SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 26, 2012**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5094N Wendy Hakim Jaffe, Index 309111/08
Plaintiff-Appellant,

-against-

Robert Jaffe,
Defendant-Respondent.

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Cohen Lans, LLP, New York (Robert S. Cohen of counsel), for appellant.

O'Brien LLP, New York (Sean O'Brien of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 27, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for a protective order quashing 30 nonparty subpoenas, or an evidentiary hearing, unanimously modified, on the law and the facts, to grant the motion to the extent of quashing the nonparty subpoenas issued to SC Management, and to Bank of New York Mellon to the extent it seeks records related to SC Management, El-Kam Realty, Aval Company, Old Salem Farm Acquisition Corporation and Affiliates, Enterprise Products Partners LP, Nantucket Campfire, LLC, Bedford Entities, Buckingham Trading and Trading Partners, the matter

remanded for a determination as to whether the other subpoenas at issue were reasonably tailored to lead to relevant discovery, and otherwise affirmed, without costs.

In this divorce action, defendant served 37 nonparty subpoenas on the business office maintained by plaintiff's father. Each subpoena was addressed to a different entity closely held by, or affiliated with, plaintiff's family, which has many real estate holdings. Plaintiff acknowledges that, before the marriage, she had minority interests in many of the entities and that during the marriage she transferred the interests in those companies to a single holding company in exchange for a 25% interest in the holding company. Unlike two of her siblings, plaintiff was given no current or future managerial authority in the holding company. Defendant also addressed subpoenas to SC Management, the company that manages the real estate holdings of the various LLCs. Plaintiff claims to have no interest in SC Management or six other entities that received subpoenas. In addition to the entities affiliated with plaintiff's family, defendant served a subpoena on Bank of New York Mellon, seeking documents related to accounts maintained there by all of the entities in which plaintiff held an interest, as well as SC Management and eight other entities in which plaintiff denies having any interest.

The subpoenas addressed to the entities in which plaintiff had transferred her interest to the holding company differed from each other in some respects, but they uniformly sought financial statements; tax returns; detailed fixed asset registers and depreciation schedules for all assets held; building permits filed between 1996 and 2000; rent rolls identifying all tenants, their apartment numbers, their leases, the square footage of their apartments, and a calculation of their rent per square foot; documents reflecting "in kind" payments or barter transactions with any entity owned by the Hakim Organization, or with any employee, partner or shareholder of such entity; board meeting or other entity meeting minutes; business plans and projections; 1099s with copies of cancelled checks; ownership, operating, management, or subscription agreements; agreements of understanding signed by plaintiff; ownership schedules and stock transfer ledgers, including copies of front and back of all shares issued; copies of credit applications made to a bank or to other creditors; and outside accountants' working paper files and business evaluations or real estate appraisals conducted during the marriage.

Plaintiff moved to quash the subpoenas. She argued that the subpoenas were duplicative of discovery demands defendant had served on her directly (to which she also objected), and that

they were intended solely to harass her parents. Indeed, plaintiff asserted, the subpoenas were served on the eve of Rosh Hashanah and immediately after defendant threatened to establish that plaintiff's parents were tax evaders. She further contended that, to the extent she had interests in the entities to which the subpoenas were addressed, it was separate property and had no bearing on the distribution of the parties' marital assets. She claimed to have no active role in the companies that would have caused any appreciation in their value to become marital property.

In opposition to the motion, defendant argued that the documents and information sought by the subpoenas were necessary to determine whether a portion of plaintiff's family assets is marital property and because the documents bear on maintenance and child support. Pointing to documents he had already discovered during the litigation, defendant submitted that "[m]onies flow[ed] freely" among the subpoenaed entities and that plaintiff was active in the management and development of her family's real estate holdings. Defendant further asserted that the subpoenaed entities regularly made loans to various management companies controlled by the family, particularly SC Management, and used the management companies to pay for family members' personal expenses. Defendant stated that the discovery

he sought was relevant to the issue of whether plaintiff's actions caused appreciation to the separate property that should then be included in the marital estate. He also argued that, even if plaintiff's interests in the entities were nonmarital, they were still relevant under Domestic Relations Law § 236(B)(5)(d)(9), which requires the court, in determining equitable distribution, to consider "the probable future financial circumstances of each party."

The court granted the motion in part and denied it in part. It held that nonparty discovery was appropriate as to those entities in which plaintiff conceded having an interest. However, it quashed the subpoenas for all companies in which plaintiff claimed to have no ownership interest, except for SC Management. The court found that there was evidence, such as checks payable to plaintiff, that "raise[d] the possibility" that plaintiff received compensation for work she performed for that company. The court did not expressly address the subpoena served on Bank of New York.

In a divorce action, "[b]road pretrial disclosure which enables both spouses to obtain necessary information regarding the value and nature of the marital assets is critical if the trial court is to properly distribute the marital assets" (*Kaye v Kaye*, 102 AD2d 682, 686 [1984]). Indeed, in *Kaye*, the court

denied the husband's motion for a protective order preventing discovery into four closely held family corporations in which he held minority interests, observing, "[I]t has been held that both parties in a matrimonial action governed by the Equitable Distribution Law are now entitled to: a searching exploration of each other's assets and dealings at the time of and during the marriage, so as to delineate the extent of marital property, distinguish it from separate property, uncover hidden assets of marital property, discover possible waste of marital property, and in general gain any information which may bear on the issue of equitable distribution, as well as maintenance and child support. The entire financial history of the marriage must be open for inspection by both parties" (*id.* [internal quotation marks omitted]).

Pursuant to this rule of liberal discovery in matrimonial litigation, defendant is entitled to records of the entities in which plaintiff has an interest, so that he may determine whether her interests have a bearing on the distribution of the marital estate as well as support obligations. However, we find that defendant has failed to establish that plaintiff has any interest in SC Management; accordingly, the subpoena served on that entity should have been quashed. Further, to the extent the subpoena served on Bank of New York Mellon seeks records related

to SC Management, El-Kam Realty, Aval Company, Old Salem Farm Acquisition Corporation and Affiliates, Enterprise Products Partners LP, Nantucket Campfire, LLC, Bedford Entities, Buckingham Trading and Trading Partners, the bank need not comply. Defendant has also failed to demonstrate any affiliation between plaintiff and those entities. The bank is required, however, to divulge information related to the companies in which plaintiff has conceded having an interest.

While the entities in which plaintiff has an interest are thus not immune from discovery in this action, we agree with plaintiff that the subpoenas for those entities are overbroad in many respects. For example, the subpoenas include a demand to provide the names and addresses of all commercial and residential tenants, with copies of every lease, and all building permits filed for any building, including construction and renovations for every building plaintiff's family owned, over a 15-year period of time. This information appears to be of dubious relevance. Accordingly, the motion court must reconsider plaintiff's motion to determine whether the particular demands annexed to the subpoenas are sufficiently tailored to the financial issues in the action, and whether it would be unduly burdensome for the entities to respond.

The Decision and Order of this Court entered herein on September 15, 2011 is hereby recalled and vacated (*see* M-4371 and M-4506 decided simultaneously herewith).

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

ENTERED: JANUARY 26, 2012

CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, Richter, JJ.

5757 The People of the State of New York, Ind. 6194/08
Respondent,

-against-

Kenneth Powell,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about November 17, 2009,

Said appeal having been argued by counsel for the respective parties; due deliberation having been had thereon, and finding the sentence not excessive,

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

The Decision and Order of this Court entered herein on October 18, 2011 is hereby recalled and vacated (see M-5712 decided simultaneously herewith).

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

ENTERED: JANUARY 26, 2012

CLERK

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

6619 The People of the State of New York, Respondent, Ind. 48888C/05

-against-

Curtis Abraham, Defendant-Appellant.

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Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Debevoise & Plimpton LLP, New York (Nicholas A. Duston of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

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Judgment of resentence, Supreme Court, Bronx County (Dominic Massaro, J.), rendered April 22, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree and attempted assault in the second degree, and resentencing him, as a second felony offender, to concurrent terms of 20 years and 2 to 4 years, unanimously affirmed.

Following a remand from this Court (66 AD3d 412 [2009], *lv denied* 14 NY3d 769 [2010]), the court reimposed the original sentence. Defendant's constitutional claims regarding his sentence are unavailing (*see People v Pena*, 50 NY2d 400, 411-412 [1980], *cert denied* 449 US 1087 [1981]), and we perceive no basis for reducing the sentence.

Defendant's claim that he received ineffective assistance of

counsel at the resentencing proceeding is unreviewable on direct appeal because it involves matters outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant asserts that counsel failed to bring to the resentencing court's attention defendant's alleged desire to make a statement. However, the record does not establish that defendant wished to address the court, and there is no information in the record as to any advice from counsel in that regard. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JANUARY 26, 2012

CLERK

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

6621 In re Ricardo S.,
Petitioner-Respondent,

-against-

Carron C.,
Respondent-Appellant.

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Carol Kahn, New York, for appellant.

Virginia Geiss, Brooklyn, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Hal Silverman of counsel), attorney for the child.

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Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about February 4, 2011, which, inter alia, awarded petitioner father custody of the subject child with liberal visitation to respondent mother, unanimously affirmed, without costs.

A sound and substantial basis in the record supports the determination that it is in the child's best interests to remain in the custody of his father (*see Lubit v Lubit*, 65 AD3d 954, 955 [2009], *lv denied* 13 NY3d 716 [2010], *cert denied* __ US __, 130 S Ct 3362 [2010]). The court reached this determination after a full evidentiary hearing at which it had the opportunity to hear the testimony of the witnesses, including both parents, and

interview the child in camera (*see Eschbach v Eschbach*, 56 NY2d 167, 171-172 [1982]; *Matter of Nelissa O. v Danny C.*, 70 AD3d 572 [2010]).

The record indicates that the child has thrived in his father's custody, is healthy, receives regular medical care, continues to be a successful participant in his school's gifted and talented program, and has extensive and important bonds with his paternal relatives in New York. Moreover, although the child loves both of his parents and refuses to be forced to choose between them, the court did conclude, based upon its in camera interview, that the child would prefer to remain in New York, with extensive visitation with his mother in Jamaica. While not dispositive, the child's preference is significant, and the court's order supports what it found to be the child's preferred living arrangement (*see e.g. Eschbach,* 56 NY2d 173).

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

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

ENTERED: JANUARY 26, 2012

CLERK

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

6622 Joseph Russo, Index 301395/09
Plaintiff-Respondent,

-against-

Hudson View Gardens, Inc., et al.,
Defendants-Appellants.

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Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered June 14, 2011, which, insofar as appealed from, denied defendant Midboro Management Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, the motion granted to the extent of dismissing the Labor Law § 200 and common-law negligence claims against it, and otherwise affirmed, without costs.

In this action for personal injuries arising from plaintiff's use of an A-frame ladder, the Labor Law § 200 and common-law negligence claims against Midboro are not viable. The record shows that Midboro, the managing agent of the subject premises, did not directly control the method or means of plaintiff's work, or have actual or constructive notice of an

unsafe condition (*see e.g. Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [2007], *lv denied* 10 NY3d 710 [2008]). Although plaintiff attributed the injury-causing accident to the instability of the ladder he was using, he admitted that he selected the ladder himself; that the ladder was owned by defendant property owner Hudson View Gardens, Inc. (Hudson); that he had used the ladder previously; and that while he knew the ladder did not have rubber bottoms on the legs to help secure it, he did not tell anyone about it. Plaintiff further failed to offer evidence that would lead to a conclusion that Midboro should have known of the condition.

The motion court properly declined to dismiss the Labor Law § 240(1) and § 241(6) claims. Triable issues of fact exist as to whether Midboro had the authority, pursuant to its agreement with Hudson, to supervise and control plaintiff's work for the purposes of liability under Labor Law § 240(1) and § 241(6) (*see Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [2009]; *see also Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 98-99 [1999]).

Under the circumstances presented, we decline to search the record and reach a determination on the merits of the Labor Law § 240(1) and § 241(6) causes of action.

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

ENTERED: JANUARY 26, 2012

CLERK

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

6627 Thomas Gass, Index 302536/08
Plaintiff-Respondent,

-against-

Susan Gass,
Defendant-Appellant.

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Susan Gass, appellant pro se.

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Order, Supreme Court, New York County (Saralee Evans, J.), entered August 26, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's motion for additional discovery and for counsel fees, unanimously affirmed, without costs.

Defendant's request for additional discovery for purposes of the hearing on equitable distribution has been rendered moot by the fact that the hearing was held on December 1, 2011. In any event, there was no basis to delay the hearing for additional discovery since any outstanding issues or gaps in disclosure could have been addressed at the hearing. Moreover, resolution of this matter is long overdue.

Defendant failed to establish her need for interim counsel fees (*see* Domestic Relations Law § 237[a]; *Charpie v Charpie*, 271 AD2d 169, 173 [2000]). Defendant did not submit a current statement of her own or of plaintiff's net worth or an affidavit

by her attorney stating the amount of attorneys' fees already paid, the amounts to be paid to counsel and any experts, or any additional costs (*see Mimran v Mimran*, 83 AD3d 550, 550-551 [2011]; 22 NYCRR 202.16[k][2], [3]).

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

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

ENTERED: JANUARY 26, 2012

CLERK

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

6628 The People of the State of New York, Respondent, Ind. 1002/07

-against-

Rickey Bryant, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rither Alabre of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Albert Lorenzo, J. at hearing; Analisa Torres, J. at jury trial and sentencing), rendered August 11, 2009, convicting defendant of robbery in the first degree, criminal possession of stolen property in the fifth degree, and two counts of criminal possession of a controlled substance in the seventh degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Upon defendant's lawful arrest at the door of his apartment, the police properly conducted a limited protective sweep of the apartment to determine if there was anyone present who might destroy evidence or pose a threat to the officers (*see Maryland v Buie*, 494 US 325, 334 [1990]). The robbery victim had provided information warranting a reasonable belief that other

participants in the robbery might be present in the apartment. The record supports the hearing court's finding that the recovery of incriminating evidence from a partly open closet was justified under the plain view doctrine, and was within the scope of the protective sweep (*see People v Lasso-Reina*, 305 AD2d 121, 122 [2003], *lv denied* 100 NY2d 595 [2003]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its resolution of inconsistencies in the testimony of the prosecution witnesses.

The court properly denied defendant's request for a missing witness charge, since defendant failed to meet his burden of showing that the uncalled witness would have provided material, noncumulative testimony (*see People v Brunner,* 67 AD3d 464, 465 [2009], *affd* 16 NY3d 820 [2011]).

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

ENTERED: JANUARY 26, 2012

CLERK

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

6631 Krystal Paulino, Index 303166/08
Plaintiff-Appellant,

-against-

Christian Rodriguez, et al.,
Defendants-Respondents.

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

Law Offices of Edward M. Eustace, White Plains (Heath A. Bender of counsel), for respondents.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about July 14, 2010, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint for failure to satisfy the "serious injury" threshold of Insurance Law § 5102 (d), unanimously modified, on the law, to the extent of denying the motion with respect to plaintiff's claim of serious injury to her left shoulder, and otherwise affirmed, without costs.

Defendants met their prima facie burden of establishing their entitlement to judgment as a matter of law. Defendants demonstrated that plaintiff did not suffer a serious injury to her cervical spine, lumbar spine, or left shoulder by relying on the medical reports of plaintiff's treating physician which concluded, approximately four months after the accident, that she

had full ranges of motion and that the MRIs of her cervical and lumbar spine were normal (*see* Insurance Law § 5102 [d]; *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]; *Newton v Drayton*, 305 AD2d 303, 304 [2003]).

In opposition, plaintiff raised an issue of fact regarding the injury to her left shoulder. Plaintiff's subjective complaints of persistent pain were substantiated by objective medical evidence, including an MRI of her left shoulder, taken approximately two weeks after the accident, which showed the presence of fluid in her subscapular bursa, consistent with the diagnosis of bursitis. Plaintiff also submitted medical evidence that she tested positive for a painful arc test and an impingement sign test, suffered persistent pain despite conservative treatment, and continued to exhibit range of motion deficits in her left shoulder even after undergoing arthroscopic surgery (*see Morris v Cisse*, 58 AD3d 455 [2009]; *Jones v Norwich*, 283 AD2d 809 [2001]). Since injuries may worsen over time, evidence of contemporaneous range of motion limitations is not a prerequisite to plaintiff's claim (*Perl v Meher*, __ NY3d __, 2011 NY Slip Op 08452 [2011]).

Plaintiff submitted no further evidence of serious injury to her spine. However, if the trier of fact determines that a serious injury has been sustained, it may award damages for all

injuries causally related to the accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [2010]).

Plaintiff did not plead a 90/180-day claim in her bill of particulars. In any event, defendants established that plaintiff returned to her part-time job within one month after the accident and there was no medical determination that she was unable to engage in substantially all of her material and customary daily activities for 90 out of the first 180 days after the accident (*see Torain v Bah*, 78 AD3d 588 [2010]).

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

ENTERED: JANUARY 26, 2012

CLERK

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

6632 In re Bianca R., and Another,

Children Under the Age
of Eighteen Years, etc.,

Anne Marie S.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

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In re Giselle S.,
Petitioner,

Carmelo R., Jr.,
Petitioner-Respondent,

-against-

Ann Marie S.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for Commisioner of Social Services of the City of New York, respondent.

Anne Reiniger, New York, for Carmelo R., Jr., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child Brianna R.

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Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about August 23, 2010, which awarded custody of Brianna R. to her father and stepmother, unanimously affirmed, without costs. Appeal from order, insofar as it

awarded custody of Bianca R., unanimously withdrawn in accordance with the stipulation of the parties.

The court properly considered the relevant factors when it determined that it was in the child's best interests to award custody to the father and stepmother. The court found that they had provided the child with structure and a stable home environment, where she was thriving (see *Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). The 11-year old child's preference to return to respondent mother, although a factor to be considered, is not dispositive (*see Matter of Cresean W. v Betty H.*, 55 AD3d 420, 420-421 [2008]).

The court's determination had a sound and substantial basis in the record. Although respondent appears to have made progress, she failed to demonstrate that she has overcome the problems which led to the child's removal from her home. Neither respondent's therapist nor the court-appointed expert recommend that the child be returned to respondent.

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

ENTERED: JANUARY 26, 2012

CLERK

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

6633 The People of the State of New York, Ind. 1228/08
Respondent,

-against-

Lualma Blackwell,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about July 1, 2009, 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: JANUARY 26, 2012

CLERK

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

6634 Shamona Carlton, etc., Index 8989/01
Plaintiff-Appellant, 83905/09

-against-

St. Barnabas Hospital,
Defendant-Respondent,

Eric Rothstein, et al.,
Defendants.

- - - - -

St. Barnabas Hospital,
Third-Party Plaintiff-Respondent,

-against-

Malsuk Park, M.D., et al.,
Third-Party Defendants-Respondents.

_____

Stephen D. Chakwin, Jr., New York, for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, respondent.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for Malsuk Park, M.D., Thomas Klie, M.D., and Quarry Road Emergency Services, P.C., respondents.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered November 19, 2010, which granted defendant/third-party plaintiff's and third-party defendants' motions for summary judgment, dismissing the complaint and third-party complaint, unanimously affirmed, without costs.

Third-party defendants made a prima facie showing — based on hospital records, deposition testimony and the affirmations of

experts — that their treatment of plaintiff's late husband comported with good and accepted medical practice. Contrary to plaintiff's contention, the emergency medical physician's opinions were not conclusory (*cf. Wasserman v Carella*, 307 AD2d 225, 226 [2003]). In addition, plaintiff failed to preserve her argument that third-party defendants and their experts relied on inadmissible evidence (*see Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 [2006]), and we decline to review in the interest of justice. Were we to review it, we would reject it. Plaintiff does not challenge the accuracy or veracity of the decedent's uncertified medical records or the transcripts of her testimony. In fact, she relied on the medical records in opposition to the motions.

Plaintiff failed to raise an issue of fact in response to the motions. The affirmation of plaintiff's expert was conclusory, ignored the bulk of the record of the decedent's treatment in the emergency room, and was insufficient to contradict third-party defendants' expert. The defense offered expert testimony that, in light of decedent's symptoms and complaints, he was appropriately diagnosed with lumbosacral sprain/strain and possible radiculopathy, and referred to a neurologist (*see Altmann v Molead*, 51 AD3d 482, 483 [2008]). Plaintiff's claim that third-party defendants should have

detected decedent's deep vein thrombosis was also conclusory and unsupported by the record (*see id.; Wong v Goldbaum*, 23 AD3d 277, 279-280 [2005]).

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

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

ENTERED: JANUARY 26, 2012

CLERK

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

6635 The People of the State of New York, Ind. 2443/05
Respondent,

-against-

Edgar Montano,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about July 28, 2009, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). The mitigating factors

asserted by defendant were adequately taken into account by the risk assessment instrument (*see e.g. People v Hansford*, 67 AD3d 496 [2009]).

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

ENTERED: JANUARY 26, 2012

CLERK

Mazzarelli, J.P., Saxe, Acosta, Román, JJ.

6637 In re Esteban Rivera, et al., Petitioners-Appellants, Index 260296/10

-against-

Amica Mutual Insurance Company, Respondent-Respondent.

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Shapiro Law Offices, PLLC., Bronx (Ernest S. Buonocore of counsel), for appellants.

Miranda Sambursky Slone Sklarin Verveniotis, LLP, Elmsford (Richard S. Sklarin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered March 21, 2011, which, to the extent appealed from, determined that petitioners were entitled to recover a total of $100,000 under their insurance policy's supplemental underinsured motorist (SUM) coverage provisions, unanimously affirmed, without costs.

In *Butler v New York Cent. Mut. Fire Ins. Co.* (274 AD2d 924 [2000]), the Third Department held that whether the term "insured," as used in an identical Condition 6 of the SUM Endorsement, "refers to each independent insured" or "a cumulative grouping of all who qualify as insureds" was ambiguous, and should be construed against the insurer (*id.* at 925-26). However, in this case, Condition 6 cannot be viewed as ambiguous because such provision refers to "[t]he SUM limit shown

on the Declarations," and the Declarations clearly set forth a "per accident" limit (*see Matter of Automobile Ins. Co. Of Hartford v Ray*, 51 AD3d 788, 790 [2008]; *Matter of Government Empls. Ins. Co. v Young*, 39 AD3d 751, 752-53 [2007]; *Matter of Graphic Arts Mut. Ins. Co. [Dunham]*, 303 AD2d 1038, 1038-39 [2003]). Petitioners' piecemeal view of Condition 6 runs afoul of the principle that "[w]hen interpreting a contract, we must consider the entire writing and not view particular words in isolation" (*Wachter v Kim*, 82 AD3d 658, 661 [2011]).

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

ENTERED: JANUARY 26, 2012

CLERK

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

6638N Rich Town Realty, Inc., Index 600618/10
Plaintiff-Respondent,

-against-

Kim's International, Inc.,
Defendant-Appellant.

_____

Sim & Park, LLP, New York (Sang J. Sim of counsel), for appellant.

Goetz Fitzpatrick, LLP, New York (Bernard Kobroff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 4, 2011, which denied defendant's motion to vacate a default judgment, unanimously affirmed, with costs.

The court properly denied defendant's motion to vacate the default. In order to succeed on its motion, defendant was required pursuant to either CPLR 317 or CPLR 5015 (a)(1) to establish a meritorious defense. Defendant failed to do so because the original commission agreement stated that its terms could not be changed orally. Evidence of any alleged oral modification to decrease the broker's commission from $500,000 to $250,000 is barred by the explicit terms of the commission

agreement (*see* General Obligations Law § 15-301[1]; *Rose v Spa Realty Assoc.*, 42 NY2d 338, [1977]; *Ralco, Inc. v Citibank, N.A.*, 32 AD3d 301 [2006]). Indeed, when the parties first agreed to modify the terms of payment of the broker's commission, they executed a writing in compliance with the original commission agreement. Thus, contrary to defendant's contention, the subsequent agreement affects the original agreement only as to how the broker's commission would be paid.

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

ENTERED: JANUARY 26, 2012

CLERK

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

6639 & M-5042 — In re William C. Israel, Petitioner, — Index 570790/10

-against-

Hon. Martin Schoenfeld, etc., et al., Respondents.

_____

William C. Israel, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Monica Connell of counsel), for respondents.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: JANUARY 26, 2012

CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5414 Maxine Company, Inc., Index 602233/05
Plaintiff-Appellant,

-against-

Brink's Global Services USA, Inc.,
Defendant-Respondent.

_____

Nelson, Levine, de Luca & Horst, LLC, New York (Erika C. Aljens of counsel), for appellant.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Linda Genero Sklaren of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 23, 2010, affirmed, with costs.

Opinion by Tom, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Rolando T. Acosta
Dianne T. Renwick
Leland G. DeGrasse, JJ.

5414
Index 602233/05

_____x

Maxine Company, Inc.,
Plaintiff-Appellant,

-against-

Brinks's Global Services USA, Inc.,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered April 23, 2010, granting defendant's motion for summary judgment and dismissing the complaint.

Nelson, Levine, de Luca & Horst, LLC, New York (Erika C. Aljens, and Kevin T. Levine of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for appellant.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Linda Genero Sklaren of counsel), for respondent.

TOM, J.P.

On appeal from the summary dismissal of the complaint, plaintiff, which shipped valuable jewelry with defendant, contends that the contract of carriage is ambiguous, particularly with respect to the term "fragile." Whether that term is precisely defined in the contract is immaterial to the construction of the instrument since the contract designates *all* jewelry as fragile for the purpose of Brink's liability for damage sustained by transported merchandise.

The complaint describes plaintiff as a jewelry retailer and alleges that, on or about November 16, 2004, Brink's picked up a shipment consisting of 157 ornate pieces of handmade jewelry from plaintiff's New York City facility for delivery to the Nieman Marcus department store in McLean, Virginia. The items were contained in a soft-sided rolling suitcase, and the waybill lists a declared value of $2 million. Plaintiff's invoices, however, place a retail value on the merchandise of $6,627,868, and plaintiff's principal placed the wholesale value at half that amount. It is uncontested that, while in transport, the shipment was damaged, resulting in 23 pieces being unrepairable, for which plaintiff seeks $631,900 at wholesale prices, and 26 pieces requiring repairs, for which plaintiff seeks $100,000. On defendant's motion, Supreme Court held that the action was barred

by the terms of the contract and dismissed the complaint.

Plaintiff contends that the contract's liability provisions are ambiguous, particularly article X — which limits Brink's liability to the carrier's loss of a shipment, not any damage that the shipment might sustain while in transport, should the shipper "fail to identify a fragile item and pay additional charges if required by Brink's." It is undisputed that plaintiff did not identify as fragile any of the jewelry it shipped. Plaintiff, however, contends that the jewelry was not necessarily fragile and suggests that the term, which is undefined in the contract, is vague. Thus, it maintains, the meaning intended to be ascribed by the parties to the term "fragile" presents a material question of fact precluding summary judgment.

Plaintiff's argument is without merit. Jewelry is expressly included in those items deemed to be fragile for the purpose of Brink's liability for damage sustained by goods during shipment. Article X of the contract contains various exclusions from liability, providing, inter alia, that Brink's will not be directly or indirectly responsible for specified occurrences, including in pertinent part: "BREAKAGE of statuary, marble, glassware, 'bric-a-brac,' porcelain, decorative items including jewelry and similar fragile articles unless this breakage is caused by [instrumentalities not pertinent to this matter]."

Plaintiff argues that it is inaccurate to include jewelry in the list because not all articles of jewelry are fragile. Further, it argues that the list of articles deemed to be fragile is "buried" in a contract that is printed in very small type. Without citation to any statutory provision that is violated by the form of the contract, plaintiff asks this Court to ignore the provision, thereby permitting it to avoid the contractual limitation on recovery for breakage.

Article X is entitled "BRINK'S LIABILITY; DECLARED VALUE LIMITS; LIMITATIONS ON BRINK'S LIABILITY," and plaintiff can hardly profess surprise that it contains, among other things, a limitation on liability for breakage. Plaintiff purports to find the explicit exclusion of "decorative items including jewelry" to be unclear, arguing that it is uncertain whether the phrase "similar fragile articles" refers to "jewelry," or "decorative items," or whether it limits application of the exclusion to only the listed items that are actually fragile.

As a matter of common usage, a list of entities stated in the conjunctive is set off by commas, with the last entity preceded by the word "and," as in "a, b, c and d." The provision at issue reads, "BREAKAGE of statuary, marble, glassware, 'bric-a-brac,' porcelain, decorative items including jewelry and similar fragile articles . . ." In order for the phrase "similar

fragile articles" to refer only to "decorative items" or "jewelry," the provision would have to read, "BREAKAGE of statuary, marble, . . . porcelain *and* decorative items including jewelry and similar fragile articles . . ." To limit the exclusion to listed items that are actually fragile, the provision would read, "BREAKAGE of *fragile* statuary, marble . . . porcelain *and* decorative items including jewelry and similar fragile articles . . ." Appearing between the final comma and the conjunction, the phrase "decorative items including jewelry" is obviously intended to be a single entity in a list of articles deemed to be fragile for which recovery is limited to loss of (and not damage to) those articles. It should be apparent that had Brink's intended to convey any of the several meanings sought to be ascribed to the provision by plaintiff, such effect could easily have been achieved by a modest change in language.

Whether particular articles are actually fragile is material under the contract only if they are not included in the list of items deemed to be fragile. If an item were required to be fragile to be subject to the limitation on recovery, the list of specific items to which the limitation applies would be rendered surplusage, in contravention of well established rules of contract interpretation (*see Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 195-196 [1995]). As the Court of Appeals

has noted, where an item is explicitly identified, it is unnecessary to decide whether it should be considered to be included within a class of similar items (*see e.g. Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 680 [2007] ["'cleaning' is expressly afforded protection under (Labor Law) section 240(1) whether or not incidental to any other enumerated activity"]). That a slab of marble or a bronze statue might not be fragile, as plaintiff argues, is not at issue since both are specified items for which the contract excludes liability for breakage. Thus, the terms of the contract are clear and definitive, and, under the law of either New York or Connecticut, its interpretation presents a matter of law for the court (*West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]; *Best Friends Pet Care, Inc., v Design Learned, Inc.*, 77 Conn App 167, 176, 823 A2d 329, 335 [2003]).

This Court cannot simply ignore the exclusion of liability provision as plaintiff urges. It is settled law that a contract must be construed to give effect to each and every part (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Laba v Carey*, 29 NY2d 302, 308 [1971]). Nor can a court "rewrite the terms of an agreement under the guise of interpretation" (*85th St. Rest. Corp. v Sanders*, 194 AD2d 324, 326 [1993]; *see Vermont Teddy Bear Co. v 538 Madison Realty Co.*,

1 NY3d 470, 475 [2004]). Plaintiff cites no authority suggesting that Connecticut courts would apply different criteria to the construction of a contract.

Fairly read, the contract of carriage gives the shipper two distinct options: (1) disclose fragile items, including those listed in the subject exclusion provision, and pay an additional fee for special handling or (2) ship the merchandise at the regular rate and accept the contractual limitation restricting recovery to damages occasioned by loss of the shipment by the carrier.

Because plaintiff failed to identify the subject jewelry as fragile and pay the special handling fee, and because the contract deems all jewelry to be fragile, the contractual limitation applies and Brink's is not liable for the damage to the jewelry.

In view of the foregoing determination, it is unnecessary to reach Brink's other arguments for avoiding liability — namely, the adequacy of its packaging for shipment and the substantial understatement of the value of the merchandise.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered April 23, 2010, granting

defendant's motion for summary judgment and dismissing the complaint, should be affirmed, with costs.

All concur.

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

ENTERED: JANUARY 26, 2012

CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6570 In re The State of New York, Index 250306/11
Petitioner-Appellant,

-against-

Enrique T. (Anonymous),
Respondent-Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Colleen D. Duffy, J.), entered on or about August 10, 2011, reversed, on the law, without costs, order directing respondent's unconditional release vacated, and the matter remanded for proceedings consistent with this decision and order.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. Catterson
Leland G. DeGrasse
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

6570
Index 250306/11

_____x

In re The State of New York,
Petitioner-Appellant,

-against-

Enrique T. (Anonymous),
Respondent-Respondent.

_____x

Petitioner appeals from an order of the Supreme Court, Bronx County (Colleen D. Duffy, J.), entered on or about August 10, 2011, which, upon finding that the pre-trial detention provisions of MHL § 10.06(k) are facially unconstitutional, ordered respondent's immediate release without supervision.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh and Steven C. Wu of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for respondent.

CATTERSON, J.

In this proceeding in which the New York State Attorney General seeks civil management of a sex offender pursuant to Article 10 of the New York Mental Hygiene Law (hereinafter referred to as "MHL"), we are asked to vacate an order of Supreme Court that unconditionally released the respondent, a convicted sex offender. His release was based on a finding that the pretrial civil detention provisions mandated by MHL § 10.06(k) are facially unconstitutional. This Court now finds that Supreme Court erred in attempting to make such a determination. We therefore reverse, on the law, vacate the order of the respondent's unconditional release, and order the respondent returned to detention pending completion of disposition pursuant to the Sex Offender Management and Treatment Act (hereinafter referred to as "SOMTA").[1] Additionally, we reject the respondent's argument on appeal that the statute is unconstitutional as applied to him and those sex offenders who may ultimately be approved for civil management under strict and intensive supervision and treatment, a less restrictive

[1] This Court was informed at oral argument on December 15, 2011, that at trial, the respondent was found to be a sex offender requiring civil management, and that a dispositional hearing was set for January 30, 2012. Pending disposition, the court continued the respondent's unconditional release.

alternative to confinement.

The respondent, Enrique T., is a 36-year-old convicted sex offender whose first conviction for a sexual offense occurred in 1990 when he raped and sodomized a 4-year-old girl whom his mother was babysitting. He pleaded guilty to rape in the first degree and was sentenced to a prison term of 1 to 3 years.

On January 23, 2001, the respondent was arrested and charged with multiple counts of deviate sexual intercourse with a person under age 11, sodomy and sexual abuse. He pleaded guilty to two counts of sexual abuse in the first degree involving sexual contact with his girlfriend's 7-year-old daughter and forcing an 11-year-old girl to undress and allow him to fondle her breasts and vagina. The 2001 rape and sodomy came to light when the younger victim told her mother that she knew about sex because the respondent had forced her into numerous sexual activities, including putting his penis in her mouth and forcing it into her rectum. An investigation determined that between July 1, 2000 and August 31, 2000, the respondent subjected the victim to numerous forms of sexual contact against her will; during the same period, on at least three occasions, he forced a second child to undress and fondled her breasts and vaginal area. In subsequent sex offender counseling, the respondent admitted to the activity, and said he "groomed" the victims by buying them

things and that he "fantasized" about them getting naked and in sexual positions; he said his "excuse" was that the older victim was a "big boned girl" who was "ready for sex" and the younger one was "getting there too so it's ok for her too." He was sentenced on March 2, 2001 to a term of 5 years to be followed by 5 years' postrelease supervision.

After the respondent was released to parole supervision on June 17, 2005, he absconded to Florida and tampered with his electronic monitoring unit, resulting in his parole being revoked on August 15, 2006. The respondent was returned to custody to complete his sentence. The respondent's scheduled release date of January 23, 2011 brought him within the purview of Article 10 in October 2010.

Article 10 forms the basis of SOMTA, enacted by the Legislature, effective April 13, 2007. The statute was based on legislative findings "that some offenders have mental abnormalities that predispose them to engage in repeated sex offenses." MHL § 10.01(b). The Legislature's concern was that "recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management." MHL § 10.01(a). "Civil management" means either commitment to a secure psychiatric facility, or management in the community under the supervision of the division of parole. The

second option is known as strict and intensive supervision and treatment (hereinafter referred to as "SIST"). MHL §§ 10.03(q), 10.11(a)(2).

When a detained sex offender is nearing release, the agency with jurisdiction over the offender is required to give notice of the anticipated release to the Attorney General and the Commissioner of Mental Health. MHL § 10.05(b). The Commissioner is authorized to designate a multidisciplinary staff that will make a "preliminary review" of the need for civil management and whether to refer the person to a case review team. MHL § 10.05(d).

If the preliminary review results in referral to a case review team, the team must review relevant medical and other records, and may arrange for a psychiatric examination. MHL § 10.05(e). If the case review team finds that a respondent is a sex offender requiring civil management, it must notify the respondent and Attorney General. MHL § 10.05(g). The Attorney General then may file a sex offender civil management petition. MHL § 10.06(a).

Within 30 days after the filing of a civil management petition, the court is required to conduct a hearing without a jury to "determine whether there is probable cause to believe that the respondent is a sex offender requiring civil

management." MHL § 10.06(g). If the court finds "there is probable cause to believe that the respondent is a sex offender requiring civil management," it must order that the respondent be committed to a secure treatment facility designated by the Office of Mental Health (hereinafter referred to as "OMH") for care, treatment and control. MHL § 10.06(k). The court is also required to set a date for a jury trial, to be conducted within 60 days after the probable cause determination, and "the respondent shall not be released pending the completion of such trial." Id.; MHL § 10.07(a).

Subsequently, if, at trial, a jury finds that the respondent is a sex offender suffering from a mental abnormality, then the court determines the appropriate disposition at a hearing. It "shall consider whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision." MHL § 10.07(f). Additional evidence may be offered on that issue by both the respondent and the Attorney General. MHL § 10.07(f).

Civil commitment to a secure treatment facility is required if the court finds, upon clear and convincing evidence, that the respondent "has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to

others and to commit sex offenses if not confined to a secure treatment facility." MHL § 10.07(f). If the court does not so find, it *must* make a finding of disposition that the respondent is a sex offender requiring SIST. MHL § 10.07(f). The determination is based on consideration of the conditions that would be imposed under SIST, and all available information about the prospects for the respondent's reentry into the community. Id.

In this case, on October 28, 2010, the Department of Corrections and Community Supervision (hereinafter referred to as "DOCCS") gave notice to the Commissioner and the Attorney General pursuant to MHL § 10.05(b) of the respondent's anticipated release from incarceration on January 23, 2011. On November 22, 2010, it gave notice to the respondent that his case had been referred to a case review team for evaluation. On January 13, 2011, OMH notified the respondent that the case review team had found he was a sex offender requiring civil management, and provided him with a copy of a report prepared by an OMH psychologist. On January 14, 2011, the Attorney General filed a petition pursuant to Article 10, seeking civil management of the respondent following his release from prison. Following the filing of the petition, the Attorney General moved for an order finding probable cause to believe the respondent is a sex

offender requiring civil management. The court set a January 20, 2011 return date, appointed Mental Health Legal Services as counsel, and authorized retention of the respondent pending the probable cause hearing.

The Attorney General submitted an evaluation report prepared by an OMH psychologist, dated January 11, 2011. Based on an interview of the respondent, review of his criminal history and records of DOCCS and the State Division of Parole, the OMH psychologist concluded that the respondent has a mental abnormality as defined by MHL § 10.03(i), and that he meets diagnostic criteria for pedophilia and antisocial personality disorder. The Attorney General reported that the respondent had scored a 5 on the STATIC-99 instrument, which predicts the risk of recidivism for sexual offenders, indicating a moderate to high risk. The Attorney General urged that, given the respondent's criminal record and history of having absconded from parole, he is a "detained sex offender who requires civil management," and that he is "sufficiently dangerous" to require pretrial detention and no less restrictive alternative to OMH confinement would adequately protect the public pending trial.[2]

[2] The Attorney General was bound by a federal injunction barring him from enforcing mandatory pretrial detention without showing that no lesser conditions than confinement will suffice.

On or about May 26, 2011, the OMH psychologist testified at the respondent's probable cause hearing. The psychologist opined that the respondent had retained a deviant sexual arousal to young girls, or chronic pedophilia, and antisocial personality disorder, and that he suffers from a mental abnormality with serious difficulties in controlling such conduct. According to the psychologist, the respondent's language and repeated behavior indicated that he is still suffering from a disorder. The psychologist stated that she considered the respondent to be a danger to the community if released pending trial, absent information on where he would reside and go for treatment.

The court's written decision of June 7, 2011 was based on what it deemed to be the psychologist's "credible" testimony that the respondent suffers from conditions that "predispose him to commit sex offenses." Additionally, the court found the respondent dangerous based on testimony that he had violated his parole and had serious difficulty controlling his behavior; the "chronic nature of his deviant sexual interest" in young girls; and his "willingness to risk his personal, familial relationships to satisfy his sexual urges."

However, the court stated it would continue the hearing on the issue of whether the respondent could be civilly confined pending trial in light of a federal injunction barring the

Attorney General from seeking enforcement of the mandatory detention provisions of MHL § 10.06(k). On June 13, 2011, the court reopened the probable cause hearing based on the federal decision in MHLS v. Cuomo (785 F. Supp.2d 205 (S.D.N.Y. 2011)), which the court acknowledged was not binding, but which it found "persuasive." After hearing arguments, the court issued an order for an investigation as to the propriety of civil management by SIST for the respondent, and adjourned the matter to August 1, 2011 for receipt of the report.

The SIST report, completed by DOCCS and OMH on July 14, 2011, recommended 69 mandatory and special conditions of SIST that would apply to the respondent. The OMH report found the respondent "has demonstrated his sexually deviant and unpredictable behavior, as well as behavior that places the community at risk," and, if released, he "will be monitored closely and placed on a curfew" and electronic monitoring. The community investigation by DOCCS concluded that it would approve proposed release to a supervised program and to a single room occupancy residence, and that the respondent would be required to register pursuant to the Sex Offender Registration Act as a Level 3 sex offender.

In a supplemental decision dated August 4, 2011, the court concluded that MHL § 10.06(k), the pretrial detention provision

of Article 10 is facially unconstitutional, and that it was therefore constrained to order the respondent's release. The court purported to find facial unconstitutionality based on its observation that the provision mandates pretrial detention "without a delineation between a dangerous sex offender requiring confinement and a sex offender requiring strict and intensive supervision." The court appeared to draw, in part, on MHLS v. Cuomo, where the District Court held that there are those with a mental abnormality who will be subject to detention, and those with a mental abnormality subject to parole- or probation-like conditions, but that the provision at issue provides for automatic detention of all Article 10 individuals "without a judicial proceeding to determine dangerousness." 785 F.Supp.2d at 226.

The court further noted that OMH had recommended community-based treatment for the respondent after trial, demonstrating that "[t]here is very little likelihood, if any," that he would ultimately be found to be a "dangerous sex offender requiring confinement." Thus, the court observed, the pretrial detention imposed on the respondent was "more onerous than the consequences that [he] faces even if a jury were to find, after trial, that he suffers from a mental abnormality."

The court, relying on United States v. Salerno (481 U.S.

739, 107 S.Ct. 2095 (1987)), concluded that due process mandates a "specific finding of dangerousness" and a showing that "lesser conditions than confinement would not suffice to protect the community." It observed that the Attorney General had failed in its burden to make such a showing, but that, in this case, no such finding could be made anyway as the SIST report made clear that the respondent could be safely released to the community under supervision.

Additionally, the court observed that Article 10 violates procedural due process because the statute provides no means "to effectuate any finding by a court that lesser conditions than confinement (e.g., supervision, medication, community-based treatment) would suffice to protect the community from a respondent pending a civil management trial."

On appeal, the Attorney General asserts that Supreme Court erred because MHL § 10.06(k) incorporates a finding of dangerousness at the probable cause stage, release under SIST represents a discretionary policy and is not constitutionally mandated, and the United States Supreme Court has upheld civil commitment statutes without a consideration of less restrictive alternatives where a respondent is found to be a danger to society. Thus, the Attorney General argues, committing the respondent to a secure treatment facility pending trial does not

violate any substantive or procedural due process guarantees, even if it is ultimately found, after trial, that he requires civil management under SIST.

For the reasons set forth below, we hold that a finding of probable cause to believe that an Article 10 sex offender requires civil management because of mental abnormality incorporates the necessary finding of a respondent's dangerousness. As a danger to society, all Article 10 sex offenders, therefore, come within the scope of those statutes upheld by the United States Supreme Court that authorize commitment or detention, even pretrial detention, without mandating consideration of a lesser restrictive alternative.

Therefore, the fact that under Article 10, a court is subsequently required to determine whether civil management should continue at a secure treatment facility or should take the less restrictive form of SIST is a discretionary policy. Furthermore, release under SIST is not, as characterized by the federal district court in Cuomo, a "parole- or probation-like" (785 F. Supp.2d at 222) release but is a complex and individualized plan, primarily meant to safeguard the community into which the sex offender will be released. It is thus not an alternative available at the probable cause stage of the judicial process which determines whether there is reasonable cause to

believe that a detained sex offender has a mental abnormality rendering him a danger to society.

Initially, Supreme Court erred in attempting to determine, sua sponte, the facial validity of MHL § 10.06(k). The issue of facial unconstitutionality was not before the court, the respondent did not argue it, and in any such argument, it is the challenger's burden to so argue and establish unconstitutionality beyond a reasonable doubt. Cook v. City of Binghamton, 48 N.Y.2d 323, 330, 422 N.Y.S.2d 919, 922, 398 N.E.2d 525, 528 (1979)("[t]he burden of showing the unconstitutionality of a statute, of course, rests on the party which attacks its validity, and every legislative enactment carries a strong presumption of constitutionality")(internal citations omitted). Facial invalidation is an extraordinary remedy and generally is disfavored. Amazon.com LLC v. New York State Dept. of Taxation & Fin., 81 A.D.3d 183, 194, 913 N.Y.S.2d 129, 136 (1st Dept. 2010). Moreover, it is well settled that "'courts *must* avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional'" (emphasis added). Id. at 194, 913 N.Y.S.2d at 137, quoting LaValle v. Hayden, 98 N.Y.2d 155, 161 (2002); see also Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008) (acknowledging courts' general reluctance to "'formulate a

rule of constitutional law broader than is required by the precise facts to which it is to be applied'").

Thus, the court erred in embarking on such an analysis, sua sponte, and we decline to compound the error by making any determination on the merits, save to observe that the court's decision clearly missed the mark on facial invalidation: The heavy burden of a challenger is to establish that "no set of circumstances exists under which the [statute] would be valid." Salerno, 481 U.S. at 745.

This the court did not do. Rather, the court appeared to accept that there is a category of Article 10 sex offenders where pretrial detention would be valid, but observed that this was not applicable to the respondent, who appeared to fall into that category of sex offender who could be approved posttrial for supervision rather than commitment. The court held: "[t]his is just such a case where lesser restrictive conditions would suffice to protect the public *during the pendency of Respondent's trial*" (emphasis added).

On appeal, the respondent does not assert more. He argues, inter alia, that MHL § 10.06(k)'s mandatory detention provision is unconstitutional *as applied* to him because he belongs to that class of sex offender that may ultimately be found suitable for SIST, that the evidence before the hearing court indicated that

he could be "safely" released on conditions pending trial, and thus that the Attorney General failed in sustaining its burden of proving that less restrictive alternatives would not suffice to protect the community from him. Therefore, the respondent argues, the provision offends the due process guarantees of the Federal Constitution, and violates the New York State Constitution's guarantee that mental health patients be treated in the "least restrictive alternative setting."

We confine our analysis to the respondent's assertion that the statute is unconstitutional as applied to him as well as to that category of Article 10 sex offender who, at disposition, may be approved for release into the community under SIST. The respondent argues that if he and others like him are found not sufficiently dangerous to warrant confinement posttrial and disposition, then they are not sufficiently dangerous to warrant detention pretrial. Thus, he asserts, the provision is not narrowly tailored to effectuate the government's objective of protecting the public from him and those like him. We disagree.

Any view that there are dangerous and non-dangerous Article 10 sex offenders, or that there is no judicial determination of dangerousness at the probable cause stage is based on an essential misreading of the statute. The statute is clear that a "'sex offender requiring civil management' means a detained sex

offender who suffers from a mental abnormality." MHL § 10.03(q). "Mental abnormality," in turn, means:

> "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct." MHL § 10.03(i).

These component elements of mental abnormality hew closely to the statutory language analyzed in Kansas v. Hendricks (521 U.S. 346, 117 S.Ct. 2072 (1996), which the United States Supreme Court held was sufficient to establish a finding of dangerousness based on a mental abnormality characterized by a "serious lack of ability to control behavior." Thus, Article 10's definition of mental abnormality incorporates a finding of a respondent's dangerousness, even if the word "dangerous" is not used in the statutory definition. See Matter of David B., 97 N.Y.2d 267, 275-276, 739 N.Y.S.2d 858, 863, 766 N.E.2d 565, 571 (2002); see also Kansas v. Crane, 534 U.S. at 413 ("states retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment").

Consequently, whether ultimately confined or released conditionally under SIST, all Article 10 sex offenders are "detained sex offenders" where there is probable cause to believe

they suffer a mental abnormality, and where such is found at trial. MHL § 10.03(q); see also MHL § 10.03(r)("'[s]ex offender requiring strict and intensive supervision' means a detained sex offender who suffers from a mental abnormality ..."); see also MHL § 10.03(e)("'[d]angerous sex offender requiring confinement' means a person who is a detained sex offender suffering from a mental abnormality ...").

The fact that a sex offender requiring SIST is defined as "a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement" (MHL § 10.03(r)) is not to be interpreted to mean a sex offender who is *not* dangerous at all. Rather, it should be interpreted to mean a sex offender who is not dangerous to the extent where his dangerousness must be managed by confinement. Indeed, Article 10's procedures are designed to winnow out the *most* dangerous of the dangerous sex offenders where "confinement ... will need to be extended by civil process ...." MHL § 10.01(b).

More significantly, the requirements of due process are met in providing for the civil commitment of sexual predators based on a "finding of dangerousness" resulting from a mental illness or mental abnormality that results in a "serious lack of ability to control behavior." Crane, 534 U.S. at 409-410, 412-413 (internal quotation marks omitted); see also, Hendricks, 521 U.S.

at 357 (states may provide for civil detainment of people "who are unable to control their behavior and *who thereby pose a danger* to the public health and safety")(emphasis added).

Thus, as the Attorney General correctly asserts, Article 10's scope encompasses only sex offenders who are dangerous enough to be confined without the need to consider less restrictive alternatives. See Hendricks, 521 U.S. at 387 (Breyer, J., dissenting, criticizing Kansas statute for not considering lesser conditions of release for dangerous sexual predators).

We therefore reject the argument, accepted by the court below, that the State may impose pretrial detention only if it shows there are no lesser conditions than confinement to assure the safety of the community. The respondent, relying on United States v. Salerno, argues that the Supreme Court has never upheld pretrial detention unless the statute authorizing that detention included some individual inquiry to ensure that pretrial detention was imposed only on those individuals who could not be managed in less restrictive ways. This is simply incorrect. Salerno does not stand for the proposition that consideration of the least restrictive alternative is constitutionally mandated at the pretrial detention stage.

In Salerno, the Supreme Court determined the

constitutionality of a federal statute, the 1984 Bail Reform Act, authorizing postarrest/pretrial detention of individuals *charged* under penal law with a specific category of "extremely serious offenses" on the grounds that it was likely they would be responsible for dangerous acts in the community after arrest. Salerno, 481 U.S. at 750. The challenge implicated the inviolate constitutional principle of presumption of innocence. Indeed, the dissent framed the issue as determining the constitutionality of "a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future." Salerno, 481 U.S. at 755. The majority, thus, articulated a number of factors that were to be considered by courts in order to ensure that the Act was consistent with due process. The "no lesser conditions" analysis was just one of the factors, but Salerno did not mandate a "lesser conditions" analysis as a fundamental constitutional requirement for all pretrial detention or confinement.

Further, the statute challenged in Salerno is easily distinguishable from the provision at issue here, since Article 10 contemplates further civil management for a *convicted* and

*detained* sex offender based on a probable cause finding that the sex offender is a danger to society because of his predisposition to commit sex offenses. Such civil management usually follows a sentence imposed for a criminal sex offense. Hence, the future dangerousness of Article 10 sex offenders is closely related to the crime of which they have been convicted, and for which they have been incarcerated.

In any event, the Supreme Court has consistently held that government's "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." Salerno, 481 U.S. at 748-749 (authority of government is well established, in special circumstances, to restrain an individual's liberty prior to, or even without, criminal trial and conviction). The question for a court to determine is whether the restriction of liberty is "impermissible punishment or permissible regulation." Id. at 747.

The Supreme Court was particularly instructive in Schall v. Martin (467 U.S. 253 (1984)) as to a situation where a final disposition may be less onerous than pretrial detention. The statute at issue in Schall concerned juveniles detained before trial, who ultimately could demonstrate that detention posttrial is unnecessary. The Court held that "the final disposition of a case is largely irrelevant to the legality of a pretrial

detention." 467 U.S. at 273 (internal quotation marks omitted). More interestingly, the Court cited to the New York Court of Appeals' observation that "caution and concern for both the [respondent] and society may indicate the more conservative decision to detain at the very outset, whereas *the later development of very much more relevant information* may prove that while a finding of delinquency was warranted, placement may not be indicated." Id., quoting People ex rel. Wayburn v. Schupf, 39 N.Y.2d 682, 690, 385 N.Y.S.2d 518, 522, 350 N.E.2d 906, 910 (1976).

As the Attorney General persuasively asserts, the Legislature's decision to provide, as a discretionary policy, the less restrictive option of SIST to certain dangerous respondents after trial depends on implementing a carefully tailored and individualized program. MHL § 10.11(a). This does not create a mandatory constitutional obligation to offer such release before trial when the same safeguards and protections are absent. The court below appeared to misapprehend the nature of SIST as a lesser restrictive alternative. Certainly, contrary to the Federal District Court's characterization of SIST as a "parole- or probation-like" alternative, SIST is a uniquely restrictive program or "substantially" more restrictive than parole or probation.

The recommendation for the respondent specified 69 mandatory restrictions and special conditions. These included: submission to physical inspection and search by parole officers *whenever directed* and random alcohol and drug testing; requirement of making a log of all daily events; obligation to submit television, phone, Internet and cable bills upon request; prohibition from leaving the state, entering school grounds, using on-line computer services that exchange electronic messages, and watching sexually explicit movies; prohibition from using a computer without permission, contact with children under age 18 unless approved by a parole officer, and ownership of puppies or kittens without permission; prohibition from visits, without prior approval, to pet stores, toy stores, parks, malls, bike trails, skating rinks, and bowling alleys; prohibition from possession of toys or children's clothes or cameras; prohibition from hitchhiking, drinking, driving a car without permission, and using a cellphone with a camera. The SIST, therefore, is effectively a form of detention.

It also requires evaluation of available treatment options with the input of qualified professionals as to implementing an effective program of outpatient treatment and supervision. Consequently, Article 10 contemplates imposition of SIST, if at all, following trial and the development of a fully litigated

record on the nature and severity of a respondent's mental abnormality, and at a dispositional hearing where the Attorney General has the opportunity to object to recommendations. As a practical matter, then, SIST does not appear to be an available alternative prior to trial, and due process does not prohibit the Legislature from deferring a "lesser conditions" analysis until a record has been developed.

The Supreme Court has held that "identification of the specific dictates of due process generally requires consideration" of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976).

In this case, the private interest is weighty. However, the risk of an erroneous deprivation of such interest is limited by the statutory requirement of two levels of review prior to commencing an Article 10 petition, and by the statutory requirement of a judicial finding of probable cause to believe the respondent is a sex offender requiring civil management. The

statute provides extensive procedural protections for respondents in connection with that probable cause determination. Once the Attorney General files a sex offender civil management petition, the court is required to "[p]romptly" appoint counsel (MHLS where possible) for a respondent who is financially unable to retain counsel. MHL § 10.06(c). Both the Attorney General and the respondent have the right to request a psychiatric evaluation by an examiner of their choice, and, if the respondent is financially unable to pay, the court will appoint an examiner to be paid within the limits prescribed by law. MHL §§ 10.06(d) and (e). It also sets a time frame, although not strict time limits, contemplating a trial within 60 days, for resolution of the Article 10 proceeding. MHL §§ 10.06(k), 10.07(a).

The respondent's claim that the New York State Constitution mandates that mental health patients must be treated in the "least restrictive setting," and that Article 10 is unconstitutional because it fails to do so, is without merit. The statute states clearly that sex offenders in need of civil management are a different population from traditional mental health patients. MHL § 10.01(g). As the court below specifically found, "mental abnormality" as used in the statute at issue has no medical validity. Rather, it is a legal term containing an inherent meaning of dangerousness. Thus, while

Article 10 aims to treat the sex offender, it was nevertheless primarily enacted to protect the community from high risk sex offenders and, as in other statutes designed for the protection of the community, to "remove the offender from the arena of possible action." Wayburn, 39 N.Y.2d at 689, 385 N.Y.S.2d at 521.

Finally, we do not agree with the respondent that the issue of constitutionality as applied to him will be moot upon his dispositional hearing. The respondent's mootness argument is based on the view that once a disposition is made, this Court would no longer need to decide whether the Attorney General sustained his burden of establishing that lesser conditions than confinement would not suffice to protect the public in the respondent's case. However, the issue raised by the respondent's as-applied challenge -- and determined here in the negative -- is whether the Attorney General has that burden at all with regard to Article 10 sex offenders. In that sense, it is a challenge the Attorney General is certain to face again from sex offenders in the same category as the respondent, or those where the propriety of SIST is immediately apparent. Moreover, the temporary nature of pretrial detention makes it unlikely that the constitutional issue will be decided before a respondent's dispositional hearing. Hence, as an issue likely to arise in

other cases, but likely to evade review, it meets the exception of mootness. See Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-715, 431 N.Y.S.2d 400, 402, 409 N.E.2d 876, 878 (1980); see also Schall, 467 U.S. at 256 n.3; Matter of Miguel M. (Barron), 17 N.Y.3d 37, 41 (2011).

Accordingly, the order of the Supreme Court, Bronx County (Colleen D. Duffy, J.), entered on or about August 10, 2011, which, upon finding that the pre-trial detention provisions of MHL § 10.06(k) are facially unconstitutional and ordered petitioner to immediately release respondent without supervision, should be reversed, on the law, without costs, the order for the respondent's unconditional release vacated, and the matter remanded for proceedings consistent with this decision and order.

All concur.

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

ENTERED: JANUARY 26, 2012

CLERK