Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10596 The People of the State of New York, Ind. 1734/12
Respondent,

-against-

Terrance Hale,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ann M. Donnelly, J.), rendered May 4, 2015, convicting defendant, after a jury trial, of assault in the first degree, aggravated assault upon a police officer and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 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 for disturbing the jury's rejection, after considering conflicting expert testimony, of defendant's insanity defense.

Defendant did not prove by a preponderance of the evidence that he lacked substantial capacity to appreciate that his act of stabbing the victim was wrong (*see* Penal Law § 40.15).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10597 In re Carlos Fernandez, Index 26176/17E
Petitioner-Appellant,

-Against-

New York City Transit Authority,
Respondent-Respondent.

_____

Alan H. Krystal, P.C., Nesconset (Alan H. Krystal of counsel), for appellant.

David Farber, Brooklyn (Daniel Chiu of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 5, 2018, which denied the petition to vacate the arbitration award, dated April 25, 2017, which demoted petitioner from bus driver to cleaner, and dismissed the proceeding against respondent New York City Transit Authority (NYCTA), unanimously affirmed, without costs.

On a prior appeal in this proceeding, this Court vacated the arbitration award sustaining NYCTA's decision to terminate petitioner's employment, and remanded the matter for imposition of a lesser penalty (*Matter of Fernandez v New York City Tr. Auth.*, 120 AD3d 407 [1st Dept 2014]). During the second arbitration, held upon remand, petitioner testified that he had recently pleaded guilty to reckless driving in Ohio. The arbitrator properly considered this conviction, in conjunction with the original offense of engaging in lewd activity in public, in demoting petitioner to the position of cleaner. Thus, there was sufficient proof to justify the award (*Matter of Roberts v*

City of New York, 118 AD3d 615, 617 [1st Dept 2014]). Moreover, the arbitrator did impose a lesser penalty, as this Court directed in its 2014 order, by demoting petitioner rather than terminating his employment.

Petitioner has also failed to show by clear and convincing evidence that the arbitrator was biased (*see Matter of Infosafe Sys. [Intl. Dev. Partners]*, 228 AD2d 272 [1st Dept 1996]). The arbitrator awarded petitioner back pay, over NYCTA's objections, which evidences a lack of bias. Moreover, a review of the hearing transcript reveals that the arbitrator considered all of the circumstances and relevant evidence in reaching his decision (*compare Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431 [1st Dept 2012], *affd* 20 NY3d 963 [2012]). Even if the arbitrator had erred in failing to fully consider an alternative position such as a Driller or Shifter, as petitioner suggests, this was, at worst, "an error in judgment, which is not a basis for setting aside the determination" (*Matter of County of*

Westchester v Doyle, 43 AD3d 1055, 1056 [2d Dept 2007]).

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

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10598 In re Stephanie L. L.,
Petitioner-Respondent,

-against-

Romey S. M.,
Respondent-Appellant.

_____

Romey S. M., appellant pro se.

Burger Green & Min, LLP, New York (Nancy Green of counsel), for respondent.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about May 11, 2018, which, to the extent appealed from as limited by the briefs and stipulation, after a nonjury trial, granted the parties joint legal custody, with the petitioner mother having final decision-making authority in the area of medical and other issues, unanimously affirmed, without costs.

Family Court's determination of the custody and visitation issues has a sound and substantial basis in the record, and the father has identified no grounds to disturb the determination (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]; *Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641 [1st Dept 2012]). The court properly considered the totality of the circumstances and the best interest of the child (*Eschbach*, 56 NY2d at 171, 174).

Family Court properly awarded the parties joint legal custody with the mother having final decision-making authority, given that the mother had been the child's primary caregiver for

many years and in light of the parties' contentious relationship (*see Nimkoff v Nimkoff*, 74 AD3d 408 [1st Dept 2010]; *Matter of Elizabeth S. v Edgard N.*, 150 AD3d 585 [1st Dept 2017]).

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

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10599 The People of the State of New York, Ind. 9256/98
Respondent,

-against-

Norcott Corby,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about April 28, 2015, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered April 20, 2000, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Defendant has not established that the allegedly exculpatory information that he claims should have been disclosed under *Brady v Maryland* (373 US 83 [1963]) ever existed, nor has he provided a sufficient evidentiary basis to warrant a hearing into whether or not it existed (*see People v Ozuna*, 7 NY3d 913, 915 [2006]; *People v Ford*, 46 NY2d 1021 [1979]).

Defendant claims that the main witness at his 2000 murder trial had told the police in 1982 that defendant had committed an unrelated murder, and that this evinced a long term bias against

him. However, in defendant's moving papers, the claimed existence of the witness's purported statement was predicated on a conversation defendant allegedly had with a fellow inmate in 2006 or 2007 (long before the 440 motion). Defendant has never indicated how this inmate came to know about an interview with a witness that supposedly occurred in a police station in 1982. Furthermore, the language of the Police Department's standard form response to defendant's FOIL request for the alleged statement does not support an inference that such a statement exists, particularly since the People represented, in their response to the 440 motion, that their own investigation revealed no such statement.

In any event, defendant's *Brady* claim fails for two other reasons. The alleged statement that defendant contends that the People withheld from him was unrelated to this case, and thus the People could not have been found to have been in constructive possession of any information the police may have had regarding the witness's statement (*see People v Garrett*, 23 NY3d 878, 888 [2014]). The alleged statement would only have served as cumulative impeachment evidence tending to show that the witness had a bias against defendant, a matter that was extensively

explored at defendant's trial, as discussed in prior appeals in this case (15 AD3d 14, 19-23 [1st Dept 2004], *affd* 6 NY3d 231, 235-236 [2005]; *see also Corby v Artus*, 699 F3d 159, 167 [2d Cir 2012], *cert denied* 568 US 1180 [2013]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10601 The People of the State of New York, Ind. 1947/15
Respondent,

-against-

Freisy Sosa-Garcia,
Defendant-Appellant.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered April 20, 2016, 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: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10602-
10602A Craft EM CLO 2006-1, Ltd.,
Plaintiff-Appellant,

-against-

Deutsche Bank AG,
Defendant-Respondent.

Index 656152/16

_____

Wollmuth Maher & Deutsch LLP, New York (Randall R. Rainer of counsel), for appellant.

Jones Day, New York (Jayant W. Tambe of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered August 14, 2017, and October 19, 2018, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The court, in the order entered October 19, 2018, correctly granted defendant's motion to dismiss pursuant to CPLR 3211(a)(3) for lack of standing. Pursuant to the granting clauses in the governing indentures, plaintiff, as issuer of the Class E, F, and G notes, transferred all of its rights under the swap agreements, one pertaining to the class E and F notes and the other to the class G notes, to the trustee. As a result, its prior suit alleging that defendant breached the swap agreements was dismissed for lack of standing (*CRAFT EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 139 AD3d 638 [1st Dept 2016]).

Plaintiff and the trustee then entered into assignment agreements, dated November 4 and 18, 2016, purporting to assign

those claims back to plaintiff and thus to remedy the prior deficiency in standing. Plaintiff then commenced the instant lawsuit. However, the swap agreements require that such further transfer of such rights by the trustee be "pursuant to the [i]ndenture," and the indentures contain no provision authorizing plaintiff, by Issuer Order, to direct the trustee to execute the assignment agreements at issue here. As a result, the assignments were not "pursuant to" the indentures, and the attempted assignments were "null and void," as stated in Section 5.1 of the Schedules to the ISDA Agreement. There is no basis for concluding that this provision is merely a personal covenant (*C.U. Annuity Serv. Corp. v Young*, 281 AD2d 292, 292 [1st Dept 2001]).

Moreover, the court correctly granted defendant's CPLR 3211(a)(5) motion to dismiss all but six breach of contract claims, relating to accountant certifications, on the additional ground that they were barred by the applicable statute of limitations. The court correctly reasoned that plaintiff, who originally timely sued as the "issuer" under the swap agreements, could not rely on CPLR 205(a) when it refiled the suit as assignee of the trustee's claims, which were time-barred when

assigned (*Reliance Ins. Co. v PolyVision Corp.*, 9 NY3d 52, 57 [2007]).

In light of our determination, we need not reach plaintiff's remaining contentions.

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10603 The People of the State of New York, Ind. 1311/17
Respondent,

-against-

Tevin Gingles,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Michael Obus, J.), rendered July 13, 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: DECEMBER 19, 2019

CLERK

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

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10604 In re S. T. S. M., and Another,

Dependent Children Under the Age of
Eighteen Years, etc.,

Forestdale, Inc.,
Petitioner-Appellant,

S. M.,
Respondent-Respondent.

_____

Rosin Steinhagen Mendel PLLC, New York (Melissa Wagshul of counsel), for appellant.

The Bronx Defenders, Bronx (Elizabeth Newman of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about January 9, 2019, which, upon a fact-finding determination that petitioner agency failed to demonstrate by clear and convincing evidence that respondent mother permanently neglected the subject children, dismissed the petition to terminate respondent's parental rights, unanimously reversed, on the law, without costs, the petition reinstated, finding of permanent neglect entered against respondent, and the matter remanded to Family Court for disposition.

Petitioner demonstrated by clear and convincing evidence that it exercised diligent efforts to encourage and strengthen respondent's parental relationship with the subject children and that, notwithstanding these efforts, respondent failed to plan

for the children's future (*see* Social Services Law § 384-b[7][a]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). The agency created a service plan for respondent, referring her for services, arranging for supervised visits, and following up with her and the subject children. However, respondent cancelled approximately half of the visits scheduled with the children (*see Matter of Heaveah-Nise Stephania Jannah H. [Stephanie M.]*, 132 AD3d 458 [1st Dept 2015]). Moreover, she failed to visit the children at all during two prolonged periods, one seven weeks long and the other four months, despite being aware of the emotional toll her absence was taking on the children (*see Matter of Jayden Isaiah O. [Rossely R.-O.]*, 144 AD3d 465 [1st Dept 2016], *lv denied* 28 NY3d 911 [2017]).

In addition, while respondent partially complied with her service plan by completing some referred programs, she failed to engage in individual counseling on a consistent basis, submit to random drug tests, complete domestic violence counseling before the date of the petition, and attend special education meetings for her children, which shows a lack of planning for the

children's future (*see Matter of Selvin Adolph F. [Thelma Lynn F.]*, 117 AD3d 495, 498 [1st Dept 2014]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10605- Index 29773/18E
10606- 29758/18E
10607- 29579/18E
10608- 31436/18E
10609- 29529/18E
10610- 29483/18E
10611 Rosa A., etc., et al.,
Plaintiffs-Respondents,

-against-

D&E Equities, Inc., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

- - - - -

Gawayne Blake, etc., et al.,
Plaintiffs-Respondents,

-against-

D&E Equities, Inc., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

- - - - -

Ethel Stewart Hall, et al.,
Plaintiffs-Respondents,

-against-

D&E Equities, Inc., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

- - - - -

Isadora Nembhard, et al.,
Plaintiffs-Respondents,

-against-

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

- - - - -

Hilda Ohmteng, etc.,
Plaintiff-Respondent,

-against-

D&E Equities, Inc., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

- - - - -

Ramdhanie Rajkumar, et al.,
Plaintiffs-Respondents,

-against-

D&E Equities, Inc., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

- - - - -

Carmaleta H.S., etc., et al.,
Plaintiffs-Respondents,

-against-

D&E Equities, Inc., et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

Zachary W. Carter, New York (Jeremy W. Shweder of counsel), for appellant.

Lisa M. Comeau, Garden City, for Rosa A., Christian Moto, Catalina Santiago Sanchez, Luz H., Milka G., Noel Martinez, Enoc Martinez, Nana Y., Emelia Acheampong, Yadriana K., Gawayne B., Kadian B., Ethel Stewart Hall, Sasha A., Isadora Nembhard, Steven Kay, Hilda O., Ramdhanie Rajkumar, Janet Lockhart, Joel Rodriguez, Betty Rodriguez, Albert Bryant, Cynthia Bryant, Allen Cannon, Matthew Igbinedion, Ester Sakyl, Thiermo Diallo, Seydou Diabate, Fauta Kande, Diana Reyes, Natalyn Negron, Robert Mensah, Michael Morgan, Kenneth Owusu Kodsa, James Addo, Carmaleta H.S. and Ernesto S., respondents.

Faust Goetz Schenker & Blee, New York (Jeffrey Rubinstein of counsel), for D&E Equities, Inc., and Annal Management Company, Ltd. respondents.

Orders, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered February 6, 2019 and February 15, 2019, which denied the motions of defendant City of New York to dismiss the complaints and any cross claims asserted against it by defendants D&E Equities, Inc. and Annal Management Company, Ltd., unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgments accordingly.

At issue on these related appeals is whether the complaint in each of the actions alleges defendant City had a special relationship with plaintiffs such that it may be held liable to

them for its alleged negligence in failing to inspect or correct safety violations, failure to ensure a fire hydrant was operable, failing to investigate or remove the child who allegedly started the fire, and/or failing to properly combat the fire (*see generally Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425-426 [2013]). The complaints "allege[] no facts sufficient to show a special duty owed by the City defendants," requiring dismissal such claims (*Green v City of New York*, 150 AD3d 439, 439 [1st Dept 2017]). Furthermore, the spoliation of evidence claims against the City must also be dismissed as New York does not recognize an independent tort for either first- or third-party negligent spoliation of evidence (*see Wood v NYU Hosps. Ctr.*, 116 AD3d 590, 591 [1st Dept 2014], *lv denied* 24 NY3d 914 [2015]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10612 The People of the State of New York, Ind. 3206/16
Respondent,

-against-

Elvis Palaguachi,
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 (Noreen M. Stackhouse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered July 17, 2017, convicting defendant, upon his plea of guilty, of burglary in the first degree, and sentencing him to a term of seven years, with five years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing

the prison component of the sentence to six years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

10613N Luis Ramirez, Index 15498813
Plaintiff-Respondent,

-against-

A.W.&S. Construction Co., Inc.,
et al.,
Defendants-Appellants.

_____

Russo & Toner, LLP, New York (Daniel M. Schiavetta of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (D. Allen Zachary of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel Mendez, J.), entered on or about March 5, 2019, which purported to deny defendants' motion for leave to reargue defendants' motion for summary judgment, but effectively granted reargument and adhered to its prior determination, unanimously affirmed, without costs.

Issues of fact exist whether plaintiff was engaged in protected activity under Labor Law §§ 240(1) and 241(6) at the time he was injured (*see Gonzalez v Paramount Group, Inc.*, 157 AD3d 427 [1st Dept 2018]; *Cardenas v One State St., LLC*, 68 AD3d 436 [1st Dept 2009]). Similarly, there are factual issues

whether defendant contractor Waldorf exercised supervision and control over plaintiff's work for purposes of Labor Law § 200 and common law negligence (*see Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641 [1st Dept 2013]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, JJ.

10614N Ydalgo Berra, Index 22534/13E
Plaintiff-Respondent,

-against-

CHSP 36th Street LLC, et al.,
Defendants-Appellants,

Rotavele Elevator, Inc.,
Defendant-Appellant-Respondent.

_____

Cartafalsa, Turpin & Lenoff, New York (Christopher J. Turpin of counsel), for appellants.

Gottlieb Siegel & Schwartz, LLP, New York (Laura R. McKenzie of counsel), for appellant-respondent.

Louis Grandelli, P.C., New York (Ari R. Lieberman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 10, 2019, which, to the extent appealed from, denied the motion of defendants CHSP 36th Street LLC and Hyatt Hotel Corporation (collectively CHSP) for conditional summary judgment on their cross claim for contractual defense and indemnification against defendant Rotavele Elevator, Inc. (Rotavelle), and granted plaintiff's cross motion for partial summary judgment on the issue of liability based on the doctrine of res ipsa loquitur, unanimously reversed, on the law, without costs, CHSP's motion granted and plaintiff's cross motion denied.

The opinion of Rotavele's expert engineer, based on his inspection of the elevator, that the mechanical design of the elevator would make it impossible for the elevator car to free-

fall or even speed up, raised questions of fact as to whether the accident occurred as plaintiff alleges and whether the doctrine of res ipsa loquitur applies here (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

Furthermore, given the clear and unmistakeable terms of the elevator service agreement between CHSP and Rotavele, CHSP was entitled to conditional summary judgment on its claim for a defense and indemnification notwithstanding any possible negligence on its part in the cause of plaintiff's alleged injuries (*see Antoniak v P.S. Marcato El. Co., Inc.*, 144 AD3d 407 [1st Dept 2016]; *see also Giancola v Yale Club of N.Y. City*, 168 AD3d 539 [1st Dept 2019]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Manzanet-Daniels, J.P., Kern, Oing, Singh, JJ.

10029 Yannick Benjamin, et al., Index 106847/04
Plaintiffs-Appellants,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for the City, respondent.

Torino & Bernstein, P.C., Mineola (Bruce A. Torino of counsel), for Trocom Construction Corp., respondent.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered May 1, 2017, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiffs allege that plaintiff Yannick Benjamin was injured after his car collided with and rolled over a guiderail on the northbound side of the Henry Hudson Parkway, near 96th Street. This action was brought against the City and various City agencies (the City defendants), alleging negligence. The action against defendant Trocom Construction Corp. (Trocom) alleges liability based upon its' contract with the City to replace certain damaged guiderails between 79th and 125th Streets.

The City defendants established prima facie entitlement to judgment as a matter of law by submitting New York City

Department of Transportation records revealing that they had not received any prior written notice of the allegedly defective roadway markings (*see* New York City Administrative Code § 7-201(c)(2); *Sada v City of New York*, 168 AD3d 1014, 1014-1015 [2d Dept 2019]). In opposition, plaintiffs failed to raise a triable issue of fact.

We reject plaintiffs' claim that the City defendants were negligent in failing to adequately address a recurrent flooding condition at catch basins in the area of plaintiff's accident (*see generally Cappolla v City of New York*, 302 AD2d 547, 548 [2d Dept 2003], *lv denied* 100 NY2d 511 [2003]). Deposition testimony indicates eight flooding complaints within approximately three years in the vicinity of plaintiff's accident. Of these complaints, three involved different locations, two were not substantiated, and the remaining three were either timely remedied or resolved themselves (*see Cassidy v City of New York*, 121 AD3d 735, 736-37 [2d Dept 2014]; *Cappolla*, 302 AD2d at 548-49). As none of the reported flooding incidents were caused by clogged catch basins, the reports were insufficient to constitute constructive notice of a recurrent flooding hazard (*see Cassidy*, 121 AD3d at 736-37; *Cappolla*, 302 AD2d at 548-49).

We also reject plaintiffs' claim that a history of similar accidents should have put the City on notice of a hazardous guiderail. According to New York State Department of Transportation records, in the five years preceding the subject

accident, there were two prior accidents in the area labeled "collision with guiderail - end," but the known facts regarding those accidents and the incident road conditions were sufficiently dissimilar to preclude finding that the subject guiderail was an actionable hazard (*see generally Chunhye Kang-Kim v City of New* York, 29 AD3d 57, 59-61 [1st Dept 2006]; *see Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [1st Dept 2007]). The five notices of claim submitted by plaintiffs were likewise insufficient to put the City on notice of a defective guiderail at the location where plaintiff was injured (*see Fan Guan v State of New* York, 55 AD3d 782, 785 [2d Dept 2008]; *Martin v State of New York*, 305 AD2d 784, 785 [3d Dept 2003], *lv denied* 100 NY 512 [2003]; *but cf. Gregorio v City of New* York, 246 AD2d 275, 280 [1st Dept 1998], *lv dismissed* 93 NY2d 917 [1999]).

The specificity of Trocom's guiderail replacement contract with the City, and the fact that this defendant did not repair the guiderail where plaintiff was injured, preclude plaintiff claim against this defendant (*see generally Espinal v Melville*

Snow Contrs., 98 NY2d 136, 138, 140, 142-43 [2002]; *Rosenbaum, Rosenfeld & Sonnenblick, LLP v Excalibur Group NA, LLC*, 146 AD3d 489, 490 [1st Dept 2017]).

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: DECEMBER 19, 2019

CLERK

Renwick, J.P., Gische, Mazzarelli, Moulton, JJ.

10543 737 Park Avenue Acquisition LLC, Index 154241/13
Plaintiff-Appellant-Respondent,

-against-

Laura Goldblatt also known as Laura Goldblatt-Jensen, et al.,
Defendants-Respondents-Appellants.

_____

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for appellant-respondent.

Brill & Meisel, New York (Allen H. Brill of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered January 4, 2019, which, to the extent appealed from as limited by the briefs, held that the apartment is subject to rent stabilization, denied plaintiff's request for a counter-declaration that defendants had disavowed the apartment as their primary residence, denied plaintiff's motion to dismiss defendants' first counterclaim for tortious interference with prospective economic relations, and granted plaintiff's motion to dismiss defendants' equitable estoppel defense, unanimously modified, on the law, to grant plaintiff's motion to dismiss defendants' first counterclaim for tortious interference with prospective economic relations, and otherwise affirmed, without costs.

This action for a declaratory judgment concerns a dispute whether the defendants, who are siblings, may sublet an apartment in a building located at 737 Park Avenue, New York, New York

without complying with applicable rent regulation laws, and without the consent of plaintiff, the new owner of the building. Defendants are the children of Barbara and Jacob Goldblatt, now deceased. In 1958, Mrs. Goldblatt obtained a lifetime leasehold interest in the apartment from her father, who purchased the building in 1944. At that time, the rent was set at $244.37, the same rent that continues to be registered with DHCR.

In a prior related appeal brought by Bruce E. Bozzi, as a sublesee, against the Goldblatts, as sublessors, this Court held that "[t]here is no dispute that the apartment became subject to the rent stabilization laws in 1974 prior to [Bozzi's] occupancy" (*Bozzi v Goldblatt*, 186 AD2d 82, 83 [1st Dept 1992]). Notwithstanding that order, Bozzi, the Goldblatts, and the prior owner of the building subsequently entered into a 1995 so-ordered stipulation of settlement and discontinuance in which they purported to agree that the apartment was exempt and excluded from certain protections and provisions of the rent stabilization laws. They also agreed that so long as Bozzi continued to occupy the apartment, he would do so at the rent specified in his sublease, and that they had not violated or evaded rent regulations laws. Although the rent registered with DHCR for this apartment has at all times been $244.37 a month, the sublease was at a considerably higher amount. In addition to addressing the issue of subletting, the stipulation also provided that the siblings would have a lifetime interest in the apartment

as their parents' successors in interest. The last Bozzi sublease, an agreement dated April 30, 1997, extended the lease to June 30, 2013 and was in effect when plaintiff, the new owner, purchased the building. In 2009, the prior owner and defendants entered into a lease providing that neither the lease nor the apartment was subject to rent stabilization. Although that lease also provided that defendants had to obtain owner's prior written consent for a sublease, a subsequent Lease Amendment Agreement dated August 5, 2011 deleted that requirement in its entirety. A replacement provision in the lease amendment allowed defendants to sublease the apartment without owner's consent, subject to certain time limitations. It also provided that such limitations "shall not apply" to Bozzi and his co-tenants. The sale of the building to the new owner, plaintiff here, closed August 5, 2011, the same date the prior owner executed an assignment of leases.

Plaintiff contends that defendants had no right to sublease the apartment to Bozzi once his lease expired in June 2013, because it is not their primary residence. Plaintiff seeks a counter-declaration that defendants do not occupy the apartment as a primary residence. Plaintiff also argues that because the apartment is rent stabilized, any new lease and sublease will have to comply with all applicable rent regulations. Defendants contend, however, that they have a contractual right to unrestricted subletting, that the apartment is not rent-stabilized, and that plaintiff has tortiously interfered with

their right to extend their sublease with Bozzi.

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court" (*Delgado v City of New York*, 144 AD3d 46, 51 [1st Dept 2016]). Consequently, the motion court correctly held that the apartment is subject to rent stabilization. The defendants' right to sublet the apartment, therefore, is limited by the applicable provisions of the rent stabilization laws because, as stated in our prior 1992 order, this is a rent-stabilized apartment. Moreover, a tenant cannot enter into a private agreement purporting to take a lease out of the rent regulation regime "even if the particular agreement is the product of a stipulated settlement" (*Drucker v Mauro*, 30 AD3d 37, 41 [1st Dept 2006], *lv dismissed* 7 NY3d 844 [2006] [internal quotation marks and citation omitted]) regardless of whether the agreement bestows obvious advantages on the tenant (*390 W. End Assoc. v Harel*, 298 AD2d 11, 16 [1st Dept 2002]). "Any [agreement] provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void" (*Drucker*, 30 AD3d at 39; Rent Stabilization Code [9 NYCRR] § 2520.13). Notably, in 1995, when the parties' stipulation was so-ordered, the law was settled that "any purported waiver of rent stabilization rights in a settlement agreement is invalid as a matter of public policy" (*Cvetichanin v Trapezoid Land Co.*, 180 AD2d 503, 504 [1st Dept 1992], *appeal dismissed* 79 NY2d 933

[1992]).

In denying plaintiff's motion for summary judgment dismissing defendants' first counterclaim for tortious interference with prospective economic relations, Supreme Court stated it was doing so on the basis that it was "constrained" to give effect to the so-ordered stipulation. Having now determined that the 1995 stipulation purporting to remove the apartment from rent regulation is void ab initio, there is no basis for defendants' claim that they sustained economic damages because plaintiff interfered with their right to continue subletting the apartment to Bozzi (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]; *Sustainable PTE Ltd. v Peak Venture Partners LLC*, 150 AD3d 554, 556 [1st Dept 2017]). Plaintiff's motion for dismissal of the tortious interference counterclaim should be granted.

Supreme Court properly denied, however, plaintiff's motion for a "counter-declaration" that defendants have disavowed the apartment as their primary residence. There is no predicate notice or properly instituted claim against them for non-primary residence (Rent Stabilization Code [9 NYCRR] 2524.4[c]; *Park House Partners, Ltd. v DeIrazabal*, 140 AD2d 84, 86 [1st Dept 1988], *lv dismissed* 73 NY2d 866 [1989]). In any event, this action for a declaratory judgment is for narrow relief, to wit, that defendants must comply with the statutes and regulations applicable for subletting a rent-stabilized apartment. Although plaintiff speculates that defendants have no intention of moving

back into their childhood apartment, generally a conflict over a tenant's primary residence should be resolved at trial in a properly commenced proceeding (*Extell Belnord LLC v Uppman*, 113 AD3d 1, 12 [1st Dept 2013][internal citation omitted]).

We find, however, that Supreme Court properly granted plaintiff's motion for dismissal of defendants' equitable estoppel defense because defendants merely pleaded this defense without any supporting facts (*see Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2d Dept 2010]).

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: DECEMBER 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10565 Olangy Felix, Index 23870/17E
Plaintiff-Respondent,

-against-

Yosef Polakoff,
Defendant-Appellant.

_____

Russo & Tambasco, Melville (Jill Dabrowski of counsel), for appellant.

Bongiorno & Associates, P.C., Mineola (Christopher G. Conway of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John R. Higgitt, J.), entered October 18, 2018, which, inter alia, denied defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The undisputed facts are that on August 26, 2016, at about 6:30 p.m., defendant was driving eastbound on West 186th Street, Bronx County, a two-way street, toward its intersection with Bennett Avenue, a one-way street for southbound traffic. Plaintiff was riding a bicycle on Bennett Avenue, and as he entered the intersection of West 186th and Bennett Avenue, he collided with the passenger side of defendant’s vehicle. Neither party disputes that defendant’s direction of travel was governed by a yield sign, and that plaintiff was bicycling the wrong way on Bennett Avenue at the time of the accident.

Plaintiff conceded that although Bennett Avenue went

southbound only, he was riding north on Bennett Avenue. Plaintiff stated that he was traveling at about 14 miles per hour and slowed down somewhat to check upcoming traffic, but did not stop before entering the intersection.

Plaintiff stated that he looked to his right and to his left as his bicycle entered the intersection. As he was entering the intersection, he saw that defendant's vehicle was one or two seconds away and was coming into the intersection on his left from 186th Street. According to plaintiff, he did not stop nor did he do anything to let defendant know that he was there.

Defendant stated that he looked northbound on Bennett Avenue for oncoming traffic before entering the intersection, but he did not remember looking southbound, i.e., the opposite direction of traffic, before the accident. As he proceeded through the intersection, a bicycle traveling northbound on Bennett Avenue crashed into his "two passenger side doors," although he did not see the impact.

Surveillance video shows defendant's vehicle traveling toward the crosswalk on West 186th Street as plaintiff rides his bicycle on Bennett Avenue toward its intersection with West 186th Street. It appears that defendant tapped his brakes before entering the intersection and was increasing his speed when the accident happened. It does not appear that plaintiff reduced his speed before entering the intersection and crashing his bicycle into the middle of defendant's vehicle on the passenger side.

The video also does not show any pedestrians in or near the crosswalk as testified to by plaintiff.

In denying defendant's motion for summary judgment, the motion court acknowledged that it was clear that plaintiff was negligent, but found there were issues of fact as to whether defendant failed to see what was there to be seen through the proper use of his senses. We find that defendant established his prima facie entitlement to summary judgment.

Pursuant to Vehicle and Traffic Law § 1231, a person riding a bicycle on a roadway has the same rights and responsibilities as a driver of a motor vehicle. Therefore, a bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself into a dangerous position (*see Laracuente v Ruiz*, 304 AD2d 478, 479 [1st Dept 2003]; *accord Palma v Sherman*, 55 AD3d 891, 891 [2d Dept 2008]; *Trzepacz v Jara*, 11 AD3d 531 [2d Dept 2004]).

Vehicle and Traffic Law § 1142(b) states that a "driver of a vehicle approaching a yield sign shall . . . slow down to a speed reasonable for existing conditions, or shall stop if necessary," and "yield the right of way . . . to any vehicle in the intersection or approaching on another highway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection." In addition, Vehicle and Traffic Law § 1146(a) requires motorists to "exercise due

care to avoid colliding with any bicyclist, pedestrian, or domestic animal" on the roadway and to "give warning by sounding the horn when necessary."

The undisputed testimony was that plaintiff was traveling in the opposite direction of traffic, in clear violation of Vehicle and Traffic Law § 1231, and traveled into the intersection without stopping or yielding to defendant's vehicle which was clearly already in the intersection. Admittedly, plaintiff made no attempt to stop, or to alert defendant of his presence. Although a driver of a motor vehicle has a duty to see what is there to be seen, defendant was not required to look in the opposite direction of the intersecting one-way street to see if someone was traveling in the wrong direction and at a speed indicating no intent to stop.

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

GESMER, J. (dissenting)

Because plaintiff raised triable issues of fact, I dissent. Although defendant testified that he was traveling between 15 and 20 miles per hour when plaintiff's bicycle struck his passenger-side doors, plaintiff and a nonparty witness averred in their affidavits that defendant's vehicle was traveling between 35 and 40 miles an hour before the accident, which was in excess of the speed limit. These conflicting versions of the accident raise triable issues as to whether defendant failed to use reasonable care to avoid the collision. Furthermore, I disagree that the surveillance video shows indisputably that defendant tapped his brakes before entering the intersection. In any event, the surveillance footage of the accident does not establish as a matter of law that defendant exercised reasonable care before entering the intersection.

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

ENTERED: DECEMBER 19, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10568- Ind. 2299/14
10568A The People of the State of New York, 1650/16
Respondent,

-against-

James Cruz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Angel E. Chiohh of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Denis Boyle, J.), rendered March 21, 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 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: DECEMBER 19, 2019

CLERK

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

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10615 The People of the State of New York, Ind. 3655/14
Respondent,

-against-

Edward Garcia,
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 (Alan Gadlin 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 (Michael Sonberg, J.), rendered July 12, 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: DECEMBER 19, 2019

CLERK

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

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10616-
10617 Index 110429/11

Denise Kingue Bonnaig, Esq.,
doing business as Denise K. Bonnaig
& Associates,
Plaintiff-Appellant-Respondent,

-against-

Dr. Hilary C. Walton,
Defendant,

BrainPop U, A Division of Anina
Management Ltd., et al.,
Defendants-Respondents-Appellants.

- - - - -

Denise Kingue Bonnaig, Esq.,
doing business as Denise K. Bonnaig
& Associates,
Plaintiff-Respondent,

-against-

Dr. Hilary C. Walton,
Defendant,

BrainPop U, A Division of Anina
Management Ltd., et al.,
Defendants-Appellants.

_____

Denise K. Bonnaig & Associates, New York (Mahima Joishy of counsel), for appellant-respondent/respondent.

Shiboleth LLP, New York (Daniel Goldstein of counsel), for respondents-appellants/appellants.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered November 27, 2018, which, to the extent appealed from, sua sponte severed the action against defendant Dr. Hilary C. Walton, unanimously reversed, on the law, without costs, and the order vacated. Appeal from order, same court and Justice, entered March 16, 2015, which denied plaintiff's motion to sever

the action against Walton, denied plaintiff's request to search the record and grant summary judgment against the BrainPop defendants (BrainPop), and denied BrainPop's cross motion for summary judgment dismissing the complaint as against them, unanimously dismissed, without costs.

On December 25, 2015, after plaintiff and BrainPop had perfected their appeals from the March 2015 order, defendant Walton died. After having denied plaintiff's motion to sever the action against Walton in the March 2015 order, the motion court sua sponte severed the action against her in the November 2018 order.

The part of the November 2018 order that severed the action against Walton, who was then deceased, must be vacated as void as no legal representative has been appointed (*Harding v Noble Taxi Corp.*, 155 AD2d 265 [1st Dept 1989]; *see also Griffin v Manning*, 36 AD3d 530 [1st Dept 2007]; *Schnapp v Miller's Launch, Inc.*, 135 AD3d 655 [1st Dept 2016]).

Although the March 2015 order is not void, because Walton was still alive when it was issued, the appeals from the order

must be dismissed, because no estate representative has been appointed (*Schnapp*, 135 AD3d at 656; *Griffin*, 36 AD3d at 532; CPLR 1015[a]). However, the dismissal is without prejudice (*see Schnapp*, 135 AD3d at 656).

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10618 In re Amanda N.,

A Dependent Child Under the Age of Eighteen Years, etc.,

Ping N. (Anonymous),
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

NYU School of Law Family Defense Clinic/Washington Square Legal Services, New York (Amy Mulzer of counsel), for appellant.

Magovern & Sclafani, Mineola (Mary Jane Sclafani of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Emily Olshansky, J.), entered on or about July 30, 2018, which upon a fact-finding determination that respondent father's consent was not required for the subject child's adoption, terminated the father's parental rights to the child and committed custody and guardianship of the child to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously reversed, on the law, without costs, and the matter remanded for further proceedings consistent herewith.

The record demonstrates that the father's consent to the adoption of the child was required (*see* Domestic Relations Law § 111[1][d]). The court erred in limiting the evidence solely to the time that the child was in foster care. The fact that the

child resided with the father and was financially supported by him from her birth until her removal from the home at the age of five plainly qualified him as a consent father under the statute (*see Matter of Sean Michael P.*, 56 AD3d 783 [2d Dept 2008]; *Matter of Smith*, 10 Misc 3d 1077[A], 2005 NY Slip Op 52250[U], *6-7 [Family Ct, Bronx County 2005].

In view of the foregoing and because "a court will not pass upon a constitutional question if the case can be disposed of in any other way" (*People v Felix*, 58 NY2d 156, 161 [1983], *appeal dismissed* 464 US 802 [1983]), we decline to reach the issue of whether Domestic Relations Law § 111(1)(d) is unconstitutional as applied to the father.

Accordingly, the matter is remanded for fact-finding on the agency's alternative claim alleging permanent neglect.

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10619 John Gilligan, et al., Index 154536/15
Plaintiffs,

-against-

CJS Builders, et al.,
Defendants-Respondents,

CJS Industries Ltd., et al.,
Defendants.
- - - - -
[And a Third-Party Action]
- - - - -
CJS Industries, Inc., etc.,
Second Third-Party Plaintiff-Respondent,

-against-

Complete Construction Contracting Corp.,
Second Third-Party Defendant-Appellant.
- - - - -
11 West 42 Realty Investors, LLC,
Third Third-Party Plaintiff,

-against-

Complete Construction Contracting Corp.,
Third Third-Party Defendant-Appellant.

_____

Hannum Feretic Prendergast & Melino, LLC, New York (Steven R. Dyki of counsel), for appellant.

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

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Order, Supreme Court, New York County (David B. Cohen, J.), entered March 30, 2018, which, to the extent appealed from as limited by the briefs, granted the cross motion of defendant/second third-party plaintiff CJS Industries, Inc. t/a CJS Builders (CJS) for summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims as against it,

and on its third-party claim for contractual indemnity against second and third third-party defendant Complete Construction Contracting Corp. (Complete), unanimously affirmed, without costs.

Plaintiff John Gilligan was injured when he fell several feet from a scaffold. This accident arose out of the means and methods of his work, and not, as Complete contends, a dangerous or defective premises condition (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Accordingly, since CJS showed that it did not exercise the requisite degree of control over the means and methods of the work in which Gilligan was engaged at the time of his accident, CJS was entitled to summary judgment dismissing the common-law negligence and Labor Law § 200 claims (*see Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 [1st Dept 2014]; *Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]).

In view of the foregoing, CJS also established its entitlement to full contractual indemnification from Complete pursuant to the express terms of its indemnification agreement (*see Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 463 [1st Dept 2014]; *see generally Masciotta v Morse Diesel Intl.*, 303 AD2d

309, 310 [1st Dept 2003]).

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

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10620- Ind. 3177/15
10620A- 1875/16
10620B The People of the State of New York, 3802/16
Respondent,

-against-

Tuaron Smith also known as Frederick Smith,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered June 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 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: DECEMBER 19, 2019

CLERK

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

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10621 In re Citigroup Global Markets, Inc., et al., Petitioners-Respondents, Index 653017/13

-against-

John Leopold Fiorilla, etc., Respondent-Appellant.

_____

Law Office of Bernard V. Kleinman, PLLC, Somers (Bernard V. Kleinman of counsel), for appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Audra J. Soloway of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 9, 2018, which granted petitioners' motion, pursuant to Section 130-1.1 of the Rules of the Chief Administrator of the Courts, for an order awarding them sanctions and attorneys' fees, and sanctioned respondent in the amount of $213,832.50 payable to petitioners, to be set off against the judgment (same court and Justice), entered May 12, 2014, against respondent and in favor of petitioners in the amount of $800,000, in addition to a sanction of $20,000 payable to the Lawyers's Fund for Client Protection, unanimously modified, on the law, the facts, and in the exercise of discretion, to delete the provision for payment of $20,000 in sanctions to the Lawyers' Fund for Client Protection, and substitute therefor a provision directing that a total of $20,000 be deposited with the Clerk of the Supreme Court, New York County, for transmittal to the State Commissioner of Taxation and Finance, and otherwise affirmed,

without costs.

In 2010, Fiorilla commenced a FINRA arbitration against petitioners. In April 2012, with express authorization from Fiorilla, his attorney, Toskes, settled with petitioners in exchange for $800,000. The parties confirmed the settlement in writing with FINRA. Fiorilla changed his mind and directed Toskes to proceed to arbitration. Toskes refused and Fiorilla fired him. Successor counsel for Fiorilla persuaded FINRA that the parties had not settled.

Fiorilla filed a disciplinary complaint against Toskes with the Florida Bar, alleging that Toskes had lied about the FINRA settlement. The Florida Bar dismissed the complaint, finding, in effect, that Toskes had acted truthfully and ethically in settling the matter. Citigroup notified FINRA of the Florida Bar ruling, but FINRA still refused to enforce the settlement. The matter proceeded to arbitration, ending with an $11 million award in Fiorilla's favor.

Petitioners commenced a proceeding in Supreme Court, New York County, to vacate the arbitral award. In May 2014, Supreme Court, finding that Fiorilla had in fact settled his claim against petitioners for $800,000, rendered judgment vacating the award and awarding Fiorilla $800,000. In April 2015, this Court unanimously affirmed, finding that the arbitral panel had manifestly disregarded the law in failing to enforce the settlement. In so holding, this Court found unavailing

Fiorilla's arguments that the arbitrators, and not the courts, were the sole adjudicators of whether the parties had settled, and that Citigroup's attorney had misled Supreme Court into thinking that a Florida court, rather than the Florida Bar, had found that the parties had settled the FINRA arbitration (*see Matter of Citigroup Global Mkts., Inc. v Fiorilla*, 127 AD3d 491 [1st Dept 2015], *lv denied* 26 NY3d 908 [2015] [*Citigroup I*]).

In blatant disregard of our ruling in *Citigroup I*, in March 2016, Fiorilla commenced an ex parte proceeding to enforce the award in France. Fiorilla did not inform the French Court that the New York courts had vacated the award, and did not notify petitioners of the French proceeding.

In September 2016, Fiorilla moved in Supreme Court, pursuant to CPLR 5015, to vacate the *Citigroup I* judgment. Fiorilla repeated his losing arguments from *Citigroup I*, that petitioners had misled Supreme Court to believe that a Florida court had upheld the settlement, and that the New York courts should not have overridden the arbitral panel's decision not to enforce the settlement. Citigroup opposed the application and moved to enjoin Fiorilla from seeking to enforce the award overseas.

Supreme Court denied Fiorilla's vacatur application as "frivolous," granted Citigroup's motion for an anti-suit injunction, and expressly "invite[d]" Citigroup to bring "a motion for sanctions." In June 2017, we unanimously affirmed, finding that Fiorilla's arguments were "the same as he made in"

Citigroup I, which was "law of the case" (*Matter of Citigroup Global Mkts., Inc. v Fiorilla*, 151 AD3d 665, 666 [1st Dept 2017], *lv dismissed* 30 NY3d 986 [2017] [*Citigroup II*). We likewise upheld the anti-suit injunction, finding that Fiorilla had "commenced the French proceeding in bad faith," and that the "French court's recognition of the vacated [arbitral] award" was not itself entitled to recognition under the doctrine of comity (*id.*).

Fiorilla went on, unsuccessfully, to seek to vacate the judgment in the Federal courts, which held that they lacked subject matter jurisdiction to review the New York orders (*see Fiorilla v Citigroup Global Mkts., Inc.*, 771 Fed Appx 114 [2d Cir 2019]).

Finally, in August 2017, petitioners took up Supreme Court's invitation and moved pursuant to Rule 130-1.1 for an order awarding them attorneys' fees and sanctions. Supreme Court providently exercised its discretion in granting the application (*see Murray v National Broadcasting Co.*, 217 AD2d 651, 653 [2d Dept 1995]; *Picinic v Seatrain Lines*, 189 AD2d 622, 623 [1st Dept 1993], *lv denied* 81 NY2d 709 [1993]). The arguments that Fiorilla raised in *Citigroup II* in moving to vacate the *Citigroup I* judgment were a mere rehash of the arguments he had raised in *Citigroup I*. Nor did Fiorilla explain why he waited so long — until September 2016, 17 months after this Court's affirmance in *Citigroup I* — to seek to vacate the judgment.

Fiorilla contends that Supreme Court's signing of the order to show cause by which he made the *Citigroup II* vacatur application signifies Supreme Court's assessment that the application was not utterly meritless, and therefore not frivolous. This contention is unavailing. Assuming that Supreme Court subjected the order to show cause application to at least a minimal quantum of scrutiny sufficient to ensure that it could grant the relief sought (*see Mallory v Mallory*, 113 Misc 2d 912, 913-914 [Sup Ct, Nassau County 1982]), Supreme Court's signing of the order did not connote any approval of the substance of the motion (*see Bush v 280 Park Ave. S. Assocs.*, 2003 NY Slip Op 50758[U], at 2 [App Term 2d Dept 2003]). Instead, the most that can be said on the existing paper record is that the signing of the order to show cause signified the court's agreement that, if everything in the papers were accurate, it would be possible to grant Fiorilla the relief he sought. Indeed, the frivolousness of the papers is not apparent on their face. To the contrary, their frivolousness becomes evident only when taken in context, and only with a knowledge of the history of the parties' dispute. Such a determination, particularly in this procedurally complex dispute, would require a level of merits scrutiny that is not warranted on an application for an order to show cause, which, in the end, "is simply a substitute for a notice of motion as a device for bringing on a special proceeding" (*Matter of Allison v New York State Dept. of Correctional Servs.*, 73 AD2d 824, 824

[4th Dept 1979]).

As to Fiorilla's initiation of proceedings to enforce the vacated arbitral award in France, we have already expressly held that Fiorilla "commenced the French [enforcement] proceeding in bad faith" (*Citigroup II*, 151 AD3d at 666), thereby warranting imposition of sanctions (*see* 22 NYCRR § 130-1.1[c] [2]).

Fiorilla asserts that petitioners could have, and thus should have, made their application for attorneys' fees incurred in the French proceedings to the French Court itself. This assertion is unpersuasive. In the first place, Fiorilla continues to maintain that he had a right under French law to seek enforcement of the arbitral award in France, notwithstanding the fact that the New York courts had vacated the award. Since Fiorilla continues to insist that the French proceeding was perfectly proper under French law, he cannot also maintain that the French Court would have found Fiorilla's commencement of the proceeding to be frivolous. In any event, the courts of this State have the power to protect the integrity of their pronouncements, including by sanctioning parties under their personal jurisdiction for initiation of foreign proceedings for the sole purpose of flouting their judgments.

As noted, Supreme Court imposed sanctions of $20,000 on Fiorella, and directed him to pay them to the Lawyers' Fund. We modify to delete the provision for payment to the Lawyers' Fund and substitute therefor a provision directing that the $20,000 be

deposited with the Clerk of the Supreme Court, New York County, for transmittal to the State Commissioner of Taxation and Finance" (*Martinez v New York City Tr. Auth.*, 218 AD2d 643, 643 [2d Dept 1995]; *see* 22 NYCRR § 130-1.3).

We note that Supreme Court's award of $20,000 in sanctions exceeds the $10,000 maximum "for any single occurrence of frivolous conduct" (22 NYCRR § 130-1.2). On our independent review of the record, we find that an award of sanctions of $10,000 is appropriate for each of the two discrete instances of frivolous conduct presented; that is, for the *Citigroup II* application and the French enforcement proceedings. With that finding, we exercise our discretion to modify the award to an aggregate total of $20,000 (*see David Z. Inc. v Timur on 5th Ave.*, 7 AD3d 257, 257-258 [1st Dept 2004]).

Supreme Court providently exercised its discretion in awarding attorney's fees, as well as in setting the amount awarded (*see Matter of Aronesty v Aronesty*, 202 AD2d 240, 240 [1st Dept 1994]). Fiorilla's contention that the attorneys' fee award was not supported by sufficient evidence is unavailing in light of his agreement before Supreme Court to forego an evidentiary hearing, and to have the court decide the matter based on the existing paper record because there were no disputed issues of fact (*see Terrastone Audubon, L.P. v Blair Ventures,*

LLC, 160 AD3d 526, 527 [1st Dept 2018]). It is submitted that there is no basis for disturbing the court's exercise of discretion in awarding the attorneys' fees sought (*see Old Paris v G.E.B.M. Intl.*, 170 AD2d 392, 393 [1st Dept 1991]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10622 The People of the State of New York, Ind. 3168/16
Respondent,

-against-

Jose Soto,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J. at plea; Gregory Carro, J. at sentencing), rendered September 20, 2016, 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: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10623 In re Wimbledon Financing Master Fund, Ltd., Petitioner-Respondent, Index 654559/17

-against-

Sage Group Consulting Inc., et al., Respondents-Appellants,

Aaron A. Grunfeld, et al., Respondents.

_____

Parlatore Law Group, LLC, New York (Scott D. Brenner of counsel), for appellants.

Kaplan Rice LLP, New York (John P. Collins, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 15, 2018, which denied Sage Group Consulting Inc. and Parmjit "Paul" Parmar's (respondents) motion to vacate the default judgment against them, unanimously affirmed, without costs.

To vacate a default judgment under CPLR 5015(a), a defendant "must demonstrate a reasonable excuse for its delay in appearing and answering the complaint and a meritorious defense to the action" (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]).

Respondents failed to establish a reasonable excuse for their default in answering the petition (*Lockard v Sopolsky*, 82 AD3d 657 [1st Dept 2011]). The incarceration of Parmar, who was represented by counsel at the time, did not provide a reasonable

excuse for his default, and certainly not for that of Sage Group Consulting Inc. (*Matter of Kathy C. v Alonzo E.*, 157 AD3d 503 [1st Dept 2018]).

Respondents also have not established a meritorious defense. In particular, they have not demonstrated fair consideration or good faith in connection with the subject conveyance (*Sardis v Frankel*, 113 AD3d 135, 141 [1st Dept 2014]; *see Reed Smith LLP v LEED HR, LLC*, 156 AD3d 420 [1st Dept 2017]). Moreover, this Court has previously acknowledged the evidence of fraud involved in the underlying transactions and related transfers (*Matter of Wimbledon Fin. Master Fund, Ltd. v Wimbledon Fund, SPC*, 162 AD3d 433 [1st Dept 2018]; *Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496 [1st Dept 2018]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10624 Highland Capital Management, L.P., Index 151322/18
Plaintiff-Appellant,

-against-

Dow Jones & Company, Inc., et al.,
Defendants-Respondents,

Does 1-20,
Defendant.

_____

Harder LLP, New York (Anthony Harwood of counsel), for appellant.

Vinson & Elkins LLP, Dallas, TX (Thomas S. Leatherbury of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered October 24, 2018, which granted defendants' motion to dismiss the complaint with prejudice, unanimously affirmed, with costs.

Supreme Court properly dismissed this action alleging that an article published by defendant Dow Jones & Company on its website and in the print edition of the Wall Street Journal, and various tweets by defendants concerning an arbitration decision, were defamatory.

"A civil action cannot be maintained. . .for the publication of a fair and true report of any judicial proceeding. . .or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published" (Civil Rights Law § 74). In determining whether an article constitutes a fair and true report, "the language used therein should not be

dissected and analyzed with a lexicographer's precision," because a news article is, "by its very nature, a condensed report of events which must, of necessity, reflect to some degree the subjective viewpoint of the author" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68 [1979]). It is enough that the article be "substantially accurate" (*id.* at 67). "'Substantially accurate' is interpreted liberally[, and t]he test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published" (*Daniel Goldreyer, Ltd. v Van De Wetering*, 217 AD2d 434, 436 [1st Dept 1995] [internal citation omitted]).

Here, the articles and tweets were substantially accurate reports of the arbitration decision. Although they erroneously stated that the award was rendered against plaintiff when it was against ACIS Capital Management, L.P. (ACIS) and ACIS Capital Management GP, LLC (ACIS GP), the panel attributed to plaintiff the wrongful conduct that was the basis of the award and noted that ACIS and ACIS GP operated exclusively through plaintiff's employees and officers. It is unlikely that a reader knowing the actual truth would have had a more favorable impression of plaintiff than that created by the article.

The article also accurately stated that the dispute with plaintiff's former employee related to his objection to extending the due date on certain notes payable to plaintiff's clients in

order to lend, rather than transfer, money to an affiliated entity. Contrary to plaintiff's allegations, the article did not credit another former employee's claim that he was terminated because he refused to execute asset transfers directed by plaintiff's founder.

Plaintiff further asserts that the article failed to report certain facts that were favorable to it concerning other litigations. However, an omission of relatively minor details in a report that is otherwise basically accurate is not actionable because this "is largely a matter of editorial judgment in which the courts, and juries, have no proper function (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 383 [1977], *cert denied* 434 US 969 [1977]).

The tortious interference with contractual relations claim was properly dismissed. Defendants' conduct as alleged in the complaint was incidental to the lawful and constitutionally

protected process of news gathering and reporting (*see Bartnicki v Vopper*, 532 US 514, 534 [2001]). The complaint also failed to cite any specific confidentiality agreements that defendants knowingly induced their sources to violate.

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10625 In re British R. and Another,

Children under Eighteen Years of Age, etc.,

Shavon J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Joshua R.,
Petitioner-Respondent,

-against-

Shavon J.,
Respondent-Appellant.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Georgia Pestana, Acting Corporation Counsel, New York (Susan Paulson of counsel), for Administration for Children's Services, respondent.

Thomas R. Villecco, Jericho (Thomas R. Villecco of counsel), for Joshua R., respondent.

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children.

_____

Order of disposition and custody, Family Court, Bronx County (Monica D. Shulman, J.), entered on or about January 7, 2019, which, to the extent appealed from as limited by the briefs, upon releasing the children to the father and granting him custody, granted the mother supervised visitation with the children, with conditions, unanimously modified, on the law, to remand to Family Court for further proceedings to determine a

supervised visitation schedule, and otherwise affirmed, without costs.

Family Court's determination that supervised visitation by the mother would be in the children's best interest has a sound and substantial basis in the record (*see Michael Evan W. v Pamela Lyn B.*, 152 AD3d 414 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]). The court considered testimony indicating that the mother is not in the position to be the caregiver of the subject children, including evidence of her aggressive and confrontational behavior with agency staff and the father, and her noncompliance with court orders concerning visitation.

However, given the mother's history of aggressive behavior toward the father and visitation supervisors, it was unlikely that the parties would be able to effectuate appropriate visitation (*see Matter of Spencer v Killoran*, 147 AD3d 862, 863 [2d Dept 2017], *lv dismissed* 29 NY3d 994 [2017]). Moreover, Family Court's order essentially delegated the court's authority to determine visitation to the father, which it may not do (*Matter of Izrael J.[Lindsay F.]*, 149 AD3d 630 [1st Dept 2017]). Accordingly, the matter should be remanded to the Family Court for further proceedings to establish a visitation plan, including, but not limited to, a specific schedule and identification of an appropriate supervisor or supervisors (*id.*; *Spencer*, 147 AD3d at 863).

The mother's claim that she was deprived of her fundamental

right to counsel by the court's instruction that she not communicate with her attorney about her past or anticipated testimony during breaks in the hearing is unpreserved, given that her counsel was present and available to protest (*see People v Umali*, 10 NY3d 417, 423 [2008], *cert denied* 556 US 1110 [2009]). We decline the mother's request to take corrective action in the interest of justice with respect to that issue.

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

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10626 Mutual Redevelopment Houses, Inc., Index 651927/16
Plaintiff-Respondent,

-against-

Skyline Engineering, L.L.C,
Defendant-Appellant,

Lakhani & Jordan Engineers, P.C.,
Defendant.

_____

Winget, Spadafora & Schwartzberg, LLP, New York (Garry T. Stevens, Jr. of counsel), for appellant.

Goetz Fitzpatrick, LLP, New York (Gary M. Kushner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about April 30, 2018, which denied the motion of defendant Skyline Engineering, L.L.C. (Skyline) for summary judgment dismissing the complaint as against it, unanimously modified, on the law, the motion granted to the extent of dismissing the breach of contract claim against Skyline, and otherwise affirmed, without costs.

Plaintiff commenced this action in 2016 alleging that it retained Skyline, an engineering firm, to perform "special inspection" services for "Phase I" of an HVAC installation project, and that Skyline negligently performed those services and breached the contract. In support of its motion for summary judgment, Skyline demonstrated prima facie that it completed Phase I work under the contract in 2012 and that it was serving in a professional capacity as an engineering firm when it

performed those services, so that the three-year limitations period applied (CPLR 214[6]; *see Chase Scientific Research v NIA Group*, 96 NY2d 20, 29 [2001]; *see also Sendar Dev. Co., LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]). In particular, Skyline showed that it was hired to perform specialized inspections of the HVAC installation and file technical reports to demonstrate compliance with the required inspections/tests to the New York City Department of Buildings, and thus its inspectors were working in a professional capacity, as engineers (*see e.g. IFD Constr. Corp. v Corddry Carpenter Dietz & Zack*, 253 AD2d 89 [1st Dept 1999]; *Matter of Clark Patterson Engrs., Surveyor, and Architects, P.C. [City of Gloversville Bd. Of Water Commrs.]*, 25 AD3d 984 [3d Dept 2006], *lv denied* 6 NY3d 714 [2006]).

Nevertheless, plaintiff demonstrated that the action is not time-barred because the continuous representation doctrine is applicable and tolled the accrual of the limitations period until 2014 (*compare Sander Dev. Co., LLC*, 68 AD3d at 503-504). Plaintiff submitted evidence showing Skyline provided special and progress inspection and testing services for "Remediation of Phase I" of the project, pursuant to a 2014 agreement. Although this work was completed under a separate agreement, Skyline rendered these services to correct the engineering and construction defects that it failed to identify during its Phase 1 inspection in 2012. Since Skyline continued to provide

services in connection with Phase I in 2014, the action commenced in 2016 is timely under CPLR 214(6) (*see Matter of Clark Patterson Engrs., Surveyor, & Architects, P.C. [City of Gloversville Bd. of Water Commrs.]*, 25 AD3d at 986-987).

Plaintiff's breach of contract cause of action, however, is dismissed, as duplicative of the negligence claim, because it is based on the same facts and alleges the same damages (*see InKine Pharm. Co., Inc. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003]). Nor did plaintiff allege that Skyline breached a promise to achieve a specific result (*see Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]).

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10627 The People of the State of New York, SCI 30/14
Respondent,

-against-

Kenneth Campbell,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Rachel L. Pecker of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Marc J. Whiten, J.), entered on or about December 16, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record sufficiently establishes that, by refusing to be transported to court from his place of incarceration, defendant waived or forfeited his right to be present at the hearing (*see People v Reid*, 49 AD3d 338, 339 [1st Dept 2008], *lv denied* 10 NY3d 713 [2008]). The court providently exercised its discretion in declining to adjourn the hearing. Notwithstanding defendant's absence, his counsel was able to litigate the downward departure issue.

Even assuming defendant's correct point score is 115, as he contends, rather than 130, as the court found, defendant remains a level three offender and, given the underlying facts, we

perceive no basis for a downward departure or for further proceedings in that regard (*see generally People v Gillotti*, 23 NY3d 841 [2014])

We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 19, 2019

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10628-
10628A The People of the State of New York,
Respondent,

-against-

Luis Bonilla,
Defendant-Appellant.

Ind. 186/17
2536/17

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

Darcel D. Clark, District Attorney, Bronx (Christopher P. Regan of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Mark Whiten, J. at plea; Armando Montano, J. at sentencing), rendered January 22, 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 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: DECEMBER 19, 2019

CLERK

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

Friedman, J.P., Webber, Gesmer, Kern, JJ.

10629 J.G., an Infant, by His Mother and Natural Guardian, Tanisha S., et al., Plaintiffs-Appellants, Index 21246/13E

-against-

New York City Health and Hospitals Corporation, Defendant-Respondent.

_____

Burns & Harris, New York (Jason Steinberg of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (D. Alan Rosinus, Jr. of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (George J. Silver, J.), entered June 6, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The infant plaintiff alleged personal injuries resulting from defendant's negligence in delaying surgical intervention to treat compartment syndrome that developed after he sustained a gunshot wound to his right leg. Defendant met its prima facie burden of establishing the absence of a departure from good and accepted medical practice, or that any such departure was not a proximate cause of the patient's injuries, by submitting evidence that defendants timely commenced a fasciotomy, and that the infant plaintiff did not sustain permanent damage to the tissue and muscles of his right leg as the result of the timing of the surgery (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st

Dept 2015]).

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs' expert misstated when the infant plaintiff was first diagnosed with compartment syndrome in asserting that there was a significant delay in commencing the fasciotomy, and stated only a conclusory opinion that the purported delay worsened the infant plaintiff's injuries from his gunshot wound (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

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

ENTERED: DECEMBER 19, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Peter Tom
Angela M. Mazzarelli
Jeffrey K. Oing
Anil C. Singh, JJ.

10089-
10089A
Ind. 6041/11

_____x

The People of the State of New York,
Respondent,

-against-

Darrin McGhee,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Laura A. Ward, J.), entered on or about April 23, 2018, which denied defendant's CPL 440.10 motion to vacate the judgment, same court and Justice, rendered July 7, 2015, convicting him, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and imposing sentence, and from the foregoing judgment.

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes and Patrick J. Hynes of counsel), for respondent.

MAZZARELLI, J.

"`The *Brady* rule is based on the requirement of due process, and [i]ts purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that the accused receives a fair trial'" (*People v Garrett*, 23 NY3d 878, 884 [2014], quoting *United States v Bagley*, 473 US 667, 675 [1985]). Here, the People admittedly failed to disclose a witness statement that could have aided the defense in attempting to impeach the only eyewitness to the shooting in question and that could have opened up an additional avenue of investigation. Indeed, the Court of Appeals recently reaffirmed that a defendant's inability to interview a potentially favorable witness because his existence was suppressed constitutes a *Brady* violation where the information gathered, "if true, would have directly contradicted the People's theory of the case" (*People v Rong He*, 34 NY3d 956, 958 [2019]). Moreover, here, in addition to the *Brady* violation, there were at least two other trial errors. While each of those errors may have individually withstood analysis under the harmless error doctrine, of overriding concern in appellate review of any jury verdict is whether the defendant received a trial that was fundamentally fair. Coupled with the People's failure to turn over the

statement, it cannot be said in light of those errors that the goal of a fair trial was achieved. Accordingly, defendant is entitled to vacatur of his conviction pursuant to CPL 440.10 and a new trial.

Defendant was charged with murder in the second degree and criminal possession of a weapon in the second degree in connection with the November 14, 2011 shooting death of Archie Phillips in the parking lot of the Polo Grounds public housing complex. The principal item of evidence presented by the People was the eyewitness and identification testimony of Nicole Davis, who lived in the Polo Grounds. According to her testimony, a few minutes after 3:30 p.m. on the day of the shooting, Davis walked out of her building to socialize with friends near the parking lot next to a staircase that led up to the street (known locally as the "110-step staircase"). Davis saw Phillips standing 50 to 60 feet away, talking to and hugging a woman. Roughly one minute later, Davis saw defendant, wearing "all beige" clothes, a jacket, and a flat cap with a snap in front, walk up to Phillips, shoot him in the back four times, and then walk slowly to the 110-step staircase. Defendant looked Davis in the eye after he shot Phillips, and she recognized him as someone she had seen twice before. The first time was four or five months earlier,

the prior summer, in the same parking lot. At that time, he was new to the neighborhood, and she and another friend watched him for about an hour while he was in the parking lot. The second time she saw him was one week before the shooting. Davis was walking out of her building as defendant was walking in, and Davis held the door for him. They exchanged greetings. Davis was "sure" that the man who shot Phillips was the same man she had seen on those two occasions.

Prior to trial, defendant had moved to suppress Davis's identification of him. Davis picked defendant out of a photo array several hours after the shooting and out of a lineup several weeks later. At a *Wade* hearing, Detective Jorge Morban testified that, before Davis viewed the photo array, he showed her a 40- to 50-minute surveillance video that did not show the shooting but that did depict various people in the vicinity of the Polo Grounds around the time of the shooting. Morban testified that he told Davis to view the video, and that during the viewing "[s]he basically yells out, 'that's him, that's him. He shot the boy in the Polo Ground." She also revealed that she had seen defendant twice before, once four or five months earlier, the prior summer, in the same parking lot, and a second time a week before the shooting, when she was walking out of her

building and defendant was walking in. In response to questioning from the court, Morban admitted that as Davis was viewing the video he instructed her to let him know if she saw anyone wearing all brown, since the police were aware from 911 calls that the perpetrator had been dressed in brown. About 21 hours later, Morban showed Davis a six-person photo array. Morban asked if she recognized anyone, and Davis identified one of the photos, which was of defendant, as showing the shooter. About 1 1/2 months later, Davis viewed a six-person lineup. Morban told Davis that the suspect from the Polo Grounds shooting might or might not be in the lineup, and if she recognized him "from the photo array" or "[f]rom the shooting," she should state his number and from where she recognized him. Davis identified defendant as the person who did the shooting. The court denied the suppression motion. In addition, it admitted Davis's statement,"[t]hat's him," at trial as an excited utterance.

The People presented other witnesses (although not eyewitnesses) in addition to Davis, including John Reynolds, who testified pursuant to a cooperation agreement. Reynolds stated that, on the evening of November 11, 2011, Phillips assaulted him and stole his money, including drug sale proceeds, and his iPod

and watch. Reynolds told Mike Lilly, a drug dealer he worked for, about the incident, and Lilly told him that Phillips had recently robbed another of Lilly's drug sellers, and that he was going to "send a clear message" to Phillips, and that Phillips was "out of here." Over the next several days, a period during which Reynolds was smoking marijuana "excessively," Lilly arranged for defendant to kill Phillips, and directed Reynolds to give defendant a gun and a cell phone that he could use to contact Lilly the next time he saw Phillips. Phone records introduced at trial confirmed that defendant had the phone beginning on November 13, 2011, because beginning on that date, the phone made and received calls from four numbers that defendant repeatedly called during later periods of incarceration at Rikers Island. Cell site and cell phone records showed that defendant used the phone from near the Polo Grounds during the afternoon on November 13, 2011.

On the day of the shooting, Lilly called Reynolds to tell him that he was coming over to get Reynolds's gun. Reynolds was not home, but he called his wife and told her to let Lilly into the apartment. That afternoon, while Reynolds was alone in the apartment, Lilly used his cell phone to call Reynolds at 3:23 p.m., 3:24 p.m., and 3:27 p.m., and told Reynolds that he was on

the 155th Street Bridge, which overlooked the Polo Grounds, having spotted Phillips. At 3:28 p.m., Lilly called the phone that Reynolds's wife had given to defendant. Defendant answered, and the call lasted just under a minute. Cell phone records showed that both phones were in or near the Polo Grounds. At that time, Reynolds looked out of his window, which faced the 155th Street Bridge and the 110-step staircase, and he recognized defendant walking down the steps. He did not observe the shooting, but did see defendant run back up the stairs.

Reynolds further testified that he took a cab to Lilly's apartment after the shooting. Lilly told Reynolds, "[T]hat boy [is] out of here. He's gone." Defendant said, "You should have seen how I put five in [him]." Reynolds saw that Lilly had smashed the shells left in the gun, which was lying nearby. Defendant said they should scrape the inside of the barrel with a coat hanger "to get off the ballistics." Lilly later broke the gun and got rid of it. Reynolds learned that Lilly had paid defendant in crack cocaine and money to shoot Phillips. At a later time, Reynolds saw Lilly pay defendant "his last little bit of money." The People also elicited the testimony of Reynolds's wife, who was in the apartment the day after Reynolds was assaulted when he, Lilly and defendant were there. She testified

that Reynolds went to retrieve a gun and the three men then spent time looking out a window for somebody. The next day the wife gave a cell phone she had to defendant, at her husband's direction. The following day, she testified, she was in the apartment when Reynolds called and instructed her to let Lilly into the apartment. She did, and she saw Lilly go into the bedroom, retrieve a gun and exit the apartment.

After defendant was apprehended, he made several recorded phone calls in which he acknowledged that he was on surveillance videos. Those surveillance videos, from two buildings on St. Nicholas Place between West 153rd Street and West 155th Street from around the time of the shooting, showed that, at approximately 3:42 p.m., defendant and Lilly walked along St. Nicholas Place, away from the 110-step staircase. Lilly walked in the street, with his right arm out, as if trying to hail a taxi. Defendant walked behind Lilly in the street, and then waited near the sidewalk, behind a car. The men were gesturing and seemed to be agitated or excited. They walked toward 153rd Street, and defendant kept a jacket over one hand, near his waist. Eventually, defendant caught up with Lilly, and both men ran across the street. At around 3:40 p.m., Morban and a police officer arrived in response to radio calls of gunshots fired in

the Polo Grounds. Phillips was placed in an ambulance, but he died on the way to the hospital. Morban spoke to people on the street and learned the shooter was "a male Black in brown." Several months after the trial concluded, the assistant district attorney who tried the case received an inter-office email attaching a report from a detective who had interviewed an eyewitness to the shooting. The ADA and another prosecutor had themselves interviewed the witness before the trial, having learned that a man who had been arrested for a drug sale near the Polo Grounds told a detective that he had seen the Philips shooting. The prosecutors spoke to the eyewitness in the detective's presence, and no one took notes. Both prosecutors recalled only that the witness said he saw a man in brown clothes go down the 110 step-staircase, shoot Phillips, and go back up the steps. The ADA concluded that the statement was "cumulative" and did not disclose it to the defense. However, after receiving the email, he notified defendant's trial counsel about the witness, and attached the report, which he stated he had not known had ever been created. The report stated:

> "We asked [the eyewitness] about Archie Phillips who was killed in the Polo Grounds. This met the following results: On this day he was sitting 155 st by the train station with [redacted] and [redacted] both who are originally from the Polo

> Grounds. When he's hanging out, he's very observant of his surrounding area. During this time he observes a m/b wearing a beige bucket hat, darker beige shirt and khakis walking down the 110 steps. The m/b walks through the 3rd lane of the parking lot to the F/O building #3 and engages in a conversation, with a m/b (later known as Archie Phillips). At this time, he hears 1 gun shot and sees Archie being chased by the m/b (dressed in beige) running towards building #2. He loses sight of them, when they run behind the benches and then sees them again. Once he sees them again, he hears 3 more shots and sees the perp, run back towards the 110 stairs by cutting through the 1st lane of the parking lot and run's [sic] up the 110 stairs.
>
> "The word on the street is that Archie 'robs' people after they cash their S.S. check. The killer is the son of one of his robbery victims.
>
> "ADA Hammer, ADA Gilbert and ADA Krupnick did interview the [redacted] in regards to the above statement.
>
> "Det Morban of the 32sqd was notified of the above statement.
>
> "All perps in this case have been arrested and have a court appearance in part 71 on 3/04/13."

Defendant's appellate counsel met with the ADA and the eyewitness at the District Attorney's office. The witness refused to provide his full name, and his recollection of the shooting differed from his earlier statement. Among other things, he stated that the shooter did not chase Phillips, and he no longer recalled whether there was a conversation before the

shooting. The witness also claimed that he did not know who had said that the shooter was the son of one of Phillips's robbery victims. According to the prosecution, when appellate counsel asked the witness to describe the man in beige who shot Phillips, the witness's description matched defendant's height and build.

Defendant moved pursuant to CPL 440.10 to vacate the judgment of conviction on the ground that it was obtained in violation of his state and federal constitutional rights, including his rights under *Brady*. Defendant noted that the prosecution failed to disclose that it had interviewed a second eyewitness two years before trial and failed to disclose the report. Defendant's trial lawyer submitted an affirmation in which he explained how timely disclosure of the information would have affected his preparation of the defense, including a misidentification defense. His investigator also submitted an affidavit in which he stated that timely disclosure would have been valuable because the statement contained "several strong leads." For example, he would have spoken to the eyewitness before his memory faded or he became uncooperative, and he would have located the other two people who were sitting with the eyewitness. In addition, the rumor that Phillips robbed Social Security recipients was another lead that would have caused the

investigator to seek out people not otherwise on the defense "radar" for potential leads about Phillips or those who wanted to kill him. The court denied the motion, on the basis that there was "overwhelming evidence" supporting the verdict, so that disclosure of the statement would not have resulted in a different verdict. We conclude that this was error.

The *Brady* rule, derived from the Due Process Clauses of the Federal and state Constitutions, requires the prosecution to disclose evidence in its possession that is favorable and material to the defense (*see Brady v Maryland*, 373 US 83 [1963]; *People v Giuca*, 33 NY3d 462, 473 [2019]; *People v Fuentes*, 12 NY3d 259 [2009]). To establish a *Brady* violation, the defendant must show that (1) the evidence is favorable to the defendant because it is exculpatory or impeaching in nature, (2) the evidence was suppressed by the prosecution, willfully or inadvertently, and (3) prejudice resulted to the defendant because the suppressed evidence was "material" (*Strickler v Greene*, 527 US 263, 281-282 [1999]; *People v Garrett*, 23 NY3d 878, 884 [2014]; *Fuentes*, 12 NY3d at 260). Here, the People concede the first two prongs, as they must, since the witness statement could have been used to impeach Davis and because it was suppressed. The question then becomes whether it was

material.

The test for materiality in this case is relaxed, because defendant specifically requested witness statements. Accordingly, all defendant needed to establish was that there exists a "reasonable possibility" (not probability) that the verdict would have been different had the material not been suppressed (*see People v Vilardi*, 76 NY2d 67, 77 [1990]). In the recently decided case of *People v Rong He* (34 NY3d 956 [2019], *supra*), the People failed to turn over to the defendant, who had been charged with assaulting someone in a nightclub, the statement by the owner of the nightclub, which identified two people as assailants, neither of whom was the defendant. The Court held that the statement was material because, notwithstanding other evidence of the defendant's guilt, the sole witness to identify the defendant at trial initially told police he did not see the assailant's face. Thus, granting the defendant access to the owner "could have allowed defendant to develop additional facts, which in turn could have aided him in establishing additional or alternative theories to support his defense" (*id*. at 959).

The People attempt to minimize the impeachment potential of the witness statement, acknowledging certain discrepancies

between the description of the perpetrator contained therein and that given by Davis of defendant, but arguing that they are insignificant. For example, they point out, there is not a substantial difference between Davis's description of the assailant wearing a flat cap with a brim snap and the witness's description of a "bucket hat." Nor, they argue, is it significant that one witness saw the shooter speak to the victim and one did not; that one observed four successive shots and the other witnessed one shot and then three more while the victim was being chased; whether the shooter ran or walked away from the scene; or, finally, whether the assailant was wearing a jacket or not.

These differences are not insubstantial under the circumstances. As in *Rong He*, there was only one eyewitness who testified at trial, Davis, making her credibility "a pivotal consideration" (*People v Steadman*, 82 NY2d 1, 8 [1993] [finding *Brady* materiality where prosecution suppressed promise that sole eyewitness would not receive prison time for pending charges against him in exchange for testimony]). Similarly, in *People v Bond* (95 NY2d 840 [2000]), the Court found that a material *Brady* violation existed where the prosecution failed to divulge a prior inconsistent statement by an admitted crack addict who actually

witnessed the shooting in question, holding that "while defendant was able to challenge [the witness]'s credibility based on her drug usage, he was denied the opportunity to challenge the credibility of the People's key witness as a liar" (95 NY2d at 843]). At trial, defendant had little basis for questioning Davis's identification of him as the shooter. Accordingly, any ability to challenge her description of the assailant would have been critical to the defense in at least being able to plant a seed of doubt in the jury's mind. Further, given certain other infirmities in the People's evidence, such as the fact that Reynolds was testifying under a cooperation agreement and admitted to using copious amounts of marijuana around the time of the incident, it is impossible to say that even a semblance of skepticism about Davis's identification of defendant would not have tipped the jury into the realm of reasonable doubt.

The People also argue that the fact that the undisclosed witness's statement noted that the victim was known to people in the neighborhood as one who would rob people for their Social Security checks, and that he had robbed the father of the person who killed him, is too speculative to form the basis for a material *Brady* violation. However, because it suggested an alternative theory about who killed Phillips, its materiality is

clear. In the recent Court of Appeals decision *People v Ulett* (33 NY3d 512 [2019]), the People secured a murder conviction based principally on eyewitness testimony. Unbeknownst to defense counsel until after the trial, a surveillance video placed in a position that captured the precise scene where the victim was shot existed, but had not been produced. Applying the more stringent "reasonable probability" test employed when *Brady* material is not requested by the defense before trial, the Court reversed the conviction. It found that the video, which showed a person interacting with the victim after he was shot, could have opened an additional avenue of inquiry for the defendant, since none of the people who testified mentioned the presence of that person. The Court of Appeals did not require that the defendant establish any degree of probability that such an inquiry would have borne fruit. Similarly, in *People v Rong He* (34 NY3d 956), the Court required the People to produce the statement of witnesses who recalled a second assailant without expressing any concern about whether, once interviewed, those witnesses would be able to identify a person whom the defendant could point to as the true perpetrator. Finally, it is highly relevant here that the *Ulett* Court observed that, "[a]t a minimum, the presence of unidentified witnesses, at least one of whom was only a few feet

away when the shots were fired, could have been used by the defense to argue that the police failed to conduct a thorough investigation" (33 NY3d at 521).

The dissent cites several cases that it asserts "draw borders around the materiality aspect of the *Brady* analysis." It does this to demonstrate that, where there is overwhelming evidence of guilt, or the alleged *Brady* material is weak, a defendant will usually fail to overcome the materiality test. However, in one of those cases, *Turner v United States* (__US__, 137 S Ct 1885 [2017]), the United States Supreme Court stated that analyzing the materiality element

> "is legally simple but factually complex. We must examine the trial record, [and] evaluate the withheld evidence in the context of the entire record" (__ US at __, 137 S Ct at 1893 [internal quotation marks omitted]).

Thus, in light of the fact-intensive nature of *Brady* objections, comparing one case to others, for the purposes the dissent offers, is not particularly constructive. Indeed, and in any event, the cases cited by the dissent differ sufficiently on their facts that they do not support the dissent's position that the undisclosed witness statement here was not material. For example, unlike in *Turner* and *People v Giuca* (33 NY3d 462 [2019], *supra*), the impeachment value of the statement was not cumulative

of other material defendant used at trial to impugn Davis's credibility. To the contrary, there was no such material. In *People v Stilley* (128 AD3d 88 [1st Dept 2015] *lv denied* 27 NY3d 1007 [2016], the defendant confessed twice to the homicide at issue. There is no such confession here. In *People v Hart* (43 AD3d 722 [1st Dept 2007], *lv denied* 9 NY3d 1006 [2007]), the victim and an additional eyewitness both testified. Here, again, there was only one eyewitness who testified at trial. And in *People v Brooks* (123 AD3d 448 [1st Dept 2014]), *lv denied* 25 NY2d 1070 [2015]), the alleged *Brady* material was the police report of a person who did *not* witness the homicide, in contrast to the statement here, which identified a person who did.

The dissent concludes that there was no reasonable possibility that the disclosure to the defense of the witness statement would have changed the outcome of the trial, by permitting defendant to impeach Davis or to inquire into whether there was any factual basis for the rumor about people other than defendant having a motive to murder Phillips. However, it does so in a conclusory fashion, without addressing any of the infirmities in the People's case discussed above. To the extent that the dissent rests its conclusion on the witness's having disavowed some of the content of his original statement at a

joint interview with defendant's appellate counsel and the People's trial attorney, it is noted that the joint interview took place nearly four years after the original statement was given. Thus, it is impossible to say whether the passage of time altered the witness's memory or motivation to give an accurate account, and whether knowledge of his existence much closer to the time he gave the initial statement would have borne fruit for defendant.

Even if one were to agree with the dissent that the materiality prong of the *Brady* test was not met, the prosecution's failure to produce the witness statement should not be considered in isolation from the trial errors to which defendant objected. These included the admission of Davis's identification of defendant on surveillance video, which was tainted by Morban's suggestion that she look for someone in all brown, the color the alleged assailant was wearing according to the 911 calls (*see generally People v Edmonson*, 75 NY2d 672, 676-677 [1990], *cert denied sum nom Edmonson v New York*, 498 US 1001 [1990]). Additionally, the court erred in admitting as an excited utterance Davis's statement to Morban, "[T]hat's him, that's him. He shot the boy in the Polo Ground," when she saw defendant in the video, since she was not in the requisite state

of mind (*see People v Johnson*, 129 AD3d 486 [1st Dept 2015], *lv denied* 26 NY3d 1089 [2015]; *People v Mitchell*, 46 AD3d 480 [1st Dept 2007], *lv denied* 10 NY3d 842 [2008]).

We do not suggest that these errors were, standing alone, not harmless. However, they are compounded by the suppression of the witness report, and "[u]ltimately, sufficient harmless errors must be deemed 'harmful'" (*People v Dowdell*, 88 AD2d 239, 248 [1st Dept 1982). In other words, given multiple errors, each of which would otherwise be considered harmless, "the cumulative effect [may be] to deny the defendant the fair trial to which he was entitled, . . . constrain[ing a court] to reverse and remand for a new trial 'without regard to any evaluation as to whether the errors contributed to the defendant's conviction'" (*People v Nevedo*, 202 AD2d 183, 186 [1st Dept 1994], quoting *People v Crimmins*, 36 NY2d 230, 238 [1975]). We recognize that there is significant evidence in the record that can be reasonably construed to suggest defendant's guilt. However, as the *Crimmins* Court stated, "[T]he right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right" (36 NY2d at 238). Here, the trial errors, coupled with the prosecution's failure to turn over the witness statement, raise a serious question as to whether defendant was

deprived of that right.

Accordingly, the order of the Supreme Court, New York County (Laura A. Ward, J.), entered on or about April 23, 2018, which denied defendant's CPL 440.10 motion to vacate the judgment, same court and Justice. rendered July 7, 2015, convicting him, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, should be reversed, on the law, the motion granted, and the matter remanded for a new trial. The appeal from the judgment, same court and Justice, should be dismissed, as academic.

All concur except Tom, J.
who dissents in an Opinion.

TOM, J. (dissenting)

Because I conclude that defendant was not deprived of a fair trial as a consequence of the prosecutor's inadvertent failure to timely disclose the existence of a witness who did not testify at trial, I respectfully dissent. I differ with the majority principally on the issue whether the undisclosed evidence in this case was material with respect to the conviction, which necessarily raises the question whether disclosure would have reasonably led to a different verdict. In examining materiality, we are responsible for considering the trial record as a whole.

The facts indisputably show, by overwhelming evidence, that defendant was hired as a contract killer by Michael Lilly, a local drug dealer, to execute the victim, Archie Phillips, who had apparently robbed one of Lilly's employees, John Reynolds, whom defendant later shot and killed. Reynolds, who provided the gun for the killing and otherwise provided essential services leading to the killing, entered a cooperation agreement and testified against defendant in exchange for a reduced sentence. Reynolds's wife, who was uninvolved but witnessed the interactions and activities of the culpable participants in material respects, volunteered identifications to the police and provided compelling trial evidence. Nicole Davis, who was in the

parking lot where the killing took place, witnessed the shooting in broad daylight. She identified defendant, whom she recognized from prior observation in the neighborhood and a recent encounter in her apartment building, in a surveillance tape as well as a photo array and a lineup. Video surveillance cameras in various locations, as well as evidence derived from a cell phone, placed defendant at various locations at times relevant to the shooting and his flight, and in the company of Lilly. This surveillance and cell phone evidence also fatally undermined defendant's own testimony while also providing persuasive corroboration of the People's theory of the case.

The majority focuses on the existence of another potential witness whom the prosecutor, concluding that his evidence was merely cumulative, did not call at trial. However, a detective had recorded the undisclosed witness's statements during an investigative interview, which ultimately resulted in a report. The report reflected that the undisclosed witness stated that he had seen the killer talk to the victim and chase him, in contrast to Davis's testimony that defendant approached the victim and quickly shot him four times before himself running away. The undisclosed witness also related that he had heard a street rumor that the victim may have been shot by a relative of someone

robbed by the victim. However, he described the shooter as wearing beige or khaki clothing, which was consistent with the testimony of Davis and other witnesses.

The prosecutor seemingly overlooked the potential witness so that his existence was not disclosed to defendant at the time of trial. Several months after the trial, he received the report of the detective who had initially interviewed the witness. The prosecutor informed defense counsel. Defendant's attorney and the prosecutor then interviewed the witness, whose statements differed in some significant details from his original statements in the police report.

Defendant moved to vacate the conviction pursuant to CPL 440.10 on the basis of *Brady v Maryland* (373 US 83 [1963]) and other grounds. In denying the motion, Supreme Court, examining the report, found that the testimony could have served for impeachment but that it was not itself material and it would not likely have altered the outcome of the verdict. In view of the overwhelming evidence, where several items of evidence interlocked with and corroborated other evidence of guilt, I reach the same conclusion.

In *Turner v United States* (_US_, 137 S Ct 1885 [2017]), the United States Supreme Court recently analyzed the issue of

materiality for a *Brady* claim where the potential impeachment information had not been disclosed to the defense at the time of trial. In what the Court described as a fact-intensive case, two participants in the group robbery and murder of the victim cooperated with the prosecution. These witnesses testified as to the defendants' planning and then perpetrating the vicious assault as they robbed the victim, who ultimately died of her injuries. This testimony was amply corroborated by additional testimony by witnesses who had heard and observed the group proposing a robbery or who had observed the assault by perpetrators recognized by the witnesses. During postconviction proceedings, however, additional, previously undisclosed, evidence was turned over to the defendants. This included the prosecutor's or police notes of an interview of an undisclosed witness whom the prosecutor concluded was not credible (and eventually was murdered by the person whom she initially identified as the killer), an interview of another potential witness who stated that she had been high on PCP at the time of the crime, and two more undisclosed sets of notes of interviewees who provided information at variance with that of other witnesses. This also included a statement that a man had been seen running from the scene, which defendant construed to support

a single-perpetrator theory at variance with the group robbery/assault theory presented by the prosecutor's evidence. The defendants argued that had they known of the undisclosed information, they could have argued alternative theories, including that of a single assailant, ostensibly exonerating the appealing defendants and undermining the prosecution's case.

However, considering the record as a whole, the Supreme Court characterized the withheld evidence was "too little, too weak, or too distant from the main evidentiary points to meet *Brady's* standards" (*id.* at 1894). The Court noted that the witnesses might have "differed on minor details, but virtually every witness to the crime itself agreed as to [the] main theme" (*id.*). The Court concluded that it was not "reasonably probable that adding [the undisclosed identity and statements] could have led to a different result at trial" (*id.*). To the extent the undisclosed information had impeachment value, the record showed it to be largely cumulative and insufficient to undermine confidence in the jury's verdict (*id.* at 1895).

This approach by the Supreme Court, I conclude, has salience for the present case, notwithstanding the majority's concern that the impeachment related to Davis, the only prosecution eyewitness to the shooting itself. Although New York employs a less

demanding standard - no reasonable possibility rather than no reasonable probability (*People v McCray*, 23 NY3d 193, 198 [2014]) - I conclude that these facts do not support vacating the conviction and remanding for a new trial.

In *People v Giuca* (33 NY3d 462 [2019]), the defendant was convicted with Antonio Russo of murder in the second degree and additional offenses on the basis of testimony by several acquaintances that the defendant supplied Russo with the gun with which the victim was killed, had made incriminating statements after the murder, and hired another individual to dispose of the gun two days later, coupled with phone records consisting of an unusual number of calls between the defendants in the hours before and days after the murder. Thus far, the factual similarity with the present case is striking. Additional incriminating testimony was provided by a jailhouse informant whose extensive criminal record and history of drug abuse was elicited during cross-examination. In his subsequent CPL 440 motion, the defendant claimed that the People had failed to disclose an agreement to confer a benefit on the jailhouse informant in exchange for the testimony, which the defendant further inferred was related to a different prosecutor's personal intervention to seek a favorable result for the informant in an

unrelated drug case notwithstanding his failure to comply with a court-imposed condition involving drug treatment. The Court found no sound support for the existence of a cooperation agreement in the murder case, and that even if information pertaining to the informant's lack of success in a rehabilitation program had been disclosed, its value for impeachment purposes would have been cumulative. Defense counsel had amply availed himself of opportunities to impeach the witness on cross-examination and challenged his credibility on summation on the basis of the informant's own admissions, the evidence of the defendant's guilt from other sources was overwhelming, and the additional information presented no reasonable likelihood of a different verdict. This analytical approach, if applied here, would also compel an affirmance.

In a trio of murder cases of relatively recent vintage, we have also rejected *Brady* challenges on the basis of the quantum of the evidence supporting conviction. In *People v Stilley* (128 AD3d 88 [1st Dept 2015], *lv denied* 27 NY3d 1007 [2016]), the drug dealer who was the target of a misplaced shot that killed a bystander testified for the People that the day of the shooting was the last day that he sold drugs and that he had turned his life around. Subsequent to the verdict but prior to sentencing,

however, the prosecutor was made aware that the witness had sold drugs to an undercover officer on the very day of his testimony, which the prosecutor brought to the attention of the court and ultimately to defense counsel. We acknowledged that the record was inadequate to ascertain when the People became aware, by imputation or otherwise, of the witness's latest drug sale, which was valid impeachment material. Nevertheless, in rejecting the *Brady* claim, we found that even if the information had been timely disclosed, in view of the overwhelming evidence of guilt there was no reasonable possibility that the verdict would have been different. In *People v Brooks* (123 AD3d 448 [1st Dept 2014], *lv denied* 25 NY3d 1070 [2015]), arguable discrepancies between trial witnesses and the account of a person in an undisclosed police report also did not rise to the level of exculpatory or impeachment value. In *People v Hart* (43 AD3d 722 [1st Dept 2007], *lv denied* 9 NY3d 1006 [1st Dept 2007]), where the defendant subsequently made incriminating statements, nondisclosure of a wiretapped conversation by persons unconnected to the defendant who had unsuccessfully plotted to murder the victim, and a letter by a different prosecutor seeking leniency for the victim in a different case, if disclosed, also would not have affected the verdict.

These decisions draw borders around the materiality aspect of the *Brady* analysis. Taken together, I think that they, and the facts of the present case, compel an affirmance. Here, when the undisclosed eyewitness was interviewed at the District Attorney's office, his recollection of the event differed significantly from his earlier account to the detective. Among other inconsistent statements, he stated that the shooter did not chase Phillips, and he no longer recalled whether there was a conversation before the shooting. The witness also claimed that he did not know who had said that the shooter was the son of one of Phillips's robbery victims. According to the prosecution, when appellate counsel asked the witness to describe the man in beige who shot Phillips, the witness's description matched defendant's height and build.

Nor were the descriptions in the report provided by the undisclosed witness closer to the time of the killing inconsistent with Davis's testimony in any material aspect such as would provide a plausible basis for a misidentification defense. That Davis described the killer's hat as a flat hat with a brim snap and the undisclosed witness described it as a "bucket hat" seems to me to be an attempted distinction without a real difference - both seem to portray a flat-topped hat. At

most, there may have been minor differences in how Davis and the undisclosed witness, as judged by his statements documented in the police report, recalled aspects of the event, but these were minor distinctions that would not have undermined the consistency of the major descriptive elements. One can easily note that a daylight execution in a public place could be a shocking event, quickly concluded. This setting could easily have contributed to a minor distortion in how minor details might have been mentally processed by Davis and the undisclosed witness, and it bears repeating that Davis was attentive to actions of defendant, who had previously aroused her curiosity and possibly her suspicion. In any event, as I've noted, the two descriptions sufficiently correspond in material aspects that I do not see how a valid misidentification defense could have been presented had defendant counterpoised the respective descriptions at trial.

For this reason, I see no reasonable possibility that the evidence in this case, if it had been supplemented at trial by the undisclosed information, would have resulted in a verdict more favorable to the defense. Nor do I find a credible basis for supposing that defense counsel could have used the information to devise an alternative theory plausibly challenging the People's compellingly supported theory of the case (*see*

People v Garrett, 23 NY3d 878, 892 [2014]).

I respectfully disagree with the majority's reliance on the recent decision in *People v Rong He* (34 NY3d 956 [2019]). In *Rong He*, a bartender who observed the assault stated that two assailants were involved and he identified the person who actually struck the victim as someone other than the defendant. This, in the first instance, sets *Rong He* apart from the proofs and circumstances of the present case. This statement, where there was an actual alternative identification, was not disclosed. Another witness may have identified the defendant, but at trial his testimony may have become less than reliable. The Court of Appeals concluded that if disclosed, the bartender's statement would have afforded the defendant the opportunity to challenge the People's single-assailant theory. However, while there was additional evidence presented by the prosecution, the decision strongly suggests that it was far from overwhelming. Hence, I do not conclude that our analysis should be governed by either the facts or the analysis of *People v Rong He*.

Finally, while I agree that the detective's directive that Davis, in viewing the video, should look for someone wearing "all brown" resulted in an unduly suggestive identification procedure (*see generally People v Edmonson*, 75 NY2d 672 [1990], *cert denied*

sub nom Edmonson v New York, 498 US 1001 [1990]), the overwhelming evidence of guilt also rendered this impropriety harmless error. Davis had made reliable lineup and in-court identifications of defendant. Reynolds testified extensively about how defendant, who used his apartment as a lookout position, committed this contract murder and that he boasted about it afterward. This evidence was amply corroborated by cell phone records, surveillance video and other evidence. As I previously observed, these items of evidence neatly interlocked, even if there may have been minor, nonmaterial discrepancies that would not have detracted from the soundness and reliability of the verdict.

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about April 23, 2018, which denied defendant's CPL 440.10 motion to vacate the judgment rendered July 7, 2015, reversed, on the law, the motion granted, and the matter remanded for a new trial. Appeal from foregoing judgment, dismissed, as academic.

Opinion by Mazzarelli, J. All concur except Tom, J. who dissents in an opinion.

Sweeny, J.P., Tom, Mazzarelli, Oing, Singh, JJ.

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

ENTERED: DECEMBER 19, 2019

CLERK