SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 17, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Gonzalez, Sweeny, JJ.

2902 Hassan Gorden, Index 115977/03
Plaintiff-Appellant,

-against-

Leonite Liranzo Tibulcio, et al.,
Defendants-Respondents.

[And A Third-Party Action]

Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for appellant.

Picciano & Scahill, P.C., Westbury (Gilbert J. Hardy of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 9, 2006, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he sustained personal injuries in September 2002 while a passenger in a vehicle, driven by his brother, which became involved in an accident. He claims that when the accident occurred, his chest and knees hit the dashboard and his right shoulder hit the door of the vehicle.

In his bill of particulars, plaintiff specified the following injuries: disc herniations, disc bulging, degeneration

of the parespinal muscles, sensory loss of the upper extremities, impaired mobility, pain aggravated by coughing and sneezing, difficulty standing or sitting, and difficulty walking and climbing stairs. His supplemental bill of particulars alleged injuries to his knees, including tears of the menisci, buckling, locking, instability, burning, clicking and swelling. Plaintiff claims he was confined to bed for approximately 90 days, confined to home for approximately 6 months, and was partially disabled.

At his deposition, plaintiff testified that he could not return to work from the date of the accident until January 2003, and that he remained confined to bed and/or home for approximately four months after the accident. He also testified that he first sought medical treatment approximately one week after the accident, complaining of pain in both knees, both shoulders, and his neck and back. He undertook a four-month course of physical therapy, which included acupuncture, massage, electrical stimulation and chiropractic, five days a week. He was also sent for radiological studies, including an MRI.

Plaintiff further testified he had been involved in a prior auto accident in September 2000 that resulted in injuries to his neck and lower back. He commenced a lawsuit for that accident that was settled for $500.00.

Two independent medical examinations were conducted on plaintiff. The first was performed in January 2005 by Dr.

Michael J. Katz, an orthopedist. Dr. Katz reviewed the X-ray, MRI and EMG reports taken at the time of the 2002 accident and performed various range-of-motion tests on plaintiff's cervical and lumbar spine, knees and shoulders. Dr. Katz found plaintiff's range of motion to be normal and concluded that cervical and lumbosacral strains, as well as the bilateral knee and shoulder contusions, were all "resolved." Dr. Katz further opined that plaintiff showed "no signs or symptoms of permanence on a causally related basis," that he was not disabled, and was "capable of gainful employment as a security guard, but is not working by choice. He is capable of all activities of his daily living."

The second independent medical examination, conducted in June 2005 by Dr. Burton S. Diamond, a neurologist, also found plaintiff's range of motion to be within normal ranges. Although Dr. Diamond noted a decreased range of motion in the low back area, based upon the results of various tests, he concluded that "this restriction was purely voluntary." He also concluded that plaintiff's cervical and lumbar sprain was resolved, there was no permanency to his condition, that plaintiff was capable of working on a full-time basis and performing the normal activities of daily living.

Defendants moved for summary dismissal of the complaint on the ground that plaintiff did not meet the serious injury

threshold set forth in Insurance Law § 5102(d). In opposition, plaintiff submitted four medical reports from his treating physicians at the time of the accident, which included copies of the radiologic and MRI studies. In an affirmed follow-up report dated October 28, 2002, Dr. Jefferson Gabella compared range-of-motion limitations to the normal range in a percentage format, and he diagnosed plaintiff as having lumbar sprain/strain, lumbar radiculopathy, cervical herniated/bulging discs, and internal derangement of the left shoulder and right knee. Dr. Gabella opined that these injuries were causally related to the 2002 accident and limited plaintiff in the activities of daily living.

Plaintiff also submitted the affirmed report of his current treating physician, Dr. Louis C. Rose, who first examined plaintiff some 3 ½ years after the accident. He also reviewed the MRI studies and X-ray evaluations from 2002. Although Dr. Rose reported restricted range of motion, he did not indicate in his report the normal range of motion for the areas tested. Dr. Rose concluded plaintiff's injuries to his shoulders and knees were a "direct result" of the 2002 accident, and his spinal injuries were due to an "exacerbation of a pre-existing injury to his neck and lower back."

The IAS court found that defendants established a prima facie case of entitlement to summary judgment, and that plaintiff failed to raise triable issues of fact that he had sustained a

qualifying injury under Insurance Law § 5102(d). The court found that with the exception of Dr. Rose's affirmation, none of the medical documentation was submitted in admissible form. Moreover, Dr. Rose relied on unsworn medical reports to reach his conclusions after an examination that took place more than three years after the accident, and his report failed to state with specificity the normal range-of-motion with respect to tests he had performed on plaintiff.

Defendants met their burden of establishing prima facie entitlement to summary judgment that plaintiff did not sustain a serious injury under Insurance Law § 5102(d). The affirmed reports of an orthopedist and neurologist, made after a review of plaintiff's medical records and a personal examination in 2005, stated that as of that date, plaintiff did not suffer from a neurologic or orthopedic disability, and that the injuries to plaintiff's shoulder, cervical and lumbar injuries were resolved (*see Perez v Hilarion*, 36 AD3d 536 [2007]). Moreover, the reviews conducted by these doctors of plaintiff's medical records, MRIs and the treating physicians' reports, including the records of treatment during the 180-day treatment period immediately following the accident, were insufficient to establish that plaintiff had sustained a serious injury under the 90/180 category of Insurance Law § 5102[d], thus shifting the burden to plaintiff to establish triable issues of fact with

respect to these claims (*see Nelson v Distant*, 308 AD2d 338, 339 [2003]).

At the time of the incident, plaintiff's physicians made three references to plaintiff's ability to perform his usual and customary activities for 90 of the 180 days following the incident: Dr. Gabella's September 30, 2002 report stated he instructed plaintiff not to perform "heavy work" until told to do so by the doctor; Dr. Mohamed K. Nour's October 15, 2002 report recommended that plaintiff "Avoid any strenuous activities as lifting, carrying, pushing or pulling heavy weights"; and Dr. Gabella's October 28, 2002 report concluded that "patient is somewhat limited in activities of daily living." These statements are too general in nature to raise an issue of fact that plaintiff was unable to perform his usual and customary activities during the statutorily required time period and do not support plaintiff's claim that his confinement to bed for 90 days and to home for 6 months was medically required.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102(d), plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ,

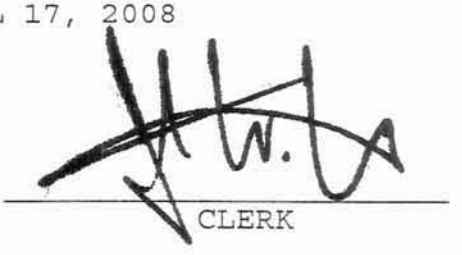
member, function or system" (*John v Engel*, 2 AD3d 1027, 1029 [2003]). Certainly, the reports of defendants' examining doctors are detailed and contain such objective, quantitative evidence. While the unsworn MRI reports that plaintiff submitted in opposition to the motion were improperly rejected by the motion court (*see Thompson v Abbasi*, 15 AD3d 95, 97 [2005], citing inter alia, *Ayzen v Melendez*, 299 AD2d 381 [2002]), the material contained therein was reviewed and cited by plaintiff's physicians in their respective reports. Dr. Rose's report cites an MRI taken of plaintiff's knees a few weeks after the accident, revealing "intrasubstance tear and/or mixoid degeneration involving the posterior horn of both menisci." Dr. Rose diagnosed "internal derangement . . . with possible medial meniscal tear." However, he does not explain why he ruled out degenerative changes as the cause of the internal derangement. This failure rendered his opinion speculative that the derangement was caused by the accident (*see Abreu v Bushwick Bldg. Prods. & Supplies, LLC*, 43 AD3d 1091, 1092 [2007]). Similarly, MRIs of plaintiff's spine taken shortly after the accident revealed herniations and other pathologies that plaintiff's expert opines were sustained in the September 2000 motor vehicle accident and exacerbated by the instant September 2002 accident, but the expert does not indicate that he reviewed the medical records concerning plaintiff's condition immediately

following the previous accident. Thus, there is no objective basis by which to measure the claimed aggravation of injuries, or to attribute any new injuries to the later accident (*McNeil v Dixon*, 9 AD3d 481, 483 [2004]). Moreover, while plaintiff's expert states plaintiff had a restricted range of motion, he does not indicate the normal range for the areas tested, and he further fails to describe the objective tests he used to measure the restrictions reported (*see Shaw v Looking Glass Assoc., LP*, 8 AD3d 100, 103 [2004]). Also unexplained is plaintiff's lack of treatment since January 2003 (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]).

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

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

ENTERED: APRIL 17, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 17, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
Richard T. Andrias
John T. Buckley
John W. Sweeny, Jr.
James M. McGuire, Justices.

The People of the State of New York,
Respondent, Ind. 1380/05

-against-

2431

Eric Joyner,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Budd G. Goodman, J. at motion and plea; John Cataldo, J. at sentence), rendered on or about August 18, 2005,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 1, 2008,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTER:

Clerk.

Nardelli, J.P., Williams, Sweeny, Catterson, JJ.

2982-
2982A Marilyn Rodriguez, Index 18104/94
Plaintiff-Respondent,

-against-

New York City Health and Hospitals Corporation,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for appellant.

Slingsby, Sanders & Pagano, Bronx (Carl Sanders and Christopher Pagano of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about August 25, 2006, upon a jury verdict awarding plaintiff damages in this medical malpractice action predicated on lack of informed consent, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered July 6, 2006, which denied defendant's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleged that although she signed a consent form for the surgery, her lack of ability to read English rendered that consent invalid. She further claimed she was not properly advised by defendant's surgeon that the recommended breast

reduction surgery would leave hypertrophic scars, that he did not advise her of alternative treatment methods, and that her difficulty in understanding English prevented her from giving an informed consent.

"To recover damages for lack of informed consent, a plaintiff must establish, pursuant to Public Health Law § 2805-d, that (1) the defendant physician failed to disclose the material risks, benefits, and alternatives to the contemplated medical procedure which a reasonable medical practitioner 'under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation', and (2) a reasonably prudent person in the patient's position would not have undergone the procedure if he or she had been fully informed" (*Dunlop v Sivaraman,* 272 AD2d 570-571 [2000], citing paragraphs 1 and 3 of the statute). Where a plaintiff fails to adduce expert testimony establishing that the information disclosed to the patient about the risks inherent in the procedure is qualitatively insufficient, the cause of action for medical malpractice based on lack of informed consent must be dismissed (CPLR 4401-a; *Gardner v Wider*, 32 AD3d 728, 730 [2006]), particularly where she has failed to prove that a reasonably prudent person in her position would not have undergone the procedure had she been fully informed of the risks of the procedure,(*Evans v Holleran*, 198 AD2d 472, 474 [1993]).

In this case, Dr. Cooper, plaintiff's expert, reviewed plaintiff's medical files and records and found no fault with the surgery itself. However, while testifying that it is essential in this type of surgery to inform the patient specifically of the kinds of scarring possible, he did not indicate how the consent obtained by defendant's surgeon and medical staff was insufficient. In fact, his opinion was based on a hypothetical question that presupposed that plaintiff did not read or understand English, and that certain procedures which he deemed necessary were not followed, rather than what the actual evidence in this case revealed. Dr. Cooper further testified that he personally performed nearly 1,000 breast reduction surgeries, and that in each case he discussed the full risks involved. Each of those patients elected to undergo the surgical procedure despite the stated risks.

Defendant's surgeon, while not specifically recalling the discussions with plaintiff concerning the risks involved in this surgery, testified that consent is an ongoing process of discussion between physician and patient, and that not all risks or matters of discussion are set forth in the signed consent form. Plaintiff testified that she had difficulty reading English and did not understand the consent form she signed for the surgery. She did not, however, ask to have a Spanish consent form or interpreter provided for the surgical consent, although

she did sign a consent in Spanish for general medical services to be provided by the hospital. Morever, although she claimed to have difficulty understanding English when spoken, she testified that she acted as a translator for another Spanish-speaking patient while at the hospital. While Dr. Cooper and defendant's two experts agreed that a lack of understanding of the English language would prevent a signed consent from being valid, there was insufficient evidence that plaintiff did not understand the discussions with defendant's surgeon or other hospital staff.

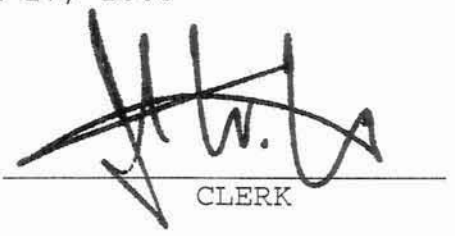
Of significance is the discrepancy in plaintiff's own testimony on the issue of whether she would have proceeded with the surgery in any event. Although she testified on direct examination that had she known about the potential for wide scarring she would not have undergone the procedure, she reversed course on cross-examination and testified that regardless of the risks involved, she would have had the surgery because she wanted to alleviate the pain in her back and shoulders. Indeed, she was even inconsistent with how she came to be at the plastic surgery unit of the hospital in the first place, initially stating she was referred there by the hospital clinic, but then stating it was her own idea to go to the plastic surgery unit to inquire about breast reduction surgery.

In short, plaintiff's expert evidence did not establish that the information provided to her was qualitatively insufficient,

as a matter of law, to support the jury's finding that a reasonably prudent person in her position would not have proceeded with the surgery had she been fully informed of the risks, benefits and alternatives (Public Health Law § 2805-d[3]; *see Thompson v Orner*, 36 AD3d 791 [2007]).

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

ENTERED: APRIL 17, 2008



CLERK

Mazzarelli, J.P., Andrias, Friedman, Sweeny, JJ.

3379 Jesse Cintron, Jr., etc., et al., Index 6780/97
Plaintiffs-Appellants,

-against-

New York City Transit Authority,
Defendant-Respondent.

Profeta & Eisenstein, New York (Fred R. Profeta, Jr. of counsel), for appellants.

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for respondent.

Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered January 4, 2007, which granted defendant's motion to set aside a jury verdict on damages to the extent of granting a new trial unless plaintiff stipulated to reduce the $20 million award for past and future pain and suffering to $2.5 million, before a further 50% reduction for plaintiff's own negligence, unanimously modified, on the law and the facts, without costs, to increase the stipulation amount to $4.75 million, before a further 50% reduction for plaintiff's own negligence, and otherwise affirmed, without costs.

The infant plaintiff was 14 years old when he suffered a traumatic brain injury and hip fracture after being hit by a subway car as he was painting graffiti in a subway tunnel. His injuries included such cognitive impairments as significant deficits in perceptual organization, processing speed and memory;

residual weakness principally in the left hand; pain and headaches; and depression. The awards for pain and suffering, as set by the jury, were clearly excessive, and the trial court correctly found that they deviated "materially from what would be reasonable compensation" (CPLR 5501[c]); *see Paek v City of New York*, 28 AD3d 207 [2006] *lv denied* 8 NY3d 805 [2007]. However, although the court reasoned that plaintiff's injuries were not as severe as other brain trauma cases it analyzed, we cannot agree that $2.5 million is sufficient compensation for past and future pain and suffering. We thus modify the court's figure to the extent indicated.

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3408 The People of the State of New York, Ind. 2400/05
Respondent,

-against-

Edward Giordano,
Defendant-Appellant.

Shearman & Sterling LLP, New York (Jae Woo Park of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 3, 2006, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant was convicted of fourth-degree grand larceny, which requires a theft of property worth in excess of $1000, based on testimony that he shoplifted two jackets whose tags indicated selling prices of $1,695 and $410, respectively. Defendant concedes that, in this case, the selling price of the jackets constituted their market value for Penal Law purposes (*see People v Irrizari*, 5 NY2d 142, 146 [1959]). He nevertheless argues that the price tags constituted inadmissible hearsay, as did the testimony of two security guards, whose testimony as to the selling price of the jackets was based on the price tags. He

further asserts that only sales or management personnel, rather than security guards, would have been competent to testify as to selling price.

We disagree. First, we conclude that the price tags were not hearsay. The tags were not offered as an assertion of value as distinct from selling price; as defendant concedes, only selling price itself is at issue here. Instead, the tags constituted circumstantial evidence of the price a shopper would have been expected to pay for the jackets. Thus, the tags were essentially verbal acts by the store, stating an offer to sell at a particular price (*cf. People v Ayala*, 273 AD2d 40 [2000], *lv denied* 95 NY2d 863 [2000][directions given by one participant in the crime to another were non-hearsay circumstantial evidence of accessorial conduct]). Defendant asserts that the price tags did not establish the garments' actual selling price on the date defendant stole them, since the garments might have been on sale for a lower price that day. However, that factor would not affect the admissibility of the price tags as evidence of selling price, but rather the weight to be accorded them, and whether the tags alone could establish a prima facie case with regard to the element of value. Here, the guards testified that they were familiar with the store's procedures, with particular reference to an electronic scanning procedure that verified the correspondence, in this case, between the price tags and the

actual selling prices of the jackets on the day in question. Furthermore, there was no evidence suggesting either or both of the jackets was being offered at a lower price than stated on the tags. The evidence permitted the jury to conclude there was no reasonable possibility that the actual selling price of the jackets fell below the statutory threshold (*see People v Trilli*, 27 AD3d 349 [2006], *lv denied* 6 NY3d 899 [2006]).

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3409 In re Llonnie D.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

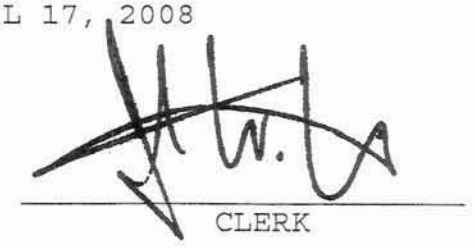
Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about May 15, 2007, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute obstructing governmental administration in the second degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request for a dismissal or an adjournment in contemplation of dismissal, and instead adjudicating him a juvenile delinquent and imposing a conditional discharge (*see e.g. Matter of Jonaivy Q.*, 286 AD2d 645 [2001]), in light of the fact that, after stealing property, appellant refused to obey the

lawful command of a police officer to stop and fled, resulting in a serious injury to the officer.

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

ENTERED: APRIL 17, 2008



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3410 Harry Kalt,
Plaintiff-Respondent,

-against-

Sidney Ritman,
Defendant,

HBS, Ltd.,
Defendant-Appellant.

Index 601652/01

Michael C. Marcus, Long Beach, for appellant.

Gordon & Gordon, Forest Hills (Peter S. Gordon of counsel), for respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered August 15, 2007, after nonjury trial, awarding plaintiff the principal sum of $200,000, unanimously reversed, on the facts, with costs, and the complaint dismissed. The Clerk is directed to enter an amended judgment accordingly.

While the conclusions of a fact-finding court should not be disturbed on appeal unless they obviously could not have been reached under any fair interpretation of the evidence, especially when the findings rest in large measure on witness credibility (*Watts v State of New York*, 25 AD3d 324 [2006]), our reach in reviewing the evidence in a nonjury trial is as broad as that of the trial court (*see Universal Leasing Servs. v Flushing Hae Kwan Rest.*, 169 AD2d 829 [1991]).

The record in this action to collect on a purported loan

reveals a preponderance of evidence that the $200,000 check given by plaintiff to defendant HBS and immediately turned over to the latter's factor was in consideration for the release of plaintiff as a personal guarantor of a corporate debt. Contemporaneous with receipt of the funds, the factor amended the guaranty to effect such release. No repayment period was ever agreed to between the parties, no interest was set on the principal amount, and no loan agreement exists. The testimony of the parties' accountant that the transaction was characterized as a loan in corporate records and tax returns to obtain a tax benefit, with no expectation on the part of either party that it would be repaid, was uncontroverted.

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3413 Roberto Vilomar, Index 17393/03
Plaintiff-Appellant,

-against-

490 East 181st Street Housing
Development Fund Corp Corporation, et al.,
Defendants-Respondents.

Peña & Kahn, PLLC, Bronx (Steven L. Kahn of counsel), for appellant.

Brody, Benard & Branch, LLP, New York (Tanya M. Branch of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered December 18, 2006, which, in an action for personal injuries sustained when plaintiff slipped on a banana peel on an interior stairwell in his apartment building, granted the motion of defendants property owner and management company for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing that they did not have constructive notice of the banana peel on which plaintiff allegedly slipped (*see Piacquadio v Racine Realty Corp.*, 84 NY2d 967 [1994]) by submitting plaintiff's deposition testimony that he did not see any banana peels on the stairs the day before the accident, and the deposition testimony of the building's superintendent that he cleaned the stairs twice a day, on arriving for work between 6:00 and 6:45 a.m. and after 4:00 p.m.

before leaving work, that there was no garbage on the stairs when he left the building the evening before the accident, and that the accident happened shortly before he arrived for work (*see Strowman v Great Atl. & Pac. Tea Co.*, 252 AD2d 384, 384-385 [1998]). In opposition, plaintiff offered the affidavit of his live-in companion that the building had not been cleaned for at least four days before the accident, that she had seen the banana peel on which plaintiff said he slipped on the stairs for at least two days before the accident, that there was a lot of other garbage on the stairs for several consecutive days before the accident, and that she complained to both the superintendent and the management office about the garbage that was always on the stairs and in the hallways and lobby but that nothing was ever done. This affidavit was properly rejected by the motion court as feigned evidence tailored to avoid the consequences of plaintiff's deposition testimony that he did not observe any banana peels on the stairs the day before the accident and never made any complaints to defendants specifically about garbage on

the stairs (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [2000]; *Schiavone v Brinewood Rod & Gun Club*, 283 AD2d 234, 235-236 [2001]).

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3414 The People of the State of New York, Respondent,

-against-

Christopher Lomnicki, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Kevin F. Meade of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Nicole Beder of counsel), and Orrick, Herrington & Sutcliffe, New York (Melissa DePetris of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 30, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 3 years, unanimously affirmed.

The court properly granted the People's request that potential spectators other than defendant's family submit to a screening process before entering the courtroom during the undercover officer's testimony. The People made a proper showing under *Waller v Georgia* (467 US 39 [1984]) to justify such a procedure. The officer testified at a *Hinton* hearing (*People v Hinton*, 31 NY2d 71 [1972]) that he had worked undercover in the area of defendant's arrest as recently as one to two weeks before the hearing, and he expected to return to that area as early as the next day. Moreover, the courthouse was easily accessible

from both the area where the undercover officer predominantly worked, near the Port Authority (*see People v Pearson*, 82 NY2d 436, 443 [1993]), and the area where defendant was arrested, near Tompkins Square Park. He also had three or four cases pending in the courthouse, and took precautions when coming to court (*see People v Cummings*, 271 AD2d 305 [2000], *lv denied* 95 NY2d 864 [2000]; *People v White*, 271 AD2d 263 [2000], *lv denied* 95 NY2d 872 [2000]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 17, 2008

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3415 Marguerite Camaiore, Index 350023/05
Plaintiff-Respondent,

-against-

Frank Farance,
Defendant-Appellant.

Joseph & Smargiassi, LLP, New York (Mario A. Joseph of counsel), for appellant.

Goldweber Epstein LLP, New York (Nina S. Epstein of counsel), for respondent.

Marguerite Camaiore, respondent pro se.

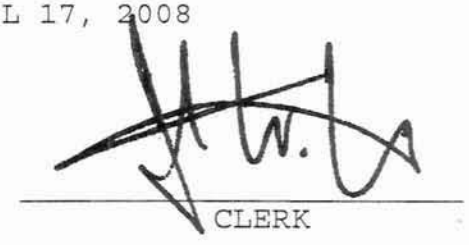
Order, Supreme Court, New York County (Joan B. Lobis, J.), entered on or about January 14, 2008, which granted plaintiff's motion for clarification of the parties' stipulation of settlement to the extent of finding that each party's right of first priority to care for the parties' children during the other party's unavailability is limited to "occasions when a parent has an unusual change in his or her schedule" and does not apply "when the mother has made appropriate after-school arrangements for the children, consistent with her regular work schedule," unanimously reversed, on the law, without costs, and plaintiff's motion denied in its entirety.

The subject first-priority clause (article 5, paragraph 3[e]) is clear and unambiguous and does not contain the terms added by the motion court. "In adjudicating the rights of

parties to a contract, courts may not fashion a new contract under the guise of contract construction" (*Slatt v Slatt*, 64 NY2d 966, 967 [1985]). Nor may they "'imply a condition which the parties chose not to insert in their contract'" (*Nichols v Nichols*, 306 NY 490, 496 [1954]).

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

ENTERED: APRIL 17, 2008



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3416 G.G., Index 20100/95
Plaintiff-Appellant,

-against-

Yonkers General Hospital,
Defendant-Respondent,

Paul "Doe," et al.,
Defendants.

Fellows, Hymowitz & Epstein, P.C., New City (Darren J. Epstein of counsel), for appellant.

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for Yonkers General Hospital respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 10, 2006, which granted defendant hospital's motion for summary judgment to the extent of dismissing the entire complaint against all defendants, unanimously modified, on the law, so much of the complaint as claimed negligent retention reinstated against defendant hospital, and otherwise affirmed, without costs.

This action seeks recovery for personal injuries sustained by plaintiff in 1993, while a patient at defendant hospital, when she was sexually assaulted and raped by a male nurse at the hospital.

In order to recover against an employer for negligent retention of an employee, a plaintiff must show that "the employer was on notice of a propensity to commit the alleged

acts" (*White v Hampton Mgt. Co., LLC*, 35 AD3d 243, 244 [2006]). The hospital met its initial burden for summary dismissal of the claim of negligent retention by submitting evidence that during the six years the nurse had worked for the hospital prior to the incident, he received positive reviews.

In opposition, plaintiff raised a triable issue of fact based on the testimony of a nursing aide who had previously reported that the nurse had offered a patient medication in exchange for sex. As plaintiff and the other patients were in a drug rehabilitation program, this knowledge could be found by the trier of fact to have triggered a duty to protect plaintiff from a known or suspected sexual predator (*see N. X. v Cabrini Med. Ctr.*, 97 NY2d 247 [2002]). While we recognize that the record reflects questions about the credibility of the nursing aide, resolution of such issues is not for the court.

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

ENTERED: APRIL 17, 2008

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3417 The People of the State of New York, Respondent, Ind. 268/04

-against-

Raheim Williams, Defendant-Appellant.

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

Raheim Williams, appellant pro se.

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentence), rendered December 15, 2005, convicting defendant, of six counts of robbery in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 20 years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The hearing evidence credited by the court established that defendant never requested that his counsel be present at his lineup.

Defendant failed to make a record that is sufficient to

permit review (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]; *People v Johnson*, 46 AD3d 415 [2007]) of his claim that the court did not provide defense counsel with notice of jury notes and an opportunity to be heard regarding the court's responses (*see People v O'Rama*, 78 NY2d 270 [1991]). Viewed in light of the presumption of regularity that attaches to judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]), the existing record, to the extent it permits review, demonstrates that the court satisfied its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]) to disclose jury notes and permit comment by counsel. The court specifically invited the attorneys to read any jury notes and assist in formulating responses. Furthermore, the court read each note into the record, except for notes merely requesting exhibits, and a note concerning a readback where the record clearly reflects counsel's input into the response. Accordingly, counsel's failure to object to the procedure employed by the court or to its responses to the jury notes renders the claim that the court violated CPL 310.30 unpreserved (*see e.g. People v Salas*, 47 AD3d 513 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court merely provided exhibits, readback of testimony and a rereading of a charge already provided to the jury, in addition to advising the jury that it could not answer its factual questions about

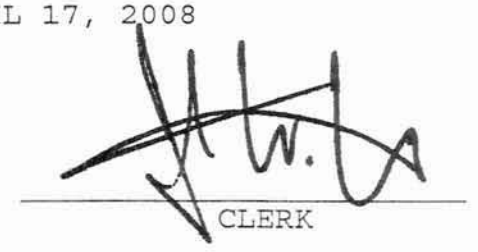
matters outside the record. Counsel's input into any response could have only been minimal.

The court properly exercised its discretion in summarily denying defendant's CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct. Defendant failed to establish that he was prejudiced by a midtrial conversation between the foreperson and her friend, during which the foreperson discovered that her friend was defendant's niece, and proceeded to comment briefly on the trial. On the contrary, this incident was, if anything, beneficial to defendant (*see People v Clark*, 81 NY2d 913, 914 [1993]). The remainder of defendant's motion was an impermissible effort to impeach the verdict by probing into the jury's deliberative process (*see People v Maragh*, 94 NY2d 569, 573 [2000]).

We have considered and rejected defendant's pro se claims.

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

ENTERED: APRIL 17, 2008



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3418 The People of the State of New York, Respondent, Ind. 4558/06

-against-

Miguel Cruz, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Lawrence Bernstein, J.), rendered on or about May 21, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3419 Donald Miller, et al.,
Plaintiffs-Respondents,

Index 101342/03
591001/03

-against-

Metropolitan 810 7th Avenue, et al.,
Defendants-Appellants,

Otis Elevator Co., et al.,
Defendants.

[And A Third-Party Action]

Gannon, Rosenfarb & Moskowitz, New York (Jason B. Rosenfarb of counsel), for appellants.

Shapiro Law Offices, Bronx (Jason S. Shapiro of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 13, 2007, which denied defendants-appellants' motion pursuant to CPLR 3108 for an open commission to conduct a post-note of issue deposition of an out-of-state nonparty witness, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in denying appellants' motion, where appellants failed to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue that would warrant such relief (*see* 22 NYCRR 202.21[d]; *Karr v Brant Lake Camp*, 265 AD2d 184 [1999]). The record establishes that appellants were aware of the nonparty witness several years prior to the filing of the note of issue, yet made a strategic decision not to seek

his deposition after he was interviewed by their investigator. Appellants never moved to vacate the note of issue, and the instant motion was brought 10 months after the note of issue was filed and 5 months after appellants discovered the purported discrepancy between the witness's statements to their investigator and those he subsequently made in an affidavit that was submitted in support of plaintiffs' opposition to summary judgment motions.

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3420 Geraldine L. Ortner,
Plaintiff-Appellant,

Index 6632/02
84802/05

-against-

The City of New York,
Defendant,

E.J. Excavating Company, Inc.,
Defendant-Respondent.

[And A Third-Party Action]

Kevin D. Moloney, Scarsdale, for appellant.

Baxter, Smith, Tassan & Shapiro, P.C., Hicksville (Joseph M. Guzzardo of counsel), for respondent.

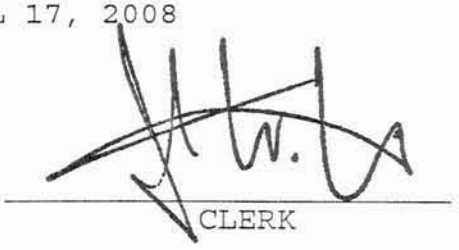
Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered January 26, 2007, which granted defendant E.J. Excavating Company's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Respondent E.J. Excavating satisfied its burden of establishing prima facie entitlement to summary judgment with evidence that its repaving of the roadway in 1989 was satisfactorily performed and approved by the City. In opposition, plaintiff failed to raise a triable issue of fact. There was no evidence to support the conclusory opinion in plaintiff's expert's affidavit that plaintiff's accident was caused by a street pavement condition "due to the improper original placement of the asphalt pavement [i.e., the repaving

work performed by respondent more than a decade earlier] or by failing to allow enough time for the asphalt to cure before re-opening the road to traffic." The speculative nature of this opinion is underscored by its contrast with the opinion set forth in his report, prepared five years earlier. The report concluded that the defect had been in existence for "at least several months," whereas the expert opined in his subsequent affidavit, as noted, that the condition had been existence since the "original placement of the asphalt," over a decade earlier. There is no suggestion in the report, nor any evidence from which it can be inferred, that the condition could have existed for that length of time. Moreover, the expert fails to rule out other causes of the alleged defect, such as the mere passage of time or heavy use of the road (*see Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364 [1982]).

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

ENTERED: APRIL 17, 2008



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3421 The People of the State of New York, Respondent,

-against-

Gary Rodriguez, Defendant-Appellant.

Ind. 4418/04

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Proskauer Rose LLP, New York (Colin Cabral of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered June 29, 2005, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him, as a second violent felony offender, to concurrent terms of 25 years and 15 years, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence established that one of the participants in the robbery displayed what appeared to be a firearm, and we reject defendant's arguments to the contrary.

The trial court properly admitted, under the present sense impression exception to the hearsay rule, two nontestifying declarants' statements to 911 operators describing the victim's

pursuit of defendant and his accomplice (*see People v Brown*, 80 NY2d 729 [1993]). Furthermore, the 911 calls were not testimonial within the meaning of *Crawford v Washington* (541 US 36 [2004]), as the statements in the calls were primarily made "to enable police assistance to meet an ongoing emergency" (*Davis v Washington*, 547 US 813, 822 [2006]; *see also People v Smith*, 37 AD3d 333, 334 [2007], *lv denied* 8 NY3d 950 [2007]). Any error in failing to redact portions of the calls that related to events that occurred prior to the chase actually being witnessed by the callers was harmless under the standards for constitutional or nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]). The information at issue was cumulative to other evidence and had little bearing on defendant's guilt.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 17, 2008

CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3422 The People of the State of New York, Respondent, Ind. 3670/04

-against-

Franklin Middleton, Defendant-Appellant.

Robert E. Nicholson, Brooklyn, for appellant.

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered on or about May 31, 2005, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

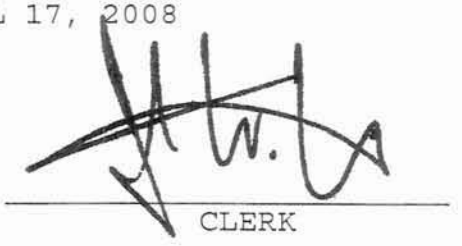
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 17, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 17, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, Justices.

The People of the State of New York, Ind. 1956/05
Respondent,

-against- 3424

Reynaldo Vincente,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ruth Pickholz, J., at plea; Michael R. Ambrecht, J., at sentence), rendered on or about March 23, 2006,

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

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

ENTER:

Clerk.

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

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3425N Vincenzo Badalamenti, et al., Index 26464/03
Plaintiffs-Appellants,

-against-

The City of New York, et al.,
Defendants-Respondents.

Talisman & DeLorenz, P.C., Brooklyn (Paul F. McAloon of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Brendan T. Fitzpatrick of counsel), for The City of New York and New York City Health and Hospitals Corporation, respondents.

London Fischer LLP, New York (Brian A. Kalman of counsel), for G.A.L. Manufacturing Corporation, respondent.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered February 2, 2007, which, insofar as appealed from as limited by the briefs, denied that part of plaintiffs' motion to produce discovery arising from a similar accident involving identical defendants, unanimously reversed, on the law, without costs, the motion granted and defendants directed to produce all reports relating to the *Neary* litigation.

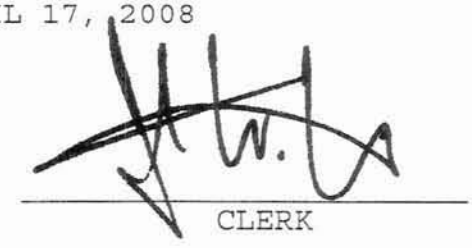
The motion court erred in denying plaintiffs' request for the production of reports arising out of and relating to the *Neary* case, where the pit-stop switch for the building's elevators involved in both the subject accident and in the accident involving *Neary* are identical devices manufactured by

defendant G.A.L. Manufacturing Corp. (*see McKeon v Sears Roebuck & Co.*, 190 AD2d 577 [1993]).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: APRIL 17, 2008



CLERK

Andrias, J.P., Friedman, Buckley, Catterson, Acosta, JJ.

3426N-
3427N Armando Gonzalez, as the Auxiliary Executor for the Estate of Antonio Laurentino Turbel, et al., Plaintiffs-Appellants, Index 605012/98

-against-

Société Générale, Defendant-Respondent.

Bolatti & Griffith, LLP, New York (Edward Griffith of counsel), for appellants.

Friend & Reiskind, New York (Edwin M. Reiskind, Jr., of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 14, 2007, which denied plaintiffs' motion for disclosure sanctions resolving certain issues and for leave to amend the complaint, and order, same court and Justice, entered November 30, 2007, which granted defendant's motion to strike plaintiffs' notice of deposition, unanimously affirmed, with one bill of costs.

At the least, it appears that defendant, a New York bank, had a good faith belief that it was not legally obligated to produce documents solely in the possession of an Argentine affiliate that had been dismissed from the action years earlier (*see* 276 AD2d 446 [2000]), a belief eventually confirmed by the motion court's ruling that such production could not be compelled (*see* 37 AD3d 187). Therefore, it cannot be said that any

noncompliance by defendant with prior disclosure orders pertaining to such production was so willful as to justify the extreme sanction of precluding it from contesting potentially dispositive issues at trial. Nor should plaintiffs be given leave to amend their complaint nearly five years after they filed a note of issue, especially in view of the proposed new allegations concerning the actions and intentions of a plaintiff long deceased, or the opportunity on the eve of trial to depose a witness without any persuasive explanation why that deposition could not have been conducted earlier.

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

ENTERED: APRIL 17, 2008

CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on April 17, 2008.

Present - Hon. Richard T. Andrias, Justice Presiding
David Friedman
John T. Buckley
James M. Catterson
Rolando T. Acosta, Justices.

In re Michael Paccione,
Petitioner,

3428
[M-1497]

-against-

Hon. Cheryl Chambers, etc., et al.,
Respondents.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTER:

Clerk.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Milton L. Williams
James M. McGuire, JJ.

2252
Ind. 6523/03
6697/03

The People of the State of New York,
Respondent,

-against-

Paul Boyd,
Defendant-Appellant.

Defendant appeals from judgments of the Supreme Court, New York County (Philip M. Grella, J.), rendered September 21, 2004, each convicting him, upon his plea of guilty, of robbery in the first degree, and imposing sentence.

Dominic J. Sichenzia, Carle Place, for appellant.

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

TOM, J.P.

At issue on this appeal is whether acceptance of defendant's guilty plea in exchange for a negotiated determinate sentence without advising him of the duration of the period of postrelease supervision to be imposed or the permissible statutory range for the period of such supervision deprived him of the ability "to knowingly, voluntarily and intelligently choose among alternative courses of action" so as to require reversal of the judgment of conviction (*People v Catu*, 4 NY3d 242, 245 [2005]). Under the particular facts of this matter, this Court concludes that merely telling defendant "there is a postrelease supervision that's mandatory," without further explanation, was insufficient to accord him due process (*see id.*).

Under separate indictments, defendant was charged with a total of four counts of robbery in the first and second degrees. He entered a plea of guilty to two counts of first degree robbery in full satisfaction of the indictments and waived his right to appeal in return for concurrent determinate sentences of 12 years on each count. At plea, the court specifically found that defendant was not a predicate felony offender. After the allocution, the prosecutor asked if the court had mentioned postrelease supervision. The court responded:

> I don't, because it's mandatory. Okay. Do you understand that there is a postrelease supervision that's mandatory?

Defendant simply answered "Yes," and the court thereupon accepted his plea.

Although defendant was sentenced in accordance with the plea agreement, the court did not impose a period of postrelease supervision to follow the determinate prison term. By statute, a defendant who is not a predicate felony offender is subject to mandatory postrelease supervision ranging from 2½ to 5 years, at the court's discretion (Penal Law § 70.45[2][f]).

On appeal, defendant contends that the court violated his due process rights by failing to apprise him of the range of the mandatory period of postrelease supervision and the duration of supervision to which he is subject. He requests that this Court reverse his conviction and vacate the pleas.

In response, the People argue that the trial court afforded defendant due process by advising him that postrelease supervision is mandatory and that, in any event, defendant's failure to immediately state an objection or move to vacate the pleas renders any error unpreserved. However, we note that the duration of postrelease supervision was neither pronounced at sentence nor otherwise entered on the court's records (*cf. People v Lingle*, 34 AD3d 287 [2006], *lv granted* 9 NY3d 877 [2007]), and

by requesting that the matter be remitted so that postrelease supervision may be added to defendant's sentence for such period of time as Supreme Court determines, in its discretion, the People implicitly concede the illegality of the sentence.

The particular question confronting this Court is whether a defendant contemplating entry of a guilty plea can knowingly and intelligently choose among available alternatives without knowing the *duration* of postrelease supervision to which he is subject upon his release from incarceration or even the limits imposed by statute on that period of supervision. We answer this question in the negative. If postrelease supervision, like incarceration, is a significant component of sentence (*see Catu*, 4 NY3d at 245), then the duration of supervision and its relationship to the range provided by statute are likewise material to a defendant's ability to intelligently choose among alternative courses of action (*see People v Van Deusen*, 7 NY3d 744 [2006]). Conceptually, if the postrelease supervision component of a sentence is "significant" (*Catu*, 4 NY3d at 245), then it is no more reasonable to conclude that a knowing and voluntary choice among available alternatives can be made in the absence of knowledge of the length of the period of supervision than to conclude that due process is served merely by informing a defendant that he will be subject to incarceration without

disclosing its duration. In addition, the statutory provision for a discretionary period of postrelease supervision presents a defendant with the opportunity to negotiate between the time to be spent under supervision and the time to be served in confinement.

The People contend that the length of postrelease supervision is "clearly delineated in the Penal Law, of which defendant had constructive notice." They further speculate that "counsel surely understood the [postrelease supervision] rule and defendant averred that he had discussed the plea bargain with counsel." Thus, they argue, the record "provides no basis to conclude that defendant misunderstood the length of the term."

This argument is disingenuous. First, defendant could not possibly understand the length of a term of postrelease supervision that, as the People concede, has yet to be imposed on remand. Since the period of supervision is discretionary within the statutory range, it is reasonable to expect that if the parties had been aware of it in the course of plea negotiations, the duration of the period of supervision would have been specified in the plea agreement along with the period of incarceration.

Second, "due process requires that the record must be clear that 'the plea represents a voluntary and intelligent choice

among the alternative courses of action open to the defendant'" (*People v Ford*, 86 NY2d 397, 403 [1995], quoting *North Carolina v Alford*, 400 US 25, 31 [1970]). Thus, the operative question is whether the record establishes that defendant understood the plea (*see People v Parilla*, 8 NY3d 654, 660 [2007]), not whether defendant can demonstrate that he misunderstood its terms. The Court of Appeals has recently made it quite clear that the question is not subject to harmless error analysis (*People v Hill*, 9 NY3d 189 [2007], *revg* 39 AD3d 1 [2007]; *see also Van Deusen*, 7 NY3d at 746 [whether defendant would have declined to plead guilty had he known about postrelease supervision not material]).

The People argue that this matter must be remitted to Supreme Court for imposition of a period of postrelease supervision (Penal Law § 70.45[2][f]). Whatever the duration the court might decide upon, the sentence would suffer from the same infirmity identified in *People v Goss* (286 AD2d 180, 184 [2001]): the defendant may not be said to have knowingly agreed to the period of postrelease supervision to follow his determinate sentence (*see Hill*, 9 NY3d at 192). Even if the court were to reduce the term of incarceration by the same duration so that the total period of incarceration plus postrelease supervision is no greater than the 12-year sentence originally agreed upon, it

would not render the plea knowing and voluntary (*see id.*; *Van Deusen*, 7 NY3d at 746).[1]

There is no merit to the People's contention that defendant failed to preserve any objection to the court's allocution by immediately registering a protest or moving to vacate the plea agreement. While such a challenge must ordinarily be preserved by a motion to withdraw the plea under CPL 220.60(3), this does not apply "where a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution" (*People v Louree*, 8 NY3d 541, 545-546 [2007]). Implicit in this rule is that the trial judge must fully advise a defendant of the terms of postrelease supervision so as to permit a knowing and intelligent choice to be made among alternative courses of action. As a matter of due process, "[a] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences" (*Ford*, 86 NY2d at 402-403). Without knowledge of the period of postrelease supervision, it was simply not possible for defendant herein to possess the full understanding necessary to an informed plea.

---

[1] A reduction in time served corresponding to the period for which the defendant was to be subject to postrelease supervision was exactly the ad hoc remedy implemented by the trial court in *Hill* (39 AD3d at 19 [Marlow, J., dissenting]).

Though the prosecutor directed the court's attention to this problem during allocution, the court nevertheless failed to advise defendant of the duration of postrelease supervision. Defendant should not be penalized for the court's failure to fulfill its constitutional burden before entering a plea. To rule otherwise would shift the court's allocution obligations to defendant. The duty to make sure the record establishes that the defendant's plea represents a voluntary and intelligent choice among his available alternatives is imposed on the court, not on the defendant (*Louree*, 8 NY3d at 545). It is dispositive that the record fails to establish that defendant was made aware of either the statutory range of the period of postrelease supervision or the particular period to which he would be subjected (*see Goss*, 286 AD2d at 184 [counsel's knowledge of plea agreement components not attributable to defendant]). Thus, defendant may challenge the sufficiency of the allocution on direct appeal.

A contrary holding would pose an insurmountable dilemma, for if a defendant was misinformed concerning postrelease supervision, he could hardly be expected to withdraw his plea until he received accurate information; and if definitive information was not imparted until sentence was pronounced, the defendant would be precluded from withdrawing his plea because a

motion under CPL 220.60(3) is only available before sentencing (*id.*). Here, it appears that the parties and the Court may have proceeded under the misconception that the period of postrelease supervision was mandated by statute. The statement, "there is a postrelease supervision that's mandatory," without further elaboration or action on the part of the court, suggests the belief that it had no discretion with respect to the statutory period of postrelease supervision to be imposed. The court's failure to provide for it in any written document and the absence of any motion by the People to set aside the sentence only bolsters the impression that postrelease supervision was regarded by all concerned as an automatic component of the sentence requiring no action on the court's part (*cf. Lingle*, 34 AD3d at 289). However, regardless of whether the period of postrelease supervision was mandatory or discretionary, the court was obligated to inform defendant of the specific period of supervision. Where, as here, the omission complained of is apparent from the face of the record, the defendant is required to assert the issue on appeal, not by way of motion under CPL 440 (*Louree*, 8 NY3d at 545-546).

The People's attempt to shift onto defendant the burden to demonstrate that his constitutional rights were not preserved also fails. What counsel might have known about the permissible

duration of postrelease supervision is neither pertinent to the determination of this appeal nor discernible from the record. Once again, the obligation to see that a defendant's due process rights are protected rests on the court accepting a guilty plea, not on counsel.

In view of the evident omissions by the court and by the People in this matter resulting in defendant's incomplete understanding of the implications of entering a guilty plea and the need to correct an illegal sentence, the appropriate course is to permit defendant to withdraw his plea and restore the parties to their status before the plea agreement was reached (*see People v Reyes*, 167 AD2d 920, 921 [1990], *lv denied* 77 NY2d 842 [1991]).

We reject any need to delay decision of what is, apparently, a matter of first impression. The cases cited by the dissenter, which are awaiting decision by the Court of Appeals, are distinguishable by their procedural context and, significantly, by the lack of any discretion on the part of the trial court as to the period of postrelease supervision to be imposed.

Accordingly, the judgments of the Supreme Court, New York County (Philip M. Grella, J.), rendered September 21, 2004, each convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to concurrent terms of 12 years,

should be reversed, on the law, the pleas vacated, the full indictment reinstated, and the matter remitted for further proceedings.

All concur except McGuire, J. who dissents in an Opinion.

McGUIRE, J. (dissenting)

I respectfully dissent as I disagree with the majority in two respects. First, in my view, the *Catu* claim (*People v Catu*, 4 NY3d 242 [2005]) is not preserved for review. Second, the prudent step for this Court to take is to defer decision on defendant's appeal until after the Court of Appeals decides the quartet of cases, including three cases from this Court, raising claims under and issues relating to *Catu* that were heard on March 12, 2008: *People v Sparber*, 34 AD3d 265 (2006), *lv granted* 9 NY3d 882 (2007); *People v Lingle*, 34 AD3d 287 (2006), *lv granted* 9 NY3d 877 (2007); *People v Thomas*, 35 AD3d 192 (2006), *lv granted* 9 NY3d 882 (2007); and *Matter of Garner v New York State Dept. of Correctional Servs.*, 39 AD3d 1019 (3d Dept 2007), *lv granted* 9 NY3d 809 (2007).

As to preservation, *People v Lopez* (71 NY2d 662, 665-666 [1988]) holds that to preserve a challenge to the sufficiency of a plea allocution a defendant must either move to vacate the plea prior to the imposition of sentence pursuant to CPL 220.60(3) or move to vacate the judgment pursuant to CPL 440.10. That preservation requirement is excused only in the "rare case" where the allocution "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*id.* at 666).

The first of these exceptions is not implicated here and thus the issue is whether the second exception applies. The argument that it does apply is grounded on the fact that the court did not expressly specify during the plea allocution that as a first-time violent felony offender, defendant would be subject to a period of postrelease supervision of not less than two and one-half years and not more than five years (Penal Law 70.45[2][f]). Preservation was not at issue in *People v Hill* (9 NY3d 189 [2007]), and thus that recent decision does not resolve the preservation issue. In concluding that the defendant's plea had to be vacated because he did not possess the "requisite information knowingly to waive his rights," however, the Court stated that "at the time of his plea, defendant was not informed that *a period* of postrelease supervision would follow his term of incarceration" (*id.* at 192 [emphasis added]). Thus, the Court did not rely on the fact that the defendant was not informed of the particular period of postrelease supervision that would follow. Similarly, *People v Catu* also seems to stress the failure to apprise the defendant at the time of the plea of the fact of rather than the particulars of the mandatory period of postrelease supervision (*Catu*, 4 NY3d at 245 ["[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in

order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction"]; *see also People v Van Deusen*, 7 NY3d 744, 746 [2006] ["[a]t the time defendant pleaded guilty, she did not possess all the information necessary for an informed choice ... because she was not told that she would be subject to mandatory postrelease supervision as a consequence of her guilty plea"]).

On this score, in short, no decision of the Court of Appeals holds that a *Catu* claim is established so as to render a guilty plea involuntary when the defendant is informed by the court at the time of the guilty plea that a period of postrelease supervision is required, but is not informed of the particular term or range of terms that is required.[1] However, a decision of the Court of Appeals (*People v Louree*, 8 NY3d 541, 544-546 [2007]) and this Court's decision in *Thomas* (*supra*) support the People's position that defendant failed to preserve his *Catu* claim.

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[1]Even if the Court of Appeals were to hold that the defendant must be informed of the particular term or range of periods, it would not follow necessarily that the preservation exception applies whenever the defendant's *Catu* claim is valid on the merits. If it were so to apply, that would mean in essence that a *Catu* claim need not be preserved for review; a defendant could raise a *Catu* claim that must be reviewed as a matter of law whenever the defendant is correct on the merits of the claim.

During the plea allocution in *Louree*, "[t]he judge did not mention that a period of postrelease supervision would follow either the conditionally promised two-year or a potential seven-year sentence" (8 NY3d at 543). At sentencing, the court stated that the sentence included a five-year period of postrelease supervision and the Court of Appeals rejected the People's contention that the *Catu* claim was not preserved for review. After noting the rare-case exception discussed in *Lopez* (*supra*) the Court held that the exception was applicable when "a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution" (8 NY3d at 545-546).[2] In explaining this holding, the Court stressed that "[i]f the trial judge does not mention postrelease supervision at the allocution, as happened here, a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge" (*id.* at 546).

Here, of course, precisely the opposite is true. That is, the judge did more than "mention" postrelease supervision, the judge specifically stated that "it's mandatory" and elicited from

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[2]Thus, as it did in *Catu*, *Van Deusen* and *Hill*, the Court seemed to focus in *Louree* on the failure of the court to inform the defendant during the plea proceeding that the law required a period of postrelease supervision, as opposed to the particulars of that requirement.

defendant an affirmative answer to the express question, "[d]o you understand that there is a postrelease supervision that is mandatory?" Given that he unquestionably did have knowledge of this ground for moving to withdraw his plea, defendant certainly could be expected to move to withdraw his plea on this very ground. To conclude that defendant's claim is preserved, moreover, would undercut central purposes of the requirement of a specific and contemporaneous objection: promoting finality and preventing the waste of public resources through the timely correction of errors (*see People v Dekle*, 56 NY2d 835, 837 [1982]; *see also People v Lopez*, 71 NY2d at 665-666 [by not moving to withdraw or vacate his guilty plea on the ground that the allocution was insufficient, the defendant "denies the trial court the opportunity to address the perceived error and to take corrective measures, if needed"]).

In *Thomas*, this Court made essentially this same point in concluding that a similar albeit not identical *Catu* claim was not preserved. The only difference between *Thomas* and this case is that in *Thomas* the court stated at the plea allocution what the term of the period of postrelease supervision would be (35 AD3d at 193). In rejecting the defendant's argument that his *Catu* claim "was incapable of being preserved" (*id.*), the panel in *Thomas* said the following:

> "On the contrary, this procedural defect in the sentence could easily have been corrected upon timely objection.... When, at sentencing, the court mentioned the statutory fees but neglected to mention [postrelease supervision], defendant remained silent, but now seeks to be relieved of [postrelease supervision] as a windfall to be derived from the court's omission. Accordingly, we decline to reach this unpreserved issue in the interest of justice. 'To hold otherwise is to encourage gamesmanship ...' (*People v Dekle*, 56 NY2d [at] 837 ...)"
> (35 AD3d at 193 [citation omitted after first ellipsis]).

The majority does not even attempt to explain why the *Catu* claim in *Thomas* was unpreserved but defendant's *Catu* claim is preserved. I respectfully submit that there is no convincing explanation.[3] The majority certainly encourages gamesmanship. Defendant (and his attorney) unquestionably knew no later than the plea proceeding that postrelease supervision was mandatory. After expressly stating at the plea proceeding that he understood that, defendant did not thereafter -- neither during the plea proceeding nor sentencing -- utter so much as a peep about postrelease supervision. Yet the majority now allows defendant, more than three and one-half years after he freely pleaded guilty when the People's case may have weakened due to the passage of time, to get his guilty plea vacated on the strength of his claim

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[3]The majority's failure to distinguish *Thomas* is all the more puzzling given that two members of the majority were on the panel in *Thomas*.

that he did not understand the postrelease supervision component of his plea. As the Court of Appeals stated in *Dekle* with respect to its holding that the alleged error was unpreserved, "[t]o hold otherwise is to encourage gamesmanship and waste judicial resources in order to protect a defendant against a claimed error protection against which requires no more than a specific objection on his part" (56 NY2d at 837).

As noted, *Thomas* was heard by the Court of Appeals on March 12. Given the dispatch with which the Court of Appeals typically acts, a decision can be expected by not much more than a month after *Thomas* is heard. At the very least, the guidance that will be provided by the Court's resolution of the preservation issue in *Thomas* would be valuable to this Court in resolving the similar but not identical preservation issue in this case. Indeed, the decision in *Thomas* could be virtually or even actually dispositive of the preservation issue in this case.

The majority does not disagree with any of this but nonetheless decides this significant issue without waiting for the decision in *Thomas*. The majority may believe there is no or negligible uncertainty about whether or not defendant's *Catu* claim is preserved. If so, the majority's confidence in its

position is difficult to understand.[4] Alternatively, it may be that the majority believes that despite some uncertainty about the preservation issue, there is an urgent reason to resolve it now and, having resolved it in defendant's favor, to vacate his guilty plea. But that urgency is not only unstated, it is nonexistent. After all, during an otherwise impeccable plea allocution defendant freely admitted that he had committed two separate gunpoint robberies and agreed to accept a 12-year sentence on each crime. On this appeal, defendant raises only his *Catu* claim. Accordingly, there is no reason to think -- and the majority does not suggest otherwise -- that resolving this appeal before *Thomas* is decided is critical to protecting defendant's liberty interest.

Even assuming that defendant's *Catu* claim presents a question of law for review because of the exception for the "rare case" in which the allocution "calls into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666), it would not follow necessarily that defendant is correct on the merits of that claim. To the contrary, it would not be unreasonable to

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[4]Those who follow this Court's criminal docket will find it hard to understand why other cases raising a variety of *Catu* claims and issues that are currently pending before this Court are not decided until after the Court of Appeals decides the quartet of cases heard on March 12.

conclude that when a defendant unequivocally is informed during a plea allocution that postrelease supervision is mandatory and expressly states that he understands, he cannot plausibly contend that the very particulars of the mandatory postrelease supervision about which he never inquired at any time up to and including sentence nonetheless were necessary "to knowingly, voluntarily and intelligently choose among alternative courses of action" (*Catu*, 4 NY3d at 245)[5]. On this question, too, the decision in *Thomas* could be highly informative. I need not resolve the question, however, as I can only conclude in the absence of additional guidance from the Court of Appeals that defendant's *Catu* claim is unpreserved.

For these reasons, I would reject defendant's *Catu* claim as unpreserved and decline to review it in the interest of justice. Although defendant argues only that his plea should be vacated, other issues would have to be resolved if my position on the

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[5]For essentially the same reasons, it would not be unreasonable to conclude that by pleading guilty under these circumstances defendant waived any claim concerning the sufficiency of the information imparted to him concerning postrelease supervision (*see People v Iannone*, 45 NY2d 589, 600 [1978] [defendants "waived their objections to the sufficiency of the factual allegations in the indictments" by pleading guilty]; *see also id.* [noting that "[a]lthough the questions of waiver and failure to preserve a question of law are conceptually severable, in the present case the dispositive considerations are the same"]).

preservation issue prevailed. They include: (1) whether the court's failure to state a period of postrelease supervision renders the sentence illegal, (2) whether the minimum permissible period of the postrelease supervision mandated by the Legislature (in this case, two and one-half years) should be deemed to have been imposed as matter of law, (3) if not, whether this Court is authorized or obligated to direct corrective action, either on its own initiative or at the People's request, and (4) if so, what the appropriate corrective action would be. As the majority disagrees with me on the preservation issue and would vacate the guilty plea on the merits, it would be pointless for me to grapple with these issues. I note, moreover, that the Court of Appeals will provide guidance on at least some of these issues when it decides the four cases heard on March 12, 2008.

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

ENTERED: APRIL 17, 2008

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Eugene Nardelli
Milton L. Williams
James M. McGuire
Rolando T. Acosta, JJ.

2718
Ind. 4852/01

The People of the State of New York,
Respondent,

-against-

David Martinez,
Defendant-Appellant.

Defendant appeals from a judgment of Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 15, 2006, convicting him, upon his plea of guilty, of attempted rape in the first degree, and imposing sentence.

Richard M. Greenberg, Office of the Appellate Defender, New York (Mugambi Jouet and Rosemary Herbert of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Eric Rosen, Richard Nahas and Julie Paltrowitz of counsel), for respondent.

ACOSTA, J.

The issue in this case of first impression is whether an indictment that identifies a defendant solely by his or her DNA markers satisfies the defendant's constitutional right to notice. We hold that it does.

On October 31, 1996, the complainant, a 20-year old female, was sexually assaulted at gunpoint in the Lafayette/Canal Street subway station. The assailant held a gun to the complainant, took her money and stated that "this is what happens to women who take the train alone at night." He then forced the complainant to take her pants down, touched her breast, and tried to force his penis into her vagina. Unsuccessful in this attempt, he put his penis in her hand and ejaculated. Two other persons allegedly served as lookouts for the assailant, but were not apprehended. The complainant was treated for her injuries at the hospital and a semen sample was collected and preserved.

The immediate investigation by the police produced no suspects. Then in March 2000, the DNA sample from the assault was submitted to a multi-jurisdiction DNA databank and again no match was made. Nevertheless, a New York County grand jury was presented with the DNA sample with a particularized DNA profile from the assailant, and in 2001, the grand jury charged "John Doe" with attempted rape in the first degree, three counts of

sexual abuse in the first degree, and two counts of robbery in the first degree.

In July of 2004, years after the "John Doe" indictment was issued, defendant completed a New Jersey sentence for a 1999 drug conviction. He was returned to New York as a parole violator for a 1985 robbery conviction. The police took defendant's DNA and entered his profile into the DNA databank. On October 12, 2004, a "cold hit" in the system revealed that defendant's DNA profile matched the profile in the 2001 "John Doe" indictment. Defendant was arrested and produced for arraignment. Shortly thereafter, the indictment was orally amended to name defendant as the accused. As noted by the People, there is no record that defendant ever objected to this amendment, and he does not claim on appeal that he did so.

On December 16, 2004, defendant moved to dismiss the indictment with prejudice, arguing that the "John Doe" designation accompanied by the DNA profile was defective inasmuch as it did not "name a person" and did not "adequately describe" him. Defendant also contended that he was given "inadequate notice" that he was accused of a crime because he did not know his own DNA profile. He further alleged that he had been denied his constitutional right to a speedy trial and that the statute of limitations had lapsed.

The People argued in response that the indictment properly named and described defendant by referring to his DNA profile, and that a DNA profile is a far more certain description than a name or a list of physical attributes. In any event, the People asserted, defendant was not entitled to notice of the charges against him prior to arraignment because he had been indicted before arrest.

By order dated January 26, 2005, Supreme Court denied defendant's motion to dismiss, finding that the indictment tolled the statute of limitations as the People were unable to locate him despite the exercise of due diligence. The court did not address defendant's claims presented on this appeal. Defendant subsequently pled guilty to attempted rape in the first degree.

On appeal, defendant asserts that because the indictment identified him solely by his DNA profile, which only a technically trained person could decipher, it deprived him of his right to be notified that he was the person accused. By pleading guilty, however, defendant waived this claim, which is technical rather than jurisdictional *(see People v Hansen*, 95 NY2d 227, 230-231 [2000]). While the right to challenge an insufficient accusatory instrument survives a guilty plea, it can only be challenged insofar as it fails to accuse the defendant of acts constituting a crime, or fails to allege every element of the

offense charged and that the defendant committed it *(People v Konieczny*, 2 NY3d 569, 575 [2004]).

Here, the indictment alleged every element of attempted rape in the first degree, three counts of sexual abuse in the first degree, and two counts of robbery in the first degree, and that defendant committed those crimes. That the indictment did not refer to defendant by name is of no moment inasmuch as it identified him by his unique DNA markers.

Nothing more was required until defendant was arraigned and the indictment was properly amended without objection. That is, the amendment did "not change the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed such indictment, or otherwise tend to prejudice the defendant on the merits" (CPL 200.70[1]; *Tirado v Senkowski*, 367 F Supp 2d 477, 491 [WDNY 2005]["The prosecution was entitled to amend the indictment to specify Tirado's proper name since the amendment conformed to the proof before the grand jury and did not prejudice the defendant"]; *cf. People v. Ganett*, 68 AD2d 81, 84 [1979], *affd* 51 NY2d 991 [1980] [where defendant is indicted under a fictitious name because his true name is unknown or where some person other than the intended defendant is accused in the indictment, the indictment may be amended upon discovery of the true name of the person the grand jury intended to indict]). In

fact, the amendment was a technical substitution of defendant's name for his DNA profile, reasonably done once his DNA had been matched to the sample in the databank.

In any event, by his guilty plea, defendant also waived his challenge to the amendment of the indictment since that claim raises no jurisdictional defect *(People v Thompson*, 287 AD2d 794, 796 [2001], *lv denied* 97 NY2d 688 [2001]).

We also reject defendant's claims on the merits. The right to notice that a defendant is entitled to by indictment is the right to "fair notice of the accusations made against him, so that he will be able to prepare a defense" *(People v Iannone*, 45 NY2d 589, 594 [1978]). This function of the indictment is founded on the notice requirement of article I (§ 6) of our State Constitution as well as the 6th Amendment to the Federal Constitution. To satisfy this notice requirement, the indictment must allege all the legally material elements of the charged crime and state that defendant in fact committed the acts which comprise the elements. The "basic essential function of an indictment qua document is simply to notify the defendant of the crime of which he stands indicted" (*People v Iannone* at 598).

Defendant's right to notice of the charges attached at his arraignment (*see* CPL 210.15[1]), at which time the indictment was unsealed (*see* CPL 210.10[3]). At the arraignment, defendant was

informed of the charges against him and given a copy of the indictment. Defendant was thus necessarily placed on notice that he was the individual charged in the indictment. Nothing in CPL 200.50 requires that an individual charged in an indictment be referred to in any particular manner, and we conclude that a "John Doe" indictment accompanied by a specific DNA profile is sufficient to give a defendant notice of the charges against him.

Indeed, given the advances in science, the practice of indicting by DNA is starting to take a foothold in this country's criminal justice system (*see* Scott Akehurst-Moore, *An Appropriate Balance? - a Survey and Critique of State and Federal DNA Indictment and Tolling Statutes*, 6 J High Tech L 213 [2006]). Some states have employed non-statutory DNA indictments, but in addition to the federal legislation (18 USC § 3282) there are four states utilizing statutory DNA indictments. The non-statutory states include Wisconsin, (*see State v Dabney*,264 Wis 2d 843, 854, 663 NW2d 366, 372 [Ct App 2003], *petition dismissed* 266 Wis 2d 67, 671 NW2d 852[2003]) and Massachusetts (*see* Suzanne Smalley, *Newest Suspect in Rapes: The DNA 'John Doe' Indicted to Keep Cases Open, The Boston Globe*, June 20, 2004, p 1 ([noting use of DNA indictment after legislature failed to abolish statute of limitations for rape]). Examples of

legislative implementation of DNA indictments include Ark Code Ann § 5-1-109(b)(1)(B),(i)-(j); Del Code Ann tit 11, § 3107(a); Mich Comp Laws § 767.24(2)(b); NH Rev Stat Ann § 592-A:7(II); and 18 USC § 3282). States in which a genetic material has been indicted (*see* Moyer & Anway, *Biotechnology and the Bar: A Response to the Growing Divide Between Science and the Legal Environment*, 22 Berkeley Tech LJ 671, 688 [2007]) include California, Texas, Wisconsin, North Dakota, Pennsylvania, Oklahoma, New York, Utah, Missouri and Kansas (*id.* at 689 n 95).

Aside from the right to notice, no other constitutional rights were implicated here. Clearly, the right to indictment by a grand jury, guaranteed by section 6 of article I of our State Constitution, was not violated. Furthermore, the indictment qua document served all of the traditional functions. That is, it provided fair notice of the accusations, ensured that "the crime for which the defendant is brought to trial is in fact one for which he was indicted by the grand jury, rather than some alternative seized upon by the prosecution in light of subsequently discovered evidence," and served as a means of avoiding double jeopardy claims (*Iannone*, 45 NY2d at 594-595). Had defendant gone to trial, his constitutional right of confrontation would have permitted him to examine the lab technician who had compared the DNA samples and otherwise attempt

to dispute the findings (*People v Rawlins*, 2008 NY LEXIS 277, 2008 WL 423397).

Absent a constitutional or statutory prohibition, a DNA indictment is an appropriate method to prosecute perpetrators of some of the most heinous criminal acts. Indeed, the prevalence of DNA databanks today as a criminal justice tool supports the conclusion that a defendant can be properly identified by a DNA profile, especially in light of the accuracy of this identification. The chance that a positive DNA match does not belong to the same person may be less than one in 500 million (*see* Moyer & Anway, *supra*, 22 Berkeley Tech LJ at 684 n 64). Therefore, in the instant case, given the nature of the crime, the notice of the charges received by defendant was "reasonable under all the circumstances" (*People v Palmer*, 7 AD3d 472 [2004], *lv denied* 3 NY3d 710 [2004]).

To be sure, any question or uncertainty about the identity of the accused in the instant case was answered when he was arraigned for the crimes charged in the indictment. Additionally, he was further notified that he was the accused upon the amendment of the indictment. Such notice allowed him to prepare a defense and to be made aware of the specific crimes charged by the grand jury, thereby satisfying the purposes of an indictment (*Iannone*, 45 NY2d at 594).

To accept defendant's broadside attack on indictment by DNA would lead to anomalous results. Contrary to defendant's arguments, his constitutionally grounded right to fair notice of the crime of which he is accused is not dependent on the subjective capacity of defendant to understand it. Just as defendant is not required to be literate for a written indictment to be valid, he is not required to be a geneticist to be subject to indictment by DNA profile.

Moreover, we are fully aware that DNA indictments will pose problems in certain cases. As Frank B. Ulmer points out in *Using DNA Profiles to Obtain "John Doe" Arrest Warrants and Indictments*, 58 Wash & Lee L Rev 1585, 1616-18 (Fall 2001), "when there is a significant passage of time between indictment and commencement of trial, there is always the possibility that someone simply will misplace or mislabel the evidence, thereby depriving the defendant of an opportunity to perform his own DNA profiling analysis on the evidence collected from the crime scene." Ulmer goes on to note (at 1618) that

> "perhaps more importantly in sexual assault cases, the crime scene sample from which the suspect's DNA is extracted is often so small that, after the initial prosecution tests, further testing is no longer possible because the prosecution consumes the entire sample. This alone would severely hamper a defendant's ability to rebut the prosecution's identification evidence. In such a situation, the defendant would be faced with DNA identification evidence, tested many years in the past, that the

> prosecution claims is conclusive proof of the fact that the defendant, at the very least, was at the crime scene. Yet, the defendant is deprived of the ability to confirm or to challenge the prosecution's tests."

But these problems can be dealt with on a case by case basis (*see People v Vernace*, 96 NY2d 886, 887 [2001] ["Courts must engage in a sensitive weighing process of the diversified factors in the particular case," including whether the "defense has been impaired by reason of the delay"]; *People v Singer*, 44 NY2d 241, 253 [1978] ("the State due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute . . . and the Sixth Amendment").[1]

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[1] Of course, indicting by DNA to circumvent the statute of limitations may raise issues regarding some of the policy considerations that CPL 30.10 was designed to protect (*see e.g.* Ulmer, 58 Wash & Lee L Rev at 1612-1621; Meredith A. Bieber, Comment, *Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations*, 150 U Pa L Rev 1079, 1086 [2002]). These policy considerations include the difficulty in having to defend against a charge when basic facts may have become obscured by the passage of time, the amelioration of the fear of punishment for acts committed in the far-distant past, and the encouragement of prompt investigation of suspected criminal activity (*People v Seda*, 93 NY2d 307, 311 [1999], *citing Toussie v United States*, 397 US 112, 114-115 [1970]).

Statutes of limitations are not constitutionally mandated, however, and have been legislatively amended to further an important state goal. Thus, for instance, in enacting CPL 30.10(4)(a)(ii), which provides for a five-year tolling of the limitations period during which the defendant's whereabouts remain unknown and unascertainable through the exercise of reasonable diligence, our legislature "carefully balanced the general policy in favor of avoiding prosecution of stale cases

Finally, defendant failed to preserve his challenge to the procedure under which he was adjudicated a persistent violent felony offender, and we decline to review it in the interest of justice. As an alternative holding, we find it without merit (*see Almendarez-Torres v United States*, 523 US 224 [1998]).

Accordingly, the judgment of Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 15, 2006, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, should be affirmed.

All concur.

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

ENTERED: APRIL 17, 2008

CLERK

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against the countervailing policy of ensuring that law enforcement officers have sufficient time to bring suspected criminals to justice" (*Seda*, 93 NY2d at 311). It did so by placing a five-year limitation on the tolling exception as well as imposing a "reasonable diligence" requirement to serve as "a deterrent to delaying an investigation" (id. At 311-312). It also bears mentioning that as for post commencement delays involved with DNA indictments, they may be dealt with by constitutional and statutory speedy trial requirements (see US Const, 6th Amend; CPL 30.20, 30.30).