SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 10, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Acosta, Renwick, JJ.

10599 The People of the State of New York, Respondent, Ind. 5702/09

-against-

Weston Coote,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Kirkland & Ellis LLP, New York (Shireen A. Barday of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered May 12, 2010, as amended May 28, 2010, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of 6½ years, unanimously affirmed.

Defendant's assault conviction stems from the events that took place in a bar on October 15, 2009, when defendant struck the victim in the head with a "pint glass," causing numerous lacerations to the victim's neck, ear and scalp.

The verdict was based on legally sufficient evidence and

was not against the weight of the evidence as to the element of serious physical injury. The element of serious physical injury was satisfied by evidence supporting the conclusion that the wounds inflicted by defendant caused serious disfigurement to the victim (*see People v McKinnon*, 15 NY3d 311, 315-316 [2010]). The victim testified that, at the time of trial, six months after the attack, he had scars on the left side of his face, on the front and back of his neck, and on his skull behind his ear. He also testified that he had grown a beard to "blend [the scar on his neck] in so it won't be that noticeable." The treating physician testified that, on the day of the trial, he observed that the scar on the victim's neck "appeared to be hypertrophic," which, he explained, means "a bulky scar that's red and almost looks piled up with scar tissue." The testimony of the victim and his treating physician, viewed as a whole, and especially considering the prominent location of the wound on the face, support the inference that at the time of trial the scars remained seriously disfiguring under the *McKinnon* standard.

The court properly adjudicated defendant a second violent felony offender based upon his 2002 guilty plea conviction to assault in the second degree. Defendant's bald assertion that he had not been informed of the post release supervision component of his sentence at the time of his plea does not satisfy the

burden of establishing that his prior conviction was unconstitutionally obtained. It was incumbent on defendant to come forward to prove his claim (CPL 400.21 [7][b]), and the trial court did not err by relying on the presumption of regularity (*see People v Hodges*, 194 AD2d 484 [1st Dept 1993], *lv denied* 82 NY2d 720 [1993]).

Finally, we find that defendant's sentence, which was less than the maximum, was not excessive in light of his significant record and the fact that this was a senseless act of violence that could have easily resulted in more severe injuries than it did.

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10723 The People of the State of New York, Respondent, Ind. 370/08

-against-

Malik Yusuf, also known as Yusuf Ashford, 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 (Nicole Coviello of counsel), for respondent.

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Appeal from judgment of resentence, Supreme Court, New York County (Daniel P. Conviser, J.), rendered July 24, 2012, resentencing defendant, as a second felony drug offender, to an aggregate term of 3 1/2 years, unanimously dismissed as moot.

Since defendant has completed his entire sentence, including postrelease supervision, his claim of improper resentencing is moot (*see People v Hults*, 231 AD2d 836 [3d Dept 1996]), and we do

not find that the exception to the mootness doctrine applies. In any event, defendant's claim is unavailing.

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10724 In re Veronica P.,
Petitioner-Respondent,

-against-

Radcliff A., etc.,
Respondent-Appellant.

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

Dora M. Lassinger, East Rockaway, for respondent.

_____

Appeal from order, Family Court, New York County (Ivy I. Cook, Referee), entered on or about February 4, 2011, which after a hearing, determined that respondent had committed acts that constituted harassment in the second degree (Penal Law § 240.26), and granted petitioner a two-year order of protection directing appellant to, inter alia, stay away from her home, unanimously dismissed, without costs, as moot.

Because the order of protection has expired, this appeal is moot (*see Matter of Diallo v Diallo*, 68 AD3d 411 [1st Dept 2009], *lv dismissed* 14 NY3d 854 [2010]).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10725-
10726 Heidi Moon,
Plaintiff/Petitioner-Respondent-Appellant,

-against-

Julie Tupler,
Defendant/Respondent-Petitioner-Respondent.

Index 107637/10

_____

Ferber Chan Essner & Coller, LLP, New York (Robert M. Kaplan of counsel), for appellant.

Law Office of Robert L. Greener, New York (Robert L. Greener of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered October 1, 2012, in favor of defendant, Julie Tupler, in the amount of $8000 with interest, unanimously affirmed, without costs. Appeal from the underlying order, same court and Justice, entered August 17, 2012, which confirmed an award by a special referee and directed the entry of judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The special referee had jurisdiction to hold plaintiff, Heidi Moon, personally liable for "disallowed" expenses, as the court's February 8, 2011 order of reference directed the referee to determine, without limitation (*see* CPLR 4311), plaintiff's compliance with paragraph two of the order that confirmed the

arbitration award. Although the arbitrator awarded "restitution" as a remedy, he explicitly recognized that the calculation of damages was "problematic," and thus fashioned an award that included paragraph two, the requirement for an accounting.

Article 75, cited by defendant in her petition to confirm the award, applies only to the confirmation of an award by an arbitrator, as opposed to a referee (*see* CPLR 7510; *Mobil Oil Indonesia v Asamera Oil (Indonesia)*, 43 NY2d 276, 281 [1977]). However, where "a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded" (CPLR 2001; *see also Eugene DiLorenzo, Inc. v A.C. Dutton Lbr Co.*, 67 NY2d 138 [1986]), and there was no prejudice in citing the wrong provision in the application to confirm, as plaintiff was aware of the relief being sought and the failure to cite the proper provision did not result in any action being taken against her that would not have occurred had the proper provision, CPLR 4403, been cited.

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10727 In re Madelyn Montanez, Index 105008/11
Petitioner-Appellant,

-against-

The Department of Education of
the City of New York, et al.,
Respondents-Respondents.

_____

The Law Offices of Stewart Lee Karlin, P.C., New York (Daniel Dugan of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered December 29, 2011, denying the petition to vacate an arbitration award, dated April 9, 2011, which terminated petitioner's employment as a public school teacher, confirming the award, and dismissing the proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, unanimously affirmed, without costs.

Upon review of the transcript provided on appeal, we conclude that the hearing officer's finding that petitioner fraudulently obtained a free New York City public school education for her son during the 2009-2010 school year is supported by adequate evidence in the record (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563,

568 [1st Dept 2008]). Petitioner did not urge the hearing officer to apply a heightened standard in finding fraud.

Although petitioner has an unblemished record as a teacher and offered to resolve the dispute by making restitution, the penalty of termination is not shocking in light of her having used a fraudulent affidavit to obtain a free New York City education for her non-resident child (*see Cipollaro v New York City Dept of Educ.*, 83 AD3d 543 [1st Dept 2011]; *compare Matter of Guzman v City of New York*, 105 AD3d 460 [1st Dept 2013]).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10728 Steven Quock, Index 104341/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Abul K. Azad, et al.,
Defendants-Appellants.

_____

Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for Quock, appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for Azad and Inta Cab Corp., appellants.

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered November 28, 2012, which granted defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff police officer was injured in a collision at an intersection between a radio motor patrol vehicle in which he was a passenger, and a taxicab owned by defendant Inta Cab Corp. and driven by defendant Azad. The accident occurred when plaintiff's partner, Officer Santiago, driving east in response to a radio call of a crime in progress, proceeded through a red traffic

light and was hit by Azad's cab, which was traveling northbound.

Dismissal of the action as against the City was proper since there are no triable issues as to whether Santiago acted recklessly in crossing the intersection, as required to impose liability under Vehicle and Traffic Law § 1104, the statutory predicate for plaintiff's claim under General Municipal Law § 205-e (*see Gonzalez v Iocovello*, 93 NY2d 539, 551 [1999]). The record shows that Santiago activated her lights and sirens immediately upon entering the vehicle, thereby alerting those around her to her presence and emergent right of way (*see Frezzell v City of New York*, 105 AD3d 620 [1st Dept 2013]; *Spencer v Astralease Associated, Inc.*, 89 AD3d 530 [1st Dept 2011]). Santiago also reduced her speed as she approached the intersection and although she thereafter accelerated, Santiago looked in the direction of oncoming traffic, but saw no cars approaching (*cf. Campbell v City of Elmira*, 84 NY2d 505, 508 [1994]). The fact that Santiago did not see Azad's taxi until just before the accident does not render her conduct reckless (*see Perez v City of New York*, 80 AD3d 543 [1st Dept 2011]).

Furthermore, even after accelerating into the intersection, there is no evidence that Santiago was travelling faster than 35 m.p.h., a mere five miles per hour above the applicable speed limit. Considering that she was responding to a report of a

crime in progress, Santiago's relatively modest speed under the circumstances does not rise to the level of reckless conduct (*see Saarinen v Kerr*, 84 NY2d 494, 503 [1994]; *Perez*, 80 AD3d at 543-544).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10729-
10729A The People of the State of New York, Respondent,

Ind. 175/10
4/10

-against-

Antwan Hope, also known as Antwan Hopkins,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 17, 2010, convicting defendant, upon his pleas of guilty, of rape in the second degree and bail jumping in the second degree, and sentencing him, as a second felony offender, to concurrent terms of five years and two to four years, respectively, to be served consecutively to a nine month sentence imposed on a prior conviction, unanimously modified, on the law, to run the sentences imposed herein concurrently with the sentence imposed on the prior conviction, and otherwise affirmed.

As the People concede, the sentences were required to run concurrently with the definite sentence imposed on defendant's conviction in a prior case because of the merger provisions of Penal Law § 70.35.

Although the record does not establish a valid waiver of the right to appeal, we perceive no basis for reducing the sentence any further.

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10730-
10730A In re Jessey Andrews S., and Another

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

Benny William W., etc.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 25, 2011, which, upon fact-finding determinations that respondent's consent was not required for the adoption of the subject children and, in the alternative, that respondent permanently neglected the children, terminated respondent's parental rights and committed the custody and guardianship of the children to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The record supports the court's finding that respondent's consent was not required for the adoption of the children (*see*

Domestic Relations Law § 111[1][d], [e]; *Matter of Timothy M [Timothy B.]*, 79 AD3d 595 [1st Dept 2010]). Respondent, who did not live with the children's mother during the relevant period, admitted that he made no payment toward the support of the children. The small gifts and occasional meals he gave them are insufficient to constitute support (*see* Domestic Relations Law § 111[1][d][i]).

The record also supports the court's alternative finding that respondent permanently neglected the children by failing to plan for their future despite the agency's diligent efforts to strengthen his relationship with them (*see* Social Services Law 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). The case worker testified that the agency made numerous referrals and that respondent refused them, saying that he had completed the services in the past in connection with proceedings to terminate his parental rights to his two other children. Moreover, respondent admitted that he failed to complete the service plan before the petitions were filed.

The record demonstrates that it is in the best interests of the children to be freed for adoption (*see* Family Court § 631;

Matter of Michael B., 80 NY2d 299 [1992]). While respondent has failed to address the problems that led to the children's placement, the foster parents, who want to adopt the children, have provided them with a loving, supportive home in which their special needs are addressed.

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10732-
10733 The People of the State of New York,
Respondent,

-against-

Angel Birriel,
Defendant-Appellant.

Ind. 4339/08

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered on or about December 5, 2011, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court correctly applied the presumptive override for a prior felony sex crime conviction. At the hearing, defendant did not establish that he was being released to a secure psychiatric facility. In any event, he has still not established that the nature of his psychiatric placement is a mitigating factor, not adequately taken into account by the risk assessment instrument,

that would warrant any type of downward departure (*see e.g. People v James*, 103 AD3d 588 [1st Dept 2013], *lv denied* 21 NY3d 856 [2013]).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10736 Xavier Delagrange, etc., Index 600425/10
Plaintiff-Appellant,

-against-

Francois Payard,
Defendant-Respondent,

I-T Restaurant, LLC,
Defendant.

_____

Hodgson Russ LLP, Buffalo (John L. Sinatra, Jr. of counsel), for appellant.

Tarter Krinsky & Drogin LLP, New York (Linda S. Roth of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 29, 2012, which granted defendant Payard's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, with costs.

Plaintiff's claims against Payard, whether asserted individually or on behalf of In-Tent Restaurant Ltd., were correctly dismissed because there is no evidence that Payard ever acted outside the scope of his role as representative of FR Venture Inc., the managing member of In-Tent (*see Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209 [1st Dept 2005]; *Mendez v City of New York*, 259 AD2d 441 [1st Dept 1999]; *see also Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). Moreover, as

to the claims brought in plaintiff's individual capacity, there is no evidence – indeed, plaintiff does not even adequately allege – that an oral contract existed between Payard and himself (*see Carlsen v Rockefeller Ctr. N., Inc.*, 74 AD3d 608 [1st Dept 2010]) or that Payard owed him any duty independent of the duty arising from defendant I-T Restaurant LLC's operating agreement (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]). Plaintiff's fraud claim is both insufficiently specific and duplicative of the breach of contract claim (*see* CPLR 3016[b]; *Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]).

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

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10738 In re Erika Hildebrandt,
Petitioner-Appellant,

—against—

Dwaine Philmore St. Elmo Lee,
Respondent-Respondent.

_____

The Kepanis Law Firm, P.C., New York (Douglas S. Kepanis of counsel), for appellant.

Elisa Barnes, New York, for respondent.

Carol Kahn, New York, attorney for the child.

_____

Order, Family Court, New York County (George L. Jurow, J.H.O.), entered on or about April 30, 2012, which, after a hearing, denied petitioner mother's application to relocate to Texas with the parties' minor child, and granted respondent father's petition for modification of custody, awarding sole custody of the child to the father with visitation to the mother, unanimously affirmed, without costs.

A sound and substantial basis exists in the record for the court's determination that the child's best interests would be served by denying the mother's relocation application and awarding sole custody to the father with visitation to the mother (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]; *Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]).

Although the child has indicated a preference to live with the mother, that factor is not "determinative" (*Eschbach*, 56 NY2d at 173). Further, the record shows that the mother and her parents, particularly her father, have engaged in a long-standing pattern of exclusionary behavior and hostility toward the father, thereby making it unlikely that the father-child relationship would be preserved if the mother were permitted to relocate with the child to Texas (*see Matter of Rebecca B.*, 204 AD2d 57, 59 [1st Dept 1994], *lv denied* 84 NY2d 808 [1994]). By contrast, the record shows that the father does not harbor any animosity toward the mother and her family and would help facilitate and maintain the mother's relationship with the child (*see Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295, 296 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]).

Although the evidence shows that the mother's life will be enhanced economically, emotionally, and educationally by the move, the educational benefit to the child, if any, will be minimal.

The court properly rejected the forensic expert's opinion in favor of awarding custody to the mother (*see Matter of John A. v Bridget M.*, 16 AD3d 324, 332 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]), since his report contained many deficiencies, as noted by an expert peer reviewer. Indeed, the forensic expert

failed to consider, among other things, the mother's actions in temporarily leaving the jurisdiction with the child in violation of a court order and permanently moving to Texas without notifying the court, the father or the social worker.

The court properly declined to credit the mother's unsubstantiated allegations of the father's sexual improprieties toward her on several occasions from 2006 to 2009 (*see Eschbach*, 56 NY2d at 173).

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

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10739 The People of the State of New York, Respondent, Ind. 3044/09

-against-

Marvel Jones, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered March 30, 2011, convicting defendant, after a nonjury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports a reasonable inference that defendant cut the victim's face with a razor blade, as opposed to merely punching her, and that he did so with the intent to cause serious physical injury.

Since defendant made an offer of proof at trial that was

completely different from the theory of relevance he asserts on appeal, his claim that the court unduly restricted his cross-examination of the victim is unpreserved (*see People v Brown*, 298 AD2d 176 [2002], *lv denied* 99 NY2d 556 [2002]). Defendant's constitutional argument is unpreserved for the same reason, as well as the additional reason that defendant never asserted a constitutional right to pursue the line of inquiry at issue (*see e.g. People v Lane*, 7 NY3d 888, 889 [2006]). We decline to review these claims in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant was not deprived of his right to cross-examine witnesses and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986])

Defendant did not properly preserve his claim that the court erred in delaying its consideration of his request to proceed pro se – asserted for the first time during cross-examination of the victim – until after the victim's testimony had concluded; in any event, defendant abandoned that claim when, through counsel, defendant withdrew his request to represent himself (*see People v Douglas*, 227 AD2d 130 [1st Dept 1996], *lv denied* 88 NY2d 965 [1996]).

The record does not establish that defendant's sentence was based on any improper criteria and we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10741 The People of the State of New York, Ind. 5362/10
Respondent,

-against-

Calvin Guido,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee 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 (Renee A. White, J.), rendered on or about April 26, 2011,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

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

ENTERED: OCTOBER 10, 2013

CLERK

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

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10743 501 Fifth Avenue Company LLC, Index 153082/12
Plaintiff-Appellant,

-against-

Alvona LLC.,
Defendant,

Serhiy Hoshovsky, et al.,
Defendants-Respondents.

_____

Borah Goldstein Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Chukwuemeka Nwokoro, New York, for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about December 3, 2012, which granted the motion to dismiss the complaint made by defendants Serhiy Hoshovsky and Iryna Kryakina, unanimously affirmed, with costs.

Plaintiff is correct that the motion court should not have considered the affidavit of the director of the corporate defendant's parent. The affidavit, which was in a foreign language, was translated into English but was not accompanied by an affidavit from the translator (CPLR 2102[b]).

Even without considering the affidavit, the claims against the individual defendants, which are based on piercing the corporate veil, were properly dismissed. The allegations of corporate domination are wholly conclusory and consist of no more

than a recitation of the elements of the claim, "upon information and belief." Moreover, the documents, and the complaint itself, show that the individual defendants are not owners of the corporate defendant, but mere employees or officers. As such, there is no explanation of how any domination was for their personal gain. Finally, the failure to allege any fraud or unjust conduct is fatal to the complaint, especially since the corporate defendant performed under the five year lease at issue for almost four years (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10744 The People of the State of New York, Respondent, Ind. 4656/09

-against-

Evita Quimbley, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Juan Merchan, J.), rendered on or about July 20, 2011, 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 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10745N Sandra Rivacoba, Index 305844/09
Plaintiff-Respondent,

-against-

Jose Alejandro Luna Aceves,
Defendant-Appellant.

_____

McNamee, Lochner, Titus & Williams, P.C., Albany (Bruce J. Wagner of counsel), for appellant.

Law Offices of Sergio Villaverde, New York (Sergio Villaverde of counsel), for respondent.

_____

Amended order, Supreme Court, New York County (Barbara Jaffe, J.), entered on or about April 9, 2012, which, insofar as appealed from as limited by the briefs, awarded plaintiff wife $61,300 in temporary attorney fees, unanimously affirmed, without costs.

Upon considering the relevant factors, the court exercised its discretion in a provident manner in its award of counsel fees to plaintiff (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Wechsler v Wechsler*, 19 AD3d 157 [1st Dept 2005]). Nor did the award impose too great a financial burden on defendant husband under the circumstances (*compare Maidman v Maidman*, 82 AD3d 577 [1st Dept 2011]).

Furthermore, the award of interim counsel fees was supported by sufficient documentation and description of the work performed

(*compare Mimran v Mimran*, 83 AD3d 550, 551 [1st Dept 2011]). Although the wife does not dispute that she received one billing statement within an 18-month period, she did not object to the billing statement and thus waived her right to receive bills at least every 60 days (*see Granato v Granato*, 75 AD3d 434 [1st Dept 2010]; 22 NYCRR 1400.2). "It is the right of the client, not the adversary spouse, to be billed at least every 60 days, and the client may waive that right" (*Petosa v Petosa*, 56 AD3d 1296, 1298 [4th Dept 2008]).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, Clark, JJ.

10746N Mintz & Fraade, P.C., Index 603125/07
Plaintiff-Appellant

-against-

Docuport, Inc.,
Defendant-Respondent.

_____

Mintz & Fraade, P.C., New York (Alan P. Fraade of counsel), for appellant.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 12, 2012, which, to the extent appealed from, denied plaintiff's motion for summary judgment on its claim for an account stated and dismissing of defendant's counterclaim for breach of fiduciary duty as time-barred, unanimously affirmed, without costs.

The motion court correctly denied plaintiff's motion for summary judgment on its claim for an account stated. Plaintiff law firm failed to state a prima facie case for an account stated since the invoices submitted in support of the motion did not set forth plaintiff's "hourly rate, the billable hours expended, or the particular services rendered" (*Ween v Dow*, 35 AD3d 58, 62 [1st Dept 2006]).

The motion court also properly declined to dismiss defendant's counterclaim for breach of fiduciary duty. Although

the counterclaim was based on events that occurred more than three years before the counterclaim was interposed (*see* CPLR 214), the counterclaim arose from the same "transactions, occurrences, or series of transactions and occurrences" as the claims in the complaint (CPLR 203[d]; *cf. Messinger v Mount Sinai Med. Ctr.*, 279 AD3d 344 [1st Dept 2001]).

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Sweeny, Saxe, Freedman, JJ.

10747 In re Gregory Ferguson, Ind. 2061/11
[M-4352] Petitioner,

-against-

Hon. John Doe, et al.,
Respondents.

_____

Gregory Ferguson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. John Doe, respondent.

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella of counsel), for Cynthia Lindblom and Lindsey Ramistella, respondents.

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

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

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

ENTERED: OCTOBER 10, 2013

CLERK

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9943 The People of the State of New York, SCI 40154C/07
Appellant,

-against-

Raul Salazar,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), entered on or about February 8, 2012, reversed, on the law, the verdict reinstated, and the matter remanded for sentencing.

Opinion by Sweeny, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
John W. Sweeny, Jr.
Paul G. Feinman, JJ.

9943
SCI. 40154C/07

_____x

The People of the State of New York,
Appellant,

-against-

Raul Salazar,
Defendant-Respondent.

_____x

The People appeal from the order of the Supreme Court, Bronx County (Caesar D. Cirigliano, J.), entered on or about February 8, 2012, which granted defendant's CPL 330.30(1) motion to set aside a verdict convicting him of driving while intoxicated.

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan and Joseph N. Ferdenzi of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for respondent.

SWEENY, J.

Does the failure of the police to administer a physical coordination test to a non-English speaking defendant of Hispanic origin arrested for driving while intoxicated violate equal protection and due process, where such tests are routinely administered to English-speaking defendants? For the reasons stated herein, we hold that it does not.

On June 26, 2007, at approximately 10:55 p.m., Police Officer Miguel Iglesias observed a 1992 Toyota Camry parked partially on the sidewalk facing oncoming traffic on Pugsley Avenue in the Bronx. Upon approaching the vehicle, Iglesias noticed the driver's side front tire was blown out. He saw defendant in the driver's seat, "slouched" over the steering wheel. Iglesias knocked on the driver's side window to get defendant's attention. When the door opened, Iglesias smelled a strong odor of alcohol coming from the vehicle and saw an open 40-ounce bottle of beer in the car. The keys were in the ignition, the motor was running and the dashboard lights were on. Iglesias asked defendant to step out of the car. Defendant was unable to do so by himself and had to be assisted by Iglesias. Officer Iglesias testified that defendant was unsteady on his feet, had bloodshot eyes, and appeared to be intoxicated. Iglesias asked defendant basic questions such as his name and

address. Defendant began speaking in Spanish. Iglesias then asked defendant, in Spanish, if he was drunk and defendant replied, also in Spanish, "Yes, I am drunk. That's why I parked over here." At that point, Officer Iglesias placed defendant under arrest.

Police Officer Angel Padilla responded to the scene to transport defendant to the 45th Precinct for a breathalyzer test. Padilla testified that defendant was unsteady on his feet, needed help to walk to the police van and had bloodshot eyes with dilated pupils, and that his breath smelled strongly of alcohol. After arriving at the 45th Precinct, Officer John King, the breathalyzer operator, told defendant why he was under arrest and asked if he wanted to take the breathalyzer test. Upon realizing there was a "language barrier," King read the information and question regarding the breathalyzer test in English and then played a Spanish-language tape that repeated the information and question. After watching the tape, defendant agreed to take the test. Officer Padilla assisted Officer King in explaining to defendant in Spanish the procedure required to take the test. The test results indicated that defendant's blood alcohol content was .21, nearly three times the legal limit.

Officer King, who had been specially trained to administer the standard physical coordination test and analyze the result,

testified that he did not give that test to defendant because he did not speak English. He explained that, although Officer Padilla assisted him with the breathalyzer test, he did not want Padilla to translate the coordination test instructions since "[P]art of the test is following directions. There's subtle parts of the test and I wouldn't know if the officer truly and accurately described what I was saying" or whether Padilla was "using his own words or translating exactly what I said." Officer King also testified that the Police Department does not have a Spanish language tape of the coordination test instructions.

After a jury trial, defendant was found guilty of driving while intoxicated. Thereafter, defendant moved to set aside the verdict on the ground that the New York City Police Department policy of administering both breathalyzer and physical coordination tests to English-speaking DWI suspects while offering only the breathalyzer test to non-English speakers violated the Equal Protection and Due Process Clauses of the United States and New York Constitutions.[1]

The trial court granted defendant's motion, set aside the

[1]The record reflects that defense counsel raised this issue both at the pretrial hearing and in the context of his motion to dismiss at the close of the evidence.

verdict and dismissed all charges. The court found that the procedure employed by the police department created a "classification predicated upon a person's Hispanic origin and their inability to speak and/or understand the English language and therefore discriminates against primarily Spanish speaking individuals of Hispanic origin" and thus, violated the equal protection clause under either a strict or rational basis analysis.

The court also found a due process violation, finding the procedures utilized deprived defendant of his liberty interest and that this deprivation could be eliminated by "additional or substitute procedures", i.e., by providing interpreters for non-English speaking suspects. It rejected the People's argument that such procedures would be cost prohibitive.

Much of the court's rationale is similar to its reasoning in a prior published decision (*People v Molina*, 25 Misc 3d 362 [Sup Ct, Bronx County 2009]). We now reject that rationale and find the court erred in concluding that defendant's constitutional rights to equal protection of the law and due process were violated by the Police Department practice under consideration.

The Equal Protection Claim

Section one of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause protects against "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents" (*Village of Willowbrook, et al. v Grace Olech*, 528 US 562, 564 [2000]). Article 1, section 11 of the New York State Constitution provides New York citizens with an equivalent constitutional safeguard (*see Hernandez v Robles*, 7 NY3d 338, 362 [2006]).

Claimed violations of equal protection are evaluated under either a "strict scrutiny" or "rational basis" analysis. Where governmental action disadvantages a suspect class or burdens a fundamental right, the conduct must be strictly scrutinized and will be upheld only if the government can establish a compelling justification for the action (*see Regents of the Univer. of Cal. v Bakke*, 438 US 265, 299-300 [1978]; *San Antonio Ind. Sch. Dist. v Rodriguez*, 411 US 1, 16-17 [1973]). Where a suspect class or a fundamental right is not implicated, the action need only be rationally related to a legitimate governmental purpose (*see Massachusetts Bd. of Retirement v Murgia*, 427 US 307, 312

[1976]).

When these fundamental analytical principles are applied to the facts of this case, the trial court's determination that the practice at issue disadvantaged a suspect class, triggering the strict scrutiny that requires the government to establish a compelling justification for the practice (*Bakke*, 438 US at 299; *Rodriguez*, 411 US at 16-17) cannot stand.

Although Hispanics as an ethnic group constitute a suspect class under equal protection analysis (*see Keyes v School Dist. No. 1*, 413 US 189, 197 [1973]), the practice at issue here is facially neutral as to ethnicity. The policy determination as to whether or not to perform physical coordination tests is based on a suspect's ability to speak and understand English, and is not based upon race, religion or national origin. It has long been the rule that "[l]anguage, by itself, does not identify members of a suspect class" (*Soberal-Perez v Heckler*, 717 F2d 36, 41 [2d Cir 1983], *cert denied* 466 US 929 [1984]).

The facial neutrality of the classification however, does not prevent defendant from demonstrating intentional discrimination, either in the general policy or, as in this particular case, based on Hispanic ethnicity. "[S]uch a claim requires that a [defendant] show an intent to discriminate against the suspect class." In order to establish intentional

discrimination, defendant must show that "the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." (*Soberal-Perez v Heckler*, 717 F2d at 42). Thus, while a practice that is facially neutral as to a suspect classification does not insulate it from a finding of discrimination against a suspect class, an equal protection claim can only be established by a demonstration of actual intentional discrimination. Otherwise, the claim must be evaluated under the rational basis analysis.

Significantly, there is nothing in the record to support the trial court's rejection of the police officer's explanation of the policy, as well as its conclusion that the police chose not to administer a coordination test on the basis of anti-Hispanic animus. On the contrary, the only evidence adduced here shows that non-English-speaking suspects are not offered the option of taking a physical coordination test, in order to avoid confusion and complications due to a language barrier. Other courts that have addressed this issue have accepted this rationale (*see People v* Perez, 27 Misc 3d 880, 885 [Sup Ct, Bronx County 2010]; *People v Burnet*, 24 Misc 3d 292, 300-301 [Sup Ct, Bronx County 2009]) as we now do.

Accordingly, since the practice at issue does not burden a

suspect class, and intentional discrimination based on ethnicity was not demonstrated, we evaluate defendant's claim under the rational basis analysis (*see Murgia*, 427 US at 312) instead of the more stringent strict scrutiny analysis.

To establish an equal protection violation under the rational basis analysis, a claimant must show that the governmental action in question does not bear a rational relationship to a legitimate government purpose (*see id.*). Based upon the evidence before us, we conclude that such a rational basis for the policy does exist.

The police, of course, clearly have an interest in the reliability of coordination tests. The evidence supports the conclusion that conducting the test through a Spanish-speaking police officer who was not trained in conducting the test could compromise the reliability of the result. Furthermore, there was evidence in the record, similar to the testimony presented in *People v Perez* (27 Misc 3d at 886-887), that it is inherently impracticable to conduct coordination tests through interpreters. While the failure to provide interpreters in judicial or administrative proceedings may give rise to equal protection and due process claims (*see e.g. People v Ramos*, 26 NY2d 272, 274 [1970]; *People v Robles*, 203 AD2d 172, 173 [1st Dept 1994], *revd on other grounds* 86 NY2d 763 [1995]), we note that sobriety

coordination tests are merely investigative techniques and are neither judicial nor administrative actions (*see id.*; *see also People v Burnet*, 24 Misc 3d at 301). Indeed, a defendant's right to an interpreter is available "only at or after the time that adversary judicial proceedings have been initiated against defendant" (*People v Pelegrin*, 39 Misc 3d 788, 797-798 [Crim Ct, Bronx County 2013], quoting *Kirby v Illinois*, 406 US 682, 688 [1971]). To require the police department to have qualified interpreters on call on a 24/7 basis would impose unrealistic and substantial financial and administrative burdens.[2] The avoidance of these crushing obligations provides a rational basis for the policy. This conclusion is not undermined by the fact that the police department sometimes uses bilingual officers as ad hoc interpreters for other purposes, such as reading a suspect his or her *Miranda* rights, as occurred in this case. Additionally, the time it would take an interpreter to get to a testing site would serve to degrade evidence, as the passage of time impacts

[2]The New York State Unified Court System's Annual Report for 2007 identified 170 distinct languages spoken in New York courts. That same report identified the pay scale for qualified interpreters at $250 per diem, and $140 for half a day. The Weissman Center for International Business at Baruch College compiles statistical data on various aspects of New York City life and has identified over 38 different language *groups* spoken by New Yorkers as of 2011, the latest year for which estimates were available.

sobriety. To require the police department to implement such a policy would be tantamount to substituting our judgment for that of the agency. Such policy making is not the function of the courts. When we are called upon to review the actions of coordinate branches of government, "we do so to protect rights, not to make policy" (*Campaign for Fiscal Equity, Inc. v State of New York*, 8 NY3d 14, 28 [2006]). As we have previously noted, the courts should not "substitute their judgment for the discretionary management of public business by public officials", as the courts have not been lawfully charged with that responsibility (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 326 [2011], *lv denied* 17 NY3d 717 [2011], citing *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]; *Matter of Abrams v New York City Tr. Auth.*, 39 NY2d 990, 992 [1976]).

As the policy in question does not violate the equal protection clauses of the Federal and New York State Constitutions, defendant's arguments must fail.

The Due Process Claim

The due process claim, as framed by defendant, is not whether it is unconstitutional to conduct a physical coordination test for one group of suspects and not another, but whether it is unconstitutional to deprive *any* suspect of such a test.

Before we begin our analysis of defendant's due process claim, we must consider the nature of the physical coordination test. As stated, the coordination test is merely an investigative tool used to gather evidence. Defendant argues that such a test *may* have provided evidence favorable to his defense and thus, the failure of the police to give him the opportunity to obtain potentially favorable evidence violates his due process rights.

This argument is specious at best. We are not faced with a situation where the police failed to disclose or preserve evidence (*see People v Kelly*, 62 NY2d 516, 520 [1984]). This defendant "erroneously equates the word 'preserve' with 'obtain' or 'acquire'. There is a difference between preserving evidence already within the possession of the prosecution and the entirely distinct obligation of affirmatively obtaining evidence for the benefit of a criminal defendant." (*People v Hayes*, 17 NY3d 46, 51 [2011], *cert denied* 132 S.Ct 844 [2011]). It is the settled law of this state "that the police have no affirmative duty to gather or help gather evidence for an accused" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995]; *see also People v Alvarez* 70 NY2d 375, 381 [1987]; *People v Hayes*, 17 NY3d at 52;). These precedents need to be considered in evaluating defendant's due process claim, since we must be mindful of the

flexible nature of due process that calls for "such procedural protections as the particular situation demands (*Matthews v Eldridge*, 424 US 319, 334 [1976]).

In evaluating defendant's due process claim, we use the three-factor balancing test set forth in *Matthews*: "the private interest that will be affected by the official action; [] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (424 US at 335).

Applying these principles to this case, we conclude that a DWI suspect does not have a due process right to compel the police to administer a coordination test.

While, as in any criminal case, a significant liberty interest is at stake, defendant has failed to show that the policy at issue presents a great risk that he will be erroneously deprived of his liberty. As noted in our discussion of defendant's due process claim, unlike judicial or extrajudicial proceedings, where it is essential that defendants who do not speak sufficient English be provided with qualified interpreters in order to meet due process standards, "the investigation of

suspected intoxicated driving by the police, in the field or at the intoxicated driver testing facility, is not a judicial, quasi-judicial or even an administrative proceeding." (*People v Perez*, 27 Misc 3d at 887-888). This is particularly true where, as here, defendant's breathalyzer test results, as well as the officer's observations of defendant at the scene of his arrest, amply supported the conclusion that defendant was in fact, intoxicated.

Since, as noted, there is no authority that a defendant has the right to have the police perform certain investigative functions simply because they may yield information that is helpful to him (*People v Hayes*, 17 NY3d at 52]), there is no risk of an erroneous deprivation of defendant's liberty interest by failing to conduct a physical coordination test.

Although addressed in the context of defendant's equal protection claim, it bears repeating in the context of his due process claim that the probable value of substitute procedural safeguards, i.e., to require the New York City Police Department to have trained interpreters in numerous languages available around the clock on short notice, would result in enormous fiscal and administrative burdens on the police department. These impacts are legitimate concerns of the government. Defendant has made no showing and has failed to cite any precedent to support

his proposition that he has a right to a pre-arrest translator or that the failure to provide non-English speakers with a physical coordination test violates either equal protection or due process.

The *Matthews* analysis clearly demonstrates that defendant's due process claims, as with the equal protection claims, are without merit.

Accordingly, the order of the Supreme Court, Bronx County (Caesar D. Cirigliano, J.), entered on or about February 8, 2012, which granted defendant's CPL 330.30(1) motion to set aside a verdict convicting him of driving while intoxicated, should be unanimously reversed, on the law, the verdict reinstated, and the matter remanded for sentencing.

All concur.

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

ENTERED: OCTOBER 10, 2013

CLERK