SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 9, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Williams, Nardelli, McGuire, JJ.

995 Craig Crawford, Index 113702/04
Plaintiff-Appellant,

-against-

Liz Claiborne, Inc., et al.,
Defendants-Respondents.

Thompson Wigdor & Gilly LLP, New York (Douglas H. Wigdor of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Michael Delikat of counsel), for respondents.

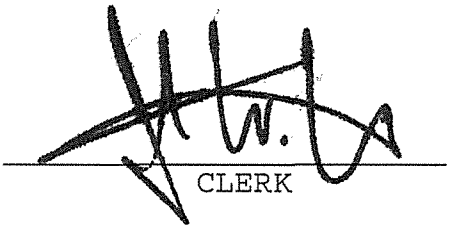
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 20, 2006, which, in an action for, inter alia, discrimination on the basis of sexual orientation, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's contention that defendants' motion for summary judgment was untimely has been rejected by the Court of Appeals, which found that the motion was timely (___NY3d___, 2008 NY Slip Op 07989 [Oct. 23, 2008]). On the merits of that motion, defendants met their burden of demonstrating prima facie entitlement to summary judgment, and were properly granted summary judgment given that plaintiff's only argument in

opposition to the motion was that it was untimely. We reject plaintiff's argument that the court erred in not giving him an opportunity to address defendants' motion on the merits in the event the court rejected his argument that the motion was untimely. Plaintiff initially challenged the timeliness of defendants' motion by filing an order to show cause to strike the motion that, several days later, was orally argued and denied in a written order that directed plaintiff to raise the timeliness issue in his response to defendants' motion. The clear import was that any substantive response had to be raised along with the timeliness issue. If plaintiff was uncertain as to what was expected, he should have sought clarification.

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

ENTERED: DECEMBER 9, 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 December 9, 2008.

Present - Hon. Peter Tom, Justice Presiding
Angela M. Mazzarelli
David Friedman
Milton L. Williams
Karla Moskowitz, Justices.

In re Jack White,
Petitioner,

-against-

4134
[M-3937]

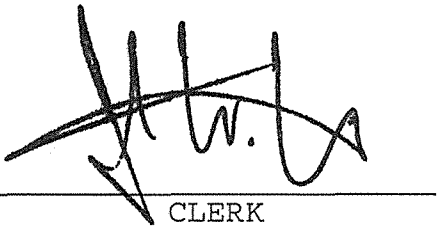
Hon. Bernard Fried, etc., et al.,
Respondents.

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

Andrias, J.P., Nardelli, McGuire, Moskowitz, Renwick, JJ.

4222 Isabel Danvers, Index 21446/99
Plaintiff-Respondent-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants-Respondents.

Steve S. Efron, New York, for appellants-respondents.

Rubert & Gross, P.C., New York (Soledad Rubert of counsel), for respondent-appellant.

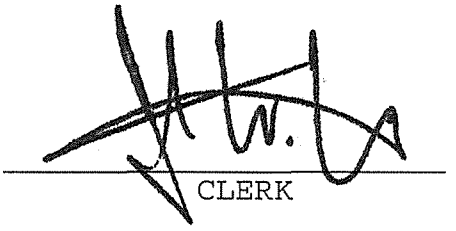
Judgment, Supreme Court, Bronx County (Alan J. Saks, J., and a jury), entered June 14, 2007, awarding damages for personal injuries and bringing up for review, inter alia, the denial of defendants' motion at the close of evidence for judgment as a matter of law, unanimously reversed, on the law, without costs, defendants' motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff failed to make out a prima facie case of serious injury under either a quantitative or qualitative analysis (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Concerning her lumbar spine, while plaintiff submitted evidence of herniated and bulging discs and a history of pain, an objective assessment of her range-of-motion limitations was not made until more than five years after the accident, too remote to permit an inference that her limitations were caused by the accident (*see Medina v Medina*, 49 AD3d 335 [2008]). Concerning

her ankle, the arthroscopic surgery performed eight months after the accident to repair a partially torn ligament and a history of pain do not by themselves establish a serious injury (*see O'Bradovich v Mrijaj*, 35 AD3d 274 [2006]), and, once again, the only objective evidence of range-of-motion limitations was produced by tests too remote in time from the accident to permit an inference that plaintiff's present limitations were caused by the accident. In any event, plaintiff's evidence reveals an unexplained gap of two years and nine months in her primary physician's treatment, negating any showing of serious injury (*see Otero v 971 Only U, Inc.*, 36 AD3d 430 [2007]).

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

ENTERED: DECEMBER 9, 2008



CLERK

Mazzarelli, J.P., Friedman, Nardelli, Williams, Freedman, JJ.

4243 Michael Espinell, Index 17045/05
Plaintiff-Appellant,

-against-

Edwin N. Dickson, et al.,
Defendants-Respondents.

George S. Bellantoni, White Plains, for appellant.

Gannon, Rosenfarb & Moskowitz, New York (Jaclyn D. Mitchell of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered February 29, 2008, which, to the extent appealed from as limited by the brief, granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff slipped and fell on a patch of ice on the sidewalk, at the curb in front of defendants' building at 8:45 A.M. The record establishes that it had rained, snowed and sleeted during the preceding day and night, that any precipitation that could have caused the icy condition, including the freezing drizzle of the early morning hours, had ceased by 6 A.M., and that snow flurries fell until approximately 7 A.M. The record is devoid of evidence that defendant created or was aware of the icy condition on the sidewalk with sufficient time to correct it, or that the condition existed long enough that defendant should have been aware of its existence. Plaintiff testified at his deposition that prior to falling, he did not see

any ice at the site of the accident, nor did he observe any other ice or snow on the ground.

"[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended" (*Pippo v City of New York*, 43 AD3d 303, 304 [2007]). This Court has further held that "[a] reasonable time is that period within which the [landowner] should have taken notice of the icy condition and, in the exercise of reasonable care, remedied it by clearing the sidewalk or otherwise eliminating the danger" (*Valentine v City of New York*, 86 AD2d 381, 383 [1982], *affd* 57 NY2d 932 [1982]).

As a matter of law, defendants should not be held liable for plaintiff's injuries. As noted, the record shows that defendants lacked actual or constructive notice of the icy condition - due to the fact that the icy condition was not readily visible and to the relatively short, early morning interval between the end of the storm and the accident - and presents no evidence that defendants created the hazard (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Garcia v New York City Hous. Auth.*, 183 AD2d 619, 620 [1992]). Although the report filed by the New York City Fire Department emergency medical technician (EMT) who responded to the accident states that the

site of the accident was very icy, it does not indicate whether the EMT personally observed such condition, or was merely recounting plaintiff's after-the-fact explanation of the accident. This case is factually distinguishable from *Powell v MLG Hillside Assoc.* (290 AD2d 345 [2002]). In that case, the landlord had actual notice that the hazard existed, since there was visible snow on the ground, which, approximately an hour after cessation of the storm, he had sought to have the custodian remove, and the interim between the end of the storm and the accident was longer.

All concur except Mazzarelli, J.P. who dissents in a memorandum as follows:

MAZZARELLI, J.P. (dissenting)

Plaintiff slipped and fell on a patch of ice in front of defendants' building at 8:45 a.m. on December 15, 2003. Certified meteorological records submitted by plaintiff demonstrated that on the day before the accident approximately five inches of snow fell over a period of seven hours. The snow ended at about 3:00 P.M., before changing to rain for the remainder of that day. Most of the snow and ice melted, but a trace of snow and ice remained at the end of the day on exposed, untreated, undisturbed outdoor surfaces. On the day of the accident, the rain changed to sleet at about 4:00 A.M. and continued until 6:00 A.M. Thereafter, a trace of snow fell, stopping at 7:00 A.M. According to an uncontradicted affidavit submitted by plaintiff's meteorological expert, the ice which caused plaintiff's accident was created by the combination of precipitation that fell during the preceding day and until 6:00 A.M. on December 15.

Defendants moved for summary judgment, arguing that plaintiff could not establish that they had actual or constructive notice of the icy condition in sufficient time to remedy it before the accident. The court agreed, holding that there was "no evidence at all" that defendants either created the icy condition or were aware of it in time to clear it, or that an icy condition had existed for a long enough time that defendants

should have been aware of its existence.

There is no question that, under the "storm in progress" doctrine, any duty defendants had to remedy the icy condition existed no earlier than 6:00 A.M., when all precipitation but a trace amount of snow ceased falling. Rather, the question is whether defendants established that, as a matter of law, the 2 hours and 45 minutes between the end of the storm and the accident did not provide defendants with sufficient opportunity to clean the sidewalk. To decide that question requires a close review of the record facts.

As described above, an appreciable winter storm occurred the day before the accident, and continued until the following morning. The ice on which plaintiff slipped covered approximately four feet of the sidewalk and was "right in front" of defendants' building. Defendant Edwin N. Dickson lived in an apartment on the second floor of the building and was there on the day of the accident. He acted as his own superintendent and personally handled snow and ice removal. He kept on site several snow shovels and an ice chopper. His practice and procedure around the time of the accident was that when he knew there had been a storm he would look out a window on the first floor of the building, and that he would then clean away snow and sand and salt the area outside the building, including the precise area where plaintiff fell. This practice applied even if a storm

occurred overnight; indeed, Mr. Dickson recounted at his deposition that he and his son once went downstairs at 1:00 A.M. to remove accumulated snow and ice. However, he did not recall whether he or his son (who also lived at the building and helped him with snow and ice removal) cleaned any ice or snow on the day of plaintiff's accident.

This Court has held that "'[there] is no formula for determining liability on the basis of any ratio between the number of inches of snowfall and the time elapsed before the happening of the accident and, ordinarily...these factors, as well as all the other conditions, constitute a jury question'" (*Valentine v City of New York*, 86 AD2d 381, 386 [1982], quoting *Yonki v City of New York* [276 App Div 407, 410 (1950)], *affd* 57 NY2d 932 [1982]). In both of those cases, the plaintiffs slipped on ice or snow resulting from an historic storm, a 25.8 inch snowfall in *Yonki*, and an ice storm in *Valentine* that was described as the second worst in the preceding 50 years. We determined that in each case the City established that it acted reasonably in deploying its sanitation crews first to clear roadways and areas of heavy pedestrian traffic, and only then to clear sidewalks on secondary and tertiary streets such as those where the accidents occurred. Accordingly, we determined, as a matter of law, that under those circumstances it was not unreasonable for the City not to have remedied the wintry

conditions encountered by the plaintiffs even though, in *Yonki*, the accident occurred 60 hours after the cessation of the storm, and, in *Valentine*, 30-1/4 hours.

However, the facts here are dramatically different from those in *Yonki* and *Valentine*. Indeed, they are much closer to the facts in *Gonzalez v American Oil Co.* (42 AD3d 253 [2007]). In that case, this Court affirmed Supreme Court's holding that issues of fact on the question of constructive notice precluded summary judgment. In *Gonzalez*, the plaintiff slipped on a three-foot by six-foot patch of ice which was six feet from the entrance of a gasoline station convenience store. On the day of the accident only a trace amount of snow fell, but none within three to four hours before the accident. On the preceding day, 2.8 inches of snow had fallen. The defendant generally performed ice and snow removal on an "as needed" basis, but had no records of having performed maintenance around the time in question. This Court held, based on, among other things, the size of the ice patch and the fact that it was transparent, that it had been there for at least three hours before the accident occurred. The Court wrote that

> "[i]f the ice was there that long, even if it were transparent, defendants should have discovered it, and would have had they made any reasonable effort to keep the area clear of ice and snow.
>
> From these facts - the large size of the ice patch, its consistency as well as its close

> proximity to the store's front door, and defendants' failure to perform any meaningful maintenance - one could reasonably conclude that defendants should have discovered this condition well before plaintiff's fall and remedied it" (42 AD3d at 256).

Here, plaintiff testified that the patch of ice on which he fell covered a four foot area - smaller than the area in *Gonzalez*, but significant enough that an issue of fact exists as to whether defendants should have noticed it.[1] In addition, as in *Gonzalez*, the ice patch was close in proximity to defendants' building. Moreover, the amount of time which elapsed here is only 15 minutes less than the amount at issue in *Gonzalez*. Also similar to *Gonzalez*, defendants in this case indicated that they would have been able to remedy the icy condition immediately upon becoming aware of it. Indeed, Mr. Dickson testified that his custom when there had been wintry precipitation overnight was to inspect the sidewalk outside the property immediately upon rising in the morning. The majority's observation that constructive notice was absent as a matter of law because of the "short, early morning interval between the end of the storm and the accident," is simply not supported by the record.

This Court has held that two hours is not as a matter of law

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[1]It is unclear from the record whether plaintiff, in describing the ice patch, was referring to its total area or simply the length of sidewalk it occupied. If the latter, the patch could have been closer to the 18-square-foot ice patch in *Gonzalez*.

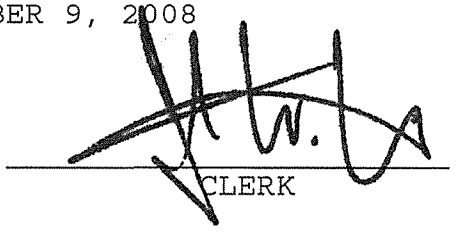
insufficient time to create a duty to clean ice (*see Powell v MLG Hillside Assoc.* (290 AD2d 345 [2002]). In *Powell*, this Court stated:

> "In applying [the "storm in progress"] rule in derogation of liability, we should be less concerned with what was happening at the very moment of the accident. More relevant is what was happening during the period immediately preceding the accident. If only trace amounts fell during the two to three hours prior to plaintiff's accident and defendant's custodian was present, then it is reasonable to ask whether the custodian should have been shoveling the accumulated snow. This record calls for determination by a trier of fact, not a rote application of a rule of law."

(290 AD2d at 346; *see Tucciarone v Windsor Owners Corp.*, 306 AD2d 162 [2003] [passage of "several hours" between cessation of storm and accident created issue of fact as to reasonableness of defendant's delay in removing snow]). In this case the record requires a determination by a trier of fact as to whether there was sufficient time to remedy the dangerous condition. Accordingly, I would reverse the motion court's order and reinstate the complaint.

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

ENTERED: DECEMBER 9, 2008



CLERK

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

4459 American Transit Insurance Company, Index 604308/05
Plaintiff-Respondent,

-against-

Rechev of Brooklyn, Inc., et al.,
Defendants,

Judith Klausner,
Defendant-Appellant.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for appellant.

Marjorie E. Bornes, New York, for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 1, 2007, which granted plaintiff insurer's motion for summary judgment declaring that it has no duty to defend and indemnify defendants insureds in an underlying personal injury action brought by defendant-appellant, and denied appellant's cross motion for summary judgment directing plaintiff to satisfy the judgment in the underlying action, affirmed, without costs.

Although appellant had provided plaintiff with information about the accident shortly after it occurred, in compliance with the policy, she failed to give plaintiff notice of her suit against its insureds until 14 months after the suit was commenced and she had obtained an order for a default judgment. Plaintiff having thus lost its right to appear and interpose an answer, its

disclaimer of coverage was proper (*see* Insurance Law § 3420(a)(3); *American Tr. Ins. Co. v B.O. Astra Mgt. Corp.*, 39 AD3d 432 [2007], *lv denied* 9 NY3d 802 [2007]).

All concur except McGuire, J. who concurs in a separate memorandum as follows:

McGUIRE, J. (concurring)

I agree with the majority's implicit conclusion that plaintiff insurer American Transit Insurance Co. (ATIC) was required to show that it was prejudiced by the failure of defendant Klausner, the plaintiff in the underlying personal injury action, to provide timely notice to ATIC of the action she had commenced against ATIC's insured. I write separately because I believe we should explain that conclusion, especially in light of decisions by this Court and the Second Department that appear to support a different conclusion.

Although ATIC did not receive timely notice of the action from Klausner, it did receive timely notice of the accident, as is evinced by the letter it sent to Klausner less than two months after the accident requesting that she complete a form providing information about the accident and her injuries. Indeed, ATIC conceded in its reply papers that it had received timely notice of the accident. Moreover, that letter addresses Klausner as "Claimant." According to Klausner's submission opposing ATIC's motion for summary judgment, she completed and returned the form, and her attorney thereafter provided medical reports and records to ATIC and engaged in settlement discussions with ATIC. ATIC did not dispute these assertions in its reply papers.

In *Argo Corp. v Greater N.Y. Mut. Ins. Co.* (4 NY3d 332, 340 [2005]), the Court of Appeals held that a commercial liability

insurer "was not required to show prejudice before declining coverage for late notice of lawsuit." The Court stressed in its opinion, however, that the carrier also had not received timely notice of claim (*id.* at 339-340). As the Court of Appeals noted in *Argo*, "[i]n *Matter of Brandon (Nationwide Mut. Ins. Co.)* (97 NY2d 491 [2002]), we again departed from the general no-prejudice rule and held that the carrier must show prejudice before disclaiming based on late notice of a lawsuit in the SUM [supplementary underinsured motorist] context" (4 NY3d at 339). In *Rekemeyer v State Farm Mut. Auto. Ins. Co.* (4 NY3d 468 [2005]), the plaintiff in a declaratory judgment action against her insurance carrier "did not submit notice of her SUM claim as soon as practicable" (*id.* at 474). Although the notice of claim was untimely, the Court accepted the plaintiff's argument that the Court should "relax its application of the no-prejudice rule in SUM cases where the carrier has been timely put on notice of the accident" (*id.*).

Because this case is not one involving SUM coverage, Klausner cannot maintain that *Matter of Brandon* and *Rekemeyer* require relaxation of the no-prejudice rule. Indeed, *Rekemeyer* arguably supports the opposite conclusion: timely notice of the accident should not lead to relaxation of the no-prejudice rule because this is *not* a SUM case. Moreover, the proposition that ATIC was required to show that it was prejudiced by Klausner's

failure to give timely notice of her suit against ATIC's insured is at least called into question by our recent decision in *1700 Broadway Co. v Greater N.Y. Mut. Ins. Co.* (54 AD3d 593 [2008]). In *1700 Broadway*, the insured did not give notice to the commercial general liability insurer of the underlying personal injury action against the insured until eight months after the insured was served with the summons and complaint. This Court held that the unexplained delay "constituted late notice as a matter of law" and that the insurer "was not required to demonstrate prejudice by reason of the delay in order to disclaim coverage" (*id.* at 593-594). Although nothing in this Court's opinion suggests that the insurer had received timely notice either of the occurrence or of the claim, nothing in the opinion suggests that whether either notice had been given in timely fashion was relevant to the holding. Moreover, the Second Department has held that an insurer validly disclaimed coverage on the ground of untimely notice of the underlying personal injury action against its insured even though the insurer had received written notice of the accident one month after the accident and one of the plaintiffs in the personal injury action had sought no-fault benefits from the insurer not later than three and one-half months after the accident (*Matter of GEICO Co. v Wingo*, 36 AD3d 908 [2007]).

As the majority indicates, this appeal is controlled by our

decision in *American Transit Ins. Co. v B.O. Astra Mgt. Corp* (39 AD3d 432 [2007], *lv denied* 9 NY3d 802 [2007]). Consistent with the emphasis the Court of Appeals placed in *Argo* on the fact that the carrier had not received timely notice of claim, this Court held that "[h]aving received timely notice of claim, plaintiff insurer was not entitled to disclaim coverage based on untimely notice of the claimant's commencement of litigation unless it was prejudiced by the late notice" (*id.* at 432). This case is a fortiori to *B.O. Astra*, because ATIC received both timely notice of the accident and timely notice of Klausner's claim.

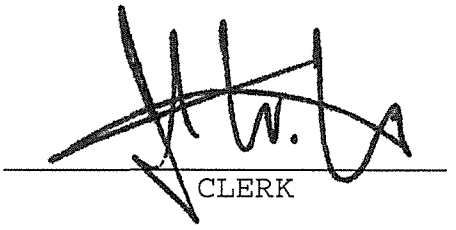
The majority's analysis premises the propriety of the disclaimer of coverage on ATIC "having ... lost its right to appear and interpose an answer." For this reason, and because the majority goes on to cite *B.O. Astra*, it appears that the majority has concluded, albeit implicitly, that ATIC was required to show prejudice. As stated above, I agree that *B.O. Astra* requires that conclusion. Unquestionably, moreover, ATIC was prejudiced by Klausner's failure to provide notice until after she had obtained a default judgment. As Justice Lehner observed in his written decision granting ATIC's motion for summary judgment, although ATIC "could ... have applied to vacate the default ... on the part of its insured, it is far from clear whether such a motion would be granted, and it could be prejudicial to [ATIC's] rights to require it to appear for its

insured under such circumstances." I would add only -- I doubt Justice Lehner meant to suggest otherwise -- that it is prejudicial to ATIC's rights to require it to shoulder the burden of moving to vacate the default.

Finally, there is no merit to Klausner's argument that ATIC's disclaimer is really a disclaimer for failure to cooperate. Although an insurer can disclaim on account of its insured's failure to cooperate in the handling of a claim, ATIC disclaimed on the distinct ground of lack of timely notice of the underlying action. The requirement of timely notice of that action is a condition precedent to ATIC's liability (*American Tr. Ins. Co.* v *Sartor*, 3 NY3d 71, 76 [2004]), and Klausner failed to exercise her independent right to fulfill this policy obligation (*id.* ["the Legislature has given an injured party the statutory right to fulfill this policy obligation [of timely notice] by allowing any necessary notification to be issued by the claimant"]).

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

ENTERED: DECEMBER 9, 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 December 9, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
James M. McGuire
Karla Moskowitz
Leland G. DeGrasse
Helen E. Freedman, Justices.

In re Shariff Alleyne,
Petitioner,

-against-

4514
[M-4451]

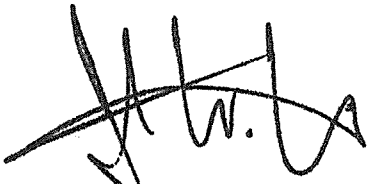
Hon. Arlene Silverman, etc., et al.,
Respondents.

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

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 December 9, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
James M. McGuire
Karla Moskowitz
Leland G. DeGrasse
Helen E. Freedman, Justices.

In re Ricardo Sanchez,
Petitioner,

-against-

4515
[M-4596]

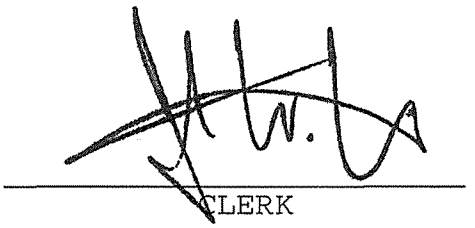
Hon. Edward J. McLaughlin, etc., et al.,
Respondents.

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

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

4748 The People of the State of New York, Respondent, Ind. 4361/06

-against-

Venice Brown, Defendant-Appellant.

- - - - -

4749 The People of the State of New York, Respondent, Ind. 4361/06

-against-

Patreese Johnson, Defendant-Appellant.

Gibbons P.C., Newark, NJ (Melanca D. Clark of counsel), for Venice Brown, appellant.

Orrick, Herrington & Sutcliffe LLP, New York (Karen D. Thompson of counsel), for Patreese Johnson, appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 14, 2007, convicting defendant Venice Brown, after a jury trial, of gang assault in the second degree and assault in the third degree, and sentencing her to an aggregate term of 5 years, unanimously modified, on the law and as a matter of discretion in the interest of justice, to the extent of vacating the gang assault conviction and remanding for a new trial on that count, and otherwise affirmed.

Judgment, same court and Justice, rendered June 14, 2007, convicting defendant Patreese Johnson, after a jury trial, of

gang assault in the second degree and assault in the first and second degrees, and sentencing her to concurrent terms of 11 years, 11 years and 7 years, respectively, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences for the gang assault in the second degree and assault in the first degree convictions to 8 years each, and otherwise affirmed.

The evidence of defendant Brown's participation in the crime is substantially similar to the evidence received at the same trial against codefendant Renata Hill. Accordingly, for the reasons stated in our prior decision (*People v Hill*, 52 AD3d 380 [2008]), we conclude that the verdict as to Brown was based on legally sufficient evidence and was not against the weight of the evidence, but that Brown is entitled to a new trial on the gang assault charge because of the charging errors discussed in *Hill*. We find it unnecessary to reach any other issues raised by Brown.

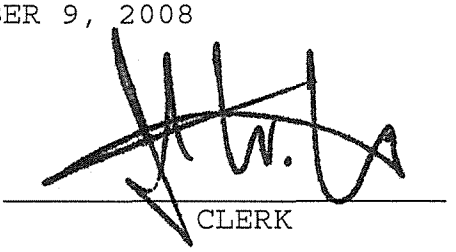
Defendant Johnson, who personally stabbed the victim, challenges the sufficiency of the evidence establishing the element of serious physical injury. That claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Even without the aid of expert testimony, the jury could have readily inferred from the victim's testimony and medical records that his stab wounds to his liver and stomach were life-threatening (*see*

e.g. People v Jones, 38 AD3d 352 [2007], *lv denied* 9 NY3d 846 [2007]). Johnson's ineffective assistance of counsel claim relating to this issue is likewise without merit.

We find Johnson's sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 9, 2008



CLERK

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4755 The People of the State of New York, Ind. 2597/06
Respondent,

-against-

Floyd Burton,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell, New York (Alexis G. Stone of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Vikas Khanna of counsel), for respondent.

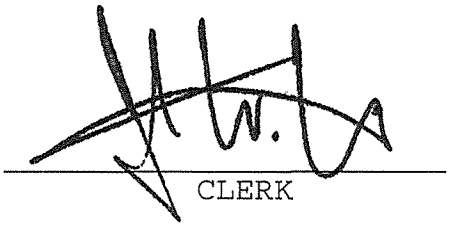
Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 12, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. While defendant was in custody and awaiting medical attention at a hospital, an officer engaged him in general conversation on subjects unrelated to the case. This was not the functional equivalent of interrogation (*see e.g. People v Man Lee Lo*, 118 AD2d 225, 230-231 [1986], *lv denied* 68 NY2d 814 [1986]), and the surrounding circumstances were not inherently coercive. Defendant ultimately asked the officer two questions about the charges against him. In each instance, the officer's immediate answer was brief, neutral and did not go beyond what was asked

(*see e.g. People v Rivers*, 56 NY2d 476, 480 [1982]; *People v Minor*, 158 AD2d 412 [1990], *lv denied* 75 NY2d 968 [1990]; *compare People v Lanahan*, 55 NY2d 711 [1981]), and each answer led to a spontaneous incriminating statement by defendant that was not the product of interrogation. Finally, defendant's claim that, at the time of these statements, he had invoked his right to remain silent improperly relies on trial testimony (*see People v Abrew*, 95 NY2d 806, 808 [2000]).

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

ENTERED: DECEMBER 9, 2008



CLERK

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4756-
4756A In re Shayna R., and Others

Dependent Children under
the Age of Eighteen Years, etc.,

Cherisse C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Victor B.,
Petitioner,

-against-

Cherisse C.,
Respondent-Appellant,

Administration for Children's Services,
Respondent-Respondent.

George E. Reed, Jr., White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about July 6, 2007, which, insofar as appealed from, upon a fact-finding determination that respondent mother neglected the subject children, directed the release of the children Britney D. and Shayna R. to the mother under supervision of the Administration for Children's Services, and directed the release of the child Brandon B. to the custody

of his father, and order, same court and Judge, entered on or about July 6, 2007, which granted petitioner father's petition for custody of Brandon and awarded the mother weekend visitation three times per month, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (Family Court Act § 1046[b][i]), including the cross-corroborating statements of the children Brandon and Shayna that the mother routinely left them and their younger sister alone in the apartment, sometimes in the middle of the night (*see Matter of Nicole V.*, 71 NY2d 112, 124 [1987]). There exists no basis upon which to disturb the court's credibility determinations (*see Matter of Frantrae W.*, 45 AD3d 412 [2007], *lv denied* 10 NY3d 705 [2008]).

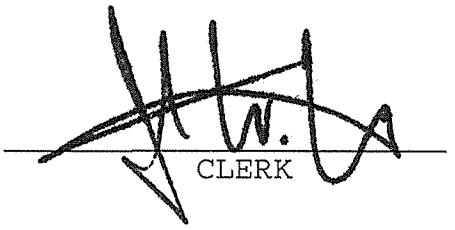
The totality of the circumstances establish that the award of custody of Brandon to his father was in the best interests of the child and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The record shows that in addition to the finding of neglect, the mother exposed Brandon to violence in the home by being involved in abusive personal relationships, failed to tend to his educational needs as evidenced by Brandon's school records showing excessive lateness and absences, behaved erratically, and failed to avail herself of the services offered by ACS to help her deal with what appeared to be an untreated mental condition, whereas the father

was able to provide Brandon with stability, a suitable home, emotional and intellectual support, and was involved with his education. Although the award separates Brandon from his siblings, the father has expressed a willingness to ensure that Brandon would have frequent contact with his sisters (*see Matter of Olimpia M. v Steven M.*, 228 AD2d 270 [1996]).

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

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

ENTERED: DECEMBER 9, 2008



Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4757 In re Dart Mechanical Corp., Index 101494/07
Petitioner-Appellant,

-against-

New York City Office of Administrative Trials and Hearings Contract Dispute Resolution Board, et al.,
Respondents-Respondents.

Tunstead & Schechter, Jericho (Marvin Schechter and Frank P. Ribaudo of counsel), for appellant.

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

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered October 29, 2007, which denied petitioner's application to annul the determination of respondent New York City Office of Administrative Trials and Hearings Contract Dispute Resolution Board rejecting petitioner's claims for additional compensation for the increased cost of supplying certain equipment required by petitioner's contract with respondent New York City Department of Sanitation, and dismissed the petition, unanimously affirmed, without costs.

The petition was properly dismissed where the contract did not include an escalator clause or other provision for additional compensation, and the Board rationally found (*see Secco Elec. Corp. v Kalikow*, 13 AD3d 252 [2004], *lv denied* 5 NY3d 702 [2005])

that the Department of Sanitation did not breach either the contract provision or the Procurement Policy Board's rules regarding procurement and substitution of sole source items.

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

ENTERED: DECEMBER 9, 2008

CLERK

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4758 Peggy Magidson, Index 102131/95
Plaintiff-Appellant,

-against-

Harry Otterman, et al.,
Defendants-Respondents,

Sun Mgmt. Co.,
Defendant.

Beck & Beck, LLC, New York (Kenneth A. Beck of counsel), for appellant.

Epstein, Harms & McDonald, New York (Michael A. Buffa of counsel), for Harry Otterman and Oxford 41-41 Owners Corp., respondents.

Harris Beach PLLC, New York (Steven J. Rice of counsel), for Cascade Water Services, Inc., respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 16, 2007, which granted the motion by defendant Cascade and cross motion by defendants Otterman and Oxford to dismiss the complaint, unanimously affirmed, without costs.

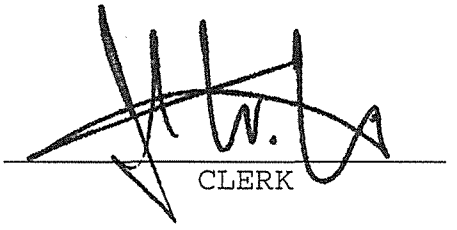
Plaintiff alleges injury caused by exposure to toxic substances in her apartment. Her claim accrued at the latest in the fall of 1991, when she acknowledges having become aware of her injury. The statute of limitations thus expired in late 1994, prior to the commencement of this action in January 1995 (CPLR 214-c; *see Martin v 159 W. 80 St. Corp.*, 3 AD3d 439 [2004]). The argument that plaintiff's claim did not accrue

until March 2003, based on the January 2008 affidavit of her treating physician, which is dehors the record, has not been preserved for appellate review. Were we to consider it, we would find it without merit.

Plaintiff's arguments concerning an order of April 25, 2006 are not properly before this Court because she never filed an appeal from that order, and the time for taking an appeal has long since expired. We have considered her other claims and find them without merit as well.

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

ENTERED: DECEMBER 9, 2008



Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4759-
4759A The People of the State of New York, Ind. 5158/06
Respondent, 4624/06

-against-

Doreen Ballard,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Melissa A. Pennington of counsel), for respondent.

Judgments, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing; Robert M. Stolz, J. at pleas and sentence), rendered June 11, 2007, as amended September 19, 2007, convicting defendant of criminal sale of a controlled substance in the fourth and fifth degrees, and sentencing her, as a second felony drug offender, to an aggregate term of 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. 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]). In this observation sale case, defendant concedes that there was reasonable suspicion warranting her detention, but argues that the police use of handcuffs elevated the encounter to an arrest, and that probable cause to arrest did not develop until the observing officer made

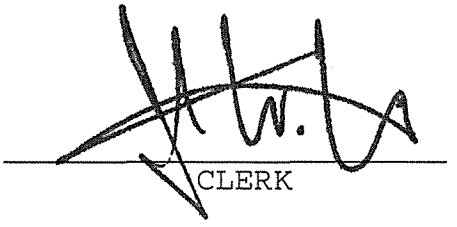
a confirmatory identification. However, the hearing evidence, viewed as a whole, supports the conclusion that defendant was not handcuffed until after the confirmatory identification, notwithstanding some evidence to the contrary. In any event, the record also supports the hearing court's alternate finding that there was probable cause even before the identification (*see e.g. People v Martinez*, 289 AD2d 125 [2001], *lv denied* 98 NY2d 653 [2002]; *People v Genyard*, 276 AD2d 299 [2000], *lv denied* 95 NY2d 963 [2000]).

Shortly after the arrest, an experienced narcotics officer observed a clear plastic bag containing what he immediately recognized to be cocaine on the console of defendant's van. Accordingly, seizure of the drugs was justified by application of the plain view doctrine (*see People v Batista*, 261 AD2d 218 [1999], *lv denied* 94 NY2d 819 [1997]). Defendant's argument that the hearing court employed the wrong standard with regard to the plain view issue is unpreserved and without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 9, 2008



Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4762 The People of the State of New York, Ind. 1823/07
Respondent,

-against-

Hector Manrique,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Richard Joselson of counsel), for appellant.

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

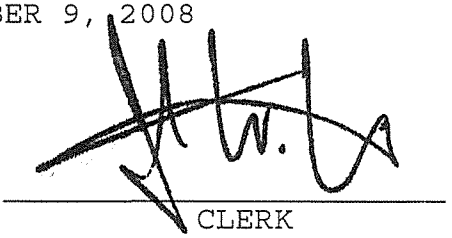
Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 26, 2007, convicting defendant, upon his plea of guilty, of attempted burglary in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's motion to suppress merchandise recovered from his possession by a store security guard was properly denied without a hearing because he failed to allege facts raising an issue as to state action (*see People v Parris*, 220 AD2d 254 [1995], *lv denied* 87 NY2d 976 [1996]). Unlike the situation in *People v Mendoza* (82 NY2d 415, 433-434 [1993]) and *People v Green* (33 AD3d 452 [2006]), defendant had ample access to information about the guard, including his identity and employment status, which led defendant to subpoena the records of the store's security provider. Accordingly, defendant was required to do

more than baldly assert that the security guard was licensed to exercise police powers or was acting as an agent of law enforcement in order to obtain a hearing. Defendant's allegation that the store worked with the District Attorney's office to institute an anti-shoplifting program did not raise a factual issue as to state action (*see People v Duerr*, 251 AD2d 161 [1998], *lv denied* 92 NY2d 949 [1998]).

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

ENTERED: DECEMBER 9, 2008



CLERK

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4768 The People of the State of New York, Ind. 967/06
Respondent,

-against-

Gregory Slates,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

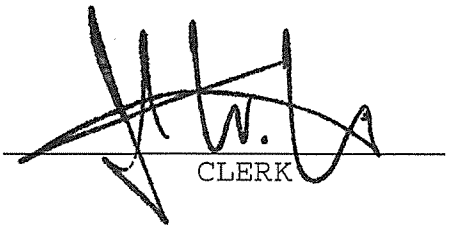
Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 17, 2006, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. 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]). Defendant's furtive behavior in attempting to purchase a MetroCard with multiple credit cards, viewed in light of the arresting officer's training and experience regarding credit card fraud at MetroCard vending machines, justified a level two inquiry, which led to defendant's production of two credit cards and his admission that they did

not belong to him, furnishing probable cause for his arrest (*see People v Wilson*, 52 AD3d 239 [2008], *lv denied* 11 NY3d 743 [2008]).

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

ENTERED: DECEMBER 9, 2008



Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4769 Vincent Ayala, a minor under the age of eighteen by his mother and natural guardian, Layda Rosa, et al., Plaintiffs-Respondents, Index 113491/05

-against-

Carol Douglas, Defendant-Appellant.

Rivkin Radler LLP, Uniondale (Melissa M. Murphy of counsel), for appellant.

Levine & Blit, PLLC, New York (Leslie J. Levine of counsel), for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered July 30, 2007, which denied defendant's motion for summary judgment dismissing the complaint on the ground that the infant plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and granted plaintiffs' cross motion for summary judgment on the issue of liability, unanimously modified, on the law, to grant defendant's motion to the extent of dismissing the infant plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Defendant established prima facie that the infant plaintiff did not sustain a serious injury (*see e.g. Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [2005]). She submitted an orthopedic surgeon's findings on examination that plaintiff's sprains of the cervical, thoracic and lumbar spine and left knee had resolved

and a radiologist's findings that MRIs of plaintiff's lumbar spine showed degenerative changes manifested by disc hydration, disc space narrowing and a mild annular bulge and that the MRI of plaintiff's left knee showed intact lateral menisci and no abnormalities.

In opposition, plaintiffs raised a triable issue of fact by providing objective evidence of a permanent disability causally related to the accident (*see e.g. Engles v Claude*, 39 AD3d 357 [2007]). They submitted an affidavit by a physician who diagnosed a herniated disc and derangement of plaintiff's left knee, quantified limitations in the ranges of motion of the lumbar spine and left knee, and opined that the injuries were causally related to the accident, and a radiologist's report that the MRI of plaintiff's left knee showed a tear of the medial meniscus, the MRI of his cervical spine showed straightening of the normal lordosis, and the MRI of his lumbar spine revealed disc herniation. Although unsworn, plaintiff's radiologist's reports were properly considered, because they were reviewed by defendant's expert in reaching his conclusion (*see id.*).

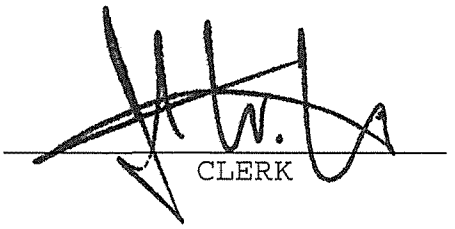
Plaintiffs did not, however, raise an inference that a "medically determined" injury or impairment prevented plaintiff from performing substantially all his usual and customary daily activities for at least 90 of the first 180 days following the accident (*see e.g. Prestol v McKissock*, 50 AD3d 600, 601 [2008]).

The only evidence as to this claim is plaintiff's testimony that he returned to school after three weeks and that he was unable to participate in gym and sports for some time.

In his testimony and affidavit, plaintiff stated that he was crossing the street with the light and looked in both directions before stepping off the curb into the crosswalk, where he was struck by defendant's car. In opposition to plaintiffs' cross motion for summary judgment on the issue of liability, defendant submitted only an affirmation by her counsel, who had no personal knowledge of the facts *(see Diaz v New York City Tr. Auth.*, 12 AD3d 316 [2004]).

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

ENTERED: DECEMBER 9, 2008



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 December 9, 2008.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
Eugene Nardelli
Karla Moskowitz, Justices.

The People of the State of New York,
Respondent,

Ind. 5328/03
229/04
1573/04

-against-

4770

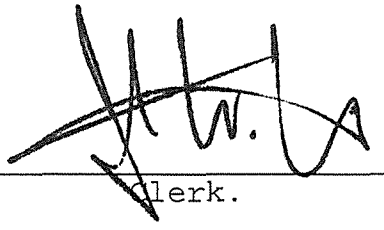
Edwin Vidal,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Peter J. Benitez, J.), rendered on or about January 3, 2007,

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

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

ENTER:



Clerk.

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

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4771-
4772 The People of the State of New York, Ind. 671/04
Respondent,

-against-

Eddie Valentin,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Elizabeth Squires of counsel), for respondent.

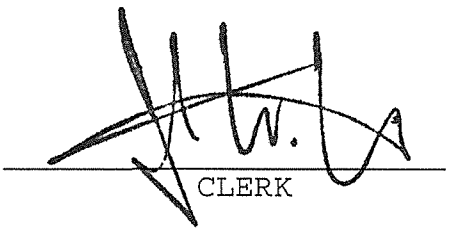
Order, Supreme Court, New York County (Renee Allyn White, J.), entered on or about June 27, 2006, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court assessed a total of 70 points, which is just below the threshold for a level two adjudication, and then departed upward to level two. The court properly assessed 15 points under the risk factor for drug or alcohol abuse, since defendant had a long history of drug possession convictions that was not excessively remote in time and he had not sufficiently demonstrated a prolonged period of abstinence (*see e.g. People v Warren*, 42 AD3d 593, 594 [2007], *lv denied* 9 NY2d 810 [2007]; *People v Regan*, 46 AD3d 1434). The upward departure was

supported by clear and convincing evidence of defendant's mental illness, noncompliance with his medication regimen, and his resulting behavior when not medicated (*see People v Roland*, 272 AD2d 271 [2002], *lv denied* 98 NY2d 614 [2002]).

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

ENTERED: DECEMBER 9, 2008



Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4774 The People of the State of New York, Ind. 5002/06
Respondent,

-against-

Benjamin DeJesus,
Defendant-Appellant.

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

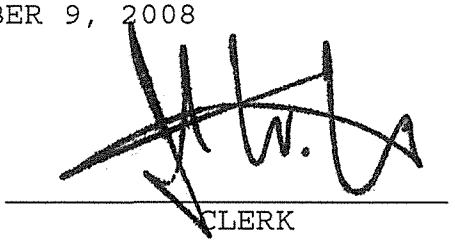
Robert M. Morgenthau, District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered April 10, 2007, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him to a term of 4½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 4 years, and otherwise affirmed.

Under the unusual circumstances presented herein, we find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 9, 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 December 9, 2008.

Present - Hon. Peter Tom, Justice Presiding
Luis A. Gonzalez
Eugene Nardelli
Karla Moskowitz
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 4595N/07
Respondent,

-against- 4775

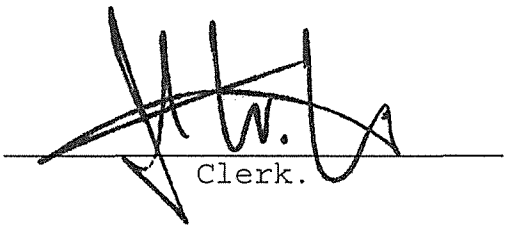
Angela Boyd,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about October 11, 2007,

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

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

ENTER:



Clerk.

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

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4776N Charlene Lea, Index 103372/06
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Godosky & Gentile, P.C., New York (William A. Gentile of counsel), for respondent.

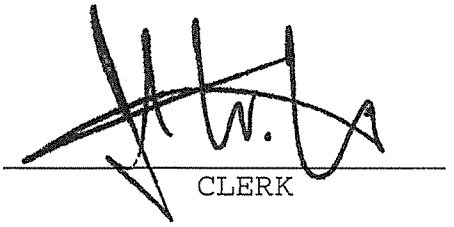
Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 2, 2007, which, in an action for personal injuries sustained in a slip and fall on a staircase maintained by defendant New York City Transit Authority, inter alia, granted plaintiff's motion to strike defendant's answer unless defendant "complie[d] with the outstanding discovery demands" within 30 days, unanimously modified, on the facts, to grant the motion to strike unless defendant produces (1) its station supervisor's log, or an affidavit from someone with knowledge that such log could not be found after a diligent search, and (2) its station supervisor for deposition, both within 60 days after issuance of this order, and otherwise affirmed, without costs.

On appeal, defendant does not challenge the demands for its station supervisor's log and deposition. Concerning the demands that do remain in issue on appeal, they are all are palpably

improper (*see Haller v North Riverside Partners*, 189 AD2d 615, 616 [1993], citing *Alaten Co. v Solil Mgt. Corp.*, 181 AD2d 466 [1992]; *cf. Sonsini v Memorial Hosp. for Cancer & Diseases*, 262 AD2d 185, 186-187 [1999]), and thus production thereof should not be compelled despite defendant's failure to timely object thereto under CPLR 3122 (*see Haller*; *Perez v Board of Educ. of City of New York*, 271 AD2d 251 [2000]).

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

ENTERED: DECEMBER 9, 2008



CLERK

Tom, J.P., Gonzalez, Nardelli, Moskowitz, Renwick, JJ.

4777N Fred Baron, Index 601066/07
Plaintiff-Respondent,

-against-

Rocketboom, LLC,
Defendant-Respondent.
- - - - -
Amanda Congdon,
Nonparty Appellant.

Hughes Hubbard & Reed LLP, New York (Russell W. Jacobs of counsel), for appellant.

Stephen Einstein & Associates, P.C., New York (Stephen Einstein of counsel), for Fred Baron, respondent.

Kenneth J. Glassman, New York, for Rocketboom, LLC, respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 20, 2007, which denied the nonparty appellant's motion for leave to intervene as a party defendant and to add Andrew Baron as a necessary party, or in the alternative, to dismiss the action for failure to join a necessary party, unanimously affirmed, without costs.

Plaintiff seeks repayment on a loan. Appellant, who had a 49% membership interest in defendant, submitted a proposed intervenor's answer with a cross claim for declaratory relief, an accounting, and damages for breach of fiduciary duty and breach of contract. She alleged that the loan was improperly entered into between plaintiff and his son (Andrew Baron, who held a 51%

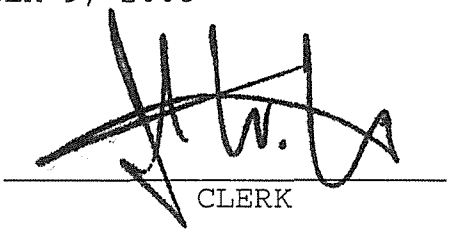
interest in defendant) without her knowledge or consent. Appellant was properly barred from intervening in this matter (*see* CPLR 1012[a]). To allow otherwise would override the restriction in Limited Liability Company Law § 610 that prohibits a member of a limited liability company from entering an action against the company except where the object is to enforce the member's right against the company. Here, appellant essentially argues that she fits within the § 610 exception insofar as she seeks to preserve the value of her equity interest in the company, which includes the company's assets. However, apart from a claimed individual right to an "equity interest" in the company, appellant has not demonstrated her individual right to any of the company's assets. Her alleged equity interest cannot be equated to a "right" to the company's assets, except upon dissolution of the company. Absent a derivative action on the company's behalf (*see e.g. Tzolis v Wolff*, 10 NY3d 100 [2008]), appellant is barred by § 610 from intervening in an effort to block enforcement of the company's obligation to repay the loan to the lender.

That branch of appellant's motion seeking joinder of the majority member as a necessary party to the action was properly denied absent evidence showing that the exception in § 610 would apply to him. Furthermore, appellant has not shown that complete

relief cannot be afforded to plaintiff without his son's joinder as a party.

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

ENTERED: DECEMBER 9, 2008



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, J.P.
John T. Buckley
Karla Moskowitz
Dianne T. Renwick
Leland G. DeGrasse, JJ.

4054
Ind. 5263/05

The People of the State of New York,
Respondent,

-against-

Glenn Wood,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 25, 2006, convicting him, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him as a second felony offender.

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

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

GONZALEZ, J.P.

In order to convict a defendant of criminal possession of a weapon in the third degree for unlawfully possessing a switchblade knife that was disguised as a cigarette lighter (Penal Law §§ 265.02[1], 265.01[1]), must the prosecution prove that the defendant knew that he or she possessed a switchblade knife or at least that the object possessed functioned as a weapon? Or, as the People here argue, is it sufficient to prove that the defendant knew he or she possessed an object that met the statutory definition of a switchblade? Although the statute includes no express element of mental culpability and the offense has often been referred to as a crime of "strict liability," existing constitutional, statutory and case law requirements mandate that the prosecution prove that defendant knew that the object he possessed actually functioned as a weapon. Because the trial court in this case refused to adequately charge the jury on this element of knowing possession, defendant's conviction must be reversed and a new trial ordered.

The facts underlying defendant's conviction are briefly stated. Defendant and an accomplice were arrested for the commission of a robbery. During a search of defendant's person, the police recovered a combination switchblade knife and

cigarette lighter. After defendant and his accomplice were tried and acquitted of the robbery charge, defendant was tried for criminal possession of a weapon in the third degree for unlawfully possessing the switchblade knife.

At the close of the prosecution's case, defendant moved for a trial order of dismissal on the ground that the People failed to introduce any evidence that he knowingly possessed a switchblade, because there was no evidence that he knew the object's character as a weapon. The court reserved decision on the motion. During the subsequent charge conference, defense counsel requested that the jury be instructed that, in order to convict, it must find that defendant knew the object he possessed had the characteristics of a weapon and was not merely a lighter. The court denied the request to charge, stating that Penal Law § 265.01(1) was a strict liability statute, listing the switchblade knife as a "per se weapon," citing *People v Davis* (112 Misc 2d 138 [Crim Ct, Bronx County 1981] [Friedmann, J.]).

In his summation, defense counsel argued to the jury that there was no evidence that defendant used, or intended to use, the object as a knife. The prosecutor argued that the evidence showed that defendant knowingly possessed a switchblade, and, more specifically, that defendant knew that the object was a

knife as well as a lighter. After summations, the trial court informed the parties that notwithstanding the prosecutor's argument that defendant's possession was knowing, it intended to charge the jury that there was "no knowledge requirement." In fact, the court charged the jury that the crime had two elements: 1) that the weapon was possessed by defendant, and 2) that it was in fact a switchblade. With respect to defendant's knowledge, the court instructed:

> "I also said that there are some things that by its nature do not require any mental element. One of them is something called a switchblade. The elements that you have to decide are: Did he have it? Is it a switchblade? Each of those things has to be proven beyond a reasonable doubt. Of course he had to know that he had the item but there is no requirement that he knew its precise nature."

Defense counsel objected to the court's charge, and further objected to the court's comparison of the switchblade/lighter to a cane sword, another per se weapon prohibited by Penal Law § 265.01(1). Notably, the prosecutor also asked the court to clarify its charge by adding the requirement of "knowing possession," to which the court responded, "C.J.I. is not Court of Appeals."[1] The trial court ultimately overruled both

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[1]The model jury charge drafted by the Committee on Criminal Jury Instructions for Penal Law § 265.01(1) provides that a person is guilty of violating this statute when "that person

objections, and defendant was found guilty of third-degree weapon possession.

On appeal, defendant argues that the court's refusal to charge that Penal Law § 265.01(1) requires proof that he knew the object he possessed was a weapon, and not simply a lighter, deprived him of due process of law. We agree.

Penal Law § 265.01(1) provides that "a person is guilty of criminal possession of a weapon in the fourth degree when ... [h]e possesses ... [a] ... switchblade knife ..." The charge is elevated to third-degree possession where, as here, the defendant "has been previously convicted of any crime" (Penal Law § 265.02[1]). Penal Law § 265.00(4) defines switchblade knife as "any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife."

The parties disagree as to whether a defendant's knowledge that the object possessed was a weapon is an element of the

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knowingly possesses any ... switchblade knife" (emphasis added). The model charge further instructs that "(a) person knowingly possesses [a switchblade knife] when that person is aware that he or she is in possession of such [switchblade knife]" (CJI 2d NY Penal Law § 265.01[1]). A footnote to this model charge indicates that the "knowingly" element was added "to comport with statutory law (Penal Law § 15.05[2]) and with case law" (CJI 2d [NY] Penal Law § 265.01[1] n 1), citing *People v Ford*, 66 NY2d 428, 440 [1985]; *People v Marino*, 212 AD2d 735, 736 [1995]; *People v Cohen*, 57 AD2d 790 [1977]).

crime that must be charged. The inquiry is complicated by the fact that this switchblade knife was disguised as a cigarette lighter. Defendant concedes that the statute does not expressly require proof of knowledge that a weapon was possessed. Nevertheless, he contends that controlling case law and Penal Law article 15 together require that the prosecution prove that the defendant "knowingly" and "voluntarily" possessed a weapon, and that such weapon met the statutory definition of a switchblade.

The prosecution counters that the Legislature intentionally omitted any mental culpability requirement from Penal Law § 265.01(1), rendering the possession of any of the "per se weapons" enumerated in this subdivision a strict liability offense. It notes that, unlike other subdivisions of Penal Law § 265.01, which include express mental culpability elements such as "knowingly" or "with intent to use the same unlawfully against another" (*see* Penal Law § 265.01[2], [3], [7], [8]), subdivision 1 contains no mens rea element. This disparate treatment, the prosecution contends, is compelling evidence that no mental culpability element exists in Penal Law § 265.01(1).

We find that under current law, in order to convict a

defendant of criminal possession of a weapon under Penal Law § 265.01(1), the jury must find that the defendant's possession of the weapon is both knowing and voluntary (*see People v Persce*, 204 NY 397, 402 [1912]; *see* also *People v Saunders*, 85 NY2d 339 [1995]; *People v Ford*, 66 NY2d 428, 440 [1985]; Penal Law §§ 15.10, 15.00[2]; CJI 2d [NY] Penal Law § 265.01[1]), and the jury must be adequately instructed on these elements where appropriate in a particular case.

The source of the voluntary possession requirement is article 15 of the Penal Law, which sets out the minimum requirements for criminal liability and guidelines for determining whether an offense includes an element of mental culpability. Penal Law § 15.10 provides, in relevant part, that "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or [] omission ... [and] [i]f such conduct is all that is required for commission of a particular offense ... such offense is one of 'strict liability.'" However, even with respect to a strict liability offense, a voluntary act also includes "the possession of property *if the actor was aware of his physical possession or control* thereof for a sufficient period to have been able to terminate it" (Penal Law § 15.00[2] [emphasis

added]). Thus, although Penal Law § 265.01(1) includes no express element of mental culpability for possession of the enumerated weapons, article 15 nevertheless requires that a defendant be aware of his physical possession of one of the prohibited objects before he may be convicted.[2]

Subdivision 2 of Penal Law § 15.15 also makes it clear that the absence of an express mens rea provision in a particular statute does not necessarily mean that none exists. Subdivision 2 states:

> "Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense ... if the proscribed conduct necessarily involves such culpable mental state. A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability."

A review of the legislative history of Penal Law § 265.01(1) and its predecessor statute (former Penal Law § 1897) does not

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[2]The use of the term "strict liability" is really a misnomer, at least with respect to weapon possession offenses, since Penal Law article 15 and many cases clearly require an awareness of possession of the prohibited object (*see* Penal Law § 15.00[2]; *see also Staples v United States*, 511 US 600, 607 n 3 ["the term 'strict liability' is really a misnomer ... [as] we have avoided construing criminal statutes to impose a rigorous form of strict liability"]). As it must, the prosecution in this case concedes the voluntariness requirement in Penal Law § 15.00(2), but it argues that no additional mental culpability element may be implied into the statute.

reveal a clear legislative intent to impose strict liability. To be sure, the exclusion of any mens rea element from subdivision 1 of section 265.01, despite its presence in other subdivisions, supports the People's argument that subdivision 1 imposes strict liability. In addition, there are several judicial decisions that refer to this particular statute as one defining an offense of "strict liability" (*see e.g. People v Saunders*, 85 NY2d at 342; *People v Simon*, 148 Misc 2d 845, 847 [Crim Ct, Bronx County 1990]; *People v Davis*, 112 Misc 2d at 139; *see also People v Messado*, 49 AD2d 560 [1975]).

Nevertheless, the prosecution's argument in support of a strict liability reading of Penal Law § 265.01(1) is substantially weakened by the historical origins of the statute and the decades-old case law interpreting it. Regarding the statute's origins, the author of McKinney's Practice Commentary for Penal Law article 265 notes that, while some of the statutes criminalizing possession of a weapon expressly require a "knowing" culpable mental state, others are silent on the subject (*see* Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law Article 265, Firearms and Other Dangerous Weapons, at 85). The author states that the different treatment

stems, at least in part, from the fact that all the former Penal Law weapon possession statutes, which, with rare exceptions, did not include a culpable mental state, were carried verbatim into the present weapon possession Penal Law statutes, while most of the weapon possession statutes added to the present Penal Law have incorporated the culpable mental state of "knowingly" (*id.*). Accordingly, in this commentator's view, the absence of culpable mental states from some subdivisions of § 265.01 but not others appears to be the product of drafting history, not legislative design.

More importantly, even assuming that the legislative history of § 265.01(1) supported a reading of strict liability, New York case law interpreting this weapon possession statute for the last 100 years has required that possession of a weapon be both knowing and voluntary. For example, in *People v Persce*, which involved a prosecution under former Penal Law § 1897 for "carry[ing], or possess[ing] any instrument or weapon ... known as a 'slungshot'" (204 NY at 400), the Court of Appeals upheld the authority of the Legislature, in the exercise of its police power, to prohibit the mere possession of a weapon without evidence of criminal intent to use the same. In doing so, however, the Court stated an important caveat, namely, that the

possession be a "knowing and voluntary one" (*id.* at 402). Similarly, in *People v Visarities* (220 App Div 657, 658 [1927]), which involved a prosecution for possession of a "bludgeon" under § 1897, this Court held that "[p]roof of intent to use is not an ingredient of the crime charged against the defendant herein. Mere possession of the prohibited instrument, known and voluntary, constitutes the offense."

This rule requiring knowing and voluntary possession has become firmly entrenched in this State's jurisprudence (*see People v Saunders*, 85 NY2d at 341-342 ["the corpus delicti of weapons possession under Penal Law § 265.01[1] is the voluntary, aware act of the possession of a weapon"]; *People v Ford*, 66 NY2d at 440 ["Possession third requires only that defendant's possession be knowing"]; *People v Cohen*, 57 AD2d at 791 [court erred in failing to instruct jury that in order to convict they must find "knowing possession"]; *see also* CJI 2d [NY] Penal Law § 265.01[1] n 1), and provides compelling evidence that the Legislature did not intend Penal Law § 265.01(1) to impose strict liability. Indeed, the *Persce* and *Visarities* holdings have been on the books for almost 100 years, and the Legislature has never seen fit to alter the statutory language or otherwise attempt to eliminate the requirement of knowing possession, although it has

enacted several other amendments to the statute. Under our principles of statutory construction, the Legislature is presumed to be familiar with existing decisional law, and, in this case, its failure to alter the judicially created requirement of "knowing possession" for 96 years is strong evidence that it has come to accept "knowing possession" as an element of the offense (*see People v Robinson*, 95 NY2d 179, 184 [2000]; *Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]; *Jiggets v Dowling*, 21 AD3d 178, 184 [2005], *lv dismissed* 6 NY3d 807 [2006]; *see also* McKinney's Cons Laws of NY, Book 1, Statutes § 191, comment ["The Legislature will be assumed to have known of existing statutes and judicial decisions in enacting amendatory legislation"]).

Having established that possession must be knowing and voluntary, however, does not end the matter. Still remaining is the question of what degree of knowledge the defendant must have in order to be convicted under § 265.01(1). Must the defendant know that he or she possesses a switchblade knife, or at least that the object possessed is a weapon, or is it sufficient that he or she knowingly possesses any object that meets the statutory definition of a switchblade? The Court of Appeals has not spoken directly to this issue (*see* Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law Article 265, at 86

["There are issues not yet settled by the Court of Appeals as to what, if anything, besides possession, the possessor must be aware of"]).

Some trial and appellate decisions in New York have held that in order to satisfy the element of knowing possession under Penal Law § 265.01(1), the prosecution must prove that the defendant knew he possessed a knife, or firearm, or some other weapon, but not that he knew the weapon met the statutory definition of the prohibited object (*see People v Berrier*, 223 AD2d 456 [1996], *lv denied* 88 NY2d 876 [1996] [court correctly charged that prosecution had to prove that defendant knew he had a knife in his possession, not that he knew it was specifically a gravity knife]; *People v Voltaire*, 18 Misc 3d 408, 411 [Crim Ct, Kings County 1988] [same]; *see also People v Velasquez*, 139 Misc 2d 822, 823 [Sup Ct, NY County 1988] ["New York courts and those in other jurisdictions ... have generally declined to extend the knowledge requirement to the specific characteristics or nature of the weapon"]).

While these authorities certainly suggest that a defendant's knowledge of his or her possession of a weapon, any weapon, is the minimum requirement to satisfy due process, they are also factually distinguishable from this case because they involved

weapons that were readily identifiable as such. For example, both *Berrier* and *Voltaire* involved gravity knives that presumably were readily identifiable as knife-like weapons. Thus, while this Court in *Berrier* (223 AD2d at 457) stated that "the prosecution had to prove that defendant knew he had a knife in his possession, not that he knew it was specifically a gravity knife," it is unclear, in that context, what the prosecution was required to prove. Since the gravity knife in that case was readily identifiable as a knife, the *Berrier* Court could have meant that the prosecution merely had to prove that he knew he had an object in his possession (that obviously was a knife), not that he had to know its character as a weapon. In *Berrier*, proof of possession of the object necessarily included proof of knowledge of the nature of the object. Here, the situation is different, because proof of knowledge of possession of the object (a switchblade disguised as a cigarette lighter), is not the equivalent of proof of knowledge of the object's character as a weapon. *Berrier*, therefore, does not definitively answer the question of what degree of knowledge is required in the case of a disguised weapon.

The only reported case addressing the knowing possession requirement in the context of a disguised per se weapon is *People v Small* (157 Misc 2d 673 [Sup Ct, NY County 1993]). In *Small*,

the defendant was prosecuted for possessing an electronic stun gun in violation of Penal Law §§ 265.01(1) and 265.02(1). The defendant was alleged to have broken into a car and stolen its contents, including the alleged stun gun, which he testified he believed was a radar detector. The prosecutor instructed the grand jury that it was not required to find that the defendant knew he possessed a stun gun, but only that he knew he possessed an object that was in fact a stun gun. The defendant moved to dismiss the indictment as defective based on this instruction.

In granting the motion to dismiss, the Trial Justice reviewed both the legislative history of § 265.01(1) and the *Persce* and *Visarities* decisions, and concluded that "our courts, in effect, do read a mens rea requirement into the possession of weapon statutes, which requires the prosecution to prove that the possession is both knowing and voluntary (*Small*, 157 Misc 2d at 676-677). In addition, the court examined the history of imposing strict liability for public welfare offenses and determined that a traditional prerequisite for such liability is that the prohibited object be readily identifiable as an inherently dangerous weapon or article (*id.* at 679 ["the power to prohibit the act of possession depends upon the identity of the

thing possessed as an inherently dangerous object not readily adapted to innocent use"]). Ultimately, the *Small* court held that, because the alleged stun gun was not readily identifiable as a weapon, strict liability was inappropriate and the court was required to read into the statute a knowledge requirement in order to preserve its constitutionality (*id.* at 681).

We are convinced that Justice Rothwax's analysis in *Small* is both correct and applicable to this case. It is now beyond question that the Legislature may dispense with a mental culpability requirement with respect to certain public welfare offenses (*see Persce*, 204 NY at 401-402; *Visarities*, 220 App Div at 658-659; *see also People v Munoz*, 9 NY2d 51, 58-60 [1961]; *Staples v United States*, 511 US at 606-607; *United States v Balint*, 258 US 250, 252-254 [1922]). For a weapon possession offense to qualify, however, the object possessed must be one that is inherently dangerous and, therefore, "not likely to be found on innocent persons" (*Munoz*, 9 NY2d at 59; *Staples*, 511 US at 607 ["our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items"]).

In addition, the cases have generally required that the inherently dangerous nature of the prohibited object be readily apparent, so as to put the object's possessor on clear notice

that the object is potentially subject to government regulation or prohibition (*see Persce*, 204 NY at 402 [proper exercise of police power to prohibit mere possession of certain weapons based on their "well-understood character ... of dangerous and foul weapons seldom used for justifiable purposes"]; *Visarities*, 220 App Div at 658 ["To base a conviction on mere possession it must clearly appear that the thing possessed answers the description of one of the prohibited instruments or weapons"]). Thus, the underlying rationale for imposing strict liability for public welfare offenses is that the element of mental culpability may be eliminated only because the objects that are the subject of the legislation are so obviously and inherently dangerous that anyone who possesses them should bear the burden of determining, at their own peril, whether they are prohibited by law (*Small*, 157 Misc 2d at 679-680; *Staples*, 511 US at 607).[3]

As should be plain, the rationale for imposing strict liability for public welfare offenses is inapplicable to the

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[3]The Supreme Court cases, such as *Staples*, also note two additional characteristics common to public welfare offenses: a relatively light penalty and a potential for difficulty in proving guilty knowledge under the statute (*see Staples*, 511 US at 616-617; *Morissette v United States*, 342 US 246, 253-256 [1952]; *Balint*, 258 US at 251-252). While both of these factors exist here, we still cannot find Penal Law § 265.01(1) to be a public welfare offense imposing strict liability in its most rigorous form, at least in this circumstance, because a disguised switchblade knife is not a readily identifiable dangerous weapon.

instant case. Because the object possessed by defendant appeared externally to be a cigarette lighter (notwithstanding that it also functioned as a switchblade knife), it was not the type of object that is readily ascertainable as inherently dangerous. Given the ambiguous nature of the object possessed, notice that it was potentially subject to regulation cannot be imputed to defendant and, accordingly, the predicate for strict liability is absent.

Where the nature of the object possessed fails to provide notice to the possessor that the object may be subject to government regulation or prohibition, it would violate principles of due process to allow a conviction without proof of mental culpability (*Small*, 157 Misc 2d at 679 ["In order to comport with basic principles of due process of law, proof of some awareness of wrongdoing is ordinarily required before criminal sanctions may be imposed"]). As the Supreme Court concluded in *Staples* (511 US at 614), "the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state - ignorance of the characteristics of the weapons in their possession - makes their actions entirely innocent."[4]

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[4]*Staples* goes one step further than *Small* and *Berrier* by requiring that the defendant know that the rifle in his

In this case, unless the jury was instructed that the defendant had to "knowingly" possess a weapon, specifically a knife, it could convict defendant of possessing what he believed was a cigarette lighter - totally innocent conduct. In order to satisfy the requirements of due process, we agree with the *Small* court and the model jury charge that an element of knowing possession must be read into the statute (*see Small*, 157 Misc 2d

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possession was capable of firing automatically, thus rendering it a "firearm" within the meaning of the National Firearms Act (26 USC §§ 5801-5872) (511 US at 602, 615). The Court reasoned that in light of the "long tradition of widespread lawful gun ownership by private individuals in this country" (*id.* at 610-611), the mere possession of a rifle by a person who may not know of its automatic firing capability would not put such person on notice of potential governmental regulation (*id.*). The merit of this conclusion aside, we find this case distinguishable to the extent that defendant's possession of a cigarette lighter that he knows also functions as a weapon would be sufficient to put him on notice of the likelihood of government regulation, without specific knowledge that it constitutes a switchblade under the statute. Many federal and state cases have similarly distinguished *Staples* on this ground (*see e.g. United States v Erhart*, 415 F3d 965, 969 [8th Cir 2005], *cert denied* 546 US 1156 [2006] [where character of weapon was "quasi-suspect," such as sawed-off shotgun, government was not required to prove possessor's knowledge of specific characteristics of weapon that brought it within scope of statute]; *United States v Weintraub*, 273 F3d 139, 149-151 [2d Cir 2001] [government only required to prove defendant's knowledge that substance involved was asbestos, not that asbestos was of a type sufficient to trigger statutory work-practice standard]; *State v Jordan*, 89 Ohio St 3d 488, 733 NE2d 601 [2000] [state not required to prove defendant's knowledge that shotgun had barrel less than 18 inches]; *Moore v United States*, 927 A2d 1040, 1055 [DC 2007] [government not required to prove that defendant knew firing capability of machine gun]).

at 681; *see also People v Finkelstein*, 9 NY2d 342, 344-345 [1961] [reading a requirement of scienter into statute prohibiting possession of obscene material for sale]; *Carter v United* States, 530 US 255, 269 [2000] ["the presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct'"]).

In this particular case, the jury should have been instructed that the People were required to prove beyond a reasonable doubt that defendant knowingly possessed a weapon, to wit, a knife, and that such weapon met the statutory definition of a switchblade knife.[5] The failure to properly instruct the jury on this element of the crime charged was reversible error, and requires a new trial (*see People v Haddock*, 48 AD3d 969, 970-971 [2008] [due process considerations required that court

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[5]In the case of an *undisguised* switchblade knife, the court may instead use the model jury instruction that defendant "knowingly possesses [a] ... switchblade knife" (CJI 2d [NY] Penal Law 265.01[1]), since, in that circumstance, the knowing possession of the object would necessarily include knowledge of its character as a knife. If, after receiving this instruction, the jury questioned whether the defendant was required to know that the knife actually "has a blade which opens automatically by hand pressure applied to a button, lever, spring or other device in the handle of the knife" (Penal Law § 265.00[4]), the court should answer in the negative, and provide a supplemental instruction that, although that specific knowledge is not required (*Berrier*, 223 AD2d at 456), the defendant did have to know that he possessed a weapon.

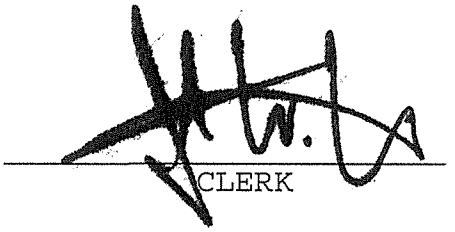
instruct jury that defendant "knowingly" violated the registration requirements of the Sexual Offender Registration Act, notwithstanding absence of mental culpability requirement in statute]).

Accordingly, the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 25, 2006, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, should be reversed, on the law, and the matter remanded for a new trial in accordance herewith.

All concur.

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

ENTERED: DECEMBER 9, 2008



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