SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 27, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Manzanet-Daniels, Tom, Kapnick, Moulton, JJ.

9100 Reinaldo Rodriguez, as Voluntary Administrator of the Estate of Eneida Rodriguez, deceased,
Plaintiff-Appellant,

-against-

River Valley Care Center, Inc., et al.,
Defendants-Respondents.

Index 27889/16E

Parker Waichman, LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, Valhalla (Rebecca A. Barrett of counsel), for River Valley Care Center, Inc., respondent.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Gracie Square Hospital, respondent.

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered July 28, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(3) based on plaintiff's lack of capacity to enforce decedent's personal injury and wrongful death claims, and denied plaintiff's cross motion to amend the caption and complaint to recognize him as administrator of

decedent's estate, unanimously reversed, on the law, without costs, defendants' motions denied, and plaintiff's cross motion granted.

Plaintiff Reinaldo Rodriguez, decedent Eneida Rodriguez's son, timely commenced a prior action for personal injuries, medical malpractice and wrongful death against defendants River Valley Care Center, Inc. (the nursing home) and Gracie River Hospital (the hospital) in his capacity as "proposed administrator" of decedent's estate. By order dated May 26, 2016 and entered June 1, 2016, the court granted the nursing home's motion to dismiss the action pursuant to CPLR 3211(a)(3), for lack of capacity, since letters of administration had not been issued authorizing plaintiff to bring suit on behalf of the estate. By order entered October 26, 2016, the court granted the hospital's motion to dismiss the remaining claims pursuant to CPLR 3211(a)(3).

On or about November 21, 2016, plaintiff commenced this essentially identical action as "voluntary administrator" of the estate. The nursing home moved and the hospital cross-moved to dismiss the complaint pursuant to CPLR 3211(a)(3), again arguing that plaintiff lacked the legal capacity to assert the claims on behalf of the estate. On April 18, 2017, less than six months

after the remaining claims against the hospital were dismissed in the prior action, Surrogate's Court issued letters of administration to plaintiff. Accordingly, plaintiff opposed defendants' motions, arguing that they should be denied because letters of administration had been issued, and cross-moved pursuant to CPLR 3025(b) to amend the caption and pleadings to recognize him as administrator. The court, finding that the prior action was terminated by the May 2016 order, granted defendants' motions to dismiss.

On appeal, plaintiff argues for the first time that the prior action was finally terminated when the October 2016 order granting the hospital's motion was issued, so that the court used the wrong date to calculate when the six-month savings period under CPLR 205(a) began to run. We will consider this argument, since it raises a legal question appearing on the face of the record which could not have been avoided (*see Rojas-Wassil v Villalona*, 114 AD3d 517, 517-518 [1st Dept 2014]; *Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]).

While plaintiff, as voluntary administrator, lacked the legal capacity to enforce decedent's personal injury and wrongful death claims on behalf of the estate in this second action

(Surrogate's Court Procedure Act § 1306[3]; *Carrick v Central Gen. Hosp.*, 51 NY2d 242 [1980]), he could remedy this defect by obtaining letters of administration within the six-month savings period provided under CPLR 205(a) (*see Snodgrass v Professional Radiology*, 50 AD3d 883, 884-885 [2d Dept 2008]; *Bernardez v City of New York*, 100 AD2d 798, 799-800 [1st Dept 1984]). In applying CPLR 205(a), we bear in mind that it is designed to ameliorate the potentially "harsh consequence of applying a limitations period where the defending party has had timely notice of the action" (*Malay v City of Syracuse*, 25 NY3d 323, 327 [2015]). Because the first action was finally terminated on October 18, 2016, and the letters of administration were issued on April 18,

2017, on the last day of the six-month savings period (CPLR 205[a]), plaintiff timely obtained legal capacity to pursue the claims in this action.

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

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

ENTERED: AUGUST 27, 2019

DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Oing, Moulton, JJ.

8386 Stephanie Yutkin, etc., et al., Index 104384/10
Plaintiffs-Appellants-Respondents,

-against-

George A. Fielding, M.D., et al.,
Defendants-Respondents.
- - - - -
Susie Chung, M.D., et al.,
Defendants-Respondents-Appellants,

N.Y.U. Hospitals Center, et al.,
Defendants-Respondents,

Sydney J. Mehl, M.D., et al.,
Defendants.

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Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Alice Schlesinger, J.), entered on or about January 5, 2017,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 16, 2019,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: AUGUST 27, 2019

Margaret Sowal
DEPUTY CLERK

Renwick, J.P., Manzanet-Daniels, Kahn, Moulton, JJ.

9407- Index 161367/15
9408 Marie Napoli, 161423/15
Plaintiff-Appellant,

-against-

New York Post, et al.,
Defendants-Respondents.

- - - - -

Marie Kaiser Napoli,
Plaintiff-Respondent-Appellant,

-against-

Marc Jay Bern, et al.,
Defendants-Appellants-Respondents.

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Napoli Shkolnik PLLC, Melville (Marie Napoli and Salvatore C. Badala of counsel), for appellant/respondent-appellant.

Nixon Peabody LLP, Jericho (Santo Borruso of counsel), for Marc Jay Bern, The Parkside Group, LLC, and Brian Brick, appellants-respondents.

Farrell Fritz, P.C., Uniondale (James M. Wicks of counsel), for Clifford S. Robert, appellant-respondent.

Davis Wright Tremaine LLP, New York (Laura R. Handman of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn Freed, J.), entered November 9, 2015, which, to the extent appealed from as limited by the briefs, granted the New York Post defendants' motion to dismiss the amended complaint, unanimously affirmed, without costs. Order, same court (Carmen Victoria St. George,

J.), entered August 14, 2018, which, to the extent appealed from as limited by the briefs, denied that part of the Bern defendants' motion to dismiss plaintiff's claims for defamation and prima facie tort against the Bern defendants and breach of fiduciary duty as against Marc Jay Bern individually, unanimously affirmed, without costs.

The court properly dismissed plaintiff's claims against the New York Post defendants. The allegedly defamatory statements appearing in various news articles essentially summarize or restate the allegations in judicial filings in a case related to plaintiff, so they are protected by Civil Rights Law § 74 (*see McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]). The court correctly held that plaintiff failed to adequately allege that the Post defendants participated in drafting the purported "sham" filings in that action (*see Williams v Williams*, 23 NY2d 592, 599 [1969]).

The court properly determined that the Post defendants' reporting of the contents of an email concerning third-party conversations mentioning plaintiff were not actionable (*see generally Brian v Richardson*, 87 NY2d 46, 51-52 [1995]). The court also properly found that the intentional infliction of emotional distress claim was duplicative since the underlying

allegations fall within the ambit of the defamation causes of action (*see Akpinar v Moran*, 83 AD3d 458, 459 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]), and that plaintiff failed to allege that she was placed in physical danger or was caused to fear for her personal safety as a result of the Post defendants' conduct in support of her negligent infliction of emotional distress claim (*see Ferreyr v Soros*, 116 AD3d 407 [1st Dept 2014]).

The court in the *Bern* action properly determined that collateral estoppel does not apply to bar plaintiff's defamation claims against the Bern defendants. The issues raised in the *Bern* action, in which plaintiff claims that the Bern defendants made sham filings and circulated them to the press for the sole purpose of defamation, differ from those raised in the *New York Post* action, in which plaintiff alleges that the New York Post defamed her by reporting on those filings (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]). The court also properly determined that issues of fact remained as to whether the litigation privilege extended to the Bern defendants' court filings (*see Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]). The court properly sustained plaintiff's prima facie tort cause of action against the Bern defendants, pleaded in the alternative, which did not rest on the same facts and

allegations supporting the alleged defamation (*see generally Curiano v Suozzi*, 63 NY2d 113, 118 [1984]). Furthermore, plaintiff's allegations that Marc Bern disclosed confidential information obtained in the course of his representation of her and disclosed documents in violation of the attorney-client privilege state a cause of action against him for breach of fiduciary duty (*see Keller v Loews Corp.*, 69 AD3d 451 [1st Dept 2010]). The court correctly found that plaintiff's allegations, along with two affidavits supporting her claim that Bern represented her sufficiently pleaded the requisite elements of a breach of fiduciary duty claim (*see Burry v Madison Park Owner LLC*, 84 AD3d 699 [1st Dept 2011]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: AUGUST 27, 2019

Margaret Soval

DEPUTY CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9432N Terence Cardinal Cooke Health Center, Index 653740/16
Plaintiff-Appellant,

-against-

Commissioner of Health of the State of New York, et al.,
Defendants-Respondents.

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Bond, Schoeneck & King, PLLC, New York (Raul A. Tabora of counsel), for appellant.

Letitia James, Attorney General, New York (Blair J. Greenwald of counsel), for respondents.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 2, 2018, which granted defendants' motion to dismiss the second cause of action, convert the action to an article 78 proceeding, and transfer the proceeding to Albany County, unanimously affirmed, without costs.

Plaintiff, a Medicaid provider, operates a health care facility in New York that includes a 50-bed "specialty hospital" that offers residential and inpatient nursing and supportive services to children and young adults with developmental disabilities. Defendant Commissioner of Health is responsible for determining and certifying rates of payment for services rendered to Medicaid recipients by "specialty hospitals"

certified by defendant Office of People with Developmental Disabilities (OPWDD). OPWDD is responsible for approving the Commissioner's rate-setting methodology. Defendant Director of the Budget is responsible for approving the Health Commissioner's Medicaid reimbursement rates.

Plaintiff alleges that defendants, in promulgating new Medicaid reimbursement rates retroactively applicable to plaintiff's speciality hospital, improperly used a new methodology for calculating Medicaid reimbursement rates that failed to include an appropriate trend (inflation) factor, as required by Public Health Law § 2808, 10 NYCRR 86-2.40, and 14 NYCRR 680.12.

In alleging violations of lawful procedures under the Public Health Law and Mental Hygiene Law, plaintiff is challenging a quasi-legislative act by defendants (*see New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 204 [1994]). "[W]here a quasi-legislative act by an administrative agency such as a rate determination is challenged on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803[3]), a proceeding in the form prescribed by article 78 can be maintained" (*id.*; at 204-205 *see also Concourse Rehabilitation*

& Nursing Ctr., Inc. v Shah, 161 AD3d 669 [1st Dept 2018], *lv denied* 32 NY3d 904 [2018]). Thus, this declaratory judgment action was correctly converted to an article 78 proceeding (*see* CPLR 103[b], [c]).

The article 78 proceeding was properly transferred from New York County to Albany County (*see* CPLR 506[b]). The record demonstrates that the Medicaid reimbursement-rate determination was made in Albany County. In addition, defendants' principal offices are located in Albany.

Supreme Court correctly granted the motion to dismiss the second cause of action, which asserts that defendants failed to comply with a statutory directive to provide plaintiff with 60 days' advance notice of the subject rate revisions. Contrary to plaintiff's position, defendants are not required to provide plaintiff with 60 days' notice of changes to the reimbursement rates applicable to plaintiff's specialty hospital, because the 60-day notice requirement of Public Health Law § 2807(7), on which plaintiff relies, applies only to a "residential health care facility," a term that does not include specialty hospitals within its scope. The term "residential health care facility" is defined as "a nursing home or a facility providing health-related service" (Public Health Law § 2801[3]), and such institutions are

certified to operate by the Department of Health (*see* 10 NYCRR 86-2.1[a]). Plaintiff's specialty hospital, by contrast, is certified by OPWDD under article 16 of the Mental Hygiene Law and is subject to OPWDD regulations governing the operation of "Specialty Hospitals" (*see* 14 NYCRR part 680). That plaintiff's specialty hospital operates alongside (and shares a mailing address with) plaintiff's nursing home does not affect our conclusion that the specialty hospital is not a "residential health care facility," given that it is undisputed (and admitted in plaintiff's brief) that the specialty hospital is a distinct unit and is separately issued an operating certificate by OPWDD.

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

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

ENTERED: AUGUST 27, 2019

DEPUTY CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9445-
9445A Arch Insurance Company for itself and as subrogee of Criterion Development Group, LLC, et al.,
Plaintiffs-Respondents,

-against-

Nationwide Property & Casualty Insurance Company, et al.,
Defendant-Appellant,

S&J Industrial Co., et al.,
Defendants.

Index 652835/14

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Kennedys CMK, New York (Ann Odelson of counsel), for appellant.

Connell Foley LLP, New York (William D. Deveau of counsel), for respondent.

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Judgment and supplemental judgment, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 12, 2017, after a nonjury trial, in favor of plaintiff and against defendant Nationwide Property and Casualty Insurance Company, unanimously affirmed, without costs.

In this insurance coverage dispute, plaintiff Arch Insurance Company seeks to recover sums it incurred in settling a personal injury action against its insureds, One Astoria Square, LLC and Criterion Development Group, LLC, the owner and contractor of a

development in Astoria (collectively, Owners).

S&J Industrial Co. (S&J) was the plumbing, sprinkler, and HVAC subcontractor on the project. Pursuant to its subcontract, S&J was required to clean up rubbish and waste caused by its operations and deposit it in designated locations or containers from which Criterion would remove it. S&J's subcontract also required it to indemnify Owners "[t]o the fullest extent permitted by law" against claims, damages, etc. for personal injury or property damage "caused in whole or in part by [S&J's] negligent acts or omissions." Additionally, S&J was required to procure insurance naming Owners as additional insureds.

Defendant Nationwide Property & Casualty Insurance Company had issued to S&J a primary commercial general liability insurance policy with a $1 million per occurrence limit. The Nationwide primary policy provided additional insured coverage to any organization that S&J agreed to add as an additional insured but only for liability "caused, in whole or in part," by S&J's acts or omissions in the performance of such work. In addition, Nationwide issued to S&J an umbrella policy with an additional $5 million limit in excess of the underlying CGL policy limits and "any other collectible insurance."

In 2009, an S&J employee, Jan Tolpa, commenced an action

(*Tolpa* action) in Supreme Court, Kings County, against Owners alleging, inter alia, common-law negligence and violations of Labor Law §§ 200 and 241(6) after he was allegedly injured on the job. Arch assigned counsel to represent Owners in the *Tolpa* action.

Arch tendered the defense and indemnification of Owners to S&J under both the primary and umbrella policies. On August 3, 2010, Nationwide accepted tender by letter, without a reservation of rights. After the *Tolpa* action settled, with Nationwide contributing the $1 million limits of its primary policy and Arch contributing $950,000, Arch commenced this action seeking to recover from Nationwide the amounts Arch had contributed.

After trial, Supreme Court properly found that the additional insured coverage available to Owners included both the $1 million primary policy "and the $5 million excess limits with respect to contractual liability which S&J had pursuant to" S&J's contractual obligation to indemnify Owners.

We find that the record establishes that the Owners were not negligent and were only vicariously liable. With regard to S&J's negligence, testimony at trial showed that the nonparty masonry subcontractor, FASA, had not been working in the basement for months prior to the accident and that S&J broke through the

masonry to perform its work. Therefore, the only party that was negligent was S&J. Accordingly, we decline to disturb Supreme Court's factual finding that "the only party who likely would have created debris that included broken cinderblocks [sic] in the basement was S&J."

Since Owners were entitled to contractual indemnification from S&J and a complete pass through of liability, the Nationwide umbrella policy issued to S&J must respond before the Arch primary policy issued to Owners (*see Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co.*, 74 AD3d 21, 26 [1st Dept 2010]; *AIU Ins. Co. v Valley Forge Ins. Co.*, 303 AD2d 325 [1st Dept 2003]).

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

ENTERED: AUGUST 27, 2019

Margaret Sarah

DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Barbara R. Kapnick
Ellen Gesmer
Peter H. Moulton, JJ.

8235 [M-5194, M-3162,
M-3322, M-3324]
Ind. 3305/15
OP 161/18

_____x

In re Samy F.,
Petitioner,

-against-

Hon. Ralph Fabrizio, JSC, Bronx County,
Respondent.

- - - - -

Darcel D. Clark,
Nonparty Respondent.
_____x

Petitioner seeks a writ of mandamus pursuant to CPLR article 78.

Janet E. Sabel, The Legal Aid Society, New York (Terri S. Rosenblatt of counsel), for petitioner.

Letitia James, Attorney General, New York (Carly Weinreb of counsel), for Hon. Ralph Fabrizio, respondent.

Darcel D. Clark, District Attorney, Bronx (James J. Wen and Nancy D. Killian of counsel), for Darcel D. Clark, respondent.

GISCHE, J.

Databanks containing DNA profiles of convicted defendants have proven to be useful and valuable tools in criminal law enforcement. They allow a DNA profile to be used by law enforcement in identifying qualifying DNA matches to unknown forensic material recovered in connection with ongoing and future criminal investigations (Executive Law §§ 995-c[3][a];[6][a]; *see also* 9 NYCRR Part 6192; *see e.g. Kellogg v Travis*, 100 NY2d 407, 410 [2003]). Since 1996, New York has maintained a state DNA index system (SDIS) for the mutual exchange, use and storage of DNA records. The storage and use of such records is subject to the provisions and requirements of Article 49-B of the Executive Law (§ 995 et seq.).

This petition raises two issues of first impression for this Court. The first is whether the local DNA databank maintained by the Office of the Chief Medical Examiner (OCME), is subject to the State Executive Law. The second is, when DNA is collected during the investigatory phase of a particular crime that ultimately results in a youthful offender (YO) determination, whether the court has the authority to expunge the YO's DNA profile from a local DNA databank, like OCME's, along with the underlying DNA records. We conclude that both questions should be answered in the affirmative.

The underlying facts are not in dispute. On October 18,

2015, petitioner, then age 16, was arrested on a weapons charge following a shooting. A gun was recovered from a vehicle in which he was a passenger. Petitioner was taken into custody and administered *Miranda* warnings. He was then asked to voluntarily provide a DNA sample. Petitioner agreed by signing a consent form, and a buccal swab was obtained from him. He was subsequently indicted on a charge of criminal possession of a weapon in the second degree (Penal Law § 265.03). Although in a pretrial suppression motion petitioner contested the voluntariness of his consent to providing DNA, he ultimately agreed to a YO disposition (CPL 720.10 *et seq*.). Because the YO disposition was agreed to before the court made any decision on the pending suppression motion, petitioner forfeited any right to contest the voluntariness of his consent to providing a DNA sample for use in that particular prosecution (*People v Hecker*, 105 AD3d 606 [1st Dept 2013] *lv denied* 21 NY3d 1016 [2013]). At some point petitioner's DNA profile was uploaded to OCME's databank.[1]

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[1]Exactly when this record was uploaded to OCME's databank is unclear, but that it was actually uploaded at some point is not disputed by respondent or refuted by the District Attorney. The separate issue of when in a non-YO criminal proceeding DNA information is uploaded to any DNA database within the state, while very much an open legal issue, is not implicated by this proceeding (*see People v Flores*, 61 Misc 3d 1219[A] [Crim Ct, NY County 2018]; *People v Blank*, 61 Misc 3d 542, 545 [Sup Ct, Bronx County 2018]; *People v K.M.*, 54 Misc 3d 825, 832 [Sup Ct, Bronx County 2016]).

Following the conclusion of his criminal case, petitioner filed a motion in Supreme Court to have his DNA and DNA-related records expunged from OCME's databank. In denying the motion, the Supreme Court held that, as a matter of law, it had no authority to grant the relief requested on three separate bases. The Supreme Court held that Executive Law § 995-c(9)(b), which pertains to expungement of DNA profiles, did not apply to OCME which was a local DNA index. The court also determined that nothing in the YO statute expressly provided for expungement of lawfully collected DNA from a youthful offender (CPL 720.35). Finally, the Supreme Court held that although Executive Law §§ 995-c(9)(a), (b), provides for expungement of DNA records in the case of an acquittal, reversal or vacatur of a conviction, a YO adjudication did not qualify under any of those criteria.

Petitioner contends that the Supreme Court has discretion to expunge a YO's DNA records and seeks a writ of mandamus, directing that respondent (a Supreme Court Justice) exercise his discretion to decide whether respondent's DNA profile and records should be expunged under the facts and circumstances of the underlying criminal proceeding.

The CPLR Article 78 Petition is Properly Brought

Respondent urges dismissal of this petition based on two procedural threshold issues, which we reject. We do not agree that the District Attorney is a necessary party under either CPLR

7804(i) or CPLR 1001(a). Nor is the DA required under a permissive joinder analysis. There is no relief that the DA can provide, and the DA will not be equitably affected by any disposition of this petition (*see e.g. City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]). Additionally, not only was the DA served with the petition, it filed opposition, which was considered by this Court (*Matter of Lovell v Goodman*, 305 AD2d 314, 315 [1st Dept 2003]). Consequently the failure to name the DA as a party is not fatal to this petition.

Respondent also argues that petitioner has an adequate remedy at law, namely a direct appeal from the denial of his underlying expungement motion. No appeal lies from a determination made in a criminal proceeding, however, unless specifically provided for by statute (*People v Lovett*, 25 NY3d 1088, 1090 [2015]). The limited grounds for appeal set forth in section 450.15 of the Criminal Procedure Law do not apply to the Supreme Court disposition of the expungement motion. Although respondent now argues this is a directly appealable civil matter, neither party, nor the DA, treated the underlying motion as one for civil relief, with a right of direct appeal. In the absence of an available remedy at law (*see* CPL 450.20), the important issues raised on this appeal will escape this Court's review unless this petition proceeds (*Matter of Clark v Newbauer*, 148

AD3d 260, 265-266 [1st Dept 2017]).[2] Moreover, this Court has original jurisdiction over the issues raised because they concern a sitting justice (CPLR 506[b][1]; 7804[b]; *see Matter of Baba v Evans*, 213 AD2d 248 [1st Dept 1995], *cert denied* 520 US 1254 [1997]).

The Executive Law applies to OCME's DNA Laboratory and Databank

There is abundant support for the conclusion that OCME's responsibilities in testing, analyzing and retaining DNA data are subject to the State Executive Law. Respondent's arguments that the statutory reference to a "state" DNA identification index in Article 49-B necessarily excludes a local DNA laboratory like that the one operated by OCME, is unavailing.

Since 1996, New York has maintained a "state DNA identification index" to store the DNA profiles of "designated offenders" as expressly defined in the statute (Executive Law §§ 995[6], 995-c). Designated offenders are required to provide post conviction DNA samples, regardless of whether DNA was required as part of the investigation of the underlying crime for which they were convicted (Executive Law § 995-c[3]). The

[2]Issues concerning collection of a youth's DNA, what happens when a YO determination is made, and whether the profile must or should be expunged have garnered considerable attention at the trial level, not always with the same results (*People v K.N.*, 62 Misc 3d 444 [Crim Ct NY County 2018]; *People v Flores*, 61 Misc 3d 1219[A] [Crim Ct NY County 2018]; *People v K.M.*, 54 Misc 3d 825 [Sup Ct Bronx County 2016]; *People v Debraux*, 50 Misc 3d 247 [Sup Ct NY County 2015]; *People v Mohammed*, 48 Misc 3d 415 [Sup Ct, Bronx County 2015]).

collected DNA samples are then tested and analyzed by authorized forensic DNA laboratories, which create profiles that are indexed and eventually uploaded to the state databank (Executive Law § 995-c[5]).

Article 49-B broadly defines a "forensic [DNA] laboratory as "*any* laboratory operated by the *state or unit of local government* that performs forensic [DNA] testing on crime scenes or materials derived from the human body for use as evidence in a criminal proceeding or for purposes of identification" (Executive Law § 995[1][emphasis added]). The Commission on Forensic Science (CFS), a body created under the Executive Law, sets the minimum standards and a process by which "all" public forensic laboratories within the state are accredited (Executive Law §§ 995-a, 995-b). The Executive Law also ensures that all forensic DNA laboratories comply with any applicable privacy laws, and adhere to restrictions on the disclosure or re-disclosure of DNA records, findings, reports and results (Executive Law § 995-d[1]). Pursuant to Executive Law § 995-d, DNA testing records, findings, and reports "shall be confidential," with certain exceptions, one being for use in law enforcement (Executive Law §§ 995-d[2]; 995-c[6]).

OCME, established in 1918, self-identifies as having the largest public DNA crime laboratory in the world (NYC Office of Chief Medical Examiner, *About OCME*,

https://www1.nyc.gov/site/ocme/about/about-ocme.page [last accessed May 10, 2019]). It is an independent subdivision of the New York City Department of Health and Mental Hygiene. Pursuant to section 557(f)(3) of the New York City Charter, OCME may "to the extent permitted by law, provide forensic and related testing and analysis . . . in furtherance of investigations . . . not limited to . . .(DNA) testing."

Notwithstanding OCME's general authorization to act under the New York City Charter, it is also one of New York State's eight local, public forensic laboratories, accredited by the CFS, all fulfilling the Executive Law mandate to test, analyze and maintain the DNA records of designated offenders (https://www.criminaljustice.ny.gov/forensic/dnabrochure.htm [last last accessed May 10, 2019]; *see* Executive Law §§ 995-b, 995-c[1],[4],[7]; 9 NYCRR part 6190). These local public forensic laboratories each upload their DNA data into a Local DNA Index System, or LDIS. The LDIS and SDIS are part of the Combined DNA Index System, known as CODIS. CODIS is the Federal Bureau of Investigation's (FBI) nation-wide searchable software program that supports criminal justice DNA databases (https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet [last accessed May 10, 2019]). The National DNA Index System (NDIS), is part of CODIS (*see also* https://www.criminaljustice.ny.gov/forensic/dnabrochure.htm [last

accessed May 10, 2019]). An LDIS is defined by the state executive branch regulations as "that level of the CODIS program in which a public DNA laboratory maintains its DNA records for searching and uploading to higher level indices such as SDIS and NDIS" (9 NYCRR 6192.1[r]). Information available in the New York State Division of Criminal Justice Services (DCJS) website establishes that the forensic DNA profiles that OCME generates at the LDIS level flow upward to populate the SDIS (https://www.criminaljustice.ny.gov/forensic/dnafaqs.htm. [last accessed May 10, 2019]).

OCME's forensic DNA laboratory operates in accordance with guidelines and accreditation credentialing required under the Executive Law. Although OCME also has its own internal procedures for the verifying and reporting of DNA matches within the state, nationwide and beyond, they are in addition to the minimum procedures required under the Executive Law. (https://www1.nyc.gov/site/ocme/services/technical-manuals.page [last accessed May 10, 2019], cached at http://www.nycourts.gov/reporter/webdocs/OCMETechManuals.PDF; https://www1.nyc.gov/assets/ocme/downloads/pdf/technical-manuals/forensic-biology-codis-manual/Verifying-and-Reporting-DNA-Matches.pdf [last accessed May 10, 2019], cached at https://www.nycourts.gov/reporter/webdocs/VerifyingReportingDNAMatches.pdf).

The Executive Law expressly provides that it "shall not apply" to a federally operated DNA laboratory (Executive Law § 995-e). There is no similar exclusion for an LDIS, like OCME (Executive Law §995[1]). To the contrary, the broad definition of "forensic laboratory" in the Executive Law includes DNA laboratories operated by local government. Given OCME's responsibilities for the testing, storage and sharing of DNA data, the Executive Law clearly applies to an LDIS, like OCME's. By establishing a "state" DNA identification index, the state has created a "comprehensive and detailed regulatory scheme" with regard to the subject matter (*People v Diack*, 24 NY3d 674, 677 [2015]). OCME's operations fall firmly within the Executive Law umbrella and "must yield to that of the State in regulating that field" (*id.*).

The Supreme Court has discretion under the Executive law to Expunge a YO's DNA Records

As more fully set forth below, we hold that the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO disposition replaces a criminal conviction. The motion court, in finding that, as a matter of law, it had no discretion, failed to fulfill its statutory mandate to consider whether in the exercise of discretion, expungement of petitioner's DNA records was warranted in this case.

A core mandate of the Executive Law is that, after conviction, "designated offenders" must provide DNA samples to be tested, analyzed and retained in the SDIS (Executive Law § 995-c). In 2012, the category of "designated offenders" who must provide post conviction DNA samples was considerably expanded to require that any defendant convicted of "any felony . . . or any misdemeanor[3] defined in the penal law" (Executive Law § 995[7], as amended by L 2012, ch 19), "shall be required to provide a sample . . . for DNA testing" and for inclusion in the state DNA identification index (Executive Law § 995-c[3][a]). It is beyond dispute that youthful offenders are not "designated offenders" under the Executive Law and that their DNA may not be collected post conviction (https://www.criminaljustice.ny.gov/forensic [last accessed May 10, 2019], cached at http://www.nycourts.gov/reporter/webdocs/NYDCJSForensicServs.PDF)

In fact, a YO is not even subject to a mandatory surcharge imposed to collect DNA (Penal Law §§ 60.02[3]; 60.35[10]; *People v Stump*, 100 AD3d 1457, 1458 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]).

The only reason we are faced with issues concerning retention of petitioner YO's DNA records is because the DNA was collected by law enforcement as part of the underlying criminal

[3]There is an exception for a misdemeanor concerning marijuana possession (Penal Law § 221.10).

investigation against him. The DNA was not and could not have otherwise been collected or stored in the SDIS. Petitioner's circumstances are, therefore, different from mandatory postconviction DNA collection otherwise required by the Executive Law.

After an arrest, but preconviction, a DNA sample may only be obtained from a suspect on consent, or by warrant or court order (CPL 240.40[2][b][v]; *see e.g. People v Dail*, 69 AD3d 873, 874 [2d Dept 2010], *lv denied* 14 NY3d 839 [2010]). As limited by constitutional concerns, a court will issue an order to collect a DNA sample only when there is (1) probable cause to believe defendant has committed a crime, (2) a "clear indication" that relevant evidence will be found, and (3) the method used to secure it is safe and reliable (*People v Debraux*, 50 Misc 3d 247, 260 [Sup Ct, NY County 2015], citing *Matter of Abe A.*, 56 NY2d 288, 291 [1982]). The mandatory DNA requirements of Executive Law § 995-c(3)(a) do not apply and cannot be invoked to collect DNA from a suspect by law enforcement for use in the investigation or prosecution of a crime.

The Executive Law provides, under certain limited circumstances, an ability to expunge a DNA profile from the databank, as well as the related DNA records. The law, however, makes distinctions, based upon whether the DNA was mandatorily collected post conviction or obtained as part of the

investigation of the prosecution of a crime (Executive Law § 995-c[9]). Where the DNA is mandatorily collected from a designated offender after a conviction, if the conviction is then reversed or vacated or the defendant has been pardoned, the DNA record is automatically expunged from the SDIS. Additionally, the defendant has the right to apply to the court in which the original judgment of conviction was granted for the discretionary expungement of any additional related DNA records, including samples or analyses (Executive Law § 995-c[9][a]).

Where, however, DNA was provided either voluntarily or obtained pursuant to court order during an investigation or prosecution of a crime, a defendant may only seek the discretionary expungement of the DNA records where: (1) no criminal action was timely commenced; (2) there was an acquittal; or (3) if there was a conviction, it was reversed or vacated or the defendant was pardoned (Executive Law § 995-c[9][b][discretionary expungement]). A youthful offender could never qualify for automatic expungement from the database, because no DNA can be collected from such a youth post disposition. Any rights that a youthful offender may have to expungement, therefore, flow only from the discretionary authority the statute provides to the court with respect to DNA material that may have been collected during the investigatory, preconviction phase of a criminal proceeding.

We disagree with the motion court's conclusion that a YO finding does not meet any of the statutory criteria for the exercise of discretionary expungement. A YO disposition by its very nature is a judgment of conviction that is vacated and then replaced by a YO determination. This conclusion is supported by the mechanics of the YO statute, its salutary goals, and legislative intent.

The YO statute (CPL 720.10[1], [2] *et seq*.) codifies a legislative desire to relieve youths from the stigma or onus of a criminal record and the consequences of "hasty or thoughtless acts" (*People v Francis*, 30 NY3d 737, 740-741 [2018], *quoting People v Drayton*, 39 NY2d 580, 584 [1976]). Upon determining that an eligible youth is a youthful offender, the youth's conviction is deemed vacated and replaced by the YO finding, affording that youth "the opportunity for a fresh start, without a criminal record" (*People v Francis*, 30 NY3d at 741). A YO adjudication is "not a judgment of conviction for a crime or any other offense" (CPL 720.35[1]). While the motion court reasoned that the vacatur of a conviction in a YO circumstance was not a finding that the petitioner was "not guilty," not all vacaturs of convictions in non-YO circumstances are the equivalent of findings of innocence (*see Wilson v State of New York*, 127 AD3d 743, 744 [2d Dept 2015], *lv denied* 25 NY3d 913 [2015]; *Leka v State of New York*, 16 AD3d 557, 558 [2d Dept 2005], *lv denied* 5

NY3d 704 [2005]). The Executive Law does not provide that only particular types of vacaturs are eligible for expungement consideration.

Aside from imposing a lesser punishment, a further objective of a YO finding is to protect a youth from having an historical record of criminal behavior arising from the circumstances underlying the YO. Thus, when a youth is granted YO status, "all official records and papers, whether on file with the court, a police agency or the [DCJS]" relating to the YO adjudication are rendered confidential (CPL 720.35[2]; *Matter of Capital Newspapers Div. of Hearst Corp. v Moynihan*, 71 NY2d 263, 268 [1988]). Such records remain confidential and they "may not be made available to any person or public or private agency," except where required or permitted by law or court order, or unless the statutory privilege is waived, for instance by the youthful offender affirmatively placing the information or conduct at issue in a civil action (CPL 720.35[2]; *Castiglione v James F.Q.*, 115 AD3d 696, 697 [2d Dept 2014]).

Consistent with this public policy, the legislature has generally exempted YO status from the reach of the Executive Law. A youthful offender is not a "designated offender" mandatorily required to provide DNA. Proposed legislation to expand the definition of "designated offender" to explicitly include YOs never made it out of the committee process (*see* 2011 NY Senate

Bill S1675; 2011 NY Senate Bill S693A). In a 2012 press release, Governor Andrew M. Cuomo expressly stated that the law "does not apply to ... youthful offenders" (https://www.criminaljustice.ny.gov/pio/press_releases/2012-8-1_pressrelease.html [last accessed May 10, 2019], cached at http://www.nycourts.gov/reporter/webdocs/DNADatabankExpansion.PDF).

Respondent argues that there is no prohibition in the statute against the permanent storage of petitioner's profile and records in OCME's DNA databank or further dissemination of that information. That observation, while true, is not inconsistent with discretionary expungement of such records in appropriate circumstances. In respondent's view, once a youthful offender's DNA is lawfully obtained, that youth loses any right to "recover" it. These arguments are irreconcilable with the inherent protections of CPL 720.35(2) and undermine the legislature's desire to provide a youthful offender with "the opportunity for a fresh start, without a criminal record" (*People v Francis*, 30 NY3d at 741). Moreover, a "record" need not be documentary in nature or a file, as respondent suggests. The confidentiality provision has been applied to the information gleaned from corporeal test results (*see Matter of Barnett v David M.W.*, 22 AD3d 575, 577 [2d Dept 2005][results of breathalyzer and blood alcohol tests that resulted in a prior YO adjudication fall

within the category of information protected by CPL 720.35, unless waived]).

Petitioner did not, either expressly or by implication, waive the privilege of nondisclosure and confidentiality by providing his DNA before the court made its determination that he was eligible for YO status. Clearly the Executive Law permits an adult who has voluntarily given his or her DNA in connection with a criminal investigation the right to seek discretionary expungement where a conviction had been reversed or vacated. A youthful offender does not have and should not be afforded fewer pre-YO adjudication protections than an adult in the equivalent circumstances.

Respondent contends that use of the permissive word "may" in Executive Law § 995-c(9)(b) means petitioner has no clear legal right to expungement of his DNA profile from the OCME databank and the legislature intended to impart discretion on the court in deciding whether to grant a motion for expungement. We agree that this subdivision of the law imparts discretion on the part of the court (Executive Law § 995-c[9][b]). Respondent, however, did not exercise any discretion by finding that the law simply did not apply to these circumstances. Significantly, we are not directing the respondent how to exercise his discretion, only that he must do so. In considering whether, in whole or part, to expunge petitioner's DNA records in this case, respondent should

consider, among other things, the events surrounding the underlying YO finding, including the extent of petitioner's participation in the underlying crime, the circumstances surrounding petitioner's consent to DNA sampling, including his age when such consent was provided, his claim of developmental delays and the absence of a parent or other adult at the time of his consent. Because the respondent held he had no discretion, none of these or any other relevant factors were considered before respondent denied the motion.

Accordingly, the petition brought pursuant to CPLR article 78 for a writ of mandamus should be granted, without costs, and respondent directed to exercise his discretion to decide whether, under the facts and circumstances of this case, petitioner's DNA profiles and records, or any part thereof, should be expunged

from the LDIS or other part of the court records.

All concur.

> The Decision and Order of this Court entered herein on May 28, 2019 (174 AD3d 7 [1st Dept 2019]) is hereby recalled and vacated (*see* M-3162, M-3322 and M-3324 decided simultaneously herewith).

Petition pursuant to CPLR article 78 granted, without costs, and respondent directed to exercise his discretion to decide whether, under the facts and circumstances of this case, petitioner's DNA profiles and records, or any part thereof, should be expunged from the LDIS or other part of the court records.

Opinion by Gische, J. All concur.

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

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

ENTERED: AUGUST 27, 2019

Margaret Soval
DEPUTY CLERK