SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 4, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

6877-
6878 Index 653514/16

Neda Talebian Funk, et al.,
Plaintiffs-Respondents,

-against-

Seligson, Rothman & Rothman, Esqs., et al.,
Defendants-Appellants.

_____

Seligson, Rothman & Rothman, Esqs., New York (Stewart Rothman and Martin S. Rothman of counsel), for appellants.

Santamarina & Associates, New York (Gil Santamarina of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered February 6, 2017, in plaintiffs' favor against defendant Petit 5, LLC, in the amount of $55,180.60, unanimously reversed, on the law, without costs, the judgment vacated, and plaintiffs' motion for summary judgment denied. Appeal from order, same court and Justice, entered January 20, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Paragraph 25(d) of the agreement between plaintiffs and

Petit states, "If no Commitment is issued by the Institutional Lender on or before the Commitment Date, ... [plaintiffs] may cancel this contract ..., provided that ... [they] ha[ve] complied with all [their] obligations under this paragraph 25." In turn, plaintiffs' obligations under paragraph 25 included making a prompt application to one or more Institutional Lenders, pursuing such application with diligence, and cooperating in good faith with the lender(s).

Plaintiffs' June 9, 2016 notice cancelling the contract merely stated that they had "complied with all their obligations under Paragraph 25." The following day, Petit's counsel (Alyne Diamond) asked plaintiffs' transactional counsel (Steven Mero) to provide documentation of their good-faith pursuit of financing.

Paragraph 25(d) is ambiguous (*see generally Goldman Sachs Group, Inc. v Almah LLC,* 85 AD3d 424, 426 [1st Dept 2011], *lv dismissed* 18 NY3d 877 [2012]). On the one hand, it could mean, as plaintiffs contend, that they only have to say they are in compliance. On the other hand, it could also mean, as defendants contend, that plaintiffs have to *show* they were in compliance; defendants did not have to accept plaintiffs' mere say-so.

"If a contract is ambiguous, it cannot be construed as a matter of law" (*Rubin v Baumann,* 148 AD3d 556 [1st Dept 2017] [internal quotation marks omitted]). Therefore, plaintiffs were

not entitled to summary judgment (*see id.*).

Even if plaintiffs' June 9, 2016 notice were sufficient, there is an issue of fact as to whether plaintiffs withdrew it and agreed to proceed with the transaction if Petit agreed to extend the Commitment Date and closing, which it did. After defendants submitted Diamond's affirmation, detailing her dealings with Mero, plaintiffs failed to submit either an affirmation or an affidavit from him; hence, they are deemed to have admitted the facts in Diamond's affirmation (*see e.g. Kuehne & Nagel v Baiden,* 36 NY2d 539, 544 [1975]). Moreover, although the contract required plaintiffs' cancellation notice to be in writing, it did not require a withdrawal of the notice to be in writing.

Nevertheless, defendants are not entitled to summary judgment because their own submissions (i.e., some of their exhibits) showed that plaintiffs may have insisted on a new written contract. In other words, it is unclear whether plaintiffs agreed to proceed (a) if Petit postponed the Commitment Date and closing or (b) only if there were a new written agreement. "When parties do not intend to be bound until their agreement is reduced to writing and signed, there is no contract in the interim even if the parties have orally agreed upon all the terms of the proposed contract" (*Chatterjee Fund*

Mgt. v Dimensional Media Assoc., 260 AD2d 159, 159 [1st Dept 1999] [internal citations omitted]; *see also e.g. Scheck v Francis,* 26 NY2d 466, 469 [1970]). The doctrines of promissory estoppel, equitable estoppel, and part performance do not entitle defendants to summary judgment, either.

An additional issue of fact arises from paragraph 25(a), which states, "[A] commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a 'Commitment' hereunder until an appraisal is approved (and if that does not occur before the Commitment Date, [plaintiffs] may cancel under paragraph 25 ... (d) *unless the Commitment Date is extended)"* (emphasis added). It is undisputed that Petit extended the Commitment Date; however, it did not do so in writing, and the contract requires all modifications to be in writing signed by the party to be charged. However, "a contractual prohibition against oral modification may itself be waived" (*Rose v Spa Realty Assoc.,* 42 NY2d 338, 343 [1977]), and waiver is usually a question of fact (*see e.g. Fundamental Portfolio Advisors, Inc. v Toqueville Asset Mgt., L.P.,* 7 NY3d 96, 104 [2006]; *Alsens Am. Portland Cement Works v Degnon Contr. Co.,* 222 NY 34, 37 [1917]).

If it is ultimately determined that defendants should have returned plaintiffs' down payment on or about June 20, 2016, it

may be entitled to interest at the statutory rate of 9% from that date forward (*see J. D'Addario & Co., Inc. v Embassy Indus., Inc.*, 20 NY3d 113, 117 [2012]; *NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]).

Seligson contends that, since the court dismissed all of plaintiffs' claims against it, the court should have granted Seligson summary judgment on its counterclaim for indemnification. However, even if Seligson forewent income when one or more of its lawyers defended it in this action instead of working for paying clients, it cites no authority for the proposition that such foregone income constitutes the type of "reasonable attorneys' fees" for which plaintiffs and Petit are required to indemnify it.

In light of our reversal of the grant of summary judgment to plaintiffs, defendants' argument that they needed discovery to oppose the motion is academic.

It is unclear whether defendants are arguing that paragraph 5(B) of the contract entitles them to summary judgment. If so, that argument is unavailing, as it did not give Petit the

unilateral right to adjourn the Commitment Date (as opposed to the closing).

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7224 The People of the State of New York, Respondent, Ind. 2839/11

-against-

Jose Rodriguez, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Frank P. Milano, J.), rendered July 25, 2013, convicting defendant, after a jury trial, of menacing in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to time served and a fine of $1,000, 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 for disturbing the jury's credibility determinations. The evidence established that defendant threatened the victims with a handgun, and fired it.

Defendant validly waived his right under *People v Antommarchi* (80 NY2d 247 [1992]) to be present at bias-related bench conferences with prospective jurors (*see People v Velasquez*, 1 NY3d 44 [2003]). Even though defendant declined to

sign a written *Antommarchi* waiver, the court advised him that he had the right to attend bench conferences, and he chose not to do so (*see People v Flinn*, 22 NY3d 599, 601 [2014]; *People v Williams*, 15 NY3d 739, 740 [2010]). Given the totality of circumstances and sequence of events, defendant's refusal to sign the document did not negate his waiver.

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

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7225 Barbara A. Lowenstern, Index 159528/14
Plaintiff-Respondent,

-against-

Sherman Square Realty Corp., et al.,
Defendants-Appellants.

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellants.

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Christopher L. Sallay of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 3, 2017, which, inter alia, denied defendants' motion for summary judgment dismissing the complaint in its entirety, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The defendants made a prima facie showing of entitlement to summary judgment based on the storm-in-progress doctrine through the submission of their witness's and a nonparty witness's deposition testimony, as well as certified meteorological data and an affidavit from a meteorologist, all of which establish that there was a storm in progress at the time of plaintiff's accident (*see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept 2013]). In addition, the building surveillance videos

show that snow was falling at the time of plaintiff's accident.

Plaintiff's conclusory deposition testimony that it was not snowing at the time of her accident fails to raise a triable issue of fact.

Nor has plaintiff demonstrated that defendants' pre-salting of the subject sidewalk created or exacerbated a dangerous condition. Defendants submitted competent evidence that pre-salting the sidewalk was reasonable and prudent under the circumstances, and plaintiff's speculation that a jury could conclude otherwise was insufficient to defeat defendants' motion (*see Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 [1st Dept 2009]).

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7226-
7226A In re Tyrone F.,
Petitioner-Respondent,

-against-

Mariah O.,
Respondent-Appellant.

- - - - -

In re Sayoni S.S.F.,

A Child Under Eighteen Years
of Age, etc.,

Mariah O.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent,

Tyrone F.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Thomas R. Villecco, Jericho, for Tyrone F., respondent.

Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for Administration for Children's Services, respondent.

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

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Orders, Family Court, Bronx County (David J. Kaplan, J.), entered on or about July 12, 2017, which denied respondent-appellant mother's motion to vacate orders of the same court and Judge, entered on or about January 30, 2017, granting

the order to show cause of petitioner Administration for Children's Services finding that appellant violated the terms of a suspended judgment and ending supervision of the Article 10 petition filed against her; and granting respondent father's petition for custody of the child and dismissing appellant's custody petition, unanimously affirmed, without costs.

The Family Court providently exercised its discretion in denying the motion to vacate the mother's default because the moving papers failed to demonstrate both a reasonable excuse and a meritorious defense (*see Matter of Tyieyanna L. [Twanya McK.]*, 94 AD3d 494 [1st Dept 2012]). The mother's claim that she missed the January 30, 2017 hearing because she lacked the funds for travel from Georgia to the Bronx was unsubstantiated and therefore insufficient as a reasonable excuse for vacating her default (*see Matter of Gloria Marie S.*, 55 AD3d 320, 320 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]). Even if the mother's lack of funds were the true reason for her failure to appear at the hearing, she provided no explanation as to why she did not notify her counsel, the court or the agency of her inability to attend (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538, 539 [1st Dept 2012]; *Matter of Isaac Howard M. [Fatima M.]*, 90 AD3d 559, 560 [1st Dept 2011], *lv dismissed, denied* 18 NY3d 975 [2012]).

Given the mother's failure to establish a reasonable excuse for her default, this Court need not determine whether she established a meritorious defense to the allegation that she violated the suspended judgment (*see Matter of Ne Veah M. [Michael M.]*, 146 AD3d 673, 674 [1st Dept 2017]). In any event, her conclusory denial of violating the order of protection issued against her failed to establish a meritorious defense (*see Matter of Shavenon N. [Miledy L.N.]*, 71 AD3d 401 [1st Dept 2010]).

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7227 Celio Moura, et al., Index 150011/13
Plaintiffs-Respondents-Appellants,

-against-

City of New York,
Defendant-Respondent-Appellant,

New York City Department of
Transportation, et al.
Defendants,

B&H Engineering, P.C.,
Defendant-Appellant-Respondent.

- - - - -

B&H Engineering, P.C.,
Third-Party Plaintiff,

-against-

Rovi Construction Corp.,
Third-Party Defendant-Appellant-Respondent.

- - - - -

[And a Second Third Party Action]

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Wade Clark Mulcahy LLP, New York (Paul W. Vitale of counsel), for B&H Engineering, P.C., appellant-respondent.

Voutè, Lohrfink, Magro & McAndrew, LLP, White Plains (Howard S. Jacobowitz of counsel), for Rovi Construction Corp., appellant-respondent.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for Celio Moura and Gabriella Prata Moura, respondents-appellants.

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Benjamin N. Gonson of counsel), for City of New York, respondent-appellant.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.),

entered May 17, 2017, which, insofar as appealed from as limited by the briefs, denied the motions of defendants City of New York and B&H Engineering, P.C. (B&H) for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.30 as against them, the common-law negligence and Labor Law § 200 claims as against B&H, and the cross claims as against B&H, and granted the motions to the extent of dismissing the section 241(6) claim predicated on Industrial Code § 23-1.7(b)(1)(i), unanimously affirmed, without costs.

The injured plaintiff's employer was hired to erect, move, and adjust rolling scaffolding to facilitate B&H's inspection of the Manhattan Bridge. Viewed under the totality of the circumstances, this work constituted construction and alteration within the contemplation of Labor Law § 241(6) and Industrial Code § 23-1.4(b)(13) (*see Saint v Syracuse Supply Co.*, 25 NY3d 117, 124-125 [2015]; *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]; *cf. Martinez v City of New York*, 93 NY2d 322 [1999]). In addition, the injured plaintiff's work was a covered activity because it involved the construction and alteration of a structure, namely, the large rolling pipe scaffold that he helped erect and alter (*see Lewis-Moors v Contel of N.Y.*, 78 NY2d 942 [1991]; *McMahon v 42nd St. Dev. Project*, 188 Misc 2d 25, 32-33 [Sup Ct, Bronx County 2001]).

The section 241(6) claim predicated on a violation of Industrial Code § 23-1.30 was properly sustained because there is an issue of fact as to whether the light at the accident site (the hole into which plaintiff stepped) was adequate, given the conflicting testimony supplied by defendants and the injured plaintiff (*see Boggs v City of New York*, 135 AD3d 583 [1st Dept 2016]; *Hernandez v Columbus Ctr., LLC*, 50 AD3d 597 [1st Dept 2008]).

The Labor Law § 241(6) claim predicated on a violation of Industrial Code § 23-1.7(b)(1)(i) was properly dismissed because the area into which the injured plaintiff fell did not constitute a hazardous opening within the meaning of that provision (*see Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475 [1st Dept 2014]; *Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Labor Law § 200 and common-law negligence liability cannot be imposed upon B&H premised on the methods and means of the work because it merely exercised general supervisory authority over the injured plaintiff's work. There was no evidence that B&H provided actual supervision or direction over his work on the scaffold (*see Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 [1st Dept 2014]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

Nevertheless, there are issues of fact sufficient to support

Labor Law § 200 and negligence claims as against B&H predicated on the dangerous condition of the premises. Evidence showed that the hole, combined with the alleged inadequate lighting, was a dangerous condition created by B&H when its inspectors removed lighting originally given to the injured plaintiff and his coworkers (*see Hernandez*, 50 AD3d at 598; *cf. Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350-351 [1st Dept 2006]).

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: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7228 Sanjay Sehgal, et al., Index 155018/16
Plaintiffs-Appellants,

-against-

Michael DiRaimondo, et al.,
Defendants-Respondents.

_____

Godosky & Gentile, P.C., New York (Robert E. Godosky of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (Matthew J. Bizzaro of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered March 15, 2017, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, the motion denied as to plaintiffs' legal malpractice claim based on allegations that he traveled outside the United States in reliance on defendants' negligent legal advice as to the immigration consequences of his guilty plea, and otherwise affirmed, without costs.

Plaintiff, a lawful permanent resident of the United States since 1998, pled guilty in 2014 to certain violations of federal election laws and was sentenced to one year probation. He alleges that he separately sought advice from defendants, who are specialists in immigration law, concerning the immigration consequences of his plea. Defendants provided a legal memorandum

in which they advised plaintiff that it was unlikely he would be deported as a result of his plea and that, if he were placed in removal proceedings, he could seek a waiver from inadmissibility. Plaintiff alleges that, in reliance on the advice, he pleaded guilty and later traveled abroad. Upon his return to the United States, plaintiff was detained, placed in removal proceedings, and incarcerated for approximately four months.

Defendants moved to dismiss pursuant to CPLR 3211(a)(1) and (7), arguing that plaintiff's guilty plea bars the malpractice claim and that actions taken by the attorney who represented plaintiff after he was detained may have been an intervening cause of plaintiff's prolonged detention. The motion court granted defendants' motion on the basis that plaintiff had terminated defendants' services before he pleaded guilty and retained other counsel, thus severing the chain of causation.

Neither the allegations in the complaint (CPLR 3211[a][7]), nor the documentary evidence submitted by defendants in support of the motion (CPLR 3211[a][1]), support the motion court's conclusion that subsequent counsel, who was not retained until after plaintiff had already been detained, caused plaintiff's harm.

We affirm dismissal of part of the malpractice claim on alternative grounds. Plaintiff's claim that he pleaded guilty to

criminal charges in reliance on defendants' negligent legal advice concerning the immigration consequences of the plea is barred by his guilty plea and lack of any claim of innocence (*Carmel v Lunney*, 70 NY2d 169, 173 [1987]; *Yong Wang Park v Wolff & Samson, P.C.*, 56 AD3d 351 [1st Dept 2008], *lv denied* 12 NY3d 704 [2009]).

However, the policy underlying the rule established in *Carmel v Lunney*, *supra*, does not require dismissal of the entirety of plaintiff's legal malpractice claim, because the remainder of his claim that defendants failed to advise him of the potential immigration consequences of traveling outside the United States as a result of entering a guilty plea does not dispute the validity of his conviction (*see generally Carmel v Lunney, supra; see also Bass & Ullman v Chanes*, 185 AD2d 750 [1st Dept 1992]). Further, plaintiff's allegations that he relied on defendants' faulty legal advice concerning the immigration consequences of his guilty plea in deciding to travel abroad after he pled guilty, resulting in his being detained and subjected to removal proceedings, state a valid cause of action for legal malpractice. Defendants' other arguments present

disputed factual issues concerning the standard of care and proximate cause that are not properly resolved on a motion to dismiss the complaint (*see Urias v Daniel P. Buttafuoco & Assoc., PLLC*, 120 AD3d 1339, 1343 [2d Dept 2014]).

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7229 The People of the State of New York, Ind. 2950/15
Respondent,

-against-

Lance O'Carrol,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam Best, J.), rendered October 5, 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: OCTOBER 4, 2018

CLERK

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

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7230 Perini Corporation, Index 601720/03
Plaintiff-Appellant, 101709/10

-against-

City of New York (Honeywell Street and Queens Boulevard Bridges),
Defendant-Respondent.

- - - - -

Tutor Perini Corporation,
Plaintiff,

-against-

City of New York (Honeywell Street and Queens Boulevard Bridges),
Defendant.

_____

Duane Morris LLP, New York (Charles Fastenberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered January 23, 2017, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing plaintiff's claims seeking to recover delay damages, unanimously affirmed, without costs.

The no damages for delay clause in the parties' agreement is valid and enforceable (*Corinno Civetta Constr. Corp. v City of New York*, 67 NY2d 297, 309 [1986]). Plaintiff has not met its heavy burden of establishing that the delays were not

contemplated by the parties under the contract or resulted from defendant's breach of a fundamental obligation of the contract and, thus, were excluded from the exculpatory clause (*id.* at 309-310; *Polo Elec. Corp. v New York Law Sch.*, 114 AD3d 419 [1st Dept 2014]; *Bovis Lend Lease (LMB), Inc. v Lower Manhattan Dev. Corp.*, 108 AD3d 135, 147 [1st Dept 2013]). The contract contains numerous express disclosures that the railroads did not guarantee rail outages and had discretion concerning their operations, including decisions related to staffing of protective personnel on the projects. Also, the daily safety meetings were contemplated under the contract, which mandated plaintiff's compliance with the railroads' rules and regulations, as well as with federal, state and local laws, rules and regulations bearing on railroad safety.

Plaintiff does not assert in the amended complaint a pass-through claim on behalf of its subcontractor ADF International, Inc. In any event, it does not dispute that it denied ADF's claim due to untimely notice.

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

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7232- Ind. 4918/15
7232A The People of the State of New York, 2117/16
Respondent,

-against-

Tyemel S.,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., New York (Noreen M. Stackhouse of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered October 4, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: OCTOBER 4, 2018

CLERK

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

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7233 The People of the State of New York, Respondent, Ind. 3391/16

-against-

Luis Rodriguez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered March 1, 2017,

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: OCTOBER 4, 2018

CLERK

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

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7234- Ind. 3050/13
7234A The People of the State of New York, 566/14
Respondent,

-against-

Brandon Senquiz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Ronald A. Zweibel, J. and Michael J. Obus, J. at pleas; Michael J. Obus, J. at motion and sentencing), rendered December 16, 2014, convicting defendant of assault in the first degree (two counts) and assault in the second degree, and sentencing him to an aggregate term of 17 years, unanimously affirmed.

The court properly denied defendant's motion to controvert search warrants for defendant's apartment and Facebook account, without granting a hearing. There is nothing to support defendant's speculative assertions that the Facebook posting by defendant referred to in the warrant application was not available to the public, and that the police somehow accessed a nonpublic portion of defendant's Facebook account before they

applied for the warrants.

Given the extreme seriousness of the crimes, which involved three heinous unprovoked attacks on strangers, the court providently exercised its discretion in denying youthful offender treatment (*see generally People v Drayton*, 39 NY2d 580 [1976]), and we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7235-
7236 In re Kenneth J.,
Petitioner-Appellant,

-against-

Lesley B.,
Respondent-Respondent.

- - - -

In re Lesley B.,
Petitioner-Respondent,

-against-

Kenneth J.,
Respondent-Appellant.

_____

Kenneth J., appellant pro se.

Elayne Kesselman, New York, for respondent.

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

_____

Order, Family Court, New York County (Machelle Sweeting, J.), entered on or about June 27, 2017, which granted the mother's motion for summary judgment and suspended all visitation and contact of any kind between the father and the parties' child, unanimously reversed, without costs, the mother's and the attorney for the child's motions for summary judgment denied, the mother's petition for modification of custody suspending the father's visitation, and the father's petitions for enforcement of visitation, holiday visitation modification, and custody

modification awarding him sole custody restored, and the matter remanded.

Family Court improperly determined the mother's modification petition and the father's petitions for enforcement, parenting time modification, and sole custody by suspending all contact between the father and child without a hearing.[1] Modification of custody or visitation, even on a temporary basis, requires a hearing, except in cases of emergency (*Shoshanah B. v Lela G.*, 140 AD3d 603, 606 [1st Dept 2017]). We have held that a hearing may be "as abbreviated, in the court's broad discretion, as the particular allegations and known circumstances warrant" (*Martin R.G. v Ofelia G.O.*, 24 AD3d 305, 306 [1st Dept 2005]; *see also Matter of Myles M. v Pei-Fong K.*, 93 AD3d 474 [1st Dept 2012] [court properly modified custody to permit unsupervised visitation without a full hearing, based on, inter alia, testimony of forensic social worker]). However, here, the court granted the drastic remedy of suspension of all contact between parent and child based solely upon its *in camera* interview with the child and its review of the motion papers and some portion of the court file, which included an unsworn and uncertified report

[1]We note that, while the order issued on the record suspended visitation and other forms of contact for one year, the written order appealed from contains no time limit.

by Family Court Mental Health Services (MHS) and unsworn letters from the child's treating therapist and from therapists who had seen the parties and child for family therapy between June and November 2016.

While a court may consider a child's expressed preference, the child's statement is not determinative of the child's best interests, and the court "must consider the age and maturity of the child and the potential for influence having been exerted on the child" (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

It is not clear from the record before us what portions of the record of the earlier custody case Family Court relied on in reaching its determination. While the father repeated some claims he had made during the earlier proceedings, he also made new allegations, denied that the child's current distress was caused solely by his actions, and urged that the full forensic evaluation that had previously been ordered by the court on consent be completed before the court ruled on the petitions.

Family Court improperly considered the MHS report, since it was not referenced in or attached to the mother's or the child's attorney's motion, was neither sworn nor certified and thus not in admissible form, as is required on a motion for summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), contained inadmissible hearsay (*see Strauss v Strauss*,

136 AD3d 419, 420 [1st Dept 2016]), and was not subject to cross-examination. Moreover, even if the court could have considered the report, it did not support suspension of all contact between the father and the parties' child. In fact, it (1) did not state conclusions with a reasonable degree of psychological certainty; (2) was not based on interview with the child or consultation with the child's therapist; (3) noted that the father acknowledged that his conduct was one factor in the child's anger toward him, and that the mother acknowledged that she had not consistently shielded the child from her anger toward the father; and (4) recommended only that the parties continue in family therapy, and that the father and child each continue in individual therapy. Accordingly, it did not support the result ordered by the court.

The court also improperly considered the therapists' unsworn letters, which were not attached to the mother's or the child's attorney's motion, and which also contained inadmissible hearsay. Even if the court could have considered them, we would find that they did not support the award of summary judgment to the mother, since they failed to establish that there were no material facts in dispute and that the mother was entitled to the relief sought as a matter of law (CPLR 3212[b]). The mother had alleged that the father's disparagement of her in the child's presence and his

discussion of his adult problems with the child caused the child's anxiety and suicidal thoughts. The father claimed that the child's distress was the result of the mother's efforts to alienate the child from him. The therapists' observations were not a substitute for a formal neutral forensic mental health evaluation, and did not establish that suspension of all contact between the father and child was in the child's best interests.

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7237 Alfred Joseph Ayers, III, Index 116404/07
Plaintiff-Appellant,

-against-

The Dormitory Authority of the State of New York,
Defendant-Respondent,

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

_____

Steven L. Salzman, P.C., New York (David S. Gould of counsel), for appellant.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Joel M. Maxwell of counsel), for respondent.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered August 31, 2016, after a jury trial, in favor of defendant Dormitory Authority of the State of New York and against plaintiff, unanimously affirmed, without costs.

Plaintiff was injured when he jumped from the second floor of a building onto an attached sidewalk shed in an attempt to extinguish a fire on the shed. The building was owned by defendant Dormitory Authority of the State of New York (DASNY) and occupied by the City University of New York at Hunter College. Plaintiff claims that DASNY was responsible for causing the fire through its negligence in allowing rubbish to accumulate on the shed and/or failing to remedy the recurrent condition of

students smoking in the stairwells and discarding their lit cigarettes out of the window and onto the shed. After trial, the jury returned a verdict in DASNY's favor.

Defendant's counsel's alleged misconduct did not rise to the level of egregiousness sufficient to warrant setting aside the verdict (*see Smith v Rudolph*, 151 AD3d 58, 63 [1st Dept 2017]; *Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021, 1023 [2d Dept 2016], *lv dismissed* 28 NY3d 947 [2016]).

The jury charge accurately stated the scope of DASNY's duty. The trial court instructed that DASNY had a duty to keep the shed safe and that it breached this duty to the extent it "knew or should have known" of the recurrent condition of students smoking and discarding lit cigarettes. This instruction is consistent with our prior articulation of DASNY's duty (*see Ayers v Dormitory Auth. of the State of N.Y.*, 127 AD3d 586 [1st Dept 2015]).

The trial evidence does not demonstrate conclusively whether DASNY was an out-of-possession landlord bearing no responsibility for events occurring entirely inside the building (*see Gronski v County of Monroe*, 18 NY3d 374, 379-81 [2011]). However, DASNY's duties (if any) with respect to the inside of the building are not relevant to the instant case, which concerns only a fire on the shed. To the extent any conduct occurring inside the

building is relevant to plaintiff's claims, it is the fact of students smoking and throwing lit cigarettes out the window, and that conduct was properly highlighted in the charge.

Plaintiff failed to demonstrate that circumstances existed under which DASNY had an affirmative duty to conduct reasonable inspections of the premises (*see Rossal-Daub v Walter*, 97 AD3d 1006, 1007 [3d Dept 2012]; *see also Singh v United Cerebral Palsy of N.Y. City, Inc.*, 72 AD3d 272, 276 [1st Dept 2010]). *Hayes v Riverbend Hous. Co., Inc.* (40 AD3d 500 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007]), on which plaintiff relies, is inapposite, since the instant case is devoid of any "object capable of deteriorating" that was "concealed from view" (*id.* at 501).

The court properly denied plaintiff's request for a special verdict sheet. *Davis v Caldwell* (54 NY2d 176 [1981]), on which plaintiff relies, is inapposite, since there is no claim that any of plaintiff's theories of negligence should not have been submitted to the jury (*see also Suria v Shiffman*, 67 NY2d 87, 96 [1986]).

The court providently exercised its discretion in permitting defendant to amend its answer during trial to include a defense based on General Obligations Law § 15-108(a), since there is no evidence that the amendment caused prejudice to plaintiff (*see Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998];

see also CPLR 3025[b]). Plaintiff argues that allowing the amendment altered his trial preparation, but fails to articulate how his preparation was altered.

While the law of apportionment of liability under CPLR 1601 has changed since the time of trial (*see Artibee v Home Place Corp.*, 28 NY3d 739 [2017], *modfg* 132 AD3d 96 [3d Dept 2015]), any error in the court's charge allowing such apportionment was harmless, since the jury never reached the issue (*see John W. Cowper Co. v Buffalo Hotel Dev. Venture*, 72 NY2d 890, 892-93 [1988]).

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7238 Ivy J. Mack, Index 452586/15
Plaintiff-Appellant,

-against-

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

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Jonny Kool of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

Order, Supreme Court, New York County (W. Franc Perry, J.), entered May 18, 2017, which granted defendants' motion for leave to amend their answer to assert a defense based on the exclusivity provisions of the Workers' Compensation Law and to dismiss the complaint based on that defense, unanimously affirmed, without costs.

Plaintiff was injured when she tripped and fell on a raised carpet while entering the building where the offices of the New York County District Attorney are located. Plaintiff, who was employed as a secretary for the District Attorney at the time of the accident, applied for and received Workers' Compensation benefits, which were paid by the City.

The court providently exercised its discretion in granting defendants leave to amend the answer to assert the affirmative

defense, since leave to amend is freely given and plaintiff did not show any prejudice (CPLR 3025[b]; *see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

Plaintiff's claims were properly dismissed based on the exclusivity provisions of the Workers' Compensation Law because employees of the New York County District Attorney's office are considered employees of the City of New York (*see Morris v City of New York*, 198 AD2d 35 [1st Dept 1993]; Workers Compensation Law §§ 11, 29; *see also* Public Officer's Law § 2; Administrative Code of the City of New York, § 7-110). Furthermore, employees of the District Attorney's office, including plaintiff, are paid by the City of New York (*Morris*, 19 AD2d at 36), and the City actually paid plaintiff's Workers' Compensation benefits.

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

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7239 The People of the State of New York, Respondent, Ind. 1224/12

-against-

Tulsie Singh, Defendant-Appellant.

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

Richard A. Brown, District Attorney, Kew Gardens (Jonathan K. Yi of counsel), for respondent.

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about January 4, 2017, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant was properly assessed 20 points under the risk factor for continuing course of sexual misconduct based on his sexual abuse of the victim on multiple occasions, as established by the victim's reliable grand jury testimony (*see People v Mingo*, 12 NY3d 563, 573 [2009]). Furthermore, defendant's plea allocution corroborated the grand jury testimony, as well as clearly established that the victim was less than 10 years old when the sexual abuse began, thereby supporting an assessment of 30 points under the factor based on the victim's age.

Defendant was also properly assessed 20 points for his exploitation of a professional relationship with the victim. Defendant, a teacher, used his role to secure the victim's trust in order to sexually abuse him (*see People v Briggs*, 86 AD3d 903, 904-905 [3rd Dept 2011]). We see no reason to limit this risk factor to professionals such as health care providers whose relationships with potential victims involve body contact.

Finally, defendant's affirmative claim of actual innocence, despite having pleaded guilty, supported an assessment of points for failure to accept responsibility.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). There were no mitigating factors that were not adequately taken into account in the risk assessment instrument, or that outweighed the seriousness of the underlying offense.

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7240 The People of the State of New York, Respondent, Ind. 792/15

-against-

Niheim Howard, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered September 15, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7242-
7243 The People of the State of New York,
Respondent,

-against-

Richard Marini,
Defendant-Appellant.

Ind. 2644/14

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered February 16, 2016, as amended April 4, 2017, convicting defendant, upon his plea of guilty, of grand larceny in the second degree, and sentencing him to a term of one to three years, with restitution in the amount of $648,693.24, unanimously affirmed.

Defendant did not preserve his claim that the statutory definition of larceny is unconstitutionally vague as applied to him (*see People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find that the definition of larceny as a "wrongful" taking (Penal Law § 155.05[1]), which expressly includes "obtaining property by false pretenses" (Penal Law §

155.05[2][a]), provides fair notice to a person of ordinary intelligence that it encompasses the conduct with which defendant was charged and of which he was convicted. If a person is paid to provide licensed site safety managers to conduct inspections at construction sites, and this person instead uses unlicensed interns who sign the names of licensed inspectors, both dead and living, this is plainly a "wrongful taking" that at the very least involves obtaining property by false pretenses (*People v Stuart*, 100 NY2d 412 [2003]; *People v Foley*, 94 NY2d 668, 681 [2000], *cert denied* 531 US 875 [2000]). Moreover, the statute provides law enforcement officials with "clear standards for enforcement" (*Stuart*, 100 NY2d at 420).

Defendant made a valid and enforceable waiver of his right to appeal, which precludes review of his challenges to the restitution amount and the lack of a restitution hearing. These challenges are not addressed to the legality of the sentence, but to the adequacy of the procedures the court used to arrive at its sentencing determination, specifically, calculating the amount of restitution (*People v Callahan*, 80 NY2d 273, 281 [1992]). Defendant argues that when the court allegedly increased the restitution portion of his promised sentence (by approximately 6%), this impaired the voluntariness of the plea, so that the issue survives an appeal waiver. In any event, regardless of the

applicability of the waiver to defendant's appellate claims, we find no basis for any relief.

Because defendant never moved to withdraw his plea, he failed to preserve his argument that he was entitled to plea withdrawal when the court, in amending the restitution order at a postsentence proceeding, purportedly enhanced his sentence (*see* (*see e.g. People v Williams*, 27 NY3d 212 [2016]; *People v DeValle*, 94 NY2d 870 [2000]; *People v Lopez*, 71 NY2d 662, 665-666 [1988]) and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There was no increase to the restitution amount, and thus no enhanced sentence was imposed. Accordingly, defendant would not have been entitled to withdraw his plea even if he had requested to do so. Specifically, defendant agreed, at the plea proceeding, to the restitution amounts he owed. The itemized restitution amounts to be paid to eight victims were stated on page one of the restitution order. Defendant does not dispute that the arithmetic in the original order was incorrect, in that the eight individual restitution payments totaled $648,693.24, not $610,693.24 as stated in the original order. Thus, the court, in amending the order, did not enhance defendant's sentence, but merely corrected a clerical error to reflect the accurate tally of $648,693.24 (*see People v Minaya*, 54 NY2d 360, 364 [1981],

cert denied 455 US 1024 [1982].

To the extent defendant argues that he was entitled to a restitution hearing before he was sentenced in order to determine whether there was support in the record for the eight individual restitution amounts, defendant, while represented by counsel, agreed to those amounts, and in signing the restitution order, expressly waived any right to a restitution hearing and to challenge those amounts, or to challenge that amount on appeal. Defendant acknowledged at the plea proceeding that he read and understood the order, and stated to the court that had no questions about it. To the extent he argues that the court should at least have granted his request for a hearing to challenge those eight amounts at the later restitution correction proceeding, that request was untimely (*see People v Schonfeld*, 68 AD3d 449, 450 [1st Dept 2009]).

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7244 The People of the State of New York, Ind. 4948/15
Respondent,

-against-

Jovanni Arellano,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Jill Konviser, J.), rendered August 23, 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: OCTOBER 4, 2018

CLERK

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

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7245 The People of the State of New York, Ind. 3147/15
Respondent,

-against-

Victor Cordova, also known as
Victor Cordovoir,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 15, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 4, 2018

CLERK

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7246-
7247-
7248-
7249N Index 651695/15

Norddeutsche Landesbank Girozentrale, et al.,
Plaintiffs-Respondents,

-against-

Lynn Tilton, et al.,
Defendants-Appellants.

_____

Gibson, Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellants.

Berg & Androphy, New York (Michael M. Fay and Chris L. Sprengle of counsel), for respondents.

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Orders, Supreme Court, New York County (Eileen Bransten, J.), entered January 12, 2018, which, in motion sequence number 5, denied defendants' motion to seal portions of plaintiffs' amended pleading and motion to amend that summarize or quote tax-related financial information contained in documents other than tax returns, and in motion sequence number 6, denied defendants' first motion for a protective order barring the use of any tax-related discovery and the further discovery of any such tax-related financial information, and orders, same court and Justice, entered May 25, 2018 and May 29, 2018, which, in motion sequence number 10, denied defendants' second motion for a protective order barring discovery of any tax-related information

post-dating April 2012, and, in motion sequence number 12, inter alia, granted plaintiffs' motion to compel certain tax-focused depositions, unanimously affirmed, without costs.

The court properly denied defendants' motions for protective orders barring the use of all tax-related discovery and tax-related discovery post-dating April 2012, because the produced and requested tax-related discovery satisfies the liberally interpreted standard for disclosure (*see* CPLR 3101[a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). It is material to plaintiff's fraudulent inducement claim. While a party seeking disclosure of tax returns must make a strong showing that the information contained in the returns is necessary and unavailable from other sources (*see Weingarten v Braun*, 158 AD3d 519 [1st Dept 2018]; *Williams v New York City Hous. Auth.*, 22 AD3d 315 [1st Dept 2005]), the underlying financial information, when contained in documents other than tax returns, such as in Form K-1s, is typically discoverable if material and necessary (*see Shabasson v Greenberg, Trager, Toplitz & Herbst*, 284 AD2d 230 [1st Dept 2001]). This Court's decisions in *MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC* (103 AD3d 486 [1st Dept 2013]) and *Haenel v November & November* (172 AD2d 182 [1st Dept 1991]) should not be read to hold otherwise.

The court properly denied defendants' motion to seal

portions of the amended complaint and motion to amend that summarize or quote tax and financial information, since defendants failed to overcome the broad presumption of public entitlement to judicial proceedings and court records (*see Mosallem v Berenson*, 76 AD3d 345, 350 [1st Dept 2010]; *see also Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191-192 [1st Dept 2010]). The disclosures they seek to seal are not tax returns, and do not involve trade secrets or information that could result in a competitive disadvantage. Although the disclosures involve sensitive financial information that relates to information contained in tax returns, the court properly found that the privacy interest in such information, unlike the privacy interest in tax returns, is not a sufficient basis for an order sealing that information so that it is not accessible to the public (*see Mosallem*, 76 AD3d at 351).

Defendants have failed to show that the court erred in granting plaintiffs' motion to compel certain tax-focused depositions. Contrary to their contention, the court did not

order the parties to violate the rules that protect against disclosing materials subject to the attorney-client privilege.

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

ENTERED: OCTOBER 4, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Barbara R. Kapnick
Jeffrey K. Oing
Anil C. Singh, JJ.

5404
Index 1311/13

_____x

The People of the State of New York,
Respondent,

-against-

Darryl T. (Anonymous),
Defendant-Appellant.
_____x

Defendant appeals from an order of the Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 31, 2016, insofar as it denied defendant a new initial hearing pursuant to CPL 330.20 in connection with his plea of not responsible by reason of mental disease or defect.

Michael D. Neville, Mental Hygiene Legal Service, Mineola (Ana Vuk-Pavlovic and Dennis B. Feld of counsel), for appellant.

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

TOM, J.P.

In this appeal, we must consider whether defendant was deprived of the effective assistance of counsel when, following his plea of not responsible by reason of mental disease or defect to robbery in the first degree, his counsel conceded that defendant had a dangerous mental disorder, and effectively waived defendant's right to an initial hearing concerning his civil confinement pursuant to Criminal Procedure Law 330.20(6).

Defendant Darryl T., now nearly 50 years old, has a history of mental illness that began at age 10 and a history of committing larceny during psychiatric episodes that occurred when his medication had worn off. He has been diagnosed repeatedly with bipolar disorder and schizoaffective disorder, a combination of schizophrenia and mood disorders, and has been hospitalized repeatedly as a danger to himself and others, due to his auditory hallucinations and voices telling him to kill himself and others. He has also been treated with several different antipsychotics and mood stabilizers.

When defendant was between 14 and 16 years old, he stabbed a man with intent to kill, and then stabbed himself. In 1994, he tried to hurt himself by taking his friend's gun, and was confined at the Creedmoor Psychiatric Center for observation from October 1994 to March 1995; he told medical personnel that he had

heard voices in his head since age six, that the voices told him to kill, and that he had previously stabbed himself because of those voices.

Defendant was confined in institutions for periods of a few days to a week at a time in March 2003, January 2005, January 2006, May-June 2010, October 2010, May 2011, June 2011, July-August 2011, and January 2012. During those confinements, he said that he heard voices and that he wanted to kill himself and others, and throughout his medical history, he has tested positive for alcohol and cocaine on numerous occasions.

In August 2012, defendant tried to jump off the George Washington Bridge. Some days before that, five security officers had escorted him out of Mount Sinai Hospital after he threw monitor cords at the staff and threatened to hurt staff outside of the hospital. On March 19, 2013, while hospitalized at Bellevue, defendant said he heard voices in his head that told him he was worthless and should kill himself. One week after his release from Bellevue, he committed the offense to which he pleaded not guilty by reason of mental disease or defect.

It was alleged that in the late evening of March 27, 2013, defendant was seen shoplifting items from a Pathmark grocery store, and that when Pathmark employees confronted him, he took out a knife and said, in sum and substance, "I'm going to shoot

you." Defendant was arrested and charged with robbery in the first degree, robbery in the third degree, petit larceny, criminal possession of stolen property in the fifth degree, and criminal possession of a weapon in the fourth degree.

From March 31, 2014 to April 15, 2014, he was confined, and treated for hearing voices telling him to kill himself and others, and between April 17, 2014 and April 25, 2014, he was again diagnosed with schizoaffective disorder and a history of alcohol and cocaine abuse.

On February 27, 2015, while represented by an attorney from the 18-B panel, defendant pleaded not responsible by reason of mental disease or defect to robbery in the first degree. The People acknowledged that they had received the psychiatric evidence in the case, including defendant's medical records from October 12, 1994 to April 15, 2014, and more than 3,400 pages pertaining to defendant's placement in eight institutions, not including the approximately 10 times that he was seen by the New York City Correctional Health Services in Rikers Island. Those records were admitted into evidence.

Defense counsel confirmed that defendant understood the proceedings, that he had discussed the case with defendant, that defendant understood the consequences of his plea, and that there were no other viable defenses to the charges.

The court asked defendant whether he was aware that the charge to which he was pleading not responsible by reason of mental disease or defect was robbery in the first degree, and defendant said yes. The court asked, "Do you understand the consequences of such plea?," and defendant said he did. Defendant also confirmed that he understood that he had a right to plead not guilty, a right to a trial at which the People would have to call witnesses, the right to cross-examine those witnesses, and the right not to incriminate himself. He also said that he understood that by entering his plea of not responsible there would not be a trial, and that he was waiving his right to a trial. He further acknowledged the truth of the People's allegations, as previously described, regarding his conduct on March 27, 2013, at Pathmark. At the court's request, the prosecutor summarized the psychiatric evidence and history set forth above.

Based on the history and psychiatric evidence, the prosecutor said that defense counsel had conceded that defendant was a danger to himself and society. Defense counsel agreed that he conceded that defendant was a danger to himself and society. He noted that defendant's conduct arose when he was not on his medication, and that when he took his medication, he was "highly functional, ... intelligent, [and] cooperative." Nevertheless,

defense counsel confirmed that he was not disputing the medical testimony or the statements made by the prosecutor about defendant's psychiatric history.

Defense counsel also said that defendant had the capacity to understand the plea proceeding, but did not have the capacity to understand what he was doing at the time of the robbery.

The court, referring to a CPL 330.20(6) initial hearing, confirmed that both parties were "not requesting that any hearing be held, because the hearing would not establish anything further than what has been presented here today." Both the prosecutor and defense counsel agreed.

The court asked defendant whether he understood "what's going on," and defendant said he did, and confirmed that he had taken his prescribed medications on that day. Defendant also confirmed that he had not taken his medication on March 27, 2013, the day of the robbery.

Defendant further confirmed that no one had threatened him or forced him to plead not responsible. Defense counsel said that he had numerous conversations with defendant about the plea and that he was satisfied that defendant had the capacity to understand the consequences of a plea of not responsible.

The court then concluded that it was satisfied that each element of robbery in the first degree as alleged in the

indictment would be proved beyond a reasonable doubt at trial, that the defense would prove by a preponderance of the evidence the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, that defendant had the capacity to understand the proceedings and assist in his defense, and that defendant's plea was knowing and voluntary.

Pursuant to CPL 330.20, the court issued a written examination order requiring a psychiatric examination to determine whether defendant had a dangerous mental disorder or was mentally ill. The court adjourned to await completion of the examination and report on defendant's mental condition.

Defendant was admitted to the Mid-Hudson Forensic Psychiatric Center (Mid-Hudson) for the examinations. Dr. Mark Bernstein and Dr. Nancy Flores-Migenes examined defendant and issued reports that concluded that defendant had a dangerous mental disorder and was a danger to himself and others and that he needed inpatient care with the highest available level of security.

Dr. Bernstein opined that defendant suffered from "chronic Schizoaffective thought disorder ... complicated by alcohol, cocaine and cannabis abuse with an underlying Antisocial Personality." He found that defendant had previously threatened staff at hospitals, and had a history of poor compliance with

treatment recommendations.

Dr. Flores-Migenes similarly diagnosed defendant with "Schizophrenia, Chronic, Paranoid-Type," with a history of alcohol and cocaine abuse, which led to conduct dangerous to himself and others. Dr. Flores-Migenes noted that defendant had told her that all of the information he had given to other facilities were "lies," and that he had been taking his medication at the time of his arrest. He alternated between acknowledging that he was noncompliant and saying that he was always compliant with his medication requirements.

In various letters to the court, defendant asked to withdraw his plea, saying that defense counsel had misinformed him and told him not to ask questions during the plea proceeding, that he had been hearing voices before the proceeding, and that he had lied in the past about having suicidal thoughts. He also said that defense counsel had told him that he would prefer a 1 to 30-day commitment in a civil hospital to the program the court had previously offered. Defendant claimed both that he had been on cocaine on the night of the offense and that he had been on his medications.

At a proceeding on May 28, 2015, defendant addressed the court directly in an effort to take back his plea; he told the court that defense counsel had told him on February 20, 2015 that

he had gotten him a deal of 1 to 30 days in a civil hospital, and that counsel had told him "to come into the courtroom and say [] yes to everything.... [T]hey confirmed that I was on medicine during the time of the crime. He [defense counsel] told me to say that I wasn't." Defendant thus asked to "withdraw this plea." He added, "I know I don't belong in a one day to life plea for this charge." Defendant denied being dangerously mentally ill. He explained that he had a "bad cocaine history" in 1989 or 1998, and that he had cut or stabbed himself, and that when he wanted to detox he would lie and say he wanted to kill himself, and he would be admitted immediately to the psych ward, where he would detox and get clean.

The court said, "I would not have thought that they would have made a determination that you were suffering from an affliction and also that you constitute a danger to yourself and to others. However, obviously I'm not an expert in ... psychiatric evaluations." The court noted that two experts had determined that defendant was a danger to himself. The court also explained that the determinations were not based solely on defendant's statements, but also on his medical records, prior diagnoses, and approximately 20 earlier hospitalizations. Defendant said that he hospitalized himself, that a dangerously mentally ill person would not do that, and that the finding that

he suffered from a dangerous mental disorder was a lie. The court replied that it was bound by the findings in the reports.

The People argued that defendant should be committed because he had been found to be a danger to himself or society. Defense counsel said that he relied on the psychiatrist's reports and plea allocution and otherwise deferred to the court's discretion.

The court denied defendant's oral request to withdraw his plea. Defendant protested: "If I had known this was a 330.20, I wouldn't have accepted this plea. That is why [defense counsel] didn't tell me that that's what it was. He told me one to 30 days in civil hospital." The court responded, "I told you it was 330.20." Defendant said that he "didn't know anything about a 330.20" and that defense counsel had told him to say yes to everything. The court said, "I explained to you exactly what was going on. You took the plea." Defendant said, "If I had understood, I wouldn't have taken it." The court repeated that it had explained it to defendant and added that if defendant was released, then he could avail himself of the program.

The court issued an order of commitment upon its finding that defendant was not responsible by reason of mental disease or defect, and defendant was committed to Mid-Hudson. On October 6, 2015, defendant was transferred to the Rochester Psychiatric Center, where he is currently hospitalized.

In March 2016, defendant moved, through Mental Hygiene Legal Services, to withdraw or vacate his plea or, in the alternative, for a new initial hearing pursuant to CPL 330.20(6). Defendant argued that Supreme Court did not sufficiently advise him of, and ensure he understood, the consequences of his plea, specifically, that his plea could result in his commitment in a secure psychiatric facility, potentially for life. He also contended that he received ineffective assistance of counsel when his attorney conceded that he had a dangerous mental disorder and effectively waived his right to a hearing on his mental status. In the alternative, defendant argued that he was deprived of a proper initial hearing in light of counsel's concession, and sought a new initial hearing.

The People opposed the motion, arguing that the record established that defendant's plea was knowing, intelligent and voluntary, and that he received the effective assistance of counsel. In an affirmation, defendant's plea counsel maintained that he had explained defendant's sentence exposure, his option of completing a program, and his option of a not responsible plea, which could result in "his initial commitment to a secure facility to be followed by all necessary treatment in a secure facility." Counsel also said that "[a]fter review[ing] ... all the facts in this matter" he believed that defendant was a danger

to himself and others and in need of commitment, and thus he "deferred to the appropriate psychiatric experts."

Supreme Court denied defendant's motion, reasoning that the earlier denial of the oral application to withdraw the plea on the same grounds was the law of the case. The court separately concluded that the motion should be denied because the record established that defendant was advised about the consequences of a not responsible plea, and that the plea was made knowingly and voluntarily.

The court also denied defendant's request for a new initial hearing pursuant to CPL 330.20(6) because defendant had had an opportunity to be heard via his letters to the court. Thus, the court found that defendant had been afforded an opportunity to challenge the findings of the psychiatrists, and had been afforded due process. The court further found that counsel had not been ineffective for conceding the accuracy of those findings or waiving defendant's right to an initial hearing, as he could not raise meritorious challenges to the extensive psychiatric records. In this regard, the court said that attorneys were not required to challenge unanimous documented psychiatric findings that a defendant was a danger to him or herself or others, especially where arguments would be futile, citing *Matter of Brian HH.* (39 AD3d 1007, 1009 [3d Dept 2007]).

On October 19, 2016, a Justice of this Court granted defendant leave to appeal pursuant to CPL 330.20(21)(a)(ii), to the extent the May 31, 2016 order "denied the alternate relief requested in [defendant's] motion to withdraw or vacate his plea ..., namely, a new initial hearing under CPL 330.30." We now reverse and remand for an initial hearing.

As occurred here, after a court accepts a not responsible plea, it must issue an examination order for the defendant to be examined by two qualified psychiatric examiners (CPL 330.20[2]), who must submit to the court a report of their findings and evaluation regarding defendant's mental condition (CPL 330.20[5]).

Critical to this procedure is the requirement that the court conduct an initial hearing within 10 days after receipt of the psychiatric examination reports, in order to classify the defendant as "track one," "track two," or "track three" based on the defendant's mental condition (CPL 330.20[6]; *Matter of Allen B. v Sproat*, 23 NY3d 364, 368 [2014]).

The track is significant because it determines the level of the defendant's confinement and treatment. Track one is based on a finding of "dangerous mental disorder," meaning that the defendant suffers from a "mental illness," and that "because of such condition he currently constitutes a physical danger to

himself or others" (CPL 330.20[1][c]; see Mental Hygiene Law § 1.03[20] [defining "mental illness"]). Track two is based on a finding of "mentally ill," without a dangerous mental disorder (CPL 330.20[1][d]). Track three is based on a finding of not mentally ill (CPL 330.20[7]).

"The track designation places more dangerous acquittees under the purview of the Criminal Procedure Law, while less dangerous, though still mentally ill, acquittees are committed to the custody of the Commissioner of Mental Health and come under the supervision of the Mental Hygiene Law" (*Matter of Norman D.*, 3 NY3d 150, 154 [2004]). Thus, track designation is "vitally important in determining the level of judicial and prosecutorial involvement in future decisions about an acquittee's confinement, transfer and release" (*id.*).

Upon making a track one determination, the court will issue a commitment order committing the defendant to the custody of the commissioner for confinement in a secure facility for treatment for six months (CPL 330.20[1][f], [6]). Track one defendants can be detained for longer than the initial six-month confinement if a court issues subsequent retention orders, lasting up to two years at a time, upon finding that the defendant's dangerous mental disorder persists (CPL 330.20[g], [h]). Such orders could, in theory, be issued repeatedly for two years at a time,

resulting in defendant's indefinite confinement (CPL 330.20[8]-[12]; *see Allen B.*, 23 NY3d at 369-70). Track two defendants, on the other hand, are ordered into the Commissioner's custody for detention in a nonsecure (civil) facility, subject to an order of conditions, while track three defendants are discharged either unconditionally or, in the court's discretion, with an order of conditions (CPL 330.20[7]). Thus, "track one status is significantly more restrictive than track two status" (*Norman D.*, 3 NY3d at 155).

At the initial hearing, the People bear the burden of proving "to the satisfaction of the court," i.e., by a fair preponderance of the credible evidence, that the defendant has a dangerous mental disorder or is mentally ill (CPL 330.20[6]; *People v Escobar*, 61 NY2d 431, 439-440 [1984]).

The initial hearing under CPL 330.20(6) is "a critical stage" of proceedings at which the defendant is entitled to the effective assistance of counsel (*Brian HH.*, 39 AD3d at 1009). To prove a claim of ineffective assistance of counsel under New York law, a defendant must prove that defense counsel's performance, viewed in totality, did not amount to meaningful representation (*People v Benevento*, 91 NY2d 708, 711-712 [1998]; *see also People v Turner*, 5 NY3d 476 [2005]). We agree with defendant that counsel's performance did not meet that standard.

As defendant argues, at the same proceeding at which he entered his not responsible plea his counsel simply conceded that he had a dangerous mental disorder, and thus implicitly consented to his confinement in a secure facility. Counsel also confirmed that he was not requesting that any hearing be held. These concessions waived defendant's right to an initial hearing. There could be no legitimate strategy that warranted these actions, and failing to challenge the worst possible outcome of a track one designation under the circumstances of this case did not amount to meaningful representation.

Notably, counsel rendered ineffective assistance when he conceded at the plea proceeding that defendant was a danger to himself and society, and waived defendant's right to an initial hearing before reviewing the psychiatric examination reports which had not yet been prepared for the court. Further, at the proceeding that followed the issuance of the reports, counsel simply relied on the psychiatrist's reports and deferred to the court's discretion. He did not call any witnesses or seek to cross-examine the psychiatrists who prepared the reports. Nor did counsel consult an expert on defendant's behalf who might have offered a contrasting opinion.

In *Brian HH.* (39 AD3d 1007), the court found that counsel had not provided meaningful representation when he failed to

challenge the prosecutor's position that the evidence supporting the less restrictive track two status was not as credible as that supporting track one status. Counsel did not call witnesses, including a psychiatrist who had concluded that the respondent was mentally ill but not dangerous, and waived cross-examination of the psychiatrists supporting track one status. The court noted that there could be no valid strategy or legitimate explanation for counsel's conduct given that there were conflicting reports as to the respondent's condition (39 AD3d at 1009-1010). Similarly, in this case there could be no strategy or other proper explanation for waiving defendant's right to a hearing before any reports were issued to the court. In other words, counsel waived a hearing before even learning what the reports would conclude and whether they would offer conflicting opinions. Counsel's own review of the extensive medical records entered into evidence was not a sufficient substitute for reports prepared by psychiatrists for the CPL 330.20 proceeding.

Preserving defendant's right to an initial hearing was also critical in light of defendant's claims that he had lied about his mental condition and the court's acknowledgment that in its lay opinion defendant did not appear to be dangerous. In these circumstances, defense counsel should have consulted an independent psychologist or at least cross-examined the

psychiatrists regarding, in particular, defendant's claims told to Dr. Flores-Migenes, that he had previously lied about his mental health, to obtain admission to facilities that would treat his drug use. While defendant's medical records may appear to show that he is dangerous, it is not a legitimate strategy to concede his track one status without further investigation or inquiry, under the circumstances of this case and since defendant's confinement in a secured psychiatric institution could be indefinite.

Furthermore, in contrast to this case, in *People v Odell B.-P.* (154 AD3d 534 [1st Dept 2017], *lv denied* __NY3d__, 2018 NY Slip Op 63820 [2018]) we found that the defendant received effective assistance of counsel at the initial hearing when his counsel explained to the court that she would not challenge the psychiatrists' findings that the defendant was dangerously mentally ill because the defense psychologist who examined the defendant had told her that he would not contest the findings. Of course, when counsel consults a defense expert who has personally examined the defendant, and is advised that there is no basis for challenging a finding that the defendant is dangerously mentally ill, it is reasonable for counsel not to challenge the finding. However, no such consultation or reasonable strategy took place here. Rather, counsel conceded

defendant's status before any reports were issued and before any hearing was held.

Defendant's remaining claims, including whether the court abused its discretion in denying his motion to withdraw the plea, are beyond the scope of this Court's review pursuant to the grant of leave to appeal and therefore are not properly before us for consideration. In the alternative, to the extent these remaining claims are not rendered academic by our holding, we reject them on the merits. In any event, we find that defendant is entitled to a new initial hearing at which the People must prove, by a preponderance of the evidence, that he suffers from a dangerous mental disorder or is mentally ill (CPL 330.20[6]; *People v Escobar*, 61 NY2d at 440).

The new initial hearing should determine defendant's "present mental condition" (CPL 330.20[6]), and accordingly Supreme Court should order new examination reports.

Accordingly, the order of Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 31, 2016, insofar as it denied defendant a new initial hearing pursuant to CPL 330.20 in connection with his plea of not responsible by reason of mental disease or defect, should be reversed, on the law, and the matter remanded for a new initial hearing.

All concur.

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about May 31, 2016, reversed, on the law, and the matter remanded for an initial hearing.

The Decision and Order of this Court entered herein on March 29, 2018 (161 AD3d 47) is hereby recalled and vacated (*see* M-3864 decided simultaneously herewith).

Opinion by Tom, J.P. All concur.

Tom, J.P., Kapnick, Oing, Singh, JJ.

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

ENTERED: OCTOBER 4, 2018

CLERK