SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 5, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1319 Luis L. Munoz, Index 108147/06
Plaintiff-Appellant,

-against-

Uptown Paradise T.P. LLC,
Defendant-Respondent.

Trolman, Glaser & Lichtman, P.C., New York (Michael Altman of counsel), for appellant.

Rawle & Henderson, LLP, New York (James R. Callan of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered August 8, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated, and the matter remanded for further proceedings.

Plaintiff was injured in a fall when he allegedly slipped on a wet spot on the floor of defendant's flower shop. Plaintiff, who spent 15 minutes in the store, testified that he observed defendant's employees remove flowers from the refrigerator units, causing water to drip on the floor. The water pattern he observed was not limited to the area near the refrigerator units

but extended near the entranceway. Defendant's principal conceded that employees would shake the flowers to remove excess water, albeit inside the refrigerator, and that sometimes spills occurred. In addition, the employees were instructed to mop up any spills right away. The deposition testimony of both plaintiff and defendant's principal thus permits the inference that defendant's employees created the wet condition that caused plaintiff's accident (*see Kesselman v Lever House Rest.*, 29 AD3d 302 [2006]). There are also triable issues of fact as to whether defendant had sufficient notice to remedy the hazardous condition, given that the water was on the floor for at least 15 minutes and several employees were working in the area of the spill.

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

ENTERED: JANUARY 5, 2010

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1631 Alberto Osorio, Jr., etc., et al., Index 6924/03
Plaintiffs-Respondents,

-against-

Thomas Balsley Associates,
Defendant-Appellant,

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

Gogick, Byrne & O'Neill, LLP, New York (Elaine C. Gangel of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 22, 2008, which denied defendant-appellant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as to appellant. The Clerk is directed to enter judgment accordingly.

The 12-year-old plaintiff was injured when, while playing tag with his friends, he climbed onto a "ballet bar" or "stretching bar" in the adult fitness area of a municipally-owned park, and fell over an adjacent perimeter fence, dropping approximately nine feet to the sidewalk outside the park. Plaintiff sued two municipal defendants, who are not parties to this appeal, and Thomas Balsley Associates, the landscape architectural firm which designed the playground.

The floor of the fitness area underneath the stretching bar is rubberized, and is located five feet higher than the outside sidewalk. Separating the fitness area from the sidewalk is a five-foot retaining wall, and a four-foot wrought iron fence on top of a two-inch-high concrete curb, which itself rests on the retaining wall. The perimeter fence is located 18 inches from the stretching bar.

The infant plaintiff testified at a hearing pursuant to General Municipal Law § 50-h that he and four of his friends were playing the game of tag, and that he climbed onto the bar. After he climbed onto the bar, he fell off, and his chest came into contact with the fence next to it. He then fell over the fence.

Balsley moved for summary judgment dismissing the complaint on the theory that plaintiff had assumed the risk of potential consequences of his play activity, and actually created the risk of injury by climbing onto the bar. In opposition, plaintiff argued that the doctrine of assumption of the risk does not bar recovery in its entirety, but merely permits a jury to reduce damages after apportionment.

The court denied the motion, finding that an issue of fact existed as to whether the infant plaintiff engaged in the game of tag in the location with the full understanding of the harm; i.e., whether he knew that if he played on the stretching bar he was putting himself in danger, because, inter alia, there were no

warning signs or fences restricting children from the adult fitness area.

We reverse. The threshold issue is not whether plaintiff assumed a dangerous risk, but whether he, in fact, created one. In the absence of any indication that there had been prior incidents involving the stretching bar's improper use, the fact that it could be used for a purpose other than its intended use did not render its availability foreseeably dangerous (*Barretto v City of New York*, 229 AD2d 214, 220 [1997], *lv denied* 90 NY2d 805 [1997]). The circumstances presented here establish that, regardless of the location of the perimeter fence, the sole proximate cause of the incident was plaintiff's voluntary decision to use the stretching bar for climbing (*see Ascher v Scarsdale School Dist.*, 267 AD2d 339 [1999]; *Matter of Banks v City School Dist.*, 257 AD2d 723 [1999]). Since he has failed to prove that any consequent risk of his intentional misuse of the bar was concealed, Balsley's motion should have been granted.

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

ENTERED: JANUARY 5, 2010

DEPUTY CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

653 Yun Tung Chow, et al., Index 7851/04
Plaintiffs-Appellants, 84556/05
84906/05

-against-

Reckitt & Colman, Inc., et al.,
Defendants-Respondents,

55th Realty Inc.,
Defendant.

[And Other Actions]

Ronemus & Vilensky, New York (Lisa M. Comeau of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Christopher Kendric of counsel), for Reckitt & Colman, Inc. and Reckitt & Benckiser, Inc., respondents.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for Malco Products, Inc., respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 14, 2008, which, to the extent appealed from, as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Plaintiff Yun Tung Chow sustained an eye injury while using defendants' product, crystalline sodium hydroxide, packaged as a drain cleaner called "Lewis Red Devil Lye." When injured, Chow was attempting to use the lye to unclog a floor drain in the kitchen of the restaurant where he worked. A warning printed on the label of the bottle stated that the lye should be used only as directed. The warning also advised users to "[k]eep face away

from can and drain at all times" and that "[m]isuse may result in splash back and serious injury." The label's directions called for the insertion of only one tablespoon of lye directly into a drain. Despite the warning and directions, Chow mixed three spoonfuls of lye with three cups of water in an aluminum can. Without using eye protection, another precaution directed by the label, Chow bent over and poured the mixture into the drain. At that point, caustic liquid splashed back into Chow's face, causing the injury. The relevant negligence and strict liability causes of action are based on theories of inadequate warning and design defect. The court properly dismissed the inadequate warning claims. Chow testified that he made no attempt to read or to obtain assistance in reading the label; accordingly, any purported inadequacies in the product's labeling were not a substantial factor in bringing about the injury (*see Perez v Radar Realty*, 34 AD3d 305, 306 [2006]; *Sosna v American Home Prods.*, 298 AD2d 158 [2002]; *Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1998]).[1]

Plaintiffs base their design defect claim upon lye's propensity to cause splashback. "[A] defectively designed product is one which, at the time it leaves the seller's hands,

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[1]Defendants also argue that the inadequate warning claims are precluded by the Federal Hazardous Substances Act (FHSA) (15 USCA § 1261 *et seq.* We decline to consider this argument inasmuch as it is made for the first time on appeal (*see Omansky v Whitacre*, 55 AD3d 373, 374 [2008]).

is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983] [citation and internal quotation marks omitted]).

On a summary judgment motion in a products liability case, "if a defendant comes forward with any evidence that the accident was not necessarily attributable to a defect, the plaintiff must then produce direct evidence of a defect" (*Sideris v Simon A. Rented Servs.*, 254 AD2d 408, 409 [1998] [citation and internal quotation marks omitted]). In a design defect case, the evidence a plaintiff is required to produce must establish "that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner" (*Voss* at 108). Defendants have met their burden by making a prima facie showing that Chow's failure to heed the product warning was the sole proximate cause of the accident (*see e.g. Guadalupe,* 253 AD2d at 378; *Sabbatino v Rosin & Sons Hardware & Paint,* 253 AD2d 417 [1998], *lv denied* 93 NY2d 817 [1999]).

To meet their own burden, plaintiffs rely upon the affidavit of Meyer Rosen, a chemist and chemical engineer, who opines that Red Devil Lye is unreasonably dangerous and has known propensity

to cause splashback. Rosen next posits that nothing Chow did caused his injury. This aspect of Rosen's opinion lacks probative value because it omits critical discussion of Chow's use of more than the recommended one tablespoon of lye as well as his failure to keep his face away from the drain per the label's instructions. The omission is significant because a manufacturer need not incorporate safety features into its product so as to guarantee that no harm will come to every user no matter how careless or reckless (*see Robinson v Reed-Prentice Div. of Package Mach. Co.*, 49 NY2d 471, 481 [1980] [citations omitted]). Rosen also opines that a safer alternative to the product can be created by diluting it to a three to five percent sodium hydroxide composition. How he arrived at these percentages is unexplained. Also, without citing a basis for his opinion, Rosen simply concludes that his recommended dilution of the product would provide drain cleaning power strong enough to open clogged drains although it would take "somewhat longer to do the job." Similarly unsupported is Rosen's postulation that bottling lye in a water-based solution would not change its chemical composition or render it ineffective. In considering the feasibility of a safer alternative design, "it must be recognized that two differently designed products that . . . are generally similar in function, may nonetheless yield results so different in quality as to make it impossible to characterize the design of the safer

product as a feasible alternative to the design of the more hazardous product" (*see Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80, 84 [2008], *affd sub nom. Adamo v Brown & Williamson Tobacco Corp.*, 11 NY3d 545 [2008], *cert denied* __ US __, 130 S Ct 197 [2009]). Rosen's affidavit is insufficient to raise a triable issue of fact because it does not set forth the foundation for his conclusion that his suggested alternatives are feasible (*cf. David v County of Suffolk*, 1 NY3d 525 [2003]). As such, the affidavit falls short of explaining how the product can feasibly be made safer, as required by *Wegenroth v Formula Equip. Leasing, Inc.* (11 AD3d 677, 680 [2004]), a case cited by the dissent.

Rosen's choice of source materials is also dubious. Rosen cites a 1970 proposal by the Food and Drug Administration for an amendment of the FHSA so as to have liquid drain cleaners consisting of 10% or more of sodium hydroxide listed as banned hazardous substances. By its own terms, however, the proposal was not aimed at preventing splashback. Its purpose was to curb "serious injuries and some deaths following accidental ingestion" of liquid drain cleaners by children under five years of age. Rosen also cites a 1989 letter to the Consumer Product Safety Commission from The Association of Trial Lawyers of America. It should go without saying that in the field of chemistry, a letter from a bar association would not fall within the "professional

reliability" exception to the rule that an expert's opinion must be based upon facts in the record or personally known to the expert (*see e.g. Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984]). We have considered plaintiffs' remaining contentions and find them without merit.

All concur except Moskowitz and Freedman, JJ. who dissent in a memorandum by Freedman, J. as follows:

FREEDMAN, J. (dissenting)

I would reverse and deny summary judgment to defendants because plaintiffs have raised an issue of fact whether defendants' drain cleaning product, Lewis Red Devil Lye, was defectively designed.

Plaintiff Yun Tung Chow was seriously burned and blinded in one eye after Red Devil Lye splashed back onto his face while he was using it to clean a clogged floor drain at a restaurant where he was employed. Red Devil Lye was a powdered substance made of 100% sodium hydroxide, which is a powerful caustic agent capable of dissolving organic tissue by chemical action. Chow, who had immigrated to this country 11 years earlier and could not read English, testified that he had used Red Devil Lye numerous times before, but was unable to read the directions and warnings on its label, which instructed users to pour one tablespoon of Red Devil Lye directly into the clogged drain. Instead, since only about three spoonfuls of Red Devil Lye were left in the container, Chow put the remainder into an aluminum can, mixed in about three cups of water, and poured the mixture down the drain. When Chow bent over the drain to examine it, the contents spouted back onto his face and injured him.

I agree with the majority that the motion court properly dismissed plaintiffs' products liability claim based on the theory of inadequate warning. The Red Devil Lye container was

labeled "poison," bore a picture of a skull and crossbones, and warned users to wear eye protection when using the product. The label warned of the risk of splashback if Red Devil Lye was used improperly, and that physical contact with the product could cause burning or blindness. Since Chow testified that he did not read the label or ask another person to read it to him, any purported inadequacies in the product's labeling were not a substantial factor in bringing about the injury (*see Perez v Radar Realty*, 34 AD3d 305, 306 [2006]; *Sosna v American Home Prods.*, 298 AD2d 158 [2002]; *Guadalupe v Drackett Prods. Co.*, 253 AD2d 378 [1998]).

While defendants did not meet their burden of demonstrating that the labeling on the can complied with the Federal Hazardous Substances Act (15 USC § 1261 *et seq.*) so as to preclude a State law improper labeling claim (*see Guadalupe* at 378), additional labeling would not have prevented Chow's injury.

However, plaintiffs raised a triable issue of fact with respect to their strict products liability claim based on defective design, by introducing expert testimony that Red Devil Lye was too dangerous to be marketed for use by general consumers rather than professionals. To establish a prima facie case for a defective design claim, the plaintiff must show that the manufacturer marketed a product that was not "reasonably safe" because of its defective design, and that the defective design

was a substantial factor in causing injury (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107-109 [1983]). A defectively designed product is deemed not to be reasonably safe where a reasonable person, knowing at the time of manufacture about the defect, would conclude that the inherent risk of introducing the product into the stream of commerce outweighed its utility (*see id.* at 108). A plaintiff can proffer expert testimony to establish that a product was defectively designed (*see Warnke v Warner-Lambert Co.*, 21 AD3d 654, 656 [2005]). The risk-utility analysis may also involve a determination as to whether there is a feasible alternative design that would make the product safer. "Where . . . a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis" whether the product was reasonably safe (*Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680 [2004]).

Plaintiffs' expert Meyer R. Rosen, a chemical engineer and chemist, as well as a Fellow of both the American Institute of Chemists and the Royal Society of Chemistry, opined that Red Devil Lye was unreasonably dangerous and had a known propensity to react explosively with water within a clogged drain and cause splashbacks. He averred that pouring the mixture of Red Devil Lye and water down the drain caused a chemical reaction that

generated enough heat to boil the water and produce steam pressure, which rapidly expanded the caustic solution and other drain contents. Since the drain remained clogged, Rosen stated, the contents expanded "explosively" out of the drain onto Chow. He explained that ordinarily Mr. Chow would have seen bubbling in the aluminum container in which he mixed the lye with water, which would have alerted him to a potential danger, but this did not happen. Thus, Rosen concluded that it was the pressure from the steam pipe and not the failure to follow the specific directions concerning either the amount of the product used or direct insertion into the drain that caused the injury.

While Rosen mentions the two 1970 FDA proposals to ban such substances and the 1989 letter to the Consumer Product Safety Commission, he does not, as the majority suggests, rely upon them for his opinion. Rather he sets forth what appear to be a clear explanation for the chemical reaction that occurred and recommendations for plausible alternatives, some of which are similar to products on the market. To characterize the utility of the suggested alternatives as "unsupported" or "conclusory" is unsound, because such products either exist or may be easily manufactured.

Rosen acknowledged that Red Devil Lye was an effective drain cleaner, but added that "the risk far outweighs its utility," since "the chemical and toxicological properties of [sodium

hydroxide] make it among the most dangerous chemicals known." He further opined that defendants could have made a safer alternative by diluting the sodium hydroxide to a 3 to 5% lye solution, and that this solution "would still be strong enough to open clogged drains, albeit taking somewhat longer to do the job." As another alternative, Rosen suggested selling a premade lye and water solution, which "would not change the chemical and . . . would still be as effective."[1] He concluded that in his opinion, Red Devil Lye was too dangerous to be marketed for use by lay people.[2]

Defendants claim that the diluted sodium hydroxide products that plaintiffs' expert proposed as alternatives are not reasonably equivalent to Red Devil Lye because they would take longer to unclog drains. As support for their position,

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[1]As a final alternative, Rosen proposed that defendants sell Red Devil Lye, safety goggles, a face shield and rubber gloves packaged together as a single product. However, a product that included those safety items would cost so much more than Red Devil Lye alone that the two cannot be deemed functional equivalents.

[2] As further support for their claim, plaintiffs also offered a 1989 letter from the Association of Trial Lawyers of America to the United States Consumer Product Safety Commission stating that the Association knew of 21 instances in which the use of Red Devil Lye had caused serious injuries from splash backs, and that many safer drain cleaners were on the market. The letter requested that the Safety Commission remove Red Devil Lye from consumer markets and issue a recall.

defendants cite to *Felix v Akzo Nobel Coatings* (262 AD2d 447 [1999]), and *Adamo v Brown & Williamson Tobacco Corp.* (11 NY3d 545 [2008], *cert denied* __ US __, 130 S Ct 197 [2009]), in which proposed alternatives to a defective product were found not to be equivalents. Both cases are distinguishable. The product in question in *Felix* was a solvent-based, quick-drying lacquer floor sealer that was highly flammable.[3] The plaintiff argued that a safer, water-based lacquer sealer could have been substituted, but the Court held that the water-based sealer was a functionally different product from solvent-based lacquer because it took hours longer to dry, differed greatly in price, and produced results that did not match solvent-based lacquer in the appearance, hardness, and scratch-resistance of the finish (262 AD2d at 448-449). In this case, the functional difference between Red Devil Lye and the safer dilutions would be minimal. The dilutions would be as effective at accomplishing Red Devil Lye's essential purpose of unclogging drains, and would at most take somewhat longer to work.

In *Adamo*, the Court of Appeals held that "light" cigarettes are functionally different products from regular cigarettes containing higher levels of nicotine because it found that the function of cigarettes is to give pleasure to smokers, and that

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[3]This Court cited *Felix* with approval in *Perez v Radar Realty* (34 AD3d 305, 306 [2005]), which also involved a lacquer-based sealer.

light cigarettes are less satisfying to smokers than regular cigarettes. *Adamo* is similarly inapposite because dilutions would not impair Red Devil Lye's function of unclogging drains. Moreover, although cigarettes may cause harm over a long period of time, they do not present the immediate type of danger present here.

Accordingly, I would reinstate plaintiffs' claim sounding in strict products liability and let the finder of fact determine whether Red Devil Lye's utility outweighed its inherent danger.

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

ENTERED: JANUARY 5, 2010

DEPUTY CLERK

Mazzarelli, J.P., Sweeny, Catterson, Acosta, Abdus-Salaam, JJ.

1465-
1466-
1467N
1467NA Cindy Ocasio-Gary, etc., Index 6229/99
Plaintiff-Respondent, 86084/07

-against-

Lawrence Hospital, et al.,
Defendants-Appellants,

St. Barnabas Hospital, et al.,
Defendants.

[And a Third-Party Action]

- - - - - - -

Cindy Ocasio-Gary, etc.,
Plaintiff-Appellant,

-against-

St. Barnabas Hospital,
Defendant-Respondent,

Lawrence Hospital, et al.,
Defendants.

[And a Third-Party Action]

- - - - - - -

Cindy Ocasio-Gary, etc.,
Plaintiff-Respondent,

-against-

Lawrence Hospital, et al.,
Defendants,

Gary B. Orin,
Defendant-Appellant.

[And a Third-Party Action]

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for Lawrence Hospital, appellant.

Kanterman, O'Leary & Soscia, LLP, White Plains (Thomas J. Miller of counsel), for Leona D. Borchert, Nasir Rizvi, Brad Dworkin and Westchester County Health Care Corporation, appellants.

Pollack, Pollack, Isaac & DeCiccio, New York (Brian J. Isaac of counsel), for Cindy Ocasio-Gary, respondent/appellant/respondent.

Lewis Johs Avallone Aviles, LLP, Riverhead (Brian J. Greenwood of counsel), for Gary B. Orin, appellant.

Garbarini & Scher, P.C. New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 29, 2008, dismissing the complaint against defendant St. Barnabas Hospital, unanimously reversed, on the law, without costs, and the complaint reinstated. Appeal from order, same court and Justice, entered April 18, 2008, which granted defendant St. Barnabas Hospital's motion for summary judgment, unanimously dismissed, without costs, as subsumed in appeal from the judgment. Order, same court and Justice, entered October 16, 2008, which, to the extent appealed from, denied the motion by defendant Lawrence Hospital and renewal of a prior motion by third-party defendant Westchester County Medical Center on behalf of itself and defendants Burchart, Rizvi and Dworkin, for change of venue, and granted plaintiff's cross motion to retain venue in Bronx County, unanimously affirmed, without costs. Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered June 17, 2008, which, to the extent appealed from, denied defendant Orin's cross motion to vacate the note of issue and

certificate of readiness and to extend his time to serve a motion for summary judgment, unanimously affirmed, without costs.

The affirmation of St. Barnabas's medical expert fails to establish prima facie that the treatment of plaintiff's decedent in the emergency room of St. Barnabas Hospital comported with good and accepted practice. The record shows that the decedent was brought to the emergency room by ambulance with complaints of headache, nausea, palpitations and of having an anxiety attack that was not relieved by medications that had been previously prescribed by his private physicians. The expert opines that the decedent was appropriately evaluated and appeared to respond favorably and that the evaluation was well within the standard of care for emergency medicine. However, the expert does not specify in what way the decedent was evaluated and he does not elucidate the standard of care for emergency medicine other than to state that emergency room staff has the limited role of determining whether a patient has a life-threatening or serious illness. While the expert opines that the decedent did not require a urine test, blood test, CT-scan, MRI or x-ray, he does not explain "what defendant did and why" (*Wasserman v Carella*, 307 AD2d 225, 226 [2003]). This conclusory affidavit is

insufficient to establish St. Barnabas's entitlement to summary judgment *(Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Even had St. Barnabas met its initial burden, plaintiff's expert's submission raises triable issues of fact regarding the hospital's negligence (*see DaRonco v White Plains Hosp. Ctr.*, 215 AD2d 339 [1995]). The trial court should not have rejected the expert's opinion on the ground that the expert failed to expressly state that he or she possessed the requisite background and knowledge in emergency medicine to render an opinion. The expert, who is board certified in internal medicine, is qualified to render an opinion as to diagnosis and treatment with respect to the symptoms presented by the decedent. In contrast, the expert's affirmation in *Browder v New York City Health & Hosps. Corp.* (37 AD3d 375 [2007]), cited by the trial court, failed to indicate either the expert's specialty or that he or she possessed the requisite knowledge to furnish a reliable opinion.

Venue should be retained in Bronx County. The only ground for the motion to change venue was the dismissal of the complaint against St. Barnabas, and the complaint has been reinstated.

The motion to vacate plaintiff's note of issue, served more than 20 days after service of that note, was properly denied as untimely (*see* 22 NYCRR 202.21[e]), "no showing of special circumstances or adequate reason for the delay having been

offered" (*Arnold v New York City Hous. Auth.*, 282 AD2d 378 [2001]). Nor did the court err in finding that defendant Orin failed to demonstrate good cause for an extension of time in which to file his motion for summary judgment (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

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

ENTERED: JANUARY 5, 2010

DEPUTY CLERK

CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1918 The People of the State of New York, Ind. 6393/05
Respondent,

-against-

Samuel Tiggs,
Defendant-Appellant.

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

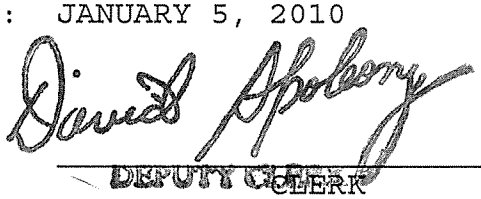
Robert M. Morgenthau, District Attorney, New York (Mary C. Farrington of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about November 7, 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.

ENTERED: JANUARY 5, 2010



DEPUTY CLERK

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

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1921 The People of the State of New York, Respondent, Ind. 3290/04

-against-

Roberto Marte, Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Darcel Clark, J.), rendered November 3, 2006, convicting defendant, after a jury trial, of attempted murder in the second degree and assault in the first degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion based on the prosecutor's summation. The challenged portions of the summation did not deprive defendant of a fair trial (*see generally People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Although the prosecutor erred by commenting that defendant knew he was guilty, the court struck that comment and subsequently delivered a thorough curative instruction, which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]), and which sufficed to prevent any prejudice. Likewise,

while the prosecutor should not have referred to defense counsel as a "male attorney" or stated a fact not in evidence, in each instance the court took suitable curative action and no further remedy was necessary. Rather than expressing the prosecutor's personal beliefs, the comments that defendant characterizes as vouching for witnesses generally constituted record-based arguments as to why the witnesses should be believed, made in proper response to defendant's attacks on the witnesses' credibility (*see People v Dais*, 47 AD3d 421, 422 [2008], *lv denied* 10 NY3d 809 [2008]; *People v Overlee*, 236 AD2d 133, 144 [1997], *lv denied* 91 NY2d 976 [1998]).

By cross-examining a detective about the absence of police documentation relating to this case, and by specifically eliciting the existence of a complaint report, defendant opened the door to the introduction by the People of a portion of that report giving the first name of the assailant. In any event, regardless of whether the court erred in receiving alleged hearsay evidence, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: JANUARY 5, 2010

DEPUTY CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1922 In re Christian G.,

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

Howard M. Simms, New York, for appellant.

Michel A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about January 8, 2009, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of criminal use of drug paraphernalia in the second degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. There was probable cause for appellant's arrest based on an officer's observations of behavior warranting a reasonable inference that appellant acted as a steerer and lookout in a drug transaction. We note that conduct of the type observed by the officer has been held to establish a legally sufficient case of

accessorial liability (*see e.g. People v Eduardo*, 11 NY3d 484, 493 [2008]), a higher standard than probable cause.

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

ENTERED: JANUARY 5, 2010

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1924 Avivith Oppenheim, et al., Index 602408/06
Plaintiffs-Appellants-Respondents,

-against-

Mojo-Stumer Associates Architects, P.C., etc., et al.,
Defendants-Respondents-Appellants,

Joseph Viscuso,
Defendant.

Braverman & Associates, P.C., New York (Jon Kolbrener of counsel), for appellants-respondents.

Zetlin & DeChiara, LLP, New York (Michael S. Zetlin and Jaimee L. Nardiello of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 23, 2009, which, to the extent appealed from, granted the Mojo-Stumer defendants' motion for spoliation sanctions but declined to strike the complaint, denied plaintiffs' cross motion for summary judgment to dismiss the counterclaim for wrongful termination of contract, and granted said defendants' motion for a protective order, unanimously modified, on the law, plaintiffs' expert's report precluded, but he is permitted to testify solely as a fact witness, the cross motion granted and the counterclaim for wrongful termination dismissed, and otherwise affirmed, without costs.

Plaintiffs spoliated evidence central to their claim that renovations on their apartment, designed by Mojo-Stumer and to be performed by defendant Viscuso's general contracting firm

(Vista), were not complete when they invited a new contractor to perform substantial additional work without first permitting defendants to verify the need for such additions, warranting a sanction (*see 430 Park Ave. Co. v Bank of Montreal*, 9 AD3d 320 [2004]). However, because defendants had extensive personal knowledge of the status of the job, and indeed had repeatedly certified completion of various stages of the work, they were still able to offer a meaningful defense (*id.*; *see also Kirschen v Marino*, 16 AD3d 555 [2005]). As such, the appropriate sanction was preclusion of plaintiffs' witness *as an expert*, but not as a fact witness.

The counterclaim for wrongful termination should have been dismissed in light of the individual defendants' convictions for bribery and tax evasion in connection with this renovation contract (*see Black v MTV Networks*, 172 AD2d 8 [1991], *lv dismissed* 79 NY2d 915 [1992] and *lv denied sub nom. Black v Viacom Intl.*, 80 NY2d 757 [1992]).

The court appropriately granted defendants' motion to treat discovery in this matter as confidential, which is standard in

commercial cases (*see Mann v Cooper Tire Co.*, 56 AD3d 363, 365 [2008]).

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

ENTERED: JANUARY 5, 2010

CLERK

DEPUTY CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1927 Gene Collins, et al., Index 115054/05
Plaintiffs-Respondents, 590790/07

-against-

Switzer Construction Group, Inc., et al.,
Defendants-Appellants,

Time, Inc., et al.,
Defendants-Respondents.

[And a Third-Party Action]

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellant.

Law Office of David P. Kownacki, P.C., New York (Andrew D. Leftt of counsel), for Collins respondents.

Newman Myers Kreines Gross Harris, P.C., New York (Charles W. Kreines of counsel), for Time Inc. and 135 West 50th Owner, LLC, respondents.

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered April 15, 2009, which, to the extent appealed from, denied defendant Switzer Construction Group Inc.'s motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, and granted the cross motion by defendants Time, Inc. and 135 West 50th Owner, LLC for leave to amend their answer to assert cross claims for contractual indemnification against Switzer and for summary judgment on said cross claims, unanimously affirmed, without costs.

Plaintiff, an electrician, was injured when, in the course of installing conduit sleeves, he stepped off a ladder and

slipped on debris scattered around the ladder. Industrial Code (12 NYCRR) § 23-1.7(e)(2) requires that areas of floors where persons work "be kept free from accumulations of . . . debris . . . insofar as may be consistent with the work being performed." Pointing to plaintiff's statement in accident reports that he slipped on conduit debris, Switzer seeks to dismiss plaintiff's Labor Law § 241(6) claim on the ground that the debris on which he slipped was created by him and was therefore "an integral part of the work he was performing" (*see Appelbaum v 100 Church*, 6 AD3d 310 [2004] [internal quotation marks and citations omitted]). However, plaintiff's deposition testimony that there were other trades working at the same time and that the debris on which he slipped was different from any of the electrical materials he had been using raises an issue of fact whether he created the debris.

Switzer's claim of prejudice resulting from Time and 135 West 50th Owner's amendment of their answer to assert cross claims for contractual indemnification against it is belied by the fact that Time and 135 West 50th Owner demanded, on two separate occasions, a defense and indemnification under the parties' agreement. Moreover, Switzer cannot reasonably claim to be surprised by its own contractual obligations. As neither Time nor 135 West 50th Owner was negligent in connection with plaintiff's accident, the indemnification and defense clauses in

their agreement are not unenforceable and void under General Obligations Law § 5-322.1 (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008]. We have considered Switzer's remaining arguments and find them unavailing.

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

ENTERED: JANUARY 5, 2010

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1928 The People of the State of New York, Ind. 859/07
Respondent,

-against-

Andre Stokes,
Defendant-Appellant.

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

Andre Stokes, appellant pro se.

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

Judgment, Supreme Court, New York County (Robert Stolz, J. at suppression hearing; William A. Wetzel, J. at jury trial and sentence), rendered August 4, 2008, convicting defendant of five counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of 1½ to 3 years, unanimously affirmed.

Defendant challenges the sufficiency of the evidence supporting two counts relating to stolen gift cards. Since he failed to alert the trial court to his specific claim that, to qualify as a debit card for purposes of Penal Law § 165.45(2), the card must be issued to a particular person who has a business relationship, such as a bank account, with the card's issuer, 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. A debit card is defined in General Business Law § 511(9), which also defines the term for Penal Law purposes (*see* Penal Law § 155.00[7-a]), as "a card, plate or other similar device issued by a person to another person which may be used, without a personal identification number, code or similar identification number, code or similar identification, to purchase or lease property or services," but "does not include a credit card or a check, draft or similar instrument." Regardless of whether the term debit card is commonly associated with banking, a gift card meets the statutory definition, as it is a "card" that may be used without a "personal identification number" to "purchase property." The statute imposes no requirement that a specific person be named on the card, or that there be a business relationship between the issuer and possessor. Accordingly, "the evidence in this case satisfies the literal language of the statute" (*People v Thompson*, 99 NY2d 38, 41 [2002] [refusing to read "credit relationship" requirement into statute defining credit card]).

The court properly exercised its discretion in denying defendant's mistrial motion, made on the ground that defendant was prejudiced by evidence relating to a count that the court decided not to submit to the jury. Defendant was charged with criminal possession of credit cards, debit cards (as discussed above) and jewelry, all of which had been taken in a burglary.

The court dismissed the count involving the jewelry, based on a problem it perceived with the police chain of custody. The dismissal did not entitle defendant to a mistrial on all counts (*see People v Brown*, 83 NY2d 791, 794 [1994]; *People v Herminio B.*, 273 AD2d 58 [2000], *lv denied* 95 NY2 905 [2000]). Defendant's remaining contentions concerning uncharged crimes are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The evidence describing the burglary was relevant to prove the credit and debit cards were stolen, and that defendant was aware of that fact, and it was not prejudicially excessive (*see People v Giles*, 11 NY3d 495 [2008]; *People v Alvino*, 71 NY2d 233, 245 [1987]). In any event, any error regarding the burglary evidence and defendant's related claims was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

With regard to defendant's pro se arguments, the ineffective assistance claim is unreviewable on direct appeal because it involves matters outside the record, and the suppression claim is without merit.

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

ENTERED: JANUARY 5, 2010

DEPUTY CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1930 Shirley Johnson, Index 17424/07
Plaintiff-Appellant,

-against-

Concourse Village, Inc., et al.,
Defendants-Respondents.

Andrew Molbert, New York, for appellant.

Margaret G. Klein & Associates, New York (Eugene Guarneri of counsel), for Concourse Village, Inc. and R.Y. Management Co., Inc., respondents.

Babchik & Young, LLP, White Plains (Marisa C. DeVito of counsel), for Mainco Elevator & Electrical Corp., respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered July 11, 2008, which, in an action for personal injuries, granted defendants' motions to dismiss the complaint, and denied plaintiff's cross motion for an extension of time to serve the complaint pursuant to CPLR 306-b, unanimously affirmed, without costs.

Although plaintiff's counsel served her pleadings just one day after the applicable 120-day service period expired (*see* CPLR 306-b), and counsel offered proof that he attempted to arrange for service with eight days remaining out of the 120-day period, he nonetheless failed to show diligence in his efforts to effect service, particularly as the three-year statute of limitations (CPLR 214[5]) had already expired, and he did not follow up with the process server regarding completion of service until after

the 120-day service period had expired. There was no evidence to indicate that the corporate defendants could not be located, or that they could not be readily served through the Secretary of State. Furthermore, counsel waited until after defendants moved to dismiss before he cross-moved for an extension of the time to serve some several months later. Such evidence of lack of diligence undermines plaintiff's "good cause" argument in support of her extension request (*see generally Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]).

Nor is a grant of an extension to serve the pleadings warranted in the interest of justice. The circumstances presented, including that the statute of limitations expired, plaintiff's lack of diligence in prosecuting this action, the lack of probative evidence offered as to the claim's merit, the vague allegations of injury, the lack of notice given of the claim for more than three years and three months, the prejudice to defendants and the several month delay in moving for an extension of the time to serve, demonstrate that the dismissal of this action was appropriate (*see Slate v Schiavone Constr. Co.*, 4 NY3d 816 [2005]; *Posada v Pelaez*, 37 AD3d 168 [2007]; *compare de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312 [2004]).

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

ENTERED: JANUARY 5, 2010

David Spolony

DEPUTY CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1931-
1932 Ulrich Suss, Index 106052/08
Plaintiff-Appellant,

-against-

New York Media, Inc., et al.,
Defendants-Respondents.

Patrick J. McAuliffe, Astoria, for appellant.

Miller Korzenik Sommers LLP, New York (David S. Korzenik of counsel), for respondents.

Judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered December 22, 2008, dismissing the complaint pursuant to an order, same court and Justice, entered December 16, 2008, which, in an action for defamation and violation of Civil Rights Law §§ 50 and 51 arising out of the publication of a photograph of plaintiff in a magazine, granted defendants' motion to dismiss the complaint as barred by the one-year statute of limitations, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above judgment.

The offending photograph appeared in the May 7, 2007 issue of the magazine; defendants assert that such issue was distributed to newsstands in Manhattan on April 28 and April 29 2007; the action was commenced on April 30, 2008; and it is undisputed that both of plaintiff's claims are governed by the

one-year statute of limitations. To prove their claim of distribution on April 28 and April 29, defendants submitted the affidavit of the magazine's officer with personal knowledge of the magazine's printing and publication practices; the affidavits of an individual who was personally involved in distributing the issue and placing covers of the issue in promotional Windows Banners at newsstands; and photographs of the Windows Banners, digitally dated April 29, taken by the distributor in the ordinary course of business, depicting covers of the issue on display at newsstands along with weekend editions of newspapers dated April 27 and other newspapers dated April 29.

We reject plaintiff's argument that such evidence fails to show, prima facie, that the issue first was published on April 29. The affidavits submitted by defendants were made with personal knowledge of the issue's distribution date; the distributor's affidavit was the proper vehicle for the submission of photographs taken by him and his staff (*see H.P.S. Capitol v Mobil Oil Corp.*, 186 AD2d 98, 98 [1992]); and the photographs, as enhanced and highlighted in defendants' reply, clearly depict what they are claimed to depict. In opposition, plaintiff failed to submit any evidence of a later publication.

We also reject plaintiff's argument that unless the court gives CPLR 3211(c) notice of its intention to do so, it may not consider nondocumentary evidentiary materials for fact-finding

purposes on a motion to dismiss pursuant to CPLR 3211(a)(5) (*see Alverio v New York Eye & Ear Infirmary*, 123 AD2d 568 [1986]; *Lim v Choices, Inc.*, 60 AD3d 739 [2009]).

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

ENTERED: JANUARY 5, 2010

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1933N Lisa Welter, Index 127969/02
Plaintiff-Respondent,

-against-

Michael Feigenbaum,
Defendant-Appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Tacopina, Seigel & Turano, P.C., New York (Brian E. King of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 18, 2009, which, to the extent appealed from, as limited by the briefs, granted plaintiff's cross motion to compel defendant to submit to a blood test, affirmed, without costs.

A plaintiff, in an action for negligent transmittal of genital herpes simplex II, may demand that the defendant submit to a blood test to determine if the latter indeed has the virus (*see* CPLR 3121). Since the test was ordered in conjunction with the litigation, it is not subject to the physician-patient privilege (*see* Connors, McKinney's CPLR Practice Commentary C3121:2). Even were the privilege to apply, defendant waived it by asserting the affirmative defense that he was asymptomatic (*see e.g. Dillenbeck v Hess*, 73 NY2d 278, 287-288 [1989]). Defendant's effort to limit the scope of discovery has simply focused the issue on whether or not he has the virus. This issue

is relevant to -- and potentially dispositive of -- the action. If the test is negative, the case will be subject to dismissal. If, on the other hand, it is positive, defendant will have an opportunity to prove his affirmative defenses that he did not have the virus in 2002, or was unaware that he had it or was asymptomatic at the time of alleged transmittal to plaintiff.

All concur except Andrias and McGuire, JJ., who concur in a separate memorandum by McGuire, J. as follows:

McGUIRE, J. (concurring)

We write separately to emphasize that we express no view on the issue of whether, if the test is positive, it is admissible at trial (*see People v Scarola*, 71 NY2d 769, 777 [1988] ["(e)ven where technically relevant evidence is admissible, it may still be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury"]).

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

ENTERED: JANUARY 5, 2010

JAN 5 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick
Helen E. Freedman, JJ.

374
Ind. 6148/06

The People of the State of New York,
Respondent,

-against-

Makeda Davis,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Michael J. Obus, J. on inspection/dismissal motion; Edward J. McLaughlin, J. at jury trial and sentence), rendered March 4, 2008, convicting her of assault in the first degree (two counts) and assault in the second degree, and imposing sentence.

Mark L. Freyberg, New York and Joel G. Kosman, New York, for appellant.

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

RENWICK, J.

Following an interview with the complainant, who knew both of her alleged assailants, the police arrested the codefendant, but were initially unsuccessful in arresting defendant. In the ordinary course of business, the People presented the case against the codefendant to the grand jury. Although the prosecutor indicated at the outset of the grand jury proceedings that she was submitting the case against the codefendant and made no mention of defendant, the prosecutor elicited detailed testimony from the complainant about the roles in the assault played by both persons, each of whom was identified by name. The police arrested defendant three days after the complainant testified. One week later, on the last day of the grand jury's term, the prosecutor advised the grand jurors that she was withdrawing the case. Several months later, without requesting authorization under CPL 190.75[3], the prosecutor re-presented the case to a second grand jury, which, after hearing testimony from the complainant and additional witnesses, indicted both defendant and codefendant. Under these circumstances, the resubmission of defendant's case to a second grand jury without leave of court violated the proscription of CPL 190.75, and the indictment that followed should be dismissed.

This matter stems from a nightclub fight that took place on

June 11, 2006, between the complainant Lynn Walker, defendant Makeda Davis and her friend, codefendant Fayola McIntosh. The next day, the police arrested McIntosh. On June 20, 2006, the Assistant District Attorney (ADA) who appeared before the grand jury announced that she was presenting three felony charges against McIntosh: two counts of assault in the first degree and one count of assault in the second degree. The ADA then advised the grand jury that, while they would hear from the victim, Walker, that day, the case would be continued at a later date.

During the first grand jury proceedings, the ADA elicited testimony from Walker about being assaulted by defendant and McIntosh. In particular, Walker testified that on June 11, 2006, she was in the nightclub when, at about 2:00 A.M., she had an argument with defendant that ended in a physical fight that was broken up by club security. Approximately 30 minutes later, defendant walked by Walker and "swiped something at [her] face." Walker, however, could not identify what defendant had supposedly "swiped." "I really didn't see exactly what it was. It was just some type of object in her hand . . . She did not touch me with it. She just put it like right here."

After swiping the object at Walker's face, defendant began to hit her. Defendant then "grabbed [Walker's] hair" and started to punch her on the left side of her face. At that point,

McIntosh came over and hit Walker on the right side of her forehead, and then continued hitting her in the back. Walker did not see whether McIntosh had anything in her hand when she struck her. After a crowd gathered, defendant cut Walker's hair. Once the fight had been broken up, Walker "felt a lot of blood running down" her face and "a big gigantic red just blot on [her] dress." Immediately thereafter, Walker went to the hospital and received 40 stitches to her forehead, the left side of her face, "behind [her] ear," as well as a liquid stitch on her hand. Walker received pain medication and was unable to return to work after the accident. During her testimony, she took off her head scarf and showed the grand jury her injuries, specifically pointing to her "cut[s]." Photographs of Walker's "cuts" taken the day of the grand jury proceedings were submitted in evidence.

At the conclusion of the presentation of the complainant's testimony, the ADA asked the grand jurors if they had any questions, which they did. The grand jurors asked Walker if she had seen the hands of defendant and McIntosh at the time they fought with her. Addressing herself first to defendant's conduct, Walker said:

> "Well, her hand was closed, so, I mean, it looked like a little whiteness on it, then something. It looked like her whole hand was around whatever it was. Maybe it might have been long, maybe it fit in her whole hand, or

> maybe it had a little handle, but I didn't see it."

When asked by grand jurors whether she saw if McIntosh had an object in her hand, Walker replied, "No . . . when she hit me, I just did not see that coming, so I was not looking at her." In response to other questions from grand jurors, Walker further testified that, when defendant and McIntosh were striking her, she was striking them back "[w]ith my fists."

Walker was excused and no further evidence was presented. Three days later, defendant voluntarily surrendered to the police. Seven days later, on June 30, 2006, the last day of the grand jury's term, the ADA advised the grand jury that she was withdrawing the case due to "witness unavailability."

Approximately four months later, in October of 2006, the ADA, without requesting judicial leave, appeared before a second grand jury to present evidence in the case against defendant and McIntosh. The same three felony charges from the first grand jury were submitted to the second grand jury. Walker again testified about the assault and again stated that defendant "swiped an object in front of [her] face." When asked whether she could see what the object was, Walker replied, "Not really. I mean, it looked like some type of blade, but I couldn't really see it because she did it real fast, like jumping at me."

When the prosecutor asked Walker what she "fe[lt]" when she was being "struck," Walker replied, "when [defendant] hit me on the side of my face, I just felt, like, a drag. Like, it was just, like. And then, her hand kind of drug down my face. It didn't feel like she hit me. And that was it. I felt it kind of drug. And the same thing, really, on this side of my face when Fayola ran over." Walker indicated that she "started getting a little blurry" and "pretty much started bleeding after that."

The rest of Walker's testimony was similar to her testimony before the first grand jury, except she indicated that she had scarring and that her scars were still visible. The photographs of Walker's injuries, taken nine days after the incident, were again admitted into evidence. In addition to Walker, two other witnesses testified before the second grand jury. Barbara Smith, Walker's friend, testified that she observed defendant and McIntosh cut Walker with razors.

Dr. Sandra Haynes, an attending physician at St. Vincent's Hospital, testified that, on the day of the incident, she examined and treated Walker. Dr. Haynes indicated that she had reviewed Walker's medical records pertaining to her treatment at St. Vincent's, and the records were admitted into evidence. Dr. Haynes described Walker's injuries and treatment, which included stitches, and testified that, with "a reasonable degree of

medical certainty," Walker's lacerations "were consistent with injury caused by a sharp instrument." When asked what the possible long-term effects were from those lacerations, Dr. Haynes replied that Walker "will have permanent scarring."

After the second grand jury presentation, defendant and McIntosh were indicted on two counts of first-degree assault and a single count of second-degree assault. Before the charges against the codefendant were severed, defendant, without the benefit of seeing the transcript of the first grand jury proceeding, moved, in an omnibus motion, to inspect the grand jury minutes and to dismiss the indictment against her on the ground that the evidence was legally insufficient to support the indictment. Defendant also requested that the court determine, among other things, whether "the presentation of evidence [was] withdrawn prior to a vote being taken and then resubmitted." Supreme Court granted the motion to inspect the grand jury minutes, but denied the motion to dismiss the indictment or reduce the charges, finding that the grand jury evidence was legally sufficient to support the charges and that the proceedings were properly conducted.

Prior to severance, the codefendant also moved to dismiss the indictment against her on the ground that the People had improperly failed to seek judicial authorization before

presenting the case to the second grand jury. Defendant did not join in that motion. Supreme Court denied the motion, finding that the judicial authorization was not necessary under the circumstances of the case. After severance, the jury convicted defendant of two counts of assault in the first degree and one count of assault in the second degree. Supreme Court sentenced defendant to an aggregate prison term of 9½ years, to be followed by 5 years of post-release supervision.[1]

On appeal, defendant asserts that since the People's case was essentially complete at the time that it was withdrawn from the first grand jury, the withdrawal constituted a dismissal of the charges, and thus the People were required to obtain leave to represent the case to the second grand jury. The People counter that defendant's argument with respect to the improprieties in the grand jury proceedings is unpreserved. The People further aver that, on the merits, the argument should be "summarily rejected" because "the first grand jury heard evidence in the case against McIntosh alone" and "never even heard evidence that was directed at defendant as the target." Finally, the People assert that even if defendant was the subject of the first grand

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[1]At a separate trial, a jury convicted codefendant McIntosh of assault in the second degree. Supreme Court sentenced her to a five-year prison term.

jury presentation, judicial authorization was not required before presenting this case to the second grand jury because there was insufficient evidence for the first grand jury to make a decision about "essential elements of the crimes with which defendant was being charged."

Preliminarily, it must be pointed out that the People cannot seriously argue that defendant has failed to preserve her claim that her indictment upon resubmission to a grand jury without proper leave of court violated CPL 190.75[3]. The People point out that defendant did not join in the codefendant's motion to dismiss the indictment on the ground that the prosecutor improperly re-presented her case without court approval. However, since defendant requested in her omnibus motion that the court determine whether "the presentation of evidence [was] withdrawn prior to a vote being taken and then resubmitted," it is clear that the issue has been adequately preserved (*cf. People v Brown*, 81 NY2d 798 [1993] [defendant failed to preserve his claim that the grand jury proceeding was defective since he did not specify, in his omnibus motion, the grounds now claimed]; *People v Julius*, 300 AD2d 167, 168 [2002], *lv denied* 99 NY2d 655 [2003] [defendant failed to preserve his claim that prosecutor improperly re-presented his case to the grand jury]).

"CPL 190.75[3] prohibits the District Attorney's office,

without leave of court, from resubmitting a charge that has been previously dismissed by the Grand Jury. The statute was enacted to curb abuses that resulted from the common law rule that allowed prosecutors to resubmit charges to successive Grand Juries ad infinitum until one voted an indictment" *(People v Montanez,* 90 NY2d 690, 693 [1997], citing *People v Wilkins,* 68 NY2d 269, 273 [1986]). Thus, "District Attorneys are allowed only one bite at the apple; if unsatisfied with the [g]rand [j]ury's dismissal of a charge, they must seek leave of court to resubmit the matter" (*People v Montanez* at 693). Leave may be granted only once, and the District Attorney is required to justify resubmission (*see* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.75, at 139).

The "one bite rule" restricting the right to resubmit charges to successive grand juries may also apply when the prosecutor withdraws the charges from a grand jury. In *People v Wilkins* (68 NY2d 269), the Court of Appeals ruled that a prosecutor may not withdraw a case from one grand jury, after having presented evidence to that grand jury, and then resubmit the case to a second grand jury, unless the prosecutor first receives court authorization for such resubmission. In so ruling, the court concluded that such a withdrawal by the prosecutor is "the equivalent of a dismissal by the first grand

jury," and that any subsequent resubmission can only be done with the consent of the court (68 NY2d at 271). In reaching this decision, the court was influenced by the extensive progress that had already been made in the initial grand jury presentation. The court noted that to allow the prosecutor to withdraw a case unilaterally under these circumstances would, in effect, allow the prosecution to forum shop for a more compliant grand jury whenever the initial presentation was not going well (68 NY2d at 275).

The *Wilkins* court makes abundantly clear that the prosecutor's reasons for withdrawing the matter from the first grand jury were irrelevant to the analysis. In *Wilkins*, the prosecutor had presented all of the People's witnesses and was ready to charge the grand jury on the law (68 NY2d at 272). However, the grand jury requested the testimony of two additional witnesses. Unable to locate these witnesses, the People withdrew the case on the last day of the grand jury's term, and resubmitted the case to a second grand jury without leave of court (*id.* 68 NY2d at 275). Notwithstanding the prosecutor's seemingly good faith explanation, the court explicitly declared that the Legislature's concern for prosecutorial excess, including forum shopping, made it clear that the prosecutor's reasons were not relevant. In addition, the court noted, to

inject the prosecutor's good faith into the analysis would "make a mockery of the legislative command that the District Attorney serve as the legal advisor to the [g]rand [j]ury" (68 NY2d at 275). To do so, "would allow the prosecutor to circumvent the statutory command that an affirmative official action or decision of the [g]rand [j]ury requires the concurrence of 12 of its members, not the sole whim, or even considered judgment, of the prosecutor" (68 NY2d at 275-276 [internal citations omitted]).

Of course, not every presentment to a grand jury and subsequent withdrawal of a case may be deemed the functional equivalent of a dismissal requiring court permission to resubmit to a second grand jury. The dissent misreads *Wilkins* as holding that "progress should be measured by the People's decision that they have presented all the witnesses and evidence they deem necessary to secure an indictment against a specific defendant or defendants."

Wilkins and its progenies, however, make clear that there is no requirement that the prosecution present its entire case for a withdrawal to be deemed a dismissal. Rather, the key factor in determining whether such withdrawal must be treated as a dismissal is the extent to which the grand jury has considered the evidence and the charge (*see Wilkins*, 68 NY2d at 274; *see*

also People v Gelman, 93 NY2d 314 [1999]; *People v Cade*, 74 NY2d 410 [1989]). Consistent with *Wilkins's* policy concern -- "that a prosecutor could attempt to circumvent the restrictions on re-presentment without judicial approval by withdrawing a matter from a grand jury prior to a vote in order to submit it to another grand jury, perhaps more receptive to an indictment" *(People v Aarons*, 2 NY3d 547, 552 [2004]) -- whether a withdrawal must be treated as a dismissal depends on the "extent to which the presentation had progressed, i.e., whether sufficient evidence had been presented for the prosecutor to ask for a vote" (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.75, at 141).

Accordingly, where the withdrawal takes place "near the end of the presentation of the evidence," the grand jury may be deemed to have "heard and considered enough to render the withdrawal of the case equivalent to a dismissal" (*Wilkins*, 68 NY2d at 274-275; *Matter of McGinley v Hynes, 75* AD2d 897 [1980], *revd on other grounds* 51 NY2d 116 [1980], *cert denied* 450 US 918 [1981]). For instance, in *People v Page* (177 Misc 2d 448 [1998]), the People, after presenting evidence to the grand jury, moved to reduce the charges against the defendant. The court accepted the reduction on the condition that the People legally withdraw the case from the grand jury. Because the People did

not receive authorization from the court to withdraw the case from the grand jury, the court granted the defendant's motion to dismiss the accusatory instrument. The court rejected the People's contention that its case was not complete, since the People's evidence before the grand jury "consisted of the testimony of a major witness, the complaining witness," and that a review of the grand jury minutes indicated "that the [g]rand [j]ury was provided with information that would enable it to decide whether a crime had been committed and whether there existed legally sufficient evidence to establish material elements of the charged crimes" (177 Misc 2d at 452).

Conversely, courts have consistently held that the People's withdrawal of the case was not tantamount to a dismissal where the presentation of evidence is so limited that the grand jury has no ability to consider the charge. For instance, in *People v Gelman* (93 NY2d 314), the Court of Appeals held that the first grand jury did not "consider the evidence and the charge" against the defendant since "little evidence of criminal conduct had been presented, and there was no evidence linking defendant to the commission of the crime" (*id.* at 317; *see also People v Rodriguez*, 281 AD2d 375, 376 [2001], *lv denied* 96 NY2d 906 [2001] [given the limited evidence presented, the first grand jury cannot be said to have considered the evidence and the charge to

such an extent that the withdrawal of the case must be treated as a dismissal]; *People v Beckwith*, 289 AD2d 956, 957 [2001] [because no evidence against the defendant had been presented, the prosecutor's withdrawal of the case from the grand jury is not deemed a dismissal requiring the People to seek judicial approval before resubmitting to another grand jury]; *People v Skolnik*, 135 Misc 2d 964, 966 [1987] [only two witnesses testified and the evidence presented was merely preliminary and background for introduction of more substantive evidence]).

We must reject the People's argument that the first presentation had not progressed to the point where withdrawal would constitute a dismissal requiring leave to re-present. On the contrary, unlike *Gelman*, the first grand jury heard and considered sufficient evidence of criminality on defendant's part, including evidence linking defendant to the commission of the charged crimes, to render the withdrawal of the case equivalent to a dismissal (*see Wilkins*, 68 NY2d at 274-275; *McGinley*, 75 AD2d at 898; *Page*, 177 Misc 2d at 452).

While only one witness, the complainant, testified at the first grand jury proceeding, her testimony was legally sufficient to establish the essential elements of the crimes charged. All of the crimes submitted to the grand jury required that the People prove either that Walker sustained serious and permanent

disfigurement (*see* Penal Law § 120.10[2]), or had been attacked with a "dangerous instrument" (Penal Law § 120.05[2]; § 120.10[1]). Walker's testimony that defendant swiped an object in front of her face, hit her while holding the object in her hand, and "cut" her hair causing her to bleed, as well as the display of her "cuts" to the jury, was sufficient to establish that defendant attacked Walker with a dangerous instrument. Although, in the second grand jury proceeding, Smith, Walker's friend, provided corroborating evidence that defendant cut Walker with a razor, it cannot be said that Smith's testimony was "necessary" to establish that Walker had been cut with a dangerous instrument.

In addition, there was sufficient evidence establishing that Walker sustained permanent disfigurement, given (1) Walker's testimony that she immediately went to the hospital after the attack and received 40 stitches; (2) her display of her "cuts" to the grand jury; and (3) the admission of photographs of her cuts indicating the extent of her injuries. While, as the People note, medical evidence was not submitted at the first grand jury proceeding, case law indicates that photographs depicting sutured wounds are legally sufficient to establish, beyond a reasonable doubt, that the wounds resulted in permanent scars (*see People v Irwin*, 5 AD3d 1122, 1123 [2004], *lv denied* 3 NY3d 642 [2004]).

Moreover, since the standard for indicting a person at a grand jury proceeding is lower than guilt beyond a reasonable doubt (*see* CPL 190.65[1]), clearly, the photographs depicting Walker's sutured wounds nine days after the incident were legally sufficient to establish that Walker sustained a permanent disfigurement.

Unlike the dissent, we are not persuaded that the vice inherent in the prosecutor's premature withdrawal of the charges was obviated by the ADA's statement at the outset of the grand jury proceedings that the case would be "continued," and because she withdrew the case at the end of the grand jury term due to witness unavailability. On the contrary, the prosecutor's desire to present more witnesses to buttress her case is entirely consistent with the need to avoid a grand jury dismissal based on the evidence already presented. More importantly, in *Wilkins*, the Court of Appeals stated that the good faith" of the prosecutor's withdrawal of the case is irrelevant where, as here, the case has progressed to the point where the withdrawal is tantamount to a dismissal (68 NY2d at 275).

Instead, where, as here, the prosecution has begun a grand jury presentation based on what it deems sufficient evidence to justify the prosecution, but is unexpectedly stymied from completing it prior to the expiration of the grand jury term, its

remedy has been clearly spelled out in *Wilkins*. In that situation, all the District Attorney needs to do is request the grand jury's agreement to an extension of its term pursuant to CPL 190.15[1] (68 NY2d at 276). Should the grand jury not agree, then, as the *Wilkins* court pointed out, "the prosecutor would always have the fallback of obtaining court approval for resubmission, which, if the reasons tendered are indeed legitimate, should be granted" (*id.*). What is not permitted is for the prosecutor to use the device of withdrawing the case in order to get another opportunity to persuade a different, and perhaps more amenable, grand jury that it should indict (*see also People v Cade*, 74 at 415-16).

Nor do we find any merit to the People's argument that the concerns addressed by *Wilkins* are inapplicable here because defendant was allegedly not the target of the first presentation. While defendants are typically indicted following arrest and filing of a felony complaint, another route that a prosecution may take is for a defendant to be indicted but not arrested until later (*see* CPL 100.05). At the first proceeding, there was a full presentation of a legally sufficient case against both of the alleged participants in the assault; the complainant's account of defendant's conduct cannot be viewed as merely incidental to her testimony against the codefendant. Thus, even

though the prosecutor did not "name" Davis as a defendant at the first grand jury proceeding, since the grand jury heard sufficient evidence against her, the withdrawal of the case may be deemed the functional equivalent of a dismissal of the charges against her (*compare People v Dym*, 163 AD2d 150 [1990], *lv denied* 76 NY2d 892 [1990], *with People v Hemstreet*, 234 AD2d 609 [1996] *and People v Almonte*, 190 Misc 2d 783 [2002]).

Wilkins has been applied to a situation analogous to this case. In *Hemstreet*, the first grand jury proceeding was investigatory and, after hearing numerous witnesses and receiving several documents into evidence relevant to the guilt of both the defendant and another suspect, the prosecutor asked the grand jury to consider charges as to the other suspect only (*see Hemstreet*, 234 AD2d at 609). After the other suspect was indicted, the People presented the case against the defendant to a second grand jury without seeking permission from the court. Under the circumstances, the courts held that since the prosecutor withdrew an "essentially completed" (*id.* at 610) case from the first grand jury, it improperly resubmitted the matter to the second grand jury without leave of court (*id.*; *see also Almonte*, 190 Misc 2d at 788).

Here, the first grand jury proceeding was not investigatory since the prosecutor stated at the outset of the proceeding that

the case was against McIntosh. However, because the grand jury clearly heard evidence against defendant, as in *Hemstreet,* the first grand jury proceeding should be considered a presentation against her. Indeed, the grand jury is "part of the investigatory process" (*People v Waters*, 27 NY2d 553, 556 [1970]), and "is accorded broad investigative powers" *(People v Lancaster*, 69 NY2d 20, 25 [1986], *cert denied* 480 US 922 [1987]). "As an investigatory body its functions are twofold -- it seeks to determine if a crime has been committed and who committed this crime" (*People v Filis*, 87 Misc 2d 1067, 1068 [1976]). After hearing and examining the evidence, it may, among other things, "[i]ndict a person" (CPL 190.60[1]). Accordingly, although the prosecutor did not name defendant at the outset of the first grand jury proceeding, the circumstances implicate the concerns raised in *Wilkins;* based on the extensive incriminating evidence presented against defendant, the grand jury could have taken the affirmative step of taking a vote on whether to indict her, irrespective of the "considered judgment of the prosecutor" (*Wilkins*, 68 NY2d at 276).

Finally, this Court's holding in *People v Dym* (163 AD2d 150 [1990]) does not compel a different result. In *Dym*, "John Doe" was named in the first grand jury presentation and the People withdrew it after "preliminary background information was

presented" (163 AD2d at 150). The defendant was named in the second grand jury presentation which resulted in his indictment. The defendant's accomplice testified for the People in the later proceeding. This Court held that the termination of the first grand jury proceeding was not a dismissal because "[t]he first proceeding was investigatory rather than specifically directed at the defendant" and "th[e] panel did not hear evidence that a crime had been committed" (*id.* at 154). In contrast, here the grand jury presentation, which was intended to procure an indictment against McIntosh, provided sufficient evidence linking defendant to the commission of the charged crimes to allow the grand jury to take the affirmative step of indicting her as well.

In sum, where, as here, the prosecution has withdrawn an essentially completed case from the grand jury prior to any action having been taken by that body, the result was the functional equivalent of a dismissal under *Wilkins*. Thus, the prosecutor's failure to seek leave of court, pursuant to CPL 190.75[3], before resubmitting the matter to a second grand jury, rendered defendant's indictment invalid. In view of this determination, we decline to address defendant's remaining arguments.

Accordingly, the judgment of the Supreme Court, New York County (Michael J. Obus, J. at inspection/dismissal motion;

Edward J. McLaughlin, J. at jury trial and sentence), rendered March 4, 2008, convicting defendant of assault in the first degree (two counts) and assault in the second degree, and sentencing her to an aggregate term of 9½ years, should be reversed, on the law, and the indictment dismissed, with leave to the People to apply for an order permitting resubmission of the charges to another grand jury.

All concur except Friedman, J.P. and Catterson, J. who dissent in an Opinion by Catterson, J.

CATTERSON J. (dissenting)

Because, in my opinion, there was no procedural violation by the People in their withdrawal and subsequent resubmission of a case to the grand jury without leave of court, I would uphold the defendant's conviction on two counts of assault in the first degree and one count of assault in the second degree. In this case, the defendant, Makeda Davis, and a second defendant, Fayola McIntosh[1], disfigured a neighborhood acquaintance by slashing her face with razor blades. The defendant asserts a violation of CPL 190.75(3) in that the People resubmitted her case to a second grand jury without leave of court, and so argues that her conviction must be vacated and the indictment dismissed.

The facts adduced at trial as to the assault are as follows: In the early hours of June 11, 2006, the victim, Lynn Walker, and the defendant argued at a Manhattan nightclub over a man the defendant claimed she had married. Subsequently, the defendant raised her hand and waved a razor blade in front of Walker's face. When Walker hit back in an attempt to defend herself, the defendant struck her with the razor blade on the left side of her face. Walker felt the blade "dr[ag] down the side of [her] face"

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[1]McIntosh's motion to sever the indictment was granted. She was subsequently convicted, after a jury trial, of second-degree assault and sentenced to a term of five years.

from her "scalp down the whole side of [her] temple" to the outer end of [her] left eye." She then felt the blade move diagonally to the bottom of her left ear.

McIntosh also had a razor blade and struck Walker with it while the defendant continued her attack. At that point, Walker "couldn't see what was going on anymore" because she "started bleeding heavily" and the skin that had been cut over her left eye was "peeling and dropping" so that it covered her eye.

One of the friends who was at the club with Walker testified at trial that she observed the defendant and McIntosh cut Walker with razor blades. Heather Norden, a paramedic who subsequently arrived on the scene, testified that Walker's injuries were "pretty gruesome," and that Walker was "covered in blood" and had "deep" facial lacerations, with her skin split "wide open." According to Norden, Walker received 40 stitches at St. Vincent's Hospital. Walker testified that her injuries were very painful and that she had "bad" scars for almost a year after the incident. She further testified that, at the time of trial, the scars still looked bad to her.

The defendant also testified at trial, and denied cutting Walker's face or encouraging anyone to cut Walker. The defendant further denied striking Walker. At the conclusion of the four-day trial, the jury found the defendant guilty on all counts as

charged.

The defendant argues that her conviction should be vacated on the grounds that, inter alia, the People improperly resubmitted the case against her to a second grand jury without leave of court in violation of CPL 190.75(3). Specifically, she contends that since the People's case was essentially complete at the time that it was withdrawn from the first grand jury, the withdrawal constituted a dismissal of the charges, and thus the People were required to obtain leave to re-present the case to the second grand jury.

I disagree, and for the reasons set forth below would affirm the judgment of conviction. It is well established that pursuant to CPL 190.75(3), "[w]hen a charge has been...dismissed, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the people to resubmit such charge to the same or another grand jury." However, it is equally well established that only certain withdrawals by the People are tantamount to a dismissal under the statute. People v. Wilkins, 68 N.Y.2d 269, 273, 508 N.Y.S.2d 893, 895, 501 N.E.2d 542, 544 (1986).

In Wilkins, the Court held: "the key factor in determining whether an unauthorized withdrawal of the case must be treated as a dismissal is the extent to which the Grand Jury considered the

evidence and the charge." 68 N.Y.2d at 274, 508 N.Y.S.2d at 895. The standard is the "extent to which the presentation had progressed -- *i.e.*, whether sufficient evidence had been presented for the prosecutor to ask for a vote." Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 190.75, at 141. If "little evidence of criminal conduct ha[s] been presented, and there [is] no evidence linking defendant to the commission of the crime," then the prosecutor need not seek judicial approval to resubmit the charges to a second grand jury after the matter is withdrawn from the first. People v. Gelman, 93 N.Y.2d 314, 317, 690 N.Y.S.2d 520, 522, 712 N.E.2d 686, 687 (1999); see also People v. Rodriguez, 281 A.D.2d 375, 376, 723 N.Y.S.2d 159, 160 (1st Dept. 2001), lv. denied, 96 N.Y.2d 901, 730 N.Y.S.2d 798, 756 N.E.2d 86 (2001).

The Court of Appeals has noted that the prosecutor's "presentation need not be complete for consideration equivalent to a dismissal to occur." Wilkins, 68 N.Y.2d at 274, 508 N.Y.S.2d at 895. Where the withdrawal takes place "near the end of the presentation of the evidence," the grand jury may be deemed to have "heard and considered enough" to render the withdrawal the equivalent of a dismissal. 68 N.Y.2d at 274-275, 508 N.Y.S.2d at

896; see also Matter of McGinley v. Hynes, 75 A.D.2d 897, 428 N.Y.S.2d 57 (2d Dept. 1980), rev'd on other grounds, 51 N.Y.2d 116, 432 N.Y.S.2d 689, 412 N.E.2d 376 (1980), cert. denied, 450 US 918, 101 S.Ct. 1364, 67 L.Ed.2d 344 (1981).

In Wilkins, the Court of Appeals held that the prosecutor's withdrawal of the case from the first grand jury was the equivalent of a dismissal since, "*as far as the prosecutor was concerned*, all witnesses had testified, and all that was left was to instruct the Grand Jury on the law." 68 N.Y.2d at 275, 508 N.Y.S.2d at 896 (emphasis added).

As a threshold matter, then, precedent does not support the majority's view that the key factor in determining whether the presentation has progressed far enough is whether the People have presented sufficient evidence on which to indict any one defendant. Rather, progress should be measured by the People's decision that they have presented all the witnesses and evidence they deem necessary to secure an indictment against a specific defendant or defendants.

In the instant case, in my opinion, the facts do not support the majority's conclusion that the withdrawal by the People was tantamount to a dismissal: The prosecutor first appeared before the grand jury on June 20, 2006, just nine days after Walker was assaulted, to present the People's case against Fayola McIntosh,

not the defendant in the instant appeal. The ADA submitted three felony charges, two counts of assault in the first degree (Penal Law § 120.10[1], [2]) and one count of assault in the second degree (Penal Law § 120.05[2]). The ADA immediately advised the grand jurors that, while they would hear from Walker that day, the case would be "continued."

Walker then testified that she was assaulted by the defendant and McIntosh at the nightclub. In particular, Walker testified that the defendant had "swiped something at [her] face." When the ADA asked Walker what exactly she had seen, Walker replied, "I really didn't see exactly what it was. It was just some type of object in her hand."

According to Walker, after defendant swiped the object at her face, she "grabbed [Walker's] hair" and started "punching" her "on the left side of [her] face." Walker then testified that McIntosh "came over" and started "hitting [her]" as well. Walker stated that she did not see anything in McIntosh's hand. Next, Walker testified that after a crowd gathered, "[defendant] cut [her] hair" and Walker "felt a lot of blood running down [her] face."

According to Walker, immediately after the incident, she went to the hospital and received 40 stitches to her forehead, the left side of her face, "behind [her] ear," as well as a

liquid stitch on her hand. Walker then took off her head scarf and showed the grand jury her injuries, specifically pointing to her "cut[s]." Photographs of Walker's "cuts" taken the day of the grand jury proceedings were submitted into evidence.

Walker was excused and no further evidence was presented. Three days later, Makeda Davis, the defendant, turned herself in and was arrested. Seven days later, on June 30, 2006, the last day of the grand jury's term, the ADA advised the grand jurors that she was withdrawing the case due to "witness unavailability."

Approximately four months later, in October 2006, the ADA, without requesting judicial leave, appeared before a second grand jury to present evidence in the case, this time against both the defendant and McIntosh. The same three felony charges from the first grand jury were submitted to the second grand jury.

Walker again testified about the assault and stated that defendant "swiped an object in front of [her] face." When asked whether she could see what the object was, Walker replied, "Not really. I mean, it looked like some type of blade, but I couldn't really see it because she did it real fast, like jumping at me."

When the prosecutor asked Walker what she "fe[lt]" when she was being "struck," Walker replied, "when [defendant] hit me on

the side of my face, I just felt, like a drag [...] It didn't feel like she hit me. And that was it. I felt it kind of drag. And the same thing, really, [...] on this side of my face when Fayola ran over." Walker indicated that she "started getting a little blurry" and "pretty much started bleeding after that."

The rest of Walker's testimony was similar to her testimony before the first grand jury, except that she indicated that she had scarring rather than "cuts" and that her scars were still visible. The photographs of Walker's injuries, taken nine days after the incident, were again admitted into evidence.

In addition to Walker's testimony, two other witnesses testified before the second grand jury. Dr. Sandra Haynes, an attending physician at St. Vincent's Hospital, testified that on the day of the incident she examined and treated Walker. Dr. Haynes indicated that she had reviewed Walker's medical records pertaining to her treatment at St. Vincent's, and the records were admitted into evidence. Dr. Haynes described Walker's injuries and treatment, which included stitches, and testified that, with "a reasonable degree of medical certainty," Walker's lacerations "were consistent with injury caused by a sharp instrument." When asked what the possible long-term effects were from those lacerations, Dr. Haynes replied that Walker would have "permanent scarring."

Walker's friend, Barbara Smith, also testified at the second grand jury proceedings that she observed the defendant and McIntosh cut Walker with razors. After the second grand jury presentation, both the defendant and McIntosh were indicted on the two counts of first-degree assault and the single count of second-degree assault.

In my view, the People are correct in asserting there was insufficient evidence for the first grand jury to consider in order to make a decision about essential elements of the crimes with which defendant was being charged. I depart from the majority's determination that the type of *extensive* progress required by the Wilkins Court was made in this case. In Wilkins, the prosecutor had presented all of the People's witnesses and was ready to charge the Grand Jury. In this case, the prosecutor made it quite clear from the very beginning that she could not present all her witnesses and that she would have to continue the presentation. Without the testimony of a medical expert, Dr. Haynes, and without the admission of victim's hospital records, the People would have been hard pressed to establish the essential element of "serious[ ] and permanent[ ]" disfigurement required for assault in the first degree pursuant to Penal Law §120.10 [2]. Equally doubtful is the likelihood they would be able to establish that the defendant used a "dangerous

instrument" pursuant to Penal Law §120.10 [1] without the testimony of Walker's friend who testified to seeing the razor blades.

I disagree with the majority that the victim's testimony alone was sufficient to establish the essential elements of the crimes charged. Nothing in Walker's testimony, including that the defendant swiped an object in front of her face, would necessarily lead to a finding that the defendant used a blade rather than, for example, that she was wearing a large ring that got in the way as she was raining blows on the victim. Further, the majority relies on People v. Irwin (5 A.D.3d 1122, 774 N.Y.S.2d 237 (4th Dept 2004), lv. denied, 3 N.Y.3d 642, 782 N.Y.S.2d 413, 816 N.E.2d 203 (2004)), to contend that photos taken nine days after the assault and depicting Walker's sutured wounds were legally sufficient to establish that she sustained permanent disfigurement. I find the reliance is misplaced. The fact that in Irwin there was a photograph from which it could be inferred that the depicted sutured wounds would result in permanent scarring does not mean that the same necessarily would be or could be inferred from a photograph of Walker's sutured wounds. Not all sutured wounds are equal. Not all sutured wounds necessarily result in permanent disfigurement, but rather that result depends on numerous factors such as the skill of a surgeon

and the elasticity of an individual's skin, as well as the depth, severity and location of the wound. A grand jury viewing "cuts" a mere nine days after the attack might not necessarily be convinced, however "gruesome" the cuts appeared so soon after the assault, that the damage would be permanent or protracted.[2] It is also a fact that where case law reflects findings of permanent disfigurement by the trier of fact, those findings are reached at trials which are usually held months, if not years, after the alleged assaults and where such finding depends in great measure on the fact that the scars are evident on the victim. See People v. Wade, 187 A.D.2d 687, 590 N.Y.S.2d 245 (2d Dept. 1992), lv. denied, 81 N.Y.2d 894, 597 N.Y.S.2d 956, 613 N.E.2d 988 (1993) (scars evident eight months after attack); People v. Allen, 165 A.D.2d 786, 563 N.Y.S.2d 792 (1st Dept. 1990), lv. denied, 76 N.Y.2d 983, 563 N.Y.S.2d 772, 565 N.E.2d 521 (1990) (scars evident two years after attack).

In any event, in this case, it is apparent that the re-presentation had nothing to do with the abuse which CPL 190.75[3] was designed to prevent, that is, forum shopping for a more amenable grand jury. The defendant now suggests that the

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[2]It is worth noting that, at trial, the defendant asserted legal insufficiency of evidence as to the severity of injuries on the basis that no medical testimony was presented to establish permanency of the scarring.

prosecutor withdrew the case because "she was dissatisfied with the evidence" and "feared" the outcome of a vote. That suggestion is refuted, as the People assert, by the announcement at the start of the first grand jury presentation --before any evidence whatsoever was presented-- that the case would be continued, which was before the People could glean any kind of reaction, positive or negative towards their case.

More recently, the Court of Appeals specifically rejected the notion that withdrawal would equate with dismissal "whenever the People present *any* evidence to a Grand Jury of criminal conduct." People v. Gelman, 93 N.Y.2d at 319, 690 N.Y.S.2d at 523. In that case, the Court, reiterated and clarified its holding in Wilkins by stating unequivocally that, in Wilkins, withdrawal was treated as a dismissal because "'the first presentation was, *as far as the prosecution was concerned,* complete' and '*all* witnesses had testified.'" Id., quoting Wilkins, 68 N.Y.2d at 274-275, 508 N.Y.S.2d at 896 (emphasis added).

In other words, unlike the majority, I believe the view of the People should prevail as to whether a presentation to a grand jury is complete. In this case, there should have been no doubt that the view of prosecution was that its presentation was not complete either against McIntosh, and certainly not against the

defendant.

I further would reject the defendant's argument that the indictment should be dismissed on the grounds the People breached their duty of fair dealing by failing to introduce in the second grand jury proceedings Walker's purported "exculpatory" testimony from the first grand jury proceedings. Specifically, the defendant asserts that the prosecutor should have introduced testimony from the first grand jury proceeding that included the statement that defendant held "some type of object in her hand," but Walker "really didn't see exactly what it was"; and that defendant "did not touch [Walker] with [the object]."

I find that the testimony is not so radically different that its omission from the second grand jury presentation constitutes sufficient prejudice to the defendant such as to render the grand jury proceeding defective. See CPL 210.20[1][c]; CPL 210.35[5]. The statutory test for finding a proceeding defective is "very precise and very high" and is not satisfied by a showing of "mere flaw, error or skewing" of the evidence. People v. Darby, 75 NY2d 449, 455, 554 N.Y.S.2d 426, 428, 553 N.E.2d 974, 976 (1990).

Indeed, while the prosecutor "owes a duty of fair dealing to the accused and candor to the courts" (People v. Pelchat, 62 N.Y.2d 97, 105, 476 N.Y.S.2d 79, 83, 464 N.E.2d 447, 451 [1984], "[t]he People generally enjoy wide discretion in presenting their

case to the Grand Jury and are not obligated to search for evidence favorable to the defense or to present all evidence in their possession that is favorable to the accused." People v. Lancaster, 69 N.Y.2d 20, 25-26, 511 N.Y.S.2d 559, 562, 503 N.E.2d 990, 993 (1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1383, 94 L.Ed.2d 697 (1987) (internal citation omitted).

Lastly, in my view, the defendant was not prejudiced by the People's failure to disclose the purportedly exculpatory statements. Even without Walker's testimony, the second grand jury had sufficient evidence to indict defendant. Indeed, Smith testified that she observed the defendant attacking Walker with a razor, and Dr. Haynes indicated that Walker's lacerations had been caused by "a sharp instrument" and would result in permanent scarring.

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

ENTERED: JANUARY 5, 2010