SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 6, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Román, JJ.

1489 The People of the State of New York, Respondent, Ind. 1642/06

-against-

Horace Hampton,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Susan Gliner of counsel), for respondent.

Judgment, Supreme Court, New York County (Thomas Farber, J. at suppression hearing; Bonnie Wittner, J. at jury trial and sentence), rendered May 18, 2007, convicting defendant of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree and reckless endangerment in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 35 years to life, unanimously affirmed.

None of defendant's claims regarding a recanting prosecution witness warrant reversal. The court properly permitted the People to impeach the witness with a prior inconsistent statement, because, in context, the witness's ultimate trial

testimony was affirmatively damaging to the People's case and not merely neutral or unhelpful (*see* CPL 60.35[1]; *People v Winchell*, 98 AD2d 838, 841 [1983], *affd* 64 NY2d 826 [1985]; *compare People v Fitzpatrick*, 40 NY2d 44, 51-52 [1976]). Defendant's objection, made for the first time during jury deliberations, failed to preserve his claim that the People demonstrated bad faith by calling the witness for the sole purpose of impeaching him, and we decline to review it in the interest of justice. As an alternative holding, we find that the People had a legitimate basis for calling the witness. We also conclude that when the deliberating jury inquired about the effect of a prior contradictory statement, the court provided a meaningful response that correctly stated the law as set forth in CPL 60.35(2), and the court was not obligated to repeat in its entirety its prior charge on this subject. In any event, any errors relating to this witness were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Two other witnesses, one of whom was acquainted with defendant, independently connected him to the crime.

The court's questioning of the recanting witness, as well as the other aspects of the court's conduct of the trial that defendant challenges on appeal, were within permissible limits (*see People v Arnold*, 98 NY2d 63, 67 [2002]; *People v Moulton*, 43 NY2d 944 [1978]). Furthermore, the conduct at issue did not

deprive defendant of a fair trial or cause him any prejudice, particularly in light of the court's curative instructions.

As the People concede, background testimony about the murder victim and a photograph of him taken while he was alive were irrelevant and should not have been received in evidence. However, this error was harmless (*see People v Stevens*, 76 NY2d 833, 835-836 [1990]).

The suppression hearing court properly exercised its discretion in denying defendant's application to call two police officers whose only connection with the identification procedure was to sit briefly with a witness before she viewed a lineup (*see People v Chipp*, 75 NY2d 327, 338-340 [1990], *cert denied* 498 US 833 [1990]). Defendant's claim that there may have been some kind of suggestive conduct by these officers was purely speculative.

Defendant failed to preserve his arguments concerning the court's charge on attempted murder and the alleged insufficiency of the evidence supporting that conviction, and his procedural claim regarding his sentencing, and we decline to review these claims in the interest of justice. By failing to make timely and specific objections or requests for additional remedies, defendant did not preserve his challenges to the prosecutor's opening statement and summation, and we decline to review these claims on the merits. As an alternative holding, we reject these

arguments on the merits. Although the prosecutor's summation contained some improprieties, they did not deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 6, 2010

CLERK

Gonzalez, P.J., Tom, Andrias, Nardelli, Richter, JJ.

1628 Destiny Gonzalez Avila, etc., et al., Index 401719/04
Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Defendants,

The New York City Health and
Hospitals Corporation,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

Candice A. Pluchino, Woodbury, for respondents.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered June 5, 2008, after a jury verdict awarding $8 million in damages to the infant plaintiff, unanimously reversed, on the law, without costs, the award vacated, and the matter remanded for a new trial.

Several hours after the jury commenced deliberations in this medical malpractice case, juror number three, the only female on the jury, ran out of the jury room stating, "I'm not going back there again. . . . I'm starting to physically fight and I'm not going to be in the room." A court officer took the juror to the robing room and instructed the remaining jurors to cease deliberations. Upon learning of the incident, the trial judge, after consulting with both counsel and without objection, declined to interview the disaffected juror to find out what

caused her to leave the jury room.

Instead, the court gave the entire jury a modified *Allen* charge (*Allen v United States*, 164 US 492 [1896]). During the charge, the court told the jury that the "heated" deliberations had caused juror number three to become "very upset and a little bit fearful." The court then instructed the jury to deliberate in an "adult way," without "invective" or "threats," and sent them back to resume deliberations. At the end of the day, after receiving a note stating that the jury had reached a verdict on some of the interrogatories, the court recessed and directed deliberations to resume the following day.

The next morning, juror number three delivered the following note to the court:

> "Your Honor, after taking the night off and trying to relax, I have come here and decided that I must write a letter to you regarding yesterday's deliberation. There is a juror who has been intimidating and threatening. In addition, he has physically threatened another juror and the situation was ended when other jurors intervened. I do not believe that I should be intimidated and/or feel threatened to change my decision. I do not feel comfortable to make a rational decision on this case, because of this person. Respectfully, . . . Juror Number Three."

After briefly hearing from plaintiffs' lawyer, the court stated that it would replace the juror with one of the alternates and instruct the jury to begin their deliberations anew.

Defense counsel protested and proposed that before replacing juror number three, the court interview all the jury members to

determine whether another juror was exhibiting threatening behavior. Counsel suggested that perhaps the allegedly threatening juror should be removed instead, and reminded the court that juror number three did not state that she could no longer deliberate. Plaintiffs' counsel objected to the court's interviewing the jurors and asked that juror number three be replaced with an alternate. The court declined to interview any jurors on the basis that it would interfere with the jury process, and stated that it would relieve the juror. Defense counsel excepted to this decision, and the court proceeded to substitute an alternate for juror number three. The jury subsequently rendered a verdict in favor of plaintiff.

The trial court should have conducted an inquiry into juror number three's complaint before discharging her (*see People v Rukaj*, 123 AD2d 277 [1986]; *People v Lavender*, 117 AD2d 253 [1986], *appeal dismissed* 68 NY2d 995 [1986]). The juror's note here did not simply report a "spirited dispute" (*People v Sampson*, 201 AD2d 314 [1994], *lv denied* 83 NY2d 971 [1994]) or "belligerent conduct" (*People v Gathers*, 10 AD3d 537 [2004], *lv denied* 3 NY3d 740 [2004]) but instead alleged that one jury member had physically threatened another. In light of the serious nature of the complaint, it was incumbent on the court, in the first instance, to interview the juror making the allegation, and then determine if any further inquiry of the

other jurors was necessary. The court's discharge of the complaining juror without any inquiry or finding that the juror was "unable to perform [her] duty" (CPLR 4106) was improper (*see Troutman v 957 Nassau Rd., LLC*, 70 AD3d 672 [2010]).

Contrary to the trial court's characterization, the juror's note did not request that she be removed from the jury. She never specifically indicated that she could not deliberate fairly or that she wished to be relieved from further service. Rather, she expressed her concern that she would not be comfortable continuing if she were to be intimidated by the other juror or threatened to change her decision. The court's concern that it could not conduct an inquiry of the jurors without interfering with the deliberative process, while understandable, was misplaced. The court could, however, have conducted a further inquiry into the allegations while at the same time ensuring that no information about the deliberations be disclosed (*see People v Pickett*, 61 NY2d 773 [1984]).

The trial court also should not have replaced the disaffected juror with an alternate without defense counsel's consent. The substitution of an alternate juror after deliberations have commenced, without consent, violates the right to a trial by jury (NY Const, art I, § 2), invalidating any resulting verdict (*Gallegos v Elite Model Mgt. Corp.*, 28 AD3d 50, 55 [2005]). Here, the record is clear that defendants did not

agree to replacing the juror and in fact specifically objected to any substitution (*see id.* at 59).

Plaintiffs' arguments to the contrary are unavailing. Merely because defense counsel agreed to keep the alternates after the original six jurors began their deliberations does not mean that she prospectively consented to all future substitutions. Nor did the fact that counsel acknowledged, after the court had already decided to replace the juror, that the alternates needed to be "looked at" evince a clear consent to replacing juror number three with an alternate. Counsel simply indicated that the alternates might have to be considered, but expressly asked the court to conduct an inquiry of each and every juror before any substitution was made.

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

ENTERED: MAY 6, 2010

CLERK

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

1872N Gal Shefer, etc., et al., Index 20102/07
Plaintiffs-Respondents,

-against-

Alex Stewart Tepper, M.D.,
Defendant-Appellant,

The Mount Sinai Hospital,
Defendant.

Martin Clearwater & Bell LLP, New York (Ellen B. Fishman of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for respondents.

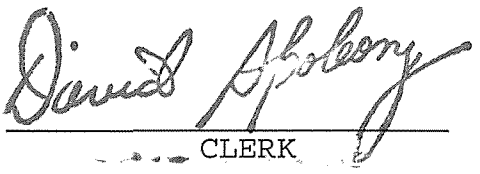
Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered November 20, 2008, which, in an action for medical malpractice, insofar as appealed from as limited by the briefs, denied defendant-appellant's motion to compel plaintiff to provide authorizations permitting informal, ex parte interviews with plaintiffs' healthcare providers, unanimously reversed, on the law, without costs, and the motion granted.

The motion court incorrectly interpreted the Court of Appeals' decision in *Arons v Jutkowitz* (9 NY3d 393 [2007]) as permitting ex parte interviews of a plaintiff's healthcare providers by defense counsel only after a note of issue was filed. To the contrary, the Court of Appeals expressly rejected the long-standing practice of proscribing such interviews only

after the note of issue was filed, and otherwise made it clear that the preferred time for such disclosure was before the filing of a note of issue (*see id.* at 410-411).

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

ENTERED: MAY 6, 2010



CLERK

Gonzalez, P.J., Catterson, Moskowitz, Renwick, Richter, JJ.

2645-
2645A Janet M. Johnson,
Plaintiff-Respondent,

Index 350749/01

-against-

Allan M. Chapin,
Defendant-Appellant.

McDermott Will & Emery LLP, New York (Daniel N. Jocelyn of counsel), for appellant.

Sheresky Aronson Mayefsky & Sloan, LLP, New York (Allan E. Mayefsky of counsel), for respondent.

Judgment, Supreme Court, New York County (Saralee Evans, J.), entered February 19, 2009, awarding plaintiff wife the total sum of $444,922.90 on her claim that defendant husband violated the divorce judgment by failing to timely fund her IRA and by failing to exercise certain stock options on her behalf, pursuant to an order, same court and Justice, entered January 29, 2009, which granted plaintiff's motion to confirm the report and recommendation of a special referee, directed entry of judgment in accordance with the recommendation, and denied defendant's cross-motion to reject the referee's report, unanimously affirmed, without costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above judgment.

The court properly confirmed the report of the referee, as its findings are supported by the record (*see Cooke v Flanagan*,

52 AD3d 257 [2008]; *Baker v Kohler*, 28 AD3d 375 [2006], *lv denied* 7 NY3d 885 [2006]). Defendant was in default of his obligation to exercise certain stock options for the benefit of plaintiff upon her proper demand, and the court properly confirmed the referee's recommendation rejecting defendant's claim that he was unable to exercise those options. Defendant waived his objection to the method of award for his failure to timely fund plaintiff's IRA account outlined in the order of reference by not raising such an objection until his post-hearing findings of fact and conclusion of law (*see Hexcel Corp. v Hercules Inc.*, 291 AD2d 222, 222-223 [2002], *lv denied* 98 NY2d 607 [2002]; *Gottesman Bus. Brokers v Goldman Fire Prevention Corp.*, 238 AD2d 250 [1997]). Under the express terms of the divorce judgment, defendant, who did not fully comply with the relevant provisions until July 1, 2008, was not entitled to reductions in his life insurance benefits obligations for the years 2006 and 2007.

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

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

ENTERED: MAY 6, 2010

CLERK

Andrias, J.P., Friedman, McGuire, Moskowitz, JJ.

249 Whitebox Convertible Arbitrage Partners, L.P., et al., Plaintiffs-Respondents, Index 600306/08

-against-

Fairfax Financial Holdings, Ltd., Defendant-Appellant.

Shearman & Sterling LLP, New York (Brian H. Polovoy of counsel), for appellant.

Anthony Ostlund Baer Louwagie & Ross, P.A., Minneapolis, MN (John B. Orenstein of counsel), for respondents.

Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered October 29, 2008, which denied defendant's motion to dismiss the complaint, unanimously affirmed.

This is an action for breach of an indenture agreement, dated as of July 14, 2003. Plaintiffs (collectively, Whitebox) are approximately two-thirds of the debenture holders. The only contested issue is the meaning of a single sentence, albeit an inordinately long one, in the indenture.

In July 2003, defendant Fairfax, a Canadian financial services holding company, issued $200 million (U.S.) worth of 5% convertible senior debentures due July 15, 2023 (the notes). The indenture governing the notes states that the notes are convertible into subordinate voting shares of Fairfax (the shares) using a defined conversion rate (conversion rate) set forth in section 10.2 of the indenture (initially 4.7057 Shares

per $1,000 [U.S.] Note).

Section 10.3 of the indenture sets out formulas for Conversion Rate increases in the event of, inter alia, a stock dividend to shareholders (§ 10.3[a]), issuance of rights or warrants (§ 10.3[b]), a stock split (§ 10.3[c]) or a cash dividend (§ 10.3[f]). Concerning cash dividends, section 10.3(f) provides for an adjustment to the Conversion Rate as follows:

> "(f) In case [Fairfax] shall, by dividend or otherwise, *distribute* to all holders of its Shares cash (regardless of whether such dividend or distribution is received and accepted by any holder of outstanding shares) (excluding any dividend or distribution in connection with the liquidation, dissolution or winding up of the Company, whether voluntary or involuntary), to the extent that the aggregate amount of any such cash distributions and dividends in *any 12-month period* exceeds, with respect to the period:
>
> > "(A) prior to July 15, 2008 Cdn$3.00 per Share (or if such distribution or dividend is declared in U.S. dollars, as determined using the noon buying rate in The City of New York for cable transfers in Canadian dollars as certified for customs purposes by the Federal Reserve Bank of New York on the date such distribution or dividend is declared); or
> >
> > "(B) on or after July 15, 2008, 4.0% of the Current Market Price (as defined in Section 10.3(g)) of the Shares,
>
> "*in each case as determined on the Record Date for such distribution or dividend,* then, in such case, the Conversion Rate shall be increased so that the same shall equal the rate determined by multiplying the Conversion Rate in effect on the applicable Record Date by a fraction [specified in two clauses in the immediately following text], such adjustment to be effective immediately prior to the opening of business on the day following the Record Date" (emphasis added).

Section 10.3(g)(iii) of the indenture defines the "Record

Date" with respect to cash dividends as "the date fixed for determination of shareholders entitled to receive such cash, securities or other property (whether such date is fixed by the Board of Directors or by statute, contract or otherwise)." Section 10.3(i) provides that cash dividends (like other distributions) do not mandate an immediate increase in the Conversion Rate unless the increase would be at least 1% of the existing Conversion Rate. If the required Conversion Rate is below this level, Fairfax may defer it, i.e., have it "carried forward and taken into account in any subsequent adjustment."

On January 4, 2007, Fairfax declared an annual dividend of $2.75 (U.S.) per Share and a Record Date of January 25, 2007. Fairfax distributed this dividend on February 8, 2007. On January 2, 2008, Fairfax declared an annual dividend of $5.00 (U.S.) per Share and a Record Date of January 14, 2008. Fairfax distributed this dividend on February 11, 2008. There is no dispute that, standing alone, neither dividend would require an immediate increase in the Conversion Rate. Thus, Fairfax could defer the increase under section 10.3(i), unless it was required to combine the two dividends because they fell within the same 12-month period. Whitebox contends that Fairfax was so required. Focusing on the language "in each case as determined on the *Record Date* for such distribution or dividend (emphasis added)," Whitebox reads section 10.3(f) of the Indenture to measure the 12

months by the Record Dates of the dividends (i.e., January 4, 2007 and January 2, 2008). Fairfax takes the position, however, that the distribution dates of the dividends (i.e., February 8, 2007 and February 11, 2008) determine the 12-month period.

Whitebox subsequently sued Fairfax for breach of the indenture for refusing to increase the Conversion Rate; it sought specific performance and declaratory relief. Fairfax moved to dismiss for failure to state a claim based on its interpretation of the language in the Indenture. In addition, Fairfax argued that Whitebox failed to comply with certain conditions of the indenture before commencing suit. The motion court agreed with Whitebox, finding that the "Indenture unambiguously states that the determination of whether the dividend exceeded Cdn$3.00 per share in any twelve month period is 'as determined on the Record Date.'" Accordingly, the motion court denied Fairfax's motion to dismiss.

We affirm, but for a different reason -- the language of section 10.3(f) of the indenture is ambiguous. The opening language thereof, by using the words "*distribute* to all holders of its shares cash," is consistent with an intent to have the 12-month period measured by the dates cash dividends and distributions are distributed, which is not, of course, the Record Date. Under that reading, because the dividends were distributed more than 12 months apart -- and because the 2008

dividend did not itself exceed the amount set forth in subsection (A) -- an increase in the conversion rate would not be required. This reading gives meaning to the unambiguous word "distribute," the first verb used in this anfractuous sentence. A reading that focuses on the "distribut[ion]" of the cash is, at the least, reinforced by the word "such" in the words following closely on the heels of the verb (but after the successive parentheticals). Thus, the words "to the extent that the aggregate amount of any such cash distributions and dividends" refer back to the "distribute[d]" cash dividends or distributions described in the opening words of the sentence (rather than to those described in the second parenthetical). Moreover, the indenture "reveals a logical reason" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990] [internal quotation marks omitted]) for the phrase upon which Whitebox pins its hopes, "in each case as determined on the Record Date for such distribution or dividend." That is, any adjustment in the Conversion Rate is required "to be effective immediately prior to the opening of business on the day following the Record Date" and the extent of the adjustment is based on the Conversion Rate and "Current Market Price" on the Record Date.

By contrast, under Whitebox's reading, the word "distribute" is assigned a limited office, even if it is not rendered surplusage (*cf. Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). Under its reading, the word serves only to reinforce what other

provisions of the indenture make clear, i.e., that distribution of a cash dividend or other distribution is a necessary condition to an adjustment in the Conversion Rate on account of such a distribution. On the other hand, to the extent that is a flaw in Whitebox's position, Fairfax's explanation for the words "in each case as determined on the Record Date" appears to suffer from the same flaw.

With respect to the actual position in the sentence of the phrase "in any 12-month period," we note that Fairfax's position surely would be strengthened if the sentence read "In case [Fairfax] shall, by dividend or otherwise, distribute in any 12-month period to all holders . . ." The actual text, however, is not rendered ambiguous simply because it can be improved. The extent to which, as a matter of grammar, the hypothetical variant and the actual text can be distinguished is a nice question.

In the final analysis, we conclude that the sentence is ambiguous, i.e., reasonably susceptible of two meanings (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [2008], *affd* 13 NY3d 398 [2009]), largely because it is not sufficiently clear whether the phrase "in each case as determined on the Record Date for such distribution or dividend," refers exclusively to the two periods defined in (A) and (B), or refers back as well to what the sentence expressly describes as a "case," i.e., the "distribut[ion] to all holders of its shares"

(*cf. Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 127 [2008] [Read, J. dissenting] [discussing "grammatical 'rule of the last antecedent,'" pursuant to which referential words, "where no contrary intention appears, refer solely to the last antecedent" but noting that "this rule is not an absolute and can assuredly be overcome by other indicia of meaning"]).

Because the sentence is ambiguous, extrinsic evidence is admissible to resolve it (*Ender v National Fire Ins. Co. of Hartford*, 169 AD2d 420, 421 [1991]). As further proceedings are necessary, we note that Whitebox is unpersuasive in seeking to buttress its reading by pointing to seemingly odd results that could follow from Fairfax's reading. We think it plain that apparent oddities can be conceived under both readings.

As for Fairfax's remaining arguments, we agree with the motion court that while Whitebox breached the "Limitation on Suits" provision of the indenture, the Trustee explicitly waived its right to rely on that provision as a bar to this action (*see Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69 [2003], *lv dismissed* 2 NY3d 794 [2004]). The Trustee chose, in

its discretion, to comply with Whitebox's direction to waive the "Limitation on Suits" provision, as the indenture's "Control by Majority" provision authorizes.

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

ENTERED: MAY 6, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2523 The People of the State of New York, Ind. 6046/02
Respondent,

-against-

Alexis Orta,
Defendant-Appellant.

- - - - -

New York City Bar Association,
Amicus Curiae.

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

Robert T. Johnson, District Attorney, Bronx (Andrew S. Holland of counsel), for respondent.

Judith Whiting, New York (Nikki R. Harding of counsel), for amicus curiae.

Appeal from order, Supreme Court, Bronx County (John P. Collins, J.), entered December 2, 2009, which denied, on the ground of ineligibility, defendant's CPL 440.46 motion to be resentenced, unanimously dismissed as moot.

Defendant contends that the motion court erred in concluding that, as a reincarcerated parole violator, defendant was ineligible for resentencing to a determinate sentence. Were we to accept that argument, the proper corrective action would be a remand to the motion court for a discretionary determination of the motion. However, during the pendency of this appeal, defendant has again been released on parole. Since he is not in custody, he is not presently eligible for resentencing (CPL

440.46[1]). Therefore, this appeal is moot, and we do not find applicable the exception to the mootness doctrine set forth in *Matter of Hearst Corp. v Clyne* (50 NY2d 707, 714-715 [1980]).

M-1278 - People v Orta

Motion seeking leave to file amicus curiae brief granted.

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

ENTERED: MAY 6, 2010

CLERK

Tom, J.P., Mazzarelli, Andrias, Saxe, DeGrasse, JJ.

2633 In re Edward F.,
Petitioner-Respondent,

-against-

Karima G.,
Respondent-Appellant.

Neal D. Futerfas, White Plains, for appellant.

Louise Belulovich, New York, for respondent.

Elisa Barnes, New York, Law Guardian.

Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about May 23, 2008, which, inter alia, awarded custody of the parties' child to petitioner father, unanimously affirmed, without costs.

The award was properly made on a record supporting findings that the mother is either unwilling or unable to facilitate a close relationship between the father and the child, and that the father, who has had temporary custody of the child since December 2005, when the child was three and a half years old, has been appropriately addressing the child's needs (*see Eschbach v Eschbach*, 56 NY2d 167, 171-172; 173-174 [1982]; *Matter of Osbourne S. v Regina S.*, 55 AD3d 465, 466 [2008], *lv dismissed 13* NY3d 782 [2009]). The court properly admitted the mother's hospital records, the mother having waived whatever privilege against disclosure she may have had (*see Ace v State of New York*,

207 AD2d 813, 814 [1994], *affd* 87 NY2d 993 [1996]), as well as text and voicemail messages sent by the mother to the father, the mother having admitted to sending many of them and the father having otherwise authenticated the voicemail recordings. We have considered the mother's other arguments and find them unavailing.

M-2140 - Edward F. v Karima G.

Motion to dismiss appeal denied.

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2721 The People of the State of New York, Ind. 2034/06
Respondent,

-against-

Jose Velazquez,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J. at motions; Ruth Pickholz, J. at suppression hearing; Renee A. White, J. at plea and sentence), rendered August 21, 2007, convicting defendant of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years, unanimously affirmed.

The motion court's summary denial of the portion of defendant's initial suppression motion that sought to suppress a backpack was proper, since defendant did not address the People's claim that he had abandoned the backpack, and did not advance any theory on which suppression could be granted (*see People v Kolon*, 37 AD3d 340 [2007], *lv denied* 81 NY3d 947 [2007]; *People v Arroya*, 268 AD2d 287 [2000], *lv denied* 95 NY2d 832 [2000]). Although, in a renewal motion (denominated a supplemental motion), defendant alleged he discarded the bag as the result of

unlawful police conduct, the motion court properly exercised its discretion in denying that motion, since defendant did not establish any reason for omitting the new allegations from his original motion (*see People v Ruth*, 260 AD2d 296 [1999], *lv denied* 93 NY2d 929 [1999]; *Foley v Roche*, 68 AD2d 558, 568 [1979]; CPL 710.40[4]). In any event, defendant received a hearing on other evidence obtained in the same incident. He had a full opportunity to litigate all aspects of the police conduct, and an additional hearing would serve no useful purpose.

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2722 In re Marc Einsohn, Index 402027/08
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

Steven L. Barkan, P.C., Melville, for appellant.

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

Order, Supreme Court, New York County (Marilyn Shafer, J.), entered on or about March 18, 2009, which denied the petition seeking, inter alia, to reinstate petitioner to his former position as Assistant Principal of Foreign Language at Francis Lewis High School, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

While disciplinary charges were pending against him, petitioner was excessed from his position as an assistant principal and assigned to a regional operations center. Two of the charges against him were sustained after a hearing pursuant to Education Law § 3020-a. Thereafter, a vacancy was posted for the position from which he was excessed.

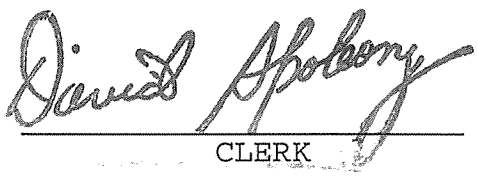
Since petitioner was not acquitted of all of the charges against him, he is not entitled to automatic reinstatement to his prior position *(see Matter of Adlerstein v Board of Educ. of City of N.Y.*, 64 NY2d 90, 102 [1984]; *Matter of Taylor v Hammondsport*

Cent. School Dist., 267 AD2d 987 [1999]). Furthermore, the provision of the collective bargaining agreement relied upon by petitioner is applicable only to an intermediate supervisor assigned to a school. During the pendency of the charges, petitioner was not an intermediate supervisor assigned to a school, and accordingly, he may not claim priority over others for the position at his former school. There is also no evidence that petitioner applied to fill the vacancy and was rejected.

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

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

ENTERED: MAY 6, 2010



CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2723-
2724 In re Lisa Bishop, et al., File 0575/05
Petitioners-Respondents,

-against-

Rona Maurer,
Respondent-Appellant.

Bahn Herzfeld & Multer, LLP, New York (Richard L. Herzfeld of counsel), for appellant.

Lawrence H. Silverman, New York, for respondents.

Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about November 9, 2009, which, upon reargument, adhered to a prior order (Renee R. Roth, S.), entered on or about December 1, 2008, granting petitioners' motion for summary judgment determining that certain real estate and its contents were estate assets, unanimously reversed, on the law and the facts, without costs, and the motion for summary judgment denied. Appeal from the prior order unanimously dismissed, without costs, as superseded by the appeal from the subsequent order.

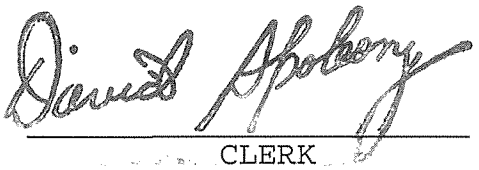
In order for assets to become part of a trust under EPTL 7-1.18, the "grantor is obligated to actually transfer the assets" to the trust (*Matter of Rothwell*, 189 Misc 2d 191, 195 [2001]). Furthermore, the language of the statute is clear that mere "recital of assignment, holding or receipt" is insufficient

for transferring assets to a trust. Here, the trust instrument simply recited that various assets belonged to, or had been assigned to, the trust; there was no evidence in the record that any deed had actually been executed. The Surrogate thus correctly found that because a deed was required under § 7-1.18, the real property at issue had never been conveyed to the trust.

Although it is beyond dispute that the house in question is part of the estate rather than part of the trust, the issue is nonetheless inextricably intertwined with respondent's counterclaim in a related proceeding that the decedent deliberately failed to transfer the real estate to the trust in the first instance, thus breaching his contractual obligation to do so. As a result, the Surrogate should have denied summary judgment pending determination of the related proceeding, since the decision on the trust assets would render ineffectual a favorable result for respondent in the related proceeding.

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

ENTERED: MAY 6, 2010



CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2725-
2726 In re Tonya Anderson,
Petitioner-Respondent,

-against-

Hal H. Harris,
Respondent-Appellant.

Hal H. Harris, appellant pro se.

Tonya Anderson, respondent pro se.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), Law Guardian.

Orders, Family Court, Bronx County (Marian R. Shelton, J.), entered on or about December 31, 2007, which, to the extent appealed from as limited by the briefs, awarded petitioner mother sole physical and legal custody of the parties' child, dismissed respondent father's petitions based on violations of temporary orders of visitation, denied respondent's second motion to dismiss the custody petition, and issued a five-year order of protection forbidding respondent from exercising any corporal punishment against the child, unanimously affirmed, without costs.

The court's direction that respondent take the Minnesota Multiphasic Personality Inventory (MMPI) diagnostic test is no longer an issue since he has already taken the test (*see Matter of Hill v Ward*, 169 AD2d 620, 622 [1991]). There is no basis for

striking the forensic psychologist's testimony. Although the forensic psychologist's report is not in the record on appeal, the child's attorney has submitted a copy of the report to this Court. Because respondent never contended that he lacked a sufficient opportunity to read the report, he cannot complain that his appeal has been impaired by the Family Court Clerk's failure to produce the report. Respondent improperly argues for the first time in his reply brief that the IAS court improperly admitted the report into evidence, and we decline to consider the argument. Although the court improperly heard a small portion of the psychologist's testimony outside the presence of the parties, the error was harmless because the rest of the psychologist's testimony and report, as well as the record generally, supported the conclusion that the best interests of the child warranted awarding custody to petitioner.

With regard to deprivation of respondent's visitation rights, he had ample opportunity to present evidence of petitioner's violations during the custody trial, but failed to do so. Moreover, the record indicates that petitioner supported the child's regular and frequent visits with her father.

Denial of respondent's request for a subpoena was a proper exercise of discretion. There is no indication in the record that petitioner was using illegal drugs or had used them in the recent past (*Garvin v Garvin*, 162 AD2d 497, 499 [1990]), or that

she had any medical or psychological condition that might negatively impact on her care for the child (*see Matter of Penny B. v Gary S.*, 61 AD3d 589, 591 [2009], *lv denied* 13 NY3d 705 [2009]).

Given respondent's testimony that he believed in physically disciplining the child and had once used a belt to do so, the court properly issued a five-year order of protection directing him to refrain from such acts (*Matter of Larry v O'Neill*, 307 AD2d 410, 411-412 [2003]). Contrary to respondent's contention, an order of protection under Family Court Act § 656 "need not be justified by aggravating circumstances in order to exceed a year in duration" (*Matter of Anson v Anson*, 20 AD3d 603, 604 [2005], *lv denied* 5 NY3d 711 [2005]; *compare* § 842). Because the order of protection was issued only on behalf of the child, petitioner was not required to allege an assault (*see* § 821[1][a]), nor was the court required to issue a summons pursuant to §§ 821-a(2)(a) or 825, or a warrant (§ 827), since those provisions of the Family Court Act apply only to family offense proceedings, not custody proceedings.

With respect to respondent's motion for poor person relief, the court had reason to doubt his claim of indigence, given his failure to submit financial documentation until almost 2½ years after he first requested assigned counsel, and even then in an unsigned and undated financial affidavit, especially in light of

the fact that he had previously retained several attorneys during the custody proceeding (*see Shapiro v Rosa*, 224 AD2d 181 [1996]). Contrary to respondent's contention, the court's authorization to pay his portion of the forensic evaluation at government expense was not tantamount to a finding that he was indigent for all purposes, since that relief was granted not because of his poverty, but because of the court's desire for a thorough and balanced forensic evaluation. Furthermore, the Support Magistrate never made a finding of indigence. To the extent respondent seeks to challenge the court's decision to assign counsel to petitioner, he does not have standing to lodge such a challenge (*Matter of Janice K.*, 82 Misc 2d 983, 985 [1975]).

The court's denial of recusal was a proper exercise of discretion. Absent statutory grounds, the movant for such relief must point to an actual ruling that demonstrates bias, which respondent failed to do (*Yannitelli v D. Yannitelli & Sons Constr. Corp.*, 247 AD2d 271 [1998], *lv denied* 92 NY2d 875 [1998]).

Respondent's motions to dismiss the custody petitions for failure to comply with the procedural time limitations in the Uniform Rules for Trial Courts (22 NYCRR) § 205.14 and CPLR 2219(a) were properly denied. Given his many attempts to prolong the proceedings by changing counsel and repeatedly requesting counsel without providing financial documentation, arriving late

and unprepared in court, repeatedly requesting adjournments, and failing to cooperate with the forensic evaluation process, it is disingenuous for him to complain about the court's failure to complete the trial and decide his first dismissal motion in a timely fashion. Moreover, neither of those authorities provides a remedy or penalty for failing to comply with time requirements (*see Matter of McDermott v Berolzheimer*, 210 AD2d 559 [1994]).

The Family Court Clerk properly refused to produce a transcript of the child's in camera testimony for respondent's review. Such testimony is confidential, and respondent failed to give a sound reason for its disclosure (*Matter of Sellen v Wright*, 229 AD2d 680, 681-682 [1996]).

There is no basis for striking the appellate briefs for petitioner and the child. Respondent's argument that his due process rights continue to be violated by the Family Court is improperly raised for the first time in his reply brief, and we decline to consider it.

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2727 The People of the State of New York, Respondent, Ind. 2524/07 4646/07

-against-

Pedro Escobar, Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Steven Barrett, J.), rendered on or about September 9, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2728 Harry Soriano, Index 28970/02
Plaintiff-Appellant,

-against-

Rosa Inoa, et al.,
Defendants,

The City of New York,
Defendant-Respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 6, 2008, which denied plaintiff's motion to set aside a trial order dismissing the complaint, unanimously reversed, on the facts, without costs, the motion denied, the complaint reinstated, and the matter remanded for further discovery on the newly revealed material and for a new trial.

It is unclear from the trial record whether Dr. Gutstein was an expert witness as to whom CPLR 3101(d) notice was required, or plaintiff's treating physician, as to whom no notice was required (*see e.g. Breen v Laric Entertainment Corp.*, 1 AD3d 298, 299-300 [2003]). Moreover, it is clear that the prejudice to defendants arose from the lack of proper authorizations for medical records and not from the report annexed to plaintiff's expert notice.

Accordingly, Gutstein's testimony as to causation should not have been precluded on the ground of plaintiff's late service of the notice.

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2729 Saul Sayeh, Index 105490/08
Plaintiff-Appellant,

-against-

66 Madison Avenue Apt. Corp., et al.,
Defendants-Respondents.

Carlos M. Carvajal, New York, for appellant.

Saul Sayeh, appellant pro se.

Cantor Epstein & Mazzola, LLP, New York (Rachael E. Gurlitz of counsel), for 66 Madison Avenue Apartment Corp., Arthur Bascomb, Liz Callahan, Michelle Campbell, David DeDiralamo, Mitchell BG Hacker, Megan O'Sullivan, David Aviram and Andrea Bunis Management Inc., respondents.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Lawrence Silberman, P.C., respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 30, 2009, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on the issue of liability against defendants Laurence Silberman, Andrea Bunis Management, Inc. (Bunis), and the individual defendants who were board members of defendant 66 Madison Avenue Apt. Corp. (the coop), granted the cross motion of the coop for summary judgment dismissing all claims as against it except the breach of contract cause of action, and granted the cross motions of the remaining defendants for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Plaintiff, a shareholder in the coop, had previously

purchased seven apartments in the building owned by the coop and sought to purchase an eighth unit. His application was turned down by the coop's board members; defendant Silberman is the coop's attorney and Bunis is its managing agent. Plaintiff commenced this action asserting, inter alia, causes of action for discrimination on the basis of national origin against all defendants, breach of fiduciary duty against the board members, breach of contract against the coop, negligence against Bunis and legal malpractice and intentional tort against Silberman. Subsequently, upon being notified by the attorney representing plaintiff in the real estate transaction action that the proprietary lease contained a stockholder-to-stockholder exemption from the requirement of board approval for assignment of shares, the coop conceded partial liability on the breach of contract claim.

Plaintiff's discrimination claim was properly dismissed. There is no evidence that either Silberman or Bunis was involved in the determination to turn down plaintiff's application, and thus, there is no basis for a discrimination claim against them. The remaining defendants established their prima facie entitlement to summary judgment with evidence that denial of plaintiff's application was made for legitimate purposes taking into consideration the interests of the coop (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538

[1990] ["(t)he business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes"] [internal quotation marks and citation omitted]; *Pelton v 77 Park Ave. Condominium*, 38 AD2d 1, 7-8 [2006]). In opposition, plaintiff failed to offer proof of unlawful discrimination to raise a triable issue of fact (*id.* at 9).

To make a prima facie case of housing discrimination under Executive Law § 296(5) and under its federal counterpart 42 USC § 3601 *et seq.*, plaintiff must demonstrate (1) that he is a member of the class protected by the statute; (2) that he sought and was qualified to purchase the apartment; (3) that he was rejected; and (4) that the coop's denial of his application occurred under circumstances giving rise to an inference of discrimination (*see Dunleavy v Hilton Hall Apts. Co., LLC*, 14 AD3d 479, 480 [2005]; *Mitchell v Shane*, 350 F3d 39, 47 [2003]). Here, plaintiff is unable to point to evidence raising an inference of discrimination, as there is no evidence that the board treated non-Israelis differently in regards to acquiring multiple apartments. Nor is there any evidence that the board chose to honor the stockholder-to-stockholder exemption in the case of non-Israelis prior to plaintiff's application. Indeed, it appears that the board was unaware of the exemption until

plaintiff's attorney pointed it out. While plaintiff asserted in response to interrogatories that the board had honored the stockholder-to-stockholder exemption in the past, he provided no evidentiary support for this claim in opposition to the summary judgment motions.

Unable to point to any evidence suggesting that the board's denial was made under circumstances giving rise to an inference of discrimination, plaintiff argues that evidence that the board had an ongoing dispute with another shareholder, an Israeli, demonstrates that the board was motivated to discriminate against plaintiff. However, conclusory or speculative assertions of discrimination are insufficient to raise a triable issue of fact (*Pelton*, 38 AD3d at 9), and in any event, there is no evidence that the third party was subjected to unlawful discrimination that adversely affected plaintiff (*cf. Bernstein v 1995 Assoc.*, 185 AD2d 160, 163 [1992]; *Dunn v Fishbein*, 123 AD2d 659 [1986]).

In the absence of any evidence of bad faith or tortious conduct by the board members independent of their disapproval of the sale, the breach of fiduciary duty claims against them were properly dismissed (*Pelton*, 38 AD3d at 10; *Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 155 [1999]; *Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324, 326 [1998]).

The action was properly dismissed as against Bunis, since it always acted as an agent for a disclosed principal (*see Crimmins*

v Handler & Co., 249 AD2d 89, 91-92 [1998]).

There is no evidence of privity or "near privity" to support the imposition of a claim of legal malpractice against Silberman (*see Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59-61 [2007]; *Baystone Equities, Inc. v Handel-Harbour*, 27 AD3d 231 [2006]). Nor is there is any evidence of collusion, malice or fraud to warrant the imposition of liability (*see Key Bank of N. N.Y. v Lake Placid Co.*, 103 AD2d 19, 31 [1984]). Plaintiff's claim for intentional tort was properly dismissed, as it is based on the same facts that give rise to the legal malpractice claim (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [2003]; *Daniels v Lebit*, 299 AD2d 310 [2002]).

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

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2730 George Cutrone, et al., Index 13349/99
Plaintiffs-Respondents-Appellants,

-against-

New York City Transit Authority,
Defendant-Appellant-Respondent,

Malvese Equipment Co., Inc.,
Defendant-Respondent.

Wallace D. Gossett, Brooklyn (Lawrence A. Silver of counsel), for appellant-respondent.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondents-appellants.

Gallagher, Walker, Bianco & Plastaras, Mineola (Robert J. Walker of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 18, 2008, after a jury verdict awarding plaintiff George Cutrone $3 million for pain and suffering, $458,215 for past lost earnings following collateral source offset, $799,872 for future lost earnings following collateral source offset, and awarding plaintiff Loretta Cutrone $1 million on each of her derivative claims for past and future loss of services, unanimously modified, on the law, and the offset to plaintiff's future lost earnings vacated; and further modified, on the facts, the awards for loss of services vacated, a new trial ordered solely as to damages for loss of services, unless plaintiffs, within 30 days of service of a copy of this order, stipulate to accept reduced

awards for past loss of services in the amount of $200,000 and future loss of services in the amount of $400,000, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The verdict finding defendant Transit Authority negligent in failing to properly maintain the electric cart that hit the injured plaintiff and/or safely maintain the premises where the accident occurred was supported by sufficient evidence and was not contrary to the weight of the evidence adduced at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493 [1978]).

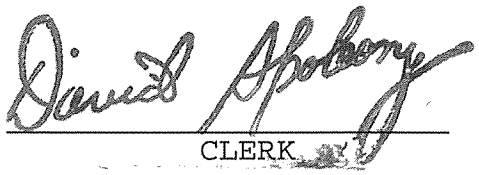
The TA was not entitled to a collateral source offset of the injured party's future earnings based on his future social security disability benefits under either CPLR 4545(b), which permits damage awards to be offset only by past costs or expenses (*see Iazzetti v City of New York*, 94 NY2d 183 [1999]), or CPLR 4545(c), since the TA failed to meet its burden of showing a high probability that he will continue to be eligible for the benefits in question (*see Ruby v Budget Rent A Car Corp.*, 23 AD3d 257 [2005], *lv denied* 6 NY3d 712 [2006]).

While we discern no reason to conclude that the pain and suffering awards deviated materially from what is reasonable compensation under the circumstances, the awards for past and future loss of services do deviate materially, to the extent indicated (*see e.g. Singh v Gladys Towncars Inc.*, 42 AD3d 313, 314 [2007]).

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

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

ENTERED: MAY 6, 2010



CLERK

Mazzarelli, J.P., Freedman, Richter, Manzanet-Daniels, JJ.

2732 In re Frank Gaetano Lamberti, etc., File 2229/01/A
Petitioner,

-against-

Glenn Angiolillo,
Respondent-Appellant,

Louis Marinelli, etc.,
Respondent-Respondent,

Joseph Angiolillo,
Respondent.

Annette G. Hasapidis, South Salem, for appellant.

Joseph A. Maria, White Plains, for Louis Marinelli, respondent.

Decree, Surrogate's Court, Westchester County (Anthony A. Scarpino Jr., S.), entered on or about April 20, 2009, directing petitioner to specifically perform under an option contract and transfer equal shares of a partnership's interest in real property to respondents Glenn Angiolillo and Marinelli in exchange for payment equal to the appraised value of the property, unanimously affirmed, without costs.

General principles governing option agreements require strict compliance with the terms setting forth the time and manner of the option's exercise (*see Agostino v Soufer*, 12 AD3d 204, 205 [2004]; *Urban Archaeology Ltd. v Dencorp Invs., Inc.*, 12 AD3d 96, 104 [2004]). However, a party to an option contract may waive its right to insist upon strict compliance with those

terms, either expressly or by its conduct (*see Ballston Ave. Dev. v Wolf*, 45 AD3d 1032, 1033 [2007]; *Kenyon & Kenyon v Logany, LLC*, 33 AD3d 538 [2006]). Waiver of an established contractual right "requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable" (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

Glenn Angiolillo waived his right to insist upon strict compliance with the underlying option agreement's terms setting forth the time period for exercising an option and the purchase price of the subject property. Both in correspondence in the record and in testimony before the court, he demonstrated his agreement to extend the option period.

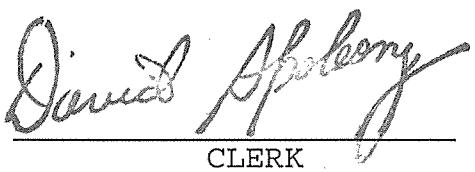
Although the option contract required modifications to be in a writing signed by all parties, the evidence of record shows that by their conduct, the parties ratified numerous modifications to their contract, such as to the terms setting forth the time period for the exercise of options to purchase the property and to the purchase price itself (*see* Restatement [Second] of Contracts § 209, Comment *a*; § 210, Comment *c*).

The Surrogate's Court did not abuse its discretion by invoking its equitable authority to grant specific performance of the underlying agreement (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 [2001]). There was a valid contract, the optionees

had substantially performed thereunder and were capable of performing their remaining obligations, the optionor was able to perform its obligations, and there was no adequate remedy at law. In its grant of equitable relief, the court properly placed the parties, to the extent possible, in the positions they would have occupied had the contract been performed according to its terms, granting no party superior rights than would have been enjoyed had there been proper performance (*see F & F Rest. Corp. v Wells Goode & Benefit, Ltd.*, 61 NY2d 496, 502 [1984]; *Stephens v Messing*, 162 AD2d 352, 354 [1990]).

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

ENTERED: MAY 6, 2010



CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2733 Benson Park Associates, LLC, Index 102966/08
Plaintiff-Respondent,

-against-

Alexander Herman,
Defendant-Appellant.

Alexander Herman, Brooklyn, appellant pro se.

Tsyngauz & Associates, P.C., New York (Yevgeny Tsyngauz of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered September 17, 2009, which, in an action for legal malpractice arising out of defendant's representation of plaintiff in an action for breach of contract, denied defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

In the underlying action, defendant failed timely to file an answer on behalf of plaintiff, and a default judgment was entered against it (*Mega Constr. Corp. v Benson Park Assoc. LLC*, 60 AD3d 826 [2d Dept 2009]).

A party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense (*Mutual Mar. Off., Inc. v Joy Const. Corp.*, 39 AD3d 417, 419 [2007]). The court properly denied defendant's third request for an adjournment of plaintiff's motion for

partial summary judgment (*see Matter of Desmond K. v Kevin K.*, 59 AD3d 240 [2009], *lv denied* 12 NY3d 711 [2009]; *Treppeda v Treppeda*, 212 AD2d 592 [1995]). While in support of the motion to vacate the default, defendant claimed that he had had a "previously scheduled engagement," he offered nothing to substantiate this claim. Moreover, at no time after the motion for partial summary judgment was submitted did defendant seek leave to submit opposition. In addition, defendant failed to offer a meritorious defense to the malpractice claim, other than to question the amount of damages.

The court properly searched the record in granting plaintiff judgment in the amount that plaintiff was required to pay in the underlying action. Plaintiff established that it had potential counterclaims exceeding the amount of judgment, claims which are now barred by res judicata (*see Santiago v Lalani*, 256 AD2d 397 [1998]).

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2734 Wilson Paredes, Index 112224/05
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents,

The District Attorney of New York County,
Defendant.

Alexander J. Wulwick, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

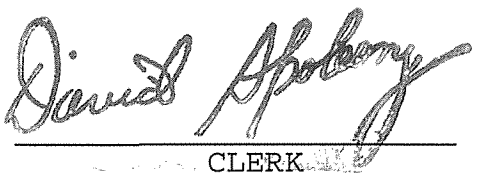
Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered December 18, 2008, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' cross motion for summary judgment dismissing the malicious prosecution cause of action, unanimously affirmed, without costs.

Respondents established their prima facie entitlement to summary judgment dismissing the malicious prosecution cause of action by submitting evidence establishing that there was probable cause to arrest and prosecute plaintiff, as the undercover officer identified plaintiff as the person who sold him cocaine during a buy-and-bust operation (*see Batista v City of New York*, 15 AD3d 304 [2005]; *Grant v Barnes & Noble*, 284 AD2d 238 [2001]). In opposition, plaintiff failed to raise a triable issue of fact. The alleged inconsistencies in the accounts

provided by the arresting officer and the undercover officer do not undermine a finding of probable cause. Furthermore, the cause of action is not viable as the complaint fails to allege actual malice (*see Shapiro v County of Nassau*, 202 AD2d 358 [1994], *lv denied* 83 NY2d 760 [1994]).

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

ENTERED: MAY 6, 2010



CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2735-
2736

Index 110519/05
116253/05

Robert J. Musso, as trustee of the Estate of Tong Lin Wu,
Plaintiff-Respondent-Appellant,

-against-

Hsing Wei Chien, et al.,
Defendants-Respondents,

Daniel Fernandez,
Defendant-Appellant.

- - - - -

Hsing Chien Wei, et al.,
Plaintiffs-Respondents,

-against-

Daniel Fernandez,
Defendant-Appellant.

Barrett Lazar, LLC, Forest Hills (Marc B. Schuley of counsel), for appellant.

Wade T. Morris, New York, for respondent-appellant.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for Hsing Wei Chien, respondent.

Shapiro, Beilly, Rosenberg & Aronowitz, LLP, New York (Roy J. Karlin of counsel), for M.T.P. Auto Leasing & Services, Inc., respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 11, 2009, which, in an action for personal injuries sustained in New Jersey by plaintiff bankruptcy trustee's debtor while a passenger in a vehicle operated by his coworker defendant Chien and owned by defendant M.T.P. Auto Leasing & Services, denied a motion by defendant Fernandez, the

driver of the other vehicle, for a ruling that New Jersey law applies, unanimously affirmed, without costs. Order, same court and Justice, entered April 22, 2009, which, insofar as appealed from as limited by the briefs, granted M.T.P's motion for summary judgment dismissing the complaint and Fernandez's cross claims as against it, and granted Chien's motion for summary judgment dismissing Fernandez's cross claims as against it, unanimously affirmed, without costs.

As Fernandez plainly admitted at his deposition that he was a resident of New York at the time of the accident, and as it is undisputed that all other parties resided in New York at the time of the accident, and as the law in issue, that of comparative negligence, is allocative in nature (*see Burnett v Columbus McKinnon Corp.*, 69 AD3d 58, 61 [2009]), New York law applies (*see Padula v Lilarn Props. Corp.*, 84 NY2d 519, 522 (1994]).

As plaintiff's claim against owner M.T.P. is vicariously based on driver Chien's alleged negligence, the claim is barred by Workers' Compensation Law § 29(6) (*Naso v Lafata*, 4 NY2d 585 [1958]). There is no merit to plaintiff's argument that because he alleges that Fernandez's negligence contributed to the accident, i.e., that coworker's Chien's negligence was not the sole proximate cause of the accident, section 29(6) does not apply to bar his claim against M.T.P. Whatever the extent of Fernandez's fault, it remains that plaintiff's only theory

against M.T.P. is vicarious liability for Chien's negligence (*cf. id.* at 590-591).

As the release executed by Fernandez in his own action against Chien and M.T.P. clearly covered "all claims" he might have had against them, including that "arising out of the certain sequence of events that occurred at the . . . time and place [of the accident]," Fernandez's cross claims against Chien and M.T.P. in this action were properly dismissed (*see Thailer v LaRocca*, 174 AD2d 731, 733 [1991]).

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2737 The People of the State of New York, Ind. 3958/07
Respondent,

-against-

Rondell Wilkins,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Charlotte E. Fishman of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 26, 2008, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the second degree and attempted forgery in the second degree (two counts) and sentencing him, as a second felony offender, to an aggregate term of 3 to 6 years, unanimously affirmed.

Defendant's general objection (*see People v Tevaha*, 84 NY2d 879 [1994]) failed to preserve his argument that the People's expert on altered MetroCards invaded the jury's province by expressing an opinion on the ultimate issue of intent, and we decline to review it in the interest of justice. As an alternative holding, we find that the testimony was permissible

(*see People v Hicks*, 2 NY3d 750, 751 [2004]; *People v Kanner*, 272 AD2d 866, 867 [2000], *lv denied* 95 NY2d 867 [2000]), and that, in any event, any error in this regard was harmless.

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2738 In re Lakima Anderson, Index 400934/08
Petitioner,

-against-

Tino Hernandez, etc., et al.,
Respondents.

An article 78 proceeding having been transferred to this Court pursuant to an order of the Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered on or about January 20, 2009,

And upon the stipulation of the parties hereto dated April 15, 2010,

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

ENTERED: MAY 6, 2010

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2740N Atlantic Aviation Investment LLC, Index 602920/07
Plaintiff-Respondent,

-against-

Varig Logistica, S.A.,
Defendant-Appellant.

Orloff, Lowenbach, Stifelman & Siegel, P.A., Roseland, NJ (Samuel Feldman of counsel), for appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Jeffrey A. Rosenthal of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered May 26, 2009, which confirmed the special referee's report, dated March 5, 2009, recommending an award of attorney's fees to plaintiff in the amount of $1,118,956.07, unanimously affirmed, with costs.

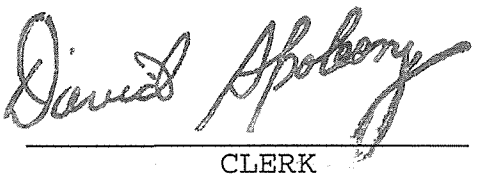
As a threshold matter, defendant argues that plaintiff is not entitled to any attorneys' fees in this matter because it was plaintiff's corporate parent that received and paid the legal bills. We decline to address this issue, raised for the first time on appeal (*see First Intl. Bank of Israel v Blankstein & Son*, 59 NY2d 436, 447 [1983]; *Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313 [2000]; *Recovery Consultants v Shih-Hsieh*, 141 AD2d 272, 276 [1988]).

As to the merits, generally, a court will not disturb the findings of a special referee where those findings are supported by the record (*see Law Office of Michael Lamonsoff v Segan Nemerov & Singer, PC*, ___ AD3d ___, 2010 NY Slip Op 1597 [2010]; *Freedman v Freedman*, 211 AD2d 580 [1995]; *Namer v 152-54-56 W. 15th St. Realty Corp.*, 108 AD2d 705 [1985]). Here, there was ample evidence supporting the reasonableness of the fees charged, as testified to by the member of plaintiff's corporate parent who reviewed and approved the legal invoices (*see Bleecker Charles Co. v 350 Bleecker St. Apt. Corp.*, 212 F Supp 2d 226, 230-231 [SD NY 2002]), and by the partner of plaintiff's New York counsel in charge of this litigation, which litigation was unnecessarily prolonged and complicated by defendant's own actions. The fees were also supported by extensive billing records. Even assuming, without deciding, that the billing records for Brazilian and Swiss counsel were improperly admitted into evidence, there was sufficient testimonial evidence, which the special referee credited, to support the billings, and to which testimony defendant expressly did not object. Defendant's general objections to the overall billing on this "simple matter," and its particular objections to specific charges, largely left

unexplored by defendant on cross-examination at the hearing, are insufficient to warrant disturbing the special referee's recommendations.

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

ENTERED: MAY 6, 2010



CLERK

Mazzarelli, J.P., Sweeny, Freedman, Richter, Manzanet-Daniels, JJ.

2741N Frank Mondello, Index 12430/06
Plaintiff-Appellant,

-against-

Patricia Mondello,
Defendant-Respondent.

Frank J. Mondello, appellant pro se.

Appeal from order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about May 26, 2009, which, inter alia, directed compliance with provisions of the parties' March 18, 2008 stipulation of settlement in their matrimonial action, unanimously dismissed, without costs.

As we noted on the prior appeal from this order (69 AD3d 469 [2010]), defendant wife did not "as soon as possible . . . take all necessary actions to distribute the . . . [parties'] accounts," necessarily implying that it was her obligation, not just plaintiff husband's, to do so; she was properly directed to comply. The husband failed to cross-move or seek affirmative relief with respect to the wife's alleged failure to comply with other specific provisions of the stipulation, requesting only that she be held in contempt, generally, and liable for punitive

damages for violating it, and is not aggrieved by the court's failure to include language directing such compliance (*see Miller v Ross*, 43 AD3d 730 [2007]).

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

ENTERED: MAY 6, 2010

CLERK

MAY 6 2010

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John T. Buckley
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, JJ.

758
Ind. 551/03

The People of the State of New York,
Respondent,

-against-

Edwin Santiago,
Defendant-Appellant.

Defendant appeals from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 28, 2004, convicting him, after a jury trial, of assault in the first degree, and sentenced him, as a second felony offender, and imposing sentence.

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

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

BUCKLEY, J.

Based on the identification testimony of the victim and two witnesses, a jury convicted defendant of assault in the first degree for repeatedly slashing a woman with a box cutter in a subway station.

In the early morning hours of January 10, 2003, the victim was standing on a well-lit subway platform with 5 to 10 other people, when she noticed defendant make eye contact with her, step behind a pillar, and reappear closer to her. Defendant repeated the sequence, during the course of which he passed by Pablo Alarcon, who also made eye contact with him. Both the victim and Alarcon took particular note of defendant, due to his strange behavior and multiple layers of clothing, including a red hood, dark jacket, and jeans. Although defendant's face was partially covered by the hood, Alarcon could see that he was an Hispanic of slightly darker complexion than Alarcon himself, had a dark goatee and eyebrows, and appeared to be in his mid-20s; Alarcon considered defendant's facial expression to be suspicious and frightening.

Edwin Rios entered the station and walked past the victim and defendant, who by then were conversing. Rios's attention was first drawn to the victim, an attractive young lady wearing a short skirt, but he also observed defendant's face and clothing.

Defendant, now arm's length distant from the victim, paced in front of her for a few seconds and then asked if she was "working." She did not understand the question, and requested clarification. He asked if she was "an escort." When the victim replied in the negative, defendant began to slash at her head repeatedly with a box cutter, causing her to bleed profusely and severing her thumb. From about 15 feet away, Rios turned to see defendant attacking the victim, who was attempting to defend herself. Hearing screaming, Alarcon also looked to see the assault. Defendant then broke off his attack and ran past Rios, who saw his face again, as well as an orange box cutter in his hand, and Alarcon, who observed defendant put in his pocket what appeared to be a "construction knife" used "to cut sheet rock." Defendant jumped onto the tracks and escaped down the tunnel, while the victim, calling for help, went up the station stairwell.

The victim was taken to the hospital, where she described her assailant to the police as a tan-skinned Hispanic man, about 5-feet, 8-inches tall, in his late 20s or early 30s, with a mustache that continued down his chin. The next day, she worked with a police artist to create a sketch of the assailant. Two days after that, the police went to the subway station as part of an investigation and spoke with Rios, who described the assailant

as a light-skinned Hispanic with a goatee similar to Rios's own, in his late 20s, about 5-feet, 8-inches tall, of medium build, and wearing blue jeans, a dark blue sweater, and a hood. Rios believed that the police sketch accurately portrayed the assailant.

On January 23rd, 13 days after the incident, Alarcon looked at a photo array, but did not recognize anyone. The next day, the victim identified defendant from a photo array. On January 25th, defendant was taken into custody, and the day after that the victim and Alarcon separately viewed a lineup. The victim immediately identified defendant as her attacker. Although Alarcon was "eighty percent" certain that defendant was the assailant, he told the police that he did not recognize anyone, because he harbored trepidations regarding his immigration status. The day after the lineup, Alarcon saw a photograph in a newspaper depicting defendant in handcuffs and accompanied by two police officers. Alarcon showed the photograph to his supervisor, but still did not mention anything to the authorities. In December 2003, 11 months after the attack, an ADA telephoned Alarcon, who admitted that he had recognized someone in the lineup and in the newspaper. Upon being shown a photograph of the lineup, Alarcon identified defendant.

In January 2004, Rios, who had not previously been shown any

photographs, viewed a lineup. Even though defendant had shaved off most of his goatee by then, Rios identified him.

The victim and Rios positively identified defendant in the courtroom, while Alarcon identified him with 80% certainty.

The hearing court properly denied defendant's motion to suppress the identification testimony. The record, including the lineup photographs, establishes that the composition of the lineups was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The differences between defendant and the fillers in facial hair and apparent age were not so distinguishing as to single out defendant (*see id*; *People v Amuso*, 39 AD3d 425 [2007], *lv denied* 9 NY3d 862 [2007]; *People v Evans*, 202 AD2d 377 [1994], *lv denied* 83 NY2d 966 [1994]). Any disparities in height and weight were minimized by the fact that the lineup participants were viewed while seated and holding large numbered cards in front of their torsos (*see Amuso*, 39 AD3d at 425-426). There is no basis for disturbing the court's credibility findings that Alarcon recognized defendant at the initial lineup but told the police otherwise out of fear concerning his immigration status, and that his identification was not the result of postlineup events (*see People v Garcia*, 284 AD2d 106, 107 [2001], *lv denied* 97 NY2d 641 [2001]). Since defendant himself elicited at trial Alarcon's photographic

identification, he cannot be heard to complain now of its introduction (*see People v Cuiman*, 229 AD2d 280, 282 [1997], *lv denied* 90 NY2d 903 [1997]).

The only preserved challenge to the prosecutor's summation concerns a remark to which defendant objected as not supported by testimony; however, we reject that claim. Defendant's remaining objections to the prosecutor's closing statement are unpreserved for review, and we decline to review them in the interest of justice. As an alternative holding, none of the cited comments exceeded the broad latitude accorded on summation (*see People v D'Alessandro*, 184 AD2d 114, 119 [1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's argument regarding the jury charge on unanimity is also unpreserved (*see People v Parra*, 58 AD3d 479 [2009], *lv denied* 12 NY3d 820 [2009]), and we decline to review it in the interest of justice. As an alternative holding, we find that the charge, as a whole, conveyed the proper legal principles (*see People v Drake*, 7 NY3d 28, 34 [2006]), and a jury poll confirmed that the verdict was, in fact, unanimous.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The sentence was not excessive, and we decline to reduce it in the interest of justice.

The remaining issue is whether the court should have allowed defendant to present expert testimony regarding identifications or ordered a *Frye* hearing on the matter. Initially, defendant's assertion that the trial court was bound by the law of the case doctrine to conduct a *Frye* hearing is belied by the plain language of the earlier Justice's preliminary ruling on the matter.

Defendant's motion to permit expert testimony set forth three groups of factors purportedly affecting the accuracy of witness identification: (1) event factors (exposure time to an event and cross-racial accuracy); (2) investigative factors (similarity of lineup participants, lineup instructions, rate of memory loss, influence of information acquired after the event, wording of questions to witnesses, unconscious transference to the crime scene of a person from elsewhere, preexisting attitudes and expectations of witnesses, and simultaneous versus sequential lineups); and (3) witness confidence (correlation of confidence level with accuracy and weapon focus). The trial court determined that, under the circumstances of this case, the proposed topics were either inapplicable, within the common understanding of the jury, or not warranted.

In *People v LeGrand* (8 NY3d 449, 452 [2007]) the Court of Appeals stated that, although the decision whether to admit

expert testimony regarding eyewitness identification ordinarily rests within the trial court's discretion,

> "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror."

The Court of Appeals has recognized that expert testimony is "a kind of authorized encroachment" into the jury's otherwise exclusive province of drawing conclusions from the facts (*People v Lee*, 96 NY2d 157, 162 [2001] [internal quotation marks omitted]). Even where a qualified expert's testimony might be relevant, beyond the ken of the average juror, and based on principles generally accepted in the scientific community, a court can providently exclude such testimony if it would unnecessarily distract the jury (*see People v Young*, 7 NY3d 40, 46 [2006]). With those considerations in mind, "[t]he trial court should weigh defendant's request to admit expert testimony against factors 'such as the centrality of the identification issue and the existence of corroborating evidence'" (*LeGrand*, 8 NY3d at 456, quoting *Lee*, 96 NY2d at 163). The qualifying "such

as" language indicates that there may be other factors, but the overriding concern is the degree of risk of misidentification (*see People v Marte*, 12 NY3d 583, 589 [2009], *cert denied* __ US __, 2010 US LEXIS 1388, 2010 WL 596609 [2010]). The court in *LeGrand* did not hold that expert testimony must be allowed if there is no corroborating evidence; rather, the court stated that it is an abuse of discretion to preclude expert testimony where "the case turns on the accuracy of eyewitness identifications *and* there is little or no corroborating evidence connecting the defendant to the crime" (8 NY3d at 452 [emphasis added]). Thus, the issue of whether expert testimony must be allowed depends on the risk of convicting the wrong person (*see e.g. Young*, 7 NY3d at 46 ["[i]t was reasonable, under the circumstances, for the trial court to conclude that [the victim's] identification was quite unlikely to be mistaken"]). Where the accuracy of an identification is more in doubt, the risk of wrongful conviction is greater, thereby militating in favor of admitting expert testimony. Indeed, in spite of some expansive language in *LeGrand*, the Court of Appeals' holding in that case, and in *Young* and *Lee*, was expressly based on "the facts and circumstances" particular to each case (*LeGrand*, 8 NY3d at 456, 459; *see Young*, 7 NY3d at 46; *Lee*, 96 NY2d at 163).

In *LeGrand*, there was no forensic or other physical evidence

linking the defendant to the fatal stabbing, and the People's case rested only on shaky identifications of eyewitnesses made almost seven years after the commission of the crime (8 NY3d at 453). One of the witnesses identified the defendant in a photo array and a lineup; a second witness thought the defendant's photo was a "'close, if not exact'" match; a third witness characterized the defendant's photo as "'similar'" to that of the assailant; and the remaining two witnesses were unable to identify the defendant (*id.*). Three years after those identifications, ten years after the crime, the defendant was identified at trial by three of the witnesses, two of whom viewed a photo array the day before their testimony (*id.*). The jury could not reach a verdict, and prior to his new trial, defendant moved to introduce expert testimony on the reliability of eyewitness identification (*id.*). The trial court found several aspects of the proposed testimony to be relevant and beyond the ken of the average juror, but, following a *Frye* hearing, precluded the evidence on the ground that it was not generally accepted in the scientific community (*id.* at 453-454). The Court of Appeals, however, determined that three factors that influence the reliability of eyewitness identifications are generally accepted: correlation between confidence and accuracy of identification, the effect of postevent information on the

accuracy of identification, and confidence malleability (*id.* at 458).

The Court of Appeals in *Young* opined that if there had not been corroborating evidence (stolen property found in the possession of two of the defendant's acquaintances), "it might well have been an abuse of discretion" to deny expert testimony on issues such as cross-racial identification, weapon focus, the effect of stress on recollection, and the correlation between confidence and accuracy (7 NY3d at 45). In that case, one victim was unable to identify the defendant (*id.* at 42). The other victim saw only part of the robber's face, retained a clear recollection of only his eyes, and viewed him under conditions of high stress while he held an axe over her wheelchair-bound husband's head (*id.* at 42, 45). That second victim also failed to recognize the defendant's picture in a photo array, although she did pick him out of a viewing and listening lineup (*id.* at 42).

In *Lee*, the Court of Appeals ruled that it was a provident exercise of discretion to preclude expert evidence, where the trial court heard testimony regarding the circumstances under which the robbery victim observed the defendant and there was corroborating evidence, namely that the defendant was arrested while driving the stolen car (96 NY2d at 163).

Most recently, the Court of Appeals revisited the issue in the simultaneously decided *People v Abney* and *People v Allen* (13 NY3d 251 [2009]). The Court held that it was an abuse of discretion to deny expert testimony in *Abney*, but not in *Allen* (*id.* at 268).

In *Abney*, the 13-year-old complainant was robbed at knifepoint during an encounter that "was fleeting" (*id.* at 257). About one hour later, the victim reported the incident to the police, describing her assailant as a black man with "'pinkish'" lips, in his 30s, over six feet tall, and wearing a short-sleeved blue shirt and blue bandana (*id.* at 257). The complainant identified the defendant from a photo array that day and picked him out of a lineup three weeks later (*id.* at 257-258). The trial court denied the defendant's request to present expert testimony on 15 factors relating to the reliability of witness identification (*id.* at 259). A three-Justice majority of this Court affirmed, on the ground that the defendant's witnesses' alibi testimony evinced a consciousness of guilt, which constituted corroborative evidence (*see* 57 AD3d 35, 43-46 [2008]). Specifically, there was testimony indicating that the defendant had sought to document an alibi before he was arrested (*see id.*). The two-Justice dissent noted the significant testimony that supported the defendant's alibi and that called

into question whether he tried to establish that alibi prior to his arrest (*see id.* at 52-53). The Court of Appeals ruled that the trial court had abused its discretion in precluding expert testimony on the subject of witness confidence and in failing to conduct a *Frye* hearing on the proposed testimony regarding the effects of event stress, exposure time, event violence and weapon focus, and cross-racial identification (13 NY3d at 268).[1] The Court determined that, "[w]hile defendant's muddled alibi evidence was no doubt unhelpful to his cause with the jury, it is not overwhelmingly inculpatory either," and thus was not sufficiently corroborative (*id.*). However, the Court did not state that the lack of corroborative evidence settled the question of whether expert testimony had to be allowed. Rather, the Court based its decision on the fact that "there was no evidence other than [the victim's] identification to connect defendant to the crime, *and she did not describe him as possessing any unusual or distinctive features or physical characteristics*" (*id.* [emphasis added]). As the highlighted conjunctive phrase indicates, a single witness's testimony, by itself, may be enough to render a motion for expert testimony a

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[1]The Court of Appeals found the subjects of lineup instructions and doubleblind lineups were not relevant to the particular circumstances of the case (*id.*).

matter of the trial court's discretion.

In *Allen*, the companion case to *Abney*, two masked men, one displaying a knife, the other a gun, held up a barbershop (*id.* at 262). Although the knife-wielder's mask covered all of his face except the portion from his top lip to above the eyebrows, one of the customers, Gabriel Bierd, recognized him from the neighborhood, based on his voice and body type (*id.*). Bierd selected the defendant's photo from an array and identified him in a lineup, as did one the robbed barbers, Juan Almonte (*id.* at 262-263). The Court of Appeals held that the trial court had not abused its discretion in denying expert testimony, since

> "the case did not depend exclusively on Bierd's eyewitness testimony -- i.e., *Allen* is not a 'case [that] turns on the accuracy of eyewitness identification [where] there is little or no corroborating evidence connecting the defendant to the crime' (*LeGrand*, 8 NY3d at 452). *Critically, Almonte independently identified defendant* as the knife-wielding robber who searched him and stood nearby throughout the course of the robbery. And defendant was not a stranger to either Bierd or Almonte" (*id.* at 269 [emphasis added]).

Thus, where corroborating evidence might be required, it need not be forensic or physical, but can be established by additional eyewitness testimony. That is the precise position that the dissenter herein embraced in her dissent in *Abney*:

> "Obviously, this does not mean that in every case

> turning on eyewitness identification testimony, a court must admit expert testimony bearing on the reliability of the identification . . . [and] the particular circumstances of a case will often render expertise about the accuracy of an identification of little or no utility[,] . . . for example, a case in which the identifying witness previously knew the perpetrator, *or in which the opportunity to observe was ample*, or in which extreme stress or cross-racial factors could have played no role affecting the reliability of the identification, or in which the witness was not distracted from her observation of the perpetrator by the near and undoubtedly terrifying presence of a threatening weapon, or in which there was no question as to whether police conduct and procedures affected the witness's post-incident identification" (57 AD3d at 50-51 [emphasis added]).

As discussed more fully *infra*, the instant case is one "in which the opportunity to observe was ample."

This Court has repeatedly distinguished *LeGrand* from instances where there was reliable witness identification testimony (*see People v Smith*, 57 AD3d 356 [2008], *lv denied* 12 NY3d 821 [2009]; *People v Chisolm*, 57 AD3d 223 [2008], *lv denied* 12 NY3d 782 [2009]; *People v Austin*, 46 AD3d 195 [2007], *lv denied* 9 NY3d 1031 [2008]; *see also People v Keitt*, 60 AD3d 501 [2009], *lv denied* 12 NY3d 917 [2009]).

In *Smith* and *Chisolm*, there was corroborative evidence, but this Court nevertheless stressed the reliability of the identifications, in contrast to *LeGrand*. Specifically, in *Smith*, this Court noted the "highly reliable multiple eyewitness

identifications," each of whom "observed the perpetrator at close range on a well-lit street" and identified the defendant in a lineup shortly after the shooting; one of those witnesses also recognized the defendant from the neighborhood (57 AD3d at 357). Similarly, in *Chisolm*, the victim's husband saw the perpetrator in broad daylight with his wife's wallet moments after it was stolen, further observed the perpetrator's features during a two-block chase, provided a detailed description shortly after the incident, and identified the defendant from a videotape and in a lineup a few weeks later (57 AD3d at 224). Both *Smith* and *Chisolm* remarked on the contrasting facts of *LeGrand*, where the reliability of the defendant's identification was seriously in doubt, in that only one of the multiple witnesses was able to identify the defendant in a lineup and photo array, seven years after the crime (*see Smith*, 57 AD3d at 357; *Chisolm*, 57 AD3d at 224).

In *Austin*, as here, there was no corroborating evidence, yet this Court found the trial court's exclusion of expert testimony was a provident exercise of discretion, since the complainant had ample opportunity to observe his assailant in a well-lit area, at close range, and chased him for two blocks, after which he gave the police a relatively detailed description, and five days later spotted the defendant on the street and pointed him out to the

police (46 AD3d at 200).

The Second Department is in accord. In *People v Tocci* (52 AD3d 541, 542 [2008], *lv denied* 11 NY3d 858 [2008]), the court ruled that the defense request to present expert testimony had been properly denied, "since there were 11 eyewitnesses as well as additional significant corroborating evidence, and there was no indication that the jury required such testimony." *People v Gonzalez* (47 AD3d 831 [2008], *lv denied* 10 NY3d 863 [2008]) is not to the contrary. There, the Second Department held that, under the particular circumstances, it was error to deny expert testimony on the reliability of identification (*id.* at 833). The victim had described her assailant as dark-skinned, well-built, and weighing about 150 pounds, but the defendant weighed more than 200 pounds, was tan-skinned, and had an unmentioned "distinctive goatee and a tattoo covering his right forearm" (*id.* at 832). The discrepancy between the description and the defendant's actual appearance thus cast serious doubt on the accuracy of the identification.

Applying the precedents to the case at hand, we find that the trial court did not abuse its discretion in denying defendant's motion to present expert testimony. The victim plus two other witnesses independently described and identified defendant. All three witnesses had ample opportunity to observe

defendant at close quarters, in a well-lit setting. All three witnesses noticed defendant before there was any criminality; two of the witnesses took particular cognizance of defendant due to his peculiar behavior, and the third because he appeared to be associated with an attractive woman. The two eyewitnesses, Alarcon and Rios, also observed defendant during the assault and his escape from the station. Immediately after the incident, the victim described her attacker to the police and helped prepare a sketch. Two weeks later, the victim identified defendant in a photo array and lineup, while Alarcon recognized defendant in a lineup and a newspaper photograph. Although Rios did not view a lineup until one year later, he had described defendant and confirmed the accuracy of the sketch three days after the incident; moreover, he picked defendant out of the lineup notwithstanding the fact that defendant had altered appearance by shaving most of his facial hair.

Under those circumstances, it was reasonable for the trial court to conclude that the identification by multiple, corroborative witnesses "'was quite unlikely to be mistaken, and that [the expert's] testimony would be an unnecessary distraction for the jury'" (*Abney*, 13 NY3d at 267, quoting *Young*, 7 NY3d at 46). This case thus stands in marked contrast to *LeGrand* (8 NY3d at 453), where essentially only one out of five witnesses could

positively identify defendant seven years after the crime, and *Abney* (13 NY3d at 257, 268), where one witness, who had merely a "fleeting" encounter, provided a minimal description.

To the extent the reliability of the witness identifications in *Young* was called into question, it is also distinguishable, since in that case one witness could not identify the robber, and the other had a dubious opportunity to adequately view him and failed to recognize his photo in an array (7 NY3d at 42, 45).

Accordingly, the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 28, 2004, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a prison term of 25 years, should be affirmed.

All concur except McGuire, J. who concurs in a separate Opinion, and Moskowitz and Acosta, JJ. who dissent in an Opinion by Moskowitz, J.

McGUIRE, J. (concurring)

I agree that reversal is not required under the rule of *People v LeGrand* (8 NY3d 449 [2007]), but disagree with the analyses of Justices Buckley and Moskowitz.

The rule of *LeGrand*, of course, is that

> "where [a] case turns on the accuracy of eyewitness identification and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identification if that testimony is (1) relevant to the witness' identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror" (*id.* at 452).

This case certainly turns on the accuracy of eyewitness identification testimony, and the expert's testimony satisfies, at least with respect to the subject of witness confidence and accuracy, each of the above four factors.[1] Is this case, however, one in which there is "little or no corroborating evidence connecting the defendant to the crime"? If it is, can the

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[1]With respect to the other proposed subject of the expert's testimony that is disputed on appeal -- the so-called "forgetting curve" -- I agree with the People's position that (1) it is common knowledge that memory generally becomes less reliable over time, and (2) while the specific principle that memory loss is greatest immediately after an event may be beyond the ken of the average juror, that principle was not supported by any specific studies identified in defendant's proffer (*see People v Carrieri*, 49 AD3d 660, [2nd Dept 2008], *lv denied* 11 NY3d 786 [2008]).

erroneous exclusion of the expert's testimony be considered harmless error? In my view, we need not answer the first question; but assuming the answer is yes, the answer to the second question is yes.

In the context of this case, the first question reduces to the following: if the evidence at trial is that more than one eyewitness identified the defendant, can the identifications cross-corroborate each other so that the case is not one in which there is but "little or no corroborating evidence connecting the defendant to the crime?" The recent decision of the Court of Appeals in *People v Abney* (13 NY3d 251 [2009]), suggests that the answer is yes.[2] In *People v Allen*, the other case decided with *People v Abney*, two eyewitnesses, Almonte and Bierd, identified the defendant at lineups held four months after the crime and at trial (*id.* at 262-263). The court ruled that the case "did not depend exclusively on Bierd's eyewitness testimony -- i.e., [it] is not a case [that] turns on the accuracy of eyewitness identification [where] there is little or no corroborating evidence connecting the defendant to the crime" (*id.* at 269

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[2]A recent article explores significant issues arising from *LeGrand* and *Abney* (*see* Paul Shechtman, *In the Area of Eyewitness Identification Expert Testimony, LeGrand Should Be Revisited*, 8 N.Y. Crim. L. Newsl. [No. 2] 8 [N.Y. St. Bar Assn., Spring 2010]).

[internal quotation marks omitted; brackets in original]). A unanimous court explained:

> "Critically, Almonte independently identified defendant as the knife-wielding robber who searched him and stood nearby throughout the course of the robbery. And defendant was not a stranger to either Bierd or Almonte" (*id.*).

As is evident, two considerations informed the Court's conclusion: the "independent[]" identification by Almonte, and that defendant was known to both identifying witnesses. Although the second consideration might be thought to provide more powerful support (if a defendant is known to the identifying witness or witnesses, can such a case be one that turns on the accuracy rather than the honesty of eyewitness identification testimony?), the court stated that the first consideration was "[c]ritical[]" to its conclusion. Regardless of the relative importance of the two considerations, at the very least the opinion suggests that multiple corporeal identifications that are "independent[]" can cross-corroborate each other so that the case is not one in which there is but "little or no corroborating evidence connecting the defendant to the crime."[3]

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[3]Circumstances can be conceived in which it would be particularly difficult to defend the conclusion that multiple corporeal identifications never can cross-corroborate each other for purposes of the *LeGrand* rule. Suppose, for example, three eyewitnesses, each of whom had extended opportunities to observe the perpetrator under nonstressful circumstances, separately gave

The dissent is unpersuasive in concluding otherwise, although I need not decide whether the dissent is wrong. In the first place, the analysis is not "quite simple," because it is not at all clear how much and what forms of corroboration are sufficient to provide more than "little . . . corroborating evidence connecting the defendant to the crime" (*LeGrand*, 8 NY3d at 452). Of course, the dissent is correct that "the problem of misidentification can exist whether there is one eyewitness or several." But the question is whether all cases of multiple identifications, regardless of their particular facts, must be treated the same for the purpose of the *LeGrand* rule. Contrary to the dissent, the opinion in *LeGrand* does not purport to address the question. True, the opinion notes that three witnesses identified the defendant during the first trial (8 NY3d at 453). But the Court immediately went on to note that "two of

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accurate and detailed descriptions and identified him at separate lineups shortly after the crime and at trial. Of course, the proposed expert testimony might undercut the force of the identification testimony of each identifying witness. According to the People, however, even the defense expert who testified at the *Frye* hearing in *LeGrand* conceded that the risk of a false identification can be "substantially reduced if two or more witnesses are available" (People's Brief in *People v LeGrand*, *supra*, at 102). On the other hand, the conclusion that multiple corporeal identifications never can cross-corroborate each other would be easier to defend if harmless error analysis is applicable to a violation of the *LeGrand* rule. After all, these hypothetical circumstances also would support a harmless error argument.

the witnesses had seen defendant's photo array in the district attorney's office the night before they were to testify" (*id.*). Thus, the Court may not have regarded these corporeal identifications as "independent[]." It seems unlikely, moreover, that the Court intended in *LeGrand* to decide without discussion the important question of whether multiple corporeal identifications can provide the corroboration connecting the defendant to the crime that can justify a trial court's decision to exclude the testimony of a defense expert. Finally, the dissent fails to deal with or even mention the statement in *Abney (Allen)*, quoted above, that a "[c]ritical[]" factor supporting the Court's conclusion that the exclusion of the expert testimony did not violate the *LeGrand* rule was that "Almonte independently identified defendant as the knife-wielding robber." Rather than regard the statement as gratuitous for some reason, I would take the Court at its word.

Justice Buckley is unpersuasive to the extent his position is that under *LeGrand* the testimony of a defense expert properly can be excluded "where there [is] *reliable* witness identification testimony" (emphasis added). Nothing in *LeGrand* or *Abney (Allen)* (nor, for that matter, in *People v Lee* [96 NY2d 157 (2001)] or *People v Young*, 7 NY3d 40 [2006]) supports the proposition that trial courts properly can exclude expert testimony offered by the

defense when the identification testimony from the prosecution can be regarded as "reliable." Nor do the decisions of this Court cited by Justice Buckley so hold. In *People v Smith* (57 AD2d 356 [2008], *lv denied* 12 NY3d 821 [2009]), the panel noted the "highly reliable multiple eyewitness identifications" (*id.* at 357), but did not rest its holding on that ground. Rather, the holding was that "the exclusion of expert testimony on the reliability of eyewitness identification" did not require reversal "[s]ince there was sufficient corroboration of defendant's guilt, including consciousness-of-guilt evidence and partially incriminating statements to the police" (*id.*). Similarly, *People v Chisolm* (57 AD3d 223 [2008], *lv denied* 12 NY3d 782 [2009]) upheld the exclusion of expert testimony on eyewitness identification because "[t]here was significant corroborating evidence of defendant's guilt" (*id.* at 223-224 [citation omitted]. In *People v Austin* (46 AD3d 195 [2007], *lv denied* 9 NY3d 1031 [2008]), the panel relied on preservation grounds when it ruled that the defendant had "failed to establish at any point [at trial] the relevance of the proferred testimony to the particular facts of this case" (*id.* at 199). Accordingly, the subsequent discussion (*id.* at 200-201), contrasting the factual circumstances of the identification with those in *LeGrand*, appears to be dicta.

We should not try to read the tea leaves in *LeGrand* and *Abney* and determine whether multiple identifications can cross-corroborate each other so as to provide more than a "little . . . corroborating evidence connecting the defendant to the crime." Regardless of how the Court of Appeals may rule on that question, I think it clear the erroneous exclusion of expert testimony under *LeGrand* is subject to harmless error analysis and that any error in this case was harmless.[4]

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[4]Deciding this case on harmless error grounds obviates the need to wrestle with constitutional questions raised by *Holmes v South Carolina* (547 US 319 [2006]). There, the question was "whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict" (*id.* at 321). The Court unanimously ruled that the evidence rule was unconstitutional, explaining that "[t]he point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt" (*id.* at 331). *LeGrand*, of course, does not hold that the testimony of a defense expert is inadmissable where the prosecution's evidence can be regarded as strong (i.e., supported by more than "a little . . . corroborating evidence connecting the defendant to the crime"). But *LeGrand* does hold that if the identification testimony adduced by the prosecution is sufficiently corroborated, a trial court does not abuse its discretion when it excludes the testimony of the defense expert. Whether that holding is consistent with *Holmes v South Carolina* is unclear. Nor is it clear whether a rule that permits the exclusion of the testimony of a defense expert when the prosecution has presented proof of multiple and independent identifications (or when the identification testimony presented by the prosecution is considered sufficiently reliable) would pass muster under *Holmes v South Carolina*. One significant question, however, comes into focus when it is considered that

At first blush it may seem odd to think that harmless error analysis has any role to play when a trial court abuses its discretion by excluding expert testimony offered by the defense in a case where there is "little or no corroborating evidence connecting the defendant to the crime." If there is "little or no corroborating evidence," how can the error be harmless? But cases can readily be conceived (including ones like *Abney (Allen)* in which the defendant is known by the identifying witness or witnesses and those noted earlier in which there are corporeal identifications by multiple witnesses each of whom had extended opportunities to view the perpetrator) in which it would be incomprehensible not to permit harmless error analysis to play a role. Moreover, *Abney* all but states that harmless error analysis does apply (13 NY3d at 268 ["we do not consider the trial judge's error in *Abney* to have been harmless"]). In addition, the Legislature has commanded appellate courts in peremptory terms to determine appeals "without regard to technical errors or defects which do not affect the substantial

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under *LeGrand* criminal defendants are entitled to an opportunity to persuade the jury of a reasonable doubt through the testimony of an expert when there is "little or no corroborating evidence" connecting them to the crime. Can a defendant be deprived of that opportunity whenever the prosecution's evidence is marginally stronger, when there is some incremental evidence so that there is more than a "little" corroborating evidence?

rights of the parties" (CPL 470.05[1]). On this score, I also note that this certainly is not a case in which the federal constitution precludes harmless error analysis (*see generally United States v Gonzalez-Lopez*, 548 US 140, 148-151 [2006] [discussing "structural defects," a class of constitutional error that, as opposed to "trial error," is not susceptible to harmless error analysis]).

In the first place, the victim provided the jury with a compelling basis for concluding that the People had proven defendant's identity as the attacker beyond a reasonable doubt. This is not a case in which the identifying witness had but a fleeting opportunity to view an attacker under stressful circumstances. To the contrary, the victim first saw the man who would attack her when he was at the opposite end of the platform. As the People argue, despite the distance and the want of any particular reason to pay attention to him, the victim observed the man well enough to recognize him when, shortly thereafter, she saw him again from a closer distance. On that second occasion, she took note of the man's layered clothing and unusual behavior of making eye contact and then stepping behind pillars. She then had an extended opportunity to observe her attacker in good lighting before he assaulted her. That is, after he approached her, she looked at him from about an arm's length

distance for several seconds while waiting for him to speak. When he asked her if she was "working," the two were face-to-face; the ensuing conversation lasted for about 30 seconds, until she was attacked. Although her attacker had a garment covering his mouth and chin, the victim could see the man's face from his moustache to above his eyebrows. Moreover, as the People correctly maintain, in describing her attacker to the police, the victim consistently provided details that closely matched defendant's ethnicity, complexion, age and facial hair. Thereafter, she viewed thousands of photographs, and never identified anyone until she saw, only about two weeks after the attack, a recent photograph of defendant in an array of photographs of Hispanic men with moustaches. When she saw the photograph of defendant, her "heart stopped," the same reaction she had just two days later when she identified defendant at a lineup.

As is clear from Justice Buckley's writing, there was much more evidence of defendant's identity as the attacker. With respect to Alarcon, suffice it to say that when he first saw the attacker, as the man walked past him toward the victim, the attacker had not yet covered his mouth and goatee. Alarcon saw him again shortly thereafter, when he heard the victim's screams and saw the attack. Of course, Alarcon testified that he was

only 80% sure of his identifications of defendant (the undeclared identification at the lineup and the in-court identification). But his testimony corroborated the victim's identification nonetheless, and that same testimony gave the jury a sound reason for concluding that Alarcon was an honest and careful witness. Finally, Rios also got good looks at the attacker's face, before and after the attack, and also gave a description of the attacker that fit defendant with respect to ethnicity, complexion, age and facial hair. Like the victim, Rios was certain of his identification of defendant as the attacker.

Regardless of whether the constitutional standard of harmless error might apply in another case, the nonconstitutional standard applies here because defendant never alerted the trial court to any claim of constitutional error with respect to the expert's testimony (*People v Kello*, 96 NY2d 740, 743-744 [2001]).

For all these reasons, and for those cited by Justice Buckley in support of his position that "it was reasonable for the trial court to conclude that the identification by multiple, corroborative witnesses 'was quite unlikely to be mistaken,'" I conclude both that the evidence of guilt was overwhelming and that there is no significant probability that the jury would have acquitted if the expert's testimony had not been excluded (*Kello*, 96 NY2d at 744). Moreover, in its final charge to the jury, the

Court admonished the jurors to "[k]eep in mind that the witness's confidence or lack of confidence in his or her testimony is not necessarily indicative of accuracy of identification." That authoritative instruction provided defendant with at least some of the benefit of the expert's testimony and further attenuates the possibility that the verdict might have been different if the expert's testimony had not been excluded.

The dissent apparently agrees that harmless error analysis is applicable and that the appropriate standard in this case is the nonconstitutional standard. Oddly, however, the dissent nonetheless relies, inter alia, on the fact that no property of the victim was found with defendant when he was arrested[5] and that none of the witnesses had "ever seen him before." Of course, however, if property of the victim had been found with defendant or if of one of the identifying witnesses knew defendant independently of the crime, there would be ample corroborating evidence connecting defendant to the crime and thus no *LeGrand* error.

The dissent is wrong in asserting that "[n]one of the witnesses had an extended opportunity to view the assailant."

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[5]As the attacker did not steal anything from the victim, it hardly is surprising that defendant was not in possession of any of the victim's property when he was arrested.

The victim had such an opportunity -- under good lighting conditions -- and it included a 30-second period of conversation before the attack began, with the assailant standing right in front of the victim. True, the other two identifying witnesses did not observe the attacker for as extended a period. But they, too, observed the attacker under good lighting conditions and saw him both before (i.e., under nonstressful circumstances) and after the attack. Although the opinion in *Abney* states only that the entire encounter between the victim and the assailant was "fleeting" (13 NY3d at 257), the dissent nonetheless states that the 30-second, preattack conversation the victim in this case had with her attacker "appears not to be much longer." In any event regardless of our disagreement about whether the preattack encounter provided the victim with an "extended" opportunity to view her attacker, the encounter certainly was not one in which the victim caught only a fleeting glimpse of him. The ability of the victim to provide so many descriptive details of her attacker also stands as persuasive proof of the reliability of her identification (*see People v Huertas*, 75 NY2d 487, 492 [1990] [description given by identifying witness "was probative of her ability to observe and remember her assailant, and thus relevant to the accuracy of the identification she made"]).

The dissent does not come to grips with these facts. Nor

does it come to grips with the accuracy of the descriptions given by the victim and Rios, the fact that the lineup occurred just two weeks after the attack or the caution about witness confidence given by the court in its final charge to the jury. Indeed, even though it does not mention that the victim recognized defendant as her attacker at a lineup just two weeks after the attack, the dissent relies on the ostensible fact that Alarcon did not "identif[y] defendant as the assailant until nearly a year after the crime occurred." But Alarcon did see and recognize defendant at the same lineup; all that the dissent fairly can say is that he did not declare his identification until considerably later. Above all, however, the dissent fails to come to grips with the fact that the identifications of each of the three identifying witnesses cross-corroborated each other.[6]

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[6]I repeatedly make clear that I do not and need not decide the question of whether multiple corporeal identifications can cross-corroborate each other so that the exclusion of a defense expert's testimony is not error under *LeGrand*. Moreover, I also make clear that I believe there are good reasons not to decide the question. Nonetheless, the dissent apparently believes that I have decided that question.

MOSKOWITZ, J. (dissenting)

In *People v LeGrand* (8 NY3d 449, 452 [2007]), the Court of Appeals ruled that "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror." It is indisputable that this case turns on the accuracy of eyewitness identifications. Indeed, as the trial court noted, it is the only issue. It is also indisputable that there was no evidence other than the testimony of these eyewitnesses to connect defendant to the crime. What is disputed is whether the multiple eyewitness identifications in this case can serve as corroborating evidence. The plurality believes that the eyewitnesses can corroborate each other, thereby rendering an expert unnecessary under *LeGrand*. Because, under the facts of this case, misidentification remains a risk, the court's refusal to permit any expert testimony constituted an abuse of discretion under *LeGrand*, and, more recently, *People v Abney* (13 NY3d 251

[2009]). Therefore, I must dissent.

The crime occurred on January 10, 2003 sometime before 5:30 A.M. at the Brooklyn Bridge subway station on the northbound J subway platform. The victim and her assailant were strangers. The assailant approached the victim, a 21-year-old female student. He had a brief conversation with her, then took out a box cutter and proceeded to slash her on the right side of her head and her left hand. The victim provided police with a description of her assailant immediately after the attack. Following a police investigation, the victim identified defendant in a photo array on January 23, 2003 and in a lineup on January 26, 2003.

There were two other eyewitnesses to this crime. Pablo Alarcon was on the J train platform on his way to work and made eye contact with the assailant who walked by with his face partly covered. Although a hood partially covered the assailant's face, Alarcon took note because the assailant had a "suspicious" expression that made Alarcon feel afraid. A short time later, Alarcon heard a woman scream and turned to the right to see the assailant attacking a woman who was trying to defend herself. The assailant walked away from the attack, passing Alarcon, who saw him put away a type of knife into his pocket. The assailant escaped into the subway tunnel.

Despite his relatively close look at the perpetrator, Alarcon did not pick defendant out of a photo array. Nor did Alarcon inform the police that he recognized defendant in the January 26 lineup, even though he was "eighty percent" certain that he did. Alarcon initially lied to police, he said, because his immigration status made him afraid. Alarcon subsequently recognized a picture of defendant in the newspaper as the perpetrator. It was not until December 2003, 11 months later, that Alarcon admitted to the District Attorney's office that he had actually recognized defendant in the lineup, but had lied to police. He was subsequently shown a photograph of the January 26, 2003 lineup. At that point he identified defendant, with 80% certainty, as the man he had recognized earlier, but had chosen not to identify. At the suppression hearing, Alarcon also identified defendant as the perpetrator.

Another eyewitness, a man named Edwin Rios, was descending the stairs on the subway platform. He walked past the victim and the assailant while they were conversing. He could see the assailant's entire face and noted that he had a dark goatee and wore a cap, jeans and a hood. Rios also saw the assailant's face again as the assailant ran away from the attack. On January 13, 2003, Rios confirmed to police the accuracy of the sketch a police artist had prepared with assistance from the victim.

However, it was not until January 20, 2004, a few days prior to the commencement of trial, that Rios identified defendant at another lineup. At trial, Rios identified defendant as the attacker.

Prior to the trial, defendant sought to introduce expert testimony from Professor Steven Penrod[1] on 12 subjects related to the accuracy of witness identifications. Specifically, defendant asked to elicit Penrod's expert opinion about: (1) exposure time; (2) cross-racial identification accuracy; (3) similarity of lineup fillers increasing the accuracy of identification; (4) how lineup instructions can affect the eyewitness's willingness to make an identification; (5) rate of memory loss; (6) influence of information acquired after the event; (7) wording of witness questioning; (8) unconscious transference to crime scene of person seen elsewhere; (9) preexisting witness attitudes and expectations; (10) simultaneous versus sequential lineups; (11) weapon focus; and (12) factors influencing witness confidence. In opposition, the People argued that the proffered testimony should be excluded as irrelevant, within the average juror's ken and not generally accepted within the scientific community. Alternatively, the People sought a *Frye* hearing to determine

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[1] The People do not contest Dr. Penrod's qualifications.

whether Professor Penrod's testimony would be based on professionally reliable sources.

In a written decision dated September 23, 2003, the motion court (Budd Goodman, J.) ordered a *Frye* hearing, to be conducted by the trial court, on the issue of whether defendant's proffered expert testimony was based on principles generally accepted in the scientific community and would be relevant to the case. Justice Goodman wrote that the trial court was "best positioned to determine whether the expert's testimony is 'generally accepted' and whether the proffered testimony is relevant and not unduly prejudicial." In a subsequent hearing conducted on December 9, 2003, Justice Goodman reiterated that it was for the trial judge to decide which, if any, of the 12 proposed subjects for expert testimony were appropriate.

However, on December 19, 2003, the trial court (McLaughlin, J.) denied both defendant's request for expert witness testimony and a *Frye* hearing. Citing *People v Lee* (96 NY2d 157 [2001]), Justice McLaughlin held that "this is not an appropriate case for an expert witness on any aspect of identification testimony. Consequently, the court will not conduct a *Frye* hearing as previously ordered" (2 Misc 3d 652, 653 [2003]). He reasoned that expert testimony concerning accuracy of identification was unnecessary because the victim had ample opportunity to observe

her attacker, provided a description immediately after the attack, helped a police artist render a composite sketch one day later, selected defendant's photograph from an array two weeks thereafter, and, on the next day, identified defendant in a lineup (*id.*).[2]

More specifically, Justice McLaughlin ruled that the proposed topic of weapon focus was not relevant because the victim never saw a weapon (*id.* at 654), that expert testimony as to how police investigative procedures might affect a lineup would be inappropriate as the victim would naturally assume that the person she had identified in the photo array would appear in the following day's lineup (*id.*) and that the composite sketch prepared the day after the assault memorialized the victim's recollection of her attacker, negating the potential significance of post event information, the "forgetting curve," the wording of questions and confidence malleability (*id.*). Justice McLaughlin also ruled that there were no generally accepted scientific principles concerning post event information and unconscious transference (*id.* at 655), that issues concerning sequential lineups are not appropriate for jury resolution, that defendant

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[2] In his ruling, Justice McLaughlin made factual findings only with regard to the victim's identification, because, at this point pre trial, neither Rios nor Alarcon had yet identified defendant.

and the victim are not members of different races as contemplated in the research literature and that the issue of the victim's confidence vis-a-vis her identification could be sufficiently addressed in voir dire and the jury charge (*id.*).

At trial, after resting his case and the denial of his motion to dismiss the indictment, defendant renewed his motion to admit expert testimony on identification. The court denied that request also.

Notably, at the time he made his rulings, Justice McLaughlin did not have the benefit of the Court of Appeals decision in *People v LeGrand* (8 NY3d 449, *supra*), because that case was decided several years after the trial in this case. However, *LeGrand* still applies (*see People v Vasquez*, 88 NY2d 561, 573 [1996]). As stated earlier, in *LeGrand*, the Court of Appeals held that it is an abuse of discretion for the trial court to preclude expert testimony where a case turns on the accuracy of eyewitness identifications (8 NY3d at 452).

The police initially derived the *LeGrand* defendant's identity from a composite sketch based on information from five witnesses to a murder. It was not until two years after the crime that a police officer first concluded that the sketch resembled the defendant, who was under arrest for an unrelated burglary (*LeGrand*, 8 NY3d at 452-453). The five witnesses did

not view a photo array or a lineup until seven years after the crime, at which time only one of them was able to identify the defendant positively from a photo array and at a lineup (*id.* at 453). Two of the remaining witnesses were shown a photo array. One witness picked out the defendant's photo as a "close, if not exact" match, while the other described the defendant's picture as "similar" to that of the assailant. The fourth and fifth witnesses were unable to identify the defendant (*id.*).

The Court of Appeals held that the trial court abused its discretion by precluding expert testimony on eyewitness identification, particularly with respect to three factors, all of which are at issue here: (1) correlation between confidence and accuracy of identification, (2) the effect of post-event information on accuracy of identification, and (3) confidence malleability (8 NY3d at 458). The Court held that these factors were relevant to the facts and issues of that case (*id.* at 456-457), and that the defendant had established that they were generally accepted in the scientific community (*id.* at 458). The Court noted, however, that "not all categories of [eyewitness expert] testimony are applicable or relevant in every case," and that "admissibility [under *LeGrand*] would rest within the trial court's sound discretion" (*id.* at 459).

LeGrand followed on the heels of *People v Young* (7 NY3d 40

[2006]). In *Young*, as in this case, the assailant's face was partially covered. He entered the victims' home wielding an axe and sledgehammer and threatened to kill one of the residents who was in a wheelchair. The assailant remained in the victims' presence for five to seven minutes until the victims turned over their cash. The assailant also stole several watches. The victims later found that other property, including binoculars and a pair of gloves, were missing from their cars. Calling the question "close" (*id.* at 42), the Court of Appeals held it was not an abuse of discretion to deny the admission of expert testimony concerning the accuracy of eyewitness identification. However, the Court noted that "if this case turned entirely on an uncorroborated eyewitness identification, it might well have been an abuse of discretion to deny the jury the benefit of [the expert's] opinions. The corroborating evidence, however, significantly diminishes the importance of the proffered expert testimony in this case" (*id.* at 46). That corroborating evidence consisted of the police finding the stolen property in the possession of two of defendant's female acquaintances, one of whom claimed to have received the items from the defendant.

Quite recently, in *People v Abney* (13 NY3d 251 [2009]), the Court of Appeals reinforced that *LeGrand's* holding is not restricted to its facts. In *Abney*, the victim was mugged and a

gold necklace was taken at knifepoint in a subway station. No evidence other than the victim's identification connected the defendant to the crime. Before jury selection, the defendant made a motion in limine for an expert to testify about the accuracy of eyewitness identification. The trial court denied this motion. The defendant renewed his motion, on a narrower basis, at the close of the People's case. The trial court denied this too. This Court affirmed the subsequent judgment of conviction and sentence (57 AD3d 35). The Court of Appeals reversed, holding that, by the time the People's case closed, "it was clear that there was no evidence other than [the victim's] identification to connect defendant to the crime, and she did not describe him as possessing any unusual or distinctive features or characteristics" (13 NY3d at 268).

Here, as in *Abney* and *LeGrand*, there was no corroborating evidence and, as Justice McLaughlin noted, the case turned purely on eyewitness testimony (*see* 2 Misc 3d at 653 [identification the "only issue"]). Moreover, misidentification was a risk. None of the eyewitnesses described the perpetrator as possessing any unusual physical features, perhaps because a hood partially covered the perpetrator's face. None of the witnesses were acquainted with defendant prior to the attack. The attack was brief and the perpetrator escaped into the subway tunnel.

Therefore, *LeGrand*'s plain language requires, with regard to each category of proffered expert testimony, a trial court to determine whether that evidence would be (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror (8 NY3d at 452). Without the benefit of the *LeGrand* decision for guidance, that analysis did not occur in this case. Rather, the court believed the risk of misidentification to be low because the victim had the opportunity to observe defendant, had helped with the sketch and had picked him out of a photo array and then a lineup. The court then decided that an expert was unnecessary or that the proposed topics were within the common understanding of the jury.

With respect to several of the topics defendant proffered, the court was correct to conclude that an expert was unnecessary on the particular facts of this case. For instance, the court's analysis was probably correct with respect to how the similarity of fillers influences accuracy of identifications because the victim had previously identified defendant in a photo array and should have realized that the person she selected would be in the lineup. The same analysis would also apply to the topic of lineup instructions. Nor does defendant contest the People's

arguments concerning: (1) exposure time, (2) cross-racial inaccuracy, (4) wording of investigator questions and (5) unconscious transference. Accordingly, defendant has abandoned on appeal his efforts to introduce expert testimony on these topics.

However, the court abused its discretion by not allowing expert testimony on the remaining topics. These subjects are relevant given the particular circumstances of this case. For example, Dr. Penrod was to testify about the "forgetting curve," i.e., that memory loss is greater directly after an event. While it is common knowledge that memory fades over time, it is not well known, indeed it is counterintuitive, that the greatest memory loss occurs directly after an event. This knowledge is therefore outside the ken of the average juror (*see id.* 259, 268). Given that the victim claimed to remember her assailant well enough to assist a police sketch artist, and the trial court's heavy reliance on the sketch to reason that an expert was unnecessary, the issue was certainly relevant. At the very least, the court should have held a *Frye* hearing to determine whether the theory behind the "forgetting curve" is generally accepted in the scientific community.

Principles about witness confidence are already generally accepted within the scientific community (*Abney* at 268). "They

are also counterintuitive, which places them beyond the ken of the average juror" (*id.*). The issue of witness confidence was relevant because two of the witnesses were certain defendant was the perpetrator, while the third was nearly certain. The jury therefore deserved to hear testimony that confidence level is not necessarily related to the accuracy of the identification and that certain factors, such as trial preparation, can affect witness confidence. The existence of the sketch has nothing to do with the tenor of the witness's testimony and therefore should not have been a basis for precluding expert testimony about witness confidence. Finally, the court's alternative method of addressing the issue of witness confidence during voir dire or charging, "as it always does," that confidence does not constitute accuracy (2 Misc 3d at 655), is insufficient to dispel the risk of false identification.

Nor was the court correct to conclude that the sketch obviated the need for expert testimony. Nothing in this record supports a finding that the inaccuracies involved in eyewitness identification are ameliorated when a victim can assist a police sketch artist. Defendant never had the opportunity, despite making the request, to have its expert address this subject.

As it is undisputed that this case turned on the accuracy of eyewitness identification testimony and there was no evidence to

corroborate that testimony, the court abused its discretion under *LeGrand*. Accordingly, defendant should be entitled to a new trial after a hearing on his offer of expert testimony during which the court should undertake the analysis *LeGrand* sets forth.

Nor do I consider the court's failure to conduct this hearing to be harmless. For a nonconstitutional trial error to be harmless:[3] (1) proof of guilt must be overwhelming; and (2) there must be "no significant probability that the jury would have acquitted had the proscribed evidence not been introduced" *(People v Kello*, 96 NY2d 740, 744 [2001]). As the trial court recognized, the only issue in this case was the identification of defendant. Yet, this case involved a real risk of misidentifications. None of the witnesses had an extended opportunity to view the assailant whose face a hood partially covered. None of them had ever seen him before. The attack was brief and the perpetrator escaped into the tunnel. No one followed him. Nothing of the victim's was found with defendant. Certainly then, the proof of defendant's guilt was not "overwhelming." Had the court permitted defendant to challenge the reliability of the identifications by means of expert

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[3] Because I believe that the error was not harmless under the standard applicable to nonconstitutional trial errors, I take no position with respect to whether the Constitution requires or precludes a harmless error analysis in this case.

testimony (proferred to include testimony relating to the "forgetting curve" and witness confidence) it is entirely possible the jury would not have believed the accuracy of the identifications. Therefore, I cannot agree with the plurality hat the three eyewitnesses (victim included) were "unlikely to be mistaken," and therefore conclude that the trial court's error in excluding expert testimony was not harmless.

Despite the clear mandate from the Court of Appeals to use the *LeGrand* factors where a case turns on eyewitness testimony and there is little or no corroborating evidence, the plurality continues to interpret *LeGrand* narrowly, in an attempt to restrict its reach by corralling its facts. The plurality mentions not only the lack of forensic or other physical evidence linking the defendant in *LeGrand* to the crime, but also the seven-year interval in that case between the commission of the crime and the witness identifications. The plurality then follows a series of decisions from this Court that have distinguished *LeGrand* on the ground that the risk of misidentification was slight compared to the risk in *LeGrand* (*e.g. People v Chisolm*, 57 AD3d 223 [2008], *lv denied* 12 NY3d 782 [2009]; *People v Smith*, 57 AD3d 356 [2008] *lv denied* 12 NY3d 821 [2009]; *People v Austin*, 46 AD3d 195 [2007]), *lv denied* 9 NY3d

1031 [2008]).[4]

However, in light of the Court of Appeals decision in *Abney* reversing this Court, it is now abundantly clear that we are not to restrict *LeGrand* to its facts, even if the risk of misidentification is only slight. The legal analysis is quite simple: if the case turns on eyewitness identifications and there is little or no corroborating evidence, the trial court abuses its discretion if it denies appropriate expert testimony on eyewitness identifications.

The plurality interprets the recent Court of Appeals decision in *People* v *Allen*, decided with *Abney*, to mean that "corroborating evidence. . . need not be forensic or physical, but can be established by additional eyewitness testimony." However, merely because there may be more eyewitnesses than just the victim does not mean an expert is dispensable. *LeGrand* recognizes that there is now persuasive scientific evidence that, under certain circumstances, eyewitness identification testimony, even while apparently convincing and certain, is fraught with error (*see LeGrand*, 8 NY3d at 454-455; *see also State v Delgado*, 188 NJ 48, 60, 902 A2d 888, 895 [NJ 2006] ["Misidentification is

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[4] In Chisolm and Smith there was evidence beyond that of the eyewitnesses to corroborate that the defendants were the perpetrators. *Austin*, however, had no such evidence and is inconsistent with *LeGrand*.

widely recognized as the single greatest cause of wrongful convictions in this country"]). Without additional circumstances, such as prior familiarity with the defendant, perhaps from the neighborhood, a prior encounter with or even a more ample opportunity to observe the perpetrator, the problem of misidentification can exist whether there is one eyewitness or several. The Court of Appeals has recognized this. After all, *LeGrand* involved at least three eyewitnesses to a murder and the *LeGrand* rule speaks in terms of accuracy of eyewitness "indentifications" in the plural, not singular. Therefore, *LeGrand* dictates that, without more, where a case turns on the accuracy of more than one eyewitness, an expert is still be necessary. The Court of Appeals' juxtaposition of the circumstances in *Allen* with *Abney* reinforces this. In *Allen*, the Court of Appeals held the case did not turn on the accuracy of eyewitness identification because the defendant was not a stranger to either the victim or the eyewitness. *Allen* involved a robbery at a barbershop. One of the customers recognized one of the robbers, whose face was partially covered, as someone whom he encountered regularly in the neighborhood. The customer had heard the defendant's speaking voice several times during the previous six months and recognized him from both his voice and body type. The defendant also was not a stranger to one of the

barbers who worked in the shop. The Court of Appeals noted that two witnesses recognized the defendant from prior encounters when it ruled that *Allen* was not a case that turned on the accuracy of eyewitness identification. Here, in sharp contrast, the perpetrator was a stranger to all involved. Nor does it make a difference that the witnesses may have noticed the perpetrator before the crime took place. That exposure was of short duration and the perpetrator's face was partially covered. The crime took place quickly and the perpetrator escaped into the subway tunnel.

Nor can I agree with Justice McGuire's analysis, despite its compelling articulation, that focuses on the single word "independently" from *Allen* to conclude that "multiple corporeal identifications that are independent can cross-corroborate each other so that the case is not one in which there is but 'little or no corroborating evidence.'" *Allen* involved more than a mere independent identification. As Justice McGuire acknowledges, the Court of Appeals also took into consideration that the defendant in Allen was not a stranger to either eyewitness and had stood by and searched one of them throughout the course of the robbery. Nothing close occurred in this case. The perpetrator did not stand by or search either Rios or Alarcon throughout the course of the crime. Rather, the perpetrator's face was partially covered, the crime occurred quickly and the perpetrator escaped

into the subway tunnel. More importantly, unlike in *Allen*, none of the eyewitnesses were acquainted with defendant prior to the crime. Finally, neither Rios or Alarcon identified defendant as the assailant until nearly a year after the crime occurred.

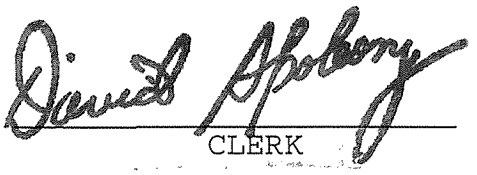
Nor do I consider the victim's interaction with the perpetrator to constitute "an extended opportunity to observe her assailant." Not only was the assailant's face partially covered, but the conversation the two had was of very short duration. Indeed, the conversation here appears not to be much longer than the conversation the victim and the perpetrator had in *Abney*, yet the Court of Appeals still held in *Abney* that it was an abuse of discretion not to allow an expert to testify. In *Abney*, like this case, the crime occurred on the subway. The assailant stopped the victim on the stairs of the subway station and asked her whether she had any change. The victim told the assailant she had no change. The two parted ways. Then, the assailant suddenly came around in front of the victim and committed the crime.

Accordingly, while I agree with Justice McGuire that it is possible to conceive of circumstances where multiple corporeal identifications can cross-corroborate each other, such as the eyewitnesses having prior acquaintance with the defendant or the defendant possessing a tattoo, scar or other distinguishing

feature, this is not that case. The risk of misidentification here is too high. *LeGrand* therefore required the trial court to allow expert testimony to enhance the quality of the deliberative process as well as the reliability of its outcome.

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

ENTERED: MAY 6, 2010



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