SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 28, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

397

KA 10-01378

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE D. ENNIS, DEFENDANT-APPELLANT.

SETH M. AZRIA, SYRACUSE, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (WENDY EVANS LEHMANN, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 24, 2010. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]), defendant contends that he is entitled to a new trial because County Court erred in allowing the victim to testify about an uncharged incident of sexual touching. We reject that contention. The challenged testimony was the result of a question during redirect examination by the prosecutor, who asked the victim where the first incident of sexual touching took place. In response, and over defense counsel's objection, the victim testified that she was first touched by defendant at her grandparents' home. The grandparents did not live in the Village of Clayton, where, according to the indictment, all of the charged offenses occurred. We nevertheless conclude that the testimony in question was admissible "to complete the narrative of [the] events charged in the indictment," and to provide "necessary background information" (*People v Workman*, 56 AD3d 1155, 1156, *lv denied* 12 NY3d 789 [internal quotation marks omitted]; *see People v Justice*, 99 AD3d 1213, 1215, *lv denied* 20 NY3d 1012; *People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922). We note that the victim did not testify to any specific acts that were committed by defendant at her grandparents' home. Defendant further contends that the court thereby violated its pretrial ruling, which prohibited the People from

presenting any evidence of sexual contact between defendant and the victim that occurred at the home of the victim's grandparents unless defendant opened the door to such testimony. Even assuming, arguendo, that defendant's contention is preserved for our review (*see generally People v Shack*, 86 NY2d 529, 541-542), we nevertheless agree with the People that defense counsel opened the door to that limited testimony during his cross-examination of the victim (*see generally People v Massie*, 2 NY3d 179, 183-184; *People v Melendez*, 55 NY2d 445, 451).

We further conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although there were minor inconsistencies between the victim's trial testimony and her grand jury testimony, those inconsistencies did not render her testimony incredible as a matter of law (*see People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778). This case turned largely upon the credibility of the victim and defendant, who also testified at trial, and we perceive no basis in the record for disturbing the jurors' credibility determinations (*see People v Massey*, 61 AD3d 1433, 1433, *lv denied* 13 NY3d 746).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on the testimony of an expert witness with respect to child sexual abuse accommodation syndrome (CSAAS) (*see People v Lawrence*, 81 AD3d 1326, 1327, *lv denied* 17 NY3d 797). In any event, that contention lacks merit. It is well settled that "[e]xpert testimony concerning CSAAS is admissible to assist the jury in understanding the unusual conduct of victims of child sexual abuse where, as here, the testimony is general in nature and does 'not attempt to impermissibly prove that the charged crimes occurred' " (*People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025, quoting *People v Carroll*, 95 NY2d 375, 387; *see People v Goupil*, 104 AD3d 1215, 1216; *cf. People v Williams*, 20 NY3d 579, 582).

We reject defendant's further contention that the court's evidentiary rulings during the cross-examination of prosecution witnesses impaired his ability to present a defense (*see People v Brown*, 70 AD3d 1341, 1342, *lv denied* 14 NY3d 839). "[A]n accused's right to cross-examine witnesses . . . is not absolute, and [t]he scope of cross-examination is within the sound discretion of the trial court" (*People v Gilchrist*, 98 AD3d 1232, 1232, *lv denied* 20 NY3d 932 [internal quotation marks omitted]; *see People v Hayes*, 17 NY3d 46, 53, *cert denied* 565 US ___, 132 S Ct 844). In many of the instances cited by defendant, in which the court sustained objections from the People, the questions posed by defense counsel were either outside the scope of direct examination or were previously asked and answered. In other instances, after the court sustained objections to questions posed by defense counsel, the questions were rephrased and the witnesses responded without further objection, and thus defendant waived his contention with respect to those instances (*see generally People v Corby*, 6 NY3d 231, 235-236; *Gilchrist*, 98 AD3d at 1232; *People v Gonzalez*, 89 AD3d 1443, 1444-1445, *lv denied* 19 NY3d 973,

reconsideration denied 20 NY3d 932). In the remainder of the instances, defense counsel's line of questioning was deficient in an evidentiary sense, i.e., the testimony he sought to elicit lacked a proper foundation or constituted impermissible hearsay (*see generally People v Snyder*, 159 AD2d 935, 935). We therefore conclude that the court's evidentiary rulings were proper and thus that defendant's ability to present a defense was not impaired thereby (*see Brown*, 70 AD3d at 1342).

Defendant failed to preserve for our review his further contention that he was denied a fair trial by prosecutorial misconduct based on comments made by the prosecutor during his opening and closing statements. Defendant either failed to object to the allegedly improper comments (*see People v Gonzalez*, 81 AD3d 1374, 1374; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), or his objections were sustained without any request for a curative instruction and the court is thus deemed to have corrected any error to defendant's satisfaction (*see People v Peters*, 98 AD3d 587, 589-590, *lv denied* 20 NY3d 934). In any event, we conclude that the comments were not so egregious as to deny defendant a fair trial (*see People v Dizak*, 93 AD3d 1182, 1184, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932; *People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916).

Finally, with respect to defendant's contention that he was denied effective assistance of counsel, we note that the constitutional right to effective assistance of counsel "does not guarantee a perfect trial, but assures the defendant a fair trial" (*People v Flores*, 84 NY2d 184, 187). Having examined the record before us, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147), and thus it cannot be said that defendant was deprived of a fair trial.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

402

CA 11-01596

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND WHALEN, JJ.

KEVIN ANDREW LEONARD, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

TERRI LYNN LEONARD, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ROBERT J. LUNN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

MATTHEW J. FERO, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from a judgment of the Supreme Court, Monroe County (John M. Owens, J.), entered December 7, 2011. The judgment, inter alia, granted sole legal custody of the parties' children to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the award of child support to plaintiff and the provision concerning counsel fees and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for a determination of the amount of child support to be awarded to defendant and for further proceedings concerning counsel fees in accordance with the following Opinion by LINDLEY, J.: In this matrimonial action, defendant wife appeals from an order issued by the Judicial Hearing Officer (JHO) who presided over the parties' nonjury trial. Defendant attributes multiple errors to the JHO, whose order was later subsumed in a judgment of divorce entered in Supreme Court. Although no appeal lies from the order, "we exercise our discretion to treat the notice of appeal as valid and deem the appeal [as] taken from the judgment" (*Hughes v Hughes*, 84 AD3d 1745, 1746; *see* CPLR 5520 [c]; *Nichols v Nichols* [appeal No. 1], 291 AD2d 875, 875).

We reject defendant's challenge to the JHO's custody determination, which awards sole legal custody of the parties' two children to plaintiff father, with shared physical custody. Pursuant to the residency schedule set by the JHO, the parties spend equal time with the children. Defendant does not object to the residency schedule, but instead contends that the parties should have been awarded joint legal custody. We reject that contention. The evidence at trial established that the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their children, and it is well settled that joint

custody is not feasible under those circumstances (*see Matter of Orzech v Nikiel* [appeal No. 1], 91 AD3d 1305, 1305-1306; *Matter of York v Zullich*, 89 AD3d 1447, 1448; *Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399). Although, as defendant suggests, the JHO could have fashioned a custody award whereby each parent has sole decision-making authority over certain aspects of the children's lives (*see Matter of Delgado v Frias*, 92 AD3d 1245, 1245; *Wideman v Wideman*, 38 AD3d 1318, 1319; *see also Chamberlain v Chamberlain*, 24 AD3d 589, 591-592), it cannot be said that the JHO abused his discretion in refusing to do so (*see Wideman*, 38 AD3d at 1319; *see generally Braiman v Braiman*, 44 NY2d 584, 589-590). We note that, although the Attorney for the Children proposed a "zones of influence" custody arrangement at trial, he has since changed his position and, in his brief on appeal, he seeks affirmance of the judgment insofar as it awards sole legal custody to plaintiff.

We agree with defendant, however, that the court erred in awarding child support to plaintiff and that the court instead should have awarded child support to her. It is well settled that in shared residency arrangements, where neither parent has the children for a majority of the time, the party with the higher income is deemed to be the noncustodial parent for purposes of child support (*see Matter of Disidoro v Disidoro*, 81 AD3d 1228, 1229, *lv denied* 17 NY3d 705; *Eberhardt-Davis v Davis*, 71 AD3d 1487, 1487-1488; *Matter of Moore v Shapiro*, 30 AD3d 1054, 1055; *Baraby v Baraby*, 250 AD2d 201, 204; *see generally Bast v Rossoff*, 91 NY2d 723, 726-727). Here, as noted, the residency schedule affords the parties equal time with the children, and thus neither party has the children for the majority of the time. Inasmuch as plaintiff's income exceeds that of defendant — at the time of trial, plaintiff earned $134,924.48 annually, while the JHO imputed income of $25,000 to defendant, whose actual earnings were $14,109.53 — plaintiff is the "noncustodial" parent and, as such, he must pay child support to defendant.

It is true, as plaintiff points out, that the above-cited cases involve awards of *joint* legal custody, whereas he was awarded sole legal custody; that fact, however, should not affect the child support determination. Although the award of sole legal custody to plaintiff allows him to make important decisions in the children's lives, that decision-making authority does not increase his child-related costs. A parent's child-related costs are dictated by the amount of time he or she spends with the children, and, here, plaintiff spends no more time with the children than does defendant. We note, moreover, that there is already a significant disparity in the parties' incomes, and an award of child support to plaintiff would only widen that gulf. In our view, the children's standard of living should not vary so drastically from one parent's house to the other.

Thus, under the circumstances of this case — where plaintiff has sole legal custody, but the residency schedule affords the parents equal time with the children — an award of child support to defendant will best "assure that [the] children will realize the maximum benefit of their parents' resources and continue, as near as possible, their

preseparation standard of living in each household" (*Baraby*, 250 AD2d at 204). We therefore conclude that the judgment should be modified accordingly, and the matter is remitted to Supreme Court for a determination of the appropriate amount of child support to be awarded to defendant.

We reject defendant's further contention that she was entitled to an award of maintenance. Considering the factors set forth in Domestic Relations Law § 236 (B) (6) (a), we conclude that the JHO's determination with respect to maintenance is supported by the record (*see generally Hartog v Hartog*, 85 NY2d 36, 50-51; *cf. Larsen v Larsen*, 270 AD2d 20, 20-21).

In her remaining contention, defendant asserts that JHO failed to set forth the required reasons for the denial of her request for an award of counsel fees, and that the provision concerning counsel fees must therefore be vacated. We agree. There is a "rebuttable presumption that counsel fees shall be awarded to the less monied spouse" (Domestic Relations Law § 237 [a]; *see Piacente v Piacente*, 93 AD3d 1189, 1189), and defendant herein is by far the less monied spouse. The JHO was thus required to articulate why defendant is not entitled to an award of counsel fees (*see generally Cheruvu v Cheruvu*, 61 AD3d 1171, 1174-1175). We therefore conclude that the judgment should be further modified by vacating the provision concerning counsel fees, and the matter should be further remitted to Supreme Court to "articulate its reasons for [its] denial [of an award of counsel fees to defendant] or, in the alternative, to reconsider its determination" (*id.*; *see generally McCoy v McCoy*, 254 AD2d 732, 733; *Mann v Mann*, 244 AD2d 928, 930).

Accordingly, we conclude that the judgment should be modified and the matter should be remitted to Supreme Court in conformance with our decision herein.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

561

CA 12-02015

PRESENT: CENTRA, J.P., FAHEY, LINDLEY, SCONIERS, AND VALENTINO, JJ.

JASON KIRCHNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, CLAUDETTE CALDWELL, ESQ., COUNTY OF ERIE, JAMES J. WOYTASH, M.D. AND UNIVERSITY AT BUFFALO PATHOLOGISTS, INC., DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS COUNTY OF NIAGARA AND CLAUDETTE CALDWELL, ESQ.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-APPELLANT COUNTY OF ERIE.

FELDMAN KIEFFER, LLP, BUFFALO (MATTHEW J. KIBLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS JAMES J. WOYTASH, M.D. AND UNIVERSITY AT BUFFALO PATHOLOGISTS, INC.

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered February 1, 2012. The order denied the motions of defendants to dismiss the complaint, and granted the cross motion of plaintiff for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this malicious prosecution action after he was arrested and indicted for the death of his seven-month-old daughter. Supreme Court, inter alia, denied the motions of defendants insofar as they sought to dismiss the complaint, and defendants now appeal. We affirm.

On these motions to dismiss, we accept the facts alleged in the complaint as true and accord plaintiff the benefit of every favorable inference (*see Daley v County of Erie*, 59 AD3d 1087, 1087-1088). According to plaintiff, his daughter fell from a couch and struck her head on a television tray the day before she died. The fall left a mark on the infant's forehead. She died the following evening after she stopped breathing, and defendant James J. Woytash, M.D., the Chief

Medical Examiner of Erie County, conducted an autopsy the day after her death. Defendant University at Buffalo Pathologists, Inc. provided Woytash's services to defendant County of Erie pursuant to a contract. The County of Erie, in turn, provided defendant County of Niagara with forensic autopsy services pursuant to a contract. Woytash concluded that the infant's death was caused by complications from a head injury, with a respiratory infection as a contributing factor, but ultimately concluded that the cause of death was undetermined.

Defendant Claudette Caldwell, Esq., an assistant district attorney with the Niagara County District Attorney's Office, recommended in June 2009 that the case be closed. Plaintiff alleged that his estranged wife thereafter contacted Caldwell and convinced her to reopen the investigation. Caldwell allegedly told Woytash that "no criminal prosecution would be possible unless evidence could be presented to the grand jury that would place the time of the head injury to no more than six hours prior to the time of [the infant's] death." Woytash allegedly fabricated findings that had no scientific basis, which were communicated to the police and later to a grand jury. Plaintiff was indicted for two counts of criminally negligent homicide and one count of manslaughter. After receiving an affidavit from plaintiff's expert challenging the testimony of Woytash before the grand jury, the Niagara County District Attorney's Office moved to dismiss the indictment, and the motion was granted.

The four elements of a cause of action for malicious prosecution are "that a criminal proceeding was commenced; that it was terminated in favor of the accused; that it lacked probable cause; and that the proceeding was brought out of actual malice" (*Cantalino v Danner*, 96 NY2d 391, 394; *see Broughton v State of New York*, 37 NY2d 451, 457, *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929; *Nichols v Xerox Corp.*, 72 AD3d 1501, 1502). The County of Erie contends that plaintiff "failed to demonstrate" that the County of Erie, either on its own or as the employer of Woytash, commenced or continued a criminal proceeding against plaintiff. The County of Erie improperly raises that contention for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). In any event, it is without merit. On this motion to dismiss, we need only determine "whether the facts as alleged fit within any recognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). Although plaintiff was investigated in Niagara County, was arrested in Niagara County, was indicted in Niagara County, and was ultimately exonerated in Niagara County, a person may be liable for malicious prosecution for commencing a criminal proceeding where the person "played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act" (*Viza v Town of Greece*, 94 AD2d 965, 966, *appeal dismissed* 64 NY2d 776). Here, the allegations in the complaint sufficiently state that Woytash, as the employee of the County of Erie, played such an active role in the prosecution by giving false findings to the police and false testimony to the grand jury.

We reject the contention of the County of Niagara and Caldwell that plaintiff failed to state a cause of action for malicious

prosecution against them with respect to the element of lack of probable cause for the criminal proceeding. Once a suspect has been indicted, the grand jury action creates a presumption of probable cause (*see Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670; *Santiago v City of Rochester*, 19 AD3d 1061, 1062). "If plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" (*Colon*, 60 NY2d at 83). Here, the complaint sufficiently alleges fraud, perjury, and conduct undertaken in bad faith. Plaintiff alleged that the police concluded in their initial investigation, based upon statements by Woytash, that the infant's death was accidental, and the case was closed. However, after plaintiff's wife spoke with Caldwell, Caldwell allegedly began a campaign to bring charges against plaintiff despite knowing that plaintiff's wife was giving inconsistent information. Plaintiff alleged that Caldwell encouraged or coached Woytash to provide false information to the police and false testimony to the grand jury regarding the infant's cause of death and time of death. Plaintiff further alleged that Caldwell and Woytash were aware that the information was not mentioned in the autopsy report, was not supported by any document, and had no scientific basis.

The County of Erie, the County of Niagara, and Caldwell contend that plaintiff failed to state a cause of action against them for malicious prosecution because plaintiff did not allege any special duty that was owed by them to him. In a negligence-based claim against a municipality, a plaintiff must allege that a special duty existed between the municipality and the plaintiff (*see Valdez v City of New York*, 18 NY3d 69, 75; *Laratro v City of New York*, 8 NY3d 79, 82-83). Such a requirement is wholly distinct from any immunity defense (*see Valdez*, 18 NY3d at 77-78). Plaintiff, however, withdrew his cause of action for negligent hiring, training, and supervision and is asserting a cause of action only for malicious prosecution. As previously noted herein, however, the existence of a special duty owed to the plaintiff is not an element of that cause of action (*see Cantalino*, 96 NY2d at 394).

We reject the contention of the County of Niagara and Caldwell that the complaint fails to state a cause of action against them because they are entitled to prosecutorial immunity. Prosecutorial immunity provides absolute immunity "for conduct of prosecutors that was 'intimately associated with the judicial phase of the criminal process' " (*Buckley v Fitzsimmons*, 509 US 259, 270, quoting *Imbler v Pachtman*, 424 US 409, 430; *see Rodrigues v City of New York*, 193 AD2d 79, 85), i.e., conduct that involves " 'initiating a prosecution and in presenting the State's case' " (*Johnson v Kings County Dist. Attorney's Off.*, 308 AD2d 278, 285, quoting *Imbler*, 424 US at 431; *see Cunningham v State of New York*, 71 AD2d 181, 182). Thus, a prosecutor's conduct in preparing for those functions may be absolutely immune, but acts of investigation are not (*see Buckley*, 509 US at 270). Prosecutors are afforded only qualified immunity when acting in an investigative capacity (*see id.* at 275; *Johnson*, 308 AD2d

at 285; *Claude H. v County of Oneida*, 214 AD2d 964, 965). The focus is on the conduct for which immunity is claimed (*see Buckley*, 509 US at 271). It is therefore the case that, where the prosecutor advises the police (*see Burns v Reed*, 500 US 478, 493-495) or performs investigative work in order to decide whether a suspect should be arrested (*see Buckley*, 509 US at 273-275), the prosecutor is not entitled to absolute immunity.

We reject the contention of the County of Niagara and Caldwell that, according to the allegations in the complaint, Caldwell was simply evaluating the evidence assembled by the police and thus that they are entitled to absolute immunity. The police interviewed plaintiff and spoke with plaintiff's wife and Woytash. Based on their investigation, including information they received from Woytash, they told plaintiff that they believed the incident was an accident, and Caldwell recommended that the case be closed. However, plaintiff alleges that Caldwell spoke with Woytash after speaking with plaintiff's wife and coached or encouraged him to lie about the cause of death and the time of the head injury. Woytash fabricated findings and gave them to the police, and plaintiff was indicted on the charges after Woytash testified before the grand jury. Inasmuch as the case was closed at the time she spoke with Woytash, it cannot be said that Caldwell was simply evaluating the evidence. Rather, she was performing investigative functions, which are not protected by absolute immunity (*see Buckley*, 509 US at 274; *Della Pietra v State of New York*, 125 AD2d 936, 938, *affd* 71 NY2d 792). We also reject the contention of the County of Niagara and Caldwell that they were entitled to qualified immunity. Qualified immunity shields a government employee from liability except where the acts were made in bad faith or the action was taken without a reasonable basis (*see Arteaga v State of New York*, 72 NY2d 212, 216; *Della Pietra*, 71 NY2d at 798). Here, plaintiff alleged that Caldwell's actions were made in bad faith, thus precluding application of the defense of qualified immunity at this stage of the litigation (*cf. Arzeno v Mack*, 39 AD3d 341, 342).

Finally, we reject the contention of defendants that the complaint fails to state a cause of action against them for malicious prosecution because they are entitled to absolute governmental immunity. The governmental function immunity defense "shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions" (*Valdez*, 18 NY3d at 76). This limitation on liability " 'reflects a value judgment that—despite injury to a member of the public—the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury' " (*Mon v City of New York*, 78 NY2d 309, 313, *rearg denied* 78 NY2d 1124; *see Haddock v City of New York*, 75 NY2d 478, 484; *Arteaga*, 72 NY2d at 216).

"Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the

functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment . . . If these functions and duties are essentially clerical or routine, no immunity will attach" (*Mon*, 78 NY2d at 313; *see Arteaga*, 72 NY2d at 216). Discretionary acts "involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (*Tango v Tulevech*, 61 NY2d 34, 41; *see Lauer v City of New York*, 95 NY2d 95, 99; *Haddock*, 75 NY2d at 484). If a functional analysis shows that the employee's position is sufficiently discretionary, then the municipal defendant must also show "that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated" (*Valdez*, 18 NY3d at 76; *see Mon*, 78 NY2d at 313 ["(I)t must then be determined whether the conduct giving rise to the claim is related to an exercise of that discretion"]). "[G]overnmental immunity does not attach to every action of an official having discretionary duties but [attaches] only to those involving an exercise of that discretion" (*Mon*, 78 NY2d at 313; *see Haddock*, 75 NY2d at 485).

Here, the functions and duties of Woytash in his capacity as the Medical Examiner include conducting an autopsy, reporting his findings to the police, and testifying before a grand jury. The functions and duties of Caldwell in her capacity as an assistant district attorney include evaluating the evidence assembled by police officers. Those functions and duties are discretionary (*see Mon*, 78 NY2d at 313-314). Based on plaintiff's allegations, however, it cannot be said that the conduct of Woytash and Caldwell was related to an exercise of their discretionary duties. Plaintiff alleged that Woytash fabricated findings and gave testimony that was not included in his autopsy report, and that Caldwell coached Woytash to lie. That alleged conduct plainly did not involve the exercise of "reasoned judgment which could typically produce different acceptable results" (*Tango*, 61 NY2d at 41).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

577

CAF 12-00601

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

IN THE MATTER OF DANIEL F. KENNEDY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASHLEY LAUREN KENNEDY, RESPONDENT-RESPONDENT.

KRISTIN KOZLOWSKI, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

BERNADETTE M. HOPPE, BUFFALO, FOR PETITIONER-APPELLANT.

KRISTIN KOZLOWSKI, ATTORNEY FOR THE CHILDREN, CHEEKTOWAGA, APPELLANT PRO SE.

EUGENE P. ADAMS, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Erie County (Tracey A. Kassman, R.), entered March 19, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, designated respondent the primary residential custodian of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner father and the Attorney for the Children (hereafter, appellants) appeal from an order in a proceeding pursuant to Family Court Act article 6 that, inter alia, awarded primary physical custody of the parties' two children to respondent mother. Appellants contend that Family Court's determination lacked a sound and substantial basis in the record, that the court relied on a flawed expert evaluation, that the court failed to consider all of the factors in determining the best interests of the children, and that the court misapplied the standard set forth in *Tropea v Tropea* (87 NY2d 727) in reaching its determination. We conclude that the expert's report relied upon by the court was of " 'limited utility' " inasmuch as it highlighted challenges faced by the father and downplayed similar challenges faced by the mother (*Matter of Dobies v Brefka*, 83 AD3d 1148, 1151-1152). We reject appellants' remaining contentions. In any event, this Court has been advised of facts and circumstances that have changed during the pendency of the appeal, and we therefore conclude that "the record before us is no longer sufficient for determining [the mother's] fitness and right" to primary physical custody of the children (*Matter*

of Michael B., 80 NY2d 299, 318). Specifically, in deciding the custody issue in the mother's favor, the court relied on evidence that the mother had become self-supporting and was living in her own apartment. We have now been informed, however, that the mother has since lost her job and her apartment and has moved in with her own mother. We therefore reverse the order and remit the matter to Family Court for an expedited hearing on the issue whether the alleged change of circumstances affects the best interests of the children.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

582

CA 12-01788

PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND LINDLEY, JJ.

IN THE MATTER OF MARGARET VAN TOL, INDIVIDUALLY AND DOING BUSINESS AS CVT PROPERTIES, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO FIRE DEPARTMENT, GARNELL W. WHITFIELD, JR., AND CITY OF BUFFALO FIRE INVESTIGATION UNIT, RESPONDENTS-RESPONDENTS.

TRONOLONE & SURGALLA, P.C., HAMBURG (GERARD A. STRAUSS OF COUNSEL), FOR PETITIONER-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CINDY T. COOPER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 14, 2011 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to compel respondents to conduct an investigation, pursuant to General Municipal Law § 204-d, into two fires at two rental properties she owned. Supreme Court properly dismissed the petition on the ground that the proceeding was not timely commenced. We note at the outset that the relief requested in the petition is in the nature of mandamus to compel inasmuch as petitioner seeks to "compel the performance of a ministerial act [imposed] by law" (*Matter of De Milio v Borghard*, 55 NY2d 216, 220; *see Matter of Heck v Keane*, 6 AD3d 95, 99). In such a proceeding, the four-month statute of limitations begins to run when a respondent refuses a petitioner's demand that it "perform its duty" (CPLR 217 [1]; *see Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233, *affd* 7 NY3d 427; *Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442). The petitioner's "demand must be made within a reasonable time after the right to make the demand occurs" (*Matter of Devens v Gokey*, 12 AD2d 135, 136, *affd* 10 NY2d 898; *see Matter of Densmore v Altmar-Parish-Williamstown Cent. Sch. Dist.*, 265 AD2d 838, 839, *lv denied* 94 NY2d 758). Here, petitioner made a February 8, 2010 written demand to the Erie County District Attorney's Office to conduct a further investigation. The Erie County District

Attorney's Office, however, is not a named respondent, and we conclude that petitioner "unreasonably delayed" in failing to make the demand to respondents on February 8, 2010 and that "this proceeding is barred by laches" (*Densmore*, 265 AD2d at 839).

In light of our determination, we need not address the issue whether the petition failed to state a cause of action for which relief can be granted.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

626

CA 12-02211

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

ELECTRICAL WASTE RECYCLING GROUP, LIMITED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANDELA TOOL & MACHINE, INC., FORMERLY KNOWN AS
ANDELA PRODUCTS, LTD., DEFENDANT-APPELLANT.

STEWART BERNSTIEL & REBAR, LLC, NEW YORK CITY (CATHLEEN K. REBAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

DINOVO PRICE ELLWANGER & HARDY LLP, AUSTIN, TEXAS (JAY D. ELLWANGER, OF THE TEXAS AND CALIFORNIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND FELT EVANS, LLP, CLINTON, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Norman I. Siegel, A.J.), entered September 4, 2012. The order, among other things, denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and dismissing the seventh cause of action and as modified the order is affirmed without costs.

Memorandum: City Electrical Factors/Matrix-Direct-Recycle (MDR), which was plaintiff's predecessor in interest, entered into two separate contracts with defendant. Pursuant to the first contract, defendant was to supply MDR with an "Electronic-CRT Recycling System." Pursuant to the second contract, defendant was to supply MDR with a "Fluorescent Tube Recycling System." Each contract contained identical limitation of liability provisions, which provided in pertinent part that defendant would "not be responsible for any indirect, special, incidental or consequential loss or damage whatsoever (including lost profits and opportunity costs) arising out of any purchase order or responding document issued as a result of this proposal."

After both systems allegedly failed, plaintiff commenced this action, asserting causes of action for, inter alia, breach of contract, strict products liability, negligence and a violation of General Business Law § 349. Defendant moved for summary judgment dismissing the first amended complaint, and Supreme Court denied the motion in its entirety. We conclude that, with the exception of the section 349 cause of action, the court properly denied the motion.

As a preliminary matter, we reject plaintiff's contention that defendant failed to meet its initial burden on the motion because it submitted an affidavit from an attorney lacking personal knowledge. Although defendant's attorney "did not assert any personal knowledge of the facts, his affirmation, to which were annexed [numerous] exhibits, satisfied the statutory requirements because it served as a vehicle for the submission of documentary evidence" (*State of New York v Grecco*, 43 AD3d 397, 399-400; *see Branch Servs., Inc. v Cooper*, 102 AD3d 645, 648; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 325).

We likewise reject defendant's contention that it was entitled to summary judgment dismissing those causes of action predicated on recovery of indirect, special, incidental or consequential loss or damages on the ground that the limited liability clauses preclude such recovery. Although defendant established as a matter of law that the clauses are neither unconscionable nor wholly void or unenforceable (*see Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 95 AD3d 724, 725-726*; Noble Thread Corp. v Vormittag Assoc.*, 305 AD2d 386, 387), we conclude that defendant, as the movant, failed to meet its burden of establishing "by competent evidence that there is no factual issue barring the grant of summary judgment in its favor" based on the limited liability clauses (*Banc of Am. Sec. LLC v Solow Bldg. II, L.L.C.*, 47 AD3d 239, 245; *see Corinno Civetta Constr. Corp. v New York*, 67 NY2d 297, 318-319; *see generally Sommer v Federal Signal Corp.*, 79 NY2d 540, 553-554). Thus, the burden never shifted to plaintiff to raise a triable issue of fact (*see generally Alvarez*, 68 NY2d at 324).

Contrary to defendant's further contention, the economic loss doctrine does not preclude plaintiff from recovering in tort as a matter of law. "Pursuant to that doctrine, a plaintiff may not recover in tort against a manufacturer for economic loss that is contractually based, 'whether due to injury to the product itself or consequential losses flowing therefrom' " (*Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1051, 1052, quoting *Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, 84 NY2d 685, 693). Where, however, there is harm to persons or property other than the property that is the subject of the contract, a plaintiff is entitled to recover in tort (*see Adirondack Combustion Tech., Inc. v Unicontrol, Inc.*, 17 AD3d 825, 826-827; *Hodgson, Russ, Andrews, Woods & Goodyear*, 300 AD2d at 1052-1053; *Village of Groton v Tokheim Corp.*, 202 AD2d 728, 728-729, *lv denied* 84 NY2d 801; *Syracuse Cablesystems v Niagara Mohawk Power Corp.*, 173 AD2d 138, 140-143). The factors to consider are "the nature of the defect, the injury, the manner in which the injury occurred, and the damages sought" (*Hodgson, Russ, Andrews, Woods & Goodyear*, 300 AD2d at 1052; *see Syracuse Cablesystems*, 173 AD2d at 142-143). We conclude that defendant failed to meet its initial burden on the motion with respect to the causes of action sounding in tort because the evidence submitted by defendant establishes that the mercury contamination of plaintiff's facility, which was allegedly caused by defendant's products, caused damage to persons and property other than the property that was the subject of

the contracts.

Finally, we agree with defendant that the court erred in denying the motion insofar as it sought summary judgment dismissing the seventh cause of action, alleging a violation of General Business Law § 349. We therefore modify the order accordingly. "A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29; *see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25-26). Defendant, as the movant, met its initial burden by establishing, as a matter of law, that its conduct was not consumer-oriented. The statute does not apply herein, inasmuch as the issues raised "essentially [concern] . . . 'private' contract dispute[s] . . . unique to these parties, not conduct which affects the consuming public at large" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 321; *see Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 25; *Cooper v New York Cent. Mut. Fire Ins. Co.*, 72 AD3d 1556, 1557-1558).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

693

KA 12-00892

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HANI ABUHAMRA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 13, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts), unlawful imprisonment in the second degree and criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the definite sentence imposed on count four of the indictment shall run concurrently with the determinate sentences imposed on the remaining counts of the indictment and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [1], [2]) and one count of criminal contempt in the first degree (§ 215.51 [b] [iv]). In appeal No. 2, defendant appeals from an order denying his motion seeking to vacate the judgment of conviction pursuant to CPL 440.10 on the ground that he was denied effective assistance of counsel. As a preliminary matter, we conclude that County Court properly denied defendant's CPL 440.10 motion without a hearing inasmuch as "trial counsel, the only person who could have provided any material information not already before the motion court, was deceased" (*People v Cotto*, 259 AD2d 288, 289, *lv denied* 93 NY2d 1002). We also note that defendant failed to support the motion with his own sworn allegations (*see* CPL 440.30 [1] [a]), but instead submitted an unsworn "affirmation." Nevertheless, because the court did not make a finding adverse to defendant on that ground, we decline to use it as a basis for affirming the order in appeal No. 2 (*see People v Santana*, 101 AD3d 1664, 1664, *lv denied* 20 NY3d 1103; *see generally People v Concepcion*, 17 NY3d 192, 194-196).

We reject the contention of defendant, raised in each appeal, that he was denied effective assistance of trial counsel. We agree with the court's determination on the CPL 440.10 motion that defendant's allegation that he withdrew his plea solely on the ground that his attorney advised him that he would never be convicted at trial or, if convicted, that he would not receive a state prison sentence, is contradicted by the record (*see* CPL 440.30 [4] [d] [i]). We also agree with the court's determination that there is no reasonable possibility that the allegation is true (*see* CPL 440.30 [4] [d] [ii]). With respect to each of the remaining alleged instances of ineffective assistance, we conclude that defendant failed to establish the lack of a strategic basis for any of the alleged deficiencies (*see generally People v Rivera*, 71 NY2d 705, 709). We therefore conclude that the record establishes that defendant received meaningful representation from trial counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention in appeal No. 1 that the People did not promptly disclose certain documents, which he contends constitute *Brady* material (*see generally* CPL 470.05 [2]). In any event, defendant's contention is without merit inasmuch as the information was turned over as *Rosario* material prior to jury selection and thus defendant had ample time to use the information (*see People v Gonzalez*, 89 AD3d 1443, 1444, *lv denied* 19 NY3d 973, *reconsideration denied* 20 NY3d 932).

We reject defendant's contention in appeal No. 1 that the sentence is unduly harsh and severe. We nevertheless conclude that the sentence is illegal insofar as the court directed that the definite sentence imposed on count four of the indictment shall run consecutively to the determinate sentences imposed on counts one and two (*see* Penal Law § 70.35; *People v Still*, 26 AD3d 816, 817, *lv denied* 6 NY3d 853). Inasmuch as we cannot permit an illegal sentence to stand (*see People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001), we modify the judgment in appeal No. 1 accordingly (*see Still*, 26 AD3d at 817). Finally, we note that the certificate of conviction erroneously states that defendant is obligated to pay restitution in the amount of $1,268.81, rather than $1,261.87, and therefore it must be amended to correct the clerical error (*see generally People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

694

KA 12-01284

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HANI ABUHAMRA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department from an order of the Erie County Court (Thomas P. Franczyk, J.), dated June 5, 2012. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed.

Same Memorandum as in *People v Abuhamra* ([appeal No. 1] ___ AD3d ___ [June 28, 2013]).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

696

OP 12-02353

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF JOSHUA R. GALLETTA, PETITIONER,

V MEMORANDUM AND ORDER

HON. JOHN H. CRANDALL, COUNTY AND SURROGATE COURT JUDGE, RESPONDENT.

TODD D. BENNETT, HERKIMER, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent. The determination denied petitioner's pistol permit application.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: In this original CPLR article 78 proceeding (*see* CPLR 506 [b] [1]), petitioner contends that the determination denying his application for a pistol permit is arbitrary and capricious. We reject that contention. " 'The State has a substantial and legitimate interest and[,] indeed, a grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument' " (*Matter of Dorsey v Teresi*, 26 AD3d 635, 636; *see Matter of Peterson v Kavanagh*, 21 AD3d 617, 617–618). "Respondent is vested with broad discretion in making the determination to grant or deny a pistol permit to an individual and may do so for any good cause" (*Dorsey*, 26 AD3d at 636 [internal quotation marks omitted]; *see Matter of Papineau v Martusewicz*, 35 AD3d 1214, 1214; *Matter of DiMonda v Bristol*, 219 AD2d 830, 830).

Here, there are several factors that militate in favor of granting petitioner's application, including the facts that he is gainfully employed and served his country honorably in the Armed Forces. Nevertheless, considering petitioner's past unlawful behavior, it cannot be said that County Court abused its discretion in denying the application. We note that petitioner, in his written statements submitted to the court in support of his application, did

not accept responsibility for his prior actions and, indeed, seemed to suggest that he had done nothing wrong, despite the fact that he had pleaded guilty to multiple offenses.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

699

CA 13-00038

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

AGGRESSIVE CO., INC., DOING BUSINESS AS
DIVERSIFIED CONTRACTING, CO.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM INSURANCE, DEFENDANT-RESPONDENT.

PIRRELLO, MISSAL, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered March 16, 2012. The order granted the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action alleging that additional work orders signed by defendant's representative for construction and remediation work performed by plaintiff at the home of defendant's insured (homeowner) constituted a contract between plaintiff and defendant for payment for that work. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint based upon its determination that the undisputed facts establish, as a matter of law, that there was no contract between the parties obligating defendant to pay plaintiff directly for the work at issue.

It is undisputed that plaintiff entered into a contract with the homeowner to perform remediation services at the homeowner's residence following an oil spill. It is also undisputed that defendant advised the homeowner that any additional work must be approved by defendant in order to ensure coverage under the homeowner's policy for that work. Defendant's representative signed three additional work orders and testified at her deposition that her signature represented pre-authorization that insurance coverage would be provided for the proposed additional work. Although defendant sent one check directly to plaintiff, it did so with the homeowner's consent, and otherwise refused the requests of plaintiff's representative that payment be sent to it directly. The homeowner thereafter refused to pay

plaintiff for the work performed pursuant to the additional work orders.

It is well established that, " '[w]hile the existence of a contract is a question of fact, the question of whether a certain or undisputed state of facts establishes a contract is one of law for the courts' " (*Gui's Lbr. & Home Ctr., Inc. v Mader Constr. Co., Inc.*, 13 AD3d 1096, 1097, *lv dismissed* 5 NY3d 842; *see Calkins Corporate Park, LLC v Eye Physicians & Surgeons of W. N.Y., P.L.L.C.*, 56 AD3d 1122, 1123). We conclude that, based upon the undisputed facts, defendant established its entitlement to judgment as a matter of law and that plaintiff failed to raise an issue of fact whether a contract existed between the parties (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although plaintiff's representative and defendant's representative signed the additional work orders and defendant sent one check directly to plaintiff, we reject plaintiff's contention that " 'the course of conduct and communications between the parties . . . created a legally enforceable agreement' " (*Zheng v City of New York*, 19 NY3d 556, 578; *cf. Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 401-402). Instead, we conclude that the course of conduct and communications was consistent with defendant's role as the homeowner's insurer.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

705.1

OP 12-01200

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF WALLACE DRAKE, PETITIONER,

V MEMORANDUM AND ORDER

HON. JOSEPH E. FAHEY, ONONDAGA COUNTY COURT JUDGE AND KELLY REDMORE, CLERK OF THE ONONDAGA COUNTY COURT, RESPONDENTS.

WALLACE DRAKE, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to prohibit the enforcement of a resentence.

It is hereby ORDERED that said petition is unanimously dismissed without costs.

Memorandum: Petitioner commenced this original CPLR article 78 proceeding seeking relief in the nature of prohibition to prevent respondents from enforcing his resentencing. "The record establishes that petitioner failed to effect personal service of the notice of petition and petition upon . . . the Attorney General (*see*[] CPLR 307 [1], [2]; 403 [c]), and similarly failed to seek an order to show cause to authorize his use of service by mail in lieu of personal service (*see*[] CPLR 308 [5]; 7804 [c]). Petitioner therefore failed to acquire personal jurisdiction over respondent[s] (*see*[] CPLR 7804 [c]; *Matter of Kelly v Scully*, 152 AD2d 698)[, and] . . . th[at] fatal jurisdictional defect requires dismissal of the proceeding" (*Matter of Bottom v Murray*, 278 AD2d 817, 817).

Dismissal of the proceeding is also required on the ground that petitioner failed to join and serve the Onondaga County District Attorney, a necessary party to this proceeding (*see* CPLR 1003, 7804 [i]; *Matter of Barnwell v Breslin*, 46 AD3d 990, 991; *Matter of Thomas v Justices of Supreme Ct. of State of N.Y., Queens County*, 304 AD2d 585, 585-586; *Matter of Arkim v Dillon*, 222 AD2d 1116, 1116).

Based on our determination, we do not reach petitioner's

remaining contentions.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

712

KA 11-00378

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKIE R. SCOTT, ALSO KNOWN AS STEPHAN SUMPSSTER,
DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

RICKIE R. SCOTT, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered November 23, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), and criminal possession of a weapon in the third degree (§ 265.02 [5] [ii]). We note at the outset that defendant's first trial ended in a mistrial for reasons not relevant herein. With respect to the merits, we reject defendant's contention that Supreme Court's handling of the fourth jury note during deliberations warrants a new trial. Contrary to defendant's contention, the court did not err in refusing to include a supplemental instruction on identification in responding to the fourth jury note (*see People v Allen*, 69 NY2d 915, 916; *see also People v Cruz*, 272 AD2d 922, 923, *affd* 96 NY2d 857). "The court was not obligated to go beyond the jury's request for information" in the fourth jury note (*People v Cosby*, 82 AD3d 63, 69, *lv denied* 16 NY3d 857), and we conclude that the court properly exercised its discretion in formulating a response to that note (*see generally People v Santi*, 3 NY3d 234, 248). Defendant failed to preserve for our review his contention that the court erred in failing to allow the jury to clarify its request with respect to the fourth jury note (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see*

CPL 470.15 [6] [a]).

Defendant further contends in his main and pro se supplemental briefs that he is entitled to a new trial because the court erroneously denied his motion for a mistrial based on the fact that a witness who was unable to make a pretrial identification of defendant as the shooter thereafter identified him as the shooter at trial. We reject that contention. "[T]he decision to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292; *see People v Robinson*, 309 AD2d 1228, 1228, *lv denied* 1 NY3d 579), and we perceive no abuse of discretion here. The inability of a witness to identify a defendant during a pretrial procedure goes to the weight to be afforded that witness's identification testimony at trial, not its admissibility (*see People v Grant*, 94 AD3d 1139, 1140-1141, *lv denied* 20 NY3d 1099; *People v Gangler*, 227 AD2d 946, 947-948, *lv denied* 88 NY2d 985, *reconsideration denied* 89 NY2d 922). Defendant also contends that he is entitled to a new trial because the court erred in denying his severance motion, but we conclude that the court "neither abused nor improvidently exercised its discretion in denying the motion for severance" (*People v Sutton*, 71 AD3d 1396, 1397, *lv denied* 15 NY3d 778).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence (*see generally People v Delamota*, 18 NY3d 107, 110; *People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Where . . . witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give [g]reat deference . . . [to the jury's] opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Allen*, 93 AD3d 1144, 1147, *lv denied* 19 NY3d 956 [internal quotation marks omitted]). Defendant's further challenge to the legal sufficiency of the evidence at the first trial is properly before us inasmuch as "[t]he Double Jeopardy Clause precludes a second trial if the evidence from the first trial is determined by the reviewing court to be legally insufficient" (*People v Scerbo*, 74 AD3d 1730, 1731, *lv denied* 15 NY3d 757). Nevertheless, we reject that contention. Viewing the evidence at the first trial in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction (*see Allen*, 93 AD3d at 1147; *see generally Bleakley*, 69 NY2d at 495).

Defendant's contention in his main and pro se supplemental briefs that he was deprived of effective assistance of counsel based on defense counsel's failure to call a certain person as an alibi witness is based on matters outside the record on appeal, "and thus the proper procedural vehicle for raising that contention is by way of a motion pursuant to CPL 440.10" (*People v Wittman*, 103 AD3d 1206, 1206, *lv denied* 21 NY3d 915; *see People v King*, 90 AD3d 1533, 1534, *lv denied* 18 NY3d 959). To the extent that we are able to review defendant's contention that he was denied effective assistance of counsel based on

the record before us, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

726

CA 12-01831

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JEAN JOHNSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF MICHAEL STACHEWICZ, III, PLAINTIFF-APPELLANT,

V ORDER

JOHN G. MANNA AND ROBERTA S. MANNA, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.)

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered December 9, 2011. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

727

CA 12-01832

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JEAN JOHNSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF MICHAEL STACHEWICZ, III, PLAINTIFF-APPELLANT,

V ORDER

JOHN G. MANNA AND ROBERTA S. MANNA, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered August 7, 2012. The order, among other things, granted the motion of defendants John G. Manna and Roberta S. Manna to strike the note of issue and statement of readiness.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

728

CA 12-01833

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

JEAN JOHNSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF MICHAEL STACHEWICZ, III, PLAINTIFF-APPELLANT,

V ORDER

JOHN G. MANNA AND ROBERTA S. MANNA, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 3.)

LAW OFFICES OF EUGENE C. TENNEY, BUFFALO (NATHAN C. DOCTOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered September 12, 2012. The order, among other things, denied the motion of plaintiff to deem abandoned the motion of defendants John G. Manna and Roberta S. Manna to strike the note of issue.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

739

CAF 12-00776

PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND LINDLEY, JJ.

IN THE MATTER OF KATHLEEN S. MANNING,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY P. SOBOTKA, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 21, 2012 in a proceeding pursuant to Family Court Act article 4. The order, inter alia, found respondent to be in willful violation of an order of support.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings on the petition.

Memorandum: Petitioner mother commenced this proceeding pursuant to article 4 of the Family Court Act based on respondent father's alleged willful violation of a child support order. The Support Magistrate entered an order in favor of petitioner upon respondent's alleged default, and Family Court confirmed that order. As a preliminary matter, we agree with respondent that this appeal is properly before us. Although respondent's brief on appeal focuses on the erroneous determination of the Support Magistrate that respondent had defaulted in his appearance, the order of the Support Magistrate, which recommended commitment, had "no force and effect until confirmed by a judge of the [Family] [C]ourt" (Family Ct Act § 439 [a]; *see Matter of Huard v Lugo*, 81 AD3d 1265, 1266, *lv denied* 16 NY3d 710). Thus, the order that is on appeal is the order entered by the court and, inasmuch as respondent appeared before the court, that order was not an order entered on his default.

We further agree with respondent that the court erred in confirming the Support Magistrate's order inasmuch as the Support Magistrate erred in finding respondent in default. Although respondent did not appear before the Support Magistrate on the scheduled date for the hearing, his attorney had previously made a written request for an adjournment and appeared in court on the date of the hearing to reiterate that request (*see Matter of Erie County Dept. of Social Servs. v Thompson*, 91 AD3d 1327, 1328; *Matter of David*

A.A. v Maryann A., 41 AD3d 1300, 1300). "A party who is represented at a scheduled court appearance by an attorney has not failed to appear" (*Matter of Sales v Gisendaner*, 272 AD2d 997, 997; *see Erie County Dept. of Social Serv.*, 91 AD3d at 1328). On the date of the scheduled hearing, the Support Magistrate indicated that she had previously decided to grant the adjournment and had scheduled another matter to be heard that day. Apparently, she changed her mind and proceeded to engage petitioner in a colloquy about respondent's failure to pay child support. In response to questioning from the Support Magistrate, petitioner stated that respondent had failed to pay child support, but she acknowledged that respondent was unemployed and was struggling financially. Moreover, the record establishes that respondent qualified for public assistance and had requested the adjournment to obtain medical records that allegedly would have demonstrated that he suffered from a physical disability that prevented him from working.

Inasmuch as the Support Magistrate erred in determining that respondent had defaulted and the colloquy with petitioner did not constitute the requisite fact-finding hearing necessary to develop a factual basis for a finding of willful violation, we conclude that the court erred in confirming the order of the Support Magistrate. "In the absence of a fact-finding hearing, there was no factual support for the finding that" respondent willfully violated the support order (*Matter of Bradley M.M. [Michael M.-Cindy M.]*, 98 AD3d 1257, 1258; *see Matter of Shemeco D.*, 265 AD2d 860, 860). We therefore reverse the order and remit the matter to Family Court for further proceedings on the petition.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

759

KA 10-00553

PRESENT: CENTRA, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMIR W., DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by adjudicating defendant a youthful offender and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Hamilton*, 49 AD3d 1163, 1164; *People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767).

We further agree with defendant that he should have been afforded youthful offender status. "The youthful offender provisions of the Criminal Procedure Law emanate from a legislative desire not to stigmatize youths between the ages of 16 and 19 with criminal records triggered by hasty or thoughtless acts which, although crimes, may not have been the serious deeds of hardened criminals" (*People v Drayton*, 39 NY2d 580, 584; *see generally* CPL 720.20). The factors to be considered in determining an application for youthful offender treatment include "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence

reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" (*People v Cruickshank*, 105 AD2d 325, 334, *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625; *see People v Shrubsall*, 167 AD2d 929, 930).

A defendant between the ages of 16 and 19 who, like defendant herein, "has been convicted of an armed felony offense . . . is an eligible youth if the court determines that . . . [there are] mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]), and we conclude that such is the case here. The record reflects that defendant was the victim of a brutal attack by multiple perpetrators the day prior to the armed felony offense at issue herein. When defendant was arrested by the police on the day of that offense, he told them that a group of people had assaulted him with wooden boards. The police report states that defendant had a "large contusion" and "board mark" on the left side of his head as well as scrapes and bruises on his hands and arms. Additionally, when defendant was subsequently examined at the jail, he was noted to have mild head trauma and a small hematoma on his scalp. Defendant told the police that he had fired a single shot into the porch of his attackers' house "to send a message to them to stop messing with him as he was a serious threat if need be." According to defendant, he knew that his attackers would not be home and, indeed, the record reflects that the residence was unoccupied at the time of the shooting.

Defendant was 16 years old at the time of the offense and had no prior criminal record. After his arrest, defendant cooperated with the police and provided a written statement in which he admitted his guilt and expressed remorse for his conduct. Both the presentence report (PSR) and a memorandum from the Center for Community Alternatives (CCA) detail defendant's upbringing, which included abuse at the hands of his mother's boyfriends and his maternal grandfather. Defendant's father was in and out of prison for most of defendant's childhood, including serving an eight-year term of incarceration for robbery. The CCA memorandum concludes that, "[w]ith the proper guidance, direction, and services, [defendant] may develop into a healthy, productive member of his community," and both the PSR and the CCA recommend youthful offender treatment (*see Shrubsall*, 167 AD2d at 931). We conclude that despite defendant's difficult upbringing, he has the potential to lead a law-abiding life, and we deem it appropriate to modify the judgment as a matter of discretion in the interest of justice by adjudicating him a youthful offender (*see People v William S.*, 26 AD3d 867, 868; *see also People v Noel*, 106 AD2d 854, 855; *see generally People v Clarence S.*, 5 AD3d 982, 983). In light of our determination, we need not address defendant's remaining contentions.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

778

TP 13-00195

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF KHALAIRE ALLAH, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered January 23, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

779

TP 12-00932

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF NEB MORROW, III, PETITIONER,

V ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT.

NEB MORROW, III, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered May 18, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

780

TP 13-00272

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF HUGO CASTANEDA, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 4, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

784

KA 11-02117

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL DONALDSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 12, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

788

KA 12-00395

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAYMOND CLYDE, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CHRISTOPHER T. VALDINA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Robert B. Wiggins, A.J.), rendered February 1, 2012. The judgment convicted defendant, upon a jury verdict, of attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

790

TP 13-00270

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF JAMEL FLOYD, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 4, 2013) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

792

TP 13-00269

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF JOSE MATUL, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered February 4, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

794

TP 13-00279

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF MARCUS JORDAN, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

MICHAEL L. D'AMICO, BUFFALO, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered February 7, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

795

KA 12-01710

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HARRY MCLEOD, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 13, 2012. The judgment convicted defendant, upon his plea of guilty, of vehicular manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

801

TP 13-00008

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF JAMES M. WEST, PETITIONER,

V ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

JAMES M. WEST, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered December 28, 2012) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

802

TP 13-00194

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF JOSEPH GUARNERI, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered January 23, 2013) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

803

TP 13-00196

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF JAMEL FLOYD, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered January 23, 2013) to review a determination of respondent. The determination found after a Tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

805

TP 13-00193

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, WHALEN, AND MARTOCHE, JJ.

IN THE MATTER OF JERRY SANDERS, PETITIONER,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Mark H. Dadd, A.J.], entered January 23, 2013) to review a determination of respondent. The determination found after a Tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

806

KA 12-00385

PRESENT: CENTRA, J.P., SCONIERS, VALENTINO, WHALEN, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN C. ANDREWS, ALSO KNOWN AS KEVIN ANDREWS,
ALSO KNOWN AS KEVIN CHRISTOPHER ANDREWS,
DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 21, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Entered: June 28, 2013

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1507/01) KA 98-05285. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHON LUCIUS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed June 28, 2013.)

MOTION NO. (1295/04) KA 02-01133. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH WRIGHT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (117/07) KA 04-00878. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GEORGE T. COTTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, PERADOTTO, WHALEN, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (940/10) KA 08-02540. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GEORGE HARRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, VALENTINO, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (977/10) KA 06-00672. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEITH LASTER, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed June 28, 2013.)

MOTION NO. (978/10) KA 06-00673. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEITH LASTER, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND SCONIERS, JJ. (Filed June 28, 2013.)

MOTION NO. (1340/10) KA 09-01555. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARVIN DYE, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed June 28, 2013.)

MOTION NO. (72/11) KA 09-01374. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SAMUEL T. TOLIVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (1331/11) KA 09-01810. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LEROY TUFF, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal, specifically, the jury's verdict was against the weight of the evidence. Upon our review of the motion papers, we conclude that the issue may have merit. Therefore, the order of December 30, 2011 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046).

Defendant is directed to file and serve his records and briefs with this Court on or before September 26, 2013. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (532/12) KA 10-02124. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALLEN MORRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (748.1/12) KA 05-00172. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CYRIL WINEBRENNER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND SCONIERS, JJ. (Filed June 28, 2013.)

MOTION NO. (59/13) CA 12-01288. -- SHAWN GILES, ALSO KNOWN AS SHAWN ANTHONY COFFEE, PLAINTIFF-APPELLANT, V A. GI YI, GERALD BREEN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, WHALEN, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (208/13) CA 12-00188. -- JOSEPH LAUZONIS, PLAINTIFF-RESPONDENT, V COLLEEN LAUZONIS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ.

(Filed June 28, 2013.)

MOTION NO. (215/13) CA 12-01857. -- TONYA TIEDE, PLAINTIFF-RESPONDENT-APPELLANT, V FRONTIER SKYDIVERS, INC., HOLLANDS INTERNATIONAL FIELD AIRPORT, AL HOLLANDS, DAYSTAR TRADING & VENTURES, LLC, PAUL GATH, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (216/13) CA 12-01861. -- TONYA TIEDE, PLAINTIFF-RESPONDENT-APPELLANT, V FRONTIER SKYDIVERS, INC., HOLLANDS INTERNATIONAL FIELD AIRPORT, AL HOLLANDS, DAYSTAR TRADING & VENTURES, LLC, PAUL GATH, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (264/13) CA 12-01303. -- INEZ BIELECKI, PLAINTIFF-RESPONDENT, V RICHARD BIELECKI, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ. (Filed June 28, 2013.)

MOTION NO. (286/13) CA 12-00920. -- IN THE MATTER OF EMMANUEL PATTERSON, PETITIONER-RESPONDENT, V ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE

DIVISION OF PAROLE, AND MALCOLM R. CULLY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, RESPONDENTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed June 28, 2013.)

MOTION NO. (355/13) CA 12-01574. -- CHRISTOPHER HAMILTON, PLAINTIFF-APPELLANT, V JOHN MILLER, DAVID MILLER, JULES MUSINGER, DOUG MUSINGER, AND SINGER ASSOCIATES, DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed June 28, 2013.)

MOTION NO. (371/13) CA 12-02126. -- IN THE MATTER OF BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., IAFF LOCAL 282, PETITIONER-APPELLANT, V BUFFALO FISCAL STABILITY AUTHORITY, CITY OF BUFFALO AND BYRON BROWN, MAYOR, CITY OF BUFFALO, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND CARNI, JJ. (Filed June 28, 2013.)

MOTION NO. (435/13) TP 12-02002. -- IN THE MATTER OF JAMES M. WEST, PETITIONER, V MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT. -- Motion to appeal denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, WHALEN, AND MARTOCHE, JJ. (Filed June 28, 2013.)

MOTION NO. (498/13) CA 12-02137. -- SAMUEL TOMAINO, PLAINTIFF-APPELLANT, V THOMAS MAROTTA, JR., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND MARTOCHE, JJ. (Filed June 28, 2013.)

KAH 12-01264. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. LEROY PEOPLES, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENT-RESPONDENT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Petitioner appeals from a judgment of Supreme Court that denied his petition for a writ of habeas corpus. Assigned counsel for petitioner moves to be relieved of the assignment on the ground that there are no appealable issues (*see People v. Crawford*, 71 AD2d 38). Upon a review of the record, we conclude that a nonfrivolous issue exists as to whether Supreme Court erred in denying the petition (*see People ex rel. Keitt v McMann*, 18 NY2d 257). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment [Denominated Order] of Supreme Court, Wyoming County, Mark H. Dadd, J. - Habeas Corpus). PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, WHALEN, AND MARTOCHE, JJ. (Filed June 28, 2013.)