, and we see no reason to disturb the court's decision to credit the testimony of respondent's expert (*see generally Kerry K.*, 225 AD3d at 1124; *Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340 [4th Dept 2020]; *Matter of State of New York v Connor*, 134 AD3d 1577, 1578 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]).

Petitioner failed to preserve for our review his contention that the court improperly admitted hearsay evidence that included the opinion from a report of a witness who was unavailable to testify inasmuch as petitioner failed to object when respondent's expert testified regarding the unavailable witness's diagnosis of petitioner contained in the report (*see Matter of State of New York v Dennis K.*, 27 NY3d 718, 741 [2016], *cert denied* 580 US 1023 [2016]).

Finally, we reject petitioner's contention that he received ineffective assistance of counsel. Inasmuch as petitioner " 'is subject to civil confinement, the standard for determining whether

effective assistance of counsel was provided in criminal matters is applicable here' " (*Matter of State of New York v Robert T.*, 214 AD3d 1405, 1406 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]). Contrary to his contention, we conclude that petitioner failed to meet "his burden on appeal to demonstrate the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies" (*Matter of State of New York v Steven A.*, 193 AD3d 1344, 1345 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *see Matter of State of New York v Juan U.*, 187 AD3d 1606, 1608 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]). Rather, "viewing the evidence, the law, and the circumstances of this case as a whole and at the time of the representation," we conclude that petitioner received effective assistance of counsel (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1440 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]; *see Juan U.*, 187 AD3d at 1609).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**927**

**CA 24-01875**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF JEFFREY HIERRO, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Melissa Lightcap Cianfrini, A.J.), entered October 31, 2024, 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 reversed on the law without costs, the motion is denied, the petition is reinstated, and respondent is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Petitioner appeals from a judgment that granted respondent's pre-answer motion to dismiss as untimely petitioner's CPLR article 78 petition seeking to annul a determination, following a tier II disciplinary hearing, that he violated an incarcerated individual rule. We reverse.

A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner" (CPLR 217 [1]). Here, the determination in question "became final and binding upon petitioner once he received notice of it" (*Matter of Wiegand v Crandall*, 118 AD3d 1355, 1356 [4th Dept 2014]), and it was respondent's burden to "establish[ ] such date" (*Matter of Feldman v New York State Teachers' Retirement Sys.*, 14 AD3d 769, 770 [3d Dept 2005]). As petitioner contends, and respondent correctly concedes, respondent failed to establish when petitioner actually received the results of his administrative appeal and, thus, respondent failed to meet his burden of establishing that the statute of limitations began to run more than four months prior to the commencement of the proceeding (*see Matter of Mintz v City of*

*Rochester*, 200 AD3d 1650, 1652 [4th Dept 2021]; *cf. Feldman*, 14 AD3d at 770).

We further agree with petitioner and respondent that the court erroneously concluded that the matter was rendered moot by petitioner's release to parole; as petitioner and respondent agree, petitioner remains in the custody of the Department of Corrections and Community Supervision.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**931**

**CA 24-01480**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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ADRIAN ROGERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DS RESTORATION & RESIDENTIAL SERVICES CO., LENARD C. DABNEY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

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RUPP PFALZGRAF LLC, BUFFALO (JILL R. ALLEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered September 4, 2024, in a Labor Law and common-law negligence action. The order, among other things, denied the motion of defendants DS Restoration & Residential Services Co. and Lenard C. Dabney for summary judgment dismissing plaintiff's complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants DS Restoration & Residential Services Co. and Lenard C. Dabney in part and dismissing the Labor Law § 241 (6) cause of action against them except insofar as it is premised on the alleged violation of 12 NYCRR 23-1.21 (b) (4) (iv), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when he fell from a ladder while cleaning gutters on a residential home. DS Restoration & Residential Services Co. and Lenard C. Dabney (defendants) moved for summary judgment dismissing the complaint and all cross-claims against them. Supreme Court, inter alia, denied that motion, and defendants now appeal.

We reject defendants' contention that the court erred in denying that part of their motion with respect to the Labor Law § 240 (1) cause of action. "Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*,

21 NY3d 562, 566 [2013]). "To recover, the plaintiff must have been engaged in a covered activity—'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' " (*id.*, quoting § 240 [1]).

First, contrary to defendants' contention, they did not establish as a matter of law that they were not contractors within the meaning of the statute. "An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors" (*Stiegman v Barden & Robeson Corp.* [appeal No 2], 162 AD3d 1694, 1697 [4th Dept 2018] [internal quotation marks omitted]; *see Prevost v Associated Materials, LLC*, 239 AD3d 1235, 1236-1237 [4th Dept 2025]). "[T]he core inquiry is whether the defendant had the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Stiegman*, 162 AD3d at 1697 [internal quotation marks omitted]; *see Prevost*, 239 AD3d at 1237). Defendants' "status as contractors is dependent on their right to exercise control, not whether they in fact did so" (*Barker v Union Corrugating Co.*, 187 AD3d 1544, 1546 [4th Dept 2020] [internal quotation marks omitted]).

Here, defendants submitted evidence that the property owner, i.e., defendant Renee Pokszywka, hired defendants to work on the gutters. They also submitted plaintiff's deposition, wherein he testified that Dabney asked him if he could assist Dabney with the job. Although there was no written contract between them, plaintiff testified that there was a verbal agreement similar to prior jobs where Dabney would pay plaintiff in cash for his work. We conclude that there is a triable issue of fact whether defendants had the authority to exercise control over the work and were contractors within the meaning of the statute (*see generally id.*; *Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098-1099 [4th Dept 2014]).

Second, contrary to defendants' contention, they did not establish as a matter of law that plaintiff was not engaged in activity covered by the statute. Defendants contend that the work constituted routine maintenance, which is not a covered activity, whereas plaintiff contends that the work constituted repair, which is a covered activity. " '[I]t is well settled that the statute does not apply to routine maintenance in a non-construction, non-renovation context' " (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; *see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). "Whether a particular activity constitutes a 'repair' or routine maintenance must be decided on a case-by-case basis, depending on the context of the work" (*Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]; *see Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728 [4th Dept 2010]). "[D]elin[e]ating between routine maintenance and repairs is frequently a close, fact-driven issue . . . , and [t]hat distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*Cullen v AT&T, Inc.*, 140 AD3d 1588, 1589 [4th Dept 2016] [internal quotation marks omitted];

*see Esposito*, 1 NY3d at 528; *Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1282 [4th Dept 2015]).

We conclude that defendants did not meet their initial burden inasmuch as the evidence submitted in support of their motion raises triable issues of fact whether plaintiff was engaged in repair or routine maintenance. The evidence, including the deposition testimony of Pokszywka and Dabney, established that Pokszywka, who thought that there may be birds nesting behind the gutter, hired defendants to work on the gutter. Both Pokszywka and Dabney testified that the work consisted primarily of cleaning the gutters, and Dabney testified that when he discovered a hole in the fascia board, he left the worksite to purchase a piece of flashing to cover the hole, which would not entail removing the gutter. While he was away from the worksite, plaintiff climbed the ladder to continue cleaning the gutter and fell when birds stirred in the hole and he shifted his weight to the left, which caused the ladder to slide and plaintiff to fall. Defendants also submitted the affidavit of their expert engineer, who opined that "[t]he hole or space at the top of the fascia board is a common issue caused by normal wear and tear."

In further support of their motion, however, defendants submitted the deposition testimony of plaintiff, who testified that the cleaning work was incidental to more extensive repair work. He explained that the work entailed cleaning the gutter, removing the gutter, removing and replacing the fascia board, and then reinstalling the gutter. Moreover, even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiff raised a triable issue of fact in opposition. Plaintiff's expert engineer opined that the hole in the area of the soffit and fascia was not the result of normal wear and tear considering that the roof was less than 10 years old, and further opined that the most common reasons for soffit and fascia rot are improper installation of drip edges and gutters. He opined that those types of repairs to areas of rot require the clearing out of rotted wood and installation of new wood, which is more extensive than simple maintenance. We conclude that there is a triable issue of fact whether plaintiff was engaged in routine maintenance by installing flashing to a hole that developed due to normal wear and tear (*see Azad v 270 5th Realty Corp.*, 46 AD3d 728, 729-730 [2d Dept 2007], *lv denied* 10 NY3d 706 [2008]), or whether the work being performed by plaintiff at the time of the accident was necessary to restore the proper functioning of the roof and gutter (*see Verhoef v Dean*, 233 AD3d 1491, 1491-1492 [4th Dept 2024]; *Davidson v Ambrozewicz*, 12 AD3d 902, 902-903 [3d Dept 2004]).

Third, contrary to defendants' contention, they failed to establish that Labor Law § 240 (1) was not violated. It is well settled that "evidence that [a] ladder was structurally sound and not defective 'is not relevant on the issue of whether it was properly placed' " (*Calloway v American Park Place, Inc.*, 221 AD3d 1473, 1474 [4th Dept 2023]; *see Petit v Board of Educ. of W. Genesee School Dist.*, 307 AD2d 749, 749-750 [4th Dept 2003]). In support of their motion, defendants submitted the deposition of plaintiff, who testified that the ladder shifted or slid when he leaned his weight to

the left. Defendants also failed to meet their initial burden of establishing that plaintiff was the sole proximate cause of his injuries (*see Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1180 [4th Dept 2023]; *see also Harris v Tesmer Bldrs., Inc.*, 197 AD3d 911, 912 [4th Dept 2021]).

We reject defendants' contention that the court erred in denying that part of their motion with respect to the Labor Law § 241 (6) cause of action to the extent it is based upon an alleged violation of 12 NYCRR 23-1.21 (b) (4) (iv). That regulation provides that, "[w]hen work is being performed from ladder rungs between 6 and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used" (12 NYCRR 23-1.21 [b] [4] [iv]).

Here, defendants failed to meet their initial burden of establishing that they did not violate the regulation, that the regulation was not applicable to the facts of this case, or that such violation was not a proximate cause of plaintiff's injuries (*see Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1449-1450 [4th Dept 2013]; *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349 [4th Dept 2003]). In support of their motion, defendants submitted the opinion of their expert that the regulation was not violated because the top of the ladder was secured against side slip by mechanical means, i.e., a stand-off stabilizer, and the bottom of the ladder had safety feet. Defendants, however, also submitted the deposition of plaintiff, who testified that the rubber boot on a stabilizer leg was missing. Plaintiff further testified that the purpose of the boot was to "help protect the house, and then the ridges are for the stability so that it has grip." Defendants' expert provided only an equivocal opinion, stating that "[a] single missing boot would not *appreciably* change the stability and safety of the standoff on a properly placed ladder in a stable environment when utilized by a person exercising reasonable safety practices" (emphasis added). We note that plaintiff has abandoned his reliance on all other regulations in his bill of particulars by failing to address them either in the motion court or on appeal (*see Fladd v Installed Bldg. Prods., LLC*, 134 AD3d 1480, 1482 [4th Dept 2015]). We therefore modify the order accordingly (*see Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]; *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1386 [4th Dept 2013]).

We reject defendants' contention that the court erred in denying that part of their motion with respect to the Labor Law § 200 and common-law negligence causes of action. Where "a plaintiff's injuries stem from the manner in which the work was being performed, no liability attaches to a defendant under the common law or under Labor Law § 200 unless it is shown that the [defendant] had the authority to

supervise or control the performance of the work" (*Triest v Nixon Equip. Servs., Inc.* [appeal No. 2], 224 AD3d 1364, 1366 [4th Dept 2024] [internal quotation marks omitted]; *see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Here, defendants failed to meet their burden inasmuch as their own submissions raise triable issues of fact whether Dabney actually directed or controlled the work that resulted in plaintiff's injuries (*see Triest*, 224 AD3d at 1366).

Finally, we reject defendants' contention that the court abused its discretion in considering the affidavit of plaintiff's attorney in opposition to the motion on the ground that it exceeded the word limit set forth in 22 NYCRR 202.8-b (former [a]) (*see generally Hart v City of Buffalo*, 218 AD3d 1140, 1151 [4th Dept 2023]). The single affidavit was submitted in response to two summary judgment motions and in support of plaintiff's cross-motion, and was meant to be helpful to the court by avoiding the duplication of information in three separate affidavits.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**932**

**CA 24-01984**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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ADRIAN ROGERS, PLAINTIFF-RESPONDENT,

V ORDER

DS RESTORATION & RESIDENTIAL SERVICES CO.,
LENARD C. DABNEY, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

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RUPP PFALZGRAF LLC, BUFFALO (JILL R. ALLEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER M. PANNOZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered November 14, 2024, in a Labor Law and common-law negligence action. The order denied the motion of defendants DS Restoration & Residential Services Co. and Lenard C. Dabney seeking leave to reargue their June 6, 2024 motion for summary judgment relating to plaintiff's Labor Law § 240 (1) cause of action.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**933**

**CA 25-00547**

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

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LASHAWNA NUCIOLA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER REGIONAL HEALTH, DOING BUSINESS AS
ROCHESTER GENERAL HOSPITAL, KEVIN P. RAVILLE, M.D.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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BOND, SCHOENECK & KING, PLLC, ROCHESTER (CLAIRE G. BOPP OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

TIVERON LAW PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered March 27, 2025, in a medical malpractice action. The order, insofar as appealed from, denied that part of the motion of defendants-appellants seeking summary judgment dismissing plaintiff's amended complaint against them.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the amended complaint is dismissed in its entirety.

Memorandum: In this medical malpractice action, plaintiff alleged in her amended complaint, as amplified by her bill of particulars, that Rochester Regional Health, doing business as Rochester General Hospital, and Kevin P. Raville, M.D. (defendants) failed to timely diagnose and treat a duodenal ulcer and, specifically, that defendants failed to order a CT scan of her abdomen when she experienced pain that was refractory to narcotic pain medication. Defendants appeal from an order that, inter alia, denied their motion insofar as it sought summary judgment dismissing the amended complaint against them. We reverse the order insofar as appealed from.

On a summary judgment motion in a medical malpractice action, a defendant bears the initial burden "of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Shakyra M. v Strittmatter*, 240 AD3d 1197, 1198 [4th Dept 2025] [internal quotation marks omitted]; *see Bubar v Brodman*, 177

AD3d 1358, 1359 [4th Dept 2019]). Here, we conclude that defendants met their initial burden with respect to both issues. Defendants submitted an expert affirmation that "address[ed] each of the specific factual claims of negligence raised in plaintiff's . . . bill of particulars . . . and was detailed, specific and factual in nature" (*Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023] [internal quotation marks omitted]; *see Bubar*, 177 AD3d at 1360-1361; *cf. Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]) and, moreover, defendants' evidence established that any such departure from the applicable standard of care did not proximately cause plaintiff's alleged injuries (*see generally Page v Niagara Falls Mem. Med. Ctr.*, 174 AD3d 1318, 1319 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]). Thus, " 'the burden shifted to plaintiff[ ] to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injur[ies]' " (*Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]).

"Even assuming, arguendo, that plaintiff[ ] raised triable issues of fact with respect to whether defendants deviated from the accepted standard of care," we conclude that "the opinion of plaintiff['s] expert with respect to the issue of proximate cause was insufficient to defeat defendants' motion for summary judgment" (*id.* at 1158). Indeed, plaintiff's expert did not refute the opinion of defendants' expert that plaintiff's duodenal ulcer perforated after she was discharged from the hospital, nor did plaintiff's expert opine that, had the CT scan shown the presence of a non-perforated duodenal ulcer, defendants could have taken some action to treat it or prevent it from perforating (*see generally Humbolt v Parmeter*, 196 AD3d 1185, 1188 [4th Dept 2021]). Inasmuch as plaintiff's expert "failed to offer anything other than a conclusory assertion that defendants' deviation from accepted standards of medical care caused plaintiff's injuries" (*Ziemendorf*, 207 AD3d at 1158), Supreme Court erred insofar as it denied defendants' motion.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**943**

**KA 22-01867**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC K. KHAUKA, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (KERRY A. CONNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 17, 2022. The judgment convicted defendant upon a jury verdict of robbery in the second degree (two counts) and assault 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 upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]) and one count of assault in the third degree (§ 120.00 [1]).

Defendant contends that the evidence is legally insufficient to support the conviction on the issue of his identity as one of the three men involved in the subject crimes. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's identity as one of the three people who committed the robbery (*see People v Rainey*, 231 AD3d 1533, 1534 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, video of the incident and testimony from those who observed it reflected that a man wearing a ski mask, generally fitting defendant's description, had been involved in the robbery. Less than two hours after the robbery, the police stopped a vehicle that contained defendant, his two accomplices, the victim's property, and, next to defendant, a black knit face mask. Furthermore, one of the accomplices testified at trial as to defendant's involvement in the crime. To the extent that defendant contends that the accomplice testimony was not sufficiently corroborated, we conclude that the other evidence at trial sufficiently "tend[ed] to connect . . .

defendant with the commission of the crime[s] in such a way as [could] reasonably satisfy the jury that the accomplice [was] telling the truth" (*People v Reome*, 15 NY3d 188, 192 [2010] [internal quotation marks omitted]; *see People v Gause*, 230 AD3d 1573, 1575 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment based on the alleged denial of his statutory right to a speedy trial (*see* CPL 30.30 [1] [a]). A failure of defense counsel to assert a meritorious statutory speedy trial claim "is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010] [internal quotation marks omitted]; *see People v Bailey*, 195 AD3d 1486, 1487 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]). A defendant is not required, however, to show that such a motion would have been meritorious in order to prevail on an ineffective assistance of counsel claim; the defendant must demonstrate only that there was an "absence of strategic or other legitimate explanations for counsel's failure to pursue [a] colorable [motion]" (*People v Carver*, 27 NY3d 418, 420 [2016] [internal quotation marks omitted]). We conclude here that the record on appeal is inadequate to enable us to determine whether a CPL 30.30 motion would have been "colorable . . . and, if so, whether [defense] counsel had a strategic or legitimate reason for failing to [make the motion]" (*People v Heverly*, 230 AD3d 1534, 1535 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]). Thus, defendant's contention "is appropriately raised by way of a motion pursuant to CPL article 440" (*People v Henderson*, 234 AD3d 1254, 1256 [4th Dept 2025] [internal quotation marks omitted]; *see People v Alverado*, 178 AD3d 1465, 1466 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]).

Contrary to defendant's further contention, County Court did not abuse its discretion in denying his motion to preclude the testimony of his accomplice due to the People's belated disclosure of the accomplice's criminal history (*see generally People v Everson*, 240 AD3d 1343, 1345 [4th Dept 2025]). If a party demonstrates that they were prejudiced by a belated disclosure, the discovery sanction or remedy to be imposed for such a violation must be "appropriate" (CPL 245.80 [1] [former (a)]). Even absent a showing of prejudice, however, the party "shall be given reasonable time to prepare and respond to the new material" (*id.*). Here, defendant made no specific showing of prejudice. We therefore conclude that no sanction was required (*see People v Phillips*, 239 AD3d 1421, 1423-1424 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Caruso*, 219 AD3d 1682, 1684 [4th Dept 2023]). Further, the court provided defense counsel an opportunity to review the material and specifically asked defense counsel if he wanted an adjournment to further review it. Defense counsel responded that an adjournment was not necessary and opted to

proceed (*see generally Caruso*, 219 AD3d at 1684).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**944**

**CAF 25-00163**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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IN THE MATTER OF ALEJANDRO G.-P.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NEIDY P., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR RESPONDENT-APPELLANT.

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 23, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent had neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from two orders, one for each of the subject children, that, among other things, adjudged that the mother neglected the subject children. We affirm.

Contrary to the mother's contention, Family Court properly determined that she neglected the children. To establish neglect, "petitioner was required to show, by a preponderance of the evidence, first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1465-1466 [4th Dept 2024] [internal quotation marks omitted]; *see Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Landen S.*, 227 AD3d at 1466 [internal quotation marks omitted]).

Here, the record establishes that the mother left one of her children in the care of her live-in boyfriend and that the child sustained bruising and a cut on the arm as a result. The mother knew of the boyfriend's propensity to commit violence, and therefore she should have known that he was an unsuitable caregiver, which may form the basis for a finding of neglect (*see Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]). Moreover, the exposure of the children to domestic violence between the mother and her boyfriend is an additional basis for a finding of neglect (*see id.*; *Matter of Michael G.*, 300 AD2d 1144, 1144 [4th Dept 2002]). Finally, the mother's decision to violate a court order and abscond with the children during the pendency of this proceeding also supports a finding of neglect inasmuch as it is an action that falls below the minimum degree of care of a parent and impaired the children emotionally (*see generally* Family Court Act § 1012 [f] [i]; *Matter of Trebor UU.*, 279 AD2d 735, 737 [3d Dept 2001]). We therefore conclude that the court's findings of neglect have a sound and substantial basis in the record (*see generally Matter of Shakema R. v Mesha B.*, 236 AD3d 1383, 1386 [4th Dept 2025], *lv denied* 43 NY3d 906 [2025]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**945**

**CAF 25-00164**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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IN THE MATTER OF NEYMAR G.-P.

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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NEIDY P., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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SALCEDO APPEALS PLLC, BUFFALO (STEVEN B. SALCEDO OF COUNSEL), FOR RESPONDENT-APPELLANT.

SHELBY MAROSELLI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 23, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent had neglected the subject child.

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

Same memorandum as in *Matter of Alejandro G.-P. (Neidy P.)* (— AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**946**

**CAF 24-00844**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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IN THE MATTER OF MATTHEW OLMSTED,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

DESIREE OLMSTED, RESPONDENT-PETITIONER-APPELLANT.

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

BRYANNE L. JONES, ROCHESTER, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered April 22, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued the parties' joint legal custody of the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father and respondent-petitioner mother each filed petitions seeking modification of the parties' custody arrangement, whereby the parties had joint legal custody of the subject child and the mother had residential custody of the child. The mother appeals from an order that, inter alia, continued joint legal custody and granted the father increased visitation. We reject the mother's contention that Family Court erred in relying on facts outside the record in making its determination. It is well settled that "a court has the power to take judicial notice of its own prior proceedings" (*Matter of Gugino v Tsvasman*, 118 AD3d 1341, 1342 [4th Dept 2014]; *see Matter of Amyn C. [Chelsea K.]*, 144 AD3d 1690, 1690 [4th Dept 2016]; *see also Matter of Hermann v Williams*, 179 AD3d 1545, 1546 [4th Dept 2020]). The record does not support the mother's contention that the court relied on allegations in prior petitions that were withdrawn in making its determination.

Contrary to the mother's further contentions, the court's determination that the parties would have joint decision-making regarding the child's medical and health issues is supported by a sound and substantial basis in the record (*see generally Matter of Dickes v Johnston*, 213 AD3d 1247, 1248-1249 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]), and the court gave the appropriate weight to the child's wishes (*see generally Matter of Krier v Krier*, 178 AD3d 1372,

1373 [4th Dept 2019]; *Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]).

We agree with the mother that the court improperly disclosed information obtained from the *Lincoln* hearing. We must "remind the court that the disclosure of any statement made by a child during a confidential *Lincoln* hearing is improper, regardless of how innocuous that statement may appear to be" (*Kaleta v Kaleta*, 225 AD3d 1293, 1295 [4th Dept 2024]). We conclude, however, that the error does not justify disturbing an otherwise valid determination (*see generally Matter of Carter v Work*, 100 AD3d 1557, 1558 [4th Dept 2012]; *Matter of Rivera v LaSalle*, 84 AD3d 1436, 1437 [3d Dept 2011]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**947**

**CA 24-01530**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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DONNA FINO, AS ADMINISTRATOR, CTA OF THE
ESTATE OF CAROLINE HLAT, DECEASED, PLAINTIFF,

V MEMORANDUM AND ORDER

MACY'S RETAIL HOLDINGS, INC., DEFENDANT-RESPONDENT,
GALLAGHER ELEVATOR COMPANY, INCORPORATED,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

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HEIDELL, PITTONI, MURPHY & BACH, LLP, NEW YORK CITY (STUART D. SCHWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

MURA LAW GROUP, PLLC, BUFFALO (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 17, 2024. The order granted the motion of defendant Macy's Retail Holdings, Inc. seeking summary judgment dismissing the complaint and cross-claim against it and for an order directing defendant Gallagher Elevator Company, Incorporated, to contractually defend and indemnify it.

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

Memorandum: In 2014, plaintiff's decedent was injured while exiting an allegedly misleveled elevator located in premises leased by defendant Macy's Retail Holdings, Inc. (Macy's) and exclusively serviced by defendant Gallagher Elevator Company, Incorporated (Gallagher). Supreme Court granted Macy's motion for summary judgment dismissing the complaint and Gallagher's cross-claim against it and for an order directing Gallagher to contractually defend and indemnify Macy's. Gallagher appeals from the portion of the order directing it to defend and indemnify Macy's. We affirm.

Contrary to Gallagher's contention, the court properly granted that part of Macy's motion with respect to Gallagher's contractual obligation to provide Macy's with a defense and indemnification. We reject Gallagher's contention that it has no such obligation because Macy's was not originally a party to the 1992 contract containing the operative defense and indemnification clause between Gallagher and Macy's predecessor-in-interest. Gallagher's president testified without contradiction that the contract was subsequently assigned to

Macy's and that both parties thereafter operated pursuant to its terms (*see generally Pearl St. Parking Assoc. LLC v City of Buffalo*, 227 AD3d 1471, 1473-1474 [4th Dept 2024]).

We also reject Gallagher's contention that its contractual obligation to provide Macy's with a defense and indemnification requires a finding that Gallagher was negligent. The unambiguous intent of the clause is to provide a defense and indemnification for "any and all claims (whether meritorious or not) . . . arising out of the performance or non-performance of maintenance services" (*see ZRAJ Olean, LLC v Erie Ins. Co. of N.Y.*, 134 AD3d 1557, 1560 [4th Dept 2015], *lv denied* 29 NY3d 915 [2017]).

Contrary to Gallagher's further contention, there is no triable issue of fact whether Macy's was negligent. Although the subject elevator was older and had not been upgraded, Gallagher's president testified that it was common for older elevators to remain in operation because those installed in "the old days were built much better than they are today," and the record establishes that Macy's "had an exclusive maintenance contract with . . . an elevator company . . . to inspect, maintain and repair the elevator and had neither actual nor constructive notice of a defective condition" (*Browning v Meadowlands Professional Park*, 254 AD2d 725, 725 [4th Dept 1998]; *see Tashjian v Strong & Assoc.*, 225 AD2d 907, 909 [3d Dept 1996]).

Finally, we reject Gallagher's contention that the contractual defense and indemnification clause violates General Obligations Law § 5-322.1. While "[a]n indemnification agreement will be deemed void and unenforceable [under General Obligations Law § 5-322.1] if the party seeking indemnification was itself negligent" (*Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1387 [4th Dept 2013] [internal quotation marks omitted]), "[w]ithout a finding of negligence [against that party] . . . , General Obligations Law § 5-322.1's prohibition against indemnif[ication] . . . is inapplicable" (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**948**

**OP 25-00654**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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IN THE MATTER OF TOWN OF FREMONT, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, NEW YORK STATE, BARON WINDS LLC, AND BARON WINDS II LLC, RESPONDENTS.

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WISNIEWSKI LAW PLLC, WEBSTER (BENJAMIN E. WISNIEWSKI OF COUNSEL), FOR PETITIONER.

JOHN J. SIPOS, GENERAL COUNSEL, NEW YORK STATE PUBLIC SERVICE COMMISSION, ALBANY (TIMOTHY PAVELKA OF COUNSEL), FOR RESPONDENTS NEW YORK STATE BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, AND NEW YORK STATE.

YOUNG/SOMMER LLC, TROY (JESSICA ANSERT KLAMI OF COUNSEL), FOR RESPONDENTS BARON WINDS LLC, AND BARON WINDS II LLC.

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Proceeding pursuant to Public Service Law § 170 (1) (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to, inter alia, set aside portions of the rehearing decision of respondent New York State Board on Electric Generation Siting and the Environment.

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

Memorandum: Baron Winds LLC (Baron Winds), a respondent in this proceeding, submitted an application pursuant to Public Service Law article 10 to the New York State Board on Electric Generation Siting and the Environment (Board), also a respondent in this proceeding, seeking approval of a project involving the construction of a wind-powered electric generating facility consisting of numerous wind turbines in several towns in Steuben County. In response to the application, the Board issued a "Certificate of Environmental Compatibility and Public Need" (certificate) in September 2019 that authorized Baron Winds, subject to certain conditions, to construct and operate a wind farm consisting of up to 68 turbines with heights of approximately 492 feet and a total maximum generating capacity of 242 megawatts.

Baron Winds subsequently submitted a petition to the Board in

March 2020 seeking to amend the certificate (amendment petition) by, in effect, dividing the project into two construction phases. The Board issued an order (first phase order) granting the amendment petition, thereby authorizing Baron Winds to install during the first phase of construction in the Towns of Cohocton, Dansville, and Wayland up to 33 turbines, 26 of which could have an increased maximum height of 650 feet, with a maximum generating capacity of up to 166.6 megawatts. Thereafter, Baron Winds and Baron Winds II LLC (Baron Winds II), another respondent in this proceeding (collectively, Baron Winds respondents), submitted a second amendment petition to the Board in September 2022 seeking to further amend the certificate with respect to the second phase of construction in the Town of Fremont (Fremont), the petitioner in this proceeding. Following an evidentiary hearing, the Board issued an order (second phase order) in July 2024 granting the second amendment petition in part by, among other things, concluding that the 1,500-foot setback distance for non-participating property owners was sufficiently protective of those residences and was consistent with Board precedent, maintaining total maximum generating capacity of 242 megawatts for the entire project, and waiving the turbine height restriction in Fremont's local law. Fremont sought rehearing, and the Board subsequently issued a rehearing decision in March 2025 that granted rehearing, clarified portions of the second phase order, and ultimately adhered to its determination granting the Baron Winds respondents' second amendment petition.

Fremont commenced this CPLR article 78 proceeding against the Board and New York State (collectively, State respondents) and the Baron Winds respondents, initiated in this Court pursuant to Public Service Law § 170 (1), seeking, inter alia, to set aside portions of the rehearing decision. We confirm the determination, and therefore we dismiss the amended petition.

Preliminarily, we reject the contention of the Baron Winds respondents that the proceeding is moot by virtue of their completion of the second phase of construction and Fremont's failure to seek injunctive relief. "Although 'construction of the underlying project can render a challenge of this type moot when the petitioner has not made any attempt to preserve its rights pending judicial review,' " that cannot be said here (*Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906, 906 [4th Dept 2001]; *see generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172-173 [2002]). The record establishes that the Baron Winds respondents were "placed on notice that if they proceeded with construction, it would be at their own risk" during the pendency of Fremont's petition for rehearing (*Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh*, 226 AD2d 1031, 1032 [3d Dept 1996], *lv denied* 88 NY2d 811 [1996]), and that Fremont opposed the request of Baron Winds II to proceed with the second phase of construction during the pendency of the Board's determination on rehearing, objected to the Board's delay in rendering such a determination, and did not delay in commencing this proceeding to challenge the rehearing decision of the Board (*see Michalak*, 286 AD2d at 906). Contrary to the Baron Winds respondents' related contention,

we conclude that the circumstances here "fail to reflect a prejudicial 'neglect in promptly asserting a claim' by [Fremont] that would warrant applying the doctrine of laches" (*Matter of Micklas v Town of Halfmoon Planning Bd.*, 170 AD3d 1483, 1485 [3d Dept 2019]; *see Michalak*, 286 AD2d at 906).

On the merits, Fremont contends that the Board violated Public Service Law § 170 (1) by failing to timely decide its application for a rehearing. We note at the outset that, contrary to the State respondents' assertion, Fremont has standing to challenge the timeliness of the Board's rehearing decision (*see id.*; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]). We nonetheless agree with the Baron Winds respondents and the State respondents that, although the Board delayed in rendering its rehearing decision, Fremont is not entitled to any relief because the time limitation in the statute is directory only, not mandatory (*see Matter of Rochester Gas & Elec. Corp. v Maltbie*, 272 App Div 162, 165-166 [3d Dept 1947]; *see generally Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 535-536 [1992]), and Fremont has failed to show that it suffered substantial prejudice from the minimal delay (*see generally Matter of Dickinson v Daines*, 15 NY3d 571, 577 [2010]).

Fremont further contends that the Board's rehearing decision is arbitrary and capricious and an abuse of discretion because, according to Fremont, the Board modified the setback requirement and maximum generating capacity limit established in the second phase order without a sound basis. Initially, contrary to the assertion of the Baron Winds respondents, we conclude under the circumstances of this case that Fremont's contention is properly before us inasmuch as it exhausted its administrative remedies with respect thereto (*see* Public Service Law § 170 [1]; *Matter of Sapienza v City of Buffalo*, 197 AD3d 914, 915 [4th Dept 2021]; *cf. Matter of Town of Cambria v New York Off. of Renewable Energy Siting*, 228 AD3d 1336, 1341 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025]; *Matter of Coalition of Concerned Citizens v New York State Bd. on Elec. Generation Siting & the Envt.*, 199 AD3d 1310, 1314 [4th Dept 2021], *appeal dismissed* 37 NY3d 1168 [2022]).

We nonetheless reject Fremont's contention on the merits. Our "scope of review is limited to whether the decision and opinion of the [B]oard, *inter alia*, are . . . supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion . . . , are made in accordance with proper procedure[,] . . . and are not arbitrary, capricious or an abuse of discretion" (*Coalition of Concerned Citizens*, 199 AD3d at 1312 [internal quotation marks omitted]). "[W]here, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

Contrary to Fremont's assertion, the Board's rehearing decision

was not arbitrary and capricious or an abuse of discretion with respect to the setback distance for non-participating property owners. The second phase order specifically agreed with the position of the Baron Winds respondents that the 1,500-foot setback distance for non-participating property owners was sufficiently protective of those residences and was consistent with Board precedent. It was therefore not arbitrary and capricious or an abuse of discretion for the Board to clarify in its rehearing decision that, notwithstanding any additional inconsistent language in the second phase order, the Board did not intend to set a more restrictive setback than that required under applicable local law and that application of that local law required a setback distance of 1,500 feet measured from any non-participating residence (*see Cambria*, 228 AD3d at 1339-1341; *Coalition of Concerned Citizens*, 199 AD3d at 1312-1313). We thus conclude that, "although the record contains some conflicting evidence 'and room for choice exists[,] there is a rational basis for the [Board's] determination' " regarding the setback requirement (*Coalition of Concerned Citizens*, 199 AD3d at 1313).

Contrary to Fremont's further assertion, the Board's rehearing decision was not arbitrary and capricious or an abuse of discretion with respect to the generating capacity authorized under the second phase order. The certificate approved a total maximum generating capacity of 242 megawatts for the entire project. The first phase order allowed a maximum generating capacity of up to 166.6 megawatts in the first phase while retaining the total maximum capacity for the entire project. The first phase order also noted that any amendment for the second phase would be considered in terms of the cumulative impacts with the first phase, and it is undisputed that the first phase, as constructed, operated at a maximum generating capacity of 122 megawatts. It was therefore not arbitrary and capricious or an abuse of discretion for the Board to conclude in its rehearing decision that the Baron Winds respondents could operate the second phase at a generating capacity of 117 megawatts without amendment to the certificate because the combined operative generating capacity of the two phases would not exceed the total maximum generating capacity of 242 megawatts permitted in the certificate (*see Cambria*, 228 AD3d at 1339-1341; *Coalition of Concerned Citizens*, 199 AD3d at 1312-1313). We thus conclude that there is a rational basis for the Board's determination regarding the generating capacity authorized under the second phase order (*see Coalition of Concerned Citizens*, 199 AD3d at 1313).

Fremont also contends that the Board unlawfully waived Fremont's local laws regarding setbacks and turbine height restrictions and that the Board's choice to do so was arbitrary and capricious and an abuse of discretion. We reject that contention. To the extent that Fremont asserts that the statutory provision allowing the Board to waive application of a local law (Public Service Law § 168 [3] [e]) violates the home rule provision of the New York State Constitution (NY Const art IX, § 2), we conclude that Fremont's assertion lacks merit inasmuch as the statutory provision empowering the Board to preempt local laws "is a general law, applying uniformly to all municipalities . . . , and energy infrastructure siting is a matter of State concern"

(*Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 105 [3d Dept 2023], *appeal dismissed* 41 NY3d 990 [2024], *reconsideration dismissed* 42 NY3d 1034 [2024] [footnote omitted]; *see Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Envt.*, 281 AD2d 89, 95 [3d Dept 2001]; *see generally County of Onondaga v State of New York*, — NY3d —, —, 2025 NY Slip Op 05737, *3-4 [2025]). Contrary to Fremont's assertion, we conclude that the Board did not act in an arbitrary and capricious manner or abuse its discretion in electing not to apply the turbine height restrictions of the local law after considering the requisite factors and finding that application of those restrictions would be unreasonably burdensome in view of the existing technology (*see* § 168 [3] [e]; [4]; *Cambria*, 228 AD3d at 1340-1341). Finally, contrary to Fremont's assertion, we conclude that the Board did not act in an arbitrary and capricious manner or abuse its discretion in determining that no waiver of the 1,500-foot setback requirement in the local law was necessary (*see Coalition of Concerned Citizens*, 199 AD3d at 1315).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**949**

**CA 24-01935**

PRESENT: MONTOUR, J.P., SMITH, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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TROY BLACKCHIEF AND JENNIFER BLACKCHIEF,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PATRICK J. PRIM, III, DEFENDANT,
TIMOTHY J. HERBST AND RENEE L. HERBST,
DEFENDANTS-APPELLANTS.

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LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. FROMEN, ATTORNEYS AT LAW, P.C., SNYDER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (WILLIAM L. HARTFORD OF COUNSEL), FOR NONPARTY RESPONDENT TOWN OF CHEEKTOWAGA.

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Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 26, 2024. The order denied the motion of defendants Timothy J. Herbst and Renee L. Herbst 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 of defendants Timothy J. Herbst and Renee L. Herbst is granted, and the complaint against them is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Troy Blackchief (plaintiff), an on-duty police officer, who was struck by a vehicle owned by defendants Timothy J. Herbst and Renee L. Herbst (collectively, defendants). At the time of the accident, plaintiff was assisting in a police pursuit of defendants' vehicle, which had been stolen from defendants' residential driveway by defendant Patrick J. Prim, III.

We agree with defendants that Supreme Court erred in denying their motion seeking summary judgment dismissing the complaint against them. Defendants met their initial burden on the claim of permissive use by submitting the police report regarding the theft, video and still images capturing the theft, affirmations from defendants attesting to the theft, and documentation reflecting the undisputed nature of Prim's related criminal guilty plea (*see Country-Wide Ins.*

*Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 175-176, 180 [2006]; *Calhoun v Maclin*, Sup Ct, Erie County, Feb. 7, 2023, Chimes, J., index No. 801838/2022, *affd for reasons stated below* 219 AD3d 1714 [4th Dept 2023]; *Stevens v Calspan-Corp.*, 292 AD2d 809, 810 [4th Dept 2002]). Defendants further met their initial burden on the claim that they violated Vehicle and Traffic Law § 1210 (a) by establishing that the statute is inapplicable to the instant case. Defendants' vehicle "had not been kept in a parking lot" or any other area to which the statute applies (*Stevens*, 292 AD2d at 810 [internal quotation marks omitted]; *see* Vehicle and Traffic Law §§ 129-b, 1100 [a]). In opposition, plaintiffs failed to raise a material issue of fact as to either the lack of permissive use or the applicability of Vehicle and Traffic Law § 1210 (a), and they failed to demonstrate that facts essential to oppose the motion exist and might be obtained by additional discovery (*see Bratge v Simons*, 173 AD3d 1623, 1624 [4th Dept 2019]; *Stevens*, 292 AD2d at 810).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**955**

**KA 22-01569**

PRESENT: CURRAN, J.P., BANNISTER, NOWAK, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE BAKER, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ELISABETH DANNAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 13, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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, upon his guilty plea, of criminal sexual act in the third degree (Penal Law former § 130.40 [2]). Under the terms of defendant's plea agreement, he was placed on a one-year period of interim probation and, if he successfully completed it, defendant would be permitted to withdraw his plea and instead plead guilty to one count of endangering the welfare of a child (§ 260.10 [1]). The People alleged that defendant violated the conditions of his interim probation and, after a hearing, defendant's interim probation was revoked and he was sentenced to a term of incarceration.

As defendant contends, and the People correctly concede, defendant's "waiver of the right to appeal does not encompass his contention that [County] Court erred in imposing an enhanced term of incarceration based on postplea conduct" (*People v Lopez*, 204 AD3d 1529, 1529 [4th Dept 2022]; *see People v Streeter*, 71 AD3d 1463, 1464 [4th Dept 2010], *lv denied* 14 NY3d 893 [2010]). However, we reject defendant's contention that the People were required to establish, pursuant to CPL 410.70 (3), that defendant violated the conditions of his interim probation by a preponderance of the evidence. Contrary to defendant's contention, " '[t]he procedures set forth in CPL 410.70 do not apply where, as here, there has been no sentence of probation' " (*People v McIntosh*, 213 AD3d 1266, 1267 [4th Dept 2023]; *People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939

[2008]). Rather, "because interim probation is imposed prior to sentencing, the presentence procedures set forth in CPL 400.10 apply" (*People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; *see Rollins*, 50 AD3d at 1536), notwithstanding the fact that "[the c]ourt and the parties . . . improperly characterized the procedure to revoke the interim probation supervision as a violation of probation hearing" (*Rollins*, 50 AD3d at 1535-1536). Consistent with CPL 400.10 (3), the court here conducted a summary hearing that was sufficient to "enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation supervision" (*Rollins*, 50 AD3d at 1536) and, in any event, the evidence adduced was sufficient even if viewed under the standard set forth in CPL 410.70 (3).

Defendant contends that, even if he violated the conditions of his interim probation, the court abused its discretion in revoking his interim probation and imposing a sentence on the pleaded-to offense of criminal sexual act in the third degree (Penal Law former § 130.40 [2]), because a conviction of that offense results in statutorily mandated registration under the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq*.). Defendant maintains that the court had discretion to continue his interim probation and, presumably, to allow him to withdraw his plea to criminal sexual act in the third degree and plead instead to an offense that does not require SORA registration. However, defendant never requested that the court exercise such discretion, nor did defendant move to withdraw his plea, and therefore defendant's contention is not preserved for our review (*see generally People v Edwards*, 239 AD3d 1478, 1478 [4th Dept 2025], *lv denied* 44 NY3d 1010 [2025]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [c] [3]).

We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**959**

**KA 24-00423**

PRESENT: CURRAN, J.P., BANNISTER, NOWAK, DELCONTE, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHET DEWOLF, DEFENDANT-APPELLANT.

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ANDREW D. CORREIA, PUBLIC DEFENDER, SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 22, 2024. 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 affirm.

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *reconsideration denied* 42 NY3d 1055 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Moreover, on this record, defendant's "monosyllabic affirmative responses to questioning by [County Court] do not render his [waiver of the right to appeal] unknowing and involuntary" (*People v Burch*, 234 AD3d 1246, 1246-1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025] [internal quotation marks omitted]).

Defendant's valid waiver of the right to appeal precludes our review of his contention that the court erred in refusing to suppress defendant's statements to a law enforcement officer (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Duzant*, 15 AD3d 860, 861 [4th Dept 2005], *lv denied* 5 NY3d 761 [2005]) and his challenge to the

severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *Burch*, 234 AD3d at 1247).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**965**

**TP 25-00703**

PRESENT: CURRAN, J.P., BANNISTER, NOWAK, DELCONTE, AND HANNAH, JJ.

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IN THE MATTER OF ALEXANDER KATES, PETITIONER,

V MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

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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, Wyoming County [Donald O'Geen, A.J.], entered April 23, 2025) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

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 to annul the determination, following a tier II disciplinary hearing, that he violated incarcerated individual rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]) and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [movement regulation violation]).

We reject petitioner's contentions that the Hearing Officer improperly denied his request to call certain witnesses to testify at the hearing. " 'Although an [incarcerated individual] has a 'conditional right' to call witnesses . . . , an [incarcerated individual] is not entitled to call witnesses whose testimony is immaterial or redundant' " (*Matter of Burroughs v Corey*, 235 AD3d 1251, 1252 [4th Dept 2025]; *see Matter of Ballard v Kickbush*, 165 AD3d 1587, 1589 [4th Dept 2018], *appeal dismissed* 32 NY3d 1182 [2019]). Here, the proposed testimony of the various witnesses was irrelevant (*see Matter of Jackson v Annucci*, 122 AD3d 1288, 1288-1289 [4th Dept 2014]).

Contrary to petitioner's further contention, the misbehavior report, together with petitioner's statement that his actions were

accurately described in the misbehavior report, constitutes substantial evidence supporting the determination that he violated incarcerated individual rules 106.10 and 109.12 (*see Matter of Griswold v Goord*, 39 AD3d 908, 909 [3d Dept 2007]; *Matter of Melvin v Smith*, 143 AD2d 525, 525 [4th Dept 1988]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**969**

**KA 25-00187**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JOSHUA TAYLOR, ALSO KNOWN AS MORIAH TAYLOR,
DEFENDANT-RESPONDENT.

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MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (APRIL J. ORLOWSKI OF COUNSEL), FOR APPELLANT.

CINDY T. COOPER, BUFFALO, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Erie County Court (James F. Bargnesi, J.), dated January 28, 2025. The order, insofar as appealed from, reduced the first and second counts of an indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, counts 1 and 2 of the indictment are reinstated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order insofar as it reduced counts 1 and 2 of the indictment from aggravated cruelty to animals (Agriculture and Markets Law § 353-a) to overdriving, torturing and injuring animals; failure to provide proper sustenance (§ 353) based on the alleged legal insufficiency of the evidence before the grand jury.

Initially, we note that County Court erred in reducing the counts without a written motion requesting such relief. "A motion to dismiss an indictment pursuant to [CPL] 210.20 must be made in writing and upon reasonable notice to the people" (CPL 210.45 [1]; *see People v Graham*, 135 AD2d 1115, 1115 [4th Dept 1987], *lv denied* 71 NY2d 896 [1988]). "The procedural requirements of CPL 210.45 must be adhered to even when consideration of the dismissal is upon the court's own motion" (*People v Pichkur*, 52 AD2d 852, 852 [2d Dept 1976]; *see People v Littles*, 188 AD2d 255, 256 [1st Dept 1992], *lv denied* 81 NY2d 842 [1993]). Unless those requirements have been waived by the People, "[t]he failure . . . to comply with the statutory mandates requires a reversal" (*People v Vega*, 80 AD2d 867, 868 [2d Dept 1981]).

In any event, we agree with the People that the grand jury evidence is legally sufficient to support the two counts of aggravated cruelty to animals. The grand jury "must have before it evidence

legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged" (*People v Jensen*, 86 NY2d 248, 251-252 [1995]). Legally sufficient evidence is defined as " 'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' " (*People v Swamp*, 84 NY2d 725, 730 [1995], quoting CPL 70.10 [1]). "The reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted . . . would warrant conviction" (*id.*; *see Jensen*, 86 NY2d at 251).

"A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, [they] intentionally kill[ ] or intentionally cause[ ] serious physical injury to a companion animal with aggravated cruelty" (Agriculture and Markets Law § 353-a [1]). "[A]ggravated cruelty" is defined as "conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner" (*id.*). According to the evidence before the grand jury, defendant placed three kittens, approximately eight weeks old, into a knotted pillowcase and left them outside on a balcony during a snowstorm. The kittens were discovered under several feet of snow after defendant's roommate called emergency services. Defendant had told the roommate not to worry about the kittens because they were "going to kitty heaven." The treating veterinarian testified that two of the kittens died due to "[h]ypothermia and possibly asphyxiation or hypoxia," while the third survived. A second veterinarian, who performed a necropsy on the deceased kittens, opined that the kittens' cause of death was hypothermia and that the kittens would have suffered while they were inside the pillowcase in the cold. The kittens were healthy prior to being placed in the pillowcase.

We conclude that the evidence before the grand jury was legally sufficient to establish that defendant, with no justifiable purpose, intentionally killed the kittens and that defendant did so with aggravated cruelty inasmuch as defendant killed the kittens in a manner that inflicted extreme pain on the dying animals (*see People v Napoli*, 167 AD3d 1080, 1081 [3d Dept 2018]) or did so in a manner likely to prolong the animals' suffering (*see generally People v Moors*, 140 AD3d 1207, 1208-1209 [3d Dept 2016], *lv denied* 28 NY3d 934 [2016]).

To the extent that the court reduced the counts on its own finding that defendant could not form the requisite intent, that was improper weighing of the evidence inasmuch as "consideration of a potential defense of mental disease or defect should rest exclusively with the petit jury" (*People v Lancaster*, 69 NY2d 20, 29 [1986], *cert denied* 480 US 922 [1987]; *see generally People v Campbell*, 69 AD3d 645, 646 [2d Dept 2010]).

We therefore reverse the order insofar as appealed from, reinstate the first two counts of the indictment, and remit the matter to Erie County Court for further proceedings on the indictment. On this appeal by the People, we have no authority to consider the contentions raised by defendant in the responsive brief (*see People v*

*Karp*, 76 NY2d 1006, 1008-1009 [1990]; *People v Woodruff*, 4 AD3d 770, 773 [4th Dept 2004])

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**971**

**KA 25-00731**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACK DAVIES, DEFENDANT-APPELLANT.

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MARK J. BYRNE, BUFFALO, FOR DEFENDANT-APPELLANT.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Betty Calvo-Torres, A.J.), dated March 26, 2025. 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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*).

We conclude that Supreme Court did not abuse its discretion in granting the People's request for an upward departure (*see generally People v DeCapua*, 179 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 906 [2020]). It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862 [2014]), the existence of "an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see People v Morin*, 232 AD3d 1241, 1241 [4th Dept 2024], *lv denied* 43 NY3d 903 [2025]; *People v Vaillancourt*, 112 AD3d 1375, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, the People met their burden of establishing by clear and convincing evidence the existence of aggravating factors not adequately accounted for in the risk assessment instrument, including defendant's pattern of procuring sexually explicit images from children by threats and extortion. Although defendant's out-of-state conviction was for sexually offending against only one victim, a 12-year-old boy, the court properly considered the case summary, which detailed multiple

uncharged, predatory online actions against other children (*see People v Mingo*, 12 NY3d 563, 572-573 [2009]; *People v Craig*, 45 AD3d 1365, 1365-1366 [4th Dept 2007], *lv denied* 10 NY3d 702 [2008]; *People v Lewis*, 45 AD3d 1381, 1381 [4th Dept 2007], *lv denied* 10 NY3d 703 [2008]).

We further reject defendant's contention that an upward departure was precluded by the fact that he received a low-risk score on an alternate risk assessment instrument, the Stable-2007, which conflicted with the high-risk assessment from the Static-99 (*see People v Pagan*, 240 AD3d 1447, 1448-1449 [4th Dept 2025]; *People v Rolon*, 210 AD3d 708, 708-709 [2d Dept 2022], *lv denied* 39 NY3d 907 [2023]; *People v Curry*, 158 AD3d 52, 60 [2d Dept 2107], *lv denied* 31 NY3d 905 [2018]).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**976**

**CAF 24-01397**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF AMIYAH C.

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ONONDAGA COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA T., RESPONDENT,
AND MARCUS C., RESPONDENT-APPELLANT.

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered July 29, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect.

Contrary to the father's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[ ] to overcome problems that prevent the discharge of the child into their care, and informing the parent[ ] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see* § 384-b [7] [f]). Here, petitioner developed a comprehensive service plan for the father, which included mental health treatment, domestic violence services, anger management counseling, substance abuse evaluation, and clinical visitation services. Petitioner also communicated to the father its concern with his continued volatile relationship with the child's mother.

Contrary to the further contention of the father, we conclude that, despite petitioner's diligent efforts, the father failed to plan for the child's future. " '[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). Here, the father failed to complete or make adequate progress in the services that petitioner recommended, including mental health services, and he continued his relationship with the mother (*see Matter of Albina H. [John H.]*, 229 AD3d 1169, 1170 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024]). Furthermore, Family Court properly drew the strongest possible negative inference against the father after he failed to testify at the fact-finding hearing (*see Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1442 [4th Dept 2022]).

We reject the father's contention that he was denied effective assistance of counsel. Here, we conclude that "the record, viewed in totality, reveals that the father received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; *see Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1165 [4th Dept 2020]).

The father failed to preserve for our review his contention that the court should have granted a suspended judgment (*see Matter of Matilda B. [Gerald B.]*, 187 AD3d 1677, 1679 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]), and, in any event, a suspended judgment was not warranted under the circumstances (*see Matter of Moses K.B. [Ezra B.B.]*, 239 AD3d 1479, 1479-1480 [4th Dept 2025]; *Matter of Mea V. [Brandon V.]*, 235 AD3d 1242, 1243 [4th Dept 2025]).

We have reviewed the father's remaining contentions and conclude that they lack merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**977**

**CAF 24-01642**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF BRENDA L. HERNANDEZ,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

JASON P. MCGOWAN, RESPONDENT-PETITIONER-RESPONDENT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SABRINA A. BREMER OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Monroe County (Nicole E. Bayly, R.), entered September 20, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued joint legal custody with respect to the subject child and modified the prior custody order by granting respondent-petitioner primary physical residency of the child.

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

Memorandum: In this Family Court Act article 6 proceeding, petitioner-respondent mother appeals from an order that, inter alia, modified the parties' prior order of custody to provide that respondent-petitioner father have primary physical residency of the subject child for educational purposes and have residency of the child on school nights during the school year. We affirm.

Preliminarily, we note that the parties do not dispute that there has been a change in circumstances sufficient to warrant an inquiry into whether a modification of the prior custody order is in the child's best interests (*see generally Matter of Cooley v Roloson*, 201 AD3d 1299, 1299-1300 [4th Dept 2022]), inasmuch as they filed competing petitions alleging such a change in circumstances (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1529 [4th Dept 2020]; *Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]).

"Generally a court's determination regarding custody and visitation issues, based on its first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Warren v Miller*, 132 AD3d

1352, 1354 [4th Dept 2015] [internal quotation marks omitted]). Here, the mother repeatedly failed to ensure that the child arrived at school on time, despite the fact that, at the time, the mother did not work in the mornings on many of the days that the child was late. We conclude that there is a sound and substantial basis in the record to support Family Court's determination that it is in the child's best interests to modify the custody arrangement so that the child could remain "in the school district in which the [father] lived and to provide [the mother] with reduced parenting time during the school year and increased parenting time when school was not in session" (*Matter of Verne v Hamilton*, 191 AD3d 1433, 1434 [4th Dept 2021]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**979**

**CA 24-01609**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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STACY A. LAMPACK AND ROBERT LAMPACK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD A. ANDREWS, DEFENDANT-APPELLANT.
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RICHARD A. ANDREWS, THIRD-PARTY PLAINTIFF-APPELLANT,

V

LEWIS COUNTY, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

HARDING MAZZOTTI, LLP, ALBANY (PETER P. BALOUSKAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

FITZGERALD MORRIS BAKER FIRTH, P.C., GLENS FALLS (JOSHUA D. LINDY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered September 20, 2024, in a premises liability action. The order denied the motion of defendant-third-party plaintiff to set aside a verdict.

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

Same memorandum as in *Lampack v Andrews* ([appeal No. 2] — AD3d — [Feb. 11, 2026] [4th Dept 2026]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**980**

**CA 25-00140**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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STACY A. LAMPACK AND ROBERT LAMPACK,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD A. ANDREWS, DEFENDANT-APPELLANT.
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RICHARD A. ANDREWS, THIRD-PARTY PLAINTIFF-APPELLANT,

V

LEWIS COUNTY, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT AND DEFENDANT-APPELLANT.

HARDING MAZZOTTI, LLP, ALBANY (PETER P. BALOUSKAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

FITZGERALD MORRIS BAKER FIRTH, P.C., GLENS FALLS (JOSHUA D. LINDY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered December 19, 2024, in a premises liability action. The order purportedly denied the motion of defendant-third-party plaintiff seeking leave to reargue a prior motion.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant-third-party plaintiff's motion pursuant to CPLR 4404 (a) is granted, the third-party complaint is reinstated, and a new trial is granted in accordance with the following memorandum: Plaintiffs commenced this premises liability action seeking damages for injuries allegedly sustained by Stacy A. Lampack (plaintiff) when she slipped and fell on ice outside a building owned by defendant-third-party plaintiff, Richard A. Andrews (defendant), and leased by plaintiff's employer, third-party defendant, Lewis County (County). Defendant then filed a third-party complaint against the County alleging, inter alia, that plaintiff's injuries were a result of the County's negligence and that the County was required to indemnify defendant pursuant to the terms of the premises lease. The case proceeded to a bifurcated trial on liability and, after the parties rested, the County moved pursuant to

CPLR 4401 for judgment as a matter of law. Supreme Court granted the County's motion and dismissed defendant's third-party complaint in its entirety. Plaintiff's complaint was then submitted to the jury, which rendered a verdict finding that plaintiff was not negligent, that defendant was negligent, and that defendant's negligence was a substantial factor in causing plaintiff's injuries. Defendant moved, pursuant to CPLR 4404 (a), for, inter alia, a new trial on the third-party complaint on the ground that there were questions of fact whether defendant was entitled to contractual indemnification from the County.

In appeal No. 1, defendant appeals from an order that denied defendant's CPLR 4404 (a) motion. In appeal No. 2, defendant appeals from a subsequent order in which the court purportedly denied defendant's motion pursuant to CPLR 2221 for leave to reargue his CPLR 4404 (a) motion.

Initially, we conclude that the court in fact granted leave to reargue and, upon reargument, adhered to its prior determination, thus rendering the order in appeal No. 2 appealable as of right (*see* CPLR 5701 [a] [2] [viii]; *Matter of Jean G.S.*, 59 AD3d 998, 998 [4th Dept 2009]; *Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 816 n 1 [3d Dept 2006]). We further conclude that the appeal from the order in appeal No. 1 should be dismissed inasmuch as that order is superseded by the order in appeal No. 2 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

In appeal No. 2, defendant contends that the court erred in granting judgment as a matter of law to the County and that a new trial is warranted under CPLR 4404 (a). We agree. "In determining a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and resolve all issues of credibility in favor of the nonmoving party . . . , and may grant the motion only if there is no rational process by which the jury could find for the [nonmoving party] as against the moving" party (*Wolf v Persaud*, 130 AD3d 1523, 1524 [4th Dept 2015]; *see also Dennis v Cerrone*, 192 AD3d 1572, 1572-1573 [4th Dept 2021]). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *see Shelters v City of Dunkirk Hous. Auth.*, 126 AD3d 1329, 1329 [4th Dept 2015]).

Here, the premises lease obligated the County to remove snow and also to indemnify defendant for the County's "negligence, whether active or passive in its use or occupancy of the [p]remises." Viewing the trial evidence in the light most favorable to defendant and affording him every favorable inference, we conclude that there was a rational process by which the jury could find for defendant against the County. There are three theories under which a jury could have concluded that the County was negligent. First, based on the evidence at trial, the jury could rationally find that the County created a dangerous condition that was a substantial factor in causing

plaintiff's fall through installation of the gutter over the entryway (*see generally Harkins v Tuma*, 182 AD3d 678, 680 [3d Dept 2020]; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318 [4th Dept 2012]). Second, the jury could rationally find that the County, as the possessor of the premises, was negligent in failing to remedy the dangerous condition in front of the employee entrance, given that it had "actual knowledge of a recurring dangerous condition in the area where plaintiff fell that would place it on constructive notice of [the] alleged dangerous condition" (*Irwin v St. John the Evangelist Church of Greece*, 229 AD3d 1108, 1109 [4th Dept 2024]; *see generally Phillips v Henry B's, Inc.*, 85 AD3d 1665, 1666-1667 [4th Dept 2011]). Third, the jury could rationally find that the County did not fulfill its contractual snow removal obligation on the day of the incident (*see Shelters*, 126 AD3d at 1329-1330).

To the extent that the court concluded that defendant "had undertaken responsibility for the [icy] condition" by agreeing to build a canopy over the entryway where plaintiff's fall took place, we conclude that this fact alone did not, as a matter of law, relieve the County of liability for negligence.

We therefore reverse the order in appeal No. 2, grant defendant's motion pursuant to CPLR 4404 (a), reinstate the third-party complaint, and grant a new trial to determine whether the County bears any liability for causing plaintiff's injuries and, if so, what percentage of fault is attributable to the County (*see generally Lifson v City of Syracuse*, 104 AD3d 1210, 1211 [4th Dept 2013]; *Marus v Village Med.*, 51 AD3d 879, 881 [2d Dept 2008]).

Entered: February 11, 2026 Ann Dillon Flynn
Clerk of the Court

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

**984**

**TP 25-00255**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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IN THE MATTER OF THOMAS A. MILLER, ALSO KNOWN AS THOMAS A. MILLER OIL CO., PETITIONER,

V MEMORANDUM AND ORDER

SEAN C. MAHAR, INTERIM COMMISSIONER, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND STATE OF NEW YORK, RESPONDENTS.

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SHANE & FIRKEL PC, WELLSVILLE (ERIC M. FIRKEL OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MEREDITH G. LEE-CLARK OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Cattaraugus County [Ronald D. Ploetz, A.J.], entered November 12, 2024) to review a determination of respondents. The determination, among other things, found that petitioner had violated 6 NYCRR 555.1.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul a determination of respondent Sean C. Mahar, the Interim Commissioner of respondent New York State Department of Environmental Conservation (DEC). As limited by his brief, petitioner challenges that part of the determination concluding that petitioner was responsible for plugging 19 previously unknown wells (U wells) discovered during inspections of two parcels of land for which he leased the subsurface mineral rights. Petitioner contends that oil and gas wells are deemed personal property in New York State and that the DEC failed to introduce substantial evidence that the U wells belonged to him. We reject petitioner's contention and confirm the determination.

"[J]udicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether the determination is supported by substantial evidence based upon the entire record" (*Matter of Tip-A-Few, Inc. v Caliva*, 196 AD3d 1040,

1040-1041 [4th Dept 2021] [internal quotation marks omitted]; *see* CPLR 7803 [4]; *Matter of Klein v City of N.Y. Dept. of Fin. Parking Violations Bur.*, 189 AD3d 1238, 1239 [2d Dept 2020]). Further, "[t]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] [internal quotation marks omitted]; *see Tip-A-Few, Inc.*, 196 AD3d at 1041).

The governing statutory and regulatory scheme is contained in Environmental Conservation Law article 23 (*see generally Matter of Western Land Servs., Inc. v Department of Envtl. Conservation of State of N.Y.*, 26 AD3d 15, 16-17 [3d Dept 2005], *lv denied* 6 NY3d 713 [2006]; *cf. Wagner v Mallory*, 169 NY 501, 505-506 [1902]; *Matter of Hazelwood Oil Co.*, 195 App Div 23, 25 [4th Dept 1920]). Under the effective statute and regulation, both the "owner" and the "operator" of a parcel of land from which oil or gas have been extracted are responsible for, inter alia, the plugging of abandoned oil and gas wells on that parcel (*see* ECL 23-0305 [8] [d], [e]; 6 NYCRR 555.1). Further, ECL 23-0101 (11) defines an "[o]wner" as "the person who has the right to drill into and produce from a pool or a salt deposit and to appropriate the oil, gas, or salt [they] produce[ ] either for [themselves] or others, or for [themselves] and others" and 6 NYCRR 550.3 (ab) defines an "[o]perator" as "any person who is in charge of the development of a lease or the operation of a producing well." Here, the DEC established that petitioner held exclusive mineral rights leases for the parcels of land upon which the subject U wells were located and was also the operator of the known wells on those parcels of land. Thus, contrary to petitioner's contention, we conclude that the determination was supported by substantial evidence in the record and was rational (*see Matter of Ecology Sanitation Corp. v New York State Dept. of Envtl. Conservation*, 241 AD3d 1561, 1563 [2d Dept 2025]; *Tip-A-Few, Inc.*, 196 AD3d at 1040-1041).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**986**

**KAH 23-01235**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ROBERTO CONCEPCION, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

AMY TITUS, SUPERINTENDENT, ORLEANS CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DOUGLAS E. WAGNER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Orleans County (Sanford A. Church, A.J.), entered July 18, 2023, in a habeas corpus proceeding. The judgment dismissed the petition and denied the request of petitioner to convert the proceeding to a CPLR article 78 proceeding.

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

Memorandum: Petitioner, an incarcerated individual in state prison, commenced this habeas corpus proceeding pursuant to CPLR article 70, contending that he is entitled to immediate release from custody because the Board of Parole (Board) improperly denied his request for release to parole supervision. Petitioner appeals from an order that dismissed the petition and denied his request to convert the matter into a CPLR article 78 proceeding, and we now affirm.

Because "the remedy for an improper denial of parole would be remittal to the Board and not immediate release" (*People ex rel. Borrell v New York State Bd. of Parole*, 85 AD3d 1515, 1516 [3d Dept 2011], *lv denied* 17 NY3d 718 [2011], *rearg denied* 18 NY3d 904 [2012], *lv dismissed & rearg dismissed* 19 NY3d 991 [2012], *reconsideration denied* 24 NY3d 1115 [2015]; *see People ex rel. Daniels v Beaver*, 303 AD2d 1025, 1025 [4th Dept 2003]), Supreme Court properly determined that habeas corpus relief is unavailable to petitioner.

Moreover, inasmuch as petitioner had not exhausted administrative remedies when he filed the petition (*see Matter of Robinson v Bennett*, 300 AD2d 715, 716 [3d Dept 2002]) and failed to name or serve the Board or the Department of Corrections and Community Supervision as a respondent (*see Matter of Montes v New York State Dept. of Corr. &*

*Community Supervision*, 223 AD3d 1131, 1132 [3d Dept 2024]), we cannot conclude that the court abused its discretion in denying petitioner's alternative request to convert the habeas corpus proceeding into a CPLR article 78 proceeding. Under the circumstances of this case, the petition would have been subject to dismissal even if the proceeding had been converted to its proper form under CPLR 103 (c).

We have reviewed petitioner's remaining contentions and conclude that they lack merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**987**

**CA 24-01798**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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FREDERICK DRISCOLL, PLAINTIFF,

V ORDER

NY DISTRICT ASSEMBLIES OF GOD, DEFENDANT.

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NY DISTRICT ASSEMBLIES OF GOD, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

LAKES CHURCH, LAKES CHURCH-AUBURN, THIRD-PARTY DEFENDANT-APPELLANT.

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O'CONNOR, O'CONNOR, BRESEE & FIRST, P.C., ALBANY (CAROL E. CRUMMEY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICES OF REINERS & ROSENBERG, NEW YORK CITY (SOPHIA M. CANDELA OF COUNSEL), FOR DEFENDANT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (ANTHONY R. MARTOCCIA OF COUNSEL), FOR PLAINTIFF.

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Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered August 22, 2024, in a personal injury action. The order, insofar as appealed from, denied the motion of third-party defendant to dismiss the third-party complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 15, December 4 and 10, 2025,

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**988**

**CA 25-00544**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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KYLE K. JAROSZ, PLAINTIFF-RESPONDENT,

V ORDER

SIDELINES SPORTS, DEFENDANT-RESPONDENT,
FRONT ROW SPORTS, AND SUPERSPORTS -
THE HOCKEY & SKATING COMPANY, LLC, DOING BUSINESS
AS FRONT ROW SPORTS USA, DEFENDANTS-APPELLANTS.

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JAMES M. SPECYAL, BUFFALO, FOR DEFENDANTS-APPELLANTS.

RICHARD T. BOGLE, NEW YORK CITY, FOR DEFENDANT-RESPONDENT.

DANIEL CHIACCHIA, HAMBURG, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 24, 2025. The order denied the motion of defendants Front Row Sports and Supersports - The Hockey & Skating Company, LLC, doing business as Front Row Sports USA for summary judgment dismissing the complaint against them and for common-law indemnification against defendant Sidelines Sports.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 22, 2025,

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

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**989**

**CA 24-01895**

PRESENT: WHALEN, P.J., LINDLEY, OGDEN, NOWAK, AND DELCONTE, JJ.

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MELBA HICKS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNITRIN ADVANTAGE INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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CRISTINA CAROLLO, STATEN ISLAND, FOR DEFENDANT-APPELLANT.

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Appeal from an order of the Supreme Court, Niagara County (Mario A. Giacobbe, A.J.), entered October 18, 2024, in a breach of contract action. The order granted the motion of plaintiff to strike defendant's answer and for a default judgment and denied the cross-motion of defendant for a protective order.

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

Memorandum: Plaintiff commenced this breach of contract action seeking no-fault benefits under an insurance policy issued by defendant, her automobile insurance carrier, following a motor vehicle accident. Prior to the accident, plaintiff had been employed full time, earning $10 per hour. Defendant partially denied plaintiff's claim for lost wages, and plaintiff now seeks $24,229.20 from defendant, pursuant to no-fault insurance law. After defendant failed to respond to plaintiff's discovery demands, including, inter alia, interrogatories, as well as her good faith demand letter, plaintiff filed a motion to compel responses pursuant to CPLR 3124. After serving incomplete discovery responses, defendant consented to a conditional preclusion order directing it to submit complete responses within 60 days. On the eve of the 60-day deadline, defendant served supplemental discovery responses, which were again incomplete, and then yet again served incomplete supplemental discovery responses after the deadline passed. Plaintiff moved for sanctions pursuant to CPLR 3126, seeking an order striking the answer and entering a default judgment in her favor, and defendant opposed the motion and cross-moved for a protective order pursuant to CPLR 3103. Supreme Court granted plaintiff's motion for sanctions and denied defendant's cross-motion. Defendant now appeals, and we affirm.

"It is well settled that [t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715 [4th Dept 2003]

[internal quotation marks omitted]; *see Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). "The nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith" (*Almontaser v Roswell Park Cancer Inst. Corp.*, 239 AD3d 1432, 1432 [4th Dept 2025] [internal quotation marks omitted]; *see Mosey v County of Erie*, 117 AD3d 1381, 1384 [4th Dept 2014]; *see generally Prattico v City of Rochester*, 197 AD3d 882, 883-884 [4th Dept 2021]). "The willful or contumacious character of a party's conduct can be inferred from the party's *repeated* failure to respond to demands or to comply with discovery orders" (*Pezzino v Wedgewood Health Care Ctr., LLC*, 175 AD3d 840, 841 [4th Dept 2019] [internal quotation marks omitted]; *see generally Zletz v Wetanson*, 67 NY2d 711, 713 [1986]). "Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse" (*Hann v Black*, 96 AD3d 1503, 1504-1505 [4th Dept 2012] [internal quotation marks omitted]).

Here, plaintiff established on her motion that defendant repeatedly failed to comply with her discovery demands and the conditional preclusion order, and that those failures were willful, contumacious, and in bad faith (*see Prattico*, 197 AD3d at 884; *Peterson v New York Cent. Mut. Fire Ins. Co.*, 174 AD3d 1386, 1388 [4th Dept 2019]; *cf. McGirr v Zurbrick*, 217 AD3d 1462, 1465-1466 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; *see generally Zletz*, 67 NY2d at 713). Thus, plaintiff met her initial burden on the motion, thereby shifting the burden to defendant to offer a reasonable excuse (*see Allen*, 121 AD3d at 1513). In opposition, defendant did not offer a reasonable excuse but, rather, contended that the discovery demands that it failed to respond to are not relevant. Contrary to defendant's contention, the demands that it failed to respond to sought evidence of potential bias on the part of defendant's independent medical examination physicians and thus are relevant to a proper inquiry (*see Dominicci v Ford*, 119 AD3d 1360, 1361 [4th Dept 2014]; *see generally Salm v Moses*, 13 NY3d 816, 818 [2009]). We therefore conclude that the court did not abuse its discretion in granting the motion for sanctions pursuant to CPLR 3126.

We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**991**

**KA 24-01070**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN SEARLES, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (TONYA PLANK OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Monroe County Court (Caroline E. Morrison, J.), rendered May 3, 2024. The judgment convicted defendant, upon a plea of guilty, of attempted assault in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant's sole contention consists of a challenge to the legality of the minimum period of the indeterminate sentence of imprisonment imposed by County Court. As defendant correctly asserts and the People correctly concede, defendant's contention would survive even a valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Balkum*, 288 AD2d 910, 910 [4th Dept 2001]). Consequently, we need not address the validity of the appeal waiver (*see People v Smith* [appeal No. 2], 237 AD3d 1531, 1532 [4th Dept 2025]). Nonetheless, defendant's challenge to the legality of the minimum period of the indeterminate sentence was rendered moot by his release to parole supervision (*see Balkum*, 288 AD2d at 910), and we conclude that the exception to the mootness doctrine does not apply (*see Smith*, 237 AD3d at 1532; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). We therefore dismiss the appeal.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**994**

**KA 24-01140**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ASHTON O., DEFENDANT-APPELLANT.

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LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE K. CALLANAN, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

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Appeal from an adjudication of the Wayne County Court (Richard M. Healy, J.), rendered April 24, 2024. Defendant was adjudicated a youthful offender upon his plea of guilty of hazing in the first degree and forcible touching.

It is hereby ORDERED that the adjudication so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a youthful offender adjudication based upon his plea of guilty of hazing in the first degree (Penal Law § 120.16) and forcible touching (§ 130.52 [1]). We reverse.

Defendant, who was 15 years old at the time of the incident, was indicted on three counts, including one count of aggravated sexual abuse in the first degree (Penal Law § 130.70 [1] [a]), a felony. Defendant was arraigned in County Court (Youth Part). The People brought a motion pursuant to CPL 722.23 to prevent removal of the case to Family Court and alleged that defendant was an adolescent offender. The court granted the People's motion. Thereafter, the court granted that part of defendant's omnibus motion seeking dismissal of the felony count of aggravated sexual abuse in the first degree on the basis of legally insufficient evidence before the grand jury, and the People indicated that they would not seek leave to represent the felony charge. Thereafter, defendant pleaded guilty to the two remaining misdemeanor counts and was adjudicated a youthful offender.

As the People correctly concede, reversal is required inasmuch as the court lacked jurisdiction to render such an adjudication. Defendant did not qualify as an adolescent offender because he was 15 years old at the time of the incident (*see* CPL 1.20 [44]), and therefore the court erred when it considered and granted the People's

motion to prevent removal of the matter to Family Court (*see* CPL 722.23). Furthermore, inasmuch as defendant did not qualify as a juvenile offender (*see* CPL 1.20 [42]) and could not be held criminally responsible for the remaining misdemeanor counts due to his age, defendant was subject to the jurisdiction of Family Court and the matter should have been transferred to Family Court for a determination whether defendant should be adjudicated a juvenile delinquent (*see* CPL 210.30 [7]; Family Ct Act §§ 301.2 [1]; 302.1 [1]).

Although the felony charge was dismissed on the ground of legally insufficient evidence before the grand jury and the People have declined to seek leave to represent that charge, we reject defendant's contention that the remaining charges of the indictment must be dismissed where, as here, the court lacked jurisdiction to adjudicate the matter and such adjudication was a nullity (*see Matter of Cunningham v Dwyer*, 302 AD2d 888, 889 [4th Dept 2003], *appeal dismissed* 99 NY2d 659 [2003], *rearg denied* 100 NY2d 577 [2003]; *see generally People v Harris*, 182 AD3d 992, 994 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]; *People ex rel. Aurnou v Strack*, 286 AD2d 690, 691 [2d Dept 2001], *lv denied* 97 NY2d 607 [2001], *rearg denied* 97 NY2d 726 [2002], *cert denied* 536 US 926 [2002]). We therefore reverse the adjudication, vacate the plea, and remit the matter to County Court (Youth Part) for the entry of an order removing the action to Family Court.

In light of our determination, defendant's remaining contentions are academic.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**998**

**CAF 24-01706**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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IN THE MATTER OF LALISA CRAIG,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ADAM THOMAS, SR., RESPONDENT-PETITIONER-RESPONDENT.

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THOMAS L. PELYCH, HORNELL, FOR PETITIONER-RESPONDENT-APPELLANT.

FRANCIS WM. TESSEYMAN, JR., ORCHARD PARK, FOR RESPONDENT-PETITIONER-RESPONDENT.

KELLY M. CICCONE, ROCHESTER, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Wayne County (Arthur B. Williams, J.), entered September 3, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent-petitioner sole legal and residential custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition of petitioner-respondent LaLisa Craig is reinstated, and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent maternal grandmother and respondent-petitioner father filed petitions seeking custody of the father's twin girls after the death of their mother. Family Court effectively dismissed the grandmother's petition upon determining that she failed to establish extraordinary circumstances and granted the father custody of the children, with visitation to the grandmother. The grandmother appeals, and we reverse.

Initially, we agree with the grandmother that a subsequent order entered on consent that granted custody of the children to the grandmother does not render this appeal moot. A consent order does not by itself constitute a judicial finding or an admission of extraordinary circumstances (*see Matter of Sevilla v Torres*, 235 AD3d 1303, 1304 [4th Dept 2025]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]; *Matter of Driscoll v Mack*, 183 AD3d 1229, 1230 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]). Thus, the grandmother's challenge to the court's finding of no extraordinary circumstances is not affected by the subsequent order entered on consent (*see generally Matter of Gorski v Phalen* [appeal No. 2], 187

AD3d 1670, 1671 [4th Dept 2020]; *Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585 [4th Dept 2014]).

It is well settled that, to have standing to seek custody, a nonparent must demonstrate "extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 546 [1976]; *see Matter of Adams v John*, 227 AD3d 1395, 1397 [4th Dept 2024]). If extraordinary circumstances exist, "the disposition of custody is influenced or controlled by what is in the best interest of the child" (*Bennett*, 40 NY2d at 544). In other words, "[t]he nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Adams*, 227 AD3d at 1397 [internal quotation marks omitted]).

We agree with the grandmother that she met her burden of establishing the existence of extraordinary circumstances. The extraordinary circumstances analysis "must consider the cumulative effect of all issues present in a given case and not view each factor in isolation" (*Matter of Byler v Byler*, 207 AD3d 1072, 1074 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022] [internal quotation marks omitted]; *see Matter of Lachenauer v Lachenauer-Myers*, 236 AD3d 1309, 1309-1310 [4th Dept 2025]).

The evidence here established that, in 2018, the father was arrested and incarcerated until 2022. During that time, the children resided with the mother in the grandmother's home until October 2021, when the grandmother moved out. The father never saw the children while he was incarcerated, rarely spoke with them, and never sent them cards, letters, or gifts. When the father was released from incarceration, the mother asked him to take custody of the children, which he did starting in July or August 2022; the grandmother visited with the children on the weekends. The mother died less than a year later, and the children lived with the grandmother during the summer of 2023. In September 2023, the parties filed petitions seeking custody of the children, and the court granted the grandmother temporary custody of the children, with the father having visitation. From that time until the conclusion of the hearing in July 2024, the father did not visit with the children and rarely communicated with them.

We conclude that the cumulative effect of the father's extended incarceration, his failure to maintain contact with the children during that time, the children's resulting bond with the grandmother, and the father's failure to maintain contact with the children during the pendency of the hearing, is sufficient to establish extraordinary circumstances (*see Matter of Robert XX. v Susan YY.*, 202 AD3d 1389, 1390 [3d Dept 2022], *lv denied* 38 NY3d 907 [2022]; *Matter of Ciriaco v Hall*, 191 AD3d 872, 873-874 [2d Dept 2021]; *Matter of Moynihan v Cohen*, 181 AD3d 965, 967 [2d Dept 2020]). We therefore reverse the order, reinstate the grandmother's petition, and remit the matter to

Family Court to make a determination regarding the best interests of the children, following an additional hearing if necessary.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**999**

**CA 25-00643**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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FRANCES GREGG, ET AL., PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COMMUNITY CARE COMPANIONS, INC.,
ALEXANDER J. CARO AND MARK GATIEN,
DEFENDANTS-RESPONDENTS.

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GLADSTEIN, REIF & MEGINNISS, LLP, NEW YORK CITY (JESSICA E. HARRIS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

JACKSON LEWIS P.C., MELVILLE (BRIAN J. SHENKER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered February 7, 2025. The order granted defendants' motion to dismiss plaintiffs' amended 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 amended complaint is reinstated.

Memorandum: Plaintiffs, current and former home care workers employed by defendant Community Care Companions, Inc. (CCC), commenced this action against CCC and defendants Alexander J. Caro and Mark Gatien, who are corporate officers of CCC, alleging that defendants failed to provide plaintiffs with wage notices and to compensate plaintiffs for working split shifts and a spread of hours in violation of Labor Law § 195 (1) and 12 NYCRR 142-2.4. Plaintiffs now appeal from an order that granted defendants' pre-answer motion to dismiss the amended complaint on the grounds that plaintiffs lack standing and failed to sufficiently plead their causes of action under Labor Law § 195 (1) and 12 NYCRR 142-2.4, and that Caro and Gatien, as corporate officers, cannot be individually liable under New York Labor Law. We reverse.

Initially, we agree with plaintiffs that Supreme Court erred in granting the motion with respect to the Labor Law § 195 (1) cause of action for lack of standing inasmuch as plaintiffs had statutory standing and were not required to allege actual injury (*see* Labor Law §§ 195 (1); 198 [1-b]; *see also Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 185 [1973], *rearg denied* 33 NY2d 178 [1973]).

We also agree with plaintiffs that the court erred in granting the motion with respect to the Labor Law § 195 (1) and 12 NYCRR 142-2.4 causes of action pursuant to CPLR 3211 (a) (7). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), [this Court] must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference" (*Van Ostrand v Latham*, 222 AD3d 1382, 1383 [4th Dept 2023] [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Here, accepting the facts as alleged in the amended complaint as true and according plaintiffs the benefit of every possible favorable inference (*see Stevens v Perrigo*, 122 AD3d 1430, 1431 [4th Dept 2014]), we conclude that plaintiffs sufficiently alleged facts to support plaintiffs' claims that defendants did not provide plaintiffs with notice containing the information required under Labor Law § 195 (1) and that defendants failed to pay plaintiffs as required under 12 NYCRR 142-2.4 (*see generally Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]).

Finally, we agree with plaintiffs that the court erred in granting that part of the motion seeking dismissal of the amended complaint against Caro and Gatien. "[C]orporate . . . officers generally may not be subjected to civil liability for corporate violations of the Labor Law absent allegations that such persons exercised control of the corporation's day-to-day operations by, for example, hiring and firing employees, supervising employee work schedules, and determining the method and rate of pay" (*Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 663 [2d Dept 2020]; *see Interstate Home Loan Ctr., Inc. v United Mtge. Corp.*, 206 AD3d 708, 710 [2d Dept 2022]). Here, the amended complaint adequately alleged that Caro and Gatien exercised control over the day-to-day operations of CCC inasmuch as they had final decision-making authority over all organization matters within CCC, including the hiring, firing, and discipline of all personnel, their wage rates and method of pay, and the terms and conditions of their employment.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**1001**

**CA 25-00079**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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IN THE MATTER OF CUBA LAKE COMMITTEE FOR FAIR ASSESSMENTS, HARRY W. KEELEY, AND HARRY W. AND CYNTHIA L. KEELEY JOINT REVOCABLE TRUST, PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CUBA, ASSESSOR OF THE TOWN OF CUBA, RYAN REED, IN HIS OFFICIAL CAPACITY AS (FORMER) ASSESSOR OF TOWN OF CUBA, RUSS HELSIN, IN HIS OFFICIAL CAPACITY AS ASSESSOR OF TOWN OF CUBA, TOWN OF CUBA BOARD OF ASSESSMENT REVIEW, VILLAGE OF CUBA, CUBA-RUSHFORD CENTRAL SCHOOL DISTRICT AND COUNTY OF ALLEGANY, RESPONDENTS-DEFENDANTS-APPELLANTS.

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BENGART & DEMARCO, LLP, TONAWANDA (JAMES C. DEMARCO, III, OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

MONACO COOPER LAMME & CARR, PLLC, ALBANY (NORAH M. MURPHY OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered July 16, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, insofar as appealed from, declared the 2023 Town of Cuba tax assessment roll null and void and reinstated the 2022 tax assessment roll.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the petition-complaint is denied in its entirety, and judgment is granted in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that the 2023 tax assessment roll is valid.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to annul and declare unenforceable the 2023 tax assessment roll of respondent-defendant Town of Cuba (Town) on various grounds, including that the methodology used in determining the 2023 tax assessment roll was arbitrary or capricious and unconstitutional. Respondents-defendants (respondents) filed an answer seeking dismissal

of the petition-complaint (petition). Respondents now appeal from a judgment that effectively granted the petition insofar as it sought a declaration that the 2023 final tax assessment roll is null and void and reinstatement of the 2022 final tax assessment roll until such time as the Town performs a new reassessment. We reverse the judgment insofar as appealed from.

We agree with respondents that, contrary to petitioners' assertion, Supreme Court erred in determining that petitioners overcame the presumption of validity attached to the property valuation and that the methodology used was arbitrary and capricious. "The cardinal principle of property valuation for tax purposes, set forth in the State Constitution, is that property '[a]ssessments shall in no case exceed full value' " (*Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon*, 88 NY2d 724, 729 [1996], quoting NY Const, art XVI, § 2). "The concept of 'full value' is typically equated with market value, or what 'a seller under no compulsion to sell and a buyer under no compulsion to buy' would agree to as the subject property's price" (*id.*). "In view of this market-oriented definition of full value, the assessment of property value for tax purposes must take into account any factor affecting a property's marketability" (*id.*). Nonetheless, "while property must be assessed at market value, there is no fixed method for determining that value" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992], *rearg denied* 81 NY2d 784 [1993]). "The ultimate purpose of valuation . . . is to arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc. Any fair and nondiscriminating method that will achieve that result is acceptable" (*id.*; *see Commerce Holding Corp.*, 88 NY2d at 731).

Where, as here, " 'the challenge is based upon the method employed in the assessment of several properties rather than the overvaluation or undervaluation of [a] specific propert[y], a taxpayer may . . . mount a collateral attack on the taxing authority's action through either a declaratory judgment action or a proceeding pursuant to CPLR article 78' " (*Matter of Cayuga Grandview Beach Coop. Corp. v Town Bd. of Town of Springport*, 51 AD3d 1364, 1364 [4th Dept 2008], *lv denied* 11 NY3d 702 [2008] [emphasis omitted]; *see Matter of Estrellita LLC v Town Bd. of Town of Alexandria*, 60 AD3d 1363, 1363 [4th Dept 2009]). "An assessor's property valuation resulting in a local tax assessment is presumptively valid" (*Matter of Abele v Dimitriadis*, 53 AD3d 969, 971 [3d Dept 2008], *lv denied* 12 NY3d 706 [2009]; *see Matter of Scarsdale Comm. for Fair Assessments v Albanese*, 202 AD3d 966, 969 [2d Dept 2022]; *Matter of Hudson Prop. Owners' Coalition, Inc. v Slocum*, 92 AD3d 1198, 1199 [3d Dept 2012]; *see generally Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187 [1998]). "To overcome the presumption, property owners must present substantial evidence of overvaluation through proof based on sound theory and objective data" (*Abele*, 53 AD3d at 971 [internal quotation marks omitted]; *see Scarsdale Comm. for Fair Assessments*, 202 AD3d at 969; *Hudson Prop. Owners' Coalition, Inc.*, 92 AD3d at 1199-1200). When property owners "fail[ ] to rebut the presumption, the municipality's

assessor has no obligation to go 'forward with proof of the correctness of [its] valuation,' and the petition is to be dismissed" (*Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 175 [2014]).

Here, petitioners "failed to submit any evidence, such as 'a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser' . . . , showing that the method employed . . . failed to achieve uniformity, was discriminatory or was otherwise improper" (*Hudson Prop. Owners' Coalition, Inc.*, 92 AD3d at 1200). Petitioners instead merely asserted that the professional real estate appraisal and consulting firm hired by the Town to perform the reassessment had used a flawed methodology and, in support of that assertion, primarily relied upon "land assessment analysis" reports prepared by a non-expert property owner, petitioner-plaintiff Harry W. Keeley, who claimed, with minimal explanation of his method, that his analyses showed anomalies in the Town's assessment (*see id.*). We agree with respondents that these "self-generated and unverified [analyses] lack[ ] the type of evidentiary value necessary to rebut the presumption" (*Matter of Channin v Minoia*, 221 AD3d 1119, 1121 [3d Dept 2023]). We conclude that petitioners' submissions in support of the petition "fell woefully short of demonstrating any infirmity in the formula used by the [firm] in assessing the properties" (*Hudson Prop. Owners' Coalition, Inc.*, 92 AD3d at 1200).

Moreover, we agree with respondents that, contrary to the court's conclusion, the record establishes that the firm rationally employed a market value method of valuation that included a comparative property analysis of residential sales and necessarily took into account the affect on marketability of those properties located on leased land (*see generally* RPTL 302 [1]; *Commerce Holding Corp.*, 88 NY2d at 729). We conclude that, "[a]lthough petitioners take issue with how [the firm] arrived at [its] calculations, . . . their conclusory [and unsubstantiated] assertion that the methodology used was arbitrary was insufficient to defeat the presumption that the assessment was valid" (*Matter of Eanniello v Morris*, 234 AD2d 642, 643 [3d Dept 1996]).

Finally, we conclude that petitioners failed to establish that the other violations of law they have alleged would warrant invalidation of the entire 2023 assessment roll (*see generally Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1, 13-14 [1975]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**1002**

**CA 24-01909**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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IN THE MATTER OF THE P. & E. T. FOUNDATION.
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JOHN N. BLAIR, ESQ., PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

CYNTHIA T. DOYLE, ROBERT M. DOYLE,
MOLLIE T. BYRNES, JOHN H. BYRNES, PETER BYRNES,
MOLLIE DOYLE, DONNA OWENS, JAMES WEISS,
AND DAVID WELBOURN, RESPONDENTS-RESPONDENTS.

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RICHARD T. SULLIVAN PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT.

PILLSBURY WINTHROP SHAW PITTMAN LLP, NEW YORK CITY (DAVID G. KEYKO OF COUNSEL), AND BARCLAY DAMON LLP, BUFFALO, FOR RESPONDENTS-RESPONDENTS.

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Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered November 1, 2024. The order, among other things, denied petitioner's motion seeking an order declaring that the parties had entered a final and binding settlement contract.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs.

Memorandum: This appeal arises from a petition and amended petition pursuant to, inter alia, SCPA 1420 seeking construction of certain trust documents related to the P. & E. T. Foundation (Foundation), a charitable trust, as well as a subsequent petition pursuant to SCPA 2102 (6) and 2107 (2) seeking, inter alia, to enjoin Cynthia T. Doyle, Robert M. Doyle, Mollie T. Byrnes, John H. Byrnes, Peter Byrnes, Mollie Doyle, Donna Owens, James Weiss, and David Welbourn (collectively, respondents) from removing petitioner as attorney trustee for the Foundation. Following the latter of those petitions, the parties engaged in mediation. In October 2022, respondents provided petitioner with two "global settlement proposals" designed to address all of the parties' outstanding issues and "completely remove[ ] [petitioner] and his family members from any involvement with the Tower entities and family." Although petitioner purportedly accepted one of those settlement proposals, a dispute arose as to whether the proposal had been withdrawn prior to its acceptance. Following that dispute, mediation continued. In April 2023, the parties signed a "Mediator Settlement Proposal Final," a second global settlement proposal that addressed many of the same concerns as the October 2022 proposals with additional and amended terms. A dispute arose, however, as to whether a signature from the

Office of the Attorney General was required before the April 2023 proposal became binding.

Petitioner thereafter moved by order to show cause seeking, inter alia, an order "[d]eclaring that the terms recited in that certain [April 2023 proposal] . . . constitute a final and binding settlement contract," or, in the alternative, "declaring that the 'first proposal' in that certain [October 2022 proposal] . . . accepted by [p]etitioner . . . constitutes a final and binding settlement contract." Surrogate's Court effectively denied the motion and determined that neither proposal was enforceable. Petitioner appeals. We vacate the order on the ground that the Surrogate lacked the authority to entertain the relief requested by petitioner's order to show cause (*see generally Matter of Allen v Fiedler*, 96 AD3d 1682, 1682 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Matter of Byrnes v County of Monroe*, 122 AD2d 549, 549 [4th Dept 1986]).

CPLR 3001 vests the authority to grant declaratory relief in Supreme Court. Thus, "[u]nless there is some other provision conferring declaratory jurisdiction on the particular court . . . the court will not have it" (Patrick M. Conners, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C3001:20; *see generally Kimmel v State of New York*, 29 NY3d 386, 393 [2017]; *Byrnes*, 122 AD2d at 550; *Wikarski v State of New York*, 91 AD2d 1174, 1174 [4th Dept 1983]). Even where the subject matter of a particular case falls within the subject matter generally heard by a court of limited jurisdiction, requests for declaratory relief must, nevertheless, typically be heard in Supreme Court (*see North Waterside Redevelopment Co. v Febbraro*, 256 AD2d 261, 262 [1st Dept 1998], *lv dismissed* 93 NY2d 888 [1999]).

That being said, so long as Surrogate's Court possesses jurisdiction over a particular matter, the Surrogate "[i]n the exercise of [their] jurisdiction . . . shall have all of the powers that the supreme court would have in like actions and proceedings" (SCPA 209 [10]). The statute, for example, expressly grants the Surrogate the power to "determine" certain things regarding, inter alia, estate property and trusts (SCPA 209 [4], [6], [10]). Thus, courts have concluded that, although not necessarily in the form of a declaratory judgment, the Surrogate has the authority to make determinations as to the rights to or ownership of estate or trust property (*see Matter of Mastroianni*, 105 AD3d 1136, 1137-1138 [3d Dept 2013]; *Carmel v Shor*, 250 AD2d 475, 476 [1st Dept 1998]; *Matter of Greenwold*, 236 AD2d 400, 401 [2d Dept 1997]; *Matter of Langfur*, 198 AD2d 355, 355-356 [2d Dept 1993]).

Without deciding the precise extent or scope of the Surrogate's authority to entertain requests for declaratory or quasi-declaratory relief, we conclude that the Surrogate lacked such authority under the circumstances of this case. Both the October 2022 and April 2023 proposals underlying petitioner's request for declaratory relief represented attempts at a global settlement resolving a myriad of issues that had arisen between the parties and their families, much of which extended beyond the relief contemplated by the petitions before the Surrogate. The October 2022 and April 2023 proposals had terms

regarding, inter alia, payment of attorney fees, payments owed to petitioner, payments petitioner would waive, claims pending against petitioner in other actions, releases from personal liability, health insurance for petitioner, and certain things that the parties agreed to do post-settlement. Both proposals explicitly referenced a separate action pending in federal court, stating that the federal action would be dismissed against petitioner and another individual who was not a party to this proceeding.

Even assuming, arguendo, that the Surrogate possessed authority to make declarations or determinations related to certain aspects of the October 2022 or April 2023 proposals, we conclude that substantive portions of those proposals involved disputes that were not properly before the Surrogate and thus the requested relief, i.e., a declaration that either of the proposals were binding, must be sought in an action in the Supreme Court (*see generally Matter of Trump*, 68 Misc 3d 593, 595 [Sur Ct, Queens County 2020]). Indeed, as noted, both the October 2022 and April 2023 proposals, among other things, effectively settled a separate action over which the Surrogate lacked jurisdiction. Because the matters outside of the Surrogate's jurisdiction were inextricably intertwined with the other terms of the proposals, we conclude that the Surrogate lacked the authority to grant declaratory relief or otherwise determine the validity or enforceability of either the October 2022 or April 2023 proposals (*see Matter of Berkowitz*, 2016 NY Slip Op 30164[U] *4 [Sur Ct, NY County 2016]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**1003**

**CA 24-01527**

PRESENT: BANNISTER, J.P., MONTOUR, SMITH, GREENWOOD, AND HANNAH, JJ.

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DARWIN S. PUTNAM, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PATSY D. PUTNAM, AS EXECUTOR OF THE ESTATE OF
DARWIN L. PUTNAM, DECEASED, PATSY DARLENE PUTNAM,
DEFENDANT-APPELLANT,
AND JON PUTNAM, DEFENDANT.

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BOND, SCHOENECK & KING, PLLC, SYRACUSE (SUZANNE M. MESSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered July 5, 2024. The order denied in part the motion of defendants to dismiss plaintiff's second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion seeking to dismiss the third cause of action to the extent it asserts a claim for fraud against defendant Patsy Darlene Putnam, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against his parents, defendants Darwin L. Putnam (decedent) and Patsy Darlene Putnam, individually (Patsy), and his brother, Jon Putnam (Jon), seeking monetary damages and title to 18 acres of the family farm (subject property). Decedent died during the pendency of this action, and Patsy in her capacity as executor of his estate was substituted for decedent as a defendant (Estate). Defendants moved to dismiss the second amended complaint, and Supreme Court denied the motion with respect to the second and third causes of action. Patsy, individually and as executor of the Estate (defendant), appeals, and we modify.

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiff[ ] with the benefit of every favorable inference . . . Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018] [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Pottorff v Centra Fin. Group, Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]).

We reject defendant's contention that the court erred in denying the motion with respect to the second cause of action, for constructive trust, against Patsy and the Estate. A constructive trust is applied in situations where "an unfulfilled promise to convey an interest in land induces another, in the context of a confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment" (*McGrath v Hilding*, 41 NY2d 625, 628-629 [1977]). The purpose of a constructive trust is to prevent unjust enrichment (*see Simonds v Simonds*, 45 NY2d 233, 242 [1978]). "Generally, there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment" (*Aubertine v Aubertine*, 240 AD3d 1360, 1361 [4th Dept 2025]; *see Barker v Gervera*, 236 AD3d 1318, 1325 [4th Dept 2025]; *Matter of Chicola*, 224 AD2d 1005, 1005-1006 [4th Dept 1996]). Courts do not rigidly apply these elements but use them as flexible guidelines (*see Simonds*, 45 NY2d at 241; *Aubertine*, 240 AD3d at 1361; *Barker*, 236 AD3d at 1325).

Here, plaintiff alleged in the second amended complaint that decedent, his father, promised to grant him title to the subject property so that plaintiff could build his home. Plaintiff further alleged that he had occupied the subject property for over 10 years, constructed his home, and used an adjacent building and a barn for his business. He alleged that he relied upon decedent's oral promise when he built his home and operated his business on the subject property and that defendants would be unjustly enriched in the event of a removal of plaintiff from the subject property. As defendant correctly contends, plaintiff did not allege an actual transfer of the subject property, but only the promise to do so. However, " 'courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer [of that property] actually occurred' " (*Aubertine*, 240 AD3d at 1361-1362; *see Canas v Oshiro*, 221 AD3d 650, 652 [2d Dept 2023]). We conclude that plaintiff's allegations were sufficient to state a cause of action for constructive trust (*see generally Aubertine*, 240 AD3d at 1362; *Estate of Uddin v Miah*, 229 AD3d 764, 766-767 [2d Dept 2024]).

We reject defendant's further contention that the court erred in denying the motion with respect to the third cause of action against Patsy insofar as it alleges undue influence. Defendant contends that there is no substantive cause of action for undue influence in New York, but we rejected a similar contention in *Barker* and concluded that "New York courts have invalidated deeds on the ground of undue influence . . . or have otherwise entertained the theory of undue influence to challenge a deed or contract" (236 AD3d at 1323). "To establish undue influence, a party is required to establish that an individual was actually constrained to act against [their] own free will and desire by identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*id.* at 1324 [internal quotation marks omitted]; *see Salitsky v D'Attanasio*, 214 AD3d 567, 568 [1st Dept 2023]).

Plaintiff alleged in the second amended complaint that Patsy and

Jon took advantage of decedent's failing health to have him rescind his agreement to transfer the subject property to plaintiff and instead transferred it to Patsy. We conclude that plaintiff's allegations were sufficient to state a claim for undue influence (*see generally Barker*, 236 AD3d at 1324).

We agree with defendant, however, that the court erred in denying the motion with respect to the third cause of action insofar as it alleges fraud against Patsy, and we therefore modify the order accordingly. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). In a cause of action based upon fraud, "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]).

Here, plaintiff does not allege what the material misrepresentation was or how plaintiff justifiably relied upon it. It appears from the heading of the third cause of action that it is asserted against Patsy and Jon for "fraud acted upon" decedent, resulting in damages to plaintiff. However, it is well settled that "under New York law, . . . third-party reliance does not satisfy the reliance element of a fraud claim" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016], *rearg denied* 28 NY3d 956 [2016]).

Entered: February 11, 2026 Ann Dillon Flynn
Clerk of the Court

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

**1006**

**KA 24-01223**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERWIE L. SINGLETON, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALINA M. YOUNG OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Ontario County Court (Brian D. Dennis, J.), dated June 18, 2024. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk and a sexually violent offender pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points for his criminal history based upon a prior juvenile delinquency adjudication. We agree. Defendant was assessed 10 points under risk factor 8 for his age at the time of his first sex crime based on a juvenile delinquency adjudication when he was 15 years old, and the court rejected defendant's challenge to the assessment of points under that risk factor. We have repeatedly held, however, that a juvenile delinquency adjudication may not be considered a crime for purposes of assessing points in a SORA determination (*see People v Gibson*, 149 AD3d 1567, 1568 [4th Dept 2017]; *People v Brown*, 148 AD3d 1705, 1707 [4th Dept 2017]; *see also People v Campbell*, 98 AD3d 5, 12-13 [2d Dept 2012], *lv denied* 20 NY3d 853 [2012]). Consequently, we conclude that the court erred in considering defendant's juvenile delinquency adjudication in assessing 10 points under risk factor 8.

Defendant also contends that the court erred when it, in the alternative, adjudicated him a level three risk through application of an automatic override based on "a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary

at 4 [2006]; *see generally People v Cohen*, 232 AD3d 1207, 1207-1208 [4th Dept 2024]). We agree. It is well settled that "[t]he People bear the burden of proving the applicability of a particular override by clear and convincing evidence" (*People v Schiavoni*, 107 AD3d 773, 773 [2d Dept 2013], *lv denied* 21 NY3d 864 [2013]; *see* Correction Law § 168-n [3]; *People v Cobb*, 141 AD3d 1174, 1175 [4th Dept 2016]). Here, we conclude that there was no evidence in the record to support the court's conclusion that the aforementioned automatic override was applicable here. While the record supports the conclusion that defendant suffered from mental illness and that he exhibited impulsive behavior, there was no clinical assessment in the record establishing that his mental illness decreased his ability to control his behavior. Of note, neither the People nor the Board of Examiners of Sex Offenders requested that the court apply the automatic override here and, further, defendant never had the opportunity to oppose use of the override before the court decided to apply it. Consequently, we conclude that the court erred in its alternative determination that defendant was a level three risk based on the automatic override.

Without the improperly assessed points under risk factor 8 and the automatic override, defendant is a presumptive level two risk. Under the circumstances of this case, we remit the matter to County Court for further proceedings to determine whether an upward or downward departure is warranted (*see Brown*, 148 AD3d at 1707; *see generally People v Weber*, 40 NY3d 206, 211-212 [2023]).

Entered: February 11, 2026 Ann Dillon Flynn
Clerk of the Court

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

**1007**

**KA 23-00679**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWREN GOINS, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWREN GOINS, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. KEANE, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 11, 2022. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and attempted murder 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 manslaughter in the first degree (Penal Law § 125.20 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]). Contrary to defendant's contention in his main brief, we conclude that defendant's waiver of the right to appeal was valid (*see People v Gaines*, 239 AD3d 1350, 1350 [4th Dept 2025]). Defendant's valid waiver of the right to appeal "precludes our review of his challenge to the severity of the sentence" (*id.* at 1351).

Contrary to defendant's further contention in the main brief, County Court did not fail to make an independent youthful offender determination (*cf. People v Hobbs*, 158 AD3d 1308, 1309 [4th Dept 2018]; *see generally* CPL 720.20 [1]), and the court was "not required to state, on the record, its reasons for denying defendant youthful offender status" (*People v Minemier*, 29 NY3d 414, 416 [2017]).

We have considered defendant's contentions in his pro se supplemental brief and conclude that they are without merit.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**1009**

**KA 23-02078**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT A. MEYER, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 31, 2023. The judgment convicted defendant upon his plea of guilty of burglary in the third degree and petit larceny.

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 of imprisonment imposed for burglary in the third degree under count 1 of the indictment to an indeterminate term of 2 to 4 years, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25), defendant contends that he was denied effective assistance of counsel. To the extent that defendant's contention survives the guilty plea (*see People v Williams*, 105 AD3d 1428, 1428-1429 [4th Dept 2013], *lv denied* 21 NY3d 1021 [2013]), we conclude that it lacks merit. The record establishes that defendant received a favorable plea bargain and that defendant was afforded meaningful representation (*see People v Moore*, 229 AD3d 1279, 1279-1280 [4th Dept 2024]). We agree with defendant, however, that the sentence is unduly harsh and severe. Defendant's conviction arises from an incident in which he stole two cans of hard iced tea from a pharmacy; defendant had previously been served with a trespass notice relating to that pharmacy and was thus prohibited from entering it. We note that defendant has no history of violence and is an addict with mental health issues who steals to get money for drugs and alcohol. Under the circumstances of this case, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for burglary in the third degree

under count 1 of the indictment to an indeterminate term of 2 to 4 years.

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court

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

**1010**

**KA 23-01779**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND HANNAH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN J. WEBER, DEFENDANT-APPELLANT.

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KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

KEVIN T. FINNELL, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered October 3, 2023. The judgment convicted defendant upon a plea of guilty 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 his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that his plea was involuntarily entered because, inter alia, the judge who presided over the plea proceeding in County Court had previously prosecuted him on an unrelated crime and defendant did not fully appreciate the potential conflict of interest when he entered the plea. Defendant also contends that his plea was involuntary because he did not understand that a single violation of interim probation for failing a drug test could result in him being sentenced to state prison on the felony to which he had pleaded guilty.

As a preliminary matter, we note that, although defendant waived his right to appeal and the court's colloquy was consistent with the appropriate model colloquy (*see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), defendant's challenges to the voluntariness of the plea survive even a valid waiver of the right to appeal (*see People v McMurtry*, 224 AD3d 1310, 1310 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Gimenez*, 59 AD3d 1088, 1088-1089 [4th Dept 2009], *lv denied* 12 NY3d 816 [2009]). Nevertheless, by failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve his contentions for our review (*see People v Santos*, 230 AD3d 1586, 1586 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]; *People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). The

narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply here.

We note that the judge informed defendant that she had prosecuted him on an unrelated charge years earlier and gave defendant an opportunity to move for her recusal. Defendant acknowledged that the judge had previously prosecuted him and stated that he nonetheless wanted to accept the People's plea offer, pursuant to which he would have been allowed to vacate his plea to the felony had he successfully completed interim probation. Defendant declined the court's offer for an opportunity to discuss the matter with his attorney. Under the circumstances, we decline to exercise our power to address defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant further contends that he was denied effective assistance of counsel because his attorney failed to object to the alleged conflict of interest arising from the judge's involvement in the case, failed to move to withdraw the plea on the basis of that alleged conflict of interest, and failed to explain to defendant that a single violation of interim probation could have such significant carceral consequences. To the extent that defendant's claims of ineffective assistance survive his plea and valid waiver of the right to appeal (*see People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]), we conclude, after reviewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Gardner*, 237 AD3d 1545, 1547 [4th Dept 2025]).

We note that defense counsel negotiated a favorable plea agreement pursuant to which defendant, who had four prior felony convictions on his record and was captured on video brutally assaulting the victim in this case, would have been permitted to withdraw his plea to the felony and instead plead guilty to a misdemeanor with no more than a year in jail had he successfully completed interim probation (*see Gardner*, 237 AD3d at 1547). The fact that defendant subsequently violated the terms of the interim probation by using cocaine does not "cast[ ] doubt on the apparent effectiveness of defense counsel" (*id.* [internal quotation marks omitted]).

Entered: February 11, 2026 Ann Dillon Flynn
Clerk of the Court

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

**1012**

**CAF 24-01332**

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, NOWAK, AND HANNAH, JJ.

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IN THE MATTER OF THOMAS J. COATES, SR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIANNA L. HODGE, RESPONDENT-RESPONDENT.

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THOMAS L. PELYCH, HORNELL, FOR PETITIONER-APPELLANT.

SHARON ALLEN, KEUKA PARK, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 5, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole legal custody and primary physical placement of the subject children.

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

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order awarding sole legal custody and primary physical placement of the children to respondent mother. We affirm.

Contrary to the father's assertion, this case involves an initial custody determination and thus it cannot properly be characterized as a relocation case to which the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied (*see Matter of Moore v Kazacos*, 89 AD3d 1546, 1546 [4th Dept 2011], *lv denied* 18 NY3d 806 [2012]; *Matter of Baker v Spurgeon*, 85 AD3d 1494, 1496 [3d Dept 2011], *lv dismissed* 17 NY3d 897 [2011]; *Matter of Schneider v Lascher*, 72 AD3d 1417, 1417 [3d Dept 2010], *lv denied* 15 NY3d 708 [2010]). The effect of the mother's relocation is therefore "but one factor among many" for Family Court to consider in making its custody determination (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeal dismissed* 19 NY3d 887 [2012], *appeal dismissed* 20 NY3d 1052 [2013]). The relevant issue is whether it is in the best interests of the children to reside primarily with the mother or the father (*see id.*; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]).

Contrary to the father's contention on appeal, the court's determination awarding sole legal custody and primary physical

placement of the children to the mother is supported by a sound and substantial basis in the record and should not be disturbed (*see Matter of Hochreiter v Williams*, 201 AD3d 1303, 1304 [4th Dept 2022]; *Matter of Hermann v Williams*, 179 AD3d 1545, 1546 [4th Dept 2020]; *see also Matter of Castle v Barnes*, 221 AD3d 1562, 1563 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]).

Entered: February 11, 2026

Ann Dillon Flynn
Clerk of the Court