SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 7, 2014

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, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1109

CA 13-00340

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

BROWN & BROWN, INC. AND BROWN & BROWN OF NEW YORK, INC., PLAINTIFFS-RESPONDENTS-APPELLANTS,

V OPINION AND ORDER

THERESA A. JOHNSON AND LAWLEY BENEFITS GROUP, LLC, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 1.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER, LITTLER MENDELSON, P.C., NEW YORK CITY (DAVID S. WARNER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered August 28, 2012. The order, among other things, denied in part the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that said cross appeal from the order insofar as it concerns the non-inducement covenant is unanimously dismissed and the order is modified on the law by granting that part of the motion with respect to the non-solicitation covenant in the first cause of action and denying the remainder of the motion and as modified the order is affirmed without costs.

Opinion by WHALEN, J.:

I

Defendant Theresa A. Johnson was hired by plaintiffs, insurance intermediaries, in December 2006 to provide actuarial analysis for plaintiffs. On her first day of work, Johnson was presented with a number of documents to sign, including an Employment Agreement (hereinafter, Agreement), which contained the three covenants at issue in this dispute: a non-solicitation covenant, which prohibited Johnson from soliciting or servicing any client of plaintiffs' New York offices for two years after termination of Johnson's employment; a confidentiality covenant, which prohibited Johnson from disclosing plaintiffs' confidential information or using it for her own purposes; and a non-inducement covenant, which prohibited Johnson from inducing plaintiffs' New York employees to leave plaintiffs' employment for two

years after termination of Johnson's employment. The Agreement also stated that it would be governed by and construed and enforced according to Florida law.

Plaintiffs terminated Johnson from her position on February 25, 2011. Shortly thereafter, Johnson was hired by defendant Lawley Benefits Group, LLC (Lawley). Plaintiffs subsequently commenced this action. The first two causes of action were against Johnson only: breach of contract, for violation of the non-solicitation, confidentiality, and non-inducement covenants in the Agreement; and misappropriation of confidential and proprietary information, which information plaintiffs alleged constituted trade secrets. As against Johnson and Lawley, plaintiffs' third cause of action alleged tortious interference with plaintiffs' prospective and existing business relations. As against Lawley only, plaintiffs' fourth cause of action alleged that Lawley tortiously interfered with the Agreement and induced Johnson to breach the Agreement. Defendants subsequently moved for, inter alia, summary judgment dismissing the complaint. Supreme Court initially determined that the Florida choice-of-law provision in the Agreement was unenforceable because the Agreement bore no reasonable relationship to the state of Florida, and thus the court determined that New York law would apply. The court granted defendants' motion with respect to the first cause of action, except to the extent that plaintiffs could establish that Johnson violated the non-solicitation covenant of the Agreement. The court further granted defendants' motion with respect to the second and third causes of action, and denied the motion with respect to the fourth cause of action. In appeal No. 1, defendants appeal and plaintiffs cross-appeal from that order.

Plaintiffs subsequently moved for leave to reargue, contending that the court erred in dismissing that part of plaintiffs' first cause of action alleging that Johnson breached the non-inducement covenant of the Agreement because defendants' motion did not address that covenant and defendants therefore failed to meet their burden. The court granted plaintiffs' motion for leave to reargue and, upon reargument, the court reinstated that part of the first cause of action alleging that Johnson breached the non-inducement covenant. In appeal No. 2, defendants appeal from that order.

II

Initially, we reject plaintiffs' contention that defendants' motion for summary judgment should have been denied because it was premature. That contention is not properly before us inasmuch as plaintiffs have raised it for the first time on appeal (*see Bradley v Benchmark Mgt. Corp.*, 294 AD2d 879, 880). In any event, plaintiffs " 'failed to demonstrate that facts essential to oppose the motion were in [defendants'] exclusive knowledge and possession and could be obtained by discovery' " (*M&T Bank v HR Staffing Solutions, Inc.* [appeal No. 2], 106 AD3d 1498, 1499; *see* CPLR 3212 [f]).

As another threshold matter, we must determine whether the court properly held that the Florida choice-of-law provision in the

Agreement is unenforceable and that the law of New York governs this dispute. It is well settled that there is a " 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Bloomfield v Bloomfield*, 97 NY2d 188, 193, quoting *Matter of Greiff*, 92 NY2d 341, 344). Thus, New York courts generally will enforce a choice-of-law provision in order to "effectuate the parties' intent" (*Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629). The chosen law, however, must "bear[] a reasonable relationship to the parties or the transaction" and must not be " 'truly obnoxious' " to New York's public policy (*id.*, quoting *Cooney v Osgood Mach.*, 81 NY2d 66, 79; *see Matter of Frankel v Citicorp Ins. Servs., Inc.*, 80 AD3d 280, 286).

We agree with plaintiffs that the court erred in determining that the choice-of-law provision in the Agreement was unenforceable because Florida law bears no reasonable relationship to the parties or the transaction. Plaintiff Brown & Brown, Inc. (BBI) is a Florida corporation with its principal place of business in Florida, and it is the parent corporation of plaintiff Brown & Brown of New York, Inc. (BBNY). The Agreement stated that it was "made and entered into by and among [BBI], a Florida corporation ('Parent'), [BBNY], a New York corporation (collectively with Parent, the 'Company'), and [Johnson], a resident of the State of New York." Plaintiffs submitted evidence that BBI directed sales strategies, set sales goals, and provided promotional and educational material for BBNY. Plaintiffs also submitted evidence that Johnson's salary was administered in Florida and paid from a Florida bank account, and that Johnson and her supervisor traveled to Florida to attend training sessions and meet with BBI employees. We therefore conclude that Florida law "bears a reasonable relationship to the parties or the transaction" (*Welsbach*, 7 NY3d at 629; *see Finucane v Interior Constr. Corp.*, 264 AD2d 618, 620).

We nevertheless conclude that the Florida choice-of-law provision in the Agreement is unenforceable because it is " 'truly obnoxious' " to New York public policy (*Welsbach*, 7 NY3d at 629). In New York, agreements that restrict an employee from competing with his or her employer upon termination of employment are judicially disfavored because " 'powerful considerations of public policy . . . militate against sanctioning the loss of a [person's] livelihood' " (*Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307, *rearg denied* 40 NY2d 918, quoting *Purchasing Assoc. v Weitz*, 13 NY2d 267, 272, *rearg denied* 14 NY2d 584; *see Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 499; *D&W Diesel v McIntosh*, 307 AD2d 750, 750). "So potent is this policy that covenants tending to restrain anyone from engaging in any lawful vocation are almost uniformly disfavored and are sustained only to the extent that they are reasonably necessary to protect the legitimate interests of the employer and *not unduly harsh or burdensome to the one restrained*" (*Post v Merrill Lynch, Pierce, Fenner & Smith*, 48 NY2d 84, 86-87, *rearg denied* 48 NY2d 975 [emphasis added]). The determination whether a restrictive covenant is reasonable involves the application of a three-pronged test: "[a] restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the

employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [emphasis omitted]). "A violation of any prong renders the covenant invalid" (*id.* at 389). Thus, under New York law, a restrictive covenant that imposes an undue hardship on the restrained employee is invalid and unenforceable (*see id.*). Employee non-compete agreements "will be carefully scrutinized by the courts" to ensure that they comply with the "prevailing standard of reasonableness" (*id.* at 388-389).

By contrast, Florida law expressly forbids courts from considering the hardship imposed upon an employee in evaluating the reasonableness of a restrictive covenant. Florida Statutes § 542.335 (1) (g) (1) provides that, "[i]n determining the enforceability of a restrictive covenant, a court . . . *[s]hall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought*" (emphasis added). The statute, effective July 1, 1996, also provides that a court considering the enforceability of a restrictive covenant must construe the covenant "in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement" and "shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract" (§ 542.335 [1] [h]; *see Environmental Servs., Inc. v Carter*, 9 So3d 1258, 1262 [Fla Dist Ct App]). Thus, although the statute requires courts to consider whether the restrictions are reasonably necessary to protect the legitimate business interests of the party seeking enforcement (*see* § 542.335 [1] [c]; *Environmental Servs., Inc.*, 9 So3d at 1262), the statute prohibits courts from considering the hardship on the employee against whom enforcement is sought when conducting its analysis (*see Atomic Tattoos, LLC v Morgan*, 45 So3d 63, 66 [Fla Dist Ct App]).

Based on the foregoing, we conclude that Florida law prohibiting courts from considering the hardship imposed on the person against whom enforcement is sought is " 'truly obnoxious' " to New York public policy (*Welsbach*, 7 NY3d at 629), inasmuch as under New York law, a restrictive covenant that imposes an undue hardship on the employee is invalid and unenforceable for that reason (*see BDO Seidman*, 93 NY2d at 388-389). Furthermore, while New York judicially disfavors such restrictive covenants, and New York courts will carefully scrutinize such agreements and enforce them "only to the extent that they are reasonably necessary to protect the legitimate interests of the employer and not unduly harsh or burdensome to the one restrained" (*Post*, 48 NY2d at 87; *see BDO Seidman*, 93 NY2d at 388-389; *Columbia Ribbon & Carbon Mfg. Co.*, 42 NY2d at 499; *Reed*, 40 NY2d at 307; *Purchasing Assoc.*, 13 NY2d at 272), Florida law requires courts to construe such restrictive covenants in favor of the party seeking to protect its legitimate business interests (*see* Florida Statutes § 542.335 [1] [h]).

We are not persuaded by plaintiffs' argument that the Agreement at issue here contains no non-compete clause, inasmuch as the term

"restrictive covenants" in the Florida statute encompasses "all contractual restrictions such as noncompetition/nonsolicitation agreements, confidentiality agreements, exclusive dealing agreements, and all other contractual restraints of trade" (*Environmental Servs., Inc.*, 9 So3d at 1262). We likewise reject plaintiffs' contention that Florida law is not truly obnoxious to New York public policy because the Florida statute has been interpreted, in practice, to disallow any undue hardship to the employee. In the case upon which plaintiffs rely for that proposition, the court wrote that "the covenant may be unreasonable when it inflicts an unduly harsh or unnecessary result upon the employee" (*Edwards v Harris*, 964 So2d 196, 197-198 [Fla Dist Ct App]). In support of that proposition, however, the court cited two cases, one decided *before* the relevant statute became effective (*Auto Club Affiliates, Inc. v Donahey*, 281 So2d 239, 241 [Fla Dist Ct App]), and the other refusing to enforce a restrictive covenant because it was overly broad, not because it imposed an undue hardship on the employee (*Austin v Mid State Fire Equip. of Cent. Florida, Inc.*, 727 So2d 1097, 1098 [Fla Dist Ct App]). We further note that three other courts similarly have determined that the Florida statute conflicts with the public policy of their respective states (*see Carson v Obor Holding Co., LLC*, 318 Ga App 645, 654, 734 SE2d 477, 484-485; *Brown & Brown, Inc. v Mudron*, 379 Ill App 3d 724, 727-728, 887 NE2d 437, 440; *Unisource Worldwide, Inc. v South Cent. Alabama Supply, LLC*, 199 F Supp 2d 1194, 1201 [Ala]). Based on the foregoing, we conclude that the Florida choice-of-law provision in the Agreement is unenforceable and that the court properly determined that the law of New York should govern this dispute (*see generally Matter of Midland Ins. Co.*, 16 NY3d 536, 543-544).

III

With respect to plaintiffs' first cause of action, alleging that Johnson breached the Agreement, we reject defendants' contention that they are entitled to summary judgment dismissing that cause of action in its entirety because Johnson was involuntarily terminated without cause. Even assuming, arguendo, that Johnson was terminated without cause, we conclude that such termination would not render the restrictive covenants in the Agreement unenforceable. Defendants' reliance on the Court of Appeals' decision in *Post* is misplaced. In that case, the Court of Appeals held that New York policies "preclude the enforcement of *a forfeiture-for-competition clause* where the termination of employment is involuntary and without cause" (48 NY2d at 88 [emphasis added]), i.e., a clause requiring the employee to comply with a restrictive covenant in order to continue receiving post-employment benefits to which the employee otherwise would be entitled (*see Wise v Transco, Inc.*, 73 AD2d 1039, 1039). There is no such clause in the Agreement herein. Contrary to defendants' contention, this Court's decision in *Eastman Kodak Co. v Carmosino* (77 AD3d 1434) did not extend the *Post* holding to establish a per se rule that involuntary termination without cause renders all restrictive covenants unenforceable. Rather, this Court cited *Post* while conducting a "balance of the equities" analysis in the context of the plaintiff's motion seeking a preliminary injunction (*id.* at 1436).

Our decision in *Eastman Kodak Co.* did not impact our decision in *Wise*, in which we refused to extend the *Post* holding to restrictive covenants that do not involve a forfeiture-for-competition clause. In any event, there are issues of fact whether Johnson was terminated without cause.

Although we agree with plaintiffs that the court properly determined that defendants failed to establish that plaintiffs have no legitimate interest in protecting their client relationships as a matter of law, we nevertheless agree with defendants that the non-solicitation covenant of the Agreement is overbroad and unenforceable. We therefore conclude that the order in appeal No. 1 should be modified by granting that part of defendants' motion with respect to the first cause of action. We note at the outset that the overbreadth of the non-solicitation covenant is "an issue of law that 'could not have been avoided by [plaintiffs] if brought to [their] attention in a timely manner' " (*Paul v Cooper*, 45 AD3d 1485, 1486, quoting *Oram v Capone*, 206 AD2d 839, 840), and thus it may properly be raised by defendants for the first time on appeal.

A non-solicitation covenant is overbroad and therefore unenforceable "if it seeks to bar the employee from soliciting or providing services to clients with whom the employee never acquired a relationship through his or her employment" (*Scott, Stackrow & Co., C.P.A.'s, P.C. v Skavina*, 9 AD3d 805, 806, *lv denied* 3 NY3d 612; *see BDO Seidman*, 93 NY2d at 393). Here, the non-solicitation covenant purported to restrict Johnson from, inter alia, soliciting, diverting, servicing, or accepting, either directly or indirectly, "any insurance or bond business of any kind or character from any person, firm, corporation, or other entity that is a customer or account of the New York offices of the Company during the term of [the] Agreement" for two years following the termination of Johnson's employment, without regard to whether Johnson acquired a relationship with those clients. We conclude that the language of the non-solicitation covenant renders it overbroad and unenforceable (*see BDO Seidman*, 93 NY2d at 393; *Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 806-807).

Plaintiffs contended at oral argument of this appeal that, if this Court determines that the non-solicitation covenant is overbroad, we nevertheless should partially enforce the covenant, inasmuch as plaintiffs seek to prevent Johnson from soliciting and servicing only those clients with whom Johnson actually developed a relationship during her employment with plaintiffs. We reject that contention. As the Court of Appeals stated in *BDO Seidman*, partial enforcement may be justified "if the employer demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing" (93 NY2d at 394). "Factors weighing against partial enforcement are the imposition of the covenant in connection with hiring or continued employment—as opposed to, for example, imposition in connection with a promotion to a position of responsibility and trust—the existence of coercion or a general plan of the employer to forestall competition, and the employer's knowledge that the covenant

was overly broad" (*Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807). Here, it is undisputed that Johnson was not presented with the Agreement until her first day of work with plaintiffs, after Johnson already had left her previous employer. Plaintiffs have made no showing that, in exchange for signing the Agreement, Johnson received any benefit from plaintiffs beyond her continued employment (*see Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807-808; *cf. BDO Seidman*, 93 NY2d at 395). Furthermore, plaintiffs presented the Agreement to Johnson in December 2006, more than seven years after *BDO Seidman* was decided. We conclude, as the Third Department concluded in *Scott*, that the issuance of the decision in *BDO Seidman* "served as notice to plaintiff[s] that the agreement at issue here was also overly broad" (*Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 808).

Contrary to plaintiffs' further contention, the fact that the Agreement contemplated partial enforcement does not require partial enforcement of the non-solicitation covenant. As the Court of Appeals wrote in *BDO Seidman*, it previously "expressly recognized and applied the judicial power to sever and grant partial enforcement for an overbroad employee restrictive covenant," and the decision whether to do so is left to the discretion of the court after "a case specific analysis" (93 NY2d at 394). Indeed, the Agreement itself provided that, in the event that a court declared any of the covenants unenforceable, "the parties agree that such court *shall be authorized* to modify such covenants so as to render . . . [them] valid and enforceable to the maximum extent possible" (emphasis added). Furthermore, allowing a former employer the benefit of partial enforcement of overly broad restrictive covenants simply because the applicable agreement contemplated partial enforcement would eliminate consideration of the factors set forth by the Court of Appeals in *BDO Seidman*, and would enhance the risk that "employers will use their superior bargaining position to impose unreasonable anti-competitive restrictions, uninhibited by the risk that a court will void the entire agreement, leaving the employee free of any restraint" (93 NY2d at 394). In our view, the fact that the Agreement here contemplated partial enforcement does not demonstrate the "absence of overreaching" on plaintiffs' part, but, rather, demonstrates that plaintiffs "imposed the covenant in bad faith, knowing full well that it was overbroad" (*id.* at 394-395; *see Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807-808). We therefore conclude that the non-solicitation covenant should not be partially enforced and must be severed from the Agreement (*see Scott, Stackrow & Co., C.P.A.'s, P.C.*, 9 AD3d at 807-808; *cf. BDO Seidman*, 93 NY2d at 394-395).

We agree with plaintiffs on their cross appeal in appeal No. 1, however, that the court erred in granting those parts of defendants' motion for summary judgment dismissing plaintiffs' first cause of action with respect to the confidentiality covenant and the second cause of action, alleging misappropriation of trade secrets. We therefore conclude that the order in appeal No. 1 should be further modified accordingly. Whether information sought to be protected from disclosure is confidential or constitutes a trade secret "is generally a question of fact" (*Ashland Mgt. v Janien*, 82 NY2d 395, 407; *see Golden Eagle/Satellite Archery v Epling*, 291 AD2d 838, 838). Here,

there is evidence that the information that plaintiffs seek to protect does not merely consist of "compilations of customer names and addresses or phone numbers" (*Marcone APW, LLC v Servall Co.*, 85 AD3d 1693, 1695). Viewing the record in the light most favorable to plaintiffs, as we must in the context of defendants' motion (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503), we conclude that there are issues of fact regarding whether the information that plaintiffs seek to protect is confidential or amounts to trade secrets, whether the confidentiality covenant was necessary to protect plaintiffs' legitimate business interests, and whether Johnson violated the confidentiality covenant or misappropriated plaintiffs' trade secrets (*see Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 104, *mod on other grounds* 14 NY3d 774; *Listworks Corp. v LCS Indus.*, 155 AD2d 305, 305).

Furthermore, we agree with plaintiffs with respect to appeal No. 1 that the court erred in granting that part of defendants' motion for summary judgment dismissing plaintiffs' third cause of action, which alleged tortious interference with prospective and existing business relations against Johnson and Lawley. Viewing the facts in the light most favorable to plaintiffs, we conclude that there are issues of fact whether defendants interfered with plaintiffs' business relations with third parties, whether defendants' actions amounted to a tort independent of the tortious interference with business relations, and whether there was a resulting injury to the business relations (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-190; *North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21; *John Hancock Life Ins. Co. v 42 Delaware Ave. Assoc., LLC*, 15 AD3d 939, 940-941, *lv dismissed in part and denied in part* 5 NY3d 819). We therefore conclude that the order in appeal No. 1 should be further modified accordingly.

IV

Finally, we reject defendants' contention in appeal No. 2 that the court erred, upon reargument, in reinstating that part of plaintiffs' first cause of action alleging that Johnson breached the non-inducement covenant of the Agreement. Defendants did not meet their burden on that issue by noting gaps in plaintiffs' proof (*see Edwards v Arlington Mall Assoc.*, 6 AD3d 1136, 1137).

V

Accordingly, we conclude that the order in appeal No. 1 should be modified as set forth herein, and that the order in appeal No. 2 should be affirmed.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1110.1

CA 13-00109

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF LAURA SPEIS,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PENFIELD CENTRAL SCHOOLS,
RESPONDENT-RESPONDENT-APPELLANT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (MICHAEL T. HARREN OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C., EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated decision and order) of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered April 4, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted the motion of respondent to dismiss the petition.

It is hereby ORDERED that said cross appeal is unanimously dismissed, the judgment is reversed on the law without costs, the motion is denied, the petition is reinstated, respondent is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, reinstatement of her employment with respondent together with certain backpay. Prior to commencing this proceeding, petitioner had been employed by respondent as a teacher until 2005, when her position was abolished. Pursuant to Education Law § 3013 (3) (a), petitioner was placed on a "preferred eligible list of candidates for appointment to a vacancy . . . that may thereafter occur in an office or position similar to the one which [petitioner] filled." In her petition, petitioner alleged that such a vacancy occurred in 2008 and that respondent failed to inform her of that vacancy. According to petitioner, it was not until August 2011 that she learned that respondent had hired a third party to fill the position without first offering it to teachers on the preferred list. Consequently, petitioner commenced this proceeding in December 2011. Thereafter, respondent made a pre-answer motion seeking, inter alia, dismissal of the petition pursuant to CPLR 7804 (f) on the ground that the relief requested was barred by the doctrine of laches. Petitioner cross-moved to amend the petition to add a necessary party and for

leave to file a late notice of claim, if required. Supreme Court granted respondent's motion to dismiss on the ground that petitioner's three-year delay in bringing this proceeding after respondent hired the third party was unreasonable and therefore the doctrine of laches barred this proceeding. The court further denied as moot petitioner's cross motion. Petitioner appeals, and respondent cross-appeals.

We agree with petitioner on her appeal that the court erred in granting respondent's motion on the ground that this proceeding is barred by the doctrine of laches (*see generally Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442; *Matter of Kaye v Board of Ed., Merrick Union Free Sch. Dist.*, 97 AD2d 794, 794-795). "Where the aggrieved party is a wrongfully terminated permanent civil service employee seeking reinstatement, his [or her] remedy is by way of mandamus to compel the performance of a ministerial act enjoined by law" (*Matter of Curtis v Board of Educ. of Lafayette Cent. Sch. Dist.*, 107 AD2d 445, 447). Inasmuch as this proceeding is in the nature of mandamus to compel, it was required to have been commenced "within four months after the refusal by respondent, upon the demand of petitioner, to perform its duty" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. Sch. Dist.*, 265 AD2d 838, 839, *lv denied* 94 NY2d 758; *see* CPLR 217 [1]). "[A] petitioner[, however,] may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches" (*Matter of Barresi v County of Suffolk*, 72 AD3d 1076, 1076, *lv denied* 15 NY3d 705; *see Matter of Devens v Gokey*, 12 AD2d 135, 136-137, *affd* 10 NY2d 898; *Matter of Chevron U.S.A. Inc. v Commissioner of Envtl. Conservation*, 86 AD3d 838, 840; *Curtis*, 107 AD2d at 447-448).

Here, petitioner made her demand upon respondent no later than December 23, 2011, upon her filing of the petition, which "may be construed as the demand" (*Matter of Meegan v Griffin*, 161 AD2d 1143, 1143, *lv denied* 76 NY2d 710, *rearg denied* 76 NY2d 1018; *see Matter of Thomas v Stone*, 284 AD2d 627, 628, *lv dismissed* 96 NY2d 935, *lv denied* 97 NY2d 608, *cert denied* 536 US 960). Petitioner submitted unrefuted sworn allegations that she did not learn of the vacancy or respondent's decision to hire a third party to fill it until August 2011. Thus, August 2011 was the earliest time that petitioner knew or should have known of the facts that provided her with a clear right to relief (*see generally Chevron U.S.A. Inc.*, 86 AD3d at 840; *Barresi*, 72 AD3d at 1076). Petitioner thereafter made her demand upon respondent by filing the petition in December 2011. We conclude that, under the circumstances presented here, petitioner's delay was not unreasonable. Thus, the court erred in granting respondent's pre-answer motion to dismiss the petition based on the doctrine of laches. We therefore reverse the judgment, deny respondent's motion, reinstate the petition, and grant respondent 20 days from service of the order of this Court with notice of entry to serve and file an answer; we further remit the matter to Supreme Court to determine petitioner's

cross motion.

In addition, respondent's cross appeal must be dismissed because it is not aggrieved by the judgment granting its motion (*see generally Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488). To the extent that respondent contends as an alternative ground for affirmance that petitioner was required to file a notice of claim prior to commencing this proceeding (*see id.*; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), we reject that contention. "A notice of claim is not a condition precedent to a special proceeding properly brought pursuant to CPLR article 78, in the nature of mandamus, seeking judicial enforcement of a legal right derived through enactment of positive law" (*Matter of Sharpe v Sturm*, 28 AD3d 777, 778-779; *see also Matter of Brunecz v City of Dunkirk Bd. of Educ.*, 23 AD3d 1126, 1127). Furthermore, because the petition may be construed as the demand, we reject respondent's contention that the proceeding was barred by the statute of limitations (*see Meegan*, 161 AD2d at 1143; *see also* CPLR 217 [1]).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1110

CA 13-00341

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

BROWN & BROWN, INC. AND BROWN & BROWN OF NEW YORK, INC., PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

THERESA A. JOHNSON AND LAWLEY BENEFITS GROUP, LLC, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, BUFFALO (PRESTON L. ZARLOCK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER, LITTLER MENDELSON, P.C., NEW YORK CITY (DAVID S. WARNER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered January 10, 2013. The order, among other things, granted the motion of plaintiffs for leave to reargue and, upon reargument, reinstated that part of plaintiffs' first cause of action alleging that defendant Theresa A. Johnson breached the employee non-inducement covenant in her Employment Agreement.

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

Same Opinion by WHALEN, J. as in *Brown & Brown, Inc. v Johnson, et al.* ([appeal No. 1] ___ AD3d ___ [Feb. 7, 2014]).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1199

KA 12-01588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK D. POTTER, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 6, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted sexual abuse in the first degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Cattaraugus County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of attempted sexual abuse in the first degree (Penal Law §§ 110.00, 130.65 [3]), defendant contends that County Court erred in failing to rule on his applications to be adjudicated a youthful offender. Defendant, an eligible youth, pleaded guilty pursuant to a plea bargain that included a promised sentence and a waiver of the right to appeal. There was no mention during the plea proceedings whether he would be afforded youthful offender treatment. At sentencing, defense counsel made several applications for defendant to be treated as a youthful offender, but the court did not expressly rule on them; instead, the court imposed a sentence that was incompatible with youthful offender treatment.

"Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). A sentencing court must determine whether to grant youthful offender status to every defendant who is eligible for it because, inter alia, "[t]he judgment of a court as to which young people have a real likelihood of turning their lives around is just too valuable, both to the offender and to the community, to be sacrificed in plea bargaining" (*People v Rudolph*, 21 NY3d 497, 501). "[W]e cannot deem the court's failure to rule on the . . . [applications] as . . . denial[s] thereof" (*People v Spratley*,

96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020; *see People v Ingram*, 18 NY3d 948, 949; *People v Chattley*, 89 AD3d 1557, 1558). Furthermore, even if the court had denied the applications, there is no information in the record from which we could ascertain whether the court properly did so in the exercise of its discretion, or whether it improperly acceded to the prosecutor's plea conditions. We therefore hold the case and remit the matter to County Court to make and state for the record a determination whether defendant should be granted youthful offender status (*see Rudolph*, 21 NY3d at 503).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1261

CA 13-00792

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

IN THE MATTER OF ARBITRATION BETWEEN VILLAGE
OF KENMORE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

KENMORE CLUB POLICE BENEVOLENT ASSOCIATION,
RESPONDENT-APPELLANT.

THE SAMMARCO LAW FIRM, LLP, BUFFALO (ANDREA L. SAMMARCO OF COUNSEL), FOR RESPONDENT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MARK A. MOLDENHAUER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered August 7, 2012 in a proceeding pursuant to CPLR article 75. The order granted the petition for a permanent stay of arbitration and denied the cross motion of respondent for an order compelling arbitration.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied and the cross motion is granted.

Memorandum: This dispute concerns health insurance coverage in a collective bargaining agreement (CBA) between the parties, and the issue before us is whether petitioner must submit to arbitration. Respondent filed a grievance pursuant to the CBA on behalf of a retired police officer and all other qualified retirees protesting petitioner's refusal to continue providing health insurance coverage for retirees who seek a change of permanent residence outside the geographic area covered by respondent's current health insurance plan. After the parties failed to resolve their dispute through the step-by-step grievance procedure set forth in the CBA, respondent sought arbitration of the dispute pursuant to the final step of the grievance procedure. Petitioner commenced this proceeding seeking a permanent stay of arbitration (*see* CPLR 7503 [b]). According to petitioner, the retirees are not "employees" pursuant to the CBA and thus have no standing to file a grievance or to seek arbitration. Respondent cross-moved for an order compelling arbitration. Supreme Court granted the petition and denied respondent's cross motion. We now reverse, deny the petition, and grant respondent's cross motion.

In determining whether an issue is subject to arbitration under a

CBA, a court must apply the two-step analysis set forth in *Matter of Acting Supt. of Schools of Liverpool Cent. Sch. Dist. (United Liverpool Faculty Assn.)* (*see* 42 NY2d 509, 513). "First, a court must determine whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233 [internal quotation marks omitted]). "If the court determines that there is no such prohibition and thus that the parties have the authority to arbitrate the grievance, it proceeds to the second step, in which it must determine whether that authority was in fact exercised, i.e., whether the CBA demonstrates that the parties agreed to refer this type of dispute to arbitration" (*Matter of Kenmore-Town of Tonawanda Union Free Sch. Dist. [Ken-Ton Sch. Empls. Assn.]*, 110 AD3d 1494, 1495; *see Acting Supt. of Schools of Liverpool Cent. Sch. Dist.*, 42 NY2d at 513).

Here, it is undisputed that there is no prohibition against arbitration, thus satisfying the first step (*see Mariano*, 92 AD3d at 1233; *Matter of City of Ithaca [Ithaca Paid Fire Fighters Assn., IAFF, Local 737]*, 29 AD3d 1129, 1130-1131; *see generally Matter of City of Niagara Falls [Niagara Falls Police Club Inc.]*, 52 AD3d 1327, 1327). With respect to the second step, we conclude that the parties in fact exercised their authority to arbitrate their grievance. Although the CBA defines a grievance as "a complaint by an employee or employees in the bargaining unit or by the [PBA] in his (or their) behalf" and further provides that "[a]n employee in the negotiating unit shall have the right to present grievances," we note that "issues concerning [respondent's] relationship to retired employees, issues concerning whether retirees are covered by the grievance procedure, and issues concerning whether the clauses of the [CBA] support the grievance are matters involving the scope of the substantive contractual provisions and, as such, are for the arbitrator" (*Mariano*, 92 AD3d at 1233-1234).

We note that our decision herein is distinguishable from our decision in *Matter of DeRosa v Dyster* (90 AD3d 1470) inasmuch as the procedural postures differ. In *DeRosa*, the petitioner sought relief by means of CPLR article 78. Here, petitioner seeks relief under CPLR article 75.

Finally, we note that the issue whether the retired employees are "employees in the bargaining unit" is a threshold issue for the arbitrator to determine (*see Matter of Spink [Williamson Faculty Assn.]*, 267 AD2d 972, 972).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1262

CA 13-01046

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

CRAIG M. SCHULTZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF WHEATFIELD AND ROBIN R. ZASTROW,
DEFENDANTS-APPELLANTS.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DAVID W. POLAK, ATTORNEY AT LAW, P.C., WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered October 16, 2012. The order, inter alia, denied in part the motion of defendants for partial summary judgment and dismissed plaintiff's second, third and fifth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the third cause of action and dismissing that cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, defamation and constructive discharge from his employment based upon his alleged demotion from the rank of sergeant. Plaintiff is a constable employed by defendant Town of Wheatfield (Town) and a former candidate for public office. He alleged that, after his unsuccessful bid for election to the Wheatfield Republican Committee in 2010, the Town demoted and constructively discharged him without cause and without a hearing in retaliation for his political activities. Plaintiff further alleged that, during his subsequent bid for a seat on the Town Board in 2011, which was unsuccessful, defendant Robin R. Zastrow, acting in his official capacity as Chief Constable, published defamatory statements about him in a letter to the Buffalo News. Defendants moved for partial summary judgment dismissing the second through fifth causes of action, for violations of plaintiff's constitutional due process rights and First Amendment rights, defamation, and constructive discharge, respectively. Supreme Court granted the motion only with respect to the cause of action for defamation, and we agree with defendants that the court also should have granted it with respect to the cause of action for the alleged violation of plaintiff's First Amendment rights. We therefore modify

the order accordingly.

Contrary to defendants' contention, we conclude that they failed to establish their entitlement to judgment as a matter of law with respect to the causes of action for violations of plaintiff's constitutional due process rights and constructive discharge (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Defendants contend that plaintiff could not have been demoted from the rank of sergeant because no such position ever existed. Even assuming, arguendo, that defendants established that plaintiff was not demoted because no such position ever existed, we conclude that their submissions on the motion failed to eliminate issues of fact whether they retaliated against plaintiff because of his political activities by eliminating his assignments and failing to schedule him for work, all without notice or a hearing pursuant to Civil Service Law § 75 (1) (c) (*see generally Richardson v City of Saratoga Springs*, 246 AD2d 900, 901-902). Defendants' conclusory assertions that notice and a hearing "are not at issue" do not establish that the second and fifth causes of action lack merit (*see Winegrad*, 64 NY2d at 853). Defendants contend for the first time on appeal that no hearing was required, and thus that contention is not properly before us (*see Swegan v Svenson*, 104 AD3d 1131, 1132).

With respect to the cause of action for violation of plaintiff's First Amendment rights, plaintiff alleges that Zastrow's letter was defamatory in nature and had a chilling effect on his First Amendment right to engage in political activity. We agree with defendants that the court erred in denying that part of their motion for partial summary judgment dismissing that cause of action. Plaintiff has not challenged the dismissal of his cause of action for defamation, which allegedly flowed from Zastrow's letter. Inasmuch as defendant has no viable common-law defamation cause of action, his First Amendment cause of action is also without merit. The First Amendment does not afford a plaintiff the right to run a political campaign that is free from public criticism (*see generally New York Times Co. v Sullivan*, 376 US 254, 270-271; *Shulman v Hunderfund*, 12 NY3d 143, 147).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1278

OP 13-00015

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

IN THE MATTER OF STEVEN WISNIEWSKI,
PETITIONER-PLAINTIFF,

V MEMORANDUM AND ORDER

HON. JOHN MICHALSKI, ERIE COUNTY SUPREME COURT JUSTICE, FRANK A. SEDITA, III, ERIE COUNTY DISTRICT ATTORNEY, ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE, AND ERIE COUNTY DEPARTMENT OF PROBATION, RESPONDENTS-DEFENDANTS.

STEVEN WISNIEWSKI, PETITIONER-PLAINTIFF PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO, RESPONDENT-DEFENDANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-DEFENDANT PRO SE, AND FOR RESPONDENTS-DEFENDANTS ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE.

JOHN W. MCCONNELL, OFFICE OF COURT ADMINISTRATION, NEW YORK CITY, FOR RESPONDENT-DEFENDANT HON. JOHN MICHALSKI, ERIE COUNTY SUPREME COURT JUSTICE.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (MICHAEL J. PACIFICO OF COUNSEL), FOR RESPONDENT-DEFENDANT ERIE COUNTY DEPARTMENT OF PROBATION.

Proceeding/action pursuant to, inter alia, CPLR article 78, CPLR 3001 and CPLR 7001 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to, among other things, vacate the determination of the New York State Board of Parole. The determination denied the release of petitioner-plaintiff to parole supervision.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this proceeding/action pursuant to, inter alia, CPLR article 78, CPLR 3001, and CPLR 7001 seeking various forms of relief, including his immediate release from prison, in connection with a criminal conviction. We agree with respondents-defendants that the amended petition/complaint should be dismissed in its entirety. It is well settled that "[a] CPLR article 78 proceeding is not the appropriate method to seek review of issues that could be raised on direct appeal" or by a motion pursuant to CPL article 440 (*Matter of Tyler v Forma*, 231 AD2d 891, 891; *see People v ex rel. Smith v Graham*, 109 AD3d 1113, 1113). Here, to the extent that petitioner contends that Supreme Court abused its discretion in failing to adhere to the plea agreement, that his pleas of guilty and waiver of the right to appeal were involuntary, and that the People committed a *Brady* violation, we conclude that those contentions could have been raised by a direct appeal from the judgment of conviction or by way of a CPL article 440 motion and thus are not properly the subject of a CPLR article 78 petition (*see Smith*, 109 AD3d at 1113; *Matter of Aarismaa v Bender*, 108 AD3d 1203, 1204).

With respect to petitioner's claim for relief in the nature of mandamus compelling Supreme Court to correct the uniform sentence and commitment and to render a decision on petitioner's pending CPL article 440 motion, we conclude that "the extraordinary remedy of mandamus does not lie . . . because petitioner has failed to establish a clear legal right to the relief sought or that the relief sought involves the performance of a purely ministerial act" (*Matter of Platten v Dadd*, 38 AD3d 1216, 1217, *lv denied* 9 NY3d 802). The determination of a postjudgment motion is not a "ministerial act" and, further, petitioner has not demonstrated a "clear legal right to the relief sought" (*Matter of Uccio v Silber*, 55 AD3d 615, 616; *see Matter of Legal Aid Socy. of Sullivan County, Inc. v Scheinman*, 53 NY2d 12, 16). Petitioner likewise failed to establish a clear legal right to "correction" of the uniform sentence and commitment (*see generally Matter of Dolan v Efman*, 94 AD3d 1116, 1116, *appeal dismissed* 19 NY3d 937; *Uccio*, 55 AD3d at 616) and, in any event, even assuming, arguendo, that the uniform sentence and commitment is inaccurate, we conclude that petitioner has an adequate remedy at law, thus rendering mandamus relief inappropriate (*see Matter of State of New York v King*, 36 NY2d 59, 62).

Petitioner's contention that the presentence investigation report (PSR) prepared in connection with his 2009 conviction and the 2009 sentencing minutes should be expunged from his institutional record is not properly before us inasmuch as he failed to exhaust available administrative remedies with respect to that contention (*see Matter of Watkins v Annucci*, 305 AD2d 889, 890; *cf. Matter of Brown v Goord*, 19 AD3d 773, 774). To the extent that petitioner challenges the inclusion of certain information in the 2009 PSR, that challenge is likewise not properly before us inasmuch as it "should have been raised before the sentencing court, prior to sentencing" (*Matter of Champion v Belmont*, 12 AD3d 1152, 1152; *see Matter of Carter v Evans*, 81 AD3d 1031, 1031-1032, *lv denied* 16 NY3d 712). In any event, petitioner has made no showing that the information contained in the

2009 PSR is inaccurate (*see People v Rudduck*, 85 AD3d 1557, 1557-1558, *lv denied* 17 NY3d 861; *cf. People v Freeman*, 67 AD3d 1202, 1202).

Petitioner further seeks to vacate the determination of the New York State Board of Parole (Board) denying his release to parole supervision. Contrary to petitioner's contention, the Board "was entitled to rely on the information contained in the [2009] presentence investigation report" and, as previously noted, "petitioner is foreclosed from challenging the accuracy of that report here, inasmuch as he failed to raise such a challenge before the sentencing court" (*Carter*, 81 AD3d at 1031). With respect to petitioner's remaining challenges to the parole determination, it is well settled that, "[w]here, as here, there is no 'showing of irrationality bordering on impropriety,' judicial intervention is not warranted" (*Matter of Johnson v Dennison*, 48 AD3d 1082, 1083, quoting *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77; *see Matter of Gaston v Berbary*, 16 AD3d 1158, 1159).

To the extent that petitioner challenges the determinations of the Board and/or the New York State Department of Corrections and Community Supervision (DOCCS) with respect to work release, temporary release, presumptive release, merit time and merit release, those challenges are untimely inasmuch as they were not interposed "within four months after the determination[s became] final and binding" (*Matter of Hayes v Evans*, 98 AD3d 1207, 1208; *see* CPLR 217 [1]; *Matter of Velez v New York State Div. of Parole*, 104 AD3d 1013, 1013; *Matter of Purcell v Dennison*, 29 AD3d 1128, 1128-1129). Moreover, petitioner failed to exhaust his administrative remedies with respect to the work release and presumptive release determinations (*see generally Watkins*, 305 AD2d at 890).

Petitioner's application for a writ of habeas corpus is procedurally defective (*see* CPLR 7004 [b]; *People ex rel. Backus v Broome County Dept. of Social Servs.*, 240 AD2d 786, 787; *People ex rel. Doe v Beaudoin*, 102 AD2d 359, 362) and, in any event, "[b]ecause the [amended] petition[/complaint] raises issues that [may be] raised on petitioner's direct appeal [or] by a CPL article 440.10 motion, habeas corpus relief is unavailable" (*People ex rel. Lyons v Conway*, 32 AD3d 1324, 1324, *lv denied* 8 NY3d 802; *see People v ex rel. Smith v Graham*, 109 AD3d 1113).

Finally, we conclude that petitioner's remaining claims for relief are unavailable and/or are without merit.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1284

CA 13-00384

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

JULIANNE RESTUCCIO, JAMES RESTUCCIO, JAMES MCMANUS, TAMMY MCMANUS, KATHLEEN THOMPSON, MICHAEL A. RUSSELL AND RAJESH MODI, INDIVIDUALLY AND AS MEMBER AND AUTHORIZED AGENT OF MATANGI MOTELS, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF OSWEGO, COMMON COUNCIL OF CITY OF OSWEGO, HONORABLE THOMAS W. GILLEN, AS MAYOR OF CITY OF OSWEGO, BRANCH DEVELOPMENT OSWEGO, LLC, CHRIS A. LABARGE AND STEVEN W. THOMAS, DEFENDANTS-RESPONDENTS.

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOGICK, BYRNE & O'NEILL, LLP, NEW YORK CITY (MICHAEL J. BYRNE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF OSWEGO, COMMON COUNCIL OF CITY OF OSWEGO AND HONORABLE THOMAS W. GILLEN, AS MAYOR OF CITY OF OSWEGO.

HISCOCK & BARCLAY, LLP, SYRACUSE (MARK WHITFORD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BRANCH DEVELOPMENT OSWEGO, LLC, CHRIS A. LABARGE AND STEVEN W. THOMAS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered November 27, 2012. The judgment granted the motions of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the provision dismissing the complaint and granting judgment in favor of defendants as follows:

> It is ADJUDGED and DECLARED that the rezoning amendment is valid,

and as modified the judgment is affirmed without costs.

Memorandum: In this declaratory judgment action challenging the rezoning of property in defendant City of Oswego (City) to accommodate the construction of a hotel, plaintiffs appeal from a judgment granting defendants' motions for summary judgment dismissing the

complaint. We conclude that, contrary to plaintiffs' contention, defendants established their entitlement to judgment and, in opposing the motion, plaintiffs failed to raise an issue of fact. We note at the outset, however, that Supreme Court erred in "dismissing the complaint rather than declaring the rights of the parties" (*Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457, citing *Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954), and we therefore modify the judgment accordingly.

It is well settled that a zoning amendment enjoys a "strong presumption of validity" (*Morgan v Town of W. Bloomfield*, 295 AD2d 902, 903; *Matter of Rayle v Town of Cato Bd.*, 295 AD2d 978, 978), and the decision of defendant Common Council of the City to amend the zoning ordinance should not be disturbed where, as here, the amendment is in accordance with the City's comprehensive plan (*see* General City Law § 28-a [12] [a]; *Asian Ams. for Equality v Koch*, 72 NY2d 121, 131). Further, "[c]ompliance with the statutory requirement is measured . . . in light of the long-standing principle that one who challenges such a legislative act bears a heavy burden" (*Bergstol v Town of Monroe*, 15 AD3d 324, 325, *lv denied* 5 NY3d 701, citing *Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 186, *rearg denied* 34 NY2d 668). " 'If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control' " (*Shepard v Village of Skaneateles*, 300 NY 115, 118, quoting *Village of Euclid v Ambler Realty Co.*, 272 US 365, 388; *see De Sena v Gulde*, 24 AD2d 165, 169). "Thus, where the plaintiff fails to establish a clear conflict with the comprehensive plan, the zoning classification must be upheld" (*Bergstol*, 15 AD3d at 325; *see Infinity Consulting Group, Inc. v Town of Huntington*, 49 AD3d 813, 814, *appeal dismissed* 11 NY3d 781, *reconsideration denied* 11 NY3d 852).

Here, defendants established not only that the rezoning of the subject property was consistent with the City's 2020 Vision Plan, but they also established that the B-1 classification for that property conformed more closely to the comprehensive plan than the existing R-3 designation. The subject property falls within the area designated "Highway Commercial" in the "Future Land Use Map," which provides "a visual depiction of the community's vision for Oswego's future," and plaintiffs do not dispute that a hotel would be an appropriate use in that proposed zone. In addition, defendants presented evidence that the rezoning application underwent a thorough review, including consideration by the Common Council's Planning and Development Committee, the City Planning Board, and the County Planning Department before the Common Council acted on the revised petition (*see Little Joseph Realty, Inc. v Town Bd. of Town of Babylon*, 52 AD3d 478, 479, *lv denied* 11 NY3d 706; *Matter of Save Our Forest Action Coalition v City of Kingston*, 246 AD2d 217, 222).

The conclusion that the rezoning is consistent with the comprehensive plan leads to the further conclusions that the rezoning does not amount to impermissible spot zoning (*see Little Joseph Realty, Inc.*, 52 AD3d at 479; *Rayle*, 295 AD2d at 979-980; *see also*

Infinity Consulting Group, Inc., 49 AD3d at 814), and that it was reasonably related to a legitimate governmental purpose, i.e., furtherance of the City's planned development, and is thus constitutional (*see Asian Ams. For Equality*, 72 NY2d at 131-132; *see also Elstein v Board of Trustees of Vil. of Skaneateles*, 184 AD2d 1079, 1079-1080).

We reject plaintiffs' further contention that the Common Council acted in an arbitrary and capricious manner when it initially denied the rezoning petition and then, at its next meeting, granted the rezoning petition. In support of their contention, plaintiffs mistakenly rely on cases holding that "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reasons for reaching a different result on essentially the same facts is arbitrary and capricious . . . and mandates reversal, even if there may otherwise be evidence in the record sufficient to support the determination" (*Matter of c/o Hamptons, LLC v Zoning Bd. of Appeals of Inc. Vil. of E. Hampton*, 98 AD3d 738, 739 [internal quotation marks omitted]). Here, the challenged action of the Common Council was that of a legislative rather than an administrative body, and "[n]o showing of a change of circumstances must be made for a legislative body to rezone property" (*Blumberg v City of Yonkers*, 41 AD2d 300, 305, *appeal dismissed* 32 NY2d 896, *lv denied* 33 NY2d 514, citing *Levitt v Incorporated Vil. of Sands Point*, 6 AD2d 701, *affd* 6 NY2d 269). In any event, defendants offered a plausible explanation for the change in vote by one of the Common Council members.

Finally, the record demonstrates that there was substantial and sufficient compliance of the Common Council with its own procedural requirements, and plaintiffs' contentions to the contrary are " 'technical at best' " and do not warrant invalidating the rezoning decision (*Alscot Inv. Corp. v Laibach*, 65 NY2d 1042, 1045).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1304

CA 13-00161

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

ERIC M. FISHER AND DENISE E. FISHER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NATHANIEL C. HILL AND MELINDA J. HILL,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF KAREN LAWRENCE, PITTSFORD (BARNEY F. BILELLO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

RICHARD D. GRISANTI, ARCADE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 5, 2012 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Eric M. Fisher (plaintiff) when the vehicle he was driving collided with a vehicle operated by defendant Nathaniel C. Hill and owned by defendant Melinda J. Hill. Supreme Court denied defendants' motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We conclude that the court erred in determining that defendants failed to meet their initial burden of establishing that plaintiff did not sustain a serious injury (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In support of their motion, defendants submitted medical records and the affirmed report of a neuroradiologist who examined plaintiff's medical records at defendants' request. The neuroradiologist concluded that the objective medical findings related only to a preexisting condition in plaintiff's spine. "[W]ith persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition, plaintiff[s] had the burden to come forward with evidence addressing defendant[s'] claimed lack of causation" and, here, plaintiffs failed to meet that burden (*Carrasco v Mendez*, 4 NY3d 566, 580; *see Mendola v Doubrava*, 99 AD3d 1247, 1248). In particular, plaintiffs' submissions did not adequately address how plaintiff's alleged injuries, "in light of [his] past

medical history, [were] causally related to the subject accident" (*D'Angelo v Litterer*, 87 AD3d 1357, 1357 [internal quotation marks omitted]). Notably, plaintiff's treating physician did not diagnose any fracture after the accident, and the equivocal observation of his neurosurgeon, made 15 months after the accident, that plaintiff "may have actually" sustained a fracture is insufficient to raise an issue of fact (*see Brackenbury v Franklin*, 93 AD3d 423, 423). Plaintiffs' submissions are likewise insufficient to raise an issue of fact to the extent that they are based upon plaintiff's subjective complaints of pain (*see Sierson v Gacek*, 67 AD3d 1431, 1432, *lv denied* 14 NY3d 704).

All concur except WHALEN, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent because I conclude that there are issues of fact whether Eric M. Fisher (plaintiff) sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the 90/180-day category. I therefore conclude that Supreme Court properly denied defendants' motion to that extent, and would modify the order accordingly. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *see Zuckerman v City of New York*, 49 NY2d 557, 562). "Once [that] showing has been made . . . , the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Here, I conclude that defendants failed to meet their burden of establishing as a matter of law that plaintiff was able to perform substantially all of his usual activities for not less than 90 days of the 180 days immediately following the accident. Specifically, defendants failed to establish what plaintiff's usual and customary daily activities were before and after the accident, and thus the burden never shifted to plaintiffs with respect to that category of serious injury (*see Paolini v Sienkiewicz*, 262 AD2d 1020, 1020; *see also* § 5102 [d]). Indeed, the record establishes that, after the accident, plaintiff was unable to return to the physical activities associated with his toy train business, and that his wife and a friend had to perform all of the physical activities associated with the business. Defendants also failed to establish what plaintiff's daily activities were outside of the business before and after the accident.

I further conclude that defendants failed to establish as a matter of law that plaintiff's injuries with respect to the 90/180-day category were related only to a preexisting condition. The physician who offered an opinion to that effect on defendants' behalf based that opinion solely on a review of plaintiff's CT scans and X rays from 2006 to 2009. He did not state that he reviewed plaintiff's deposition testimony or plaintiffs' bill of particulars or that he examined plaintiff in person. Thus, the physician had no knowledge of what plaintiff's usual and customary daily activities were before and after the accident, and his opinion was therefore insufficient "to foreclose the 90/180-day category of serious injury" (*Colavito v Steyer*, 65 AD3d 735, 736). Moreover, I note that the physician's

opinion with respect to plaintiff's preexisting medical condition fails to address plaintiff's alleged injury to his left leg. The record establishes that, although plaintiff had medical problems with his right leg prior to the accident, he alleges injuries to both legs as a result of the accident. The injury to plaintiff's left leg therefore must be a new injury, not a preexisting injury. Inasmuch as the physician's opinion fails to address plaintiffs' "essential factual allegations," I conclude that it is insufficient to establish defendants' entitlement to summary judgment (*Roques v Noble*, 73 AD3d 204, 206).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1309

KA 09-00746

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. LAYOU, DEFENDANT-APPELLANT.

MICHAEL J. LAYOU, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (SUSAN C. AZZARELLI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 6, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by remitting the matter to Onondaga County Court for further proceedings on the suppression application and as modified the judgment is affirmed in accordance with the following Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]), defendant contends that he did not receive effective assistance of counsel from the attorney assigned to represent him at his suppression hearing. We agree. While defendant was alone in his motor vehicle in the parking lot of a government building during the early morning hours of December 8, 2007, he was approached by a police officer who observed a spark of fire, as if from a cigarette, from inside the vehicle. With the aid of a flashlight, the officer observed a knife on the floor in the back seat of defendant's vehicle. The officer also observed, at defendant's feet, a glass pipe and small clear bag containing a white chunky substance that turned out to be cocaine. After ordering defendant out of the vehicle and handcuffing him, the officer recovered the knife and discovered, upon closer inspection, that it was an illegal switchblade. In response to questioning from the officer, defendant made an incriminating statement regarding the knife. At the police station, the police found a half ounce of cocaine and some marihuana in defendant's underwear. The grand jury indicted defendant on charges of criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the third degree.

Although defendant's assigned attorney filed an omnibus motion on

defendant's behalf, he did not move to suppress the knife or the cocaine, nor did he request a *Huntley* hearing with respect to defendant's incriminating statement made to the arresting officer. Defendant filed a pro se motion, however, seeking suppression of all evidence obtained by the police as a result of what he claimed was an unlawful search and seizure. More specifically, defendant asserted that he was "doing nothing illegal" when approached by the officer, who had no legal basis for searching his vehicle.

At the next court appearance, County Court engaged in a colloquy with defendant regarding whether he wished to proceed pro se. Defendant stated, inter alia, that he "didn't mind" having defense counsel represent him but that he had "never spoken" to defense counsel. Defense counsel, in turn, stated that he was "not opposed" to defendant proceeding pro se. The court did not relieve defense counsel of the assignment and granted defendant's pro se request for a *Huntley/Mapp* hearing. The arresting officer was the only witness to testify at the suppression hearing. Although defense counsel cross-examined the officer, he made no argument in support of suppression. The court later issued a written decision suppressing the statement defendant made to the officer regarding the knife but denying suppression of the knife itself and the drugs. According to the court, the officer was justified in approaching defendant's vehicle because it was located in a "no parking area," and the officer observed the knife and cocaine in plain view, which gave rise to probable cause.

For reasons not set forth in the record, the court thereafter relieved defense counsel of the assignment and appointed new counsel for defendant. Defendant eventually pleaded guilty to the felony drug offense in return for a sentence promise of a six-year determinate term of imprisonment plus five years of postrelease supervision, and the weapons count was dismissed in satisfaction of the plea. Prior to sentencing, however, defendant moved to withdraw his plea. In support of the motion, defense counsel submitted an affirmation in which he asserted that, based on his own investigation, he determined that the only "No Parking" sign in the parking lot where defendant was arrested had been bent to the ground "some time ago" and thus could not be seen. Defense counsel also submitted an affidavit from a witness who observed defendant being arrested and stated that there were no "No Parking" signs in the lot at the time. The court denied defendant's motion and imposed the promised sentence. This appeal ensued.

The facts of this case are similar to those in *People v Clermont* (22 NY3d 931), where the Court of Appeals held that the defendant was deprived of effective assistance of counsel at his suppression hearing. The Court reasoned that defense counsel's failure to marshal the facts adduced at the hearing, "coupled with his failure to make appropriate argument in his motion papers or to submit a post-hearing memorandum, meant that the defense never supplied the hearing court with any legal rationale for granting suppression" (*id.* at 933). The Court went on to note that, after the motion court issued a decision that described the facts in a manner inconsistent with the testimony at the hearing, defense counsel did not move to reargue the motion or

otherwise correct the court's apparent factual error. According to the Court, defense counsel's conduct could not be explained as "strategic" and, therefore, "defendant was not afforded meaningful representation at a critical stage of th[e] prosecution" (*id.* at 934).

Notably, the Court in *Clermont* rejected the People's contention that "the conviction should be affirmed because there is record support for the order denying suppression and defendant has failed to establish prejudice" (*id*.), explaining that "it is not necessary for us to discuss the merits of the suppression issue to decide the ineffective assistance claim, other than to note that, on appeal, the parties have presented substantial arguments for and against suppression and the issue is close under our complex *DeBour* jurisprudence." The Court "conditionally" modified the judgment by remitting the matter to Supreme Court "for further proceedings on the suppression application, to include legal argument by counsel for both parties and, if defendant so elects, reopening of the hearing" (*id*.).

Here, as in *Clermont*, suppression was the only viable defense strategy. Nevertheless, defense counsel inexplicably failed to move for suppression of the cocaine or the knife seized by the police from defendant's vehicle. Defense counsel also failed to move for suppression of defendant's incriminating statement to the officer about the knife, which the court thereafter suppressed in response to defendant's pro se motion. Like the attorney in *Clermont*, defense counsel did not marshal the facts for the court, made no legal argument regarding suppression, and submitted no post-hearing memorandum. In short, as in *Clermont*, defense counsel "never supplied the hearing court with any legal rationale for granting suppression" (*id*. at 933).

Although the attorney in *Clermont* failed to move for reargument after the court misstated the facts in its suppression decision, which did not occur here, defense counsel in this case did not even move for suppression, as did counsel in *Clermont*. Moreover, defense counsel represented defendant for approximately six months and did not once meet with him.

Under the circumstances, we conclude that defendant did not receive effective assistance of counsel from the attorney who represented him at the suppression hearing. We have reviewed defendant's remaining contentions and conclude that they are either moot or lack merit. We therefore, as in *Clermont*, conditionally modify the judgment by remitting the matter to County Court for "further proceedings on the suppression application, to include legal argument by counsel for both parties and, if defendant so elects, reopening of the hearing" (*id.* at 934). In the event that defendant prevails on the suppression application, the judgment is reversed, the plea is vacated and the indictment is dismissed and, if the People prevail, then the judgment "should be amended to reflect that result" (*id.* at 932).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1311

KA 10-00382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM T. CARVER, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 15, 2009. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). On appeal, defendant contends that the People's delayed disclosure of a 911 recording constituted a *Brady* violation that deprived him of his right to a fair trial. We agree.

"To establish a *Brady* violation, a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material . . . In New York, where a defendant makes a specific request for [an item of discovery], the materiality element is established provided there exists a 'reasonable possibility' that it would have changed the result of the proceedings" (*People v Fuentes*, 12 NY3d 259, 263, *rearg denied* 13 NY3d 766).

Here, the 911 recording is exculpatory because it includes the voice of an unidentified person referring to a white male suspect, and defendant herein is a black male. Although defendant received the 911 recording as part of the *Rosario* material provided to him on the first day of trial, he was not "given a meaningful opportunity to use the exculpatory evidence" (*People v Middlebrooks*, 300 AD2d 1142, 1143-

1144, *lv denied* 99 NY2d 630; *see generally People v Cortijo*, 70 NY2d 868, 870; *People v Gonzalez*, 89 AD3d 1443, 1444, *lv denied* 19 NY3d 973, *reconsideration denied* 20 NY3d 932). The trial was brief, commencing on a Thursday and concluding the following Monday. Defense counsel had no reason to believe that the recording contained exculpatory material because the prosecutor did not inform defense counsel that it did. Furthermore, defense counsel had difficulty hearing the contents of the recording. When she eventually discovered that it contained *Brady* material, she alerted County Court on the final day of trial and requested an adjournment to subpoena witnesses, and the court denied her request. Thus, due to the circumstances of the recording's disclosure and the court's denial of the request for an adjournment, defense counsel was unable to introduce the recording in evidence and was otherwise denied a meaningful opportunity to use it, violating defendant's constitutional right to a fair trial (*see generally Cortijo*, 70 NY2d at 870).

The 911 recording was material inasmuch as it would have allowed defendant to pursue the theory that the shooter was a white male, thereby creating reasonable doubt that defendant, a black male, was the shooter. Thus, there is "a 'reasonable possibility' that [the 911 recording specifically requested by defendant] would have changed the result of the proceedings" (*Fuentes*, 12 NY3d at 363).

In view of our determination, we do not address defendant's remaining contentions.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1313

KA 12-00294

PRESENT: SMITH, J.P., LINDLEY, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADONIS LINDER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 29, 2009. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree, criminal possession of a weapon in the third degree and attempted robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of assault in the second degree (Penal Law § 120.05 [2]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and attempted robbery in the first degree (§§ 110.00, 160.15 [2]), defendant contends that County Court erred in failing to suppress identification evidence on the ground that it was the product of an unlawful detention. Although defendant's omnibus motion sought, inter alia, suppression of any and all evidence obtained by the police as a result of what he alleged to have been an unlawful detention, the court held only a *Wade* hearing and did not rule on the legality of the detention. By failing to seek a ruling on that part of his omnibus motion challenging the detention and by failing to object to the identification testimony on that ground at trial, defendant abandoned his challenge to the detention (*see People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954; *People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733). In any event, we note that "the factual assertions contained in defendant's moving papers were insufficient to warrant a hearing" on the issue of the alleged illegality of the detention (*People v Battle*, 109 AD3d 1155, 1157; *see People v Mendoza*, 82 NY2d 415, 425-427).

Having viewed a copy of the photo array shown by the police to the victims, we further conclude that the court properly determined

that the array was not unduly suggestive, inasmuch as "the subjects depicted in the photo array are sufficiently similar in appearance so that the viewer's attention is not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection" (*People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d 646; *see People v Plumley*, 111 AD3d 1418, 1420). Nor was there any evidence at the *Wade* hearing indicating that the identification procedures employed by the police were unduly suggestive (*see People v McCurty* [appeal No. 2], 60 AD3d 1406, 1407, *lv denied* 12 NY3d 856).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish defendant's commission of the offenses in question. Not only was defendant identified at trial by one of the victims, but the People introduced a notarized letter written by defendant prior to trial in which he admitted his involvement in the crimes and accepted "full responsibility for the home invasion/shooting" he was alleged to have committed with others. Although it was one of the codefendants and not defendant who shot the victim in the foot outside the victim's apartment, there is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant, who was chasing the victim at the time with a loaded assault rifle, shared the codefendant's intent to cause injury to the victim, an element of assault in the second degree as charged under Penal Law § 120.05 (2). Further, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the indictment failed to give him fair notice "as to what specific conduct was alleged" in the two counts charging assault in the second degree, i.e., counts two and nine (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's related contention, the failure of the indictment to distinguish between the two counts of assault does not constitute a mode of proceedings error to which the rules of preservation do not apply. With respect to his mode of proceedings contention, defendant relies on, inter alia, *People v McNab* (167 AD2d 858, 858), wherein we held that the "defendant's right to be tried and convicted of only those crimes charged in the indictment is fundamental." Here, unlike in *McNab* and its progeny (*see e.g. People v Boykins*, 85 AD3d 1554, *lv denied* 17 NY3d 814; *People v Comfort*, 31 AD3d 1110, *lv denied* 7 NY3d 847; *People v Burns*, 303 AD2d 1032), there is no danger that defendant was convicted of an unindicted act. Count nine of the indictment was dismissed prior to trial, leaving count two as the only assault charge. As the People correctly note, the grand jury minutes make clear that the prosecutor, in instructing the grand jurors, stated that count two related to the shooting of the victim outside his apartment and that count nine related to the shooting inside the apartment. In rendering its verdict, the court offered detailed findings of fact demonstrating that it found defendant guilty

of assault in the second degree for the shooting outside the apartment. It therefore follows that defendant was convicted under count two of the same conduct for which he was indicted under count two, and there was no variance in fact or theory (*cf. People v Grega*, 72 NY2d 489, 495-496). In addition, because this was a bench trial, there is no danger that the conviction was the result of a non-unanimous verdict (*cf. Boykins*, 85 AD3d at 1555; *People v Jacobs*, 52 AD3d 1182, 1183, *lv denied* 11 NY3d 926).

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1314

KA 12-00660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY D. JAMES, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered February 29, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, unlawful imprisonment in the second degree and assault 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 and on the law by reversing that part convicting defendant of unlawful imprisonment in the second degree and dismissing count two of the indictment and by reducing the sentence imposed for burglary in the first degree to a determinate term of five years of incarceration to be followed by three years of postrelease supervision and as modified the judgment is affirmed.

Memorandum: On appeal from the judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [2]), unlawful imprisonment in the second degree (§ 135.05) and assault in the second degree (§ 120.05 [6]), defendant contends that his conviction of unlawful imprisonment should be dismissed pursuant to the merger doctrine. Although defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]; *People v Johnson*, 204 AD2d 1024, 1024, *lv denied* 84 NY2d 827), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]) and, because we agree with defendant, we modify the judgment accordingly. "Under the doctrine of judicial merger, an unlawful imprisonment or kidnapping that is incidental to and inseparable from the commission of another crime merges with such other crime" (*People v Moore*, 154 AD2d 929, 929, *lv denied* 75 NY2d 773). In determining whether the merger doctrine applies herein, "our guiding principle is whether [defendant's] restraint [of the victim] was so much the part of another substantive crime[, i.e., the crime of

assault,] that the substantive crime could not have been committed without such acts [constituting the crime of unlawful imprisonment] and that independent criminal responsibility may not fairly be attributed to them" (*People v McEathron*, 86 AD3d 915, 915-916, *lv denied* 19 NY3d 975 [internal quotation marks omitted]). Here, the brief "abduction" of the victim, i.e., the moment when defendant grabbed the victim and pulled him outside the dwelling at issue, was "merely 'preliminary, preparatory, or concurrent action' in relation to the ultimate crime [of assault]" (*People v Swansbrough*, 22 AD3d 877, 878, quoting *People v Miles*, 23 NY2d 527, 539, *cert denied* 395 US 948), and we thus conclude that the unlawful imprisonment count merged with the assault count (*see id.*; *see also People v Major*, 142 AD2d 603, 604).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of burglary in the first degree inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19) and, furthermore, he failed to renew the motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention lacks merit.

First, defendant contends that the evidence with respect to the burglary conviction is legally insufficient because the People did not establish that defendant entered the victim's dwelling with intent to commit the crime of unlawful imprisonment. " 'In order to secure a conviction for burglary, the People need only allege and prove a knowing and unlawful entry coupled with an intent to commit a crime therein. There is no requirement that the People allege or establish what particular crime was intended' " (*People v Lewis*, 5 NY3d 546, 552, quoting *People v Mahboubian*, 74 NY2d 174, 193). However, "[i]f the People . . . expressly limit[ ] their theory of the 'intent to commit a crime therein' element to a particular crime, then they would have . . . to prove that the defendant intended to commit that crime" (*id.* at 552 n 7). Even assuming, arguendo, that the prosecutor expressly limited the "intent to commit a crime therein" to the crime of unlawful imprisonment, we reject defendant's contention that the burglary count necessarily fails upon our dismissal of the unlawful imprisonment count. To the extent that the People limited their theory of intent to the allegation that defendant intended to commit unlawful imprisonment, "the People were required to prove only that defendant *intended* to commit [that] crime[]" (*People v Bibbes*, 98 AD3d 1267, 1269, *amended on rearg* 100 AD3d 1473, *lv denied* 20 NY3d 931), "not that he *actually committed* [that crime]" (*People v Porter*, 41 AD3d 1185, 1186, *lv denied* 9 NY3d 963 [emphasis added]; *see People v Mackey*, 49 NY2d 274, 279). Here, the People established that defendant intended to commit the crime of unlawful imprisonment upon entering the victim's home, i.e., defendant intended to restrain the victim (*see* Penal Law § 135.05), and the dismissal of the underlying count of unlawful imprisonment based on the merger doctrine does not impact the burglary conviction.

Second, defendant contends in support of his legal sufficiency challenge with respect to the burglary conviction that the evidence

does not demonstrate that he entered the victim's dwelling with the intent to commit *any* crime therein. We reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). " 'In burglary cases, the defendant's intent to commit a crime within the premises may be inferred beyond a reasonable doubt from the circumstances of the entry' " (*People v Beaty*, 89 AD3d 1414, 1416, *affd* 22 NY3d 918), his "unexplained presence on the premises, and [his] actions and statements when confronted by police or the property owner" (*People v Ostrander*, 46 AD3d 1217, 1218; *see People v Rodriguez*, 17 NY3d 486, 489; *People v Bracey*, 41 NY2d 296, 301, *rearg denied* 41 NY2d 1010). Here, defendant's intent to commit the crime of unlawful imprisonment in the second degree, i.e., his intent to restrain the victim, may be inferred from the evidence that defendant reached into the victim's dwelling and dragged him to the porch before continuously punching him.

Third, defendant contends in support of his legal sufficiency challenge with respect to the burglary conviction that the People failed to establish that defendant caused physical injury to the victim while entering the victim's dwelling, while in the dwelling, or while in immediate flight therefrom. We reject that contention. There is no dispute that the physical contact between defendant and the victim began when defendant grabbed the victim inside the victim's home and continued as defendant pulled the victim onto the porch of that dwelling. We conclude that the circumstances of this case reflect a continuous assault that began when defendant grabbed the victim inside the victim's dwelling (*see generally People v Alonzo*, 16 NY3d 267, 270; *People v Snyder*, 100 AD3d 1367, 1367, *lv denied* 21 NY3d 1010).

Defendant likewise failed to preserve for our review his contention that the conviction of assault in the second degree is not supported by legally sufficient evidence (*see Gray*, 86 NY2d at 19; *see also Hines*, 97 NY2d at 61), and in any event it lacks merit (*see generally Bleakley*, 69 NY2d at 495). Viewing the evidence in light of the crimes of burglary in the first degree and assault in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied a fair trial and thus that reversal is required based on the cumulative effect of various errors committed by County Court. We reject that contention. We note at the outset that we agree with defendant that the court erred with respect to its *Sandoval* ruling in failing "to make the necessary determination that the probative value of [defendant's prior convictions of criminal contempt and resisting arrest] on the issue of defendant's credibility outweighed the potential for prejudice to defendant" (*People v Arnold*, 298 AD2d 895, 896, *lv denied* 99 NY2d 580; *see generally People v Williams*, 56 NY2d 236, 238-239). In addition, the court erred in determining that defendant opened the door to the prosecutor's cross-examination of a defense witness concerning defendant's prior conviction of assault in the third degree (*cf.*

People v Fardan, 82 NY2d 638, 646; *People v Lyon*, 77 AD3d 1338, 1338, *lv denied* 15 NY3d 954). Reversal is not required, however, because the court's errors were harmless (*see People v Wongsam*, 105 AD3d 980, 981-982, *lv denied* 21 NY3d 1012; *People v Towsley*, 53 AD3d 1083, 1084, *lv denied* 11 NY3d 795; *see generally People v Grant*, 7 NY3d 421, 424).

Defendant waived his further contention that he was denied a fair trial by the court's submission of an annotated verdict sheet to the jury, inasmuch as the record establishes that he consented thereto (*see People v Cipollina*, 94 AD3d 1549, 1550, *lv denied* 19 NY3d 971; *see also People v Johnson*, 96 AD3d 1586, 1587, *lv denied* 19 NY3d 1027). Defendant failed to preserve for our review his contentions concerning the court's failure to dismiss the indictment based on allegedly defective grand jury proceedings and the court's alleged error in allowing the prosecutor and an assistant prosecutor to read into the record at trial portions of defendant's grand jury testimony (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We further conclude that the court did not err in admitting that redacted testimony in evidence and thus that defendant was not thereby denied a fair trial (*see People v Harris*, 249 AD2d 775, 777).

Defendant likewise failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]), and in any event it lacks merit. "Reversal based on prosecutorial misconduct is 'mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916), and that cannot be said here. We reject defendant's further contention that he did not receive effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). To the extent that defendant contends that defense counsel was ineffective in failing to object to the annotated verdict sheet and, indeed, in consenting to its submission, we conclude under the circumstances of this case that such error was not so prejudicial as to deprive defendant of a fair trial and thus does not constitute ineffective assistance (*see People v Kirkland*, 49 AD3d 1260, 1261, *lv denied* 10 NY3d 961, *cert denied* 555 US 1181; *see generally People v Benevento*, 91 NY2d 708, 712-713).

Finally, we agree with defendant that the sentence is unduly harsh and severe insofar as it imposes a determinate term of 6½ years of imprisonment on the burglary conviction to be followed by five years of postrelease supervision. We therefore further modify the judgment as a matter of discretion in the interest of justice by reducing the sentence imposed for the burglary conviction to a determinate term of five years of imprisonment to be followed by three years of postrelease supervision.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1325

CA 13-00358

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

PAUL FOTI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GINA FOTI, DEFENDANT-RESPONDENT.

JOAN de R. O'BYRNE, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KAMAN, BERLOVE, MARAFIOTI, JACOBSTEIN & GOLDMAN LLP, ROCHESTER (MICHAEL PAUL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered April 4, 2012 in a divorce action. The order granted the motion of defendant for partial summary judgment determining that various real estate entities and management companies were her separate property.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendant's motion is denied.

Memorandum: In this divorce action, defendant moved for partial summary judgment determining that various real estate entities and management companies (hereafter, entities) were her separate property. We agree with plaintiff that Supreme Court erred in granting the motion. Although defendant established that her father gifted the entities to her as separate property (*see generally Allen v Allen*, 263 AD2d 691, 692), there is an issue of fact whether defendant thereafter commingled her interests in the entities with marital property (*see generally Richter v Richter*, 77 AD3d 1470, 1471; *Haas v Haas*, 265 AD2d 887, 888). Here, the parties filed a joint federal tax return in which defendant reported her interest in the entities as tax losses, and "[a] party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1338

CA 13-01028

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

NED W. GOULD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

E.E. AUSTIN & SON, INC. AND CATTARAUGUS-LITTLE VALLEY CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPMAN O'CONNOR, BUFFALO (THOMAS D. SEAMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered January 7, 2013. The order, inter alia, denied the motion of plaintiff for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while performing masonry work at the Cattaraugus-Little Valley Central School District High School. Defendant Cattaraugus-Little Valley Central School District hired defendant E.E. Austin & Son, Inc. as the general contractor on the project, and that defendant hired Casler Masonry, which employed plaintiff, to perform certain masonry work on the project. According to plaintiff, he was working on a ladder leading up to scaffolding erected in the auditorium when an unsecured tub of mortar that was located in an elevated position on a forklift fell and struck him on the head, shoulder, back and leg, thereby injuring him. Supreme Court properly denied plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) claim.

It is well settled that, "[t]o be entitled to a judgment on liability for a violation of section 240 (1) of the Labor Law, [a] plaintiff [is] required to prove, as a matter of law, not only a violation of the section, but also that the violation was a proximate cause of his [or her] injuries" (*Rossi v Main-South Hotel Assoc.*, 168 AD2d 964, 964; *see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287, citing *Duda v Rouse Constr. Corp.*, 32 NY2d 405, 410;

Danielewicz v Klewin Bldg. Co., Inc., 39 AD3d 1194, 1194-1195), and it is further well settled that "an accident alone does not establish a [section] 240 (1) violation or causation" (*Blake*, 1 NY3d at 289). We note at the outset that the court properly determined that plaintiff established a violation of section 240 (1) (*see Williams v Town of Pittstown*, 100 AD3d 1250, 1251; *Minchala v Port Auth. of N.Y. & N.J.*, 67 AD3d 978, 978). We conclude that, by submitting the affidavit of a coworker with personal knowledge of the facts (*see Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 986), and "relying on [his own] deposition testimony, [plaintiff] established, prima facie, that [section] 240 (1) was violated and that the violation was a proximate cause of [his] injuries" (*Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479; *see generally Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582).

We further conclude, however, that the court properly denied plaintiff's motion because defendants raised a triable issue of fact whether plaintiff's alleged injuries were caused by the falling mortar tub (*see Jones v West 56th St. Assoc.*, 33 AD3d 551, 551-552; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendants submitted evidence establishing that plaintiff told his supervisor immediately after the incident that he was not injured, continued to work for the remainder of the regular workday, worked full days over the following week, and never complained of any alleged injuries associated with the mortar tub falling on him. Indeed, the evidence in the record, including plaintiff's certified medical records and an independent medical examination (IME) report, which was prepared by a physician who examined plaintiff and was submitted by defendants in opposition to the motion, demonstrates that plaintiff sought medical treatment and stopped working only after suffering an abdominal injury while lifting buckets of mortar one week after the mortar tub struck him. Even then, plaintiff did not mention to any medical professional that a mortar tub had struck him, and did not report any injuries attributable thereto, until 2½ months after the incident (*see Jones*, 33 AD3d at 551-552). Moreover, the physician who conducted the IME of plaintiff concluded, based on his examination of plaintiff, that the injuries of which plaintiff complained were degenerative in nature, and that plaintiff did not sustain any injuries when the mortar tub struck him.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1355

CA 13-01094

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

COLLETTE ALGER AND JEFFREY ALGER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

UNIVERSITY OF ROCHESTER MEDICAL CENTER,
STRONG MEMORIAL HOSPITAL, NANCY WANG, PH.D.,
STEPHANIE LANIEWSKI, C.G.C.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

DAVID A. JOHNS, PULTNEYVILLE, AND CARL L. FEINSTOCK, ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

MARTIN CLEARWATER & BELL LLP, NEW YORK CITY (STEWART G. MILCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 29, 2013. The judgment awarded costs and disbursements to defendants University of Rochester Medical Center, Strong Memorial Hospital, Nancy Wang, Ph.D., and Stephanie Laniewski, C.G.C.

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

Memorandum: Plaintiffs commenced this action seeking damages for physical and emotional injuries allegedly sustained as a result of the decision of Collette Alger (plaintiff) to terminate her pregnancy. Plaintiffs alleged that such decision was the result of defendants' negligence in performing prenatal diagnostic tests and advising them regarding the results of such tests. After a trial, the jury rendered a verdict in favor of defendants, finding that Stephanie Laniewski, C.G.C. was not negligent and that University of Rochester Medical Center, Strong Memorial Hospital (Hospital) and Nancy Wang, Ph.D. were negligent but that their negligence was not a proximate cause of plaintiffs' injuries. Supreme Court denied plaintiffs' posttrial motion seeking, inter alia, to set aside the verdict as against the weight of the evidence. We affirm.

"A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff[s] that it could not have been reached on any fair interpretation of the evidence"

(*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734 [internal quotation marks omitted]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Further, "[w]here a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [internal quotation marks omitted]). We conclude that a reasonable view of the evidence supports the jury's verdict that Laniewski, a certified genetic counselor, was not negligent. There was conflicting testimony concerning the communications between Laniewski and plaintiffs, and " 'great deference is accorded to the jury given its opportunity to see and hear the witnesses' " (*Seong Yim Kim v New York City Tr. Auth.*, 87 AD3d 531, 532).

With respect to the other defendants, we conclude that the verdict finding that they were negligent but that their negligence was not a proximate cause of plaintiffs' injuries is not inherently inconsistent (*see Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677). Nor is that verdict against the weight of the evidence unless the issues are so inextricably interwoven that it would be logically impossible to find negligence without also finding proximate cause (*see Schreiber*, 88 AD3d at 1263). We conclude that there is a fair interpretation of the evidence pursuant to which the jury could have found that defendants Hospital and Wang were negligent in reporting erroneous test results to plaintiffs, but that their negligence did not proximately cause plaintiffs' injuries. The evidence presented "factual question[s] . . . whether, under the circumstances, it could reasonably be expected that plaintiff . . . would elect to undergo an abortion" (*Lynch v Bay Ridge Obstetrical & Gynecological Assoc.*, 72 NY2d 632, 636), and whether that decision was sufficiently independent of defendants' conduct to constitute an intervening cause. Those questions presented issues for the jury to resolve (*see id.*) and we decline to disturb its resolution of those issues in defendants' favor (*see Wilson v Mary Imogene Bassett Hosp.*, 307 AD2d 748, 748-749). We reject plaintiffs' contention that the court abused its discretion in permitting several witnesses to provide expert testimony on the issue of proximate cause (*see Kettles v City of Rochester*, 21 AD3d 1424, 1426). Finally, plaintiffs' further contention that the structure of the verdict sheet caused the jury to confuse proximate cause and comparative fault is unpreserved for our review and in any event is lacking in merit (*see McFadden v Oneida, Ltd.*, 93 AD3d 1309, 1310-1311).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1356

CA 13-00964

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

WILLIAM QUILL, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered August 15, 2012 in a personal injury action. The judgment and order, among other things, denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the judgment and order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell on snow or ice in a school parking lot located in defendant school district. Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint. Defendant contended in support of the motion that it had no duty to remove the snow and ice from the parking lot because there was a storm in progress at the time plaintiff fell and, in denying the motion, the court determined that, "[w]hile defendant . . . had no duty to remove snow until the storm had ended, factual issues remain regarding the claimed presence of pre-existing hard-packed snow, and attendant actual or constructive notice to defendant." We conclude that defendant met its initial burden on the motion by establishing that there was a storm in progress at the time of the accident (*see Glover v Botsford*, 109 AD3d 1182, 1183; *Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 877). Plaintiff fell at approximately 6:30 a.m. on December 17, 2008, as he was walking back to his truck after removing waste from a dumpster in defendant's parking lot. According to defendant's expert meteorologist, a snowstorm began in the Rochester area between 10:00 p.m. on December 16, 2008 and 12:00 a.m. on December 17, 2008, and snow and freezing rain continued until approximately 10:00 a.m. on December 17, 2008.

Furthermore, a groundsman at the school that morning testified that it was snowing before and at the time plaintiff fell. Contrary to plaintiff's contention, he failed to raise a triable issue of fact "whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition" (*Meyers*, 85 AD3d at 878; *see Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624). We note that plaintiff contends for the first time on appeal that defendant failed to establish that it did not create a hazardous condition or exacerbate the hazards of the storm and thus that contention is not properly before us (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985)

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1358

CA 13-00923

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

QUINN HEYWARD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRUCE SHANNE AND VALERIE SHANNE,
DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, UTICA (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered April 15, 2013 in a personal injury action. The amended order, inter alia, denied that part of the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that said appeal from the amended order insofar as it denied that part of the motion to preclude defendants from presenting evidence of factors other than lead poisoning that may have contributed to plaintiff's injuries is dismissed and the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained as the result of his exposure to lead paint in an apartment rented by his mother from defendants when he was a child. Plaintiff moved for partial summary judgment "on the issues of notice, negligence and substantial factor," and for an order, inter alia, taking judicial notice of certain statutes and regulations regarding lead based paint; "precluding defendants' attorneys and hired experts from claiming socioeconomic, genetic, eugenic or euthenics alternative and/or negating cause[s]"; and dismissing defendants' affirmative defenses, with the exception of the affirmative defense seeking a collateral source offset under CPLR 4545. Supreme Court denied the motion except with respect to that part of the first affirmative defense asserting lack of actual notice as a result of the issuance of violations by health authorities, and plaintiff appeals.

We note at the outset that the appeal from the order insofar as it denied that part of the motion seeking to "preclud[e] defendants' attorneys and hired experts from claiming socioeconomic, genetic, eugenic or euthenics alternative and/or negating cause[s]" must be

dismissed. " '[A]n evidentiary ruling, even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Pagan v Rafter*, 107 AD3d 1505, 1507).

Plaintiff further contends that the court erred in denying that part of his motion seeking partial summary judgment "on the issues of notice, negligence, and substantial factor." We reject that contention. "It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646; *see Stokely v Wright*, 111 AD3d 1382, 1382). Under the circumstances of this case, we conclude that there is an issue of fact whether defendants had notice of the dangerous lead paint condition in the subject apartment "for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez*, 88 NY2d at 646; *see Derr v Fleming*, 106 AD3d 1240, 1242; *Woods v Alvarez*, 300 AD2d 301, 302; *Perez v Ward*, 271 AD2d 590, 591). With respect to constructive notice, we note that the Court of Appeals in *Chapman v Silber* (97 NY2d 9, 15) wrote that constructive notice of a hazardous, lead-based paint condition may be established by proof "that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment." Here, we conclude that there is an issue of fact with respect to the third *Chapman* factor, i.e., whether defendants were aware that paint was peeling on the premises (*see generally id.*; *Watson v Priore*, 104 AD3d 1304, 1305-1306, *lv dismissed in part and denied in part* 21 NY3d 1052). We also conclude that the court properly determined that there is an issue of fact as to causation (*see Robinson v Bartlett*, 95 AD3d 1531, 1534-1535; *Cunningham v Anderson*, 85 AD3d 1370, 1374-1375, *lv dismissed in part and denied in part* 17 NY3d 948).

To the extent that plaintiff challenges the amended order insofar as it denied without prejudice that part of the motion with respect to judicial notice (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984), we conclude that the court properly denied that part of the motion inasmuch as the statutes and regulations in question are inapplicable at this juncture of the litigation (*see Stover v Robilotto*, 277 AD2d 801, 802, *affd* 97 NY2d 9; *Hamilton v Miller*, 106 AD3d 1476, 1477-1478; *Sykes v Roth*, 101 AD3d 1673, 1674; *Skerritt v Bach*, 23 AD3d 1080, 1081). We also conclude that the court properly denied those parts of the motion with respect to the affirmative defenses other than that part of the first affirmative defense concerning actual notice, as previously noted herein. The court properly concluded that defendants are entitled to assert that plaintiff's mother "affirmatively created or exacerbated the lead paint conditions" at the apartment or elsewhere, such as at plaintiff's "secondary address" with his grandmother at the Howard

Avenue residence (*M.F. v Delaney*, 37 AD3d 1103, 1105), although she was not liable for alleged negligent parental supervision (*see id.*; *see generally LaTorre v Genesee Mgt.*, 90 NY2d 576, 579). The court further properly determined that defendants are entitled to assert that "[p]laintiff's conduct when he was a preteen and teenager . . . may have constituted a failure to mitigate damages at a time when plaintiff could be held legally responsible for his actions" (*Cunningham*, 85 AD3d at 1372), although the affirmative defenses alleging plaintiff's culpable conduct, failure to mitigate damages and assumption of risk will not apply prior to the time when he could be held responsible for his actions (*see id.*; *see also Watson*, 104 AD3d at 1306; *Sykes*, 101 AD3d at 1674). Likewise, we conclude that the court properly determined that defendants may present evidence at trial with respect to the affirmative defenses based on CPLR article 16 and alleging that plaintiff was exposed to lead paint at a location other than the apartment rented from defendants by plaintiff's mother, and that any injury plaintiff suffered as a result of exposure at that apartment is distinct from injury plaintiff suffered as a result of exposure to lead paint elsewhere (*see generally Cunningham*, 85 AD3d at 1372).

SMITH, J.P., LINDLEY, SCONIERS, and WHALEN, JJ., concur; FAHEY, J., concurs in the following Memorandum: I respectfully concur in the result reached by the majority, namely, the dismissal of the appeal from the amended order insofar as it denied that part of the motion to preclude defendants from presenting evidence of factors other than lead poisoning that may have contributed to plaintiff's injuries and the affirmance of the amended order. I write separately, however, to address the dismissal of part of the appeal. I agree with the majority that " 'an evidentiary ruling, even when made in advance of trial on motion papers constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Pagan v Rafter*, 107 AD3d 1505, 1507), and that the appeal from the amended order insofar as it denied that part of the motion seeking to "preclud[e] defendants' attorneys and hired experts from claiming socioeconomic, genetic, eugenic or euthenics alternative and/or negating cause[s]" must be dismissed. I also note, however, that I am troubled by the concept that an individual's *family history* may be relevant to establishing a baseline for the purpose of measuring cognitive disability or delay. I acknowledge that an explanation for cognitive problems may arise from one's *personal history*, but as a conceptual and general matter I cannot agree with the principle of the eugenics defense that defendants propose here. To my mind, the *family* of a plaintiff in a lead paint case does not put its medical history and conditions at issue, and the attempt to establish biological characteristics as a defense to diminished intelligence, i.e., a eugenics argument, cannot be countenanced and is something I categorically reject.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1361

CA 13-00793

PRESENT: FAHEY, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ.

WM. B. MORSE LUMBER CO., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORTH PONDS APARTMENTS, LLC, ET AL., DEFENDANTS,
AND NEW YORK INCOME PARTNERS, LLC,
DEFENDANT-APPELLANT.

LAW OFFICE OF BRUCE S. ZEFTEL, BUFFALO (BRUCE S. ZEFTEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT D. HOOKS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (David Michael Barry, J.), entered December 28, 2012. The order granted the motion of plaintiff for partial summary judgment seeking a determination that its mechanic's lien is valid and has priority over the construction mortgage held by defendant New York Income Partners, LLC.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's motion except to the extent that it seeks a determination that the mechanic's lien has priority over the construction mortgage held by defendant New York Income Partners, LLC and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff commenced this action to foreclose on its mechanic's lien when it did not receive payment for lumber and building materials that it supplied to the general contractor for property owned by defendant North Ponds Apartments, LLC (NPA). Defendant New York Income Partners, LLC (NYIP) holds the mortgage on the property (hereafter, construction mortgage). Plaintiff moved for partial summary judgment, as later limited by a stipulation between the parties, seeking a determination that its mechanic's lien is valid and has priority over NYIP's construction mortgage. NYIP cross-moved for, inter alia, summary judgment determining that its construction mortgage has priority over plaintiff's mechanic's lien. In granting plaintiff's motion, Supreme Court determined that plaintiff's mechanic's lien was valid and had priority over the construction mortgage because the building loan contract filed in connection with the construction mortgage did not contain the requisite borrower's statement pursuant to Lien Law § 22. We conclude that NYIP's construction mortgage is subordinate to plaintiff's mechanic's lien, but only in the event that there are

funds to which the lien could attach, which is an issue yet to be decided. We therefore modify the order accordingly.

"A building loan contract . . . must be in writing and duly acknowledged, and *must contain* a true statement under oath, verified by the borrower, showing the consideration paid, or to be paid, for the loan described therein, and showing all other expenses, if any, incurred, or to be incurred in connection therewith, and the net sum available to the borrower for the improvement" (Lien Law § 22 [emphasis added]). Here, the building loan contract filed by NYIP's predecessor in interest did not "contain" the statement verified by the borrower, as required by Lien Law § 22. Rather, the statement was filed separately, albeit minutes later, under the same cover sheet as the UCC-1 financing statement.

Lien Law § 22 " 'absolutely and unconditionally prescribes the penalty which shall follow the failure to file' " a building loan contract that complies with the statute (*P. T. McDermott, Inc. v Lawyers' Mtge. Co.*, 232 NY 336, 348), i.e., "the interest of each party to such contract in the real property affected thereby[] is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter" (§ 22), including subsequent mechanic's liens. As the Court of Appeals noted in *Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC* (21 NY3d 352, 364-365, *rearg denied* 21 NY3d 1047), "the reason for public filing is to allow any interested contractors, subcontractors and material suppliers to discover the level of financing available for construction so that they might guide their actions accordingly" (*see Nanuet Natl. Bank v Eckerson Terrace*, 47 NY2d 243, 247).

We agree with NYIP, however, that plaintiff failed to establish as a matter of law "that there were funds due and owing from [NPA, the owner,] to [the general contractor] to which [its mechanic's] lien could attach" (*L & W Supply Corp. v A.D.F. Drywall, Inc.*, 55 AD3d 1026, 1027; *see Tomaselli v Oneida County Indus. Dev. Agency*, 77 AD3d 1315, 1316), and thus plaintiff was not entitled to partial summary judgment in that respect. Contrary to NYIP's contention, however, it has not established as a matter of law that the NPA had paid the general contractor in full at the time plaintiff filed the lien (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1367

KA 12-01922

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

COREY ROHADFOX, DEFENDANT-RESPONDENT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated August 27, 2012. The order granted the motion of defendant to set aside the verdict and ordered a new trial.

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

Memorandum: The People appeal from an order in which Supreme Court sua sponte converted defendant's postverdict pro se "motion for dismissal" to a CPL 330.30 (1) motion to set aside the verdict and granted that motion. Following a jury trial during which defendant represented himself, the jury found defendant guilty of one count of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), but not guilty of two other counts of the same crime (§ 220.16 [1], [12]). In granting defendant's motion, the court determined that it had deprived defendant of his right to retained counsel of his choice by denying his request for an adjournment to obtain new retained counsel.

"Pursuant to CPL 330.30 (1), following the issuance of a verdict and before sentencing a court may set aside a verdict on '[a]ny ground appearing in the record which, if raised upon an appeal from a prospective judgment of conviction, would *require* a reversal or modification of the judgment *as a matter of law* by an appellate court' " (*People v Benton*, 78 AD3d 1545, 1546, *lv denied* 16 NY3d 828). "The power granted a Trial Judge is, thus, far more limited than that of an intermediate appellate court, which is authorized to determine not only questions of law but issues of fact . . . , to reverse or modify a judgment when the verdict is against the weight of the evidence . . . , and to reverse '[a]s a matter of discretion in the interest of justice' " (*People v Carter*, 63 NY2d 530, 536).

The issue before us on this appeal therefore is whether a court's alleged abuse of discretion in denying an adjournment would *require* reversal of the judgment of conviction as a *matter of law* upon an appeal therefrom (*see generally People v Spears*, 64 NY2d 698, 699-700). Under the unique circumstances of this case, we conclude that it would.

"It is certainly well established that the right to counsel, guaranteed by both the Federal and State Constitutions . . . , embraces the right of a criminal defendant to be represented by counsel of his own choosing . . . As a necessary corollary to this right, a defendant must be accorded a reasonable opportunity to select and retain his counsel" (*People v Arroyave*, 49 NY2d 264, 270). In other words, the fundamental right to be represented by counsel of one's own choosing "is denied to a defendant unless he [or she] gets reasonable time and a fair opportunity to secure counsel of his [or her] own choice" (*People v McLaughlin*, 291 NY 480, 483; *see generally Arroyave*, 49 NY2d at 273).

In our view, the court's refusal to grant defendant's request for an adjournment was "an abuse of discretion as a matter of law" and effectively denied defendant the fundamental right to be represented by counsel of his own choosing (*Spears*, 64 NY2d at 700; *see People v Walker*, 29 AD2d 973, 973-974; *see generally Arroyave*, 49 NY2d at 273; *McLaughlin*, 291 NY at 482-483). On the date scheduled for suppression hearings, defense counsel, who had been retained by defendant's family while defendant was incarcerated, withdrew defendant's requests for suppression and sought an expedited trial without defendant's knowledge or consent. At the next court appearance, defendant requested an adjournment of the expedited trial to afford him time in which to retain another attorney. The court, in denying that request, did not afford defendant "[a] reasonable time and a fair opportunity to secure counsel of his own choice" (*McLaughlin*, 291 NY at 483; *cf. People v Sapienza*, 75 AD3d 768, 771; *People v Mao-Sheng Lin*, 50 AD3d 1251, 1253, *lv denied* 10 NY3d 961), particularly in view of the fact that the trial was expedited without defendant's knowledge or consent (*see People v Hartman*, 64 AD3d 1002, 1005, *lv denied* 13 NY3d 860; *cf. People v O'Kane*, 55 AD3d 315, 316, *lv denied* 11 NY3d 928; *People v Campbell*, 54 AD3d 959, 960, *lv denied* 12 NY3d 756). Inasmuch as we conclude that defendant was denied the fundamental right to be represented by counsel of his own choosing, reversal of the judgment of conviction on that ground would be required as a matter of law upon an appeal therefrom (*see* CPL 330.30 [1]), and the court therefore properly set aside the verdict.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1374

CA 13-00364

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF LIVINGSTON PARKWAY ASSOCIATION, INC., KENNETH PASLAQUA, EDWARD BUTLER, JR., DIANE RODMAN, JAMES REYNOLDS, RAYMOND PAOLINI AND MICHAEL HUNTRESS, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF AMHERST ZONING BOARD OF APPEALS, THOMAS KETCHUM, TOWN OF AMHERST, ISKALO 5000 MAIN LLC, ISKALO DEVELOPMENT CORP., SONOMA GRILLE, INC., DOING BUSINESS AS SONOMA GRILLE AND MICHAEL R. MILITELLO, RESPONDENTS-RESPONDENTS.

RICHARD G. BERGER, BUFFALO, AND LIPPES & LIPPES, FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS SONOMA GRILLE, INC., DOING BUSINESS AS SONOMA GRILLE AND MICHAEL R. MILITELLO.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, HOLLAND (RONALD P. BENNETT OF COUNSEL), FOR RESPONDENT-RESPONDENT THOMAS KETCHUM.

LEONARD BERKOWITZ, ORCHARD PARK, FOR RESPONDENTS-RESPONDENTS TOWN OF AMHERST ZONING BOARD OF APPEALS AND TOWN OF AMHERST.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ISKALO 5000 MAIN LLC AND ISKALO DEVELOPMENT CORP.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 26, 2012 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, dismissed the amended petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul the determination of respondent Town of Amherst Zoning Board of Appeals (ZBA) that a condition imposing a height restriction for proposed new buildings on the subject parcel (Condition No. 4) was no longer enforceable. We conclude that Supreme

Court properly dismissed the amended petition.

We reject petitioners' contention that the ZBA's failure to adopt formal, written findings of fact renders its determination arbitrary and capricious. Generally, "[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination" (*Matter of South Blossom Ventures, LLC v Town of Elma*, 46 AD3d 1337, 1338, *lv dismissed* 10 NY3d 852 [internal quotation marks omitted]; *see Matter of Paloma Homes, Inc. v Petrone*, 10 AD3d 612, 613). Where the issue is one of pure legal interpretation of statutory terms, however, we have the power to conduct an independent review of the applicable law (*see Matter of BBJ Assoc., LLC v Zoning Bd. of Appeals of Town of Kent*, 65 AD3d 154, 160; *see also Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467-1468), and petitioners correctly concede that this case involves only an issue of legal interpretation. Under the circumstances, we conclude that the record "contain[s] sufficient facts to permit intelligent judicial review of the . . . determination" (*Matter of Iwan v Zoning Bd. of Appeals of Town of Amsterdam*, 252 AD2d 913, 914; *see Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 93; *see also Matter of Friends of Hammondsport v Village of Hammondsport Planning Bd.*, 11 AD3d 1021, 1022).

We reject petitioners' contention that Condition No. 4 survived the passage of respondent Town of Amherst's Zoning Ordinance of 1976, which continued to give effect to, inter alia, "laws, rules, [and] regulations . . . previously adopted or issued" (§ 203-2-2.1 [1976]). A "regulation is 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of [a] statute' " (*Matter of SLS Residential, Inc. v New York State Off. of Mental Health*, 67 AD3d 813, 816, *lv denied* 14 NY3d 713, quoting *Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health*, 66 NY2d 948, 951). Here, we conclude that Condition No. 4 is not a regulation inasmuch as it is not a fixed, general principle. Indeed, the language of Condition No. 4 specifically and unambiguously applied the height restriction only to new buildings proposed by a developer in June 1968. That development never came to fruition, and the subject parcel was rezoned in 1976. We therefore conclude that the Amherst Town Board annulled Condition No. 4 when it rezoned the property in 1976 (*cf. Matter of D'Angelo v Di Bernardo*, 106 Misc 2d 735, 737, *affd* 79 AD2d 1092, *lv denied* 53 NY2d 606).

We have reviewed petitioners' remaining contentions and conclude that they are without merit.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1379

CA 13-00814

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

JASON M. ISAMAN, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTOPHER R. TRAVIS, PORTVILLE TRUCK AND AUTO REPAIR, INC. AND WILL DO CONSTRUCTION, LLC, DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS CHRISTOPHER R. TRAVIS AND PORTVILLE TRUCK AND AUTO REPAIR, INC.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-APPELLANT WILL DO CONSTRUCTION, LLC.

LAW OFFICE OF FRANCIS M. LETRO, BUFFALO (FRANCIS M. LETRO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered October 24, 2012 in a personal injury action. The order denied in part the respective motion and cross motion of defendants for summary judgment dismissing the complaint and all cross claims against them.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on December 16, 2013, and filed in the Cattaraugus County Clerk’s Office on January 23, 2014,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1387

KA 10-02159

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. FORD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered May 7, 2009. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant failed to preserve for our review his challenge to Supreme Court's justification charge (*see* CPL 470.05 [2]) and, in any event, we conclude that "the justification charge, viewed in its entirety, was a correct statement of the law" (*People v Humphrey*, 109 AD3d 1173, 1175 [internal quotation marks omitted]; *see People v Johnson*, 103 AD3d 1226, 1226, *lv denied* 21 NY3d 944; *People v Poles*, 70 AD3d 1402, 1403, *lv denied* 15 NY3d 808). "Because the court did not erroneously instruct the jury regarding justification, defense counsel was not ineffective for failing to object to that charge" (*Johnson*, 103 AD3d at 1226; *see Humphrey*, 109 AD3d at 1175).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1395

CA 13-00929

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

KRISTEN M. HEIMBACH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM INSURANCE, DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (JOSEPH A. CANEPA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 13, 2012. The order, among other things, denied in part the motion of plaintiff to compel defendant to produce its entire claim file and to compel certain representatives of defendant to appear for depositions.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by granting plaintiff's motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover supplementary underinsured motorist (SUM) coverage pursuant to an automobile liability insurance policy issued by defendant, and thereafter moved to compel defendant to produce its entire claim file and to compel representatives of defendant, including the representative who handled plaintiff's claim, to appear for depositions. Supreme Court granted the motion only in part but, substituting our discretion for that of the court, we conclude that the motion should be granted in its entirety (*see Daniels v Rumsey*, 111 AD3d 1408, 1409; *see generally Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745). We therefore modify the order accordingly. Given the scope of the liability and damages issues framed by the pleadings, we conclude that plaintiff's request for the entire claim file was not palpably improper and that the disclosure was "material and necessary" for the prosecution of plaintiff's action (CPLR 3101 [a]; *see generally Cain v New York Cent. Mut. Fire Ins. Co.*, 38 AD3d 1344, 1344; *Gibson v Encompass Ins. Co.*, 23 AD3d 1047, 1047-1048). Furthermore, defendant failed to meet its burden of establishing that those parts of the claim file withheld from discovery by the court contain material that is privileged or otherwise exempt from discovery (*see Gibson*, 23 AD3d at 1048; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d

647, 648). Inasmuch as plaintiff established that defendant's claim representative directly responsible for handling plaintiff's claim possesses "material and necessary" information regarding the action (CPLR 3101 [a]), that part of plaintiff's motion seeking to compel his deposition also should have been granted.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1402

TP 13-00689

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF ROBERT QUINTANA, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT.

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

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MARY B. SCARPINE 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 [Patrick H. NeMoyer, J.], entered April 15, 2013) to annul a determination finding that petitioner was capable of returning to his employment as a police officer in a light-duty capacity.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a hearing, that he is capable of returning to work in a light-duty capacity. Petitioner had been receiving benefits pursuant to General Municipal Law § 207-c as a result of injuries that he received in the course of his work as a police officer. After receipt of an independent medical examination (IME) report indicating that petitioner was able to return to work in a light-duty capacity, respondent assigned petitioner to work as a camera monitor in the police video surveillance room.

We note at the outset Supreme Court should have transferred the entire proceeding to this Court, rather than first disposing of certain contentions of petitioner. The amended petition raises a substantial evidence question, and the remaining points made by petitioner are not objections that could have terminated the proceeding within the meaning of CPLR 7804 (g) (*see Matter of Putnam Cos. v Shah,* 93 AD3d 1315, 1316, *lv denied* 19 NY3d 811; *Matter of Wynne v Town of Ramapo*, 286 AD2d 338, 339). Nonetheless, because the record is now before us, we will “treat the proceeding as if it had been properly transferred here in its entirety” (*Wynne*, 286 AD2d at 339), and review petitioner’s contentions de novo (*see Putnam Cos.*, 93 AD3d at 1316; *Matter of Brunner v Bertoni*, 91 AD3d 1100, 1102 n).

It is well established that "the scope of [a] CPLR article 78 proceeding, following an administrative hearing, is limited to review of the issues raised and addressed in that hearing" (*Matter of Cummings v New York State Dept. of Motor Vehs.*, 87 AD3d 1347, 1348 [internal quotation marks omitted]; *see Matter of Vicari v Wing*, 244 AD2d 974, 976). Thus, " '[a] petitioner may not raise a new claim in a proceeding pursuant to CPLR article 78 that was not raised in the administrative hearing under review' " (*Matter of Stoughtenger v Carrion*, 72 AD3d 1484, 1486). Here, petitioner raises several contentions for the first time in his amended petition, including that the hearing violated his due process rights, and, therefore, those contentions are not properly before us (*see Matter of Molinsky v New York State Dept. of Motor Vehs.*, 105 AD3d 960, 960-961; *Stoughtenger*, 72 AD3d at 1486; *Matter of Mugalli v New York State Liq. Auth.*, 256 AD2d 1116, 1116).

With respect to petitioner's remaining contentions, we conclude that the Hearing Officer's determination that petitioner was able to return to work in a light-duty capacity is supported by substantial evidence (*see Matter of Clouse v Allegany County*, 46 AD3d 1381, 1381-1382; *Matter of Chadha v County of Nassau,* 248 AD2d 465, 466; *Matter of Flynn v Pease*, 242 AD2d 331, 331-332). "Substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see Matter of Lundy v City of Oswego*, 59 AD3d 954, 955). "A reviewing court in passing upon this question of law may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated" (*Matter of Purdy v Kreisberg*, 47 NY2d 354, 358; *see Chadha*, 248 AD2d at 466-467).

Here, there is ample evidence in the record, including expert medical testimony, petitioner's medical records, and several IME reports, to support the Hearing Officer's determination that petitioner was fit to return to work on a light-duty basis (*see Chadha*, 248 AD2d at 466; *Flynn*, 242 AD2d at 332). Although petitioner's primary care physician stated that petitioner was totally disabled and unable to return to work in any capacity, his progress notes contain no basis for that opinion aside from petitioner's subjective complaints of pain, and he acknowledged that petitioner had no trouble with activities of daily living, including bathing, communicating, dressing, eating, grooming, or driving. In any event, "[t]he Hearing Officer was entitled to weigh the parties' conflicting medical evidence and to assess the credibility of the witnesses, and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Clouse*, 46 AD3d at 1382, quoting *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75; *see Matter of Hill v New York State & Local Retirement Sys.*, 295 AD2d 802,

802-803).

Contrary to the contention of petitioner, the record reflects that both respondent's expert and the Hearing Officer considered the specific duties of a camera monitor and petitioner's ability to perform those duties. The police captain who oversees the surveillance room testified in detail about the duties of a camera monitor, the camera monitor job description was received in evidence at the hearing, and the Hearing Officer conducted a site visit to the surveillance room. With respect to petitioner's contention that the Hearing Officer failed to consider the impact of petitioner's medications on his ability to perform the duties of a camera monitor, we note that petitioner submitted no evidence at the hearing that his medications rendered him unable to perform the position at issue (*see Flynn*, 242 AD2d at 332). Although respondent's expert testified that two of petitioner's medications could potentially affect alertness, he further testified that petitioner had been taking those medications for so long that he did not expect any problems with petitioner's ability to perform the duties of a camera monitor (*see generally id.* at 331-332).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

1

KA 12-01757

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN MILON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 4, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Erie County Court for the filing of a predicate felony offender statement and resentencing.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "[t]he plea colloquy fails to establish that defendant knowingly and intelligently waived [his] right to appeal the severity of [his] sentence" (*People v Maracle*, 19 NY3d 925, 927). We nevertheless reject defendant's contention that the sentence is unduly harsh and severe. We note, however, that the record reflects that defendant is a predicate felon and thus the People were required to file a predicate felony offender statement in accordance with CPL 400.21 and, if appropriate, County Court was required to sentence defendant as a second felony offender (*see People v Stubbs*, 96 AD3d 1448, 1450, *lv denied* 19 NY3d 1001). Because we cannot permit an illegal sentence to stand (*see id.*), we modify the judgment by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony offender statement and resentencing in accordance with the law (*see id.*).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

2

KA 12-02291

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMIE L. POWELL, III, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered November 1, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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 his plea of guilty of criminal sexual act in the third degree (Penal Law § 130.40 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

3

KA 10-01855

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V ORDER

THOMAS STEWART, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Jeffrey R. Merrill, A.J.), rendered July 13, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

5

KA 08-01362

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE JOHNSON, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered June 12, 2008. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, a *Darden* hearing was unnecessary to establish probable cause for his arrest because "there was sufficient evidence at the suppression hearing to establish probable cause for [the] arrest independent of the [confidential informant's] statements" (*People v Anderson*, 104 AD3d 968, 971, *lv denied* 21 NY3d 1013; *see People v McCullough*, 104 AD3d 1343, 1344, *lv denied* 21 NY3d 1017). Two police officers testified that they observed the muffler dragging from the vehicle in which defendant was a passenger, which justified their stop of the vehicle (*see People v Robinson*, 97 NY2d 341, 349*; People v Binion*, 100 AD3d 1514, 1515, *lv denied* 21 NY3d 911). Within seconds after defendant exited the vehicle, one of the officers observed a gun in plain view on the floor of the passenger side where defendant had been seated, which provided probable cause for defendant's arrest (*see People v Coley*, 286 AD2d 963, 964, *lv denied* 97 NY2d 728).

We reject defendant's contention that he was denied the right to counsel when Supreme Court refused to relieve defendant's assigned counsel and to assign new counsel before trial. "Throughout the[] proceedings, defendant had four separate attorneys assigned to represent him. He was not satisfied with any of them and sought to have each replaced. The court properly denied defendant's request to

appoint a fifth attorney inasmuch as defendant did not present good cause for a substitution of counsel" (*People v DePounceau*, 96 AD3d 1345, 1346, *lv denied* 19 NY3d 1025). As he had done with his three previous attorneys, defendant raised only general complaints about his fourth assigned attorney, and therefore failed to "make specific factual allegations of serious complaints about counsel" sufficient to trigger the requisite minimal inquiry (*People v Porto*, 16 NY3d 93, 99-100).

Inasmuch as the court "conducted the requisite searching inquiry to insure that defendant's request to proceed pro se was accompanied by a knowing, voluntary and intelligent waiver of the right to counsel" (*DePounceau*, 96 AD3d at 1347 [internal quotation marks omitted]), we reject defendant's further contention that he was denied the right to counsel when he proceeded pro se at his suppression and predicate felony hearings, and at sentencing. When defendant, " 'who was not totally unfamiliar with criminal procedure, so determinedly and so unequivocally insisted on rejecting counsel and proceeding [pro se], the court had no recourse but to permit him to do so' " (*id.* at 1346, quoting *People v Medina*, 44 NY2d 199, 209).

Defendant failed to preserve for our review his contention that the court's adverse inference charge "was an insufficient sanction for the . . . loss of [photographs of the gun and the exterior of the vehicle] by the police," inasmuch as he made no request for any other remedy after the court agreed to give the adverse inference charge (*People v Anonymous*, 38 AD3d 438, 439, *lv denied* 8 NY3d 981). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, defense counsel was not ineffective in failing to request a more severe sanction. Indeed, "[i]t is well settled that defense counsel cannot be deemed ineffective for failing to 'make a motion or argument that has little or no chance of success' " (*People v Noguel*, 93 AD3d 1319, 1320, *lv denied* 19 NY3d 965, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

6

KA 11-02119

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERTON HIBBERT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA L. DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 29, 2011. Defendant was resentenced upon his conviction of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a resentence upon his conviction, in 2000, of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [former (2)]). It is undisputed that, at the time of his plea of guilty to those crimes, Supreme Court (Mark, J.) failed to advise defendant that he was subject to a period of postrelease supervision (PRS) with respect to the count of criminal possession of a weapon. Supreme Court (Valentino, J.) was alerted to the error pursuant to Correction Law § 601-d and, with the consent of the People, resentenced defendant pursuant to Penal Law § 70.85 to the bargained-for determinate term of 15 years of imprisonment without PRS to run concurrently with the indeterminate term of imprisonment imposed on the murder count. Defendant failed to preserve for our review his present contention that Penal Law § 70.85 is unconstitutional (*see* CPL 470.05 [2]) and, in any event, his contention is not properly before us because he failed to provide notice to the Attorney General of his challenge to the constitutionality of the statute (*see* CPLR 1012 [b]; Executive Law § 71 [3]; *see generally People v Williams*, 82 AD3d 1576, 1578, *lv denied* 17 NY3d 810). We nevertheless note that the Court of Appeals has determined that "section 70.85 is a constitutionally permissible legislative remedy for the defectiveness of the plea" (*People v*

Pignataro, ___ NY3d ___, ___ [Dec. 12, 2013]).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

7

KA 08-01206

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER E. WALKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 4, 2008. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that Supreme Court's justification instruction to the jury was improper with respect to the "initial aggressor" language used therein. Initially, we reject the People's contention that defendant failed to preserve his contention for our review. "Regardless of whether defendant's objection to the testimony was sufficiently explicit, the trial court, in response to defendant's protest, 'expressly decided the question raised on appeal,' " and defendant's contention thus is preserved for our review (*People v Smith*, ___ NY3d ___, ___ [Dec. 17, 2013], quoting CPL 470.05 [2]; *see People v Eduardo*, 11 NY3d 484, 493). We agree with the People, however, that defendant's contention lacks merit. It is well settled that, upon a defendant's request, "a court must charge the jury on any claimed defense that is supported by a reasonable view of the evidence[,] which the court must assess in the light most favorable to the defendant" (*People v Taylor*, 80 NY2d 1, 12). The use of the "initial aggressor" language is warranted where, as here, there is an issue of fact whether defendant was the first person to use deadly physical force in the encounter (*see People v McWilliams*, 48 AD3d 1266, 1267, *lv denied* 10 NY3d 961; *People v Daniel*, 35 AD3d 877, 878, *lv denied* 8 NY3d 945). With that language, "the court's justification charge adequately conveyed to the jury that defendant could be justified in the use of deadly physical force to defend himself [or

another] against deadly physical force initiated by" the victim (*McWilliams*, 48 AD3d at 1267; *see People v Humphrey*, 109 AD3d 1173, 1174-1175). Furthermore, the court's justification instruction, viewed as a whole, properly stated "the material legal principles applicable to the particular case, and, so far as practicable, explain[ed] the application of the law to the facts" (CPL 300.10 [2]; *see People v Drake*, 7 NY3d 28, 33-34). Thus, " 'the jury, hearing the whole charge, would gather from its language the correct rules [that] should be applied in arriving at [a] decision' " (*Drake*, 7 NY3d at 34; *see People v Johnson*, 103 AD3d 1226, 1226, *lv denied* 21 NY3d 944).

We reject defendant's further contention that, in response to a jury question, the court erred in providing an expanded definition of intent with respect to, inter alia, the original charge of murder in the second degree (Penal Law § 125.25 [1]) and the manslaughter charge of which he was convicted. When presented with a jury question, the court is obligated to provide a meaningful response pursuant to CPL 310.30 (*see People v Kadarko*, 14 NY3d 426, 429), and the court did so here. Defendant's contention that the court's instruction unfairly highlighted evidence unfavorable to his defense is not supported by the record. Moreover, the court did not by its supplemental instruction change the premise upon which defendant's summation was based, inasmuch as defendant's intent was at issue throughout the trial (*cf. People v Greene*, 75 NY2d 875, 876-877). Defendant thus "was not denied an effective summation by reason of the court's charge on the issue of" defendant's intent (*People v Dewindt*, 156 AD2d 706, 708, *lv denied* 76 NY2d 733).

Defendant further contends that the verdict is against the weight of the evidence. Based upon our independent review of the evidence pursuant to CPL 470.15 (5), and viewing the evidence in light of the elements of the crime of manslaughter in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we are satisfied that the verdict is not contrary to the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 07-01257

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLO L. COLLIER, ALSO KNOWN AS “KILLER,”
DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (JON P. GETZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 9, 2007. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree, kidnapping in the second degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]), robbery in the first degree (§ 160.15 [2]), kidnapping in the second degree (§ 135.20), and assault in the second degree (§ 120.05 [2]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his identity as one of the perpetrators of the offenses inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). Contrary to defendant’s further contention, viewing the evidence in light of the elements 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 People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that he was deprived of a fair trial by references to his nickname, “Killer,” made by two prosecution witnesses and by the prosecutor five times during summation. To the extent that this issue is not preserved for our review (*see People v Caver*, 302 AD2d 604, 604, *lv denied* 99 NY2d 653), we agree with defendant that he was deprived of effective assistance of counsel based on defense counsel’s failure to object when the prosecutor elicited that testimony and made those remarks on summation (*see*

People v Webb, 90 AD3d 1563, 1564-1565, *amended on rearg* 92 AD3d 1268). The references to defendant's nickname were highly prejudicial and had minimal, if any, probative value inasmuch as the witnesses knew defendant by his given name (*see id.* at 1565; *People v Santiago*, 255 AD2d 63, 66, *lv denied* 94 NY2d 829; *cf. People v Tolliver*, 93 AD3d 1150, 1150-1151, *lv denied* 19 NY3d 968). At one point during his summation, the prosecutor remarked that "[o]n the street [defendant] has another nickname, it is Killer. There's a reason for that." In doing so, the prosecutor was improperly urging the jurors to "consider defendant's nickname as evidence that he [committed murder]" (*Webb*, 90 AD3d at 1565).

We further agree with defendant that reversal is warranted based on Supreme Court's dismissal of the first jury panel. The first jury panel of approximately 36 people were sworn, and the court called 14 prospective jurors to be seated in the jury box. The court asked preliminary questions and, as the court excused certain prospective jurors based on inconvenience or hardship, the court would seat another prospective juror in the jury box. After the court excused approximately 10 prospective jurors, defense counsel informed the court that he was "concerned about the fact that the [c]ourt [wa]s frustrated with the excuses," and was "afraid of the spi[ll]-over effect to the other [prospective] jurors sitting there[, who may] . . . be more defensive than they should be and more disdainful of the fact that they [we]re being kept" there. The court did not agree with defense counsel that the prospective jurors had been angered by its comments, but asked whether defense counsel wanted the court to discharge the entire panel. Although defense counsel repeatedly answered no, the court discharged the panel. That was error.

Where, as here, a jury panel is "properly drawn and sworn to answer questions truthfully, there must be legal cause or a peremptory challenge to exclude a [prospective] juror" (*People v Thorpe*, 223 AD2d 739, 740, *lv denied* 88 NY2d 1025; *see* CPL 270.05 [2]). By dismissing the entire jury panel without questioning the ability of the individual prospective jurors to be fair and impartial (*see generally People v Wells*, 7 NY3d 51, 59-60), the court deprived defendant of a jury chosen "at random from a fair cross-section of the community" (Judiciary Law § 500; *see* CPL 270.05 [2]; *People v Roblee*, 70 AD3d 225, 228-230).

In light of our determination, we do not address defendant's remaining contentions.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01130

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY THOMAS, DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered April 14, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that there was evidence that he possessed both a revolver and a pistol and thus that he may have been convicted of an unindicted offense. "Because defendant's right to be tried and convicted of only those crimes charged in the indictment is fundamental and nonwaivable, we reach this issue despite the fact that it is unpreserved" (*People v McNab*, 167 AD2d 858, 858). We nevertheless reject defendant's contention. Defendant was charged with possessing "a loaded pistol and/or revolver." Prosecution witnesses testified that defendant fired at the victim with a revolver in one hand and a pistol in the other, and that the victim died from a gunshot wound to the chest from a .38 caliber revolver. The prosecution also presented as evidence defendant's statement to the police wherein he admitted that he possessed a 9 millimeter pistol but denied that he possessed a revolver. Defendant presented testimony that he did not have a weapon. There was no evidence that defendant possessed more than two loaded weapons (*cf. People v Ball*, 57 AD3d 1444, 1445, *lv denied* 12 NY3d 755), or that he possessed a weapon of a type different from the weapons alleged in the indictment. We therefore conclude that the jury did not convict him of an unindicted crime and that the prosecution did not usurp the authority of the grand jury to determine the charges (*cf. id.; McNab*, 167 AD2d at 858). Here, the indictment gave defendant the requisite notice of the charge

against him (*cf. Ball*, 57 AD3d at 1445; *McNab*, 167 AD2d at 858), to enable him to prepare a defense (*see generally People v Grega*, 72 NY2d 489, 495-496).

Defendant also implicitly contends that the indictment is facially duplicitous because it charges two offenses in one count (*see generally* CPL 200.30 [1]; *People v Bauman*, 12 NY3d 152, 154-155), and thus that reversal is required because the verdict may not have been unanimous with respect to which weapon or weapons he possessed. Defendant failed to preserve that contention for our review, however, inasmuch as he did not challenge the indictment as duplicitous within 45 days of his arraignment on the indictment (*see* CPL 255.20 [1]; *People v Brown*, 82 AD3d 1698, 1700, *lv denied* 17 NY3d 792). In any event, we reject defendant's contention. Here, "[t]here was no violation of the requirement of a unanimous verdict, since the single count of second-degree weapon possession had a single factual basis, that is, the People's theory that, in a brief, continuing incident, defendant . . . possessed [one or two loaded weapons] as part of a . . . criminal enterprise" (*People v Jones*, 64 AD3d 427, 428, *lv denied* 13 NY3d 797; *cf. Bauman*, 12 NY3d at 155). " 'Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict' " (*People v Mateo*, 2 NY3d 383, 408, *cert denied* 542 US 946, quoting *Schad v Arizona*, 501 US 624, 632, *reh denied* 501 US 1277), i.e., which particular loaded weapon or weapons defendant possessed. Indeed, "the jury need not necessarily concur in a single view of the transaction, in order to reach a verdict . . . '[I]f the conclusion may be justified upon [more than one] interpretation[] of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other' " (*id.* at 408 n 13, quoting *People v Sullivan*, 173 NY 122, 127).

Finally, we reject defendant's challenge to the severity of the sentence.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01268

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STACEY L. WILLIAMS, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Genesee County Court (Robert C. Noonan, J.), dated May 23, 2012. The order directed defendant to pay restitution to the victims of two burglaries.

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

Memorandum: Defendant appeals from an order directing him to pay restitution to the victims of two burglaries. On a prior appeal, we concluded that County Court had improperly delegated its responsibility to conduct a restitution hearing to its court attorney (*People v Williams*, 64 AD3d 1136, 1137). We therefore modified the order by vacating the amount of restitution ordered, and we remitted the matter for a new hearing to determine the amount of restitution in compliance with Penal Law § 60.27 (*id.*). The only evidence presented by the People at the hearing on remittal was the transcript of the hearing previously conducted by the court attorney in 2006. Despite the court's error in delegating its responsibility to the court attorney in 2006, we nevertheless conclude that the transcript of the sworn testimony of the victims taken nearly six years earlier, which was subject to cross-examination, constitutes "relevant evidence" (CPL 400.30 [4]). The statute expressly provides that relevant evidence may be received "regardless of its admissibility under the exclusionary rules of evidence" (*id.*; *see People v Tzitzikalakis*, 8 NY3d 217, 221; *People v Wilson*, 108 AD3d 1011, 1013-1014). We further conclude that, contrary to defendant's contention, the court properly determined that the People established the out-of-pocket losses of the respective victims by the requisite preponderance of the evidence (*see generally Tzitzikalakis*, 8 NY3d at 221; *People v Horne*, 97 NY2d 404,

410-411).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 10-01772

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY WOOD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered February 16, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that Supreme Court violated CPL 530.13 (former [4] [a]) by issuing an order of protection in favor of a person who was neither a victim of nor a witness to the crime of which he was convicted. Defendant failed to preserve his contention for our review (*see People v Nieves*, 2 NY3d 310, 316-317; *People v Brown*, 96 AD3d 1561, 1563, *lv denied* 19 NY3d 1024; *People v Kulyeshie*, 71 AD3d 1478, 1479, *lv denied* 14 NY3d 889), 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]). Contrary to defendant's further contention, this case does not fall within the " 'narrow exception to the preservation rule' . . . where a court exceeds its powers and imposes a sentence that is illegal in a respect that is readily discernible from the trial record" (*Nieves*, 2 NY3d at 315).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01237

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

HAVAH HUME, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF JERUSALEM, DEFENDANT-APPELLANT.

PETRONE & PETRONE, P.C., WILLIAMSVILLE, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

HALL AND KARZ, CANANDAIGUA (PETER ROLPH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered September 4, 2012 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when her right leg fell into a hole on the shoulder of the gravel road located approximately 75 to 100 feet south of the driveway to her residence. At the time of the accident, plaintiff was watching defendant's highway crew clean out the ditches around the area of a culvert that was going to be replaced the following week. According to plaintiff, the gravel along the edge of the road where she was walking suddenly gave way and caused her to slide down the road into a hole. Supreme Court erred in denying defendant's motion for summary judgment dismissing the complaint. Defendant met its burden by establishing that it did not receive prior written notice of the dangerous condition as required by its local law (*see Weinfeld v J. Robert Roth Assoc.* [appeal No. 2], 177 AD2d 977, 978). The burden thus shifted to plaintiff "to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728, citing *Amabile v City of Buffalo*, 93 NY2d 471, 474). As limited by her brief on appeal, plaintiff contends only that defendant had actual notice of the allegedly dangerous condition, thus abandoning her contention before the court that defendant created the condition (*see Gilbert v*

Evangelical Lutheran Church in Am., 43 AD3d 1287, 1288, *lv denied* 9 NY3d 815; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). However, contrary to the contention of plaintiff and the court's determination, actual notice of a defect is not an exception to the prior written notice requirement (*see Minew v City of New York*, 106 AD3d 1060, 1061-1062; *Palo v Town of Fallsburg*, 101 AD3d 1400, 1401, *lv denied* 20 NY3d 862; *Rile v City of Syracuse*, 56 AD3d 1270, 1271; *Oswald v City of Niagara Falls*, 13 AD3d 1155, 1157).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00842

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

DANIEL C. ANTHONY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BRENT M. PHELPS, DEFENDANT-RESPONDENT.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GORIS & O'SULLIVAN, LLC, CAZENOVIA (MARK D. GORIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered October 4, 2012 in a personal injury action. The judgment, inter alia, ordered that a judgment of no cause of action be entered.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while attempting to avoid a collision between the motorcycle he was driving and the vehicle driven by defendant. Supreme Court denied plaintiff's motion for a directed verdict at the close of his proof and, following the jury's verdict of no cause of action, the court denied plaintiff's posttrial motion to set aside the verdict as against the weight of the evidence.

We reject plaintiff's contention that the court erred in denying his motion for a directed verdict on the issue of defendant's negligence. Viewing the evidence in the light most favorable to the nonmoving party, as we must, we conclude that the court properly determined that there was a "rational process by which the fact trier could base a finding in favor of [defendant]" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Bennice v Randall*, 71 AD3d 1454, 1455).

We agree with plaintiff, however, that the court erred in denying his request to instruct the jury pursuant to Vehicle and Traffic Law § 1142 (a), and we therefore reverse the judgment and grant a new trial. Pursuant to that section, defendant was obligated to yield the right-of-way "to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is

moving across or within the intersection" (*id.*; *see* PJI 2:80). The accident here occurred at an intersection, and the jury should have been instructed on the statutory standard of care in determining whether defendant failed to yield the right-of-way and thus was negligent (*see Doyle v Olin's Leasing Corp.*, 73 AD2d 634, 635).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01124

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

BECKER-MANNING, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COMMON COUNCIL OF CITY OF UTICA, PLANNING BOARD OF CITY OF UTICA, ZONING BOARD OF APPEALS OF CITY OF UTICA AND BENDERSON DEVELOPMENT COMPANY, INC., DEFENDANTS-RESPONDENTS.

RICHARD E. KAPLAN, UTICA, FOR PLAINTIFF-APPELLANT.

MARK CURLEY, CORPORATION COUNSEL, UTICA (WILLIAM M. BORRILL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COMMON COUNCIL OF CITY OF UTICA, PLANNING BOARD OF CITY OF UTICA AND ZONING BOARD OF APPEALS OF CITY OF UTICA.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR DEFENDANT-RESPONDENT BENDERSON DEVELOPMENT COMPANY, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 6, 2013. The order and judgment granted defendants' motions to dismiss the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed with costs.

Memorandum: In this action seeking a judgment declaring that plaintiff's two parcels of property were zoned two-family residential, plaintiff appeals from an order and judgment that dismissed the complaint. Supreme Court granted defendants' motions to dismiss the complaint upon determining, inter alia, that no justiciable controversy was presented because the municipal defendants conceded that plaintiff's parcels were indeed zoned two-family residential. "Pursuant to CPLR 3001, . . . [S]upreme [C]ourt may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy. A declaratory judgment action thus requires an actual controversy between genuine disputants with a stake in the outcome, and may not be used as a vehicle for an advisory opinion" (*Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1405 [internal quotation marks omitted]). Plaintiff in its main brief does not challenge that determination by the court and thus, having failed to present any argument with respect to that dispositive determination, plaintiff is deemed to have abandoned any

contentions with respect to its propriety (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We note that, insofar as plaintiff's reply brief may be read to contend that the action presents a justiciable controversy, it is well settled that a contention raised for the first time in a reply brief is not properly before us (*see Stubbs v Capellini*, 108 AD3d 1057, 1059; *Turner v Canale*, 15 AD3d 960, 961, *lv denied* 5 NY3d 702).

In addition to determining that no justiciable controversy was presented, the court also determined that the action was time-barred, an alternative dispositive determination. Plaintiff contends that the court erred in that respect because the municipal defendants failed to conduct a review pursuant to the State Environmental Quality Review Act ([SEQRA] ECL art 8) prior to enacting the legislation that rezoned the parcels at issue, and the statute of limitations does not begin to run in such a case until the review is undertaken. That contention is without merit. "The Court of Appeals has consistently stated that in a proceeding alleging a SEQRA violation in the enactment of legislation, the challenge must be commenced within four months of the date of its enactment" (*Beneke v Town of Santa Clara*, 36 AD3d 1195, 1197, *lv dismissed* 8 NY3d 938, citing *Matter of Eadie v Town Bd. of Town of N. Greenbush*, 7 NY3d 306, 316-317 and *Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202-203). Like the Second Department, we have found "no reported case where any period longer than the four-month statute of limitations of CPLR 217 has been applied to SEQRA challenges" (*Matter of Dandomar Co., LLC v Town of Pleasant Val. Town Bd.*, 86 AD3d 83, 94). Furthermore, "[t]o the extent that any of plaintiff's causes of action emanating from this issue could properly fall under a declaratory judgment action, those issues would be time-barred as well" (*Beneke*, 36 AD3d at 1197).

Inasmuch as plaintiff presented no argument with respect to the court's determination that there was no justiciable controversy and failed to cite or discuss the law applicable to the court's alternative determination that the action was time-barred, we affirm with costs.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00759

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

LINDA SINNI, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF PAUL R. SINNI, DECEASED, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 114038.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALEXANDER & CATALANO, LLC, ROCHESTER (TIMOTHY R. MANDRONICO OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Diane L. Fitzpatrick, J.), entered July 10, 2012. The order denied defendant's motion for summary judgment dismissing claimant's claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00868

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

LORI PILATO, PLAINTIFF-APPELLANT,

V ORDER

ERIE COUNTY MEDICAL CENTER AND ALLPRO PARKING, LLC, DEFENDANTS-RESPONDENTS.

TRONOLONE & SURGALLA, P.C., BUFFALO, LAW OFFICE OF GERARD A. STRAUSS, HAMBURG (GERARD A. STRAUSS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF LAURIE G. OGDEN, BUFFALO (DANIEL J. CAFFREY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered December 26, 2012 in a personal injury action. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

20

CA 13-01338

PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND WHALEN, JJ.

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621 PAYNE AVENUE, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNION FREE SCHOOL DISTRICT NO. 1 OF NORTH TONAWANDA, ALSO KNOWN AS NORTH TONAWANDA CITY SCHOOL DISTRICT, DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, BUFFALO (STEPHEN A. SHARKEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 31, 2013. The order, among other things, denied defendant's motion for summary judgment dismissing the second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion and dismissing the second amended complaint and as modified the order is affirmed without costs.

Memorandum: We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the second amended complaint. We therefore modify the order accordingly. Initially, we note that plaintiff's causes of action sound in contract and not tort because no "legal duty independent of the contract itself has [allegedly] been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389), and thus Education Law § 3813 (1) applies to this action. Next, we agree with defendant that plaintiff did not comply with the requirements of that section, inasmuch as plaintiff failed to present the requisite written verified claim " ' to the governing body of [the] district or school' . . . as required by the clear language" of the statute, and that failure "is a fatal defect mandating dismissal of this action" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 548). Here, it is undisputed that plaintiff served the claim by certified mail upon defendant's then-attorney, who is not a member of defendant's "governing body" pursuant to Education Law § 3813 (1).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

21

KA 12-02147

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES J. ANDERSON, ALSO KNOWN AS CHARLES ANDERSON, ALSO KNOWN AS CHARLES JAMES ANDERSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), 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 October 31, 2012. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

23

KA 12-00163

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TARIQ R.B., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (BARBARA J. DAVIES OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Sheila A. DiTullio, J.), rendered December 20, 2011. The adjudication revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

25

KA 12-02066

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STANLEY A. BROWN, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), dated October 19, 2012. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

28

KA 11-01047

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ISAIAH MCCOY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (KATHLEEN ANN HART 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 Ontario County Court (Frederick G. Reed, A.J.), dated March 29, 2011. The order denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting defendant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

29

CAF 13-00040

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF CASSANDRA WASHINGTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DEAN STOKER, CHRISTY PEARO,
RESPONDENTS-APPELLANTS,
AND CHARLES PHILLIPS, SR.,
RESPONDENT-RESPONDENT.

MICHELE E. DETRAGLIA, UTICA, FOR RESPONDENTS-APPELLANTS.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-RESPONDENT.

JESSICA REYNOLDS-AMUSO, CLINTON, FOR RESPONDENT-RESPONDENT.

JULIE GIRUZZI-MOSCA, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered September 25, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted the motion of petitioner to dismiss the petition of respondents Dean Stoker and Christy Pearo.

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

Memorandum: Family Court properly granted the motion of petitioner to dismiss the petition of respondents Dean Stoker and Christy Pearo (former foster parents) seeking custody of the child of respondent Charles Phillips, Sr. (father). At the time the former foster parents commenced their proceeding, the child was in his father's care and custody, and the former foster parents lacked standing either to initiate their own custody proceeding or to intervene in the custody proceeding initiated by petitioner (*see Matter of Minella v Amhrein*, 131 AD2d 578, 579). Contrary to their contention, the former foster parents lack standing to assert on behalf of the child the child's right to maintain a relationship with them (*see generally Matter of Folsom v Swan*, 41 AD3d 899, 900). We note, moreover, that the Attorney for the Child does not support the position of the former foster parents (*see Matter of Harriet II. v Alex LL.*, 292 AD2d 92, 94-95). We reject the former foster parents' further contention that they have standing to seek custody because of

extraordinary circumstances (*see Matter of Marquis B. v Alexis H.*, 110 AD3d 790, 790). Family Court properly concluded that evidence of the father's arrest and incarceration, without more, did not meet the former foster parents' burden of establishing such extraordinary circumstances (*see Matter of Aylward v Bailey*, 91 AD3d 1135, 1135-1136). Inasmuch as the former foster parents failed to make that threshold showing, there was no basis for the court to conduct a hearing and make a determination with respect to the child's best interests (*see Matter of Jamison v Chase*, 43 AD3d 467, 467; *Matter of Kreger v Newell*, 221 AD2d 630, 631). Finally, because the former foster parents have no standing in this proceeding, they lack standing to seek dismissal of petitioner's petition, and the court therefore properly denied their cross motion to dismiss that petition (*see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

30

CAF 12-02245

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF JADA G. AND JONATHAN G.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARCELLA G., RESPONDENT,
AND JONATHAN C., RESPONDENT-APPELLANT.

PALOMA A. CAPANNA, WEBSTER, FOR RESPONDENT-APPELLANT.

JAMES WUJCIK, ACTING COUNTY ATTORNEY, GENESEO (WENDY S. SISSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

LINDA M. JONES, ATTORNEY FOR THE CHILDREN, BATAVIA.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered November 28, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents on the ground of permanent neglect.

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

Memorandum: Respondent father appeals from an order granting the petition alleging that he violated the terms of a suspended judgment and terminating his parental rights on the ground of permanent neglect. Family Court properly granted the petition. Contrary to the father's contention, the court properly determined that petitioner established by a preponderance of the evidence that he violated one or more terms of the suspended judgment (*see Matter of Malik S. [Jana M.]*, 101 AD3d 1776, 1777).

We reject the father's further contention that it was not in the children's best interests for the court to terminate his parental rights. The court properly determined that the children's best interests would be promoted by transferring their guardianship and custody to petitioner notwithstanding the fact that the children were not in a preadoptive home (*see Matter of Rasheen Lamont J.*, 244 AD2d 901, 902; *see also Matter of Wesley Antonio C.*, 287 AD2d 374, 374). Finally, we reject the contention of the Attorney for the Children that the court should have imposed a schedule for the "winding down" of the relationship between the father and the children. There is no legal authority for such a schedule (*see Matter of Hailey ZZ. [Ricky*

ZZ.], 19 NY3d 422, 437).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

31

CAF 12-01714

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF BRIANNA C., BROOKLYN C.
AND JASMINE C.
---------- MEMORANDUM AND ORDER
JOSEPH W., PETITIONER-APPELLANT,

V

ERIE COUNTY CHILDREN'S SERVICES,
RESPONDENT-RESPONDENT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR RESPONDENT-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILDREN, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 15, 2012 in a proceeding pursuant to Family Court Act article 10. The order dismissed the petition.

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

Memorandum: On appeal from an order dismissing his petition seeking modification of an order of protection, petitioner contends that Family Court erred in dismissing the petition because the Attorney for the Children (AFC) and respondent failed to make written motions to dismiss, and he further contends that the AFC and respondent failed to comply with other requirements of the CPLR with respect to motions. Petitioner failed to object to the motions on the grounds now asserted, and therefore has not preserved his contentions for our review (*see Matter of Damion D.*, 42 AD3d 715, 716).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

32

CAF 13-00010

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ALEX C., JR.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALEX C., SR., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

GERALD M. DRISCOLL, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 27, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child on the ground of permanent neglect.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. Contrary to the father's contention, petitioner established "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the father] and the child" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see* § 384-b [3] [g] [i]; [7] [a]). Among other things, petitioner arranged for a psychological evaluation of the father, facilitated supervised visitation between the child and the father both before and during the father's incarceration, recommended various services, and followed up with the father to remind him of those services.

Contrary to the further contention of the father, Family Court properly determined that he failed to plan for the future of the child (*see Matter of Serenity G. [Orena G.]*, 101 AD3d 1639, 1640; *see also* Social Services Law § 384-b [7] [a]). Although the father claimed that he took parenting classes while in prison, he told his caseworker that the classes were "stupid" and that he did not believe that he had learned anything in them. The father did not engage in mental health counseling, substance abuse treatment, or a domestic violence program

as recommended by petitioner and the psychologist who evaluated him. Further, the record establishes that the father's only "plan" for the child was that the child remain in foster care until the end of the father's term of incarceration. "The failure of an incarcerated parent to provide any 'realistic and feasible' alternative to having the child[ ] remain in foster care until the parent's release from prison . . . supports a finding of permanent neglect" (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594, *lv dismissed* 21 NY3d 975; *see Matter of Jaylysia S.-W.*, 28 AD3d 1228, 1229).

The father failed to preserve for our review his further contention that the court should have issued a suspended judgment instead of terminating his parental rights (*see Matter of Nestor H.O. [Nestor H.]*, 68 AD3d 1733, 1733; *Matter of Shadazia W.*, 48 AD3d 1058, 1058). In any event, the evidence supports the court's determination that termination of the father's parental rights is in the best interests of the child, and that the father's "negligible progress" in addressing the issues that initially necessitated the child's removal from his custody was " 'not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525; *see Matter of Joanna P. [Patricia M.]*, 101 AD3d 1751, 1752, *lv denied* 20 NY3d 863; *Matter of Keegan JJ. [Amanda JJ.]*, 72 AD3d 1159, 1161-1162). Moreover, petitioner established that the child was thriving in his foster placement and that the child's foster parents, i.e., his maternal great aunt and great uncle, intended to adopt him.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

35

CA 13-00639

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

SVETLANA BALUK AND MARK OSILOVSKIY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

MICHELE E. DETRAGLIA, UTICA, FOR PLAINTIFFS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MARCO CERCONE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered December 24, 2012. The order granted the motion of defendant to dismiss the complaint and denied the cross motion of plaintiffs for summary judgment.

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

Memorandum: Plaintiffs commenced this action alleging that defendant breached its obligations under their homeowner's policy when it failed to reimburse them fully for sums they expended to repair or replace damage to their residence resulting from "puff-back" from their malfunctioning furnace. Supreme Court properly denied plaintiffs' cross motion seeking summary judgment and granted defendant's motion to dismiss the complaint based upon plaintiffs' failure to commence this action within two years after the date of loss, as the policy required (*see 1840 Concourse Assoc., LP v Praetorian Ins. Co.*, 89 AD3d 592, 592, *lv denied* 19 NY3d 809; *Klawiter v CGU/OneBeacon Ins. Group*, 27 AD3d 1155, 1155). Plaintiffs' reliance upon *Bakos v New York Cent. Mut. Fire Ins. Co.* (83 AD3d 1485) is misplaced inasmuch as the insured in *Bakos* timely commenced that action within two years of the date of loss.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

43

KA 12-01615

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL STANTON, DEFENDANT-APPELLANT.

REBECCA CURRIER, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Cayuga County Court (Thomas G. Leone, J.), entered June 22, 2012. The order denied the application of defendant for resentencing pursuant to CPL 440.46.

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

Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46, the 2009 Drug Law Reform Act. As the People correctly concede, this appeal is not moot even though the maximum sentence for defendant's original drug conviction has now expired. Defendant "was sentenced in another case involving a later crime while he was still imprisoned on the earlier charge. If he is resentenced on the earlier charge, that resentencing could affect the time credited toward his later sentence" (*People v Paulin*, 17 NY3d 238, 242; *see People v Nieves*, 94 AD3d 671, 672).

We nevertheless conclude that County Court properly exercised its discretion in determining that substantial justice required denial of his application (*see People v Gatewood*, 87 AD3d 825, 826, *lv denied* 17 NY3d 903). It is well established that "[r]esentencing is not automatic, and courts may deny the applications of persons who 'have shown by their conduct that they do not deserve relief from their sentences' " (*People v Colon*, 110 AD3d 438, 438, quoting *Paulin*, 17 NY3d at 244). Although defendant is a military veteran who participated in many vocational programs while incarcerated and had only two minor disciplinary infractions during his incarceration, "[t]he court properly concluded that defendant's chronic inability to control his behavior while at liberty outweighed" his positive institutional record (*People v Correa*, 83 AD3d 555, 556, *lv denied* 17 NY3d 805; *see People v Hurst*, 83 AD3d 499, 499, *lv denied* 17 NY3d 796;

cf. People v Berry, 89 AD3d 954, 955-956).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

44

KA 10-01637

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL L. FRANCO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Stephen K. Lindley, J.), rendered January 4, 2010. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The sole witness at trial was the State Trooper who stopped defendant's vehicle after observing defendant's reckless driving. He testified that he could smell the odor of alcohol on defendant's breath, defendant's eyes were bloodshot, glassy, and watery, and defendant periodically mumbled as he spoke, even though he was generally understandable. The Trooper further testified that he administered six field sobriety tests, all but one of which defendant failed. Finally, there is "a record basis to show that, through words or actions, defendant declined to take a chemical test despite having been clearly warned of the consequences of refusal," and such refusal is admissible as consciousness of guilt (*People v Smith*, 18 NY3d 544, 551; *see People v McGraw*, 57 AD3d 1516, 1517; *People v Gallup*, 302 AD2d 681, 683, *lv denied* 100 NY2d 594; *see generally* § 1194 [2] [f]). We conclude that Supreme Court did not fail to give the evidence the weight it should be accorded, and thus the verdict is not against the weight of the evidence (*see McGraw*, 57

AD3d at 1517; *see generally Bleakley*, 69 NY2d at 495).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

47

KA 12-00737

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS BEDELL, DEFENDANT-APPELLANT.

ANTHONY J. LANA, BUFFALO, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John Lewis DeMarco, J.), rendered February 9, 2011. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [1]). Defendant contends that defense counsel was ineffective for failing to move to suppress the currency found on defendant during a search incident to his arrest, as well as a paper bag hidden near a guardrail at the end of a dead-end street that contained 13 “dime bags” of crack cocaine. Defendant failed to demonstrate that the “ ‘motion, if made, would have been successful and that defense counsel’s failure to make that motion deprived him of meaningful representation’ ” (*People v Bassett*, 55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922; *see generally People v Rivera*, 71 NY2d 705, 709).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we reject defendant’s contention that the evidence is legally insufficient to establish that he possessed the cocaine with intent to sell it (*see People v Freeman*, 28 AD3d 1161, 1162, *lv denied* 7 NY3d 788*; People v Smith*, 217 AD2d 910, 911; *see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant’s further contention, viewing the evidence in light of the elements of the crime in this nonjury trial (*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).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

48

KA 09-01719

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE PARSONS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDRE PARSONS, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (MATTHEW DUNHAM OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Monroe County Court (Frank P. Geraci, Jr., J.), entered July 2, 2009. The order denied the CPL 440.10 motion of defendant without a hearing.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: County Court erred in denying without a hearing defendant's motion seeking to vacate the judgment convicting him of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) on the grounds that material evidence adduced at his trial was false and was known by the prosecutor to be false prior to the entry of judgment and that the judgment was obtained in violation of his due process rights (*see* CPL 440.10 [1] [c], [h]). Defendant submitted two affidavits from a prosecution witness that "tend[ ] to substantiate all the essential facts" necessary to support defendant's claims (CPL 440.30 [4] [b]). The People submitted nothing in opposition to the motion that would require or indeed allow the court to deny the motion without a hearing (*see* CPL 440.30 [2], [4]) and, therefore, the court "was not statutorily authorized to deny defendant's motion without a hearing" (*People v Baxley*, 84 NY2d 208, 214, *rearg dismissed* 86 NY2d 886; *see* CPL 440.30 [5]; *People v Bates*, 144 AD2d 970, 970-971, *lv denied* 73 NY2d 919; *cf. People v Drake*, 256 AD2d 1159, 1160, *lv denied* 93 NY2d 969; *People v Stern*, 226 AD2d 238, 240, *lv denied* 88 NY2d 969, *reconsideration denied* 88 NY2d 1072).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

49

KA 12-00792

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAR MARTIN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Anthony F. Aloi, J.), rendered October 25, 2010. The judgment convicted defendant, upon a jury verdict, of hindering prosecution in the second 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 hindering prosecution in the second degree (Penal Law § 205.60). Viewing the evidence in light of the elements of that crime 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 People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Defendant's further contention that he was deprived of a fair trial by certain remarks made by the prosecutor on summation is not preserved for our review (*see* CPL 470.05 [2]) and, in any event, that contention lacks merit. "Reversal based on prosecutorial misconduct is 'mandated only when the conduct [complained of] has caused such substantial prejudice to the defendant that he has been denied due process of law[,]' and . . . defendant failed to establish that the prosecutor's alleged misconduct caused such prejudice" (*People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). Also contrary to defendant's contention, he was not denied effective assistance of counsel based on defense counsel's failure to object to the prosecutor's remarks on summation "inasmuch as those comments did not constitute prosecutorial misconduct" (*People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806).

Defendant failed to preserve for our review his further contention that County Court erred in considering uncharged crimes at sentencing, and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see generally People v Hirsh*, 106 AD3d 1546, 1548; *cf. People v Durand*, 63 AD3d 1533, 1536). Finally, the sentence is not unduly harsh or severe.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

52

KA 12-02313

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY E. FARR, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 16, 2012. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the waiver of the right to appeal is not valid and that the sentence is unduly harsh and severe. Although we conclude that defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence inasmuch as there is no indication in the record of the plea allocution that defendant was waiving his right to appeal the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928; *People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

54

KA 12-01614

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER J. HARRIS, DEFENDANT-APPELLANT.

TIMOTHY J. BRENNAN, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (CARL J. ROSENKRANZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 8, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree, criminal mischief in the third degree, menacing in the second degree and harassment in the second 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, inter alia, criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and criminal mischief in the third degree (§ 145.05 [2]). Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the third degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict convicting defendant of that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, the evidence is legally sufficient to support the conviction of criminal mischief in the third degree (*see generally id.*). Finally, the sentence is not unduly harsh or severe.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

55

CAF 12-02206

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF FITZGERALD LONG,
PETITIONER-RESPONDENT-RESPONDENT,

V ORDER

CARLA DIXON, RESPONDENT-PETITIONER-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR RESPONDENT-PETITIONER-APPELLANT.

LINDA M. DIPASQUALE, BUFFALO, FOR PETITIONER-RESPONDENT-RESPONDENT.

ALVIN M. GREENE, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 24, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded the parties joint legal custody of the subject child, with petitioner-respondent having primary physical custody.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

60

CA 13-01264

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

PAUL COLEMAN, PLAINTIFF-RESPONDENT,

V ORDER

1093 GROUP, LLC, 10 ELLICOTT SQUARE COURT CORPORATION, DOING BUSINESS AS ELLICOTT DEVELOPMENT COMPANY, AND G.M. CRISALLI & ASSOCIATES, INC., DEFENDANTS-RESPONDENTS.

1093 GROUP, LLC, 10 ELLICOTT SQUARE COURT CORPORATION, DOING BUSINESS AS ELLICOTT DEVELOPMENT COMPANY, AND G.M. CRISALLI & ASSOCIATES, INC., THIRD-PARTY PLAINTIFFS-RESPONDENTS.

V

SOLVAY IRON WORKS, INC., THIRD-PARTY DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTIN L. NORFLEET OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

MURAD AND MURAD, P.C., UTICA (FREDERICK W. MURAD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GOLDBERG SEGALLA, LLP, SYRACUSE (SANDRA J. SABOURIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered September 18, 2012 in a personal injury action. The order, among other things, denied third-party defendant's cross motion for summary judgment dismissing the third-party complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on October 1 and 9, 2013, and December 9, 2013, and filed in the Oneida County Clerk's Office on December 10, 2013,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

61

CA 12-01590

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

FRANK C. SLAZYK, AS REPRESENTATIVE OF THE ESTATE OF ROSE SLAZYK, DECEASED AND FRANK N. SLAZYK, PLAINTIFFS-APPELLANTS,

V ORDER

JOYCE DAVOLI, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PETER BARTLETT NICELY, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), granted April 4, 2012. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

62

CA 12-01591

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

FRANK C. SLAZYK, AS REPRESENTATIVE OF THE ESTATE OF ROSE SLAZYK, DECEASED AND FRANK N. SLAZYK, PLAINTIFFS-APPELLANTS,

V ORDER

JOYCE DAVOLI, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PETER BARTLETT NICELY, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered June 13, 2012. The order granted the motion of defendant for attorney's fees and sanctions.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

63

CA 12-01660

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

FRANK C. SLAZYK, AS REPRESENTATIVE OF THE ESTATE OF ROSE SLAZYK, DECEASED AND FRANK N. SLAZYK, PLAINTIFFS-APPELLANTS,

V ORDER

JOYCE DAVOLI, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

PETER BARTLETT NICELY, BUFFALO, FOR PLAINTIFFS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered February 24, 2012. The order granted the motion of defendant for a protective order and denied the cross motion of plaintiffs to compel answers to interrogatories and for sanctions.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

64

CA 13-00095

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

IN THE MATTER OF THORNWELL RICHBURG,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 20, 2012 in a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

66

TP 13-01204

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

IN THE MATTER OF STEVEN WISNIEWSKI, PETITIONER,

V ORDER

RANDY K. JAMES, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

STEVEN WISNIEWSKI, PETITIONER PRO SE.

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

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, Livingston County [Dennis S. Cohen, A.J.], entered July 1, 2013) to review a determination finding 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: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

67

TP 13-00209

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

IN THE MATTER OF DEVAUGHN HOLMES, PETITIONER,

V MEMORANDUM AND ORDER

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

DEVAUGHN HOLMES, 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 [Thomas G. Leone, A.J.], entered January 29, 2013) to annul a determination finding after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv]) and 114.10 (7 NYCRR 270.2 [B] [15] [i]) and vacating the recommended loss of good time and as modified the determination is confirmed without costs, respondent is directed to expunge from petitioner's institutional record all references to the violation of those rules, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 113.25 (7 NYCRR 270.2 [B] [14] [xv] [drug possession]), 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]), 121.11 (7 NYCRR 270.2 [B] [22] [ii] [third-party call]), and 121.14 (7 NYCRR 270.2 [B] [22] [v] [exchanging personal identification numbers (PINs)]). We conclude that there is substantial evidence to support the determination with respect to inmate rules 121.11 and 121.14. Specifically, the misbehavior report, together with the audiotapes of petitioner's telephone conversations, establish that petitioner made third-party calls and used the PINs of other inmates (*see Matter of Matthews v Fischer*, 95 AD3d 1529, 1530; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966; *People ex rel. Vega v Smith*, 66 NY2d 130, 140). Petitioner's protestations of innocence merely raised an issue of credibility for resolution by the

Hearing Officer (*see Foster*, 76 NY2d at 966).

Respondent correctly concedes, however, that the determination with respect to inmate rules 113.25 and 114.10 is not supported by substantial evidence (*see generally Vega*, 66 NY2d at 139), and we therefore modify the determination accordingly. Inasmuch as the record establishes that petitioner has served his administrative penalty, we direct respondent to expunge from petitioner's institutional record all references to the violation of those inmate rules (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, *lv denied* ___ NY3d ___ [Dec. 17, 2013]; *see generally Matter of Edwards v Fischer*, 87 AD3d 1328, 1330). Although we need not remit the matter to respondent for reconsideration of those parts of the penalty already served by petitioner, we note that there was also a recommended loss of good time, and the record does not reflect the relationship between the violations and that recommendation (*see Matter of Monroe v Fischer*, 87 AD3d 1300, 1301). We therefore further modify the determination by vacating the recommended loss of good time, and we remit the matter to respondent for reconsideration of that recommendation (*see id.*).

We have considered petitioner's remaining contentions and conclude that they are without merit.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

68

TP 13-01296

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

IN THE MATTER OF SHERMAN WALKER, PETITIONER,

V ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA CORRECTIONAL FACILITY, RESPONDENT.

SHERMAN WALKER, 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 July 15, 2013) to annul a determination finding 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 petition is dismissed.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

69

TP 13-01137

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

IN THE MATTER OF RONNIE ZUCHEGNO, BY HIS PARENT AND NATURAL GUARDIAN, ANDREA ZUCHEGNO, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (DIANA M. STRAUBE OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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, Monroe County [J. Scott Odorisi, J.], entered June 25, 2013) to challenge the determination of respondent. The determination denied petitioner's request for a SleepSafe II bed for her son.

It is hereby ORDERED that the determination is unanimously annulled on the law and facts without costs and the petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding to challenge the determination following a fair hearing that denied her request for a SleepSafe II bed for her son. Upon our review of the evidence presented by the parties at the fair hearing, we conclude that the determination that the SleepSafe II bed is not the least costly device that is medically necessary for petitioner's son is not supported by the requisite substantial evidence (*see Matter of Godfrey v Shah*, 91 AD3d 1294, 1295-1296). Thus, the determination must be annulled.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

70

TP 13-01319

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

IN THE MATTER OF SHARON ANDERSON, PETITIONER,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, RESPONDENT.

CHIACCHIA & FLEMING, LLP, HAMBURG (ANDREW P. FLEMING OF COUNSEL), FOR PETITIONER.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MARY B. SCARPINE 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 [Henry J. Nowak, Jr., J.], granted July 19, 2013) to annul a determination of respondent. The determination adjudged that petitioner was fit to return to light-duty work.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the Hearing Officer's determination that she was able to return to work on November 16, 2012, as ordered by respondent. Petitioner had been receiving benefits pursuant to General Municipal Law § 207-c as a result of injuries that she sustained in the course of her work as a police officer.

We reject petitioner's contention that respondent's procedure in determining her entitlement to benefits deprived her of due process. Petitioner, who was represented by counsel at the hearing, was "given the opportunity to contest" the opinion of the City's expert that she could return to work in a light duty capacity by testifying at the hearing as well as "presenting [her] own witnesses and cross-examining [respondent's] witnesses" (*Matter of Park v Kapica*, 8 NY3d 302, 311; *see Matter of Howell v County of Albany*, 105 AD3d 1122, 1124). Moreover, respondent "did not terminate [her] disability benefits at any time prior to [her] hearing" (*Park*, 8 NY3d at 311). We therefore conclude that respondent's procedure "sufficiently met the dictates of due process" (*id.*; *see also Howell*, 105 AD3d at 1124).

We reject petitioner's further contention that the Hearing Officer erred in determining that petitioner was able to return to

work. Although petitioner presented evidence establishing that she was unable to return to work as ordered, "[t]he Hearing Officer was entitled to weigh the parties' conflicting medical evidence . . . , and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Matter of Clouse v Allegany County*, 46 AD3d 1381, 1382, quoting *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75).

Finally, petitioner's contentions that respondent failed to comply with General Municipal Law § 207-c (3) and (4) are not properly before us inasmuch as petitioner failed to exhaust her administrative remedies with respect thereto (*see Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834; *see also Matter of Cummings v New York State Dept. of Motor Vehs.*, 87 AD3d 1347, 1348).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

71

KA 12-00929

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DASHAWN G., 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 (DAVID R. PANEPINTO OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Erie County Court (Michael L. D'Amico, J.), rendered May 10, 2012. The adjudication convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from an adjudication based upon a jury verdict finding him guilty of robbery in the second degree (Penal Law § 160.10 [1]). Viewing the evidence in light of the elements of the crime 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 People v Bleakley*, 69 NY2d 490, 495). Although "an acquittal would not have been unreasonable" in light of defendant's testimony (*Danielson*, 9 NY3d at 348), it cannot be said that the jury failed to give the evidence the weight it should be accorded in concluding that defendant participated in the robbery (*see People v Leggett*, 101 AD3d 1694, 1694, *lv denied* 20 NY3d 1101). The jury " 'see[s] and hear[s] the witnesses [and thus] can assess their credibility and reliability in a manner that is far superior to that of [this Court, which] must rely on the printed record' " (*People v Horton*, 79 AD3d 1614, 1615, *lv denied* 16 NY3d 859, quoting *People v Lane*, 7 NY3d 888, 890), and we perceive no reason to disturb the jury's credibility determinations.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

74

KA 11-02398

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS M. ZIRBEL, 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 (Mark H. Fandrich, A.J.), rendered September 13, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [4]). The record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

75

KA 10-01982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

JAMEL BRADFORD, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Anthony F. Aloi, J.), rendered August 11, 2010. Defendant was convicted, upon his plea of guilty, of attempted criminal possession of a controlled substance 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 his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Defendant contends that the police unlawfully arrested and searched him based on his commission of minor infractions, i.e., failing to wear a seatbelt and failing to use the sidewalk, and that there were reasonable alternatives to arresting him. We reject that contention. The police noticed that the vehicle in which defendant was a passenger had failed to signal a turn appropriately. The police attempted to stop the vehicle by activating the lights and sirens of their patrol vehicle, but the driver of the vehicle failed to pull over, and one of the officers noticed that defendant was not wearing a seatbelt. When the vehicle finally stopped, defendant immediately fled from it and ran down the middle of the street. Defendant was subsequently apprehended by a second set of police officers. Under those circumstances, we conclude that, contrary to defendant's contention, the issuance of a summons would not have been a reasonable "alternative to custodial arrest" (*People v Henry*, 181 Misc 2d 689, 694; *see generally* Vehicle and Traffic Law § 207). Here, defendant's conduct demonstrated that he was "intent on not cooperating with the police," that he would "not even temporarily submit to the[ ] authority [of the police] for the purpose of the issuance of a summons," and that "he wanted to escape from the police and avoid prosecution altogether" (*People v Bradford*, 28 Misc 3d 1220[A], 2010

NY Slip Op 51415[U], *8). We therefore conclude that the police acted reasonably in arresting defendant (*see id.*).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

76

KAH 12-01964

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
JOSEPH WILLIAMS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MALCOLM R. CULLY, SUPERINTENDENT, COLLINS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated amended decision and order) of the Supreme Court, Erie County (M. William Boller, A.J.), entered September 17, 2012 in a habeas corpus proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner's appeal from the judgment dismissing his petition for a writ of habeas corpus has been rendered moot by his release to parole supervision (*see People ex rel. Baron v New York State Dept. of Corr.*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807), and the exception to the mootness doctrine does not apply (*see id.*; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). While this Court has the power to convert the habeas corpus proceeding into a CPLR article 78 proceeding, we decline to do so under the circumstances of this case (*see People ex rel. Keyes v Khahaifa*, 101 AD3d 1665, 1665, *lv denied* 20 NY3d 862).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

84

CA 13-01106

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

IN THE MATTER OF ARBITRATION BETWEEN MONROE COUNTY DEPUTY SHERIFFS' ASSOCIATION, INC., PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

MONROE COUNTY AND MONROE COUNTY SHERIFF, RESPONDENTS-RESPONDENTS.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR PETITIONER-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (MALLORIE C. RULISON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered December 11, 2012 in a proceeding pursuant to CPLR article 75. The order denied the petition and confirmed the arbitration award.

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

Memorandum: Petitioner, the bargaining representative for certain Deputy Sheriffs employed by respondents, commenced this proceeding to vacate an arbitration award denying a grievance filed by petitioner on behalf of five of its members. Those five Deputy Sheriffs were scheduled to work on July 4, 2011 and they each requested and were granted the day off without being required to use vacation leave or compensatory time. The collective bargaining agreement (CBA) then in effect provided that Independence Day was a paid holiday and that "[a]ll employees shall be entitled to holiday pay." In addition, the five Deputy Sheriffs qualified, by virtue of their employment and military service, for the benefit extended by Military Law § 249, which provides in pertinent part that employees so qualified "shall, in so far as practicable, be entitled to absent [themselves] from [their] duties or service, with pay, on July fourth of each year" without "any loss or diminution of vacation or holiday privilege." Respondents ultimately paid the five employees eight hours of holiday pay without loss of vacation leave or compensatory time. Petitioner thereafter filed a grievance alleging that respondents violated the CBA when they failed to pay the Deputy Sheriffs for their regular shifts on July 4, 2011, i.e., for an additional 7.5 hours. The grievance was denied at each step

contemplated by the CBA, including arbitration. The arbitrator concluded, inter alia, that neither the CBA nor Military Law § 249 required respondents to pay the five Deputy Sheriffs in the manner sought by petitioner.

We conclude that Supreme Court properly denied the petition and confirmed the arbitration award. Contrary to petitioner's contentions, the arbitrator did not exceed any limitation of his power in denying the grievance (*see Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100*, 14 NY3d 119, 123-124; *Rochester City Sch. Dist. v Rochester Teachers Assn.*, 41 NY2d 578, 583), nor is his construction of the CBA totally irrational (*see Rochester City Sch. Dist.*, 41 NY2d at 583; *cf. Matter of Albany County Sheriffs Local 775 of N.Y. State Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO [County of Albany]*, 27 AD3d 979, 980). In addition, there is no basis for vacating the award as violative of public policy (*see generally Matter of New York City Tr. Auth. v Transport Workers Union of Am. Local 100, AFL-CIO*, 99 NY2d 1, 6-7). Contrary to petitioner's contention, the award does not, on its face, violate the public policy embodied in Military Law § 249, and the court properly declined to vacate the award on that ground (*see Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 631; *see also Matter of Brady v Kelley*, 51 AD2d 797, 797-798).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

91

KA 11-02519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY THOMAS, ALSO KNOWN AS ZAK,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered December 22, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Same Memorandum as in *People v Thomas* ([appeal No. 2] ___ AD3d ___ [Feb. 7, 2014]).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

92

KA 13-01262

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY THOMAS, ALSO KNOWN AS ZAK,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered February 28, 2011. Defendant was resentenced upon his conviction of manslaughter in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]) and, in appeal No. 2, he appeals from his resentence on that conviction. We note at the outset that defendant's appeal concerns only the severity of the resentence and the threshold issue whether defendant's waiver of the right to appeal was valid and thus encompasses the severity of the resentence. We therefore affirm the judgment in appeal No. 1.

With respect to appeal No. 2, we agree with defendant that his waiver of the right to appeal was invalid because the perfunctory inquiry made by Supreme 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 Brown*, 296 AD2d 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164). We nevertheless conclude, however, that the resentence is not unduly harsh or severe.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

93

KA 10-01029

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON L. DAVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NANCY GILLIGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 9, 2010. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree, criminal sexual act in the first degree and robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of kidnapping in the second degree (Penal Law § 135.20), criminal sexual act in the first degree (§ 130.50 [1]) and robbery in the second degree (§ 160.10 [1]). Defendant failed to preserve for our review his contention that his plea was not knowing, voluntary and intelligent because Supreme Court imposed a longer period of postrelease supervision (PRS) than it promised at the time of the plea. Contrary to defendant's further contention, preservation is required. The record establishes that "defendant was advised of what the sentence would be, including its PRS term, at the outset of the sentencing proceeding. Because defendant could have sought relief from the sentencing court in advance of the sentence's imposition, [the] rationale [of *People v Louree* (8 NY3d 541, 546)] for dispensing with the preservation requirement is not presently applicable" (*People v Murray*, 15 NY3d 725, 727; *see People v Peque*, 22 NY3d 168, ___ [Nov. 19, 2013]).

Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Williams*, 46 AD3d 1424, 1425; *People v Whipple*, 37 AD3d 1148, 1148, *lv denied* 8 NY3d 928), we nevertheless conclude that the sentence is not unduly

harsh or severe.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

98

KA 09-02480

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES M. LEISTMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered September 25, 2009. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Monroe County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), defendant contends that the plea was involuntary because County Court failed to inform him that a period of postrelease supervision (PRS) would be imposed. Although defendant failed to move to withdraw the plea or to vacate the judgment of conviction, it is well settled that, " 'where a trial judge does not fulfill the obligation to advise a defendant of [PRS] during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion' " (*People v Cornell*, 16 NY3d 801, 802; *see People v Boyd*, 12 NY3d 390, 393). It is also well settled that the court "has the constitutional duty to advise a defendant of the direct consequences of a guilty plea, including any period of [PRS] that will be imposed as part of the sentence," and " '[t]he failure of a court to advise of [PRS] requires reversal of the conviction' " (*Cornell*, 16 NY3d at 802, quoting *People v Catu*, 4 NY3d 242, 245). Here, as the People correctly concede, the record does not establish that the court advised defendant when he pleaded guilty that the sentence would include a period of PRS. To the contrary, the record establishes that the People indicated that they would request a sentence of at least 10 years in prison, and the

court made no sentence promise other than to indicate that defendant "will be sentenced to state prison." Because the court "failed to advise defendant prior to the entry of the plea that his sentence would include a period of postrelease supervision, . . . his plea was not knowingly, voluntarily and intelligently entered" (*People v Rajab*, 79 AD3d 1718, 1719; *see People v Hill*, 9 NY3d 189, 191-192, *cert denied* 553 US 1048; *Catu*, 4 NY3d at 245). We therefore reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings on the indictment.

Defendant's remaining contentions are moot in light of our determination.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

102

CA 13-00681

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

PIONEER WAREHOUSING AND DISTRIBUTION, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

RITE AID OF NEW YORK, INC., DEFENDANT-APPELLANT.

RAVEN & KOLBE, LLP, NEW YORK CITY (MICHAEL T. GLEASON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOLARO, FETTER, GRIZANTI, MCGOUGH & KING, P.C., SYRACUSE (CHAIM J. JAFFE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered October 29, 2012. The order and judgment, among other things, granted plaintiff's motion for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

106

CA 13-01312

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

ROBERT F. OLCZAK AND DIANE OLCZAK,
PLAINTIFFS-RESPONDENTS,

V ORDER

NIACET CORPORATION, DEFENDANT-APPELLANT.

DAMON MOREY LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS, LLC, BUFFALO (MICHAEL C. LANCER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 5, 2012 in a personal injury action. The order granted the motion of plaintiffs for partial summary judgment on liability pursuant to Labor Law § 240 (1).

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

107

CA 13-01246

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

REGINA KIMBLE, PLAINTIFF-RESPONDENT,

V ORDER

LAMONT V. BARNES, SALVATORE J. TABBI,
STEVEN WILLIAMS, DEFENDANTS-RESPONDENTS,
BEST AUTO SALES AND SERVICES, INC.,
DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

BARTH SULLIVAN BEHR, BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (SARA T. WALLITT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (CHAD E. MURRAY OF COUNSEL), FOR DEFENDANT-RESPONDENT LAMONT V. BARNES.

Appeal from an order of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), entered October 4, 2012 in a personal injury action. The order, among other things, denied the cross motion of defendant Best Auto Sales and Services, Inc. for summary judgment dismissing the amended complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

108

KA 13-00022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELJAE HILL, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE 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 Onondaga County Court (John H. Crandall, A.J.), dated December 19, 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 reversed on the law and the matter is remitted to Onondaga County Court for a hearing pursuant to CPL 440.30 (5).

Memorandum: We agree with defendant that County Court erred in denying without a hearing his motion pursuant to CPL 440.10 to vacate his judgment of conviction on the ground that his plea was not knowingly, voluntarily or intelligently entered because he did not receive effective assistance of counsel. Defendant's submissions "tend[ ] to substantiate all the essential facts" necessary to support his claim of ineffective assistance of counsel (CPL 440.30 [4] [b]). Moreover, his allegations are not contradicted by a court record and are supported by other affidavits, and "it cannot be said that 'there is no reasonable possibility that [they are] true' " (*People v Beach*, 186 AD2d 935, 936, quoting CPL 440.30 [4] [d] [ii]). Specifically, defendant averred that defense counsel advised him that, if he pleaded guilty and cooperated with the District Attorney's office in its investigation of other criminal matters, he would receive a sentence of no more than five years of incarceration. Three other people averred that defense counsel told defendant's fiancé, mother and father that defendant would receive "no more than" a five-year sentence. At the time of the plea, the court informed defendant that the agreed-upon sentence was a term of incarceration of 10 years, but noted that it would approve a lesser sentence if one were recommended by the People "based upon any cooperation [from defendant that the People] deem[ed] satisfactory and helpful." After defendant met with representatives of the District Attorney's office to fulfill his

obligation under the cooperation agreement, the court sentenced him to a term of incarceration of 10 years. According to defendant, defense counsel miscommunicated to him the level of cooperation necessary for the People to recommend a lesser sentence and misled him concerning what his sentence would be if he entered a plea to the indictment. The affidavits submitted by defendant in support of the motion raise factual issues that require a hearing (*see* CPL 440.30 [5]; *People v Frazier*, 87 AD3d 1350, 1351). Consequently, we reverse the order and remit the matter to County Court to conduct a hearing on defendant's motion.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

109

KA 09-02645

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MICHAEL B. BARKSDALE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Brian M. McCarthy, J.), rendered December 4, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and criminal mischief in the second degree.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

112

KA 12-02203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM WEBSTER, DEFENDANT-APPELLANT.

KATHLEEN P. REARDON, ROCHESTER, FOR DEFENDANT-APPELLANT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered October 9, 2012. The judgment convicted defendant, upon a jury verdict, of failure to register as a sex offender.

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 failure to register as a sex offender (Correction Law §§ 168-f [4]; 168-t). Defendant failed to preserve for our review his contention that County Court improperly permitted the prosecutor to question a defense witness concerning the witness's adjudication as a youthful offender (*see* CPL 470.05 [2]; *see generally People v Murray*, 17 AD3d 1042, 1043, *lv denied* 5 NY3d 792), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention, we conclude that the evidence, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the People's witnesses and to reject the conflicting testimony of the defense witnesses (*see People v Moore*, 227 AD2d 227, 227, *lv denied* 88 NY2d 990). Finally, we have considered the alleged deficiencies in defense counsel's performance and conclude that defendant received meaningful

representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

113

KA 12-00022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILMON VINCENT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 2, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver of the right to appeal encompasses his challenge to the severity of the bargained-for sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

118

KAH 12-00123

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MITCHELL MONTGOMERY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DALE ARTUS, SUPERINTENDENT, GOWANDA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered November 29, 2011 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the ground that he was improperly sentenced as a persistent violent felony offender on his 1998 conviction of burglary in the second degree (Penal Law § 140.25 [2]). We conclude that Supreme Court properly denied the petition. "Habeas corpus relief is unavailable because petitioner's contention[s] in support of the petition 'could have been . . . raised on direct appeal or by a motion pursuant to CPL article 440' " (*People ex rel. Lewis v Graham*, 96 AD3d 1423, 1423, *lv denied* 19 NY3d 813; *see People ex rel. Martinez v Graham*, 98 AD3d 1312, 1312, *lv denied* 20 NY3d 853; *People ex rel. Lanfair v Corcoran*, 60 AD3d 1351, 1351, *lv denied* 12 NY3d 714).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

119

CA 13-01201

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

RAFAEL URENA, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 109727.)

SIM & RECORD, BAYSIDE (SANG J. SIM OF COUNSEL), FOR CLAIMANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Christopher J. McCarthy, J.), entered September 10, 2012. The order granted the motion of defendant for summary judgment dismissing the claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at the Court of Claims.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

123

CA 13-00232

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

IN THE MATTER OF SAMUEL ABDUL-JABBAR,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 15, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

126

CA 13-00316

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

IN THE MATTER OF DARYL KNICKERBOCKER,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 20, 2012 in a CPLR article 78 proceeding. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

129

KA 12-00704

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CURTIS MIDDLEBROOKS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

CURTIS MIDDLEBROOKS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 19, 2011. Defendant was resentenced by imposing a term of postrelease supervision.

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

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

130

KA 09-01581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH MARTINEZ, JR., DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 1, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, rape 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: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), rape in the second degree (§ 130.30 [1]), and two counts of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959). In any event, his contention is without merit. In explaining what the victim had to go through after disclosing the abuse, the prosecutor stated that the victim had spoken with different agencies after she made her initial disclosure, she underwent a genital exam, and she appeared before the grand jury and at trial. Contrary to defendant's contention, the prosecutor did not state that the victim had made prior statements that were consistent with her trial testimony. Moreover, the prosecutor's remarks were a fair response to defense counsel's theory that the victim had fabricated the allegations (*see generally People v Santana*, 55 AD3d 1338, 1339, *lv denied* 12 NY3d 762). Next, the prosecutor's remark about defense counsel's probable response if the victim had been crying on the witness stand was also a fair response to defense counsel's remarks on summation, in which he was critical of the victim's lack of affect when testifying (*see generally People v Spivey*, 305 AD2d 135, 135, *lv denied* 100 NY2d 587). The prosecutor's remarks that there was "no custody battle" and that the victim did not

have a previous genital examination were fair comment on the evidence (*see generally People v McCauley*, 19 AD3d 1130, 1131, *lv denied* 5 NY3d 808).

We reject defendant's contention that he was denied effective assistance of counsel. To the extent that defendant contends that defense counsel was ineffective for failing to object to the prosecutor's remarks during summation, that contention is without merit inasmuch as the prosecutor's comments did not constitute prosecutorial misconduct (*see People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806). We further conclude that defendant failed to show that an objection to the testimony of the medical expert would have been successful (*see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence, the law, and the circumstances of this case in totality and at the time of representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's contention that the order of protection should be modified to take into account jail time credit is not preserved for our review (*see People v Hoyt*, 107 AD3d 1426, 1426, *lv denied* 21 NY3d 1042; *see generally People v Nieves*, 2 NY3d 310, 315-317). In any event, that contention is without merit inasmuch as the expiration date of the order of protection could have been significantly longer if Supreme Court had included the period of postrelease supervision when calculating the maximum expiration date of the "determinate sentence of imprisonment actually imposed" (CPL former 530.12 [5] [ii]), as it could have (*see People v Williams*, 19 NY3d 100, 103-104).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

133

KA 12-01360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN ESTEVEZ-SANTOS, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered September, 20, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal use of a firearm in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal use of a firearm in the second degree (Penal Law § 265.08 [2]). "Defendant did not move to withdraw the plea or to vacate the judgment of conviction and thus his contention that the plea was not knowingly, voluntarily and intelligently entered is not preserved for our review" (*People v Anderson*, 34 AD3d 1318, 1318, *lv denied* 8 NY3d 843). Contrary to defendant's further contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

134

CAF 12-01140

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

IN THE MATTER OF ALISA E.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WENDY F., RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

DAVID J. MORRIS, COUNTY ATTORNEY, GENESEO (WENDY S. SISSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered June 8, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked a suspended judgment and terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order revoking a suspended judgment pursuant to Family Court Act § 633 and terminating her parental rights with respect to her daughter. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the mother violated the terms and conditions of the suspended judgment (*see Matter of Giovanni K. [Dawn K.]*, 68 AD3d 1766, 1767-1768, *lv denied* 14 NY3d 707). Petitioner established that the mother failed to obtain suitable housing until after the violation petition was filed and that she withdrew or limited releases for information from programs that she attended. Although the mother testified that she had completed several programs, she failed to provide verification that she completed the programs and admitted that she did not know whether petitioner had approved those programs. Petitioner established by a preponderance of the evidence that the mother continued to live at her parents' house, to which petitioner had been denied access to make an assessment of whether it would be an appropriate home for the child to visit, and we note that Family Court's determination that the mother's testimony that she was living in the apartment that she rented was not credible is entitled to great weight (*see Matter of Baron C. [Dominique C.]*, 101 AD3d 1622, 1622). It is well established that a hearing on a petition alleging that the

terms of a suspended judgment have been violated is part of the dispositional phase of the permanent neglect proceeding, and that the disposition shall be based on the best interests of the child (*see Matter of Richelis S. [Richard S.]*, 68 AD3d 1643, 1644-1645, *appeal dismissed* 14 NY3d 767). We conclude that the record supports the court's determination that termination of the mother's rights is in the best interests of the child (*see Matter of Mercedes L. [Constance L.]*, 12 AD3d 1184, 1184).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

135

CAF 12-01187

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

IN THE MATTER OF SABRINA CAMPBELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARGARET JANUARY, RESPONDENT-RESPONDENT,
AND BENNIE CARTER, SR., RESPONDENT-APPELLANT.

MARK D. FUNK, ROCHESTER, FOR RESPONDENT-APPELLANT.

SERCU & SERCU LLP, PITTSFORD (LARA R. BADAIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

M. THOMAS SCOTT & ASSOCIATES, GRAND ISLAND (MARY THOMAS SCOTT OF COUNSEL), FOR RESPONDENT-RESPONDENT.

SANFORD A. CHURCH, ATTORNEY FOR THE CHILD, ALBION.

Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered May 15, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject child to petitioner.

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

Memorandum: On appeal from an order granting sole custody of the subject child to petitioner, a nonparent, respondent father contends that there was no showing of extraordinary circumstances. We reject that contention. It is well settled that, "as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544; *see Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147). Here, the record establishes that respondent mother placed the child with petitioner just days after his birth in February 2010, and the father disputed that he was the father of the child even after receiving the results of a DNA test confirming that he was. The father did not seek custody of the child until the child was almost one year old, after an order of filiation was entered. The father visited the child for the first time in January or February 2012, and had only six or seven visits before he stopped

attending when the visits were moved to petitioner's home around April 2012. The child has significant medical conditions and special needs requiring various forms of treatment, and the father demonstrated that he has no interest in learning about the child's conditions and needs and how to treat them (*see Matter of Brault v Smugorzewski*, 68 AD3d 1819, 1819; *Matter of Ronald I. v James J.*, 53 AD3d 706, 707). We therefore agree with Family Court that extraordinary circumstances were present here. We note that the father additionally contends that the court improperly shifted the burden of proof to him to establish extraordinary circumstances when it ordered him to present his proof first. That contention is not preserved for our review (*see Matter of Canfield v McCree*, 90 AD3d 1653, 1653-1654), and is without merit in any event. The court's determination establishes that it was aware that petitioner "bore the burden of proof regardless of the order of presentation" of the proof (*Matter of Scala v Parker*, 304 AD2d 858, 859).

Contrary to the father's further contention, the court did not err in ordering supervised visitation. Courts have broad discretion in determining whether visits should be supervised, and we conclude that there is a sound and substantial basis in the record to support the court's determination (*see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). The father is presently unable to address the child's medical conditions and special needs due to his inability to understand them or his indifference to them.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

137

CA 13-01150

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

IN THE MATTER OF SMALL SMILES LITIGATION

KELLY VARANO, AS PARENT AND NATURAL GUARDIAN OF INFANT JEREMY BOHN, SHANNON FROIO, AS PARENT AND NATURAL GUARDIAN OF INFANT SHAWN DARLING, BRENDA FORTINO, AS PARENT AND NATURAL GUARDIAN OF INFANT JULIE FORTINO, MARIE MARTIN, AS PARENT AND NATURAL GUARDIAN OF INFANT KENNETH KENYON, JENNY LYNN COWHER, AS PARENT AND NATURAL GUARDIAN OF INFANT WILLIAM MARTIN, HOLLAN CRIPPEN, AS PARENT AND NATURAL GUARDIAN OF INFANT DEVAN MATHEWS, JESSICA RECORE, AS PARENT AND NATURAL GUARDIAN OF INFANT SAMANTHA MCLOUGHLIN, LAURIE RIZZO AND DOMINICK RIZZO, AS LEGAL CUSTODIANS OF INFANT JACOB MCMAHON, JASON MONTANYE, AS PARENT AND NATURAL GUARDIAN OF INFANT KADEM MONTANYE AND FRANCES SHELLINGS, AS PARENT AND NATURAL GUARDIAN OF INFANT RAYNE SHELLINGS, PLAINTIFFS-RESPONDENTS,

V ORDER

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, ET AL., DEFENDANTS, NAVEED AMAN, D.D.S., KOURY BONDS, D.D.S., TAREK ELSAFTY, D.D.S., AND YAQOOB KHAN, D.D.S., DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

SHANTEL JOHNSON, AS PARENT AND NATURAL GUARDIAN OF INFANT KEVIN BUTLER, VERONICA ROBINSON, AS PARENT AND NATURAL GUARDIAN OF INFANT ARIANA FLORES, DEMITA GARRETT, AS PARENT AND NATURAL GUARDIAN OF INFANT I'YANA GARCIA SANTOS, KATHRYN JUSTICE, AS PARENT AND NATURAL GUARDIAN OF INFANT BREYONNA HOWARD, ELIZABETH LORRAINE, AS PARENT AND NATURAL GUARDIAN OF INFANT SHILOH LORRAINE, JR., LAPORSHA SHAW, AS PARENT AND NATURAL GUARDIAN OF INFANT ALEXIS PARKER, ROBERT RALSTON, AS PARENT AND NATURAL GUARDIAN OF INFANT BRANDIE RALSTON, KATRICE MARSHALL, AS PARENT AND NATURAL GUARDIAN OF INFANT LESANA ROSS, TIFFANY HENTON, AS PARENT AND NATURAL GUARDIAN OF INFANT COREY SMITH AND JANET TABER, AS PARENT AND NATURAL GUARDIAN OF INFANT JON TABER, PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, ET AL., DEFENDANTS, SHILPA AGADI, D.D.S., KOURY BONDS, D.D.S., ISMATU KAMARA, D.D.S., SONNY KHANNA, D.D.S., AND KIM PHAM, D.D.S., DEFENDANTS-APPELLANTS.
(ACTION NO. 2.)

TIMOTHY ANGUS, AS PARENT AND NATURAL GUARDIAN OF INFANT JACOB ANGUS, JESSALYN PURCELL, AS PARENT AND NATURAL GUARDIAN OF INFANT ISAIAH BERG, BRIAN CARTER, AS PARENT AND NATURAL GUARDIAN OF INFANT BRIANA CARTER, APRIL FERGUSON, AS PARENT AND NATURAL GUARDIAN OF INFANT JOSEPH FERGUSON, SHERAIN RIVERA, AS PARENT AND NATURAL GUARDIAN OF INFANT SHADAYA GILMORE, TONYA POTTER, AS PARENT AND NATURAL GUARDIAN OF INFANT DESIRAEE HAGER, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT AALYIAROSE LABOMBARD-BLACK, NANCY WARD, AS LEGAL CUSTODIAN OF INFANT MANUEL LABORDE, JR., JENNIFER BACON, AS PARENT AND NATURAL GUARDIAN OF INFANT ASHLEY PARKER AND COURTNEY CONRAD, AS PARENT AND NATURAL GUARDIAN OF INFANT ZAKARY WILSON, PLAINTIFFS-RESPONDENTS,

V

FORBA HOLDINGS, LLC, NOW KNOWN AS CHURCH STREET HEALTH MANAGEMENT, LLC, ET AL., DEFENDANTS, MAZIAR IZADI, D.D.S., JUDITH MORI, D.D.S., EDMISE FORESTAL, D.D.S., EVAN GOLDSTEIN, D.D.S., KEERTHI GOLLA, D.D.S., AND NASSEF LANCEN, D.D.S., DEFENDANTS-APPELLANTS.
(ACTION NO. 3.)

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, ALBANY (MELISSA A. MURPHY-PETROS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 29, 2012. The order sua sponte adopted the recommendations of a referee, which largely rejected the objections of defendants-appellants to plaintiffs' discovery responses.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Sholes v Meagher*, 100 NY2d 333, 335).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

140

CA 13-01107

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

IN THE MATTER OF ARBITRATION BETWEEN NIAGARA FRONTIER TRANSPORTATION AUTHORITY, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1949, RESPONDENT-RESPONDENT.

DAVID J. STATE, BUFFALO (WAYNE R. GRADL OF COUNSEL), FOR PETITIONER-APPELLANT.

W. JAMES SCHWAN, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 20, 2012 in a proceeding pursuant to CPLR article 75. The order denied the petition seeking a permanent stay of arbitration.

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

Memorandum: Supreme Court properly denied the petition seeking a permanent stay of arbitration pursuant to CPLR 7503 (b). Contrary to petitioner's contention, a stay was not warranted on the ground of res judicata. The prior arbitration between the parties did not involve the same claim, and therefore res judicata, or claim preclusion, is not applicable (*see generally Xiao Yang Chen v Fischer*, 6 NY3d 94, 100). Insofar as petitioner contends that the prior arbitration involved the same issue and thereby contends that collateral estoppel, or issue preclusion, applies (*see generally Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349), we note that it is for the arbitrator to determine "[t]he effect, if any, to be given to [that] earlier arbitration award" (*Matter of City Sch. Dist. of City of Tonawanda v Tonawanda Educ. Assn.*, 63 NY2d 846, 848; *see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534-535). We reject petitioner's further contention that the arbitration should be permanently stayed as a matter of public policy (*see Matter of Village of Johnson City [Johnson City Firefighters Assn., Local 921 IAFF]*, 75 AD3d 817, 818; *see generally Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 138-

140).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

141

CA 13-01247

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

DANYELLE KRAMER, AS PARENT AND NATURAL GUARDIAN
OF LINCOLN LAW, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN GRIECO, JR., MICHAEL A. RUDA, SABRA A. RUDA,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

LOTEMPIO & BROWN, P.C., BUFFALO (RAFAEL O. GOMEZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANT-RESPONDENT JOHN GRIECO, JR.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 17, 2012 in a personal injury action. The order and judgment granted defendant John Grieco, Jr.'s motion for summary judgment dismissing the second amended complaint against him.

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

Memorandum: Plaintiff, as parent and natural guardian of her son, commenced this action on behalf of her son, seeking damages for injuries he allegedly sustained as the result of his exposure to lead paint in an apartment rented by plaintiff from John Grieco, Jr. (defendant). Supreme Court properly granted defendant's motion for summary judgment dismissing the second amended complaint against him.

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646; *see Stokely v Wright*, 111 AD3d 1382, 1382). Plaintiff does not contend that defendant had actual notice of the dangerous condition at issue and, with respect to constructive notice, we note that the Court of Appeals in *Chapman v Silber* (97 NY2d 9, 15) wrote that constructive notice of a hazardous, lead-based paint condition may be established by proof "that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a

time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment."

Even assuming, arguendo, that defendant failed to meet his initial burden of establishing that there is no triable issue of fact with respect to the fourth *Chapman* factor, i.e., the knowledge of hazards factor (*see generally Jackson v Brown*, 26 AD3d 804, 805), we conclude that defendant met his burden with respect to the first and third *Chapman* factors, i.e., the right of entry factor and the peeling paint factor, and that plaintiff failed to raise an issue of fact in opposition thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

155

CAF 13-00973

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

IN THE MATTER OF ELAINE WOLF,
PETITIONER-APPELLANT,

V ORDER

JOSHUA STEINBERG, RESPONDENT-RESPONDENT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR PETITIONER-APPELLANT.

GRENIS LAW FIRM, SYRACUSE (PETER SIMON GRENIS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JUDITH A. MAYNE, ATTORNEY FOR THE CHILD, BALDWINSVILLE.

Appeal from an order of the Family Court, Onondaga County (David J. Roman, J.H.O.), entered August 28, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking permission to relocate the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 11 and 28, 2013 and by the Attorney for the Child on October 23, 2013,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

156

CA 12-02065

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

ALOKE CHAUDHURI, PLAINTIFF-APPELLANT,

V ORDER

KEITH P. GREEN, INDIVIDUALLY AND IN HIS CAPACITY AS A DEPUTY SHERIFF, COUNTY OF ONTARIO, M.J. HALPIN, INDIVIDUALLY AND IN HIS CAPACITY AS A DEPUTY SHERIFF, COUNTY OF ONTARIO, PHILLIP C. POVERO, SHERIFF, COUNTY OF ONTARIO, AND COUNTY OF ONTARIO, DEFENDANTS-RESPONDENTS.

VAN HENRI WHITE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

JOHN W. PARK, COUNTY ATTORNEY, CANANDAIGUA (MICHAEL G. REINHARDT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered February 6, 2012. The order denied plaintiff's motion to reargue his opposition to defendants' prior summary judgment motion.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

157

CA 13-00230

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

IN THE MATTER OF DAVID ECHEVARRIA,
PETITIONER-APPELLANT,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered September 20, 2012 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

176

CA 13-00950

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

EDWARD S. KALFAS, PLAINTIFF-APPELLANT,

V ORDER

TRACIE LYNN KALFAS, DEFENDANT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LENHARDT & SMITH, WILLIAMSVILLE (CLAYTON J. LENHARDT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered July 23, 2012 in a divorce action. The judgment, among other things, dissolved the marriage between the parties and distributed the marital debts and assets.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

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

177

CA 13-01122

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

DELVIR, LLC, PLAINTIFF-APPELLANT,

V ORDER

TRM ARCHITECTURE, DESIGN & PLANNING, P.C.,
DEFENDANT-RESPONDENT.

THE KNOER GROUP, PLLC, BUFFALO (CHANEL T. MCCARTHY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARK DAVIS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 10, 2011. The order denied the motion of plaintiff for, inter alia, summary judgment dismissing the counterclaims and declaring that defendant's mechanic's lien is void.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: February 7, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1945/90) KA 02-01501. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL MCKINNEY, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1078/99) KA 97-00568. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK D'ANTUONO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1690/03) KA 01-01186. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEX NANCE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (738/07) KA 03-00814. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT A. GRIFFIN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1006/08) KA 07-00713. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JARVIS LASSALLE, 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, County Court erred in failing to advise defendant prior to the entry of his plea that his sentence would include a period of postrelease supervision. Upon our review of the motion papers, we conclude that the issue may have merit. Therefore, the order of October 3, 2008 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 May 23, 2014. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND LINDLEY, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (212/09) KA 07-01644. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN L. ALLPORT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (579/10) KA 08-01906. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DERRICK R. FULTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, LINDLEY, AND SCONIERS, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (434/12) KA 10-01638. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PHILLIP HOLLOWAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (367/13) KA 11-00641. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RONDULA LANE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, CARNI, AND SCONIERS, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (910/13) CA 12-01497. -- PHILLIP DEL NERO, PLAINTIFF-APPELLANT, V MARK COLVIN, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (911/13) CA 12-01639. -- PHILLIP DEL NERO, PLAINTIFF-APPELLANT, V MARK COLVIN, DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1040/13) CA 12-01806. -- CHERYL FOLEY AND WILLIAM FOLEY, PLAINTIFFS-RESPONDENTS, V WEST-HERR FORD, INC., ET AL., DEFENDANTS. TIMOTHY B. HOWARD, SHERIFF, COUNTY OF ERIE, APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND LINDLEY, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1082/13) CA 13-00515. -- MARY BETH DEJOHN, PLAINTIFF-RESPONDENT, V SPEECH, LANGUAGE & COMMUNICATION ASSOCIATES, SLP, OT, PT, PLLC, TAMI D. TREUTLIEN AND SCOTT TREUTLIEN, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied.

PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1088/13) CA 12-02386. -- PRICE TRUCKING CORP., FOR ITSELF AND ALL OTHER SIMILARLY SITUATED TRUST FUND BENEFICIARIES OF CERTAIN TRUST FUNDS PURSUANT TO NEW YORK LIEN LAW ARTICLE 3-A, PLAINTIFF-RESPONDENT, V AAA ENVIRONMENTAL, INC., ENVIRITE OF OHIO, INC., AND MIKE LINA PAVING, INC., DEFENDANTS-RESPONDENTS, FIRST NIAGARA BANK, N.A., DEFENDANT-APPELLANT, NORAMPAC INDUSTRIES, INC., ET AL., DEFENDANTS. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1148/13) CA 13-00572. -- IN THE MATTER OF GERALD STROBEL, FAITH STROBEL, JAMES COLLINS, PATRICIA COLLINS, FREDERICK MINTER AND BARBARA MINTER, PETITIONERS-APPELLANTS, V NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, TOWN OF CLARENCE, ERIE COUNTY DEPARTMENT OF HEALTH, JAMES BUONO AND KELLI BUONO, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1191/13) CA 13-00362. -- KATHLEEN NASCA AND ANTHONY NASCA, PLAINTIFFS-APPELLANTS, V MARK LOUIS DELMONTE, DOING BUSINESS AS NIAGARA CHIROPRACTIC OFFICE (FORMERLY INCORRECTLY SUED HEREIN AS "NIAGARA CHIROPRACTIC"), DEFENDANT-RESPONDENT, ET AL., DEFENDANT. -- Motion for

reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1192/13) CA 13-00029. -- JOSHUA MORRIS AND JESSICA MORRIS, PLAINTIFFS-APPELLANTS, V TOWN OF LOCKE AND TOWN OF LANSING, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, FAHEY, CARNI, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1209/13) CA 12-01352. -- MANUEL MARTINEZ, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 119899.) (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1210/13) CA 12-01353. -- MANUEL MARTINEZ, CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 119899.) (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1253/13) CA 13-00517. -- CHARTER ONE BANK, FSB, SUCCESSOR BY MERGER TO ALBANK, FSB, PLAINTIFF-RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT:

SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1254/13) CA 13-00518. -- CHARTER ONE BANK, FSB, SUCCESSOR BY MERGER TO ALBANK, FSB, PLAINTIFF-RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

MOTION NO. (1255/13) CA 12-02062. -- CHARTER ONE BANK, FSB, SUCCESSOR BY MERGER TO ALBANK, FSB, PLAINTIFF-RESPONDENT, V RICHARD F. MILLS, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Feb. 7, 2014.)

KA 10-01773. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TOBY AMBRIATI, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Livingston County Court, Dennis S. Cohen, J. - Attempted Robbery, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

KA 13-01144. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARTIN

A. CALLOWAY, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Cayuga County Court, Thomas G. Leone, J. - Promoting Prison Contraband, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

KA 12-01695. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARYL CATES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Supreme Court, Erie County, Christopher J. Burns, J. - Aggravated Criminal Contempt). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

KA 13-00799. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RODNEY DINGLE, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Wyoming County Court, Mark H. Dadd, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)

KA 13-00032. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LUIS RODRIGUEZ-FLAMENCO, ALSO KNOWN AS ROBERTO C. VEGA-RIVERA, ALSO KNOWN AS

JUAN CARLOS-RIVERIA, ALSO KNOWN AS LUIS RODRIGUES, ALSO KNOWN AS KALIMBA, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Orleans County Court, James P. Punch, J. - Murder, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, FAHEY, CARNI, AND VALENTINO, JJ. (Filed Feb. 7, 2014.)