SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 11, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Acosta, Renwick, Freedman, JJ.

3537 The People of the State of New York, Appellant, Ind. 5260/06

-against-

Denard Butler,
Defendant-Respondent.

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Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole of counsel), for appellant.

Darren S. Fields, Brooklyn, for respondent.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 16, 2009, which to the extent appealed from, sentenced defendant as a second violent felony offender but not as a persistent violent felony offender, unanimously affirmed.

The question before this Court is whether a defendant with two prior violent felony convictions, who was resentenced for those crimes at the behest of the New York State Division of Parole (DOP) under Penal Law § 70.45 and after the commission of the crime at issue, should have been adjudicated a persistent

violent felony offender. We hold that he should not have been.

In 2009, defendant, together with codefendants, was tried and convicted of a 2006 robbery of several individuals at a hot dog stand. He was adjudicated a second violent felony offender and was sentenced to a 12-year prison term. Before defendant's 2009 felony conviction, he was twice convicted of violent felonies in Kings County. In November 1999, after defendant pleaded guilty to criminal possession of a weapon in the third degree (former Penal Law § 265.02[4]), a class D violent felony, the Kings County Supreme Court sentenced him to a four-month prison term to run concurrently with five years' probation. In March 2001, after defendant had been released from prison but was still on probation, a Kings County jury convicted him of criminal possession of a weapon in the third degree. In April 2001 the Kings County Sentencing Court (Michael J. Brennan, J.) adjudicated defendant a second violent felony offender and sentenced him to both a determinate six-year prison term on the second weapon possession conviction, and a concurrent determinate six-year term for defendant's violation of the probation terms for the 1999 conviction. The court, however, neglected to pronounce the mandatory term of postrelease supervision (PRS) for the 2001 conviction as required under Penal Law § 70.45.

The People, relying on *People v Acevedo* (17 NY3d 297 [2011]), appeal the trial court's adjudication of defendant as a second violent felony offender rather than as a persistent violent felony offender.

Defendant argues that he is not a predicate or persistent violent felon. In particular defendant contends that the April 2001 sentence was a nullity because it did not include PRS, and that "[t]he sole remedy for a procedural error such as this is to vacate the sentence and remit for a resentencing hearing so that the trial judge can make the required pronouncement" (*People v Sparber,* 10 NY3d 457, 471 [2008]). He opines, consistent with the trial court's finding, that the September 2008 order declining to resentence him constituted a "new sentence," and that the date of the order should be deemed the sentencing date for determining his status as a predicate felon.

In August 2005, defendant was released from prison, and in October 2006 he committed and was arrested for the robbery at issue on this appeal. In July 2008, while defendant was awaiting trial on the within matter, the DOP notified the Kings County sentencing court that defendant's commitment order for the 2001 conviction did not indicate that the court had imposed the mandatory PRS term, and that his sentence should thus be reviewed

pursuant to Correction Law § 601-d.

In September 2008 the court issued a "[PRS] Sentencing Order," holding that "in the interests of justice and equity," it declined to resentence defendant and that "no period of [PRS] constitutes part of [defendant's] sentence."[1] In March 2009 defendant was found guilty by a jury of the 2006 robbery. The People asked the court to adjudicate defendant a persistent violent felony offender, based on the 1999 and 2001 Kings County convictions. Defendant opposed the application, arguing that he should be sentenced as a first-time violent felony offender because the original sentences for the Kings County convictions were vacated as unlawful and he was resentenced on those convictions after he committed the 2006 robberies.

The trial court decided to sentence defendant as a second violent felony offender (*People v Butler*, 24 Misc 3d 1225 [A], 2009 NY Slip Op 51619[u],*5 [2009]). The court, relying on *People v Sparber*, held that an illegal sentence must be vacated and, that, once vacated, the conviction cannot be a predicate to enhance the defendant's sentence on a subsequent conviction,

[1]Defendant thereafter submitted a memorandum of law arguing that the court was required to formally resentence him to his original prison term without PRS, but the court took no further action.

since it does not satisfy Penal Law § 70.04(1)(b)(ii) (*Butler*, 2009 NY Slip Op 51619[u],*3). However, the trial court refused to consider defendant's first sentence as having been vacated because he failed to raise any challenge to his predicate status at the time of his second sentencing. The court deemed that challenge to have been waived pursuant to CPL 400.15(8) (2009 NY Slip Op 51619[u], *4-5, citing CPL 400.15[7][b] and 400.16[1]).

A defendant may be adjudicated a persistent violent felony offender only if he has previously been convicted of two or more predicate violent felonies (Penal Law § 70.08[1][a]). The persistent violent felony offender statute incorporates by reference a provision that the "[s]entence upon such prior conviction[s] must have been imposed before commission of the present felony" (Penal Law § 70.04[1][b][ii]).

In *People v Acevedo* (17 NY3d 297 [2011], *supra*), the Court of Appeals held that defendants could not avoid adjudication as predicate felons by seeking, after sentencing for the present conviction, resentencing of a prior conviction where the court failed to impose the required PRS. Both of the defendants in *Acevedo* received sentences for their first violent felony convictions that did not include the required PRS, and sought to have those sentences vacated after they had been convicted and

sentenced for subsequent crimes (17 NY3d at 299-302). The Court of Appeals rejected the defendants' argument that their prior convictions could not be considered in determining predicate felon status, stating: "The decisive feature of these cases is, we believe, that the sentencing errors defendants sought to correct by resentencing were errors in their favor: PRS was illegally omitted from their original sentences. The only practical benefit defendants could possibly gain from the resentencings was to move their sentences to a later date, thus eliminating their prior crimes as predicates in their later cases. We would hold that this tactic was ineffective: in circumstances like these, the original sentencing date should be the one to be considered for predicate felony purposes" (*Acevedo*, 17 NY3d at 302).

The Court of Appeals specifically narrowed its decision to instances in which the defendant requested PRS resentencing as a tactical measure to avoid predicate status. The majority opinion in *Acevedo* implicitly rejected the broader holding of the concurring opinion, which would have found that predicate status cannot not be affected by any PRS resentencing.

In this case, defendant did nothing to alter his status; rather, it was the DOP that sought and obtained the resentencing

in 2008, two years after the commission of the crime. Thus, the trial court properly adjudicated defendant a second violent felony offender, rather than a persistent violent felony offender (2009 NY Slip Op 51619,*5). Indeed, we find that where, in the normal course, the government seeks resentencing of a prior conviction and the sentence is vacated for failure to pronounce a term of PRS the resentencing date should be considered in determining whether the prior conviction meets the sequentiality requirement of the predicate felony offender statutes. While, in this case, the court in Kings County, with the People's consent, chose not to add a term of PRS, its declaration that it declined to resentence defendant does not mean that a new sentence was not imposed. Under Penal Law § 70.85, a court is required to impose a new sentence even if the District Attorney consents to reimposition without adding PRS.

Lastly, we find that the trial court properly adjudicated defendant a second violent felony offender, notwithstanding the implicit resentencing on his first felony conviction in 2008,

since the second violent felony offender adjudication based on that conviction was binding pursuant to CPL 400.15(8).

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Richter, JJ.

4882 The People of the State of New York, Ind. 4962/08
Respondent,

-against-

Danny Martin,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Willkie Farr & Gallagher LLP, New York (James F. Caputo of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 9, 2009, as amended April 29, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, affirmed.

At the conclusion of the hearing, the court determined that the police officer's initial approach to defendant was proper and that there was probable cause for the arrest, and denied defendant's suppression motion. Defendant then entered into a guilty plea, which included a waiver of the right to appeal. Defendant's waiver of his right to appeal was invalid because the

court conflated the appeal waiver with the rights automatically waived by the guilty plea. Nonetheless, the court properly denied defendant's suppression motion.

We agree with the hearing court that the officer's actions were justified at the inception and that the ensuing events justified the extent of the intrusion. Initially, the police officer's attention was drawn to defendant when the officer observed a suspicious interaction between defendant and another man; the officer saw defendant's left hand and the other man's right hand "touching one another" for between ten and thirty seconds on more than one occasion, leading the officer based on his training and experience, to believe that a "drug transaction" was "taking place." Contrary to the dissent's allegations, defendant's interactions and conduct were sufficient to provide the officer with a founded suspicion that criminality was afoot to justify a common-law right to inquire (*cf. People v Bonilla*, 81 AD3d 555 [2011]. The suspicious interaction took place in a drug-prone location and was observed by an experienced officer who was trained in the investigation and detection of narcotics.

Moreover, by the time the officer was within nine to ten feet of defendant and the other man, the officer observed a plastic bag containing a white substance "peeking out" from

defendant's closed right fist. Based on his training and experience, he believed the white substance in the bag to be a controlled substance. Under the circumstances, the officer was justified in grabbing defendant's wrist and forcing open his hand, which revealed the plastic bag with the powder substance. Contrary to the dissent's position, the evidence supports the conclusion that the officer had a sufficient opportunity to observe and recognize the object in defendant's hand, and there is no basis for disturbing the court's credibility determinations. Accordingly, the officer had probable cause to arrest defendant for drug possession (*see People v McRay*, 51 NY2d 594 [1980]).

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

FREEDMAN, J. (dissenting)

I agree that defendant's waiver of his right to appeal was invalid for the reasons stated by the majority, but I would have granted the suppression motion because I do not believe the seizure that occurred was supported by either a reasonable suspicion of criminality, or probable cause for an arrest.

The facts, viewed in the light most favorable to the prosecution, are that two plainclothes officers in an unmarked car were driving northbound along 7th Avenue at about 8:50 p.m. in September 2009 when they saw two men walking side by side on 7th Avenue near the corner of 144th Street. The arresting officer, Detective Barnes of the Manhattan Gang Unit, having patrolled the area and having made at least two arrests in the area, stated that this was a high crime area. No one else was on the street at that time. The officer testified that the two men's hands touched each other several times, defendant's left hand touching his companion's right hand, which made the officer suspect a possible drug transaction. He did not see any exchange between the men. The officer got out of the car and walked up to the men. He testified that a closed bank provided light. When he got within nine or ten feet, he claims that he saw defendant's right

hand (not the hand that had touched his companion's hand) clenched into a fist. Either at that point or when he got closer to the men, Detective Barnes claims he saw a white substance "peeking" out of a plastic bag in defendant's closed fist, but he acknowledged that he was not sure that the substance was a drug. He identified himself and then asked the men, who were cooperative, for identification and if they had any weapons. They denied having weapons, but before they had a chance to produce the identification, the detective ordered them to put their hands up, frisked them for weapons although they denied having any, and then grabbed defendant's wrist and pried open the fingers of defendant's right hand. In the hand was a plastic bag containing chunks of crack cocaine. Defendant was arrested, no money was vouchered and defendant's companion was not arrested. In denying the motion to suppress, the trial court stated, "This is a very close case quite frankly; however I find that Detective Barnes was a credible witness."

People v De Bour (40 NY2d 210 [1975]) and *People v Hollman* (79 NY2d 181 [1992]) established a four-tiered scale justifying police intrusions into private citizens' lives in street encounters. Level one allows police officers to seek information

when they have "some objective credible reason" to request information. A further level two inquiry may be made when officers have "a founded suspicion that criminal activity is afoot." Level three involves a forcible stop and detention, which requires "a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor." Level four is an arrest which requires probable cause to believe that the defendant was committing a crime (*De Bour*, 40 NY2d at 223*; see also Hollman*, 79 NY2d at 184-5).

Clearly, the stop here, which started out as a level two inquiry, quickly became a level three stop and then turned into a level four arrest as described in *People v De Bour.* The majority holds that the testimony about a white substance peeking out of defendant's clenched fist furnished probable cause for the arrest. However, Detective Barnes' testimony as to exactly when he saw this white substance was equivocal. It was either when he was approaching defendant, after nightfall, or when he actually stopped defendant and asked for his identification that the detective claims he saw the white substance, which justified the stop and frisk, followed by the arrest.

I do not believe that the circumstances described here

warranted even a level two inquiry. While two men walking along and open hands touching, may have been sufficient for a level one inquiry, I do not believe it was reasonable for an officer to suspect that criminal activity was afoot (*see De Bour*, 40 NY2d at 223). Thus, under the tests set forth in *De Bour*, there was insufficient basis to approach the defendant and ask about weapons and for identification.

However, if indeed, the detective here actually saw a white substance as he approached defendant, a level two inquiry might have been justified. In *People v Bethea* (67 AD3d 502 [2009]), we held that the defendant's putting an object into his mouth and walking away in response to a police officer's request to speak was sufficient for a level two inquiry, but not for further pursuit or seizure. Here there was less basis for suspecting that criminal activity was afoot. Nevertheless, the encounter immediately turned into a level three forcible stop and detention requiring reasonable suspicion that defendant was committing a felony or misdemeanor (*De Bour*, 40 NY2d at 223). It then became a level four arrest, requiring probable cause to believe that defendant was committing a crime, when the detective grabbed defendant's wrist and pried open his fingers (*id.*). The arrest

occurred after Detective Barnes patted down the defendant and found no weapons and despite defendant's and his companion's cooperation. Observing a clenched fist, even with a white substance peeking out was not sufficient to warrant an immediate seizure.

The cases cited by the prosecution to illustrate probable cause for a drug arrest, such as *People v McRay* (51 NY2d 594 [1980]), *People v Lewis* (242 AD2d 307 [1997], *lv denied* 91 NY2d 876 [1997]), and *People v Balas* (104 AD2d 1039, 1040 [1984], *lv denied* 64 NY2d 757 [1984]) all involve observation of white glassine envelopes or vials or of identifiable substances or tin foil packets being passed among people in what appear to be drug transactions. *People v Riccardi* (149 AD2d 742 [1989]) involved an automobile stop where white powder in a plastic bag was easily seen. The majority, citing *People v McRay* (51 NY2d 594 [1980]), states that there was probable cause for an arrest. In the instances described in *McRay*, experienced narcotics officers saw individuals passing white glassine envelopes to other individuals.

I do not believe walking side by side with hands touching but no exchange occurring and a clenched fist, even with a white

substance peeking out, is enough to furnish probable cause for an arrest, and for that reason, would grant the suppression motion.

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

ENTERED: OCTOBER 11, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5178 Steven M. Alevy doing business as Bankers Capital Realty Advisors,
Plaintiff-Appellant,

-against-

Isaac Uminer,
Defendant-Respondent,

Ditmas Capital, Inc., et al.,
Defendants.

Index 601934/06

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Wachtel & Masyr, LLP, New York (Abraham Katsman of counsel), for appellant.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered February 19, 2010, dismissing the complaint as against defendant Uminer, unanimously reversed, on the law, without costs, the judgment vacated, the first cause of action reinstated, and the matter remanded for a new trial on that cause of action.

The first cause of action is based upon defendant Uminer's alleged breach of a written independent contractor agreement (ICA). During the trial, the court granted defendant's motion in limine pursuant to CPLR 4401 to the extent of precluding plaintiff from introducing into evidence any document that was

purported to be the parties' original ICA or any copy thereof. The ruling was based upon the court's misgivings about plaintiff's eleventh hour proffer of a claimed duplicate original ICA. The court found the proffer to be at odds with an affidavit by which plaintiff had previously stated that the original ICA was destroyed in a flood after the action was commenced. Accordingly, the court found that plaintiff had not established the authenticity of the purported duplicate original or the copy previously submitted.

Based on the preclusion order, the court granted defendant's motion for judgment on the first cause of action. Under CPLR 4401, a party may move for judgment with respect to a cause of action or issue after the close of evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. Dismissal of the first cause of action was erroneous in this case because the motion was granted prior to the close of plaintiff's case. Such dismissals will be reversed as premature even where the ultimate success of the dismissed claim is improbable (*see e.g. Cetta v City of New York,* 46 AD2d 762, 762-763 [1974]).

Moreover, notwithstanding the court's doubts about plaintiff's late proffer of the purported original agreement, we

note that a copy of an ICA, allegedly signed by defendant, is annexed to the complaint and was therefore before the court prior to the commencement of the trial. It cannot be assumed that plaintiff would not have been able to lay a foundation for the introduction of this copy if afforded an opportunity to do so (*see* CPLR 4539[a]).

The court, however, properly declined to instruct the jury on Real Property Law § 440-a insofar as it prohibits persons from acting as real estate brokers without being licensed. There is no proof in the record that defendant engaged in the proscribed conduct.

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

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5534-
5534A The People of the State of New York, Respondent,

Ind. 11555/93
2102/99

-against-

Joseph Suarez, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

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Orders, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about August 6, 2010, which denied defendant's CPL 440.46 motions for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings on the motions.

Defendant is eligible for consideration for resentencing

even though he had been released from custody on his drug convictions but reincarcerated for parole violations (*see People v Paulin*, 17 NY3d 238 [2011]).

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

ENTERED: OCTOBER 11, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Abdus-Salaam, JJ.

5557 In re Joseph C. and Another,

Children under the Age
of Eighteen Years, etc.,

Anthony C.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Kevin R. Reich of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the children.

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Amended order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about June 29, 2010, which, upon a fact-finding determination that respondent further neglected his stepson, Joseph C., and derivatively neglected his biological son, Tristin C., released Joseph to the custody of his biological father with six months' supervision by the Administration for Children's Services, unanimously affirmed, without costs.

A neglected child is defined as a child less than 18 years of age whose physical, mental, or emotional condition has been

impaired or is in imminent danger of becoming impaired as a result of the failure of his parent to exercise a reasonable degree of minimal care in providing the child with proper supervision or guardianship (Family Court Act § 1012[f][i]). In this instance, the neglect finding was based on the court's conclusion that respondent unreasonably inflicted or allowed to be inflicted harm, or a substantial risk thereof, through the infliction of excessive corporal punishment (*see* Family Court Act § 1012[f][i]][B]).

Here, a preponderance of the evidence credited by the court supports its finding that respondent neglected his stepson by inflicting excessive corporal punishment on him (*see* Family Court Act § 1012[f][i][B]; *Matter of Syed I.*, 61 AD3d 580 [2009]). Respondent admitted that he punished his stepson by requiring him to hold himself in a "push-up" position and kneel on uncooked grains of rice for extended periods of time. We agree with the court's finding that these actions are not "appropriate forms of discipline." Furthermore, to the extent respondent asserts that his actions did not cause his stepson any physical, emotional, or mental injury, we note that the absence of actual injury does not preclude a finding of neglect (*see Matter of Tammie Z.*, 105 AD2d 463, 464 [1984], *affd* 66 NY2d 1 [1985]).

The derivative finding of neglect of respondent's biological son was proper as respondent's inappropriate and excessive corporal punishment of his 11-year-old stepson clearly demonstrated a sufficiently faulty understanding of his parental duties to warrant an inference of an ongoing danger to the approximately 2 year-old child as this Court did in *Matter of Syed I.* (61 AD3d 580 [2009], *supra*).

However, unlike *Syed I.*, where we noted that the mother was aware of the father's deteriorating mental health and that she could not protect the children when he hit them, respondent here has admitted that this was "not his finest parenting moment," demonstrating an appreciation of Family Court's conclusion that the punishments were grossly disproportionate to the offenses committed by his stepson. Furthermore, we take judicial notice of the fact that respondent's biological son has been returned to his care following respondent's satisfactory completion of a six-month period of ACS supervision. Nonetheless, we are reluctant to set aside the dispositions and credibility determinations of the Family Court. However, we urge the agency to evaluate any future complaints of abuse or neglect concerning the biological son, should there be any, on their own merits and not to be

unduly influenced by the existing derivative neglect finding.

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

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5655 The People of the State of New York, Ind. 4895/07
Respondent,

-against-

Freddie Gonzalez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered September 17, 2008, convicting defendant, after a jury trial, of robbery in the first degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. This Court has conducted an in camera review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]). After reviewing those minutes and all of the arguments raised by defendant on appeal, we find no basis for suppression.

Defendant did not preserve his claim that the *Darden* procedure for ex parte examinations should be confined to cases

involving warrants, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We note that the *Darden* case itself involves a warrantless arrest.

We adhere to our prior decision in which we denied defendant's motion for disclosure of the sealed hearing minutes and related relief (M-3831, 2010 NY Slip Op 83545[U] [Sept 28, 2010]).

The court properly received evidence that defendant possessed a knife at the time of his arrest one week after the robbery. The victim testified that the knife resembled the knife used in the robbery. Accordingly, the knife was clearly relevant (*see e.g. People v Del Vermo*, 192 NY 470, 481-482 [1908]; *People v Pimental*, 48 AD3d 321 [2008], *lv denied* 10 NY3d 843 [2008]). Defendant did not preserve his argument that the knife should have been excluded as evidence of an uncharged crime, or his assertion that the prosecutor's summation raised a propensity

argument, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5657-
5658-
5659 In re Dwayne F.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 7, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of robbery in the second degree, and placed him on probation for a period of 18 months, with restitution in the amount of $500, and order, same court and Judge, entered on or about May 3, 2011, which denied appellant's motion to modify the restitution amount, unanimously affirmed, without costs.

The court properly ordered appellant to pay restitution even though his allocution and admission did not include an agreement to pay restitution. Restitution is not a specific dispositional

order, but is rather a condition that accompanies a specific disposition (*see* Family Ct Act § 353.6). In this case, the court imposed restitution as a condition of probation.

The court's calculation of the amount of restitution was supported by the record. This included a sworn statement by the victim that appellant's acts had rendered her cell phone incapable of normal operation, and that she had paid approximately $500 for the device. This evidence was material and relevant, and the court properly considered it at the dispositional hearing (*see Matter of Nathan N.*, 56 AD2d 554 [1977]). Moreover, when appellant moved to modify the restitution order, the presentment agency responded with documentary proof of the device's replacement cost.

We have considered and rejected appellant's remaining arguments.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5660 The People of the State of New York, Ind. 2977/08
Respondent,

-against-

Ariel Olivier,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about December 10, 2008, unanimously affirmed.

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

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

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5661 Steiner Sports Marketing, Inc., Index 603003/09
Plaintiff-Respondent,

-against-

Steven Weinreb,
Defendant-Appellant.

_____

Kaufmann Gildin Robbins & Oppenheim LLP, New York (Daniel Gildin of counsel), for appellant.

The Roth Law Firm, PLLC, New York (Richard A. Roth of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 29, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendant's counterclaims for tortious interference with prospective economic relationships and intentional infliction of emotional distress, unanimously modified, on the law and the facts, to the extent of granting defendant leave to replead the tortious interference counterclaim, and otherwise affirmed, with costs.

In response to plaintiff Steiner Sports's action to enforce a covenant not to compete, allegedly signed by defendant Weinreb, and to prohibit Weinreb from working for other employers in the sports marketing industry, Weinreb asserted counterclaims for

tortious interference with prospective economic relationships and intentional infliction of emotional distress. Weinreb alleged that Steiner Sports had caused one of its clients, The Nelson Group, to rescind an offer of employment to him, unless Steiner Sports consented to the employment in writing, for the sole purpose of harming him. Weinreb also alleged that "Steiner Sports representatives" had falsely told "other potential employers" that he was subject to an extensive post-termination covenant not to compete, and had threatened litigation if any of those potential employers hired Weinreb.

The court properly dismissed the counterclaims under CPLR 3211(a)(7). The allegation that "Steiner Sports representatives" interfered with his prospective relationships with "other potential employers" is conclusory and unsupported by specific facts alleging any potential relationships (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 551 [2008]; *Learning Annex Holdings, LLC v Gittelman*, 48 AD3d 211 [2008]). Weinreb's assertion that Steiner Sports interfered with his prospective employment with The Nelson Group for the sole purpose of harming him is undermined by the factual allegations demonstrating that Steiner Sports had a normal economic interest in interfering with the prospective employment (*see Advanced*

Global Tech., LLC v Sirius Satellite Radio, Inc., 44 AD3d 317 [2007]). Furthermore, the allegation that plaintiff's chief executive officer requested and convinced The Nelson Group to rescind the offer does not constitute the kind of wrongful or culpable conduct required to state a claim for tortious interference with prospective economic relationships (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190-191 [2004]).

The court did not abuse its discretion in declining to grant Weinreb leave to replead, given Weinreb's inability to state what additional facts would be pleaded. However, since an undisputed fact emerged after the filing of the counterclaim, namely that Steiner Sports had submitted a fabricated agreement containing a one-year covenant not to compete in support of its complaint, we grant leave to replead the counterclaim to the extent it is based on knowing misrepresentations of an extensive non-compete agreement (*see Freedman v Pearlman*, 271 AD2d 301, 305 [2000]). Repleading would neither surprise nor prejudice Steiner Sports, as it has admitted to the misconduct, and the tortious interference claim, as repleaded, would not be "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [2010]).

Weinreb failed to allege facts sufficient to support a claim

for intentional infliction of emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121-122 [1993]). Leave to replead this counterclaim is unwarranted because even if Steiner Sports used a fabricated agreement to interfere with Weinreb's prospective employment with The Nelson Group, such conduct is not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Homes Prods. Corp.*, 58 NY2d 293, 303 [1983] [internal quotation marks and citation omitted]).

We have considered the remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5662 The People of the State of New York, Ind. 2290/08
Respondent,

-against-

Osvaldo Acosta,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered October 16, 2009, convicting defendant, after a jury trial, of robbery in the third degree and attempted robbery in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, unanimously affirmed.

The court properly granted the People's challenge for cause to a prospective juror (*see People v Williams*, 63 NY2d 882, 885 [1984]). The trial court's ability to observe demeanor is entitled to deference. The panelist's responses revealed "opinions reflecting a state of mind likely to preclude impartial service" (*People v Johnson*, 94 NY2d 600, 614 [2000]), and she ultimately was unable to give an unequivocal assurance of

impartiality. Her responses, viewed as a whole, evinced a serious difficulty with following the law relating to one-witness identification cases.

Where there is any doubt, the court should err on the side of disqualification because "the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror" (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]).

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5663- Ind. 4511N/07
5664 The People of the State of New York,
Respondent,

-against-

Eddie Delgado,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Phillip Morrow 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 (Robert M. Stolz, J.), rendered on or about April 14, 2010,

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: OCTOBER 11, 2011

CLERK

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

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5665 The Education Resources Institute, Inc., Plaintiff-Respondent, Index 305765/09

-against-

Frederick Hawkins, Defendant-Appellant.

_____

Law Office of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellant.

Susan R. Nudelman, Dix Hills, for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 19, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (7), unanimously modified, on the law, to grant the motion as to the second cause of action, and otherwise affirmed, without costs.

Defendant failed to establish prima facie that this action alleging breach of a student loan agreement is barred by the applicable six-year statute of limitations (CPLR 213[2]; *see Benn v Benn*, 82 AD3d 548 [2011]). The action was commenced in July 2009. The complaint alleges that defendant defaulted on the loan when he failed to make an installment payment on May 7, 2006.

Defendant offered no evidence to support a finding that the limitations period began to run in 2003.

Plaintiff's concession that it mistakenly opposed defendant's motion on the ground that the statute of limitations was preempted by federal law does not preclude review of its new argument that the allegations in the complaint demonstrate that the action is not time-barred. The statute of limitations issue is one of law, which may be determined from the face of the complaint and from defendant's admission that he made payments on the loan through approximately October 2004 (*see Gonzalez v New York City Health & Hosps. Corp.*, 29 AD3d 369, 370 [2006]). In any event, defendant's admissions would toll the statute of limitations (*see Banco do Brasil v State of Antigua & Barbuda*, 268 AD2d 75 [2000]). Defendant conceded in his reply papers that he had drafted, signed and sent a letter, dated March 6, 2006, to plaintiff's counsel acknowledging the balance due on the loan and unequivocally expressing an intent to pay it.

Plaintiff's second cause of action alleges that defendant owes "the sum of $.00 [*sic*], representing late charges due." While the insufficiency of a request for relief need not be fatal to a cause of action, this cause of action should be dismissed

because the complaint alleges no facts to support plaintiff's claimed entitlement to late charges, and plaintiff offered no factual support in opposition to defendant's motion (*see generally Gro-Up Frocks v Manners*, 55 AD2d 531 [1976]).

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5666 The People of the State of New York, Ind. 3352/08
Respondent,

-against-

Larry Martorell,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Matthew I. Fleischman of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 15, 2009, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 8 years, unanimously affirmed.

Defendant did not preserve his claim that the court failed to conduct an adequate inquiry into his possible justification defense during the plea allocution, and we decline to review it in the interest of justice. The narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1988]) does not apply because defendant's allocution did not cast doubt on his guilt. The court's duty to inquire was not triggered by statements defendant made to the police that may have suggested a

possible justification defense, since defendant "did not reiterate those statements at his plea allocution" (*People v Negron*, 222 AD2d 327, 327 [1995], *lv denied* 88 NY2d 882 [1996]). As an alternative holding, we find that defendant knowingly, intelligently and voluntarily pleaded guilty. In particular, the court specifically warned defendant that by pleading guilty he would be giving up any self-defense claim.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5667 The People of the State of New York, Ind. 5954/03
Respondent,

-against-

Ronnie Covington,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Order and judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about October 30, 2008, which, to the extent appealable, reimposed defendant's original prison sentence without imposing a period of postrelease supervision, unanimously affirmed.

We assume, without deciding, that this appeal is properly before us as an appeal from a judgment of resentence (*see* CPL 450.30[3]; *People v King*, 84 AD3d 473 [2011]), and we find it unnecessary to decide the appealablity issues raised by the People. However, defendant is not entitled to any relief.

Defendant's original sentence on his underlying conviction unlawfully omitted the required period of postrelease

supervision. Following postconviction motion practice and the Court of Appeals' decision in *People v Sparber* (10 NY3d 457 [2008]), the sentencing court determined that it would let the original sentence stand, without adding PRS. However, the court did not employ the procedure set forth in Penal Law § 70.85, whereby, with the People's consent, the court may correct a *Sparber* error by reimposing the original sentence without PRS.

Defendant seeks a remand for a resentencing hearing, arguing that the resentencing, or purported resentencing, was procedurally defective in various respects. However, defendant was not adversely affected by any error, because the result, i.e., freedom from having to serve a term of PRS, was in his favor (*see* CPL 470.15[1]; *People v Acevedo*, 17 NY3d 297, 302-303 [2011]).

In any event, defendant would not derive any practical benefit from a remand. To the extent that defendant seeks a proceeding at which he may ask the resentencing court for a lower prison sentence, that avenue of relief is foreclosed by the Court

of Appeals' decision in *People v Lingle* (16 NY3d 621, 634-635 [2011]). This Court likewise has no authority to revisit defendant's prison sentence on this appeal (*id.* at 635).

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5669 David L. Green, Index 117370/08
Plaintiff-Appellant,

-against-

Continuum Health Partners, Inc., et al.,
Defendants-Respondents.

_____

Jones, LLP, Scarsdale (Steven T. Sledzik of counsel), for appellant.

Littler Mendelson, P.C., New York (Barbara A. Gross of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 26, 2010, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff failed to show a continuing violation between the sexual harassment that he alleges occurred before December 30, 2005, three years before he commenced this action (*see* CPLR 214[2]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 307 [1983]), and the harassment that he alleges occurred on July 31, 2008 (*see Sirota v New York City Bd. of Educ.*, 283 AD2d 369 [2001]). The record demonstrates that for four years before July 31, 2008, the alleged harasser, a coworker, did not communicate with plaintiff about anything other than hospital business.

As to the single timely filed allegation, plaintiff failed to show that defendants acquiesced in the coworker's conduct or failed to take appropriate corrective action (*see* Administrative Code of the City of New York §§ 8-107[13][b][2], [3]). The record demonstrates that defendants conducted an investigation and terminated the coworker within several months after plaintiff's receipt of the letter.

Plaintiff also failed to show, based on defendants' handling of his complaints and the complaints of female employees, that he was treated less well than other employees because of his gender (*see Williams*, 61 AD3d at 78).

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5670 The People of the State of New York, Ind. 310/09
Respondent,

-against-

Harry Smith,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Caleb Kruckenberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered January 25, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 9 years, unanimously affirmed.

The court properly exercised its discretion when it denied defendant's mistrial motion. In that motion, defendant asserted that portions of the prosecutor's summation shifted the burden of proof. However, in each instance the court had sustained defendant's objection and struck the allegedly offending remark. The court's curative actions were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). In any event, when viewed in context, the challenged remarks were fair

responses to defendant's summation, and they did not shift the burden of proof.

Defendant's remaining challenges to the summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5671 Pietro Fragale, et al., Index 23717/04
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

_____

Arnold E. DiJoseph, New York, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 11, 2010, which, in this personal injury action arising from a slip and fall in a garage owned and managed by defendant, denied as moot plaintiff's motion for a trial preference and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the cross motion denied, and the matter remanded for proceedings consistent with this decision.

Supreme Court erred in finding that there were no issues of fact as to constructive notice of the alleged oil condition on the garage floor where plaintiff fell. The testimony and statements of defendant's employees raised an issue of fact as to

whether there was an ongoing and recurring dangerous oil condition in the area of the accident that defendant routinely left unaddressed (*see Zisa v City of New York*, 39 AD3d 313, 314 [2007]). Indeed, a supervisor stated that the garage floor was oily for "weeks and months," and a superintendent testified that he performed only weekly inspections of the premises (*compare Mercer v City of New York*, 223 AD2d 688 [1996], *affd* 88 NY2d 955 [1996]). The evidence also presents a triable issue as to whether defendant created the alleged oil condition (*see Zisa*, 39 AD3d at 314). One of defendant's supervisors testified that defendant routinely performed maintenance work on vehicles in the area where plaintiff fell, causing oil to spill on the floor. Any conflict between the witnesses' statements and their EBT testimony presents credibility questions not suitable for resolution on the defendant's motion for summary judgment.

We decline to decide whether plaintiff should have been granted a trial preference. Supreme Court denied plaintiff's

motion as moot, and thus never addressed the merits of the issue. Accordingly, we remand for the court to consider plaintiff's application for a trial preference.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5672 The People of the State of New York, Ind. 3659/06
Respondent,

-against-

James P. Wolfgeorge,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (John P. Collins, J.), rendered on or about May 15, 2009, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5674 Zamil Uddin, Index 101040/05
Plaintiff-Appellant,

-against-

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

_____

H. Bruce Fischer, P.C., New York (H. Bruce Fischer of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for municipal respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Jordan Schur of counsel), for L&L Painting Co., Inc. and Alpha Painting & Construction Co. Inc., respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 23, 2010, which granted the motion of defendants L&L Painting Co. and Alpha Painting and Construction Co. for summary judgment dismissing the complaint as against them, and granted defendant City of New York's cross motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleged that he was injured when water and an unidentified metal object fell onto the windshield of his vehicle while he was driving on the lower roadway of the Queensboro Bridge, causing him to lose control of his vehicle and strike a

divider. Plaintiff asserted causes of action for negligence, claiming that the accident was the result of paint removal work being performed on the bridge.

Defendants met their burden of establishing prima facie entitlement to summary judgment by presenting evidence that on the day of the accident, they were not working on the bridge at the time plaintiff collided with the divider. Defendants also presented evidence that the abrasive blasting work being performed did not utilize water. In opposition, plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 231 [2003]). Indeed, despite counsel's argument on appeal, the record discloses that plaintiff never testified that his vehicle was struck by sand or "sand pellets."

Contrary to plaintiff's argument, the motion court correctly concluded that the doctrine of res ipsa loquitur was not applicable. Even if the accident occurred because of negligence, the record reveals that another contractor was present at the accident location on the day in question and that this nonparty was performing abrasive blasting operations. It is well settled that the doctrine is applicable only in those situations where the injury-producing agency is within the exclusive control and

possession of the entity charged with negligence (*Mercatante v City of New York*, 286 App Div 265, 267-268 [1955]). Since it thus may be equally inferred that the accident might have been due to causes in no way connected with defendants' negligence, the rule of res ipsa loquitur may not be invoked (*id.*).

Plaintiff's argument that the paint removal work which involved abrasive blasting constitutes an inherently dangerous activity and therefore defendants are strictly liable is unavailing. Plaintiff never asserted a strict liability claim and the statute of limitations for such a claim has expired (*see* CLPR 203[f]; CPLR 214).

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5675 The People of the State of New York, Ind. 3259/07
Respondent,

-against-

Gary Teasley,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Jalina J. Hudson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J. at hearing; Arlene D. Goldberg, J. at plea and sentencing), rendered June 9, 2009, convicting defendant of forgery in the second degree, criminal possession of stolen property in the fourth degree, and grand larceny in the fourth degree (two counts), and sentencing him, as a second felony offender, to an aggregate term of 4 to 8 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

An officer issued a wanted poster containing defendant's photograph. This was based on a chain of circumstantial evidence

that was sufficient to establish probable cause, which does not require proof beyond a reasonable doubt (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). Under the circumstances, defendant's criminal history was a relevant factor in developing probable cause, but it was not the principal basis for the officer's suspicion of defendant.

Another officer recognized defendant from the wanted poster and lawfully arrested him. The arresting officer was entitled to act under the fellow officer rule. In any event, the arresting officer saw defendant commit a violation in the officer's presence. Therefore, the officer was also entitled to arrest defendant on that basis (*see People v Lewis*, 50 AD3d 595 [2008], *lv denied* 11 NY3d 790 [2008]).

While defendant was under arrest, the police lawfully obtained statements from him. Based on those statements and other information, the police obtained a valid warrant for defendant's storage space.

We have considered and rejected defendant's remaining claims.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5676 The People of the State of New York, Ind. 1515/08
Respondent,

-against-

Benjamin John,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered October 21, 2008, convicting defendant, after a nonjury trial, of attempted grand larceny in the fourth degree, and sentencing him to a term of 1 year, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its resolution of any inconsistencies in testimony. The hearing evidence clearly established that the

officer observed defendant in the act of picking the pocket of a sleeping victim.

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

ENTERED: OCTOBER 11, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Moskowitz, Abdus-Salaam, JJ.

5677 The People of the State of New York, Ind. 5116/99
Respondent,

-against-

Levern Baldwin,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 11, 2009, resentencing defendant to a term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 11, 2011

CLERK