SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**SEPTEMBER 30, 2008**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Saxe, J.P., Nardelli, Buckley, Catterson, JJ.

3508 In re Terrace HealthCare Center, Inc., Index 8754/06
Petitioner-Appellant,

-against-

Antonia C. Novello, M.D.,
Commissioner of Health for the
State of New York, et al.,
Respondents-Respondents.

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Ruskin Moscou Faltischek, P.C., Uniondale (Mark S. Mulholland of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 30, 2006, dismissing the petition to set aside as untimely the results of all respondent Department of Health's (DOH) audits of petitioner's patient review instruments (PRIs), used to calculate petitioner's Medicaid reimbursement rate, performed within the six years preceding the petition, to direct DOH to use petitioner's PRI unaudited submissions from 1996 to the present to calculate its Medicaid reimbursement rate, to rescind the parties' March 3, 2003 agreement, and to enjoin

the review scheduled for March 15, 2006 of petitioner's December 1999 PRIs, affirmed, without costs.

Petitioner's challenges to the reviews of its PRI submissions for December 1996, June 1997, December 1997, June 1998 and December 1998 are barred by the four-month statute of limitations for article 78 review (CPLR 217[1]). Petitioner contends that it is entitled to a six-year limitation period because it is challenging the constitutionality of the review process under 10 NYCRR 86-2.30. However, the review of the submissions in question was not conducted pursuant to 10 NYCRR 86-2.30. It was conducted pursuant to the parties' March 3, 2003 "Agreement to Accelerate PRI Processing," which petitioner entered into voluntarily. DOH did not breach the agreement by failing to expedite the process. The agreement did not set forth a schedule to which DOH was required to adhere, and the record shows that, based on the agreement's procedures, DOH became more timely in the reviews and began to reduce the backlog.

Nor were DOH's reviews untimely because they were performed more than six years after the PRIs were submitted. Petitioner's reliance on *Matter of Blossom View Nursing Home v Novello* (4 NY3d 581, 595-596 [2005]) is misplaced. DOH did not attribute the backlog to mere administrative inadvertence but explained that the delays were the result of having to proceed through all

stages of review in 7 of the 10 reviews that preceded the review of the December 1996 submissions, because of petitioner's improper submissions.

DOH's determination was not arbitrary and capricious. DOH is not obligated to accept petitioner's submissions without review on the ground that they were prepared by an independent organization it approved. Moreover, it is uncontested that petitioner did not have proper documentation for at least one such submission. The assertion of the organization's president that the documents must have existed when the submissions were made is not based on personal knowledge, and DOH was not required to accept it in lieu of the documents. Nor was petitioner's counsel's assertion that there had been a fire "some years ago" a substitute for the proper documentation, which, upon execution of the March 2003 agreement, petitioner knew or should have known it was required to preserve. Petitioner has raised no material issues regarding the remaining PRI reviews.

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

CATTERSON, J. (dissenting)

I must respectfully dissent because in my view relief may not be had under CPLR article 78; thus, dismissal pursuant to the four-month statute of limitations is inappropriate and would deprive the plaintiff of all relief. Because the defendant's audits of the plaintiff healthcare facility were delayed almost *seven* years despite the defendant's agreement to "expedite" the review process, I would convert this action to one for a declaratory judgment and find the audits untimely as a matter of law.

The plaintiff, Terrace Healthcare Center (hereinafter referred to as "Terrace") is a 240-bed nursing home that receives a majority of its income from Medicaid. In New York, the Department of Health (hereinafter referred to as "DOH") administers the program, establishing reimbursement rates for nursing homes. The DOH calculates reimbursement based on a Case Mix Index (CMI) which reflects the utilization of resources for each patient: the higher the CMI, the higher the reimbursement rate. Utilization is documented by Patient Review Instruments (PRI), which are prepared and submitted to the DOH every six months. The PRI details each patient's medical diagnosis, treatment, and care requirements during the four weeks preceding the submission of the form.

The DOH reviews the accuracy of PRIs approximately every 18 months. Reviews are structured in three stages. In Stage I, the records of 40 patients are assessed by an independent auditor and compared to the PRIs prepared by the facility. If there is a statistically significant discrepancy between the auditor's assessment and the facility's assessment, then a Stage II review is performed. During a Stage II review, 80 patient records are examined and the facility has an opportunity to dispute any Stage I findings and may present additional documentation. The auditor has the option of overturning Stage I findings. If there is a significant statistical discrepancy after a Stage II review, a Stage III review will be performed. In a Stage III review, all of the patients at the facility are reviewed except for those that are already being reimbursed at the lowest rate, and the facility has the opportunity to challenge Stage II determinations. If the facility "fails" (i.e. there is again a significant statistical discrepancy) the Stage III review, the DOH will require the facility to contract with a DOH-approved independent third-party assessor to prepare its PRIs based on records supplied by the facility. The reimbursement rate that is calculated at the end of a Stage III review is based on the DOH's CMI calculation and is considered final, and there is no formal or statutory procedure available to challenge this final

reimbursement rate.

In the years prior to 1996 (the first year of PRIs at issue in this case), the DOH conducted several reviews of Terrace's PRIs and found statistical discrepancies that precipitated additional stages of review. Over time, the reviews became increasingly delayed. For the years 1996 through 2001, Terrace's PRIs were timely filed and prepared by independent assessors in compliance with the DOH.

In February 2003, when the delay in DOH reviews had risen to more than six years, the Assistant Director of the Division of Health Care Financing offered to remedy the situation with a modified audit process that consisted of one onsite review of all outstanding PRIs for one period. The purported "expedite agreement" was represented to Terrace as "accelerat[ing] the inclusion of a more current case mix index" and saving "months of time." As part of the expedite agreement, Terrace waived the opportunity to challenge Stage I and Stage II results and also the right to an exit conference.

In July 2003, five months after the expedite agreement was signed, the DOH reviewed Terrace's 1996 PRIs (six years, eight months after submission) and continued reviewing each period as follows: June 1997 submissions were reviewed in May 2004 (six years, eleven months after submission), December 1997 submissions

were reviewed in October 2004 (six years, ten months after submission), June 1998 submissions were reviewed in February 2005 (six years, eight months after submission), December 1998 submissions were reviewed in June 2005 (six years, six months after submission), June 1999 submissions were reviewed in November 2005 (six years, five months after submission), and December 1999 submission were reviewed in March 2006 (six years, four months after submission). This "expedited" schedule reflected a consistent pattern of a six to-seven-year delay between the submission of the PRIs and DOH review. The DOH found that Terrace had "failed" all but the final review (June 1999 PRIs).

Pending review of the December 1999 PRIs which was scheduled for March 15, 2006, Terrace filed this article 78 proceeding on March 13, 2006 petitioning the court to rescind the March 3, 2003 expedite agreement, to set aside the results of the audits for the previous six years, and to direct DOH to use Terrace's PRIs to calculate reimbursement rates for that period.

The Supreme Court dismissed the action, finding the claims for all but the 1999 PRIs barred by the article 78 four-month statute of limitations, and dismissed claims related to the 1999 PRIs for failing to set forth a basis for the relief sought. In addressing the substantive issues for the 1999 PRIs, it concluded

that the DOH reviews were not untimely, Terrace was not prejudiced by the delay, and that DOH had not materially breached the expedite agreement. Additionally, it found that Terrace was not denied a due process right to review.

In my opinion, the court erred. It could have and should have sua sponte converted the proceeding to one for declaratory judgment on the ground that the ongoing series of determinations by DOH was ill-suited for article 78 proceedings.

It is well established that where the appropriate relief cannot be granted in an article 78 proceeding, the court may consider the matter as one for a declaratory judgment. Matter of Concord Realty Co. v. City of New York, 30 N.Y.2d 308, 314, 333 N.Y.S.2d 161, 164, 284 N.E.2d 148, 150 (1972); Matter of Greene v. Finley, Kumble, Wagner, Heine & Underberg, 88 A.D.2d 547, 547-48, 451 N.Y.S.2d 741, 742-43 (1st Dept. 1982); CPLR 103(c). Here, there is no dispute that each notification following a DOH audit constituted a final administrative act which began the four-month statute of limitations running for an article 78 proceedings. If, however, as Supreme Court concluded, the only vehicle available to Terrace was an article 78 proceeding, the four-month statute of limitations would have necessitated the filing of seven consecutive article 78 petitions. Given the factual complexity of this case, it would be an absurd use of

judicial resources to foreclose Terrace from bringing one action and insist instead on multiple petitions. See Perez v. Paramount Communications, 92 N.Y.2d 749, 754, 686 N.Y.S.2d 342, 344, 709 N.E.2d 83, 85 (1999)(stating that judicial economy and preventing a multiplicity of suits is an objective of the CPLR).

Moreover, in this case, constraining Terrace to an article 78 proceeding bound by the four-month statute of limitations after the DOH delayed the audits for over six years eviscerates the purpose of the four-month statute of limitations. See Solnick v. Whalen, 49 N.Y.2d 224, 232, 425 N.Y.S.2d 68, 73, 401 N.E.2d 190, 195 (1980)(citing Mundy v. Nassau County Civ. Serv. Comm., 44 N.Y.2d 352, 359, 405 N.Y.S.2d 660, 663, 376 N.E.2d 1305, 1308 [1978], Breitel, Ch. J., dissenting). In Solnick, the Court emphasized the rationale underlying the implementation of a four-month statute of limitations for an article 78 proceeding. Quoting Judge Breitel's dissent in Mundy, the Court stated the crux of the four-month statute of limitations for an article 78 petition "is the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations." Solnick, 49 N.Y.2d at 232, 425 N.Y.S.2d at 73. The DOH tarried almost seven years in performing the audits at issue and should not be permitted to invoke the statute of limitations as both a

sword and shield.

In my view, therefore, it is appropriate for the six-year statute of limitations for a declaratory judgment to apply. CPLR 213; see Solnick, 49 N.Y.2d at 230, 425 N.Y.S.2d at 72 (noting that "[i]f no other form of proceeding exists for the resolution of the claims tendered in the declaratory judgment action the six-year limitation of CPLR 213 (subd. 1) will then be applicable"). In any event, under the next-nearest theory advanced in Solnick, the closest proceeding would have been against DOH for breach of contract (also a six-year statute of limitations) for failing to expedite the review process pursuant to the expedite agreement and merely maintaining the same six to seven-year delay between audits. Solnick at 230, 425 N.Y.S.2d at 72, 401 N.E.2d at 194 ("Inquire into the kind of action that would have been most likely to raise the same substantive issues had there been no declaratory action available, and determine what the statute of limitations would have been on such next-nearest action") (internal quotation marks and citations omitted); SRN Corp. v. Glass, 244 A.D.2d 545, 546, 664 N.Y.S.2d 357, 358 (2nd Dept. 1997) (holding that since the claim was based in contract, the six-year statute of limitations rather than the four-month period should apply in an action brought by a nursing home seeking a declaration that a resident was eligible for

medical assistance).

The substantive issue in the declaratory judgment action thus becomes whether the PRI audits conducted by the DOH were timely. As a threshold matter, since it is undisputed that the DOH's onsite audits constituted a "final decision" concerning Terrace's PRIs, the question of their timeliness is ripe for our review. Church of St. Paul & St. Andrew v. Barwick, 67 N.Y.2d 510, 519, 505 N.Y.S.2d 24, 29-30, 496 N.E.2d 183, 188-89 (1986) cert. denied, 479 U.S. 985, 107 S.Ct. 574, 93 L.Ed.2d 578 (1986); see also Committee to Save the Beacon Theater by Meltzer v. City of New York, 146 A.D.2d 397, 402-03, 541 N.Y.S.2d 364, 367-68 (1st Dept. 1989).

In my opinion, the DOH audits were also untimely as a matter of law. See Matter of Blossom View Nursing Home v. Novello, 4 N.Y.3d 581, 596, 797 N.Y.S.2d 370, 380, 830 N.E.2d 268, 278 (2005). In that case, the Court held that a six to seven-year delay in PRI audits was inexcusable when the DOH claimed "administrative oversight (meaning inadvertence, not supervision)." Id. at 595-96, 797 N.Y.S.2d at 380. In this case, the court distinguished Blossom by accepting the DOH's excuse that it was Terrace, rather than the DOH, that caused the delay by submitting "inadequate filings." I disagree. There simply is nothing in the record to indicate that Terrace caused

the delay. The original PRIs were timely submitted and Terrace contracted with a DOH-approved third-party agency to prepare them. The DOH asserted that because Terrace's PRIs were inadequate, Stage II and Stage III PRI audits had to be performed. This distinction is unpersuasive because it nevertheless amounts to an administrative failing by the DOH to timely administer its own internally regulated processes. In Blossom, the Court found the six to seven-year delay in performing PRI audits "untimely as a matter of law." Id. at 596, 797 N.Y.S.2d at 380. Similarly, in this case, I would reject the DOH's pretext that Terrace was responsible by its conduct for the delay, and find the six to seven-year delay in audits inexcusable and untimely as a matter of law. This is particularly true since eliminating the stage reviews in the guise of "expediting" the process did nothing to hasten the glacial pace of the audits.

Moreover, I believe that an analysis of the other three factors of untimeliness enumerated in Matter of Cortlandt Nursing Home v. Axelrod (66 N.Y.2d 169, 178, 495 N.Y.S.2d 927, 932, 486 N.E.2d 785, 790 [1985] cert. denied, 476 U.S. 1115, 106 S.Ct. 1971, 90 L.Ed.2d 655 [1986] (determining whether a period of delay is reasonable within the meaning of State Administrative Procedure Act § 301(1)), also requires a finding in favor of Terrace. In addition to the causal connection between the conduct

of the parties and the delay, the Court also considered the nature of the private interest allegedly compromised by the delay, the actual prejudice to the private party, and the underlying public policy advanced by governmental regulation. Id. Prejudice results when the administrative delay has damaged a party's ability to mount a defense in an adversarial administrative proceeding. Id. at 180-81, 495 N.Y.S.2d at 791-92. The important public policy at issue in recalculating Medicaid reimbursement rates is the recovery of public funds. Id. at 182, 495 N.Y.S.2d at 793.

I believe that the court erred in finding that Terrace was not prejudiced by the delay. Here, the private interest compromised by the delayed audits was Terrace's right to present support for its PRIs. The DOH claims that Terrace was on notice to preserve documents as of the March 2003 agreement, and so cannot claim prejudice. In fact, however, the six to seven-year delay caused Terrace to be unable to present additional information during the onsite audits such as documentation regarding ADLs (Activities of Daily Living) and rehabilitation, the oral testimony of the staff who treated the patients, and the opportunity to demonstrate a patient's condition and care through direct observation. But for the delay in audits, Terrace claims it would have been able to present valuable support for its

submitted PRIs that was no longer available by the time the expedited audits were performed. For example, the record reflects that documents for one of the audit periods were inadvertently lost or destroyed by fire which led the DOH to reject certain PRIs and replace them with their own, resulting in a lower CMI index and reimbursement rate.

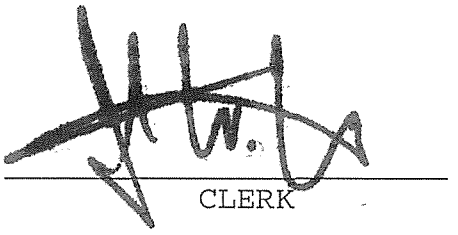
The fourth factor, public policy, is weighed against the first three. While there is a "strong, defined public policy of this State to recover public funds improperly received" (Cortlandt Nursing Home, 66 N.Y.2d at 182, 495 N.Y.S.2d at 936), as the Blossom Court pointed out, long-delayed and protracted PRI audits "harm the public fisc by thwarting prompt recoupment of any Medicaid overpayments." Blossom, 4 N.Y.3d at 595, 797 N.Y.S.2d at 379. Although great deference is normally accorded administrative agency delays when there are complex issues involved, (Cortlandt Nursing Home, 66 N.Y.2d at 181, 495 N.Y.S.2d at 934-35), as the Blossom Court aptly observed, "'timely' is not synonymous with 'timeless.'" Blossom, 4 N.Y.3d at 595, 797 N.Y.S.2d at 380.

Thus, for the foregoing reasons, I would convert this CPLR article 78 proceeding to a declaratory judgment action, find the audits performed in 2003, 2004, 2005, and 2006 untimely as a

matter of law, and order the DOH to recompute the reimbursement rate based on Terrace's originally submitted PRIs for the periods 1996, 1997, 1998, and 1999.

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

ENTERED: SEPTEMBER 30, 2008



CLERK

Tom, J.P., Saxe, Friedman, Buckley, Catterson, JJ.

3911-
3911A Andrew Nemeroff, Index 600778/05
Plaintiff-Respondent,

-against-

The Coby Group, et al.,
Defendants-Appellants.

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Vandenberg & Feliu, LLP, New York (Mark R. Kook of counsel), for appellants.

Seyfarth Shaw LLP, New York (David M. Monachino of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 10, 2008, which, upon reargument, adhered to a prior order denying defendants' motion for summary judgment dismissing plaintiff's causes of action for quantum meruit and unjust enrichment, and vacated that portion of the prior order that rejected plaintiff's claim that he was entitled to a finder's fee, unanimously reversed, on the law, with costs, the motion granted and said causes of action and claim dismissed. Appeal from the prior order, same court and Justice, entered April 5, 2007, unanimously dismissed, without costs, as superseded by the appeal from the later order.

Plaintiff, a licensed real estate broker, contends that a transaction in which defendants "flipped" property for a profit

of $15 million would not have happened but for the involvement of nonparties Alex Adjmi and Robert Cayre whom he brought into the transaction through his role as a broker or finder. Despite numerous allegations in plaintiff's appellate brief and before the motion court, there is no evidence of record that supports plaintiff's position that the transaction would not have happened without Adjmi and Cayre, or that Adjmi and Cayre would not have participated in the transaction but for plaintiff's introducing them to defendants. Similarly, there is no evidence that defendants consciously appropriated plaintiff's services, that plaintiff reasonably expected to be compensated therefor, or that defendants recognized the value of the services (*see Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 266-267 [1995]). There is also no evidence to support the cause of action for unjust enrichment: namely, that plaintiff helped lay the "groundwork" for the transaction and that the services he provided were "instrumental to the realization of [defendants'] gain" (*Galbreath Riverbank v Sheft & Sheft*, 273 AD2d 35, 36 [2000]); *see also Korff v Corbett*, 18 AD3d 248, 251 [2005]). As to plaintiff's claim of entitlement to a finder's fee, there is no evidence that the services he performed at defendants' behest were proximately linked to the consummated "flip" (*see Gregory v Universal Certificate Group LLC*, 32 AD3d 777, 778-779 [2006]; *see*

*also Northeast Gen. Corp. v Wellington Adv.*, 82 NY2d 158, 162-163 [1993]). Indeed, there is no evidence that plaintiff had anything at all to do with the "flip" of the property.

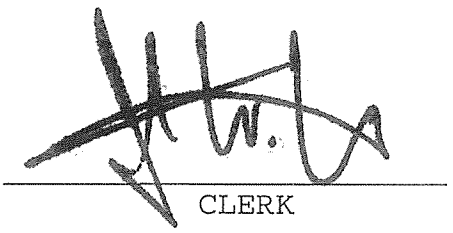
It is black letter law in this Department that plaintiff cannot avoid summary judgment by offering "self-serving affidavits" that have been "tailored to avoid the consequences of [his] earlier testimony . . ." (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). The verified complaint and plaintiff's deposition testimony make plain that plaintiff was only entitled to earn a fee if he successfully procured financing and defendants closed on the property in question. It is beyond dispute that plaintiff never obtained financing and that defendant Coby did not purchase the Florida property. The record is clear that Coby completed the "flip" of the property to MCZ Centrum without obtaining any financing. Plaintiff's continued reference to an "industry practice" of compensating a broker merely because the broker was engaged to perform a particular service is also unsupported by any citation to authority or the record.

The "Draft Preliminary Sheet" from Aareal Bank that plaintiff claims supports his position that he had procured financing instead directly rebuts his argument. It simply is not a "final version" of any term sheet evidencing financing, and

indeed the record demonstrates that no financing ever took place. Plaintiff's claim in quantum meruit also fails because he proffered no proof as to either the work he actually performed or a "reasonable value" for those alleged services (*Soumayah v Minnelli*, 41 AD3d 390, 391 [2007]; *Geraldi v Melamid*, 212 AD2d 575, 576 [1995]).

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

ENTERED: SEPTEMBER 30, 2008



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Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4135 The People of the State of New York, Ind. 3638/05
Respondent,

-against-

Kaysaun Mackie,
Defendant-Appellant.

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Robert T. Perry, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Rena Paul of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 19, 2006, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of 6 years, unanimously affirmed.

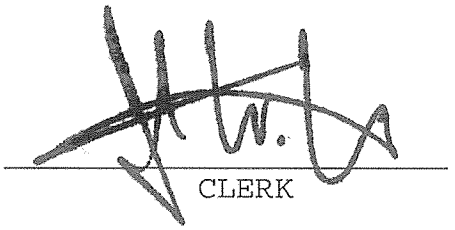
Since defendant did not move to withdraw his guilty plea on the grounds he raises on appeal, and since this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), his challenge to the validity of the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record establishes that defendant's plea was knowing, intelligent and voluntary and there was nothing in the plea allocution that cast significant doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]). The requisite intent

to cause serious physical injury could be readily inferred from defendant's responses during the allocution (*see People v McGowen*, 42 NY2d 905 [1977]; *see also People v Seeber*, 4 NY3d 780, 781 [2005]). The court's inquiry into defendant's claim of self-defense was sufficient to establish that he had no viable justification defense, and that he made a valid waiver of that defense.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 30, 2008



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Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4141 Mark Carmelengo, et al., Index 8741/06
Plaintiffs-Appellants,

-against-

Phoenix Houses of New York, Inc.,
Defendant-Respondent,

Caesar Sosa,
Defendant.

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Cleary Gottlieb Steen & Hamilton LLP, New York (Timothy M. Haggerty of counsel), for appellants.

Cravath, Swaine & Moore LLP, New York (Francis Patrick Barron of counsel), for respondent.

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Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered January 17, 2007, which granted defendant-respondent's motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

Plaintiffs contend that while they were resident inmates in the Marcy Program, a Comprehensive Alcohol and Substance Abuse Treatment Program (CASAT) (*see* 7 NYCRR 1950.1 *et seq.*) operated by Phoenix House and administered by the New York State Department of Correctional Services, defendants discriminated against them on the basis of their religion in violation of Section 8-107(4) of the Administrative Code of the City of New York, by denying their requests, as practicing Muslims, to attend

Friday religious services at a local mosque, while residents of other religious faiths were permitted to attend services.

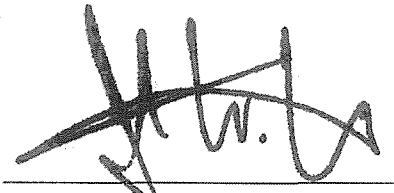
The preliminary issue is whether Phoenix House is a "place or provider of public accommodation" as defined in section 8-102(9) of the Administrative Code and thus subject to section 8-107(4). While the question of whether a facility is such a place or provider is ordinarily an issue of fact that cannot be determined on a motion to dismiss (*see generally Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401, 412 [1983]), and while the procedural posture of this case affords the plaintiffs every favorable inference, there is no question as to the exact nature of this particular program, because it is fully set out in 7 NYCRR 1950.1 *et seq*. The absence of an affidavit by Phoenix House describing its operations is therefore immaterial; nor is there any need for discovery before it can be determined exactly how Phoenix House operates.

While it is true that certain types of places not usually open to the general public have on occasion been held to constitute public accommodations under the State Human Rights Law, these places do provide services to the general public (*see Ness v Pan Am. World Airways*, 142 AD2d 233, 239-240 [1988]). An entity should not be viewed as a place of public accommodation

when it offers a particular program to a select subset of a small segment of the public. Not only are members of the general public barred from even being considered as potential participants in defendants' program, but there is a highly selective process by which a small subset of the prison inmate population may qualify for the drug rehabilitation services of the CASAT program, as well as other strict limitations placed on participation. The motion court was therefore correct to conclude, as a matter of law, that the Phoenix House program at issue does not qualify as a place or provider of public accommodation.

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

ENTERED: SEPTEMBER 30, 2008



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At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 30, 2008.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

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The People of the State of New York, Ind. 514/07
Respondent,

-against- 4143

Jairo Peralta,
Defendant-Appellant.

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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 (Robert H. Straus, J.), rendered on or about August 9, 2007,

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

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

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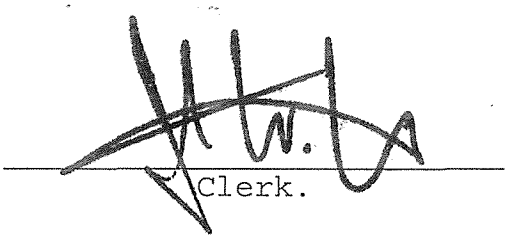

Clerk.

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

Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4145 The People of the State of New York, Ind. 12033/95
Respondent,

-against-

Ramon Lebron,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Eric Rosen of counsel), for respondent.

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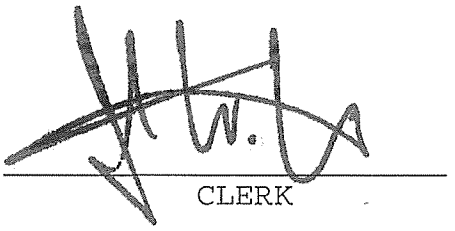
Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about July 17, 2006, which denied defendant's motion to be resentenced, unanimously reversed, on the law, and the matter remanded to Supreme Court to exercise its discretion and determine, either on the current record or on the basis of any additional submissions the parties might make, whether substantial justice dictates that the application should be denied, and, if not, inform defendant of the new sentence it would impose.

The motion court erred in denying, on the apparent ground of ineligibility, defendant's motion to be resentenced in accordance with the Drug Law Reform Act (L 2004, ch 738), and, as the People concede, defendant is entitled to a remand for further

proceedings on the motion as indicated (*see People v LaFontaine*, 36 AD3d 474, [2007]; *People v Arana*, 32 AD3d 305 [2006]). We reject defendant's requests for other relief.

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

ENTERED: SEPTEMBER 30, 2008



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Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4148 In re Carol B.,
Petitioner-Appellant,

-against-

Sanford B.,
Respondent-Respondent.

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Burger Yagerman & Green, LLP, New York (Nancy M. Green and Howard W. Yagerman of counsel), for appellant.

Reisman, Peirez & Reisman, L.L.P., Garden City (Michael J. Angelo of counsel), for respondent.

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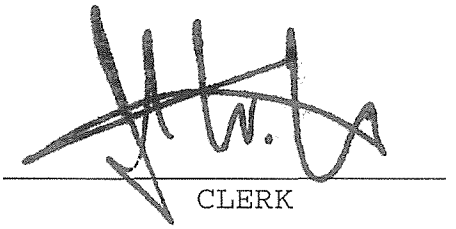
Order, Family Court, New York County (Jody Adams, J.), entered on or about July 25, 2007, which, in a proceeding to recover alleged child support arrears, denied petitioner mother's objection to that part of an October 19, 2006 Support Magistrate's order determining that a six-year statute of limitations period applies, and granted respondent father's objection to that part of the same order directing him to pay child support arrears in the amount of $17,669.25, unanimously affirmed, without costs.

Family Court properly determined that, under the plain terms of the separation agreement, which was incorporated but not merged into the judgment of divorce, the father owed no additional support payments. In any event, for more than 17 years after the separation agreement was executed, the mother

accepted the father's support payments without raising any objections. The parties' course of conduct under a contract is persuasive evidence of their agreed intention (*see Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1999]). In view of the foregoing, we need not address the mother's remaining contention that the 20-year statute of limitations in CPLR 211(e) applies, not the six-year statute in CPLR 213(1).

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

ENTERED: SEPTEMBER 30, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 30, 2008.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

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The People of the State of New York, Ind. 8131/97
Respondent,

-against- 4151

Tyrone Cordero,
Defendant-Appellant.

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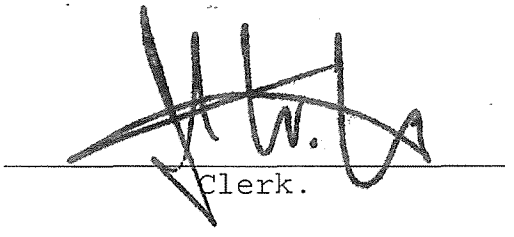
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Arlene Silverman, J.), rendered on or about February 27, 2007,

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

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

ENTER:



Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 30, 2008.

Present - Hon. David B. Saxe, Justice Presiding
John W. Sweeny, Jr.
James M. McGuire
Dianne T. Renwick
Helen E. Freedman, Justices.

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The People of the State of New York, Ind. 3021/06
Respondent,

-against- 4152

Wayne Cannie,
Defendant-Appellant.

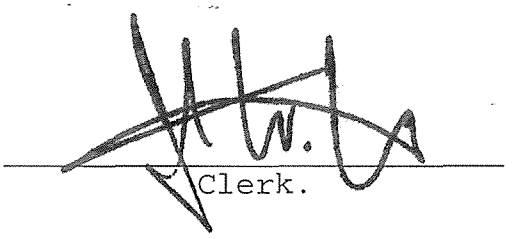
---

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bruce Allen, J.), rendered on or about November 29, 2007,

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

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

ENTER:



Clerk.

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

Saxe, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4153 In re Police Officer Benigno Mercado, etc., Petitioner, Ind. 106253/07

-against-

Raymond W. Kelly, as Police Commissioner of the City of New York, et al., Respondents.

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Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

Michael A. Cardozo, Corporation, Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

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Determination of respondent Police Commissioner, dated March 21, 2007, insofar as it terminated petitioner's employment as a police officer, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Eileen A. Rakower, J.], entered October 16, 2007), dismissed, without costs.

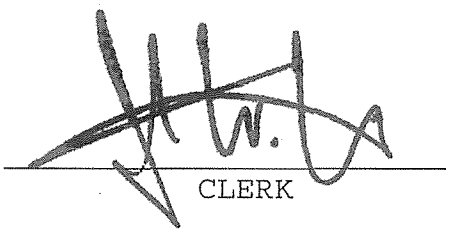
Substantial evidence supports the findings, including that petitioner possessed a stolen license plate and made false and misleading statements about whether he knew the plate was stolen. There is no basis for disturbing the hearing officer's assessment of petitioner's credibility regarding the inconsistencies between his plea allocution in the criminal case against him and his

statements to the Internal Affairs Bureau investigators (*see Matter of Berenhaus v Ward*, 70 NY2d 436 [1987]; *Matter of D'Augusta v Bratton*, 259 AD2d 287 [1999].

The penalty of dismissal does not shock our sense of fairness, particularly where the evidence gives rise to the inference that petitioner obtained the stolen license plate by virtue of his official position and intended to use the plate for fraudulent purposes (*see e.g. Matter of Kelly v Safir*, 96 NY2d 32 [2001]).

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

ENTERED: SEPTEMBER 30, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Milton L. Williams
James M. Catterson
Rolando T. Acosta, JJ.

3764-
3765-
3766

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In re Jonathan V.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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In re Drew C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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In re Michael B.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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Jonathan V., Drew, C., and Michael B., appeal from orders of disposition of the Family Court, New York County (Mary E. Bednar, J.), entered on or about June 27, 2007 (Jonathan V.) and June 11, 2007 (Drew C. and Michael B.), which

adjudicated them juvenile delinquents, upon fact-finding determinations that they each committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and that they each committed the act of unlawful possession of a weapon by a person under 16, and placed each of them with the Office of Children and Family Services for an initial period of up to 18 months.

Frederic P. Schneider, New York, for Jonathan V., appellant.

David Adam Goldstein, New York, for Drew, C., appellant.

Steven N. Feinman, White Plains, for Michael B., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal and Kristin M. Helmers of counsel), for presentment agency.

CATTERSON, J.

This case presents the question of whether the presumption of constructive possession of a firearm can be applied to persons riding on a charter bus that was used to transport an extended family from Staten Island to a violent rendezvous in Harlem. At the outset, we note that as to each appellant, the court's finding was based on legally sufficient evidence and was not against the weight of the evidence. See People v. Danielson, 9 N.Y.3d 342, 348-349, 849 N.Y.S.2d 480, 483-485, 880 N.E.2d 1, 4-5 (2007). There is no basis for disturbing the court's determinations concerning credibility.

The record reflects that Luna Suarez, mother of the appellant Jonathan V., worked for the Atlantic Express bus company as a dispatcher. The operating manager for Atlantic Express testified that the driver of the bus, Linwood Saey, was assigned to bus number 612 on a "commuter run" between Staten Island and Madison Avenue south of 59th Street. This run was only made in the morning and Saey had no authority to remove the bus from the Atlantic Express yard located in Staten Island. The manager testified that after Suarez appeared agitated while making a phone call, she asked to leave work early and asked Saey to drive her home. The record indicates that the manager did not anticipate that Saey would take a full size purple charter bus to

drive Suarez, rather than a company car. Suarez and Saey then traveled to various locations throughout Staten Island where members of Suarez's extended family, including the three appellants, boarded the bus. After leaving Staten Island, the charter bus was driven to Harlem in order to pick up Suarez's daughter. Shortly after arriving in Harlem, a shootout ensued.

When the police arrived at 155th Street between Park and Madison Avenue in response to a call of "shots fired" they found a man lying face up in the street bleeding from a gunshot wound to the head. A witness stated that the people that might have been involved had fled on a purple charter bus.

The police received information that a charter bus matching that description was parked in front of a nearby hospital. Upon arriving at the hospital, the police saw a group of people exit the bus, including the three minor appellants, two of whom had gunshot wounds. The officers entered the bus and found pools of blood, baseball bats, bloody clothing, and a loaded pistol in plain view on the floor. The bus driver and all the passengers on the bus, including the three appellants, were arrested.

Appellant Jonathan V. contends that the statutory presumption of possession (Penal Law § 265.15[3]) is inapplicable by its terms, because the bus where the weapon was discovered was a "public omnibus" used to fulfill a contract with the New York

City Department of Transportation. Appellant Drew C. contends that a bus is not an automobile, and that the absence of a definition of "public omnibus" in the statute renders it unconstitutionally vague. They both suggest that the weapon may have been left on the bus by any of "countless Staten Island commuters" who had used the bus that morning.

The Family Court correctly concluded that the automobile presumption applied because the charter bus, while clearly a "public omnibus" when it ran its route on the morning of November 15, 2006, was no longer being used as such when the gun was found. The court noted:

> "Not only did the bus stop fifty-six blocks beyond the DOT stop, but the statements by [Michael B.] and [Jonathan V.] show that they understood that the bus was taking them on a family outing, which was closed to the general public... Another clear indication to [them] of the bus' private status at the pertinent time is that neither [one] paid a fare to ride. Overall, given that the 612 bus was operating off of [its] public route, and let passengers come on and off the bus at their leisure, any reasonable person, including [the appellants], would have understood that the bus was being used in a private capacity."

Section 265.15 of the Penal Law provides, in relevant part:

> "3. The presence in an automobile, other than ... a public omnibus, of any firearm, ... is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found ..."

See People v. Verez, 83 N.Y.2d 921, 615 N.Y.S.2d 306, 638 N.E.2d 951 (1994) (presumption applied where weapon was found between

front bucket seats of a van); People v. Lemmons, 40 N.Y.2d 505, 387 N.Y.S.2d 97, 354 N.E.2d 836 (1976); Matter of Mark S., 274 A.D.2d 334, 334, 711 N.Y.S.2d 398, 399 (1st Dept. 2000)(ownership or possession by one occupant "does not, by itself, negate the statutory presumption of possession by the other occupants as well").

The Vehicle and Traffic Law defines a "bus" as a "motor vehicle having a seating capacity of fifteen or more passengers in addition to the driver and used for the transportation of persons" (§ 104). It separately defines "omnibus" as a "motor vehicle used in the business of transporting passengers for hire," other than agricultural workers (§ 126).

The legislative history of the statutory presumption, which was originally enacted in 1936, indicates that the "public omnibus" exception was included to appease legislators who were concerned "as to the dire consequences that might under the earlier bill result [*sic*] to an innocent person riding in a public omnibus, traveling in some vehicle like a motorboat or railroad train or airplane" (May 2, 1936 letter from the Committee on Criminal Courts to Gov. Herbert Lehman). The legislative history also indicates that an earlier draft exempted omnibuses carrying more than seven passengers, but that the size limitation was removed. The legislative history thus supports the

conclusion that the exception only applies to buses that are being used as public omnibuses to transport passengers for hire.

Moreover, as a matter of statutory construction, the Legislature's creation of an exclusion for "public omnibuses" implies that private omnibuses or buses of other types are not excluded from the automobile presumption. McKinney's Cons Laws of NY, Book 1, Statutes § 213 ("there is a strong implication that what is excepted would have been within the prohibition if it had not been excepted," and "[w]hen one or more exceptions are expressly made in a statute, it is a fair inference that the Legislature intended that no other exceptions should be attached to the act by implication...").

As for Drew C.'s contention that the statute is unconstitutionally vague because it does not define the term "public omnibus," the appellant has not overcome the strong presumption of constitutionality. See People v. Tichenor, 89 N.Y.2d 769, 658 N.Y.S.2d 233, 680 N.E.2d 606 (1997), cert. denied, 522 U.S. 918, 118 S.Ct. 307, 139 L.Ed.2d 237 (1997). The absence of a definition in the Penal Law does not render the statute impermissibly vague, since the term is given its legal meaning as defined in the jurisprudence of the state. See People v. Reed, 265 A.D.2d 56, 66, 705 N.Y.S. 2d 592, 600 (2d Dept. 2000), lv. denied, 95 N.Y.2d 832, 713 N.Y.S.2d 138, 735 N.E.2d

418 (2000). As so understood, "the statute [is] sufficiently clear to apprise a person of ordinary intelligence that the sort of conduct in which the defendant engaged comes within the statute's prohibition." People v. Garcia, 29 A.D.3d 255, 261, 812 N.Y.S.2d 66, 71 (1st Dept. 2006), lv. denied, 7 N.Y.3d 789, 821 N.Y.S. 2d 818, 854 N.E.2d 1282 (2006) (definition of "companion animal" not unconstitutionally vague); See also United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989, 996-997 (1954).

Accordingly, at the time of the incident, it is beyond dispute that the charter bus was not a public omnibus transporting passengers for hire, but was simply an ordinary, albeit large and purple, vehicle being used by two employees to transport a group of their family and acquaintances on a private rendezvous. Consequently, the Presentment Agency was entitled to rely on the statutory presumption to establish the weapon possession charges against the three appellant passengers.

Where the presumption is applicable, multiple occupants of a motor vehicle may be found guilty of possession of a single weapon. See e.g. Matter of Mark S., 274 A.D.2d at 334, 711 N.Y.S.2d 398 (1st Dept. 2000). A presumption is valid if "the fact proved, that is, the fact from which the inference proceeds,

be rationally connected to the fact inferred." People v. Hildebrandt, 308 N.Y. 397, 404, 126 N.E.2d 377, 381 (1955). The court's application of this permissive presumption to the facts of this case was constitutional because, under all the circumstances, there was a rational connection between the facts proved and the ultimate fact presumed. See generally Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 1245, 87 L.Ed. 1519, 1524-1525 (1943); People v. McKenzie, 67 N.Y.2d 695, 696, 499 N.Y.S.2d 923, 924, 490 N.E.2d 842, 843 (1986); People v. Terra, 303 N.Y. 332, 335, 102 N.E.2d 576, 578 (1951).

Although the Family Court was not required to draw an inference of possession, under the circumstances there was sufficient evidence to establish that each of the three appellants was present on the bus where the weapon was recovered, and the statutory presumption could rationally be applied, notwithstanding the number of people on the bus.

In this case, police testimony provided a sufficient basis for finding that each appellant was on the bus from the time it left the scene of the shooting until it arrived at the hospital where two of them were treated for gunshot wounds. While this evidence may not be a particularly strong basis for inferring that any of the appellants individually possessed the loaded weapon found on the floor of the bus, the statutory presumption

permits the inference to be drawn and deference is generally accorded to the trier of facts. See Matter of Willie W., 32 A.D.3d 479, 819 N.Y.S.2d 478 (1st Dept 2006); CPL 470.20 [5]; People v. Bleakley, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 763, 508 N.E.2d 672, 674-675 (1987). We have considered and rejected the appellants' remaining arguments, including constitutional claims, concerning the statutory presumption and the evidence presented at the fact-finding hearing.

While Drew C. contends the court erred in reopening the suppression hearing to allow Sgt. Anzelino to testify, we find that the suppression court had discretion to reopen the suppression hearing before rendering a decision, in order to allow the Presentment Agency to elicit additional evidence, in the absence of "risk of tailoring, bad faith by the [Presentment Agency] or prejudice to [the appellant]." People v. Ramirez, 44 A.D.3d 442, 443, 843 N.Y.S.2d 280, 282 (1st Dept. 2007), lv. denied, 9 N.Y.3d 1008, 850 N.Y.S.2d 396, 880 N.E.2d 882 (2007); See People v. Cestalano, 40 A.D.3d 238, 835 N.Y.S.2d 133 (1st Dept. 2007), lv. denied, 9 N.Y.3d 921, 844 N.Y.S.2d 176, 875 N.E.2d 895 (2007). This Court has found that nothing in People v. Havelka, (45 N.Y.2d 636, 412 N.Y.S.2d 345, 384 N.E.2d 1269 (1978)), the case relied upon by the appellant, deprives the suppression court of discretion to permit additional testimony to

cure a deficiency in proof prior to a decision being rendered. People v. Cestalano, 40 A.D.3d at 238-239, 835 N.Y.S.2d 133 (1st Dept. 2007).

The court properly denied appellant Jonathan V.'s motion to suppress his statement. The court properly determined that despite reasonable efforts, the authorities were unable to notify a parent and acted reasonably, under all the circumstances, in interviewing this appellant in the presence of a woman who identified herself as his aunt. See Family Ct. Act § 305.2. The evidence also supports the court's conclusion that this appellant's gunshot wound and accompanying medical treatment did not undermine the voluntariness of his statement. See People v. Hughes, 280 A.D.2d 694, 695, 720 N.Y.S.2d 586, 588 (2001), lv. denied, 96 N.Y. 2d 801, 726 N.Y.S. 2d 379, 750 N.E.2d 81 (2001).

Accordingly, the orders of disposition of the Family Court, New York County (Mary E. Bednar, J.), entered on or about June 27, 2007 (Jonathan V.) and June 11, 2007 (Drew C. and Michael B.), which adjudicated the appellants juvenile delinquents, upon fact-finding determinations that they each committed an act which, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and that they each committed the act of unlawful possession of a weapon by

a person under 16, and placed each of them with the Office of Children and Family Services for an initial period of up to 18 months, should be affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 30, 2008

CLERK