SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 23, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1856 Lukasz Kaminski, Index 106284/07
Plaintiff-Appellant,

-against-

53rd Street and Madison Tower Development, LLC,
Defendant-Respondent.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for appellant.

Lewis Johs Avallone Aviles, LLP, Melville (Michael G. Kruzynski of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 24, 2009, which denied plaintiff's motion for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) and granted so much of defendant's cross motion for summary judgment as sought to dismiss the section 240(1) claim and the section 241(6) claim based on Industrial Code (12 NYCRR) §§ 23-3.3(b)(2) and (h), unanimously modified, on the law, to deny so much of defendant's motion as sought to dismiss the section 241(6) claim based on 12 NYCRR § 23-3.3(b)(2), and otherwise affirmed, without costs.

Plaintiff was injured at a demolition site when a portion of

an exterior wall collapsed onto him as he was clearing debris on the landing of a staircase between the seventh and eighth stories. The floor of the eighth story had been largely removed with only some steel floor beams and a piece of the concrete floor remaining. The accident occurred while a coworker, located about 30 feet from plaintiff on the seventh floor, was using a long torch to cut the floor beams of the eighth floor above him. Plaintiff heard someone yell, "Wall is collapsing, wall is collapsing." A portion of the exterior wall of the building fell down onto him, knocking him down the stairs. Describing what he saw, plaintiff stated that "the wall was going up, and then it went down and collapsed."

The cause of the wall's collapse is not discernable from the record. Plaintiff was not working at an elevation so as to require a protective device enumerated in Labor Law § 240(1) (*cf. Greaves v Obayashi Corp.*, 55 AD3D 409 [2008], *lv dismissed* 12 NY3d 794 [2009]), and the collapse of a wall is not "the type of elevation-related accident that section 240(1) is intended to guard against" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]). Plaintiff's contention that the collapse was precipitated by "vibrations caused by the improper demolition of floor beams" is not supported by any evidentiary submission (*see generally Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]), and injury resulting from being struck by an object

loosened by vibration is merely a hazard incidental to the workplace (*see generally Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]).

The record contains insufficient evidence from which to infer that plaintiff's injuries were caused by defendant's alleged violations of either 12 NYCRR § 23-3.3(b)(1), which provides, inter alia, that "all demolition work above each tier of floor beams shall be completed before any demolition work is performed on the supports of such floor beams," or 12 NYCRR § 23-3.3(h), which provides that "[e]very structural member which is being dismembered . . . shall be chained or lashed in place to prevent its uncontrolled swinging or dropping."

However, we find that a factual issue is presented by plaintiff's section 241(6) claim predicated on a violation of 12 NYCRR § 23-3.3(b)(2), which provides that "[m]asonry shall not be . . . permitted to fall in such masses as to endanger the structural stability of any floor or structural support which such masonry may strike in falling." It is unclear whether the masonry of the eighth-floor wall that fell damaged the floor and staircase, endangering its stability.

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

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

ENTERED: FEBRUARY 23, 2010

CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5209 The People of the State of New York, Ind. 51080C/05
Respondent,

-against-

Edgar Correa,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

Judgment, Criminal Division of the Supreme Court, Bronx County (Robert G. Seewald, J.), rendered September 27, 2006, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a term of 15 days, reversed, on the law, and the misdemeanor information dismissed.

On September 8, 2004, citing New York State Constitution, article VI, § 28(c) and Section 211(1)(a) of the Judiciary Law as the source of her authority, Chief Judge Kaye promulgated part 42 of the Rules of the Chief Judge (22 NYCRR 42), which authorized the Chief Administrator of the Courts, in consultation and agreement with the Presiding Justice of the First Judicial Department, to establish the Criminal Division of the Supreme Court in Bronx County (BCD) and to provide for the transfer thereto of "some or all cases pending in the Criminal Court of the City of New York in Bronx County in which at least one felony

or misdemeanor is charged therein" (22 NYCRR 42.1[b], [c]).

The avowed purpose of part 42 was "to promote the administration of justice in the criminal courts in Bronx County by authorizing deployment of the judges of those courts in a manner that assures that all present and future caseload demands in such county will be met as expeditiously and effectively as possible" (22 NYCRR 42.1[a]).

On September 21, 2004, the Chief Administrative Judge, purporting to act pursuant to "the authority vested in [him] and upon consultation with the Administrative Board of the Courts," promulgated part 142 of the Rules of the Chief Administrator of the Courts (22 NYCRR 142), which established the BCD, to which *all* pending and future Bronx County criminal cases charging at least one class A misdemeanor or a felony, not resolved at arraignment, would be transferred for further proceedings (22 NYCRR 142.1; 142.2). On September 27, 2004, the Administrative Judge of Bronx County issued an order putting the transfer order into effect as of November 5, 2004. The Bronx Administrative Judge's order purports to have been issued "pursuant to the authority vested . . . by article VI, § 19(a) of the State Constitution and pursuant to direction of the Chief Administrative Judge of the Courts as provided in section 142.2(b). . . and further, upon finding that it will promote the administration of justice in Bronx County for selected components

of the criminal caseload of its courts."

These directives effectively merged the New York City Criminal Court in the Bronx with the State Supreme Court in the Bronx, creating a single consolidated criminal trial court for all cases charging at least one class A misdemeanor or a felony.

On October 1, 2005, defendant Edgar Correa's case was transferred to the newly formed BCD. Correa had been charged by information in the Bronx Criminal Court with assault in the third degree (Penal Law § 120.00[1]), menacing in the second degree (Penal Law § 120.14[1]), and criminal possession of a weapon in the fourth degree (Penal Law § 265.01[2]), all class A misdemeanors, and with harassment in the second degree (Penal Law § 240.26[1]), a violation.[1] Defendant was convicted of harassment in the second degree and this appeal followed. By letter of the Clerk of the Court dated February 22, 2009, this Court asked for additional briefing, in this and two other appeals, on the following issues, which do not have to be preserved for appellate review (*see People v Patterson*, 39 NY2d 288, 295 [1976]; *People v Harper*, 37 NY2d 96, 99 [1975]):

(1) whether the establishment of the BCD under part 142 of the Rules of the Chief Administrator of the Courts is consistent with the constitution and statutes of the State of New York; and

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[1]A superceding information in the BCD charged defendant with an additional class A misdemeanor and violation.

(2) whether the Supreme Court possesses jurisdiction over a criminal case absent the filing of an indictment or superior court information as specified in CPL 210.05.

Although part 42, part 142 and the Bronx Administrative Judge's order, which established the BCD and put the transfer order into effect, recite that they are promulgated pursuant to the authority granted by article VI, § 28(c) and § 19(a) of the State Constitution, and Section 211(1)(a) of the Judiciary Law, numerous other provisions of the State Constitution, Judiciary Law and Criminal Procedure Law relating to the structure of the Unified Court System and the authority of the Chief Judge, Chief Administrator and Legislature to regulate the courts must be considered in determining these issues. As discussed below, an analysis of these provisions leads to the conclusion that in transferring all cases charging a class A misdemeanor to the newly created BCD, causing a collapse of the constitutionally created Criminal Court of the City of New York in the Bronx, the Chief Judge and Chief Administrator overstepped the bounds of the administrative and operational authority they possess under the State Constitution, article VI, § 28 and § 19(a), and Judiciary Law § 211 and § 212, and impinged on the Legislature's reserved primary power to alter and regulate jurisdiction, practice and procedure under State Constitution, article VI, § 30.

Consequently, we now hold that the establishment of the BCD

by administrative decree, which eviscerates the Bronx Criminal Court by depriving it of its jurisdiction over class A misdemeanors and effectively restructures the constitutionally created Unified Court System, is not justifiable under the State Constitution, the Criminal Procedure Law, the Judiciary Law or any of the statutes or rules governing the administrative powers of the Chief Judge of the State of New York and Chief Administrator of the Courts.

By constitutional amendment, State Constitution, article VI, effective September 1, 1962, vested judicial authority of the State in a unified court system (NY Const, art VI, § 1). Pursuant to article III, § 1, "[t]he legislative power of this state shall be vested in the senate and assembly," which traditionally requires "that the Legislature make the critical policy decisions" (*Bourquin v Cuomo*, 85 NY2d 781, 784 [1995]).

State Constitution, article VI, § 6(d), continued the Supreme Court, with article VI, § 7(a) providing, in pertinent part, that the Supreme Court "shall have general original jurisdiction in law and equity" and, in the City of New York, "exclusive jurisdiction over crimes prosecuted by indictment, provided however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment." State Constitution, article VI, § 15(a) directs that the "legislature

shall by law establish a single court of . . . city-wide criminal jurisdiction in and for the city of New York."

Section 15(c) provides that the court of city-wide criminal jurisdiction shall have "jurisdiction over crimes and other violations of law, other than those prosecuted by indictment, provided, however, that the legislature may grant to said court jurisdiction over misdemeanors prosecuted by indictment; and over such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law" (NY Const, art VI, § 15[c]). Section 15(d) provides that the "provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article" (NY Const, art VI, § 15[d]).

Pursuant to this constitutional mandate, effective September 1, 1962, the former Court of Special Sessions was abolished and the New York City Criminal Court, of which the Bronx Criminal Court is a part, was created.

It is the dissent's position that the authority of the Chief Judge and Chief Administrator to transfer *all* cases charging a class A misdemeanor from the Bronx Criminal Court to the BCD is expressly provided by article VI, § 28 of the State Constitution and Sections 211(1)(a) and 212 of the Judiciary Law. The dissent contends that this complete transfer power does not run afoul of State Constitution, article VI, § 30, does not require

legislative consent, cannot be defeated by statute and is free of the strictures that apply when individual court transfers occur under article VI, § 19 of the State Constitution.

This position cannot withstand scrutiny.

Under the 1962 State constitutional reorganization, the general supervisory powers formerly granted to individual courts passed to the Administrative Board of the Judicial Conference (NY Const, art VI, § 28) (*see Matter of Bowne v County of Nassau*, 37 NY2d 75, 79 [1975]), composed of the Chief Judge of the Court of Appeals and the Presiding Justice of each of the Appellate Divisions. Effective in 1978, the State Constitution was again amended to vest in the Chief Judge the general supervisory powers formerly exercised by the Administrative Board and to create the position of Chief Administrator of the Courts, to be appointed by the Chief Judge, with the advice and consent of the Administrative Board (NY Const, art VI, § 28[a]).

Under article VI, § 28(c), the Chief Judge, after consultation with the administrative board, is empowered to "establish standards and administrative policies *for general application throughout the state*, which shall be submitted by the chief judge to the court of appeals, together with the recommendations, if any, of the administrative board. Such standards and administrative policies shall be promulgated after approval by the court of appeals" (NY Const, art VI, § 28[c]

[emphasis added]).[2] Pursuant to Judiciary Law § 211(1), this power includes, but is not limited to, standards and administrative policies relating to, among other things, "(a) the . . . transfer of judges and causes among the courts of the unified court system", and (b) "[t]he adoption . . . and implementation of rules and orders regulating practice and procedure in the courts, subject to the reserved power of the legislature provided for in section thirty of article six of the constitution."

State Constitution, article VI, § 30 provides that:

> "The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts. The chief administrator of the courts shall exercise any such power delegated to him or her with the advice and consent of the administrative board of the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules."

Pursuant to State Constitution, article VI, § 28[b], the Chief Administrator, on behalf of the Chief Judge, is empowered to "supervise the administration and operation of the unified

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[2]One may note that part 142 of the Rules of the Chief Administrator of the Courts is limited to procedure in Bronx County and does not "establish standards and administrative policies for general application throughout the state."

court system" on behalf of the Chief Judge. "In the exercise of such responsibility, the chief administrator of the courts shall have such powers and duties as may be delegated to him or her by the chief judge and such additional powers and duties as may be provided by law." Judiciary Law § 212(1)(c) vests the Chief Administrative Judge with the power to fix "terms and parts of court . . . and make necessary rules therefor." Judiciary Law § 212(2) vests the Chief Administrator with authority to "(d) [a]dopt rules and orders regulating practice in the courts as authorized by statute with the advice and consent of the administrative board of the courts, in accordance with the provisions of section thirty of article six of the constitution."

Thus, under State Constitution, article VI, § 28(b), the Chief Administrator's administrative power derives from two sources: (1) authority delegated by the Chief Judge who constitutionally is imbued with plenary authority over matters of administration, and (2) authority conferred by some other provision of law (*see Bloom v Crosson*, 183 AD2d 341, 345 [1992] *affd* 82 NY2d 768 [1993]). However, the authority of the Chief Administrator with respect to policy formulation "is not broad and unlimited but is subject to being exercised in conformity with standards which have been established in accordance with constitutional prescription" (*Matter of Morgenthau v Cooke*, 56 NY2d 24, 33 [1982]). It is only with respect to the plenary

authority to supervise the administration and operation of the Unified Court System delegated by article VI, § 28, as distinguished from policy formulation, that the Constitution "places no limitations on the duties the Chief Judge may delegate to the administrator" (*Corkum v Bartlett*, 46 NY2d 424, 429 [1979]; *see Matter of Met Council v Crosson*, 84 NY2d 328, 334-335 [1994]).

Under this state constitutional scheme, the authority to regulate the courts is divided between the Legislature and the Chief Judge (*see Bloom*, 183 AD3d at 344), who may delegate authority to the Chief Administrator. While under State Constitution, article VI, § 28(b) the Chief Administrator is granted administrative and operational authority over the courts, under the authority delegated by article VI, § 30, any rules regulating jurisdiction, practice and procedure must be consistent with existing legislation and may be subsequently abrogated only by statute (*see People v Ramos*, 85 NY2d 678, 687-688 [1995] ["these sources of broad judicial rule making authority do not afford *carte blanche* to courts in promulgating regulations" and "no court rule can enlarge or abridge rights conferred by statute"]; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1986]; *Lang v Pataki*, 271 AD2d 375, 376 [2000], *appeal dismissed* 95 NY2d 886 [2000]; *Bloom*, 183 AD3d at 345-346).

The impact of the establishment of the BCD and the transfer

of *all* pending and future Bronx County criminal cases charging class A misdemeanors from the Bronx Criminal Court to the BCD under part 142 of the Rules of the Chief Administrator of the Courts far exceeds the routine operation and administration of the Unified Court System contemplated by State Constitution, article VI, § 28(c) and Judiciary Law § 211(1)(a) and § 212(1)(c). Bypassing the legislative process and/or a constitutional amendment, part 142 imposes a policy determination that merges the Bronx Criminal Court and Bronx Supreme Court, marginalizing the Bronx Criminal Court and effectively restructuring the constitutional unified court system, the significance of which has not been discussed by the lower courts that have addressed the Chief Judge and Chief Administrator's authority to promulgate part 42 and part 142, respectively.[3] Given this result, the Chief Judge and Chief Administrator's "administrative" authority under State Constitution, article VI, § 28 and Judiciary Law § 211(1)(a) and § 212(1)(c) must yield to the Legislature's reserved power to regulate practice and procedure in the courts under article VI, § 30 and Judiciary Law § 211(1)(b) and § 212(2)(d) (*see Matter of Morgenthau v Cooke*, 56

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[3] *See People v Jones*, 18 Misc 3d 63 (App Term, 1st Dept 2007), *lv denied* 10 NY3d 767 (2008); *People v. Butler*, 11 Misc 3d 547 (Sup Ct, Bronx County 2005); *People v Marrero*, 8 Misc 3d 172 (Sup Ct, Bronx County 2005); *People v Gonzalez*, 6 Misc 3d 1034[A] (Sup Ct, Bronx County 2005); *People v Barrow*, 6 Misc 3d 945 (Sup Ct, Bronx County 2005); *People v Robinson*, 6 Misc 3d 645 (Sup Ct, Bronx County 2004).

NY2d 24 [1982], *supra*).

While the dissent complains that we unfairly label the Chief Judge and Chief Administrator's exercise of their authority as "collapsing" or "eviscerating" the Bronx Criminal Court, it does not dispute that part 142 and part 42 effectively deprive the criminal court of its jurisdiction over class A misdemeanors, leaving the court a shell of its former self as a result of the merger.

Significantly, there is nothing in the State Constitution that contemplates the merger of the Bronx Criminal Court into the Supreme Court. True, State Constitution article VI, § 15 contemplated a possible future merger involving the city wide criminal court, but this was a horizontal integration, not a vertical integration. Specifically, section 15(a) provides that the Legislature shall by law establish "a single court of city-wide civil jurisdiction and a single court of city-wide criminal jurisdiction in and for the city of New York" and that "the legislature may, upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction." Similarly, State Constitution, article VI, § 7(a) and § 15(c) demonstrate that the State Constitution contemplated an increase in the jurisdiction vested in the New York City Criminal Court, providing that the Legislature may grant the

criminal court "jurisdiction over misdemeanors prosecuted by indictment; and over such other actions and proceedings not within the exclusive jurisdiction of the supreme court" (NY Const, article VI, § 15[c]), not the elimination of the criminal court's jurisdiction effected by part 142, which transfers all cases charging class A misdemeanors to the newly created BCD.

The argument that article VI, § 30 has no application because the first sentence limits the Legislature's power to alter and regulate jurisdiction and proceedings in law and in equity to "that it has heretofore exercised" before voters ratified the 1962 version of the article, at which time there was no unified court system, is untenable. This interpretation, in contravention of the constitutional and statutory provisions discussed above, would imbue the Chief Judge and Chief Administrator with absolute power over the Unified Court System and deprive the Legislature of any say whatsoever with respect to their policies. Indeed, it would render superfluous the balance of the section which provides that:

> "[t]he legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts."

Moreover, State Constitution, article VI, § 33 provides that the Legislature "shall enact appropriate laws to carry into

effect the purposes and provisions of this article, and may, for the purpose of implementing, supplementing or clarifying any of its provisions, enact any laws, not inconsistent with the provisions of this article, necessary or desirable in promoting the objectives of this article." The section is consistent with article VI, § 30 which states that the legislature "shall have the same power to alter and regulate the jurisdiction and proceedings in law and equity that it has heretofore exercised," empowering the Legislature to stipulate the means by which the supreme court may exercise the broad discretion granted under State Constitution, article VI, § 7(a) (*see, Matter of Morgenthau v Roberts*, 65 NY2d 749 [1985]; *Rodriquez v Myerson*, 69 AD2d 162 [1979] *lv denied* 48 NY2d 606 [1979]).

No argument can seriously be made that part 142 does not run afoul of article VI, § 30 because the BCD's rules and orders explicitly disclaim any change in procedure (22 NYCRR 143.3), and therefore do not significantly affect the legal relationship between litigating parties. Such an argument would overlook that the eradication of the criminal court's jurisdiction over class A misdemeanors caused by the promulgation of part 142 has altered the jurisdiction of this Court and the Appellate Term. Pursuant to the constitutional provision permitting the Appellate Divisions to establish Appellate Terms within their departments (NY Const, art VI, § 8[a]), an Appellate Term has been created in

this Department to hear appeals from the New York City Civil Court and the New York City Criminal Court sitting in New York County and in Bronx County (*see* 22 NYCRR 640.1). Under this rule, appeals of convictions for class A misdemeanors emanating from the criminal court would be heard by the Appellate Term. Appeals from the trial and special terms of the Supreme Court are taken to the Appellate Division (see CPLR 5701). However, as a consequence of the creation of the BCD, which is part of the supreme court, convictions for class A misdemeanors in the Bronx have now been converted to supreme court judgments, which, under the current rules, has caused the appeals therefrom to be heard by this Court. In contrast, a similarly situated defendant convicted of a class A misdemeanor in any other criminal court within the City of New York does not have this presumed benefit and would have his appeal heard by the Appellate Term, the appropriate forum.

Applying State Constitution, article VI, § 30, there is no legislative authority for the promulgation of part 142 and part 42. As set forth above, the general laws that allow the Chief Judge and Chief Administrator to oversee court operations cannot override the constitutionally created structure of the Unified Court System and collapse courts vertically, regardless of how laudable is part 42's stated purpose of promoting the administration of justice in the Bronx courts by eliminating past

and avoiding future backlogs.[4]

State Constitution, article VI, § 19(a) does not provide the Chief Administrator with the requisite authority to promulgate part 142.[5] Article VI, § 19(a) provides:

> "[a]s *may be provided by law*, the supreme court may transfer to itself any action or proceeding originated or pending in another court within the judicial department other than the court of claims upon a finding that such a transfer will promote the administration of justice." (emphasis added).

Although Section 19(a) grants supreme court a self-executing and virtually unlimited right to transfer cases pending before it to another court with concurrent jurisdiction, it grants supreme court only a limited power, "as may be provided by law", to "transfer to itself any action or proceeding originated or pending in another court within the judicial department"

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[4]According to a June 2009 "Report on the Merger of the Bronx Supreme and Criminal Courts," prepared jointly by the Committee on Criminal Courts and Committee on Criminal Justice Operations of the Association of the Bar of the City of New York, the stated purpose of the merger has not been achieved in that it "has had the unintended consequence of creating a far greater backlog in felony trials" (Report at 2). The report recommends that "unless and until it can be demonstrated that merger can be achieved without deleterious effects on the adjudication of felony cases, it must be deemed a failure which should not be extended to other counties" (Report at 9).

[5]While the dissent posits that the power of the Chief Judge is free of the strictures that apply when individual transfers occur under State Constitution, article VI, § 19, this, as indicated above, is without merit and ignores that the Administrative Judge of Bronx County's order effecting the transfer references article VI, § 19(a) as a source of his authority.

(*see Matter of Dalliessi v Marbach*, 56 AD2d 858 [1977]).

In *Dalliessi*, the court granted an article 78 petition which sought to prohibit a Supreme Court Justice from taking any further action with respect to a case brought in the County Court. In so doing, the court held, in pertinent part:

> "The State Constitution (art VI, § 19, subd a) provides, in relevant part, that 'the supreme court may transfer to itself any action or proceeding originated or pending in another court within the judicial department . . . upon a finding that such a transfer will promote the administration of justice.' However, this power is limited by an introductory phrase, 'as may be provided by law.' CPLR 325 sets forth the grounds for removal of cases by the Supreme Court from courts of limited jurisdiction and CPLR 326 establishes the 'procedure on removal'. CPLR 325 does not authorize a transfer on the grounds set forth by the court herein. Under CPLR 326 (subd [b]), an order of removal is required" (*id.* at 858).

Here, the transfer order is not "as provided by law" in that it conflicts with the legislative mandate embodied in CPL 210.05, which provides that the "[t]he only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney." As the Practice Commentary to CPL 210.05 explains:

> "this section limits the trial jurisdiction of superior courts to offenses charged by Grand Jury indictment, or by superior court information . . . Accordingly, although superior courts have jurisdiction to try misdemeanors and petty offenses, as well as felonies, this section bars prosecution of those offenses in a superior court where they are charged in an accusatory instrument other than an indictment or a superior court information . . ." (Preiser, Practice Commentaries,

McKinney's Cons Laws of NY, Book 11A, CPL 210.05).

Nothing suggests that the Legislature intended to empower the Chief Judge or his or her designee to authorize exceptions to CPL 210.05, which dictates the means by which the supreme court may exercise its jurisdiction. As the jurisdiction of the New York City Criminal Court is constitutionally mandated by the State Constitution, article VI, § 15(c), which vests the court with jurisdiction over crimes and other violations of law, other than those prosecuted by indictment, the Chief Judge and Chief Administrator cannot effectively restructure the unified court system to incapacitate the Bronx Criminal Court by administrative fiat alone and the Bronx merger was beyond their administrative powers.

CPL 10.30(1) does not provide the Chief Administrator with the requisite statutory authority for part 142. Under CPL 10.30(1)(b), the criminal court has "[t]rial jurisdiction of misdemeanors concurrent with that of the superior courts but subject to divestiture thereof by the latter in any particular case." "[I]n any particular case" contemplates the transfer of particular cases on a case by case basis, not a sweeping transfer of all present and future cases charging class A misdemeanors that has the effect of collapsing the constitutionally created Bronx Criminal Court, thereby altering the jurisdictional structure of the Unified Court System.

Nor does the Legislature's use of the phrase "any particular case" in CPL 10.30(1)(b), rather than use of a phrase that expressly limits divestiture to cases commenced by indictment, invite the supreme court to divest the criminal court of jurisdiction in all cases, without exception. While CPL 10.20(1)(b) grants the supreme court trial jurisdiction of misdemeanors "concurrent with that of the local criminal courts," this language simply accommodates the occasional prosecution of misdemeanors by indictment - a situation in which the criminal court would otherwise lack jurisdiction, necessitating a trial in supreme court (*see* Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 10.20).

Further, CPL 10.20(2) provides that "[s]uperior courts have preliminary jurisdiction of all offenses, but they exercise such jurisdiction only by reason of, and acting through, the agency of their grand juries." Under CPL 1.20(25):

> "[a] criminal court has 'preliminary jurisdiction' of an offense when, regardless of whether it has trial jurisdiction thereof, a criminal action for such offense may be commenced therein, and when such court may conduct proceedings with respect thereto which lead or may lead to prosecution and final disposition of the action in a court having trial jurisdiction thereof."

Under CPL 100.05:

> "[t]he only way in which a criminal action can be commenced in a superior court is by the filing therewith by a grand jury of an indictment against a defendant who has never been held by a local criminal court for the action of such grand jury with respect to any charge contained in such indictment. Otherwise, a

> criminal action can be commenced only in a local criminal court, by the filing therewith of a local criminal court accusatory instrument."

Viewed together, CPL 10.20(2), CPL 1.20(25) and CPL 100.05 can only mean that although the superior court has original jurisdiction over a crime, an indictment must be handed down by a grand jury and filed in order to retain and exercise such jurisdiction (*see People v Harper*, 37 NY2d at 99 ["valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution"]; *People v Jackson*, 153 Misc 2d 270, 271 [Sup Ct, Bronx County 1991] ["a court's jurisdiction over a defendant in felony cases must be based upon the decision of a Grand Jury as expressed in an indictment"]).

Further, while CPL 10.30(1)(b) states that the criminal court's trial jurisdiction over misdemeanors is "subject to divestiture by" supreme court, CPL 170.20 and 170.25 are necessary to implement that divestiture.

CPL 170.20(1) provides that:

> "[i]f at any time before entry of a plea of guilty to or commencement of a trial of a local criminal court accusatory instrument containing a charge of misdemeanor, an indictment charging the defendant with such misdemeanor is filed in a superior court, the local criminal court is thereby divested of jurisdiction of such misdemeanor charge and all proceedings therein with respect thereto are terminated."

CPL 170.25(1) provides that:

> "[a]t any time before entry of a plea of guilty to or commencement of a trial of a local criminal court

> accusatory instrument containing a charge of misdemeanor, a superior court having jurisdiction to prosecute such misdemeanor charge by indictment may, upon motion of the defendant made upon notice to the district attorney, showing good cause to believe that the interests of justice so require, order that such charge be prosecuted by indictment and that the district attorney present it to the grand jury for such purpose."

There is no statutory authority for transfer of cases being prosecuted by misdemeanor information to supreme court unless the matter is referred to a grand jury and an indictment obtained, or the right to indictment waived and a superior court information filed (CPL 210.05; *see People v Gervais*, 195 Misc 2d 129 [Crim Ct, New York County 2003] [criminal court is divested of jurisdiction over felony complaint when indictment is filed with superior court]).

The dissent maintains that CPL 210.05 only limits how prosecutors invoke superior court jurisdiction, and does not bar superior courts from obtaining transfers from other courts and then applying the procedures of those courts. In support of its argument that CPL 210.05 is "'not a limitation directed to the courts but rather . . . to prevent prosecutorial excess,'" the dissent quotes from *People v Keizer* (100 NY2d 114, 119 [2003]), *People v Ford* (62 NY2d 275, 282 [1984]) and *People v Iannone* (45 NY2d 589, 594 [1978]). However, the quotes from the cited cases actually refer to article I, § 6 of the NY Constitution, not CPL 210.05. The power of the supreme court to transfer cases to

itself is circumscribed by article VI, § 19(a), which enables it to do so "[a]s may be provided by law." Hence, article VI, § 19(a) stands as a statutory obstacle to prosecution in a superior court by an accusatory instrument other than indictment or prosecutor's information.

Nor is CPL 210.05 unconstitutional because it restricts the supreme court's jurisdiction. As detailed above, the State Constitution grants the Legislature the authority to provide for the manner in which the supreme court transfers an action or a proceeding originated or pending in another court (*see* NY Const, art VI, § 19). Further, § 7(a)'s broad grant of jurisdiction to the supreme court is subject to "the exceptions, additions, and limitations created and imposed by the constitution and laws of the state" (Judiciary Law § 140-b; *see Sohn v Calderon*, 78 NY2d 755, 766 [1991]).

In this regard, "trial jurisdiction" is defined in terms of whether a particular accusatory instrument "may properly be filed with such court" and whether "such court has authority to . . . try . . . such accusatory instrument" (CPL 1.20[24]). Although superior courts have jurisdiction to try misdemeanors and petty offenses, as well as felonies, CPL 210.05 bars prosecution of those offenses in a superior court where they are charged in an accusatory instrument other than an indictment or a superior court information. In this way, the section regulates the manner

in which a misdemeanor can be presented to the supreme court, which may only exercise its jurisdiction over misdemeanors when the prescribed procedure is followed.

Thus, the State Constitution grants the Legislature the power to enact statutes, such as CPL 210.05, which implements the jurisdiction of courts and those statutes are part of a legitimate legislative scheme to delineate functions of the constitutionally created Criminal Court of the City of New York and reconcile its operation with the constitutionally mandated jurisdiction of the supreme court (*see People v Barrow*, 6 Misc 3d 945 [Sup Ct, Bronx County 2005], *supra*).

We also note that while not dispositive, past efforts to restructure the Unified Court System, and to eliminate the criminal court, were attempted by proposing amendments to the constitution, without success (*see* Chief Judge Kaye's State of the Judiciary Report, Jan. 23, 2005, p. 63, citing S 7510, a court merger bill introduced in the Senate but not enacted).

Based on the foregoing, the promulgation of part 142 was beyond the authority of the Chief Administrator. Since the Chief Administrator was without authority to order the transfer, the Supreme Court never acquired jurisdiction to try and sentence defendant under a misdemeanor information (CPL 210.05; *see People v Harper*, 37 NY2d at 99; *People v Wiltshire*, 23 AD3d 86, 88 [2005], *lv denied* 6 NY3d 840 [2006] [Supreme Court does not have

jurisdiction to proceed on a felony complaint]).

Accordingly, we reverse defendant's conviction and, given that he has completed his sentence, dismiss the misdemeanor information (*see People v Flynn*, 79 NY2d 879, 882 [1992]).

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

ACOSTA, J. (dissenting)

By striking down the Bronx Criminal Division (BCD) and limiting the historically broad jurisdiction of the supreme court, the majority today, demonstrating unbridled judicial activism, effectively upends tens of thousands of misdemeanor convictions adjudicated in Bronx County over the last five years and threatens to diminish the independence of the judiciary. Because I believe that the Legislature, cognizant of the great wisdom inherent in the separation of powers doctrine, delegated to the Chief Judge the authority to create BCD, and because supreme court unquestionably possesses the jurisdiction to adjudicate non-indicted misdemeanors, I dissent.

This appeal arises from a controversy between the People of the State of New York and a criminal defendant named Edgar Correa. Neither Mr. Correa nor the People challenged the jurisdiction of the Supreme Court to adjudicate Mr. Correa's misdemeanor case, or the authority of the Chief Judge to create the BCD during the trial proceedings. Nor did Mr. Correa raise such a challenge in his initial brief before this Court. In fact, the issue the majority reaches out to decide today arises because the majority itself invited the litigants (and OCA, but not the Legislature or the Attorney General) to brief this judicially created issue after the completion of oral arguments.

It is in this run of the mill criminal appeal from a

violation conviction (harassment in the second degree), that the majority today impedes the Chief Judge's rightful authority to implement court reform and in the process undermines the legal basis for the long-established Integrated Domestic Violence Courts and the other problem-solving courts, where supreme court routinely exercises jurisdiction over non-indicted misdemeanors.[1]

Notably, although the majority goes out of its way to protect the Legislature's so-called "reserved primary power to alter and regulate jurisdiction, practice and procedure" in the courts, the Legislature itself has not sought to intervene in this separation of powers controversy. Nor has the Legislature otherwise challenged the authority of the Chief Judge to create the BCD since its formation in 2004. It is perplexing that the majority would choose to decide this separation of powers controversy when one of those powers - the legislative branch, whose "legislative process" the Chief Judge allegedly "[b]ypass[ed]" by creating the BCD - is conspicuously absent from the whole litigation.

The absence and silence of the legislative branch aside, it is difficult to understand why the majority strains to decide these issues and create the chaos that would result from the

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[1]*see* Wise, *Judges Fire Queries On Court Merger Coming in Bronx*, NYLJ, Oct. 29, 2004, p. 1, col. 3; *see also People v Turza*, 193 Misc 2d 432 (Sup Ct, Suffolk County 2002) (upholding transfer of misdemeanor cases to supreme court).

majority's decision, when the same issues are currently before the Court of Appeals in *People v Wilson* (59 AD3d 153 [2009], *lv granted* 12 NY3d 790 [2009] [specifically, according to the preliminary statement, the "claimed impropriety in transfer of cases from criminal court to supreme court" is before the Court]), especially since the Court of Appeals has already approved the formation of the BCD in 2004 pursuant to the mandatory requirement of article VI, § 28[c] of the New York Constitution.[2] Although the majority properly acknowledges that the "authority to regulate the courts is divided between the Legislature and the Chief Judge," it is the majority - not the Legislature, not the Chief Judge, not the Chief Administrative Judge, not the Administrative Board of the Court and not the Court of Appeals - which boldly and proactively "regulates" the operation of the courts today.

Having created the controversy - a controversy which, I believe, does not actually exist - the majority then decides it by usurping the authority statutorily given to the Legislature and the Chief Judge, and wreaking havoc not only in Bronx County, but numerous courtrooms across the state, where the rationale for the problem-solving courts would be undermined. Remarkably, the

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[2]The Court of Appeals denied leave to appeal in the only appellate case which squarely addressed the issues raised here (*see People v Jones*, 18 Misc 3d 63 [App Term, 1st Dept 2007], *lv denied* 10 NY3d 767 [2008] [upholding constitutionality of Bronx merger]).

majority does this not in the name of judicial independence but in the name of legislative prerogative - on behalf of a legislative body which has not uttered a single word against the creation of BCD. Under these circumstances, judicial restraint, not judicial activism, is warranted.

Assuming for the sake of argument that this "controversy" is properly before us, I disagree with the majority's holding that the supreme court's jurisdiction in criminal cases is limited to offenses charged by grand jury indictment or by superior court information. Thus, in my opinion, these cases hinge on whether the Chief Judge and the Chief Administrator have the authority to transfer cases for adjudication in the BCD. After reviewing the relevant constitutional and statutory provisions, it is my opinion that the Chief Judge and Chief Administrator acted well within their authority.

New York Constitution, article VI, § 7(a) states, in relevant part:

> "The supreme court shall have general original jurisdiction in law and equity . . . In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment."

(*see also* Judiciary Law § 140-b).[3] This constitutional grant of

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[3]Judiciary Law § 140-b states:

"The general jurisdiction in law and equity which the

jurisdiction is "unlimited and unqualified" (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997] [internal quotation marks and citation omitted]; *see Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 339 [1993] [Legislature may not impede even "one particle of [supreme court's] jurisdiction," quoting from *Matter of Malloy*, 278 NY 492, 432 [1938]]; *Sohn v Calderon*, 78 NY2d 755, 766 [1991]; *Kagen v Kagen*, 21 NY2d 532, 537 [1968]), rendering the supreme court "competent to entertain all causes of action" unless its jurisdiction is specifically proscribed (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]; *see also Motor Veh. Mfrs. Assn. of U. S. v State of New York*, 75 NY2d 175, 184 n 3 [1990] [supreme court had jurisdiction over all claims arising in law or equity, "Legislature may grant concurrent jurisdiction to other courts of limited jurisdiction"]). The only such permissible limit on the supreme court's jurisdiction is to divest from the supreme court new actions not traditionally known at law or equity (*see Sohn*, at

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> supreme court possesses under the provisions of the constitution includes all the jurisdiction which was possessed and exercised by the supreme court of the colony of New York at any time, and by the court of chancery in England on the fourth day of July, seventeen hundred seventy-six, with the exceptions, additions and limitations created and imposed by the constitution and laws of the state. Subject to those exceptions and limitations the supreme court of the state has all the powers and authority of each of those courts and may exercise them in like manner."

766; *Loretto v Teleprompter Manhattan CATV Corp.*, 58 NY2d 143, 152-153 [1983]; NY Const, art VI, § 7[b]). Any other attempt to limit the supreme court's jurisdiction is void (*see Busch Jewelry Co. v United Retail Employees Union*, 281 NY 150, 156 [1939]; *Matter of Malloy*, 278 NY 429, 432 [1938]; *People ex rel. Swift v Luce*, 204 NY 478, 487 [1912]; *People v Darling*, 50 AD2d 1038 [1975]; *Jones*, 18 Misc 3d at 65).

The supreme court has enjoyed misdemeanor jurisdiction continuously since its inception as the Supreme Court of Judicature in 1691 (*see* 1 Lyon, Laws of the Colony of NY, at 229 [1664-1719]; *Darling*, 50 AD2d at 1038-1039; *People ex rel. Folk v McNulty*, 256 App Div 82, 90-91 [1939] [tracing supreme court jurisdiction to English Court of Kings Bench, which could divest lower courts of jurisdiction], *affd* 279 NY 563 [1939]; *People ex rel. Constantinople v Warden of Rikers Is.*, 72 Misc 2d 906 [Sup Ct, Bronx County 1972]; *People v Ruttles*, 172 Misc 306 [Sup Ct, Orange County 1939]). As such, misdemeanors constitute a "traditional categor[y] of actions at law and equity," jurisdiction over which article VI irrevocably vests in the supreme court concurrent with such other courts as the Legislature may provide (*Sohn*, 78 NY2d at 766).

Although article VI, § 15(a) called for the creation of a city-wide criminal court and section 15(c) vested that court with jurisdiction over non felonies, those sections did not divest

supreme court of its original general jurisdiction. Indeed, article VI, § 15(d) specifically provides that "provisions of this section shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of this article." Notably, the criminal court was not vested with "exclusive" jurisdiction over non-indicted misdemeanors and lesser offenses in the manner in which supreme court was for crimes prosecuted by indictment. Thus, the supreme court, a superior court (*see* CPL 10.10[2][a]), enjoys both "[t]rial jurisdiction of misdemeanors concurrent with that of the local criminal courts" (CPL 10.20[1][b]), including the New York City Criminal Court (*see* CPL 10.10[3][b]), and the power to divest the criminal court of its trial jurisdiction "in any particular case" without exception (CPL 10.30[1][b]).

Although the majority cites to various statutory provisions to conclude that supreme court's jurisdiction is limited to adjudicating indicted misdemeanors (and indicted felonies and superior court informations), the majority simply cannot get around the plain language and obvious import of the longstanding constitutional and statutory provisions. Read together, these provisions demonstrate that the supreme court - a court of "general original jurisdiction in law and equity" (article VI, §7[a]) - has jurisdiction over all criminal matters and that its jurisdiction is exclusive with respect to felonies, which must be

prosecuted by indictment or superior court information.

CPL 210.05, which states that "[t]he only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney," does not alter this result inasmuch as it does not limit the superior court's jurisdiction, but only the method for *prosecutors* to invoke that jurisdiction, and thus does not bar a superior court from itself obtaining a case pursuant to a proper transfer order:

> "By choosing the words 'prosecution' and 'prosecute,' it is clear that the Legislature was directing [CPL 210.05] to the district attorneys, whose job it is to prosecute, and not to the courts. Courts do not have the power to 'prosecute' cases; that job is constitutionally exercised by the executive branch of government, through its agents, the district attorneys *(Matter of McDonald v Sobel*, 272 App Div 455, 461 [2d Dept 1947], *affd* 297 NY 679 [1947]). Decisions about whether a case is to be prosecuted by indictment are usually left to the district attorney (*see People v Di Falco*, 44 NY2d 482, 487 [1978]). . . Because of the specific words chosen by the Legislature, CPL 210.05 should be read only as an 'act of sanction,' and not as an act intending to limit the power of the superior courts, conveyed via the Constitution, to preside over misdemeanor cases *(see People v Allen*, 301 NY 287, 289-290 [1950])"

(*People v Marrero*, 8 Misc 3d 172, 178-179 [Sup Ct, Bronx County 2005] [upholding BCD]).

As *Marrero* noted, CPL 210.05 relates back to the CPL 170.20 invitation that the People, prior to entry of a guilty plea to or commencement of a trial of a local criminal court accusatory instrument, may adjourn the proceedings to present a non-felony

charge to a grand jury (*see* CPL 170.20[2]). By thus obtaining and filing an indictment, the *prosecutor* divests the local criminal court of its jurisdiction (*see* CPL 170.20[1]). Likewise, a defendant may apply for an order directing the People to present the charge to a grand jury (*see* CPL 170.25[1]), and on the filing of an indictment, the prosecutor likewise divests the local criminal court of jurisdiction (*see* CPL 170.25[2]; *see also People v Jones*, 18 Misc 3d at 65 [CPL 210.05 "is directed at the District Attorney," and it "circumscribes a prosecutor's ability to invoke a superior court's jurisdiction," not the court's independent ability to assert jurisdiction]). As *Jones* points out, the absence of an indictment is not fatal to the BCD's capacity for trying misdemeanor informations, both because article 1, § 6 constitutional limitations on felony prosecutions are not implicated and because, pursuant to CPL 100.10(1), an information is a sufficient basis for both the commencement and the prosecution of a misdemeanor case (*Jones* at 65-66).

This construction of CPL 210.05 is consistent with its legislative history, which shows that the statute's sole purpose was to implement a now-relaxed right to indictment of all crimes in all courts, not to limit the supreme court's powers as against those of local courts.[4] After all, the indictment requirement to

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[4]CPL 210.05 derives from section 222 of the 1888 Code of Criminal Procedure (CCP), which effectuated the then-applicable requirement that all crimes be prosecuted by indictment

regardless of the offense charged or the court adjudicating it, but which later was amended to allow defendants to waive grand jury presentation:

> "All crimes prosecuted in a supreme court, or in a county court, or in a city court, must be prosecuted by indictment. But, where a defendant has been held to answer to any of these courts, that court, or any of said courts to which he might have been held to answer, may, on the application in writing of the defendant, direct any information to be filed against him for the offense for which he stands charged . . . When the information is filed, the defendant must be arraigned thereon and the court must proceed to trial in the same manner as if an indictment had been presented by a grand jury."

In 1928, the Court of Appeals struck down the amended CCP section 222 because the Constitution did not then allow waiver of grand jury presentation of felonies *(see People ex rel. Battista v Christian*, 249 NY 314, 318-319 [1928]). In 1941, partly to relieve the resulting spike in superior court arraignments, the Judiciary proposed a Uniform City Court Act to vest in the City Courts concurrent trial jurisdiction of crimes prosecuted by information and preliminary jurisdiction to arraign all offenses (*see* 7th Ann Report of NY Judicial Council, at 153-260). In adopting that proposal, lawmakers restored CCP section 222 by excising the waiver clause that *Battista* had struck down (*see* L 1941, ch 255, § 11).

The statute continued unchanged until the 1971 Legislature recodified the CCP as the modern Criminal Procedure Law, converting the section 222 mandate that "[a]11 crimes" be indicted into the CPL 210.05 provision that the "only" way to prosecute would be by indictment (see L 1970, ch 966). Critically, this recodification effected no change in meaning: as Governor Rockefeller wrote, the CPLs purpose was to rationalize disparate lower court systems, not infringe the Supreme Court's powers (*see* Governor's Memo approving L 1970, ch 966, McKinney's 1970 Session Laws of NY, at 3140; Mem in Support, Comm on Revision of the Penal Law and Criminal Code, 1970 NY Legis Ann, at 37). In 1972, voters addressed the 1928 *Battista* decision by amending the Constitution to allow prosecution by SCI (superior court information) (*see* NY Const, art I, § 6). The Legislature then achieved the current CPL 210.05 by conforming it to this new SCI authority (*see* L 1974, ch 467, § 13).

which CPL 210.05 refers is "'not a limitation directed to the courts, but rather to the State, and its function is to prevent prosecutorial excess'" (*People v Keizer*, 100 NY2d 114, 119 [2003], *quoting People v Ford*, 62 NY2d 275, 282 [1984]; *see People v Iannone*, 45 NY2d 589, 594 [1978]); *Jones*, 18 Misc 3d at 65). To that end, the purpose of CPL 210.05 is only to limit prosecutorial discretion to invoke a superior court's jurisdiction (*see Jones*, 18 Misc 3d at 65; *Marrero*, 8 Misc 3d at 179; *People v Turza*, 193 Misc 2d at 434), a purpose likewise manifest in CPL article 170. Here, by contrast, the challenged BCD proceedings cannot possibly suggest prosecutorial excess because the Judiciary and not the People effected the transfer of appellant's case.

Given that supreme court has jurisdiction over non-indicted misdemeanors, the only issue that remains, in my opinion, is whether the Chief Judge and Chief Administrator have the authority to direct the transfer of cases to the BCD. Although the majority unfairly labels the exercise of this authority as "collapsing" or "eviscerat[ing]" the criminal court, the authority to divest and transfer cases is expressly provided by article VI, section 28 of the State Constitution and sections 211 and 212 of the Judiciary Law.

Initially, although parts 42 and 142 cast a wide net in

transferring "some or all classes of cases pending in the Criminal Court of the City of New York in Bronx County in which at least one felony or misdemeanor is charged therein" (22 NYCRR 42.1[c]), it is inaccurate to assert that the BCD "collapse[d]" or "eviscerate[d]" the criminal court inasmuch as the criminal court in Bronx County continues to exist, arraigning tens of thousands of cases each year and otherwise adjudicating tens of thousands of accusatory instruments charging violations and summonses charging violations and unclassified misdemeanors (Annual Report 2008, Criminal Court of the City of New York, pages 24, 27 & 39, published by the Office of the Deputy Chief Administrative Judge, New York City). The Annual Report indicates that in 2008 Bronx Criminal Court adjudicated 120,331 summonses (p 39) and 76,923 cases in arraignments (p 27). Most of the cases arraigned were misdemeanors (57,588 out of 76,923) and half (48.9%) of the cases arraigned were disposed of in Bronx Criminal Court (38,323 dispositions out of 76,923 arraigned cases) (*See* Annual Report, p 36). Given the foregoing statistics, it is likewise completely inaccurate to assert that the creation of BCD "depriv[ed] [Bronx Criminal Court] of its jurisdiction over class A misdemeanors."

In any event, article 28 specifically empowers the Chief Judge to direct the transfer of cases when the interests of effective court administration so require. Judiciary Law §

211(1)(a) provides that "[t]he chief judge, after consultation with the administrative board, shall establish standards and administrative policies for general application to the unified court system throughout the state, including but not limited to standards and administrative policies relating to . . . [the] transfer of judges and causes among the courts of the unified court system." This legislative articulation of the Chief Judge's authority, which derives from section 28 of article VI, reflects the well-settled constitutional law that the power to transfer cases - independent of CPL provisions governing supreme court divestiture of criminal court actions (*see* CPL 170.20[1] and 170.25[1])- resides in the Chief Judge to effectuate systemic interests of efficient court administration. The only conditions on this authority are that the transferee court must have jurisdiction over the subject matter of the transferred case and the Chief Judge must first consult with the Administrative Board of the Courts and then obtain Court of Appeals consent before promulgating standards and administrative policies effectuating the transfer (see NY Const, art VI, § 28[c]; Judiciary Law § 211[1]).

Moreover, the Legislature vested in the Chief Administrative Judge the power to fix "terms and parts of court . . . and make necessary rules therefor" (Judiciary Law § 212[1][c]). This authority likewise flows from article VI, which vests in the

Chief Administrative Judge such power as the Chief Judge delegates and such further power as the Legislature prescribes (*see* NY Const, art VI, § 28[b]).

Thus, section 28 and Judiciary Law section 211(1) invite the Chief Judge to direct the transfer of cases among the courts after consulting the Administrative Board and with consent of the Court of Appeals. The only limit on this power is that transferred cases must be routed to courts that the Constitution vests with subject matter jurisdiction over them. Of course, the Chief Judge may exercise this authority when systemic needs of effective court administration so require. Section 28, however, does not impose on the Chief Judge the obligation to obtain legislative consent prior to exercising this authority. To do so would vitiate the intent of the framers and the Legislature that section 28 separately empowers the Chief Judge to use such transfers to serve the systemwide administration of justice, free of the strictures that apply when individual courts transfer cases under section 19 alone.[5] Moreover, any other result would belie the well-settled separation of powers axiom that core section 28 powers of court administration, including the Chief Judge's administrative transfer power, are "complete" and cannot be defeated by statute (*Matter of Council v Crosson*, 84 NY2d 328,

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[5]Criminal Procedure Law § 10.30[1][b]) states that the supreme court has the power to divest the criminal court of its trial jurisdiction "*in any particular case*" (emphasis added).

335 [1994]; *Matter of Bellacosa v Classification Review Bd. Of Unified Ct. Sys. Of State of N.Y.*, 72 NY2d 383, 388 [1988]; *Corkum v Bartlett*, 46 NY2d 424, 429 [1979]; *cf. McCoy v Helsby*, 28 NY2d 790, 791 [1971] [protecting Judiciary's "basic fibre of administrative power" against statutory intrusion]).

Accordingly, the Chief Judge, after consulting the Administrative Board and with consent of the Court of Appeals, properly promulgated part 42 to provide for the BCD's creation and the transfer of criminal court cases to reduce calendar congestion and ensure efficient judicial administration (*see* NY Const, art VI, § 28[c]; Judiciary Law § 211[1][a]). Because the Chief Administrative Judge must supervise the operation of the courts on the Chief Judge's behalf in accordance with such delegations and standards and administrative policies as the Chief Judge may provide (*see* NY Const, art VI, § 28[b], Judiciary Law § 212[1]), part 142 and the subsequent administrative orders effectuating the Chief Judge's Part 42 directive were valid. Thus, the BCD's transfer and adjudication of criminal court cases pursuant to the foregoing rules and administrative orders also were valid.

Once superior courts obtain trial jurisdiction over cases by proper transfer order moving the cases from local criminal courts, the CPL 210.05 provisions governing how prosecutors would invoke that same jurisdiction become moot. How superior courts

then handle the transferred cases turns on what rules then govern them. Here, transferred criminal court cases proceed in the BCD under the same substantive and procedural laws as apply in the criminal court (*see* 22 NYCRR [Rules of the Chief Administrator of the Courts] § 142.3).

Contrary to the majority's holding, this result is not inconsistent with article VI, section 30 of the State Constitution. That section states:

> "The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts. The chief administrator of the courts shall exercise any such power delegated to him or her with the advice and consent of the administrative board of the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules."

Indeed, section 30 limits the Legislature to such procedural powers as it "heretofore exercised" before voters ratified the 1962 version of article VI (NY Const, art VI, § 30). Before 1962, however, there was no Unified Court System, no central court administration and no administrative transfer power. As section 30 merely continued the Legislature's then-existing procedural powers while section 28 created a new centralized administrative transfer power in that same year, section 30

cannot possibly empower the Legislature to limit section 28 transfers. That result reinforces the separation of powers axiom that no statute can impede the Judiciary's "complete" section 28 self-governance powers (*see Met Council*, 84 NY2d at 355; *Bellacosa*, 72 NY2d at 388; *Corkum*, 46 NY2d at 429; *cf. McCoy*, 28 NY2d at 791).

Moreover, the Court of Appeals has instructed that nothing in section 30 bars the Judiciary from enacting rules that hold harmless the rights of litigating parties (*cf. People v Ramos*, 85 NY2d 678, 687-688 [1995] [section 30 generally bars court rules that "invade recognized rights of person or property," "significantly affect the legal relationship between litigating parties" or otherwise "enlarge or abridge rights," *quoting McQuigan v Delaware, Lackawanna & W. R.R. Co.*, 129 NY 50, 55 [1891]). The BCD's rules and orders, by contrast, explicitly disclaim any such change in procedure (*see* 22 NYCRR § 142.3 [each case transferred to the BCD "shall be subject to the same substantive and procedural law as would have applied to it had it not been transferred"]). Because procedures fixed by the Legislature for trying misdemeanors continue to apply unchanged after transfer, the BCD does not impair or abridge any litigant's procedural rights under *Ramos*. Thus, far from intruding on the Legislature's section 30 powers, Rule 142.3 fully respects their exercise.

Even if section 30 could extend to case transfers and bar the BCD's rules underlying the transfer and adjudication of defendant's case, section 30 invites the Legislature to delegate its procedural powers either to individual courts or the Chief Administrative Judge (*see* NY Const, art VI, § 30). Here the Legislature did both. To the supreme court, the Legislature delegated the CPL 10.30(1)(b) power to divest "any particular case" from local courts. To the Chief Administrative Judge, the Legislature delegated the power to establish "terms and parts of court . . . and make necessary rules therefor" consistent with the Chief Judge's directives (Judiciary Law § 212[1][c]). These delegations fully support the transfer of defendant's case for disposition in the BCD.

Finally, the majority's heavy reliance upon New York Constitution article VI, § 15(a), which directs the Legislature to "by law establish a single court of city-wide civil jurisdiction and a single court of city-wide criminal jurisdiction in and for the city of New York," ignores the import of § 15(d), which provides that the creation of such a city-wide court "shall in no way limit or impair the jurisdiction of the supreme court." In other words, the Legislature's creation of a single court of city-wide criminal jurisdiction does not in any way limit supreme court's general jurisdiction, or its broad authority to transfer cases or divest cases from the

court of city-wide criminal jurisdiction.

In short, by conferring the transfer power in such broad terms to the Chief Judge (Judiciary Law § 211[1][a]) and to the supreme court (CPL 10.30[1][b]), the legislative branch properly recognized that the independent, third branch of government -- the Judiciary -- was in the best position to implement modifications pursuant to article 28 designed to make court operations more efficient, even significant modifications which merge criminal court into supreme court.

I, too, recognize that the Legislature should have a say in the policy decisions regarding the operation of the courts. And they have said their piece loudly and clearly -- in Judiciary Law § 211(1)(a), in CPL 10.20(1)(b), in CPL 10.30(1)(b), and in Judiciary Law § 212(1)(c).

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

ENTERED: FEBRUARY 23, 2010

CLERK

Andrias, J.P., Sweeny, McGuire, DeGrasse, JJ.

5316 The People of the State of New York, Ind. 19145C/06
Respondent,

-against-

Allen Mack,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

Judgment, Criminal Division of the Supreme Court, Bronx County (Peter J. Benitez, J.), rendered August 16, 2006, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to an aggregate term of 90 days, unanimously reversed, on the law, and the misdemeanor information dismissed.

For the reasons stated in *People v Correa* (__AD3d__ [Appeal No. 5209, decided simultaneously herewith]), the judgment should be reversed and the misdemeanor information dismissed.

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

ENTERED: FEBRUARY 23, 2010

CLERK

Mazzarelli, J.P., Nardelli, Catterson, DeGrasse, Román, JJ.

1580 BDO Seidman LLP, Index 603018/08
Plaintiff-Respondent,

-against-

Strategic Resources Corporation, et al.,
Defendants-Appellants.

Mound Cotton Wollan & Greengrass, New York (Sanjit Shah of counsel), for appellants.

Schulte Roth & Zabel LLP, New York (Harry S. Davis of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 17, 2009, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant Strategic Resources Corporation (SRC) managed the day-to-day operations of non-party Phoenix Four, Inc., a mutual fund. SRC began providing services to Phoenix in or around 1994. At the same time, Phoenix retained plaintiff BDO Seidman (BDO) to provide it with accounting services. Phoenix terminated its relationship with BDO in or about 2002, and it stopped using SRC's services in 2004. In May 2005, Phoenix commenced an action in federal court against SRC alleging that during the time that it managed Phoenix, SRC fraudulently overstated Phoenix's assets, the value of which were directly tied to SRC's compensation. The

complaint sought $150 million. In September 2005, Phoenix demanded arbitration against BDO, alleging that in 2000, 2001 and 2002, BDO was negligent in failing to discover SRC's fraud. The arbitration demand initially sought approximately $77 million, but Phoenix subsequently reduced the claim to $37.3 million.

In July 2007, while the arbitration was pending, Phoenix and SRC settled the federal court action. The settlement agreement required SRC to pay Phoenix $12.5 million and for Phoenix to release SRC. The agreement also protected SRC in the event that BDO were to lose the arbitration with Phoenix and seek contribution from SRC. Specifically, the agreement stated:

> "If the Phoenix Parties settle with BDO or recover a judgment/award against BDO in the BDO Arbitration or through some other proceeding and BDO in turn asserts a claim against the SRC Parties . . . relating to the SRC Parties' . . . involvement with the Phoenix Parties, whether on the basis of contribution, indemnity or any other legal theory or claim, the Phoenix Parties agree that their settlement with or judgment/award against BDO shall be reduced to the full extent necessary to protect the SRC Parties. . . In furtherance of this settlement/judgment/award reduction obligation, the Phoenix Parties shall make payment to BDO to the full extent necessary to give force and effect to the settlement/judgment/award reduction obligation in the event the settlement/judgment/ award is no longer capable of being sufficiently reduced."

The agreement further required Phoenix to ask the arbitration panel to fashion a "reasoned award," which apportioned fault

between BDO and SRC, so any judgment against BDO could be reduced in accordance with the agreement. Phoenix and BDO jointly requested such a reasoned award.

In its post-hearing submissions to the arbitration panel, Phoenix, anticipating that it would be awarded damages, proposed a methodology for the arbitrators to use to determine by how much the judgment should be reduced to account for SRC's culpability, if any. Phoenix suggested that the arbitrators compare the amount claimed by it in the litigation against SRC ($150 million) with the amount claimed by it in the arbitration against BDO (ultimately $37.3 million). The difference between the two numbers, Phoenix reasoned, represented damage it alleged to have been caused to it solely by SRC. Using the same logic, Phoenix posited that, since it settled the litigation for $12.5 million, "only 3.1 million . . . of the $12.5 million paid by [SRC] could have been in payment of the same injuries asserted in this Arbitration." (In other words, $37.3 million is 25% of $150 million, and 3.1 million is 25% of 12.5 million.)

The arbitrators awarded Phoenix $12,578,166. They stated, in pertinent part, as follows:

> "The Panel interprets. . . the Settlement Agreement to require that in order for BDO to obtain a judgment reduction in this arbitration, the BDO parties have to obtain an 'apportionment of fault' between them and the parties BDO claims bore culpability. Thus BDO would have to provide evidence in this proceeding where this Panel could

> reasonably conclude that [SRC] caused the same injuries as did BDO and what was their contributory share of that cause."

After rejecting Phoenix's position that BDO's evidence established that SRC did not share at all in BDO's culpability for Phoenix's loss, the arbitrators stated that they "believe Phoenix has offered a fair and just method for the apportionment issue." The Panel then quoted the portion of Phoenix's post-hearing submissions which laid out the methodology discussed above. The Panel "therefore conclude[d that] it is appropriate . . . to afford [BDO] a judgment reduction of $3,125,000 on the approximately $12.6 million damages award." After adjustments to the award such as for arbitration costs, the total owed by BDO was $11,871,015.43. BDO paid that amount to Phoenix.

BDO then commenced this contribution action against SRC. The complaint alleged that SRC was liable for 100% of the award BDO paid to Phoenix, since BDO "was found liable to Phoenix in connection with [BDO]'s audits of Phoenix's year-end financial statements for the years 2000-2002 by virtue of the same facts or circumstances as are alleged herein that gave rise to [SRC]'s liability to Phoenix." SRC moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7). SRC argued that BDO's contribution claim was barred by General Obligations Law (GOL) § 15-108(b). That section immunizes a settling tortfeasor against contribution claims by non-settling tortfeasors so long as the

non-settling tortfeasor's liability is reduced by the greater of the settlement amount or the settling tortfeasor's equitable share of the plaintiff's damages. SRC further contended that collateral estoppel barred BDO from relitigating the issue of what its equitable share of the loss was, since the arbitration panel clearly apportioned liability between SRC and BDO and adjusted the award accordingly.

In opposition to the motion, BDO contended that the arbitrators never determined SRC's equitable share of Phoenix's loss. Accordingly, it argued that collateral estoppel did not bar it from litigating the amount by which its own liability should be reduced. BDO further claimed that, because the reduction of the arbitration award did not reflect the proper apportionment of liability in accordance with GOL 15-108(a), SRC was not entitled to rely on the protections of GOL 15-108(b). Finally, BDO asserted that SRC, in entering into a settlement agreement that expressly contemplated a contribution claim by BDO, waived the protections afforded by GOL 15-108(b).

Supreme Court denied SRC's motion, and it stated:

> "As is evidently clear by its reasoning, the Panel did not reduce the Award rendered against [BDO] by an amount that was at least equal to [SRC]'s percentage of fault for Phoenix's damages. Rather, the Panel calculated an award reduction based upon reasoning that has no bearing on an equitable share analysis that applies to a contribution share."

Accordingly, the court found that collateral estoppel did not bar BDO from litigating the issue of SRC's equitable share of Phoenix's loss, and that GOL 15-108(b) did not apply. In light of these findings, the court deemed the waiver issue raised by BDO to be academic and did not decide it.

GOL 15-108 reflects a balance by the Legislature (*see Mitchell v New York Hosp.*, 61 NY2d 208, 215 [1984]). By enacting subsection (b), it sought to encourage parties to settle claims by providing them with the certainty that all contribution claims against them would be extinguished. By implementing subsections (a) and (c), it granted corresponding benefits to non-settling parties. Subsection (a) reduced the non-settling parties' liability by the greater of (1) the amount stipulated by the release tendered by the injured party to the settling party; (2) the amount of the consideration paid for the release; or (3) the amount of the settling party's equitable share of the damages as set forth in article 14 of the Civil Practice Law and Rules, which codified the doctrine of contribution among joint tortfeasors. Subsection (c) ensured that parties that choose not to settle would not be exposed to contribution claims by the settling tortfeasor.

The statute is intended to work as a unified whole (*see Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld*, 309 AD2d 173, 180 [2003]). In other words, a settling party can only

immunize itself from contribution claims of non-settling parties if the non-settling parties realize the concomitant benefit of having their liability reduced. In all cases, GOL 15-108 only applies where the settling party and the non-settling party or parties are "liable or claimed to be liable in tort for the same injury" (GOL 15-108[a]).

Here, BDO argues that SRC cannot invoke GOL 15-108(b) because the arbitration panel did not attempt, as section 15-108(a) requires, to ascertain SRC's equitable share of BDO's total liability to Phoenix. Indeed, the methodology adopted by the arbitrators may have been flawed. If anything, the 25% ratio derived by comparing the damages demanded by Phoenix in the federal litigation against the damages sought by Phoenix in the arbitration was relevant to ascertaining the extent to which BDO and SRC were responsible for the same injuries *in the federal action*. It does not appear to be determinative of the extent of SRC's culpability for the injuries alleged in the arbitration. Nevertheless, we need not decide the issue. That is because, as SRC argues, regardless of the outcome before the arbitration panel, BDO is collaterally estopped from relitigating the issue now.

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . .,

whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). "[T]he issue must have been material to the first action or proceeding and essential to the decision rendered therein" (*id.*). The sole issue presented by this action is the apportionment of liability between BDO and SRC for the audit years 2000, 2001 and 2002, that is, the years at issue in the arbitration. This issue was clearly raised before the arbitration panel. Indeed, the arbitration award expressly stated that "in order for BDO to obtain a judgment reduction in this arbitration, the BDO parties have to obtain an 'apportionment of fault' between them and the parties BDO claims bore culpability." The intent was clearly to trigger the mechanism of GOL 15-108, so that, in accordance with the Phoenix/SRC settlement agreement, BDO's right to contribution would be extinguished.

Further, the arbitrators did not, as BDO argues, merely determine the extent to which BDO and SRC were responsible for the "same injury." Rather, after finding that BDO and SRC were joint tortfeasors to the extent of 25% of the injury suffered by Phoenix during 2000, 2001 and 2002, they assigned 100% of the fault for that portion of the loss to SRC, and reduced the award by a corresponding amount. Even if this was an inaccurate apportionment of liability as between BDO and SRC, all that matters for collateral estoppel purposes is that a final decision

on apportionment was rendered (*see Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978] ["The policy against relitigation of adjudicated disputes is strong enough generally to bar a second action even where further investigation of the law or facts indicates that the controversy has been erroneously decided"]; *Ellis v Abbey & Ellis*, 294 AD2d 168, 169 [2002], *lv denied* 98 NY2d 612 [2002]).

Collateral estoppel has been described as applying where the issue in the first proceeding is "the point actually to be determined in the second action or proceeding such that 'a different judgment in the second would destroy or impair rights or interests established by the first'" (*Ryan*, 62 NY2d at 501, quoting *Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 307 [1929, Cardozo, Ch. J.]). At the end of the arbitration process, Phoenix correctly assumed that, because of the award reduction, all claims as between SRC and BDO were finally resolved. It was secure in the knowledge that it would not have to absorb a further diminution in its recovery because of any unresolved claims BDO may have against SRC for contribution. However, this action exposes Phoenix to the possibility, if BDO were to prevail, of having to pay additional monies to BDO, pursuant to the terms of its agreement with SRC. Thus, a different outcome in this contribution action would certainly destroy or impair rights or interests established by the

arbitration award.

BDO unquestionably had a full and fair opportunity to litigate the matter in the arbitration, thus satisfying the second requirement for the application of collateral estoppel (*see Ryan*, 62 NY2d at 501). Indeed, BDO requested, along with Phoenix, that the arbitrators issue a reasoned award which reduced any judgment against BDO by the extent to which SRC was liable for Phoenix's loss. Accordingly, BDO had every opportunity to present evidence and arguments regarding the offset to which it believed it was entitled as a result of the SRC/Phoenix settlement.

Finally, we reject BDO's argument that SRC waived the benefit of GOL 15-108(b) in its settlement agreement with Phoenix. The agreement unquestionably anticipated that BDO might make a contribution claim against SRC. However, this alone is not a knowing relinquishment by SRC of the right to rely on the protection of the statute. In support of its waiver argument, BDO relies on *Scotts Co., LLC v Pacific Empls. Ins. Co.* (61 AD3d 464 [2009]) and *LNC Invs., Inc. v First Fid. Bank, N.A.* (935 F Supp 1333 [SD NY 1996]). In those cases, waiver was found because the party invoking the protections of GOL 15-108 reserved its *own right* to seek contribution from other parties. In this case, SRC did not reserve such a right for itself. As is clear from the agreement between Phoenix and SRC, SRC was attempting to

address every possible scenario which might defeat the purpose of the settlement, which was to finally resolve all claims arising out of SRC's relationship with Phoenix. One of those scenarios was that BDO would seek contribution from SRC, notwithstanding GOL 15-108(b). SRC would have no control over such an attempt by BDO and, accordingly, it was appropriate for SRC to insist on the clause and later invoke the protections of GOL 15-108(b). There is no legal reason why the clause should operate to SRC's detriment.

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

ENTERED: FEBRUARY 23, 2010

CLERK

Mazzarelli, J.P., Andrias, Saxe, Catterson, Acosta, JJ.

1727 The People of the State of New York, Ind. 55305C/04
Respondent,

-against-

Hoyt Phillips,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Nicholas J. Iacovetta, J. at speedy trial motion; Ethan Greenberg, J. at jury trial and sentence), rendered July 12, 2007, convicting defendant of four counts of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 90 years to life, modified, as a matter of discretion in the interest of justice, to the extent of directing that all the sentences be served concurrently, resulting in a new aggregate term of 25 years to life, and otherwise affirmed.

The court properly denied defendant's speedy trial motion. The People were required to be ready within 182 days, and they concede that 108 days of delay are includable. Although we agree with defendant that the two 14-day adjournments commencing on April 3 and 17, 2006 were includable, we find that the 48-day period of delay following August 9, 2005 was excludable as "a

reasonable period of delay resulting from . . . pre-trial motions . . . and the period during which such matters [were] under consideration by the court" (CPL 30.30[4][a]; *see People v Reed*, 19 AD3d 312, 314-315 [2005], *lv denied* 5 NY3d 832 [2005]). Therefore, the total delay chargeable to the People is only 152 days.

Defendant challenges the sufficiency and weight of the evidence regarding three of the four robbery convictions (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We reject those challenges; there is no basis for disturbing the jury's determinations concerning identification and credibility.

The first three robberies, occurring within a short time period and in the public areas of apartment buildings located within close geographic proximity, had many similarities that formed a "distinctive repetitive pattern" (*People v Allweiss*, 48 NY2d 40, 48 [1979]; *see also People v Arafet*, 13 NY3d 400 [2009]). Therefore, the court's instruction to the jury that it could consider the similarities between the various incidents on the issue of identity, while also cautioning it not to otherwise commingle the evidence, was proper (*see People v Beam*, 57 NY2d 241, 250-253 [1982]; *People v McRae*, 276 AD2d 332 [2000], *lv denied* 95 NY2d 966 [2000]).

We find the sentence excessive for a 50-year-old defendant whose felony convictions involved use of weapons, but did not

involve infliction of physical injury. And, although the new aggregate sentence of 25 years to life "would amount to little more than the mandatory minimum sentence" for one of the robberies, as the dissent notes, in this case defendant would not be eligible for parole until he is well into his seventies, thus essentially making it a true life sentence. Defendant's remaining challenge to his sentence is academic.

All concur except Saxe and Catterson, JJ. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

I respectfully dissent because I see no reason to exercise our discretion in the interest of justice to reduce a twice-adjudicated persistent violent felony offender's sentence to what would amount to little more than the mandatory minimum sentence for one of the four counts of knife point robbery for which he was convicted.

Defendant was convicted of four counts of robbery in the first degree and sentenced to an aggregate term of 90 years to life. He received two terms of 20 years to life and two terms of 25 years to life, with all four to run consecutively.

In my view, the only possible reduction in sentence would be to run two of the sentences concurrently with the remaining two sentences. This would reduce defendant's sentence to an aggregate term of 45 years to life rather than the majority's reduction to 25 years to life. Admittedly this is a very serious sentence. However, any other reduction essentially results in defendant receiving no additional jail time for the remaining three knife point robberies. In my view, this is an improvident exercise of our powers of review in the interests of justice.

This is especially true given the defendant's extensive violent criminal history.

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

ENTERED: FEBRUARY 23, 2010

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Manzanet-Daniels, JJ.

1877 Charles Udoh, Index 126690/02
Plaintiff-Appellant,

-against-

Inwood Gardens, Inc., et al.,
Defendants-Respondents.

Charles Udoh, appellant pro se.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains (Adam J. Detsky of counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 19, 2008, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the complaint reinstated.

Plaintiff is one of the tenant-shareholders of an apartment on the top floor of the Mitchell-Lama cooperative owned by defendant Inwood Gardens, Inc. and managed by defendant Metro Management Development, Inc. In 2000, plaintiff lived in the apartment with two of his sisters and a co-worker. However, at that time he was the only person with a key to the apartment. The apartment had a terrace, accessible by a door in the living room. When plaintiff moved into the apartment in 1995, he had complained to defendants that the terrace door was defective insofar as it allowed water to seep into the apartment. Over the

next five years, he asked defendants to repair the door numerous times.

On January 7, 2000, a Friday, defendants finally sent a contractor to plaintiff's apartment to replace the terrace door. However, the replacement door was the wrong size and did not fit the frame. No proper replacement door could be obtained for several days and the contractor covered the opening to the terrace by placing a plastic sheet over it. Because of the cold weather outside, a representative of defendant Metro, who was present while the contractor worked, advised plaintiff that he should vacate the apartment until the contractor replaced the door. Plaintiff accepted this advice and found shelter elsewhere.

On January 10, 2000, plaintiff returned to the apartment. As he stepped off the elevator, he noticed that the front door to the apartment, which he had locked when he left the previous Friday, was ajar. When he entered the apartment, he found that it was in a state of disarray. Upon further investigation, he discovered that the apartment had been ransacked and that many of his possessions had been stolen. Plaintiff commenced this action to recover the value of the pilfered goods. He maintains that defendants' failure to adequately secure the opening from the terrace into the apartment permitted a burglar to gain access to the apartment.

Defendants moved for summary judgment. They argued that plaintiff could not establish that they were, or should have been, aware of a likelihood that his apartment would be burglarized. Further, they contended that plaintiff would not be able to prove at trial that the intruders entered the apartment through the terrace. This was based on plaintiff's testimony at his deposition that he was not certain how the intruders entered the building or the apartment, and that he did not know how somebody could have gained access to the terrace in the first place. As an alternative to summary judgment, defendants sought dismissal of the complaint based on plaintiff's alleged failure to respond to discovery demands, or an order of preclusion.

In opposition, plaintiff contended that defendants had failed to provide him with many of the documents he had demanded from them in discovery. In support of his position that security at the building was generally poor, he submitted memoranda to shareholders alerting them to various thefts and muggings in the building, as well as board meeting minutes memorializing discussion of safety issues. However, these documents post-dated the incident at issue by several years.

Supreme Court granted the motion and dismissed the complaint. It held:

> "[T]here is no evidence that criminal activity was foreseeable, that defendants failed to provide adequate building security, that the burglar was an intruder, or that the

> burglar entered through the terrace door. Even assuming that the burglar entered through the terrace door, which admittedly was negligently maintained, plaintiff would still have to prove that it is more likely than not that an intruder committed the robbery, which he is unable to do."

The court denied the preclusion motion as moot.

We reverse. On a motion for summary judgment, all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor (*see Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2005]). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*see Dawson v Alarcon*, 154 AD2d 320 [1989]). Here, plaintiff testified that only he had the key to the front door of the apartment, and that he locked the door the last time he left the apartment before returning to find it ransacked. The lock to the front door was not broken when he returned, indicating that no one forced their way into the apartment through that door. It would be logical for a trier of fact to conclude, therefore, that whoever entered plaintiff's apartment came in through the terrace, and left through the front door.

Defendants argue that, even if the intruder entered through the terrace, summary judgment is still appropriate because plaintiff cannot establish that the person who entered the

apartment was unlawfully in the building, as opposed to being another tenant or someone allowed into the building by a tenant. They further contend that, even if the person who entered the apartment was an unlawful intruder, plaintiff possesses no evidence that it was foreseeable to defendants that the building was not secure and that they should have taken measures to better ensure residents' safety.

Defendants' position lacks merit. The record does not allow for the conclusion that the person who entered plaintiff's apartment did so lawfully. That is because plaintiff testified that no one who lived in the apartment was there between the time that he left the apartment the Friday before the intrusion and the time that he discovered the crime. Moreover, whether the intruder was lawfully in the building is irrelevant. Plaintiff's allegation is that, under the circumstances, defendants' duty to take minimal security precautions against reasonably foreseeable criminal acts by third parties (*see James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]) extended to his apartment. This is based on the fact that defendants' affirmative acts compromised not the security of the building, but of the apartment itself. Indeed, because they created the condition which allegedly permitted intruders to enter the apartment via the terrace, defendants' argument that plaintiff has not established that an intrusion by a third party was foreseeable must be rejected.

Accordingly, an issue of fact exists as to whether defendants may be held liable for plaintiff's loss. In any event, defendants created the condition, the unsecured terrace entrance, which under any circumstances would allow any malefactor to enter the apartment.

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

ENTERED: FEBRUARY 23, 2010

CLERK

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1992 Mark A. Garcia, et al., Index 22084/06
Plaintiffs-Respondents,

-against-

Fernando A. Leon, et al.,
Defendants-Appellants.

Kaplan & McCarthy, Yonkers (Jeffrey A. Domoto of counsel), for appellants.

Freed & Lerner, New York (Martin A. Lerner of counsel), for respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered January 22, 2009, that denied defendants' motion for summary judgment dismissing plaintiffs' claims based on Insurance Law § 5102(d), unanimously modified, on the law, the motion granted to the extent of dismissing plaintiffs' claims based on the 90/180 provision of Insurance Law § 5102(d), and otherwise affirmed, without costs.

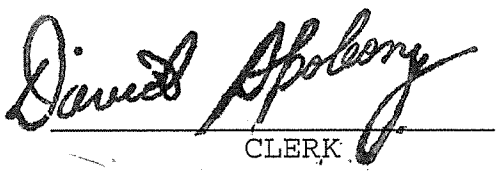
Defendants do not argue on appeal that the court erred when it ruled defendants failed to meet their initial burden of proof as to plaintiff Mark Garcia's injuries, as they limited their brief to a discussion of only Jennifer Garcia's injuries. Assuming that defendants met their initial burden as to plaintiff Jennifer Garcia, the affidavit of her treating chiropractor, taken in conjunction with her medical experts' unsworn statements and her MRI tests, raises questions as to whether her shoulder

and cervical and lumbar spinal injuries are permanent or significant, and not merely preexisting, degenerative, or caused by a subsequent 2007 accident (*see Liriano v Ostrich Cab Corp.*, 61 AD3d 543 [2009]; *Hammett v Diaz-Frias*, 49 AD3d 285 [2008]). Accordingly, triable issues of fact were presented as to whether plaintiff Jennifer Garcia sustained serious injuries that were significant or permanent under section 5102(d) when the vehicle plaintiffs were riding in collided with defendants' vehicle while defendants were changing lanes.

Nevertheless, upon a search of the record, we find that defendants are entitled to summary judgment as to both plaintiffs' 90/180 day claims based upon evidence that neither of the plaintiffs missed work or was otherwise unable to perform usual and customary daily activities for at least 90 of the 180 days following the accident (*see Liriano*, 61 AD3d at 544).

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

ENTERED: FEBRUARY 23, 2010



CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2201 The People of the State of New York, Ind. 2035/06
Respondent,

-against-

George Shaw,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered January 12, 2007, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree (seven counts), criminal possession of stolen property in the fourth degree (seven counts), possession of burglar's tools (three counts), and auto stripping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). At night, a police officer was patrolling an area known for car break-ins involving thefts of laptop computers and other electronic devices. He noticed defendant, who was disheveled and carrying a laptop bag, and whom

he recognized as a person with a record of breaking into cars and stealing electronic devices. This gave the officer an objective, credible reason, not necessarily indicative of criminality, to make a level one request for information. When the officer simply called out to defendant by name, this did not constitute a seizure (*see People v Reyes*, 83 NY2d 945 [1994]). The officer's single, nonthreatening, nonaccusatory question concerning the contents of the bag was an appropriate informational inquiry under the combination of circumstances present (*see People v Hollman*, 79 NY2d 181, 190-191 [1992]; *see also People v Carrasquillo*, 54 NY2d 248, 253 [1981]; *People v Faines*, 297 AD2d 590, 593-94 [2002], *lv denied* 99 NY2d 558 [2002]).

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

ENTERED: FEBRUARY 23, 2010

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2202 Jose L. Garzon, et al., Index 115860/06
Plaintiffs-Appellants,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Respondents.

Michelle S. Russo, Port Washington, for appellants.

Amabile & Erman, P.C., Staten Island (Anthony A. Lenza, Jr. of counsel), for respondents.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 11, 2009, insofar as it granted defendants' motion for summary judgment dismissing plaintiffs' Labor Law § 240(1) claim and denied plaintiffs' cross motion for partial summary judgment on the issue of liability under § 240(1), unanimously affirmed, without costs.

Plaintiff was struck by a caulking gun that he left temporarily on a ladder rung as he was working in a facility owned by defendants. He argues that defendants violated Labor Law § 240(1) in that they failed to provide him with a scaffold or manlift from which to work and failed to provide a safety device to secure the caulking gun.

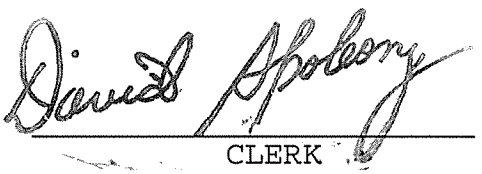
Labor Law § 240(1) applies to falling object cases where the falling of an object is related to a significant risk inherent in the relative elevation at which materials and/or loads must be

positioned or secured. The fact that an injured plaintiff may have been working at an elevation when an object fell is of no moment in a falling object case because a different type of hazard is involved (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

Here, the caulking gun did not fall because of the absence or inadequacy of the ladder, scaffold or manlift. Plaintiff left it on the ladder temporarily and forgot to remove it before adjusting the ladder. No evidence was presented by plaintiffs that the absence of a scaffold or lift proximately caused the accident. Thus, defendants demonstrated that plaintiff's conduct was the sole proximate cause of the accident.

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

ENTERED: FEBRUARY 23, 2010



CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2203 New York Coalition for Quality Assisted Living, Inc., Plaintiff-Respondent, Index 400597/08

-against-

MFY Legal Services, Inc., et al., Defendants-Appellants.

- - - - -

Disability Advocates, Inc. and New York Lawyers for the Public Interest, Amici Curiae.

Dewey & LeBoeuf LLP, New York (John M. Aerni of counsel), for appellants.

O'Connell and Aronowitz, Albany (James A. Shannon of counsel), for respondent.

Wilmer Cutler Pickering Hale & Dorr LLP, New York (Michael J. Sharp of counsel), for amici curiae.

Order, Supreme Court, New York County (Martin Shulman, J.), entered September 2, 2009, which denied defendants' motion to dismiss the complaint and declare plaintiff's proposed Guidelines for Visitor Access unenforceable, and granted plaintiff's cross motion for summary judgment declaring its Guidelines enforceable and consistent with the controlling statutes and regulations, unanimously reversed, on the law, without costs, plaintiff's cross motion denied, defendants' motion granted, and the proposed Guidelines declared unenforceable.

The proposed Guidelines conflict with State regulations controlling visitor access to adult-care facilities (Social

Services Law § 461-a[3]; 18 NYCRR 485.14). Those regulations and related administrative letters require advocates to state only the purpose of their visit to residents without having to reveal to the operator of a facility the resident they intend to visit. Operators are not expected to accompany a visitor unless specifically requested by the visitor. The regulations make the confidentiality of such meetings a primary concern.

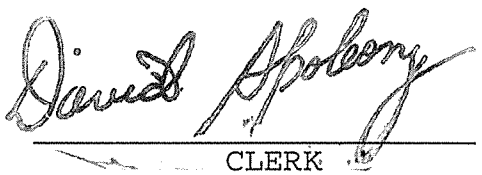
Section C.4 of the proposed Guidelines impermissibly restricts access by allowing operators to act as intermediaries between advocates and residents, providing that an operator will notify the resident that a visitor wants to meet, and will confirm whether and where the resident wants this meeting to take place. It also requires advocates to repeat this procedure for each resident they wish to visit. By making operators intermediaries for such visits, the guideline undercuts the confidentiality guaranteed in the controlling regulations.

Similarly, Section C.7 of the proposed Guidelines improperly limits advocates to visits with specifically identified residents in adult-care facilities. Such a restriction does not exist in the regulations, and ignores the fact that advocates often participate in group activities such as residents' rights training sessions. This contradicts the regulation that operators "shall not restrict or prohibit access to the *facility*" (18 NYCRR 485.14[a], emphasis added).

Finally, Section D.4 of the proposed Guidelines improperly permits plaintiff's members to restrict access when a visitor "fail[s] to comply with these Guidelines." The regulations allow access to be restricted only when an operator has reasonable cause to believe a visitor would directly endanger the safety of the residents (see 18 NYCRR 485.14[g]).

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

ENTERED: FEBRUARY 23, 2010



CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2204-
2204A In re Genesis S., etc., and Another,

Children under the Age of
Eighteen Years, etc.,

Irene Elizabeth S.,
Respondent-Appellant,

Jewish Child Care Association,
Petitioner-Respondent.

Howard M. Simms, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about December 4, 2008, which, after a fact-finding hearing, terminated respondent mother's parental rights to the subject children and committed their custody and guardianship to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent's mental illness left her unable to properly and adequately care for the children presently and for the foreseeable future was supported by clear and convincing evidence (Social Services Law § 384-b[4][c]; *see Matter of Ayodele Ademoli J.*, 45 AD3d 686 [2007]). Medical records and

unrebutted testimony by an expert psychiatrist provided detailed evidence to support the conclusion that respondent had a long mental health history, including diagnoses of schizoaffective disorder, rendering her unable to act in accordance with the children's needs (*see Matter of Shawndalaya II.*, 46 AD3d 1172 [2007], *lv denied* 10 NY3d 703 [2008]; *Matter of Nadaniel Jackie P.*, 35 AD3d 305 [2006]).

Respondent's claim, raised for the first time on appeal, that no proof was adduced that her "mental retardation" originated during her developmental period, as defined in Social Services Law § 384-b[6][b], is unpreserved (*see Matter of Star Leslie W.*, 63 NY2d 136, 145 [1984]). In any event, we note that the agency proceeded only on a "mental illness" cause of action (§ 384-b[6][a]).

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

ENTERED: FEBRUARY 23, 2010

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2208 The People of the State of New York, Ind. 1659/07
Respondent,

-against-

William Whaley,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph Nursey of counsel), and Kelley Drye & Warren LLP, New York (Christine S. Poscablo of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Daniel Conviser, J. at jury trial and sentence), rendered April 4, 2008, convicting defendant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of 4 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion based on certain portions of the People's summation, since the court's curative actions were sufficient to prevent the remarks in question from causing any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]). By failing to object, by failing to make specific objections, or by failing to request further relief after the court sustained objections, defendant failed to preserve his remaining challenges

to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Isolated instances of prosecutorial misconduct on summation are insufficient to justify reversal in the absence of an obdurate pattern of inflammatory remarks throughout the prosecutor's summation or unless the prosecutorial misconduct is "so pervasive, so egregious" and "the prosecutor's disregard of the court's rulings and warnings is deliberate and reprehensible" (*People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993] [citation and internal quotation marks omitted]).

Since one of the charges in the indictment was third-degree possession under Penal Law § 220.16(1), the court properly permitted the People to introduce testimony that defendant was carrying a large amount of cash at the time of his arrest. This testimony was probative of the essential element of intent to sell (*see e.g. People v Leak*, 66 AD3d 403 [2009]; *People v White*, 257 AD2d 548 [1999], *lv denied* 93 NY2d 930 [1999]), and the People "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). The court also properly exercised its discretion when it declined to preclude this testimony on the ground of the People's inability to produce the cash in court (*cf. People v Walker*, 249 AD2d 15 [1998]). Defendant's claim that the physical condition of the money was

critical to his defense is unpersuasive, and the court's adverse inference charge was a more than adequate remedy. Defendant's challenges to the contents of the adverse inference charge and the court's limiting instruction on the proper evidentiary use of the money are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). To the extent that defendant is claiming that he is entitled to suppression of evidence on the basis of trial testimony, that claim is unavailing. Trial testimony may not be used to support a challenge to a court's ruling at a pre-trial hearing (*see People v Abrew*, 95 NY2d 806, 808 [2000]). Defendant also claims that his counsel rendered ineffective assistance by failing to seek reopening of the suppression hearing based on alleged inconsistencies between hearing and trial testimony. However, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The alleged inconsistencies were insignificant, and defendant would not have been entitled to suppression under either the hearing or

trial versions of how the arresting officer recovered the drugs defendant was holding during an apparent drug transaction. Accordingly, counsel could have reasonably concluded that reopening the hearing would be futile. In any event, regardless of whether counsel should have made the application, there is no reason to believe it would have led to reopening of the hearing or suppression of the drugs (*see e.g. People v Sylvain*, 33 AD3d 330, 331 [2006], *lv denied* 7 NY3d 904 [2006]).

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

ENTERED: FEBRUARY 23, 2010

CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2209 In re Nelissa O.,
Petitioner-Appellant,

-against-

Danny C.,
Respondent-Respondent.

Michael S. Bromberg, Sag Harbor, for appellant.

Howard M. Simms, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), Law Guardian.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about June 27, 2008, which, determined, inter alia, that it was in the best interest of the subject children to remain in the custody of respondent father, unanimously affirmed, without costs.

There exists no basis upon which to disturb Family Court's determination that it was in the children's best interests to remain with their father. The court had the benefit of a full evidentiary hearing at which it had the opportunity to hear the testimony of both parents and assess their demeanor and credibility (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Matter of Mildred S.G. v Mark G.*, 62 AD3d 460, 461 [2009]), as well as interview the two children in camera, at the conclusion of which it declined to alter the existing custody arrangement. The totality of the circumstances demonstrates that the children

are happy, healthy and well-adjusted in their father's care, that he is adequately providing for their needs, and while not determinative (*see Eschbach*, 56 NY2d at 173), both children have expressed a preference that the current custody arrangement remain unchanged.

Petitioner has failed to preserve for review her argument concerning the alleged conflict of interest of the Law Guardian. Were we to review this argument, we would find that the Law Guardian's representation of the subject children's sibling in a neglect proceeding ceased before the commencement of the custody proceeding to which the sibling was not a party, and the interests of the sibling were not material to the custody proceeding. Nor is there any indication that the Law Guardian disclosed or utilized privileged information that was learned in the course of her representation of the sibling (*see e.g. Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94 [2008]).

We have considered petitioner's remaining contentions, including that the determination results in the children being separated from their siblings, and find them unavailing.

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

ENTERED: FEBRUARY 23, 2010

David Slobozy
CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2213 The People of the State of New York, Ind. 1082N/08
Respondent,

-against-

Darnell Banks,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Ambrecht, J.), rendered on or about October 21, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: FEBRUARY 23, 2010

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

Tom, J.P., Moskowitz, Renwick, DeGrasse, JJ.

2214 Alexander Breytman, Index 402940/04
Plaintiff-Appellant,

-against-

Olinville Realty, LLC, et al.,
Defendant-Respondents,

City of New York, et al.,
Defendants.

[And Another Action]

Alexander Breytman, appellant pro se.

Jaffe & Asher LLP, New York (Ira N. Glauber of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Milton A. Tingling, J.), entered January 20, 2009, which denied plaintiff's motion to restore the case to active status, and granted defendants-respondents' cross motion pursuant to CPLR 3217(b) to voluntarily withdraw their counterclaims, unanimously affirmed, without costs.

The determination of the motion court was appropriate in light of this Court's dismissal of plaintiff's action as against respondents (46 AD3d 484 [2007], *lv dismissed in part and denied in part* 11 NY3d 768 [2008]). Plaintiff has not shown that the dismissal of the counterclaims has caused him prejudice, nor are there any other special circumstances warranting that respondents

be compelled to pursue their counterclaims (*see Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32 [2001]).

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

ENTERED: FEBRUARY 23, 2010

CLERK

Tom, J.P., Mazzarelli, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2218N Washington Heights Optical, Inc., Index 602184/09
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent.

Jacob Rabinowitz, New York, for appellant.

Milton H. Pachter, New York (Margaret Taylor-Finucane of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 27, 2009, which denied plaintiff's motion for a *Yellowstone* injunction, unanimously affirmed, without costs.

Plaintiff brought this action to enjoin the Port Authority from terminating its lease (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). The consent of the States of New York and New Jersey to suits against the Authority (McKinney's Uncons Law of NY § 7101) does not extend to suits seeking to restrain or enjoin the Authority unless brought by the attorney general of either State (McKinney's Uncons Laws of NY § 7105) and the courts lack subject matter jurisdiction over this action (*see Matter of New York City Ch., Inc. of Natl. Elec. Contrs. Assn. v Fabber*, 73 Misc 2d 859, 864 [1973], *affd* 41 AD2d 821 [1973]; *see also Matter of Lewis v Lefkowitz*, 32 Misc 2d 434 [1961]).

While Court of Claims Act § 8 provides an exception to immunity for state agencies acting in a propriety capacity (*see Miller v State of New York*, 62 NY2d 506, 511 [1984]), there is no analogous provision governing the Authority, a bi-state agency resident in both jurisdictions (McKinney's Uncons laws of NY § 7106.

In view of the foregoing, plaintiff's remaining arguments are academic.

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

ENTERED: FEBRUARY 23, 2010

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