Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

11408 In re Sahara Construction Corp., Index 154956/18
Petitioner-Appellant,

-against-

The New York City Office of Administrative Trials and Hearings, et al.,
Respondents-Respondents.

Leavitt, Kerson & Sehati, Forest Hills (Paul E. Kerson of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 9, 2018, which denied the petition to annul the determination of respondent Office of Administrative Trial and Hearings (OATH), dated December 5, 2017, finding that petitioner violated a home improvement contract and imposing a civil penalty and ordering restitution, and granted respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court correctly found that petitioner failed to exhaust its administrative remedies (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Matter of Nayci Contr. Assoc., LLC v New York City Dept. of Consumer Affairs*, 170 AD3d 435 [1st Dept 2019]). The OATH rules provide explicitly that a party seeking to challenge a hearing officer's determination must first exhaust

the OATH appeals process outlined in 48 RCNY 6-19. Among other requirements, the appealing party must show that it has paid in full any "fines, penalties or restitution imposed by the decision" (48 RCNY 6-19[c], as amended 6-19[a][1][iii]). While OATH may waive the payment of "fines" or "penalties" if the appealing party demonstrates a financial hardship, the rules are explicit that OATH is not permitted to waive an order of "restitution" as a condition of the appeal (48 RCNY 6-19[d][2], as amended 6-19[b][2]). Instead, if a hearing officer has "ordered payment of restitution," the appealing party "must, prior to or at the time of filing the appeal, submit proof that [it] has deposited the amount of restitution with the agency responsible for collecting payment, pending determination of the appeal" (*id.*). Petitioner has not done so, and thus has failed to exhaust its administrative remedies (*see Matter of Nayci*, 170 AD3d at 436).

We do not reach petitioner's claim on appeal that the restitution order constitutes a constitutionally excessive fine. Although exhaustion is not required where a party challenges the agency's actions as unconstitutional (*Watergate II Apts.*, 46 NY2d at 57), petitioner made no excessive fine challenge below. "[M]erely asserting a constitutional violation will not excuse a litigant from first pursuing administrative remedies that can provide the requested relief" (*Matter of Schulz v State of New York*, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]).

Thus, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established" (*id.*). Petitioner has failed to do that here, and has not established that it was otherwise exempt from the exhaustion requirement (*Watergate II Apts.*, 46 NY2d at 57).

Although neither specifically preserved nor raised on appeal, we are troubled by the constitutional ramifications of an administrative tribunal insulating its decision by making judicial review contingent on satisfaction of its order, including, as here, the payment of money (*see Burns v Ohio*, 360 US 252 [1959] [invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction]). It seems patently unfair to force a litigant to pay restitution as a condition for filing an appeal where the litigant has received a waiver of prior payment of his fine due to financial hardship (*see* 48 RCNY 6-19[a][1][iii][B]). Petitioner here is excused from paying a $5,000 fine as a condition to filing an appeal based on financial hardship, but, notwithstanding its financial hardship, it is forced to pay almost a quarter of a million dollars ($234,152.57) before it can file an appeal. Under this system, if you do not have the financial means to pay, you cannot come into court and seek review regardless of the merits of the challenged administrative

determination (*compare* 48 RCNY 6-19[a][1][iii] *with* OATH's rules applicable to violations of laws or regulations enforced by the taxi and limousine commission, 48 RCNY 5-04[b] ["Pursuant to Administrative Code §19-506.1(c), a Respondent will not be required to pay the fines, penalties, or restitution imposed in the decision in order to file a timely appeal"]). Nonetheless, because this constitutional issue was not fully briefed before us, we do not decide it.

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

ENTERED: JULY 2, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11479-
11479A In re Space Race LLC,
Petitioner-Respondent,

-against-

Alabama Space Science Exhibit Commission doing business as U.S. Space & Rocket Center,
Respondent-Appellant.

Index 655649/18

_____

Maynard Cooper & Gale, PC, New York (John M. Hintz of counsel), for appellant.

Kennedy Berg LLP, New York (Gabriel Berg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Andrea Masley, J.), entered April 11, 2019, in the amount of $1,405,528, and bringing up for review an order, same court and Justice, entered April 1, 2019, which, inter alia, granted petitioner Space Race LLC's petition to confirm an arbitration award and denied respondent Alabama Space Science Exhibition Commission (ASSEC)'s motion to stay these proceedings pending determination of its petition to vacate the award in Alabama state court, unanimously affirmed, without costs. Appeal from the aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In July 2016, ASSEC and Space Race entered into a memorandum of agreement (MOA) in which Space Race agreed to produce a series of animated television shows aiming to promote science, technology, engineering, and mathematics education. Under the

terms of the MOA, ASSEC agreed to distribute $4.5 million in grant funds it received from the National Aeronautics and Space Administration (NASA) to Space Race over three years. The parties agreed that Alabama law would govern the terms of the MOA. The MOA further provided that if a dispute between the parties remained unresolved, it would be "settled by arbitration, in accordance with the Commercial Arbitration Rules of the American Arbitration Association (AAA)," and actions could be brought "in a court of competent jurisdiction" to compel compliance. The AAA Rules to which the MOA refers provide, inter alia, that "[p]arties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof" (AAA Rule 52[c]).

ASSEC subsequently failed to pay the final installment of NASA's grant money in the amount of $1.3 million to Space Race. On January 2, 2018, Space Race initiated arbitration against ASSEC with the AAA in New York. After holding hearings, in which both parties fully participated, the arbitration panel issued an award in favor of Space Race in the amount of $1,365,582. In the award, the panel explicitly noted that although ASSEC claimed that it was "an agency of the State of Alabama," ASSEC waived its sovereign immunity defense during the course of the hearings when its counsel confirmed that ASSEC would not assert such defense.

On November 13, 2018, the same day that the arbitration

panel issued the award, Space Race filed with the IAS court and served upon ASSEC a summons with notice to confirm the award. ASSEC cross-moved to dismiss on sovereign immunity grounds, but did not move to vacate any of the findings in the arbitration award. Three months later, on or about February 13, 2019, ASSEC initiated an action in the Circuit Court for Madison County, Alabama, seeking to vacate the arbitration award and enjoin the proceedings in New York until the Alabama action was decided. Two days later, Space Race obtained an order from the IAS court enjoining ASSEC from seeking to vacate the arbitration award in Alabama pending the disposition of the New York confirmation proceeding.

The IAS court properly confirmed the arbitration award. On appeal, ASSEC does not contend that the parties lacked a meeting of the minds relative to the material terms of the MOA (*Metropolitan Enters. NY v Khan Enter. Constr., Inc.*, 124 AD3d 609 [2d Dept 2015]). Their agreement to arbitrate any dispute is irrevocable and enforceable (9 USC § 2). Rather, ASSEC invokes the defense of sovereign immunity and claims that New York may not exercise jurisdiction over agencies of other states. Space Race counters that ASSEC is not a state agency entitled to sovereign immunity, and in any event, has waived any such claim.

Waivers of sovereign immunity are strictly construed, and a waiver by inference is therefore disfavored (*Matter of Bello v Roswell Park Cancer Inst.*, 5 NY3d 170,173 [2005], citing

Sharapata v Town of Islip, 56 NY2d 332, 336 [1982]). Here, however, ASSEC waived any defense of sovereign immunity by proceeding with arbitration and by explicitly waiving this defense[1] (*see C & L Enters., Inc. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411 [2001] [Native Nation may agree, by express contract, to waive sovereign immunity]). In light of ASSEC's waiver, we need not decide whether ASSEC is a state agency entitled to sovereign immunity.

The IAS court properly denied ASSEC's motion to stay the New York proceedings. ASSEC provides no reason to deviate from the first-in-time-filed rule. It proffers no evidence to show that Space Race's action was vexatious, oppressive or instituted to obtain an unjust advantage (*see Ace Prop. & Cas. Ins. Co. v Federal-Mogul Corp.*, 55 AD3d 479 [1st Dept 2008]). Now that it

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[1] "THE CHAIRMAN: Let me just ask, because I think this is explaining a case which you can explain to us or we can read it, but just is sovereign immunity an issue in this case because I haven't heard it raised? . . . Is it an issue in this case?

"MR. KAUFMANN: We've pled our affirmative defenses. We have not said sovereign immunity. That's why we're scratching our head here.

. . .

"THE CHAIRMAN: I've been told they're not asserting a sovereign immunity defense in this case. If that's so, it's not relevant.

"ARBITRATOR ASHINOFF: Is that the case, Mr. Kaufmann?

"MR. KAUFMANN: Yes."

(Arbitration Hearing, July 25, 2018).

has received an unfavorable outcome, ASSEC may not change its position and forum shop. The Federal Arbitration Act does not require the New York court to cede jurisdiction to Alabama (*see* 9 USC § 12).

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

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

ENTERED: JULY 2, 2020

CLERK

Renwick, J.P., Richter, Mazzarelli, Singh, JJ.

11352-
11353-
11353A

Index 20423/15E

Alejandra Viera,
Plaintiff-Respondent,

-against-

Yuriy Khasdan, D.D.S., et al.,
Defendants-Appellants,

Bulent Atac, M.D., et al.,
Defendants.

Chesney, Nicholas & Brower, LLP, Syosset (Debra M. Silverman of counsel), for Yuriy Khasdan, D.D.S, appellant.

Rawle & Henderson, LLP, New York (Justine K. Woods of counsel), for Hutchinson Metro Dental, P.C., appellant.

Vigorito, Barker, Patterson, Nichols & Porter, LLP, Garden City (Megan A. Lawless of counsel), for Janet Bodey, D.D.S., and Manhattan Oral Facial Surgery, LLC, appellants.

Ressler & Ressler, New York (Bruce J. Ressler of counsel), for respondent.

Orders, Supreme Court, Bronx County (Joseph E. Capella, J.), entered February 12, 2019, which denied defendants Yuriy Khasdan, D.D.S.'s and Hutchinson Metro Dental, P.C.'s (Hutchinson) motions for summary judgment dismissing the dental malpractice and informed consent claims as against them, unanimously modified, on the law, to grant the motions as to the dental malpractice claims, and otherwise affirmed, without costs. Order, same court and Justice, entered February 12, 2019, which denied defendants Janet Bodey, D.D.S. and Manhattan Oral Facial Surgery, LLC's motion for summary judgment dismissing the complaint as against

them, unanimously affirmed, without costs.

The court erred in denying defendants' motions for summary judgment on the ground that they relied on uncertified dental records. Dental records created in the regular course of business are admissible as business records to the extent they are germane to the diagnosis and treatment of the patient (*see* CPLR 4518; *see generally Williams v Alexander*, 309 NY 283, 287 [1955]). Plaintiff did not challenge the accuracy or veracity of the uncertified dental records; to the contrary, she relied on them in opposing defendants' motions. Moreover, plaintiff appended certified dental records from Hutchinson to her opposition papers (*see Carlton v St. Barnabas Hosp.*, 91 AD3d 561, 562 [1st Dept 2012]).

Defendants failed to meet their prima facie burden by providing any documentary evidence demonstrating that they informed plaintiff of the foreseeable risks associated with Clindamycin use (*see* Public Health Law § 2805-d[1]; *Lynn G. v Hugo*, 96 NY2d 306, 309 [2001]). The testimony by defendants Dr. Khasdan and Dr. Janey Bodey, indicating that it is their custom and practice to advise patients to contact their primary doctor should they experience any negative symptoms or discomforts due to any antibiotic prescribed is insufficient to establish plaintiff's informed consent to the prescription of Clindamycin. Furthermore, one of Dr. Khasdan's expert affidavits states that Clostridium Difficile C. Diff) is a well-known adverse reaction

to the prescribed antibiotic albeit rare. Yet, defendants did not establish that they advised plaintiff of this risk.

Defendants Dr. Bodey and Manhattan Facial Oral Surgery, LLC failed to establish prima facie that they did not commit dental malpractice (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In support of their motion, Dr. Bodey relied on her own affidavit, in which she made broad statements that she did not deviate from accepted standards of dental practice. Although Dr. Bodey opined that the post-operative prescription of Clindamycin was "appropriate," she did not set forth the accepted standards of dentistry that support her opinion (*see Pino v Behrman*, 168 AD3d 467 [1st Dept 2019]).

Dr. Bodey also failed to establish that the Clindamycin was not a proximate cause of plaintiff's alleged injuries, i.e., a bacterial infection and serious bowel injuries (*see Winegrad*, 64 NY2d at 853). Although she argues on appeal that plaintiff failed to show that taking Clindamycin resulted in those injuries, Dr. Bodey relied on evidence that the bacterial infection that plaintiff developed is a well-known adverse reaction to antibiotics, and submitted no evidence that the antibiotics were not a substantial factor in causing the injuries.

Dr. Khasdan established prima facie that he did not commit dental malpractice by submitting an expert affirmation that he acted in accordance with good and accepted dentistry in

diagnosing plaintiff's tooth infection, referring her to an oral surgeon because the offending tooth had already undergone a root canal, and then prescribing Clindamycin to treat the infection (*see e.g. Fleming v Pedinol Pharmacal, Inc.*, 70 AD3d 422 [1st Dept 2010]). In opposition, plaintiff failed to raise an issue of fact. Her expert's opinion that Dr. Khasdan deviated from accepted practice by not extracting the tooth and then only prescribing antibiotics if the infection did not subsequently resolve lacks evidentiary support (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The expert failed to address Dr. Khasdan's testimony that referral to an oral surgeon was necessary in this case. In the absence of tortious conduct by Dr. Khasdan, Hutchinson, Dr. Khasdan's employer, is entitled to summary judgment dismissing the dental malpractice claim against it, since the claim is premised solely on vicarious liability (*see Kukic v Grand*, 84 AD3d 609, 610 [1st Dept 2011]).

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11729-
11729A The People of the State of New York,
Respondent,

Ind. 3659/14

-against-

Shavar Hickman,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; A. Kirke Bartley, Jr., J. at plea and sentencing), rendered September 8, 2015, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life; and order, same court (Stephen M. Antignani, J.), entered on or about May 1, 2019, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. The testimony elicited at the hearing was that while on patrol, officers received a radio run of shots fired. The suspects were described as two black males, one of whom was wearing a red t-shirt, on bicycles, going northbound on Lenox Avenue. Approximately three blocks north of the location of the shooting and minutes later, the officers observed defendant, who

matched the description of one of the suspects, in that he was a black male, wearing a red t-shirt and was riding a bicycle. Defendant was the only individual in the immediate area who matched the description. Given the very close spatial and temporal proximity between the alleged shooting and the encounter with defendant, the police had reasonable suspicion to stop defendant and pat him down (*see People v Ward*, 161 AD3d 520 [1st Dept 2018], *lv denied* 32 NY3d 942 [2018]; *People v Petteway*, 11 AD3d 318, 318 [1st Dept 2004], *lv denied* 4 NY3d 747 [2004]). Any discrepancy as to his attire "[was] minor and did not detract from the specificity of the [radio run] and the congruity between the officers' observations and [the] description" (*People v Johnson*, 245 AD2d 112, 112 [1st Dept 1997], *lv denied* 91 NY2d 1008 [1998]; *People v Panzarino*, 282 AD2d 292, 292 [1st Dept 2001]; *lv denied* 96 NY2d 922 [2001]).

The motion court properly denied defendant's CPL 440.10 motion. Defendant failed to show that he received ineffective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant faults trial counsel for not using certain police records at the suppression hearing that would have allegedly undermined a finding of reasonable suspicion by, among other things, showing an age discrepancy between defendant and the described suspects. However, counsel provided an explanation of his strategic decision not to use this

evidence. We find counsel's hearing strategy to be reasonable and one that neither adversely affected the outcome of the proceedings or rendered them unfair (*see People v Benevento*, 91 NY2d at 713-714; *Strickland v Washington*, 466 US at 668). Defendant has also failed to establish any prejudice given the lack of a reasonable possibility that the suppression ruling would have been different if counsel had introduced the evidence or made the arguments that were at issue in the CPL 440.10 motion.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Webber, Gesmer, Moulton, JJ.

11730 Ocwen Loan Servicing LLC, Index 35934/14E
Plaintiff-Respondent,

-against-

Henry Siame also known as Henry N. Siame,
Defendant-Appellant,

Richard Streeter, et al.,
Defendants.

_____

Michael Kennedy Karlson, New York, for appellant.

Fein, Such & Crane, LLP, Westbury (Andrew M. Grenell of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered January 4, 2019, which, inter alia, granted plaintiff lender's motion for a judgment of foreclosure and sale, unanimously affirmed, without costs.

While defendant Henry Siame's fourth affirmative defense asserted that lender failed to provide the notice of default and Real Property Actions and Procedure Law (RPAPL) 90-day notice, defendant did not assert that lender failed to demonstrate that it served him with either notice, thereby waiving these arguments by failing to raise them in his answer with the requisite specificity and particularity required by CPLR 3015(a) (*see 1199 Hous. Corp. v International Fid. Ins. Co.*, 14 AD3d 383, 384 [1st Dept 2005]).

Lender's notice of default complied with paragraph 22 of the consolidated mortgage, and RPAPL 1304 does not preclude an

attorney acting on behalf of a lender from sending RPAPL 1304 notices (*see e.g. Flagstar Bank, FSB v Mendoza*, 139 AD3d 898, 900 [2d Dept 2016]). Lender also established actual mailing of the RPAPL 1304 notice by submitting the affidavit of service attesting to service of the 90-day notice of default by first class mail and certified mail and by depositing same in postpaid properly addressed wrappers in an official depository of the US Postal Service (*compare CitiMortgage, Inc. v Moran*, 167 AD3d 461 [1st Dept 2018]).

The attachment of the subject note to the verified complaint was sufficient to establish that lender had physical possession of the note prior to commencement of this action (*see Bank of N.Y. Mellon v Knowles*, 151 AD3d 596, 597 [1st Dept 2017]).

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11731 In re Bisoh C., Dkt. V-27697/12
Petitioner-Respondent,

-against-

Valentine S., (Deceased),
Respondent,

Shamea L.,
Respondent-Appellant.

_____

Daniel R. Katz, New York, for appellant.

Steven P. Forbes, Jamaica, for respondent.

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

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about October 13, 2015, which, after an extraordinary circumstances hearing and a best interests hearing, granted the petition for sole custody brought by the stepmother, with supervised visitation to respondent mother, unanimously affirmed, without costs.

The court properly found that the stepmother demonstrated the requisite extraordinary circumstances to be granted standing to petition for custody of the child (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). The child and the stepmother resided with the child's father in the same household for approximately three years before the father died in 2012. After the father's death, the stepmother assumed all responsibility for the child, providing for his emotional, medical, educational and

financial needs. In contrast, the mother has not cared for the child on a daily basis since he was four months old, and has had only supervised visits with him (*see Roberta P. v Vanessa J.P.*, 140 AD3d 457 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). Further, a finding of neglect had been entered against her for committing an act of domestic violence against the father in the child's presence and threatening to kill the child.

The record supports the court's determination that it is in the child's best interests to remain in his stepmother's custody (*see Matter of Bennett*, 40 NY2d at 548). Since she joined the father's household, the stepmother has been supporting the child, providing a stable home for him, and taking care of his educational and medical needs.

The determination that supervised visitation with the mother is in the child's best interests has a sound and substantial basis in the record (*see Matter of Arcenia K. v Lamiek C.*, 144 AD3d 610 [1st Dept 2016]). There is evidence that, even in a supervised setting, the mother, who has struggled with mental health issues, was not able to handle the needs of both her sons simultaneously on her own. Moreover, she has never acknowledged that her own actions resulted in the subject child's removal from her care. Although the mother was attending therapy, the evidence at trial supported a finding that, at the time of trial,

she had limited insight into how her condition affected her ability to parent and she continued to struggle with interpersonal skills, low frustration tolerance, and poor impulse control when under stress.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Gesmer, Moulton, JJ.

11732 Sheila Brown, Index 153013/18
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Stewart Lee Karlin Law Group, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Jamison Davies of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered March 7, 2019, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss plaintiff's New York City Human Rights Law retaliation claim, unanimously affirmed, without costs.

Plaintiff, a supervisor with the New York City Human Resources Administration (HRA) who lives in Staten Island, failed to allege a causal connection, based on temporal proximity, between her complaints about a supervisor's alleged discriminatory conduct and four alleged disadvantageous employment actions in 2017 (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). Her previous federal litigation, which terminated in November 2015 (*Brown v City of New York*, 622 F Appx 19, 20 [2d Cir 2015]), was too remote in time (*see Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206 [1st Dept 2015]), and the complaint did not allege any "other facts

supporting causation" (*Harrington v City of New York*, 157 AD3d 582, 586 [1st Dept 2018]). For the same reason, plaintiff cannot show a causal connection between complaints she made in March, May, and June 2017, which were resolved in July 2017 — to the extent they were protected activity — and the September 2017 decision to transfer her after two short-term assignments to the Bronx field office (*see e.g. Brown*, 622 F Appx at 20 [two-month gap insufficient]; *Murray v Visiting Nurse Servs. of N.Y.*, 528 F Supp 2d 257, 275 [SD NY 2007] [three- or four-month gap generally insufficient], citing *Clark County School Dist. v Breeden*, 532 US 268, 273-274 [2001]).

Further, plaintiff cannot show a causal connection between her complaints and the three suspensions that plaintiff served in 2017, arising from conduct pre-dating her complaints. Those penalties were a "continuation of a course of conduct that had begun before [she] complained" (*Sims v Trustees of Columbia Univ. in the City of N.Y.*, 168 AD3d 622, 623 [1st Dept 2019], quoting *Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]), in direct response to the latest misconduct accusation.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11733 The People of the State of New York, Ind. 4821/14
Respondent, 4860/14

-against-

Juan Scott,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Allison N. Kahl of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J. at plea and sentencing; Neil Ross, J. at sentencing), rendered November 7, 2016,

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.

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

ENTERED: JULY 2, 2020

CLERK

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

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11735 Charlene Smoot, Index 301434/14
Plaintiff-Respondent,

-against-

Rite Aid, et al.,
Defendants-Appellants,

925 Fuertes Realty, LLC, et al.,
Defendants.
- - - - -
Rite Aid of New York, Inc.,
Third-Party Plaintiff-Appellant,

-against-

City of New York,
Third-Party Defendant-Respondent.
- - - - -
[And Another Third-Party Action]

_____

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Adam C. Calvert of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for Charlene Smoot, respondent.

James E. Johnson, Corporation Counsel, New York (Mackenzie Fillow of counsel), for City of New York, respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about July 1, 2019, which denied defendants Rite Aid and USM, Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

After disembarking from a New York City Transit Authority bus, plaintiff slipped on snow on the sidewalk in front of a building leased to defendant Rite Aid. Rite Aid is required

under its lease with the property owners to maintain the sidewalk, and had entered into a contract with defendant USM to remove snow. Defendants contend that they are not responsible for maintaining the area where plaintiff fell, because maintenance of bus stops is the City's responsibility and because they are not contractually responsible for clearing snow from that area.

Defendants failed to demonstrate as a matter of law that the area where plaintiff fell is a "designated bus stop location" (*see Bednark v City of New York*, 127 AD3d 403, 404 [1st Dept 2015]; *Phillips v Atlantic-Hudson, Inc.*, 105 AD3d 639 [1st Dept 2013]). The deposition testimony of the bus driver and Department of Sanitation supervisors does not establish that the location of plaintiff's fall near the rear of the bus was within a designated bus stop. Nor, contrary to defendants' contention, are the exact parameters of a designated bus stop established by Administrative Code § 16-124.1, which requires the Sanitation Department to prepare plans for snow removal from streets and sidewalks (*id.* 16-124.1[b]). Section 16-124.1 does not define the length of a bus stop, but states only that the bus stop includes five feet of the sidewalk adjacent to the curb in a location that is marked by "signage" for passengers to be picked up or discharged (*id.* § 16-124.1[a][2]; see *Bednark v City of New York*, 162 AD3d 565, 566 [1st Dept 2018]).

Defendants contend that their contract and Rite Aid's lease

do not require them to clear the bus stop area of the sidewalk. However, both agreements require snow removal from public sidewalks, and the contract includes "key transit stops." While the property owners have a nondelegable duty to clear snow and ice from the abutting public sidewalk (Administrative Code of City of NY § 7-210[a]), they and Rite Aid, as tenant, may be held liable as joint tortfeasors for failure to fulfill their respective maintenance obligations (*see LaRosa v Corner Locations II, L.P.*, 169 AD3d 512 [1st Dept 2019]). In addition, defendants failed to demonstrate that their admitted snow removal activities on the sidewalk in front of the premises before the accident did not cause or create the dangerous condition.

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11736 Stephen Cernich, Index 654688/18
Plaintiff-Appellant,

-against-

Athene Holding Ltd.,
Defendant-Respondent.

_____

Arkin Solbakken LLP, New York (Lisa C. Solbakken of counsel), for appellant.

Friedman Kaplan Seiler & Adelman LLP, New York (Philippe Adler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered September 25, 2019, which granted defendant's motion pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint with prejudice, unanimously affirmed, with costs.

The motion court correctly determined as a matter of law that the forum selection clause of the parties' Repurchase Agreement did not apply to their Separation Agreement (*see TVT Records v Island Def Jam Music Group*, 412 F3d 82 [2d Cir 2005], *cert denied* 548 US 904 [2006]). Contrary to plaintiff's contention, the agreements did not constitute a single, integrated agreement, since the two agreements were not executed for the same purpose and do not concern the same subject matter or arise from the same transaction (*see Fernandez v Cohen*, 110 AD3d 557, 558 [1st Dept 2013]; *Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008], *lv denied* 12 NY3d 702 [2009]). While the parties executed both agreements at the cessation of their

relationship, and the agreements refer to each other, they are not interdependent. The Repurchase Agreement memorializes a one-time repurchase transaction. By contrast the Separation Agreement memorializes a discrete, ongoing, and conditional transaction with a different purpose. In particular, in the Separation Agreement plaintiff acknowledged his obligation to comply with certain specified Protective Covenants through April 30, 2017, and defendant agreed to pay him a Bonus Payment if he did so.

Neither agreement provides that the parties intended the forum selection clause of the Repurchase Agreement to be imputed to the Separation Agreement (*see Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238, 247-248 [2002]; *State Bank of India v Taj Lanka Hotels*, 259 AD2d 291 [1st Dept 1999]; *Kent v Universal Film Mfg. Co.*, 200 App Div 539, 550 [1st Dept 1922]).

In the absence of a forum selection clause in the relevant agreement, plaintiff's public policy arguments based on this State's strong policy of enforcing forum selection clauses are unavailing. Plaintiff also argues that the motion court's ruling violates public policy by enabling defendant to impose a restrictive covenant on him broader in scope than the covenant to which he agreed. This argument is not properly before us. The court made no findings as to the scope of the Protective Covenants, which are, in any event, not contained in the record on appeal.

Plaintiff's contention that the court erred in dismissing the complaint with prejudice is unsupported by a proposed amended pleading that would remedy the defects identified by the court.

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: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11737 The People of the State of New York, Ind. 3086/17
Respondent,

-against-

Phillip Brown,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Kerry Fulham 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 (Melissa Jackson, J.), rendered April 5, 2018,

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.

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

ENTERED: JULY 2, 2020

CLERK

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

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11738 Continental Casualty Company, Index 652103/18
Plaintiff-Respondent,

-against-

KB Insurance Co., Ltd. doing business as Kookmin Best Insurance Company (US Branch), formerly known as Leading Insurance Group Insurance Co., Ltd.,
Defendant-Appellant.

_____

Chartwell Law, New York (Matthew Kraus of counsel), for appellant.

CNA Coverage Litigation Group, New York (Marian S. Hertz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa Crane, J.), entered May 31, 2019, which granted plaintiff's motion for summary judgment declaring that defendant has a duty to defend Value Wholesale, Inc. (Value) in an underlying action and reimburse plaintiff for the defense costs, unanimously affirmed, with costs.

Defendant has a duty to defend Value because the allegations contained in the underlying complaint fall within the protection purchased under the insurance policy (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). Defendant issued a commercial general liability insurance policy to Value, which was in effect during the relevant time period. Under the terms of the policy, defendant agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury.'" "Personal and advertising injury"

includes an injury arising out of the infringement "upon another's copyright, trade dress or slogan in [the] 'advertisement.'" Defendant's contention that the claims in the underlying action are excluded from coverage is unpersuasive because there is no evidence conclusively showing that Value's conduct was to intentionally or knowingly advertise Abbott's unapproved products domestically (*see e.g. Cosser v One Beacon Ins. Group*, 15 AD3d 871, 873 [4th Dept 2005]; *PG Ins. Co. of N.Y. v Day Mfg. Co.*, 251 AD2d 1065 [4th Dept 1998]).

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: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11740 The People of the State of New York, Ind. 388/17
Respondent,

-against-

Lionel Lewis,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel) and Kirkland & Ellis LLP, New York (Stefan M. Miller of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered September 12, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the jury's credibility findings. We note that "[o]ur review of the . . . weight of the evidence is limited to the evidence actually introduced at trial" *(People v Dukes*, 284 AD2d 236, 236 [1st Dept 2001], *lv denied* 97 NY2d 681 [2001]).

We find no violation of defendant's right to a public trial. The court providently exercised its discretion in excluding defendant's relative from the courtroom based on the relative's residence in the area in which the testifying undercover officer

expected to continue her operations within a short time (*see People v Campbell*, 16 NY3d 756 [2011]; *People v Alvarez*, 51 AD3d 167, 175 [1st Dept 2008], *lv denied* 11 NY3d 785 [2008]). The court properly factored in the officer's distinctive appearance, which would readily enable defendant's relative to recognize her and reveal her identity to others, and the size of the geographic area. We have considered and rejected defendant's remaining arguments on this issue.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of trial strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record 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]). Defendant

has not shown that counsel's alleged omissions fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11741 The People of the State of New York, Respondent, Ind. 30068/17

-against-

Ronnie Lacy, Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Angie Louie of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about September 21, 2017, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in granting an upward departure (*see generally People v Gillotti*, 23 NY3d 841, 861-862 [2014]). Clear and convincing evidence established aggravating circumstances that were not accounted for by the risk assessment instrument, consisting of defendant's prior sex offenses, which were disposed of after the Board assessed defendant's risk for this case (*see People v Encarnacion-Diaz*, 165 AD3d 490 [1st Dept 2018]). These offenses "demonstrated an extremely high risk of recidivism, and [defendant's] argument that the type of misconduct in which he habitually engages is not serious enough to warrant a level three designation is

unpersuasive" (*People v Corian*, 77 AD3d 590, 590 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

Defendant's argument that the court erroneously assessed certain points is academic, because subtraction of those points would not affect his presumptive risk level, from which, as we have determined, the court justifiably departed (*see People v Corn*, 128 AD3d 436, 437 [1st Dept 2015]). In any event, the points were correctly assessed. 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: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11743 The People of the State of New York, Ind. 1067/15
Respondent,

-against-

Shakeem White,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered March 7, 2017, as amended March 17, 2017, convicting defendant, after a jury trial, of assault in the second and third degrees and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously affirmed.

Although the People's disclosure of information regarding the victim's mental illness was belated, defendant is not entitled to reversal under *Brady v Maryland* (373 US 83 [1963]). The People disclosed the information more than two weeks before the beginning of trial, and under the circumstances of the case this gave defendant a "meaningful opportunity to use the allegedly exculpatory material to cross-examine" (*People v Cortijo*, 70 NY2d 868, 870 [1987]). The victim was extensively cross-examined about his mental illness and related matters, and

defendant's claims of prejudice are conclusory and speculative. After receiving the information, defense counsel did not request an adjournment to investigate the victim's psychiatric history, to consult an expert, or for any other purpose. To the extent counsel requested any specific remedies from the court, they were unnecessary or inappropriate. In any event, there is no reasonable possibility that the People's initial failure to disclose the relevant information contributed to the verdict.

The court properly denied defendant's request for an instruction on ordinary force justification. Viewing the evidence in the light most favorable to defendant, there was no reasonable view of the evidence that he used less than deadly physical force (*see People v Vega*, 33 NY3d 1002, 1004 [2019]). The totality of the evidence, including medical and photographic evidence, established that defendant inflicted cuts or stab wounds with a knife made from a scissors blade, and there was no reasonable view to the contrary (*see e.g. People v Harrell*, 132 AD3d 507 [1st Dept 2015], *lv denied* 26 NY3d 1088 [2015]). In denying the instruction, the court considered the facts of the case and did not only apply the per se rule for crimes involving dangerous instruments that was rejected in *Vega*.

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

ENTERED: JULY 2, 2020

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CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11744 The People of the State of New York, Ind. 2373/14
Respondent,

-against-

Keith Goodman,
Defendant-Appellant.

_____

Michael E. Lipson, Jericho, for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 16, 2015, convicting defendant, after a jury trial, of conspiracy in the first degree, two counts of conspiracy in the third degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 40 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence against defendant was overwhelming. There was ample evidence of defendant's intent to commit murder and his agreement with others to do so. There is no basis for disturbing the jury's credibility determinations. The fact that the jury acquitted defendant of certain charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

The jury's verdict acquitting defendant of attempted murder

but convicting him of conspiracy to commit murder was not legally repugnant, and the court properly denied defendant's motion to set aside the verdict. The respective crimes have different elements (*see generally People v Muhammad*, 17 NY3d 532, 539-540 [2011]), and a person may conspire with others to commit an intended crime without reaching the point of attempting to commit that crime.

The court providently exercised its discretion in admitting an uncharged threat made by defendant to a rival gang member. This was highly probative of the charged crimes. A song posted on social media whose lyrics contained coconspirator declarations was also relevant to the conspiracy. Defendant failed to preserve his present challenges regarding: (i) a coconspirator's declaration that allegedly reflected on defendant's criminal propensity, (ii) the prosecutor's summation in general and specifically to a remark made by the court while overruling an objection during the prosecutor's summation, or (iii) the alleged lack of authentication of phone calls made by defendant, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Although the court's remark during the summation was ill-advised, we find this error to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's remaining arguments which were also raised by two of his jointly tried codefendants (*People v Pinkston*, 169

AD3d 520 [1st Dept 2019], *lv denied* 33 NY3d 1107 [2019]), are also rejected for the same reasons.

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: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11745 The People of the State of New York, Ind. 2205/14
Respondent,

-against-

Raymond Rodriguez-Medina,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Benjamin Rutkin-Becker of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered August 3, 2017, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him, as a second felony offender, to a term of 4½ years, unanimously affirmed.

Defendant's challenges to the voluntariness of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal. Defendant's plea allocution establishes the voluntariness of the plea and contains nothing that casts any doubt on defendant's guilt (*see People v Toxey*, 86 NY2d 725 [1995]). Defendant's statement at sentencing, viewed as a whole, was not an assertion of the defense of justification requiring further inquiry, but an apologetic request for leniency, citing

the victim's conduct as a mitigating factor (*see People v Matos*, 27 AD3d 485 [2d Dept 2006]). The record also fails to support defendant's assertion that he received misinformation about the issues that remained reviewable on appeal after his guilty plea.

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of the validity of defendant's appeal waiver, we perceive no basis for reducing the sentence.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11746 Andi Lyn Kornfeld, Index 805309/18
Plaintiff-Respondent,

-against-

Chen Hua Zheng, et al.,
Defendants,

Carmel Car and Limousine Service, Inc.,
Defendant-Appellant.

_____

The Shanker Law Firm, P.C., New York (Steven J. Shanker of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered November 8, 2019, which, inter alia, denied the motion of defendant Carmel Car and Limousine Service, Inc. (Carmel) to dismiss the negligent hiring and negligent entrustment claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when defendant Zheng, a livery cab driver for defendant Carmel, struck her with his vehicle. Plaintiff alleges that Carmel is liable and asserts claims against it for negligent entrustment of a vehicle and negligent hiring, training and retention. Although the pleadings are to be afforded a liberal construction (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), plaintiff failed to plead essential elements of those negligence claims, requiring dismissal (*see Sheila C. v Povich*,

11 AD3d 120, 129-130 [1st Dept 2004]).

An owner of a motor vehicle may be liable for negligent entrustment if it was negligent in entrusting it to a person it knew, or in exercise of ordinary care should have known, was not competent to operate it (*see Perkins v County of Thompson*, 160 AD3d 1189, 1190 [3d Dept 2018]; *Graham v Jones*, 147 AD3d 1369, 1371-1372 [4th Dept 2017]). Here, not only did plaintiff allege that Zheng owned the car, but she did not allege, even in a conclusory fashion, that Zheng was not competent to drive or that Carmel knew or should have known of such incompetence. Plaintiff's bare pleading of control by Carmel and the absence of any claim that Carmel knew or should have known of any incompetence, require dismissal of the claim.

The claim alleging negligent hiring, training and retention should also be dismissed because the complaint fails to allege that Zheng had a propensity to drive negligently, and that Carmel knew or should have known of such propensity when it retained him as a driver (*see Sheila C. v Povich*, 11 AD3d at 129-130; *Gomez v City of New York*, 304 AD2d 374 [1st Dept 2003]).

While plaintiff asserts that dismissal is premature, when opposing Carmel's motion, she did not make any additional submissions to cure the pleading deficiencies or to establish that additional discovery was necessary (*Sheila C.*, 11 AD3d at

130; *see* CPLR 3211[d]). Furthermore, Carmel responded to her outstanding discovery demands concerning the factual bases for her negligence claims while the motion was pending, and plaintiff did not object to the adequacy of those responses.

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11747N 862 Second Avenue LLC, Index 655408/16
Plaintiff-Respondent,

-against-

2 Dag Hammarskjold Plaza Condominium,
Defendant-Appellant,

Ali Baba's Terrace Inc.,
Defendant.

_____

Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for appellant.

Paul Hastings LLP, New York (Jodi Kleinick of counsel), and Cornicello, Tendler & Baumel-Cornicello, LLP, New York (Anthony Cornicello of counsel), for respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered June 26, 2018, which granted plaintiff's motion for an award of past use and occupancy and use and occupancy pendente lite against defendant 2 Dag Hammarskjold Plaza Condominium (Dag), unanimously affirmed, without costs.

The court providently exercised its discretion in awarding plaintiff past and pendente lite use and occupancy, as provided for in Real Property Law § 220, since Dag remains in possession of the demised premises by its subtenant, defendant Ali Baba's Terrace Inc. (Ali Baba) (*see Chock Full O'Nuts Corp. v NRP LLC I*, 11 AD3d 385 [1st Dept 2004]; *Getty Props. Corp. v Getty Petroleum Mktg. Inc.*, 106 AD3d 429, 430 [1st Dept 2013]). No landlord-tenant relationship was created by plaintiff's acceptance of rent from Ali Baba, as the subject lease expressly provided plaintiff

with the right to a temporary assignment of the rent from Ali Baba as a remedy for Dag's default in the payment of rent, and the lease contains a no-waiver clause (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]; *Matter of Rasic v Roberts*, 277 AD2d 120, 121 [1st Dept 2000].

The court also properly rejected Dag's argument that any award for use and occupancy cannot include rental amounts related to plaintiff's lease of its development rights, as well as Dag's unsupported claim that it obtained ownership of such rights upon termination of the lease.

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

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

ENTERED: JULY 2, 2020

CLERK

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11748N Hugh Wyatt, Index 103804/12
Plaintiff-Appellant,

-against-

Pierre Sutton,
Defendant-Respondent.

_____

Hugh Wyatt, appellant pro se.

James E. McMillan, P.C., New York (Douglas Kenneth Doneson of counsel), for respondent.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered February 8, 2019, which granted defendant's motion to strike the complaint and dismiss the action, unanimously affirmed, without costs.

The IAS court did not improvidently exercise – let alone clearly abuse – its discretion by dismissing this action after plaintiff failed to comply with two so-ordered stipulations and an October 2018 conditional order that gave him a final chance to comply. Plaintiff was warned that, if he did not comply strictly and completely, defendant could move to dismiss (*see e.g. Fish & Richardson, P.C. v Schindler,* 75 AD3d 219, 220, 222 [1st Dept 2010]).

Plaintiff claims "[t]here was no evidence of a pattern of obstructive or dilatory behavior on [his] part" (*Kaplan v KCK Studios,* 238 AD2d 264 [1st Dept 1997]). However, a "repeated failure . . . to produce, despite express orders to do so, amply demonstrates wilfulness and the lack of any reasonable excuse for

such failure" (*Oasis Sportswear, Inc. v Rego*, 95 AD3d 592 [1st Dept 2012]). Moreover, plaintiff's failure to avail himself of the newly extended deadline set forth in the October 2018 order "demonstrates that [his] noncompliance was willful, contumacious, or due to bad faith" (*Loeb v Assara N.Y.I L.P.*, 118 AD3d 457 [1st Dept 2014] [internal quotation marks omitted]). Finally, our review of plaintiff's June 15, 2017 deposition transcript amply confirms the IAS court's comment that plaintiff was wholly uncooperative.

Lastly, plaintiff contends that the court failed to properly consider his pro se status and medical issues. However, "[p]roceeding pro se is not a license to ignore court orders" (*Couri v Siebert*, 48 AD3d 370, 371 [1st Dept 2008]; *see also Pagano v Malpeso*, 96 AD3d 563 [1st Dept 2012]). Unlike the precedents cited by plaintiff, which involve one-time failures to comply due to medical issues, plaintiff did not raise his illness until his October 11, 2017 deposition and only then in opposition to defendant's first motion to strike the complaint.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11749 The People of the State of New York, Ind. 307/13
Respondent,

-against-

Darryl Tunstall,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Juan M. Merchan, J.), rendered February 7, 2019, resentencing defendant to a term of 22 years to life, unanimously affirmed.

Upon a remand for resentencing, the court providently exercised its discretion in reimposing the original sentence (*see People v Flowers*, 28 NY3d 536 [2016]), and we perceive no basis for reducing the resentence.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11750-
11750A Index 154173/16

Chi Hung Ngo,
Plaintiff-Respondent,

-against-

Chi Vy Ngo, also known as
Chivy Ngo, et al.,
Defendants-Appellants,

69 Clinton NPG, LLC,
Defendant.

_____

Joseph C. Cacciato, New York, for appellants.

Max D. Leifer, P.C., New York (Max D. Leifer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 2, 2019, after trial, awarding plaintiff the aggregate amount of $2,568,311.46, pursuant to an order, same court and Justice, entered November 30, 2018, which awarded plaintiff damages on his claim and dismissed defendants' counterclaim with prejudice, unanimously affirmed, with costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court granted plaintiff's pre-discovery motion for summary judgment on defendants' liability for the fraudulent sale of real property, and awarded plaintiff 49% of the sale proceeds, investment proceeds, and operations proceeds from the operation of the premises for three years before May 18, 2016. This Court affirmed (166 AD3d 430 [1st Dept 2018]).

In October 2018, the parties consented to a trial on plaintiff's damages claim and defendants' counterclaim, despite there being a pending summary judgment motion filed by defendants. Defendants cannot now, after having had a trial on the counterclaim, which resulted in its dismissal, seek summary judgment in their favor on that counterclaim (*see Ortiz v Jordan*, 562 US 180, 184 [2011]).

Defendants' contentions that the court improperly shifted the burden of proof with respect to damages on plaintiff's claim, and that it issued an award that was against the weight of the evidence on that claim, as well as on the counterclaim, are unavailing. The record establishes that the court did not err or abuse its discretion in evaluating the evidence or the credibility of the witnesses with respect to the claim and counterclaim.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11751 In re Alejandro F.C., Dkt. V-27377/16
Petitioner-Respondent, V-7551/17

-against-

Alexis O.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Andrew J. Baer, New York, for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Chai Park of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about June 17, 2019, which, to the extent appealed from as limited by the briefs, after a hearing, awarded petitioner father primary physical custody of the subject child, unanimously affirmed, without costs.

The award of primary physical custody of the child to petitioner father has a sound and substantial basis in the record. The court properly considered the totality of the circumstances and concluded that the best interests of the child would be served if he resided primarily with petitioner (*see Eschbach v Eschbach*, 56 NY2d 167, 171, 172-173 [1982]; Domestic Relations Law § 70). The record shows that the child had lived

primarily with petitioner since he was three years old and that petitioner was better able than respondent mother to provide a stable environment for him and to attend to his emotional, educational, and medical needs.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11752 Mayra Moran, Index 304288/12
Plaintiff-Respondent,

-against-

2085 LLC, et al.,
Defendants,

Webster Lock & Hardware Co. Inc.,
Defendant-Appellant.

_____

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Adam C. Calvert of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered on or about December 9, 2019, which denied defendant Webster Lock & Hardware Co. Inc.'s (Webster) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant Webster was retained to make repairs on a stairway in plaintiff's building, where she fell on a loose step. While Webster claims that, as a contractor, it owed no duty of care to plaintiff, the record presents issues of fact as to whether its welders exercised reasonable care while repairing the stairway and caused the subject step to become loose and unstable, thereby launching a force or instrument of harm, causing plaintiff's injuries (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139 [2002]). The property manager for codefendant Chestnut Holding of New York, Inc. testified at his deposition that Webster was

retained to repair the stairway, including the step where plaintiff alleges she fell, about a month before the accident and that the work was not completed until after she fell (*see Karydas v Ferrara-Ruurds*, 142 AD3d 771, 772 [1st Dept 2016]; *Lopez v New York Life Ins. Co.*, 90 AD3d 446, 447 [1st Dept 2011]). Contrary to Webster's contention, notations on its September 22, 2011 invoice do not definitively establish its initial burden to show that its welders did not cause the subject step to become loose and unstable while repairing the stairway or that it owed no duty to plaintiff with respect to its work (*see Cardenas v Somerset Partners, LLC*, 158 AD3d 439, 440 [1st Dept 2018]).

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11753 The People of the State of New York, Ind. 553/18
Respondent,

-against-

Jamel Clay,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about December 14, 2018, 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 providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant has not established that his presumptive risk level overassesses his risk of sexual recidivism, or any mitigating factors that would warrant a departure.

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

ENTERED: JULY 2, 2020

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CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11754 The People of the State of New York, Ind. 2699/14
Respondent,

-against-

Rafael Gonzalez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered August 2, 2017, convicting defendant, after a jury trial, of attempted gang assault in the first degree and assault in the third degree (two counts), and sentencing him to an aggregate term of 8½ years, unanimously affirmed.

The court providently exercised its discretion in responding to the People's belated disclosure of some records relating to the two victims' injuries by adjourning for four days and allowing recross-examination of the victims, while denying requests for a mistrial or preclusion of certain evidence (*see People v Cabrera*, 137 AD3d 707, 708 [1st Dept 2016], *lv denied* 27 NY3d 1129 [2016]). The court reasonably found that the People's delay in obtaining the records, including some materials concerning shoulder surgery received by one victim, did not result in substantial prejudice, because, among other things, the defense had received other records of the same surgery about two

weeks earlier, well before the opening statements. These other records adequately revealed the extent and significance of the victims' injuries, and we find unpersuasive defendant's argument that his trial strategy was impacted by the belated disclosure of the records at issue. Moreover, the delay was not caused by bad faith (*see People v Aulet*, 221 AD2d 281, 283 [1st Dept 1995], *lv denied* 88 NY2d 980 [1996]). In any event, any error was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's arguments concerning the People's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). Any improprieties in the challenged remarks by the prosecutor were not so egregious as to deprive defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11755 In re Steven L., Dkt. O-12528/18
Petitioner-Respondent,

-against-

Audrey L.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

Steven L., respondent pro se.

_____

Order, Family Court, New York County (Jacob Maeroff, Referee), entered on or about September 10, 2019, which denied respondent's motion to vacate an order of protection entered upon her default, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for her failure to appear at the hearing on the family offense petition (*see* CPLR 5015[a][1]; *Matter of Jenny F. v Felix C.*, 121 AD3d 413 [1st Dept 2014]). She also failed to offer any meritorious defense to the underlying claims. Regardless of respondent's grievances against her brother, she did not deny her threatening

behavior that supported the Order of Protection.

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

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11756 Andrzej Kolakowski, Index 160201/13
Plaintiff-Respondent-Appellant,

-against-

10839 Associates, et al.,
Defendants-Appellants-Respondents.

- - - - -

10839 Associates, et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

American Pipe & Tank Lining Co., Inc., et al.,
Third-Party Defendants-Respondents.

_____

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for appellants-respondents.

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

Kennedys CMK LLP, New York (Michael R. Schneider of counsel), for respondents.

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Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered March 26, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint and on its third-party claim for contractual indemnification, denied plaintiff's cross motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim, and granted so much of third-party defendants' separate motion as was for summary judgment dismissing the third-party claim for contractual indemnification, unanimously affirmed, without costs.

Summary judgment in any party's favor on plaintiff's Labor Law § 240(1) claim is precluded by issues of fact as to whether, and to what extent, plaintiff's employer directed him to use a safety harness, and whether plaintiff's failure to abide by any such direction rendered him a recalcitrant worker and, thus, the sole proximate cause of his accident (*see Biaca-Neto v. Boston Rd. II Housing Development* Fund Corp, 34 NY3d 1166, 1168 [2020]).

Defendants' argument that the Labor Law § 241(6) claim should be dismissed because plaintiff was the sole proximate cause of his accident is improperly raised for the first time on appeal (*see Ervin v Consolidated Edison of N.Y.*, 93 AD3d 485, 485 [1st Dept 2012]). In any event, issues of fact remain as to whether plaintiff was the sole proximate cause of his accident, as discussed above (*see Gurung v Arnav Retirement Trust*, 79 AD3d 969, 970 [2d Dept 2010]). For this reason, we also decline plaintiff's invitation to search the record and grant him summary judgment on the issue of liability on this claim (*see id.*).

Defendants also failed to establish their prima facie entitlement to summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, since they "submitted no evidence of the cleaning schedule for the [site of plaintiff's accident] or when the site had last been inspected before the accident" (*Pereira v New Sch.*, 148 AD3d 410, 413 [1st Dept 2017]; *see Ladignon v Lower Manhattan Dev. Corp.*, 128 AD3d 534, 535 [1st Dept 2015]). Rather, they "merely pointed to gaps in plaintiff's

proof," which was insufficient to meet their initial burden (*Torres v Merrill Lynch Purch.*, 95 AD3d 741, 742 [1st Dept 2012]; *see McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]).

Finally, the court properly dismissed defendants' third-party contractual indemnification claim. An indemnification "clause in a contract executed *after* a plaintiff's accident may . . . be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made as of [a pre-accident date], and that the parties intended that it apply as of that date" (*Podhaskie v Seventh Chelsea Assoc.*, 3 AD3d 361, 362 [1st Dept 2004] [citation and internal quotation marks omitted, alteration and emphasis in original]). Here, third-party defendants' principal did not execute an indemnification agreement with defendants until three days after plaintiff's accident. The principal testified that he could "only guess" that defendants wanted him to backdate the agreement so that it would cover plaintiff's accident, but he did not do so, and there is no other evidence in the record to

suggest that the agreement was, in fact, intended to apply retroactively. Accordingly, third-party defendants established their prima facie entitlement to dismissal of the third-party contractual indemnification claim, in opposition to which defendants failed to raise an issue of fact.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11757 Patricia Boyd, et al., Index 111378/11
Plaintiffs-Appellants,

-against-

254 PAS Property LLC, et al.,
Defendant-Respondents.

_____

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellants.

Gartner + Bloom, PC, New York (Arthur P. Xanthos of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 3, 2019, which denied plaintiffs' motion, under various provisions of the Debtor and Creditor Law, for certain discovery, a constructive trust and attorney's fees, unanimously affirmed, without costs.

Plaintiffs' appeal, as expressed in their reply brief, is limited to the court's decision not to grant the relief sought, under former Debtor and Creditor Law § 279, which requires a showing of actual fraudulent intent. This may be shown through "badges of fraud," such as "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]).

Here, plaintiffs failed to demonstrate by clear and convincing evidence that the transfers were actually fraudulent (*see generally United States v McCombs*, 30 F3d 310, 328 [2d Cir 1994]). Rather, the record shows that the transfers were made at market prices, were publicly disclosed, and were made in the ordinary course of defendants' business over a period of almost 10 years.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11758-
11758A In re Yumara T., and Others, Dkt. NA-11788-90/17

Children Under Eighteen Years
of Age, etc.,

Raymond K.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Cynthia Kao of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about April 23, 2019, insofar as it brings up for review a fact-finding order, same court (Monica D. Shulman, J.), entered on or about June 19, 2018, which, after a trial, found that respondent abused and neglected the child Y.S.T. and derivatively abused and neglected the other subject children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Respondent argues that the court deprived him of due process by making its findings pursuant to the theory of res ipsa loquitur, because the pleadings were not conformed to the proof, and he was not on notice that the court would consider the

theory. The court's findings of fact were made in accordance with the rebuttable presumption permitted pursuant to FCA 1046 [a][ii]. While the Court of Appeals has long held that this statutory presumption is analogous to res ipsa loquitur (*Matter of Philip M.*, 82 NY2d 238 [1993]), application of a statutory, presumption is a matter of evidence and need not be set out in the petition (see generally Guide to NY Evid. rule 3.01, Presumptions; https:/www.nycourts.gov/JUDGES/evidence/3-PRESUMPTIONS/3.01_PRESUMPTIONS_CIVIL.pdf). Respondent was not deprived of due process because the court's findings were not based on facts of a wholly different character from that of the facts alleged in the petition or a situation in which respondent was deprived of an opportunity to prepare an answer to newly asserted claims (*see e.g. Matter of Malachi B. [Windell B.]*, 155 AD3d 492 [1st Dept 2017]; *Matter of Arianna S. [Virginia R.]*, 111 AD3d 461 [1st Dept 2013]). The court's findings were based on medical records from June through August 2017, which, although they post-date the petition, document the very same wrongdoing as is alleged in the petition, i.e., sexual abuse of Y.S.T. Respondent was aware of these records, which showed that Y.S.T. had tested positive for chlamydia, a sexually transmitted disease, by October 25, 2017, when petitioner moved them into evidence, and he was aware of the court's theory of the case on November 15, 2017, when his motion to dismiss was denied. Fact-finding was then adjourned for more

than six months, to May 24, 2018, before respondent presented his case.

A preponderance of the evidence supports the finding that respondent abused Y.S.T. (*see* Family Court Act § 1046[a][ii]; 1046[b][i]). A prima facie case of abuse may be established by evidence of an injury to a child that would ordinarily not occur in the absence of an act or omission of the responsible caretakers (Family Court Act § 1046[a][ii]; *see Matter of Philip M.*, 82 NY2d at 243). Unexplained sexually transmitted disease in a child is evidence of sexual abuse (*Matter of Philip M.*, *supra*).

Respondent argues that there is no proof that Y.S.T. had a sexually transmitted disease, no proof that even if she had chlamydia she was in his care when she contracted it, and no proof that she was not sexually active when she was in the care of others. His contention that the sworn, certified medical records should not have been admitted is unavailing (*see* Family Court Act § 1046[a][iv]). The court properly presumed that Y.S.T. was in respondent's care when she contracted the disease, based on the testimony of the child's mother, which respondent failed to rebut, that respondent lived in their home for 12 years. Respondent's contention that since Y.S.T. reached the age of puberty and attended an inner city public school she must have engaged in sexual activity with peers is rank speculation.

A preponderance of the evidence supports the neglect finding based on respondent's use of alcohol "to the extent that he loses

self-control of his actions" (Family Court Act § 1012[f][i][B]; *see id.* § 1046[a][iii]). Petitioner's child protective specialist testified that respondent told her that, due to alcohol use, he could not recall whether he had abused Y.S.T. and that he routinely drank to the point of passing out. Respondent cites his testimony disputing petitioner's witness's account of what he told her, but the court's credibility determinations are entitled to deference, and we see no basis for disturbing them (*see Matter of Puah B. [Autumn B.]*, 173 AD3d 422, 424 [1st Dept 2019], *appeal dismissed* 33 NY3d 1117 [2019]).

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

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11759 The People of the State of New York, Ind. 3610/15
Respondent,

-against-

Desmond Laverpool,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Molly Schindler of counsel), and White & Case LLP, New York (Hyun Bin Kang of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered on March 10, 2017, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendant's challenge for cause to a prospective juror should have been granted. The challenged panelist stated that he could not be "fully fair" if defendant did not testify and "defend himself," and that it might be difficult for him to acquit a defendant who did not testify, because then "we only get one side." This reflected a state of mind likely to preclude the rendering of an impartial verdict (*see* CPL 270.20[1][b]), and the court did not elicit an unequivocal assurance that he would set aside any bias and render an impartial verdict based on the evidence (*see People v Bludson*, 97 NY2d 644 [2001]). When the

court asked if he would "hold it against" defendant if defendant did not testify, he responded "No, not hold it against him, but -- I don't know." When the court further asked whether defendant's failure to testify would trouble the panelist to the point where he could not give defendant a fair trial, he responded "I think I'll be able to give him a fair trial." Although expressions such as "I think" are not disqualifying, here the panelist's responses, viewed as a whole, fell short of the required express and unequivocal declarations (*see People v Blyden*, 55 NY2d 73, 79 [1982]). "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another" (*People v Arnold*, 96 NY2d 358, 362 [2001] [internal quotation marks omitted]).

Because we are ordering a new trial, we find it unnecessary to reach any other issues, except to find that defendant is not entitled to dismissal of the indictment, because the verdict was supported by legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11760 The People of the State of New York, Ind. 2519/16
Respondent,

-against-

David Howlett,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Scott H. Henney of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Steven M. Statsinger, J.), rendered April 22, 2019, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly found that defendant violated the conditions of his plea agreement, and thereby forfeited the opportunity to have his conviction replaced by a misdemeanor conviction. Initially, we find that the court providently exercised its discretion in considering the evidence and arguments submitted on defendant's motion, rather than holding an evidentiary hearing (*see People v Outley*, 80 NY2d 702, 713 [1993]). The court correctly determined that defendant violated the agreement in two independent ways: by being arrested, and by committing a new crime, consisting of filing false documents.

Defendant's various challenges to the court's determination that he committed a new crime by submitting fraudulent letters to the Bronx District Attorney's Office are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the People met their burden to show the commission of a new crime, and the Court was permitted to consider hearsay evidence in determining whether a plea condition had been violated (*see Matter of Edwin L.*, 88 NY2d 593, 605 [1996]).

The court also found that defendant violated the no-arrest condition of the agreement. There was a legitimate basis for defendant's arrest, because the record demonstrates that the police saw him unlawfully drinking alcohol from an open container, and that he was found to be in possession of a knife described by the arresting officer as a "switchblade/gravity knife," which was still unlawful at the time of the arrest. The sentencing court's ruling was broad enough to cover both bases for the arrest.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11761 The People of the State of New York, Ind. 775/18
Respondent,

-against-

Michael Vasquez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Zucker 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 (Laura A. Ward, J.), rendered January 28, 2019,

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.

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

ENTERED: JULY 2, 2020

CLERK

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

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11762 American Medical Alert Corp., Index 655974/16
Plaintiff-Appellant,

-against-

Evanston Insurance Company,
Defendant-Respondent,

Michael G. Kaiser, M.D., et al.,
Defendants.

_____

Clemente Mueller, P.A., New York (William F. Mueller of counsel), for appellant.

Tressler LLP, New York (Royce F. Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered June 12, 2019, which (1) granted defendant Evanston Insurance Company's (Evanston) cross motion for summary judgment for a declaration that it had no duty to defend and indemnify plaintiff American Medical Alert Corp. (AMAC), and to dismiss the complaint, and (2) denied AMAC's motion for summary judgment, unanimously affirmed, with costs.

The IAS court properly declared that Evanston had no duty to indemnify AMAC, based on the prior knowledge condition in the policy. Under the two-pronged "subjective/objective" test, the court must "first . . . consider the subjective knowledge of the insured and then the objective understanding of a reasonable [person] with that knowledge" (*Liberty Ins. Underwriters, Inc. v Corpina Piergrossi Overzat & Klar LLP*, 78 AD3d 602, 604 [1st Dept 2010]; *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss &*

Co., 80 AD3d 431 [1st Dept 2011]). In applying this test, the IAS court properly found that AMAC's admitted knowledge of the "relevant facts" in this case would lead a reasonable person in possession of those facts to "expect such facts to be the basis of a claim" (*Liberty Ins.*, 78 AD3d at 605). Specifically, AMAC does not contest that its errors caused a "serious delay" in the underlying plaintiff receiving the "patient care she needed." Instead, its acknowledgment that directing calls promptly to doctors in situations where time was of the essence was precisely the function that the Hospital had hired it to perform. AMAC's attempts to add additional requirements to the subjective/ objective test that the law does not require were properly rejected by the IAS court.

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

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11763 The People of the State of New York, Respondent,

Ind. 509/16

-against-

Leroy Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Emilia King-Musza of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Neil E. Ross, J. at dismissal motion; Michael J. Obus, J. at jury trial and sentencing), rendered May 10, 2018, convicting defendant of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The sequence of events, viewed in its entirety, supports the conclusion that defendant intentionally aided three other men in an attempt to rob the victim (*see* Penal Law § 20.00; *People v Kelley*, 162 AD3d 524 [1st Dept 2018], *lv denied* 32 NY3d 938 [2018]). Among other things, defendant, in the victim's words, "advised" him to surrender his money to defendant's more aggressive companions. The jury could have reasonably interpreted this as a thinly veiled threat, and could

reasonably have concluded that defendant was merely playing the role of "good robber" while his companions acted as the "bad robbers." Furthermore, defendant helped his companions scare away two passersby who sought to intervene.

Defendant's claim that his initial attorney rendered ineffective assistance by failing to effectuate his client's desire to testify before the grand jury is unavailing (*see People v Simmons*, 10 NY3d 946, 949 [2008]; *People v Wiggins*, 89 NY2d 872 [1996]).

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11764 Luis Gonzalez, Index 157389/12
Plaintiff-Respondent,

-against-

O Tembelis Trans, Inc., et al.,
Defendants,

Galaxy Towers, Inc., et al.,
Defendants-Appellants.

_____

Stonberg Moran, LLP, New York (Carmen L. Borbon of counsel), for appellants.

Cellino & Barnes, Garden City (John E. Lavelle of counsel), for respondent.

_____

Order, Supreme Court, New York County (Adam Silvera, J.), entered December 20, 2019, which, insofar as appealed from, denied the motion of defendants Galaxy Towers, Inc. and Jamie Solis for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established their prima facie entitlement to judgment as a matter of law by showing that plaintiff violated Vehicle and Traffic Law § 1214 by opening the door of the taxi cab in which he was a passenger into the side of the passing bus driven by defendant Solis after the front of the bus had passed (*see Perez v Steckler*, 157 AD3d 445 [1st Dept 2018]; *Montesinos v Cote*, 46 AD3d 774 [2d Dept 2007]).

In opposition to defendants' showing that Solis was not negligent in connection with the accident, plaintiff failed to raise a triable issue of fact (*see Smith v City of New York*, 179 AD3d 500, 501 [1st Dept 2020]).

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11766N Jean-Pascal Simon, Index 162867/14
Plaintiff-Appellant,

-against-

FrancInvest, S.A.,
Nominal Defendant,

JJS Group, Inc.,
Nominal Defendant-Respondent,

French-American Surgery Center,
Inc., et al.,
Defendants-Respondents,

Fifth Avenue Surgery Center, LLC, et al.,
Defendants.

_____

Law Office of Nancy J. Volin, New York (Nancy J. Volin of counsel), for appellant.

Lebow & Sokolow LLP, New York (Mark D. Lebow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 14, 2019, which denied plaintiff's motion for a default judgment against nominal defendants (FrancInvest and JJS), unanimously affirmed, with costs.

The court providently exercised its discretion in denying plaintiff's motion for a default judgment against FrancInvest and JJS and instead setting a schedule for the service of pleadings in light of various orders concerning the complaint (*see Simon v FrancInvest, S.A.*, 178 AD3d 436 [1st Dept 2019]). While

FrancInvest and JJS are appropriate parties given that plaintiff's current remaining claims are stockholder derivative claims, they are nominal defendants against which no direct claims have been made or relief sought.

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

ENTERED: JULY 2, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Kern, Oing, González, JJ.

11767N Valiant Insurance Company, Index 655687/16
Plaintiff-Appellant,

-against-

Utica First Insurance Company,
Defendant-Respondent.

_____

Kennedys CMK LLP, New York (Kristin V. Gallagher of counsel), for appellant.

Farber Brocks & Zane L.L.P., Garden City (Andrew J. Mihalick of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Melissa A. Crane, J.), entered May 21, 2019, granting defendant's motion to reargue an order, same court and Justice, dated October 1, 2018, which denied defendant's motion to dismiss and granted plaintiff's cross motion for summary judgment on its cause of action for a declaration that defendant had a duty to defend and indemnify plaintiff's additional insureds in an underlying action, and upon reargument, vacating its prior order, granting defendant's motion to dismiss and denying plaintiff's cross motion, unanimously affirmed, with costs.

Defendant's July 25, 2014 disclaimer of coverage to its insured, with copies to the additional insureds, was timely made within two days of defendant's initial receipt of notice of tender for a defense and indemnity (*see generally* Insurance Law § 3420[d][2]). While the disclaimer was addressed directly to its insured, it clearly stated that specified exclusions in the

policy, and particularly the employee exclusion, precluded any coverage to its insured or the additional insureds. Defendant copied counsel for the owner and general contractor, and the disclaimer notice was sufficiently specific to apprise the additional insureds of the reasons for a disclaimer as to them (*see generally Sierra v 4401 Sunset Park, LLC*, 24 NY3d 514 [2014]; *General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]; *Matter of Aetna Cas. & Sur. Co. v Rodriguez*, 115 AD2d 418, 420 [1st Dept 1985]).

We have considered plaintiffs remaining arguments and find them unavailing.

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

ENTERED: JULY 2, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11835 In re The People of the State of New York, ex rel. Alma Magana, on behalf of Uceff Wade, Petitioner-Appellant,

-against-

Cynthia Brann, New York City Department of Correction, Respondent.

Index 451077/20

Janet Sabel, The Legal Aid Society, New York (Tim Pruitt of counsel), for appellant.

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

Judgment (denominated an order), Supreme Court, New York County (Curtis J. Farber, J.), entered on or about March 27, 2020, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

We find that the writ of habeas corpus was properly denied (*see* CPLR 7010). There was no abuse of discretion.

ENTERED: JULY 2, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische
Barbara R. Kapnick, JJ.

11415
Ind. 1518/12

_____x

The People of the State of New York,
Respondent,

-against-

Darrell Patillo,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (John S. Moore, J.), rendered June 19, 2014, convicting defendant, upon his plea of guilty, of murder in the second degree and attempted murder in the second degree, and imposing sentence.

Christina A. Swarns, Office of The Appellate Defender, New York (Stephen Chu and Kami Lizarraga of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun and Ryan J. Foley of counsel), for respondent.

MANZANET-DANIELS, J.

The evidence showed defendant to be suffering from significant intellectual disability. Under these circumstances, the court was under an obligation to engage in a more probing colloquy to ensure that defendant understood the ramifications of entering a guilty plea and of waiving his right to appeal. We accordingly vacate his plea in the interest of justice and remand for further proceedings.

By definition, an intellectual disability involves deficits in intellectual and adaptive functioning (*see Hall v Florida*, 572 US 701, 709-710 [2014]; *Atkins v Virginia*, 536 US 304, 318 [2002]). It is characterized by "deficits in general mental abilities," together with "impairment in everyday adaptive functioning" that emerges during childhood (Diagnostic and Statistical Manual of Mental Disorders, at 37 [5th ed 2013]). The IQ threshold for intellectual disability is 70, well below the mean IQ of 100. The threshold between mild and moderate intellectual disability falls around 50-55.

People with intellectual disabilities possess "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" (*Atkins*, 536 US at 318). They are overly

compliant and frequently "yea-saying" (*People v Knapp*, 124 AD3d 36, 46 [4th Dept 2014] [internal quotation marks omitted]). They are "easily confused, highly suggestible, and easy to manipulate" (*id.* [internal quotation marks omitted]).

These traits render people with intellectual disabilities uniquely vulnerable to injustice within criminal proceedings. They are more likely to give false confessions and less able to meaningfully assist their counsel (*see Hall*, 572 US at 709). An intellectually disabled defendant must possess the capacity to appreciate the nature and consequences of his or her conduct and that it was wrong (*see* Penal Law § 40.15). He cannot be convicted if he lacks capacity to understand the proceedings against him or to participate in his own defense (*see* CPL 730.10[1]). Even if he has sufficient understanding to be held responsible, a court must account for his diminished mental capacity in ensuring that any waiver of constitutional rights is knowing, intelligent and voluntary (*see People v Bradshaw*, 18 NY3d 257, 266 [2011] [trial court was obliged to "give defendant a thorough explanation" and to ensure that "defendant fully grasped the nature of this fundamental right that he was foregoing," in light of the defendant's background and history of mental illness]).

Defendant's psychological assessments cast serious doubt

about his ability to enter a knowing and voluntary plea. DOE records showed defendant to have been diagnosed as mentally retarded and to suffer from "severe academic delays." The records indicated that with an IQ of only 56, defendant had "extremely low" "general cognitive ability," with "overall thinking and reasoning abilities" in the bottom 0.2%. Those records further indicated that defendant's verbal comprehension, perceptual reasoning, working memory, and processing speed were "extremely low," in the bottom 0.2 to 2%.

The CPL 390 report, ordered by the trial court in aid of sentencing, confirmed the doubts regarding defendant's mental capacity and ability to understand or participate in the proceedings. Doctors at Bellevue observed defendant to suffer from an intellectual disability with "extremely low" intellectual functioning. Defendant's IQ placed him in the bottom one percentile as compared to his peers. The report noted that defendant's limited cognitive abilities placed him at increased risk of impulsive behavior without regard to the consequences of his actions.

"[E]vidence of a defendant's irrational behavior" and his demeanor at trial are relevant considerations in determining whether further inquiry into his competence is required (*Drope v Missouri*, 420 US 162, 180 [1975]). In view of the records

showing defendant's limited cognitive abilities, his refusals to attend court or to consult with his lawyer provide further reason to doubt his competence and belie an ability to enter a knowing and voluntary plea and to assist in his defense. At sentencing, the court itself commented on defendant's refusals to appear in court and "difficult" behavior. The court believed this to be indicative of defendant's sociopathy; however, defendant's refusal to participate in the proceedings was likely reflective of his diminished mental capacity. The court's singular perspective appears to have caused it to overlook contemporaneous assessments and other evidence of defendant's intellectual disability.

A trial court bears the responsibility to confirm that a defendant's plea is "knowing, intelligent and voluntary" and thus "ensure that a criminal defendant receives due process before pleading guilty and surrendering his or her most fundamental liberties to the State" (*People v Peque*, 22 NY3d 168, 184 [2013], *cert denied* 574 US 840 [2014]). Courts must ensure the knowingness and voluntariness of each plea based on the totality of circumstances, including the "age, experience and background of the accused" (*People v Vickers*, 84 AD3d 627, 628 [1st Dept 2011] [internal quotation marks omitted]). Information in the court records may warrant a "more probing inquiry," particularly

where the record alerts the court to a defendant's "mental illness or other defect which might call into question his ability to apprehend the effect of his statements" (*People v Palmer*, 159 AD3d 118, 122 [1st Dept 2018]).

A more probing inquiry was warranted here to ensure that defendant understood the constitutional rights he was waiving, given his significant intellectual disability. The court knew, based on the records, that defendant's intellectual functioning was "extremely low," with "overall thinking and reasoning abilities" and "verbal comprehension" falling in the bottom 0.2 and 0.5 percentile. Bellevue's assessment placed defendant's "word knowledge and language development" at less than 0.1 percentile.

In light of this information, the court should have known that the standard plea allocution would be near incomprehensible to defendant. Yet the court made no effort to translate the standard litany into simple language that would be understandable to someone with defendant's limited capacities.

Under the circumstances, defendant's plea could not have been knowing and voluntary. Where the court has reports from mental health professionals detailing a defendant's mental capacity, the court should be alerted to ensure that the defendant understands the nature of the fundamental rights he is

waiving (*see e.g. People v Cleverin*, 140 AD3d 1080, 1082 [2d Dept 2016] [mentally-retarded defendant with an IQ of 53 did not knowingly and voluntarily waive his *Miranda* rights]).

The allocution was not salvaged by defendant's mechanistic recitation of "yes" in response to the court's questions. People with intellectual disabilities are, by virtue of their disability, easily confused, suggestible, and susceptible to manipulation (*see Knapp*, 124 AD3d at 46). As a result, mentally retarded persons are "frequently yea-saying" and "intensive questioning will tend to elicit an affirmative response" (*id.*). Defendant's recitation of "yes" to the court's questions during his allocution in no way demonstrated his comprehension of the plea or that he was voluntarily waiving his rights.

Accordingly, the judgment of the Supreme Court, Bronx County (John S. Moore, J.), rendered June 19, 2014, convicting defendant, upon his plea of guilty, of murder in the second degree and attempted murder in the second degree, and sentencing

him to an aggregate term of 20 years to life, should be reversed, in the interest of justice, the plea vacated, and the matter remanded for further proceedings.

All concur.

Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered June 19, 2014, reversed, in the interest of justice, the plea vacated, and the matter remanded for further proceedings.

Opinion by Manzanet-Daniels, J. All concur.

Acosta, P.J., Richter, Manzanet-Daniels, Gische, Kapnick, JJ.

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

ENTERED: JULY 2, 2020

CLERK