SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**January 10, 2019**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8071 The People of the State of New York, Ind. 545/15
Respondent,

-against-

Bayron Bermudez,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Daniel Friedman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered November 1, 2016, convicting defendant, after a jury trial, of attempted murder in the second degree, assault in the first and second degrees, attempted assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

The court providently exercised its discretion in permitting

the girlfriend of the attempted murder victim (the other victim being a bystander) to testify that her boyfriend had identified defendant as the person who shot him. This testimony qualified as an excited utterance because when this victim made the statement, he had just been shot in the leg, and surrounding circumstances show that he was "under the stress of excitement caused by an external event sufficient to still his reflective faculties" (*People v Edwards*, 47 NY2d 493, 497 [1979]). Although defendant and the victim were enemies, the victim was in an agitated condition that rendered it unlikely that he was scheming to falsely accuse defendant of shooting him (*see People v Gantt*, 48 AD3d 59, 63-65 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]).

The court also properly received a detective's rebuttal testimony that the girlfriend had told the detective that the victim had identified defendant to her as his assailant. The People properly introduced that testimony to rebut the inferences raised by defense counsel, during cross-examination of the girlfriend and direct examination of a defense witness, that the girlfriend's testimony was a recent fabrication invented to obtain a benefit from the People in a pending case against her. The prior consistent statement made to the detective predated the alleged motive to falsify (*see People v McClean*, 69 NY2d 426,

428-430 [1987]; *People v Baker*, 23 NY2d 307, 322-323 [1968]).

Defendant was not deprived of a fair trial by the People's unsuccessful attempts to get the attempted murder victim to testify about the crime, or by related events at trial. By the time of trial, this victim was awaiting sentence in an unrelated case and had entered into a cooperation agreement. The victim took the stand and testified about the agreement, but refused to give any testimony about the incident. The victim, who did not cite the Fifth Amendment or assert any other privilege, persisted in his refusal despite the threat of contempt. We conclude that there was nothing in the victim's refusal to testify, the cooperation agreement, or the People's related comments in voir dire and opening and closing statements, that would lead the jury to draw inculpatory inferences against defendant that would add any weight to the People's case (*see People v Vargas*, 86 NY2d 215, 222 [1995]; *People v Berg*, 59 NY2d 294, 298 [1983]). The various comments made by the prosecutor were neutral, and neither the victim's limited testimony before the jury nor the fact of his cooperation agreement were likely to lead the jury to infer defendant's guilt. In any event, to the extent the jury could have inferred that the victim had inculpatory evidence that he was refusing to reveal, the court's instructions that the jury

was not to speculate as to why the victim refused to testify was sufficient to avoid that inference (*see Berg*, 59 NY2d at 300), and the jury is presumed to have followed the instruction.

The court providently exercised its discretion in precluding defendant from introducing an entire recorded phone conversation between defendant and his cousin. There was no showing that the excluded portion was exculpatory, or explanatory of the portion that had been placed in evidence by the People (*see People v Dlugash*, 41 NY2d 725, 736 [1977]; *People v Carver*, 147 AD3d 415, 416 [1st Dept 2017], *lv denied* 29 NY3d 1030 [2017]).

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Gische, Mazzarelli, Webber, Oing, JJ.

7952 The People of the State of New York, Ind. 1464/16
Respondent,

-against-

Sarah Napier,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered January 9, 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: JANUARY 10, 2019

CLERK

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

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8072 Kobe Reid, et al., Index 107724/09
Plaintiffs-Respondents,

-against-

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

Aguila, Inc.,
Defendant-Appellant.

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Correia, King, Fodera, McGinnis & Liferiedge, New York (Kevin J. McGinnis of counsel), for appellant.

Krieger, Wilansky & Hupart, Bronx (Brett R. Hupart of counsel), for respondents.

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Order, Supreme Court, New York County (W. Franc Perry, III, J.), entered May 1, 2017, which denied defendant Aguila's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The injured plaintiff alleges that he tripped on a defect on a landing and fell down a staircase while residing in a hotel used as transitional housing for homeless families. Defendant Aguila argues it did not owe any duty of care to plaintiff because, at the time of the accident, it did not occupy, control or make special use of the premises (*see Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297 [1st Dept 1988], *app dismissed in*

*part, denied in part* 73 NY2d 783 [1988]). However, the evidence submitted by Aguila in support of its motion, including a contract between Aguila and the City, was insufficient to demonstrate it lacked "any authority to maintain or control the area in question, or to correct any unsafe condition" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]; *cf. Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]). Although Aguila's employee testified that co-defendant Lades Group was solely responsible for maintenance, that employee did not know who owned the premises and neither she nor the City's witness was personally familiar with the contract, if any, under which Aguila operated at the premises at the time of the accident. Thus, Aguila failed to meet its prima facie burden on the motion for summary judgment (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The motion court also properly denied the motion on the alternate basis that the motion was premature because neither Aguila nor defendant City had provided full

responses to discovery demands pertinent to the issues of ownership, control and maintenance of the premises (CPLR 3212[f]; *Marabyan v 511 W. 179 Realty Corp.*, 165 AD3d 581 [1st Dept 2018]).

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8073 In re Elizabeth E.R.T., and Others,

Children Under the Age of Eighteen Years, etc.,

Alicia T., etc.,
Respondent-Appellant,

Mary McD. R.,
Respondent,

Catholic Guardian Services,
Petitioner-Respondent,

Commissioner of Social Services for the City of New York,
Petitioner.

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Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

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Order of fact-finding and disposition (one paper), Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about January 30, 2018, insofar as it determined, after a hearing, that respondent mother neglected the subject children, unanimously affirmed, without costs.

The permanent neglect finding is supported by clear and convincing evidence (*see* Social Services Law [SSL] § 384-

b[3][g][i], [7][a]; *Matter of Star Leslie W.*, 63 NY2d 136, 140 [1984]). The record reflects that the agency made "diligent efforts to strengthen and encourage a parental relationship" (*see* SSL § 384-b[7][f]; *Star Leslie W.*, 63 NY2d at 144). The agency scheduled weekly visitation, provided the mother with Metrocards, developed and communicated an appropriate service plan, requested paperwork to "clear" the mother's husband of child sexual abuse allegations, gave the mother a housing referral, repeatedly reminded the mother of the importance of vacating the Connecticut order transferring guardianship of the children to her maternal grandmother, and assisted her in completing the requisite paperwork (*see Matter of Antonio James L. [Eric David L.]*, 156 AD3d 554, 554 [1st Dept 2017]). The agency was not required to file the papers on the mother's behalf, nor would it have had standing to do so.

Yet, despite the agency's diligent efforts, the record reflects that the mother failed for the requisite period "substantially and continuously or repeatedly to maintain contact with or plan for the future of the children" (*see* SSL § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 380 [1984]). The mother admitted that she voluntarily surrendered her guardianship rights to the grandmother and never filed the paperwork to vacate

the guardianship order; that she was present in the home during the period when the grandmother was found to have neglected the children but failed to notice any issues; and that she used illegal drugs at least once and was psychiatrically hospitalized on multiple occasions. The agency's progress notes further demonstrated that the mother failed to obtain a mental health evaluation, lied about being in therapy, had a more extensive history of psychiatric hospitalization and drug abuse, failed to maintain suitable housing, withdrew her custody petition in January 2015 because she was not ready to have custody of the children, and failed to complete the necessary paperwork to clear her husband of the child sexual abuse allegations. They also reflect that, while initially consistent and appropriate, the mother's visits became increasingly inconsistent and her behavior increasingly less appropriate.

The mother objects that the agency relied solely on the allegedly hearsay progress notes instead of offering the testimony of agency caseworkers with personal knowledge. However, the progress notes were not the sole evidence supporting the permanent neglect finding, which was also supported by the mother's own testimony. Moreover, insofar as the mother failed to object to the admission of the progress notes at the hearing,

any challenge to their admissibility is not preserved for review (*see Matter of Brooklyn S. [Stafania Q.- Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017]; *Matter of Isaiah R.*, 35 AD3d 249 [1st Dept 2006]). In any event, the progress notes were properly admitted under the business records exception to the hearsay rule (*see* CPLR 4518[a]; *Matter of Baby Boy S.*, 251 AD2d 165, 165 [1st Dept 1998]) and the agency properly relied on them to meet its burden (*see Matter of Brian T. [Jeannette F.]*, 121 AD3d 500, 500 [1st Dept 2014]; *Matter of Omea S. [William S.]*, 100 AD3d 495, 495-496 [1st Dept 2012]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8074 In re Leo Boccia, Index 101686/15
Petitioner-Respondent,

-against-

The New York City Department of Buildings, et al.,
Respondents-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Jason Anton of counsel), for appellants.

Klein Slowik PLLC, New York (Peter E. Sayer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered November 28, 2016, granting the petition seeking, inter alia, to annul the determination of respondent New York City Department of Buildings (DOB), dated July 15, 2015, which denied petitioner's application for a hoisting machine operator class A license, and remanding the matter to DOB for a new determination in accordance with the court's decision, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed.

Administrative Code of City of NY § 28-405.3.1 requires all applicants for a class A basic hoisting machine operator license

to have "at least three years experience within the five years prior to application under the direct and continuing supervision of a licensed hoisting machine operator." Here, the record shows that petitioner's application for the class A license included affidavits showing that from January 2011 to December 2014 he was supervised by a class A license holder while completing class C2 crane set-ups; however, such supervision was unnecessary since petitioner was licensed to operate class C2 cranes independently and without supervision. The affidavits also show that petitioner was supervised by a class A license holder while completing class A crane set-ups but for only one month from October 2, 2014 to October 31, 2014. Accordingly, DOB's decision to deny the application on the ground that petitioner failed to demonstrate that he possessed three years of experience using class A machinery under the supervision of an individual with a

class A license was not arbitrary and capricious, and was rationally based (*see Matter of Chilson v Hein*, 94 AD3d 517 [1st Dept 2012]; *see also* 55 RCNY 11-02[d]).

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8077 The People of the State of New York, Respondent, Ind. 1802/15 1939/15

-against-

Patricia Howard, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered April 28, 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: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8078 In re Hugh W. Campbell, etc., Index 17384/07
Petitioner-Appellant, 300513/10
83796/10

-against-

McCall's Bronxwood Funeral Home, Inc.,
Respondent-Respondent.

- - - - -

Hugh W. Campbell, etc.,
Plaintiff-Appellant,

-against-

Jeffrey D. Buss, Esq., et al.,
Defendants-Respondents.

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[And a Third-Party Action]

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Wilson Jacobson P.C., Eastchester (Leroy Wilson, Jr. of counsel), for appellant.

Spolzino, Smith, Buss & Jacobs LLP, Yonkers (Charles S. Welcome of counsel), for respondents.

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Order, Supreme Court, Bronx County (Elizabeth Taylor, J.), entered on or about December 22, 2016, which granted the motion of respondent McCall's Bronxwood Funeral Home, Inc. (the Funeral Home) and defendants Jeffrey D. Buss, Esq. and James H. Alston, Jr., for summary judgment dismissing the petition seeking involuntary dissolution of the corporate Funeral Home, and dismissing the complaint against the individual defendants, unanimously modified, on the law, to deny the petition for

dissolution of the Funeral Home, and the matter remanded for further proceedings on the issue of the value of decedent's estate's interest therein, and otherwise affirmed, without costs.

In determining whether involuntary dissolution under section 1104-a of the Business Corporation Law is warranted, the Court must consider (1) whether liquidation "is the only feasible means whereby [a] petitioner may reasonably expect to obtain a fair return on [her] investment; and (2) [w]hether liquidation . . . is reasonably necessary for the protection of the rights and interests, of any substantial number of shareholders or of the petitioners" (Business Corporation Law § 1104-a[b]; *see also Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63 [1984]). A court has discretion to deny a petition for dissolution upon a showing of shareholder oppression, provided the respondent shows that an "adequate, alternative remedy" exists, such as a buy-out under the shareholders' agreement that would provide a fair return on the corporate investment (*see Kemp & Beatley*, 64 NY2d at 74; *Matter of Harris [Daniels Agency]*, 118 AD2d 646 [2d Dept 1986]).

Because the Funeral Home and defendant Alston failed to substantiate that their buy-out offer under the 1998 corporate shareholders' agreement would provide decedent's Estate with a

fair return on the decedent's investment, and the Estate has presented substantial evidence that the buy-out offer was grossly inadequate, we remand for an evidentiary hearing on the value of the Estate's interest in the Funeral Home (*see Matter of Fancy Windows & Doors Mfg. Corp. [Fei Wu]*, 244 AD2d 484, 484 [2d Dept 1997]; *Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 AD2d 81, 85 [3d Dept 1985]).

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

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8079 Bradley C. Aldrich, et al., Index 602803/07
Plaintiffs-Appellants,

-against-

Northern Leasing Systems, Inc.,
et al.,
Defendants-Respondents.

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Chittur Law Offices, P.C., Ossining (Krishnan Chittur of counsel), for appellants.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavaler of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered March 23, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion to strike defendant Jay Cohen's answer and for class certification, partial summary judgment, and sanctions, and granted defendants' cross motion for summary judgment dismissing plaintiffs Michael Arnold and Estela Salas's first cause of action, Salas and plaintiff Bradley C. Aldrich's fourth cause of action, and all plaintiffs' fifth and sixth causes of action, unanimously modified, on the law, to deny the cross motion as to Arnold's first, fifth, and sixth causes of action, Aldrich's fourth, fifth, and sixth causes of action, and Salas's fourth and fifth causes of action and so

much of her sixth cause of action as is based on lack of notice, and otherwise affirmed, without costs.

Plaintiffs allege that some of the business practices of defendant Northern Leasing Systems, Inc. (NLS), a New York corporation that leases out equipment such as machines used by merchants to swipe credit cards, violate the Fair Credit Reporting Act (FCRA) (15 USC § 1681 *et seq.*) and the New York Fair Credit Reporting Act (NYFRCA) (General Business Law [GBL] § 380 *et seq.*).

The court providently exercised its discretion in declining to strike the answer, either as to all defendants or solely as to Cohen, upon finding, sub silentio, that defendants' complained-of conduct was not "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130-1.1[c][2]; *see generally CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]; *Pickens v Castro*, 55 AD3d 443 [1st Dept 2008]).

Defendants may argue for the first time on appeal that the FCRA preempts the NYFCRA, as this is a question of statutory interpretation (*see Matter of Richardson v Fiedler Roofing*, 67 NY2d 246, 250 [1986]). However, on the merits, the argument is unavailing. The FCRA does not prevent states from giving consumers more protection than the federal statute affords (*see*

*Credit Data of Arizona, Inc. v State of Arizona*, 602 F2d 195, 198 [9th Cir 1979]; *see also Davenport v Farmers Ins. Group*, 378 F3d 839, 842-843 [8th Cir 2004]).

The fourth through sixth causes of action allege violations of GBL 380-b(b). These causes of action asserted by plaintiff Aldrich should not have been dismissed on the ground that Aldrich is a Texan. Unlike GBL 349(a), GBL 380-b(b) is not, by its terms, restricted to this State (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). Thus, it applies to NLS, a New York business that requested consumer credit reports (CCRs) on non-New Yorkers (*see Aghaeepour v Northern Leasing Sys., Inc.*, 2015 WL 7758894, *12-13, 2015 US Dist LEXIS 161018, *36-38 [SD NY, Dec. 1, 2015, 14 CV 5449 (NSR)], *corrected on other grounds* 2016 WL 828130, 2016 US Dist LEXIS 23851 [SD NY, Feb. 25, 2016]).

An issue of fact precludes summary dismissal of the fourth through sixth causes of action asserted by plaintiff Salas, another Texan, on the ground that Salas's CCR was requested by a non-New York business. Defendants submitted an affidavit by NLS's Lina Kravic saying that nonparty MBF Leasing, LLC (MBF), an Illinois entity, accessed Salas's CCR. However, Salas submitted an affidavit saying that NLS had accessed her CCR. We do not find that Kravic's affidavit contradicts her deposition.

Plaintiffs improperly raise the best evidence rule for the first time on appeal (*see generally DeBenedictis v Malta*, 140 AD3d 438 [1st Dept 2016]).

Plaintiffs argue that defendants lacked a permissible purpose for pulling Arnold's CCRs. This argument has merit insofar as an issue of fact exists whether Arnold's signature on his personal guaranty was forged (*see Northern Leasing Sys., Inc. v Kollars*, 56 Misc 3d 131[A] [App Term, 1st Dept 2017]). At his deposition, Arnold testified that he signed only the "Lease Acceptance" box (i.e., signed the lease on behalf of his business), not the "Personal Guaranty" box. The boxes were on separate pages of the lease. By contrast, Salas, to whom this argument also applies if NLS pulled her CCR, testified that she signed only a one-page document; this testimony raises no inference that Salas's signature on the guaranty was forged. Plaintiffs' remaining contentions as to lack of a permissible purpose are unavailing. It is permissible for a person to run a credit search on the guarantor of a debt (*see e.g. Edge v Professional Claims Bur., Inc.*, 64 F Supp 2d 115, 118 [ED NY 1999], *affd* 234 F3d 1261 [2d Cir 2000]).

In view of the foregoing, as the first cause of action alleges that NLS violated the FCRA by accessing plaintiffs' CCRs

without a permissible purpose and the sixth cause of action alleges that NLS negligently violated the NYFRCA by obtaining plaintiffs' CCRs without a permissible purpose and without providing the required notice, Arnold's first and sixth causes of action should not have been dismissed. However, Salas's first cause of action and sixth cause of action to the extent it alleges impermissible purpose were correctly dismissed.

Defendants argue that plaintiffs' claim that they negligently violated GBL 380-b(b) by obtaining plaintiffs' CCRs without giving advance written notice (the fifth cause of action) fails because plaintiffs did not show that they sustained actual damages as a result of the violation, as required by GBL 380-m. This argument also applies to the sixth cause of action, which alleges a negligent violation of GBL 380-b(a) and (b), and, because 15 USC § 1681*o* imposes a similar requirement for negligent violation of the FCRA, to the first cause of action. However, the record on appeal, which does not include the expert reports mentioned by the motion court and plaintiffs, is insufficient to permit review of defendants' argument. Further, we are loath to consider the argument because defendants did not cross-appeal from the parts of the order adverse to them. The insufficiency of the record also precludes summary judgment in

plaintiffs' favor on the fifth cause of action.

Plaintiffs are not entitled to summary judgment on the fourth cause of action (willful violation of GBL 380-b[b] by obtaining CCRs without giving the required notice), for which actual damages are not required and punitive damages may be awarded, because it cannot be said as a matter of law that defendants' conduct was reckless, as opposed to merely careless (*see Navigators Ins. Co. v Sterling Infosystems, Inc.*, 145 AD3d 630, 631 [1st Dept 2016], quoting *Safeco Ins. Co. of America v Burr*, 551 US 47, 57 [2007]; *Safeco*, 551 US at 69).

The court providently exercised its discretion in denying class certification on the fourth and fifth causes of action. Common questions of law or fact do not predominate (*see* CPLR 901[a][2]), because it will be necessary to look at each class member's lease/personal guaranty to see if it gave advance notice that the member's CCR would be accessed. NLS and its affiliated companies use more than 247 different forms of lease/personal guaranty (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d

420, 422-423 [1st Dept 2010]; *see also Batas v Prudential Ins. Co. of Am.*, 37 AD3d 320 [1st Dept 2007]). In light of the above disposition, we need not reach the parties' remaining class-action-related arguments.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8080 In re L. Children,

Children Under Eighteen Years of Age,
etc.

Wileen J.,
Respondent-Appellant,

-against-

Catholic Guardian Services,
Petitioner-Respondent.

- - - - -

In re Renee J.,
Petitioner,

-against-

Wileen J.,
Respondent-Appellant.

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Thomas R. Villecco, Jericho, for appellant.

MaGovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 21, 2017, which, upon a finding of permanent neglect, held that the subject children's best interests required that they be freed for adoption, terminated the mother's parental rights, and denied the custody

petitions filed by the children's sibling and aunt, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence of the Catholic Guardian Services' (CGS) diligent efforts to encourage and strengthen the parental bond and of the mother's failure to plan for the future of the subject children (*see* Social Services Law §§ 384-b[7][a], [c]; *see also Matter of Sheila G.*, 61 NY2d 368 [1984]).

The mother's focus on her visits with the children ignores the statutory language that permanent neglect can be established by a parent's failure to maintain contact with "or" plan for the future of the child (Social Services Law § 384-b[7][a]).

The record is replete with evidence of her failure to plan for the children's future. She refused to acknowledge her son was autistic and, rather than plan for his future, was unwilling to cooperate in getting him help. Her consistent hostility towards services further supports the finding of permanent neglect. She did not or could not acknowledge why her children had been removed from her care, and insisted she needed no counseling or anger management assistance. To the extent she engaged with services, her doing so did not help her come to terms with the past or help her understand how to parent her

children going forward (*see Matter of Nathaniel T.*, 67 NY2d 838 [1986]; *Matter of Cameron W. [Lakeisha E.W.]*, 139 AD3d 494 [1st Dept 2016]; *Matter of Shaianna Mae F. [Tsipora S.]*, 69 AD3d 437 [1st Dept 2010]).

The mother's position on appeal reiterates her unwillingness to take responsibility. Rather than acknowledge CGS's diligent efforts, supported by the record, to advise her to engage in services, to ensure that visits between her and the children took place, and to ensure she was referred to a service provider with whom she felt cultural affinity, she blames the agency for not preventing her Medicaid from lapsing, even though it is unclear when she even informed the agency it had lapsed or what she expected CGS to do, given her testimony that she let it lapse due to a then-planned move to Texas. Her refusal to take responsibility and her misplaced perception of CGS as a guarantor further supports Family Court's determination of permanent neglect (*see Matter of De'Lyn D.W. [Liza Carmen T.]*, 150 AD3d 599 [1st Dept 2017]; *Matter of Zaya Faith Tamarez Z. [Madelyn Enid T.]*, 145 AD3d 459 [1st Dept 2016]; *Matter of Kadiza D. [Saaniel T.]*, 138 AD3d 421 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]).

A preponderance of the evidence supports the determination that termination of parental rights was in the best interests of

the children. They have lived in the same foster home since 2013 in the case of the boy, and since 2015 in the case of his sisters. It is a stable home environment, the children wish to refer to their foster parent as "mommy," and she is willing to adopt them.

Dismissal of the sibling's and aunt's custody petitions was also in the children's best interests. Neither demonstrated any appreciable relationship with the children. Their petitions assume that, as family members, they are preferable custodians of the children, a position appropriately rejected by Family Court (*see Matter of Chartasia H. [Sandra H.H.]*, 88 AD3d 576 [1st Dept 2011]; *Matter of Vanisha J. [Patricia J.]*, 87 AD3d 696 [2d Dept 2011]), which correctly found that adoption by the foster mother was in the children's best interests given the stability of the foster home environment and the foster mother's wish to adopt them.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8081 The People of the State of New York, Ind.5234/13
Respondent,

-against-

Jean Andre,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered March 3, 2017, convicting defendant, after a jury trial, of robbery in the third degree and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. The victim's testimony was extensively

corroborated by other evidence, such as that other persons pursued defendant, without losing sight of him for any significant time, from the crime scene until the point of his capture.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8082 The People of the State of New York, Ind. 5120/15
Respondent,

-against-

Kavon Venzen,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Amith Gupta of counsel), and Arnold & Porter, New York (Daniel F. Gilpin of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Robert M. Stolz, J. at plea and sentencing), rendered May 3, 2017, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the hearing court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). The court properly determined that the police had probable cause to arrest defendant after seeing a rapid exchange of small objects for money that

reasonably appeared to be a drug transaction (*see e.g. People v Jones*, 90 NY2d 835 [1997]; *People v James*, 83 AD3d 504 [1st Dept 2011], *lv denied* 17 NY3d 817 [2011]; *People v Frierson*, 61 AD3d 448 [1st Dept 2009], *lv denied* 12 NY3d 915 [2009]). The record also supports the hearing court's alternative finding that, irrespective of probable cause, defendant abandoned a bag containing drugs as the officers approached and identified themselves (*see People v Boodle*, 47 NY2d 398, 402-404 [1979], *cert denied* 444 US 969 [1979]).

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8083 The People of the State of New York, Respondent, Ind. 3019N/15 271N/16

-against-

Brian Jordan, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression proceedings; Abraham L. Clott, J. at jury trial and sentencing), rendered August 10, 2016, convicting defendant of four counts each of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia, and sentencing him to an aggregate term of five years, unanimously affirmed.

The court providently exercised its discretion in precluding a defense witness from testifying that, during the search of one of the two apartments at issue, an unidentified officer stole cash from a room other than the one where contraband was recovered. The officer who testified about the search of the apartment was cross-examined about this allegation and denied

taking any money. In offering extrinsic evidence of any alleged theft, defendant made no claim that the testifying officer was the unidentified thief, or that the proffered evidence of the theft tended to impeach the credibility of any testimony; instead, defendant claimed that the proffered evidence undermined the overall integrity of the search operation. However, this evidence had no bearing on whether the testifying officer recovered drugs and drug paraphernalia from the apartment, and thus it would have diverted the jury's attention to "collateral matters having little or no bearing on the guilt or innocence of the defendant" (*see People v Aska*, 91 NY2d 979, 981 [1988]). Defendant has not preserved his claim that the court's ruling deprived him of his constitutional right to present a defense (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

The court providently exercised its discretion when it discharged a sworn juror who had overheard the defense witness talking on a cell phone about the above-discussed evidence, which the court had excluded. Although defendant objected to discharging the juror, and made a vague reference to a further

inquiry, he did not preserve his claim that the court was obligated to inquire into whether this incident would have affected the juror's impartiality, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The court acted within its discretion, because "the jury must reach its verdict solely on evidence received in open court, not from outside sources" (*People v Arnold*, 96 NY2d 358 [2001] [internal quotation marks omitted]).

Based on our in camera review of the minutes of a hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), we find no basis for suppression. Probable cause for the issuance of a search warrant was established through police-supervised drug purchases made by a reliable confidential informant. We have considered and rejected defendant's requests for further relief relating to the sealed minutes.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.,

8084- 157609/14
8085 Tishman Construction Corp. of N.Y.,
Plaintiff-Respondent,

-against-

Scottsdale Insurance Company,
Defendant-Appellant,

Ornamental Installation Specialists, Inc.,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Gerald Lebovits, J.), entered on or about August 16, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated December 3, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8086- Index 101637/15
8087-
8088 In re Sysco Metro NY, LLC,
et al.,
Petitioners-Respondents-Appellants/Respondents

-against-

City of New York, et al.,
Respondents-Appellants-Respondents/Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for appellants-respondents/appellants.

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for respondents-appellants/respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered September 26, 2017, which granted the petition to annul determinations by respondent New York City Department of Finance, Commercial Adjudication Unit, finding petitioner Sysco Metro NY, LLC guilty of violations on 1,019 summonses issued to tractors that describe their body types as anything other than "TRAC" or "tractor" and violations of a lift-gate rule on 367 summonses issued to tractors, direct respondents to remit all fines paid by petitioner in connection with these summonses, and enjoin respondents from finding petitioner guilty of the violations of any such summonses, to the extent of annulling the determinations

as to the summonses issued to tractors that describe their body types as anything other than "TRAC" or "tractor," dismissing those summonses, directing respondents to remit all fines paid by petitioner in connection with those summonses, and enjoining respondents from finding petitioner guilty of violations on any summonses issued to tractors that describe their body types as anything other than "TRAC" or "tractor," and otherwise denied the petition and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Order, same court and Justice, entered September 26, 2017, which granted petitioners' motion to stay enforcement of judgments on summonses pursuant to the parties' stipulation, dated October 14, 2015, and applied the prior order to those summonses, unanimously affirmed, without costs. Order, same court and Justice, entered May 30, 2018, which, insofar as appealed from as limited by the briefs, granted petitioners' motion to amend the September 26, 2017 order, unanimously affirmed, without costs.

The court correctly found that summonses that failed to comply with the requirement to specify the correct body types of the relevant vehicles in accordance with Vehicle and Traffic Law (VTL) § 238(2) were improperly issued and must be dismissed (*see Matter of Wheels, Inc. v Parking Violations Bur. of Dept. of*

*Transp. of City of N.Y.*, 80 NY2d 1014, 1016 [1992]; *see Matter of Nestle Waters N. Am., Inc. v City of New York*, 121 AD3d 124, 130 [1st Dept 2014]). Given the holding of the Court of Appeals that "a misdescription of any of the five mandatory identification elements [set forth in VTL § 238(2)] . . . mandates dismissal" (*Matter of Wheels*, 80 NY2d at 1016), respondents' arguments that such a requirement is infeasible and that imprecise designations of body types may be upheld are unavailing.

The court correctly found that the summonses that charged violations of 34 RCNY 4-08(k)(7), which provides that commercial vehicles may not be parked on city streets and left unattended "with a platform lift set in a lowered position," properly specified tractors as the body types. The VTL distinguishes between "vehicles" (VTL § 159) and "motor vehicles" (VTL § 125). A "trailer" is defined as a "vehicle" (VTL § 156), while a "tractor" is defined as a "motor vehicle" (VTL § 151-a). VTL § 238(2) requires a notice of violation to be served on the operator or owner of a "motor vehicle." Respondents rationally interpreted the statute to allow for a summons to be issued to the owner or operator of the tractor to which an offending trailer is attached (*see Matter of Golf v New York State Dept. of*

*Social Servs.*, 91 NY2d 656, 667 [1998]). Petitioners' interpretation would render the word "motor" in VTL § 238(2) superfluous (*see Kimmel v State of New York*, 29 NY3d 386, 393 [2017]).

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8089 The People of the State of New York, Ind. 309/13
Respondent,

-against-

Dashawn Jones,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes 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 (Renee A. White, J. at plea and sentence), rendered August 20, 2013,

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: JANUARY 10, 2019

CLERK

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

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8090 The People of the State of New York, Ind. 3730/16
Respondent,

-against-

Jennifer Cruz,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered March 30, 2017, convicting defendant, upon her plea of guilty, of aggravated driving while intoxicated, and sentencing her to five years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent

of reducing the sentence to three years' probation, 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: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8091 Courtney Gibson, Index 304843/09
Plaintiff-Respondent-Appellant,

-against-

The Estate of Teddy Antiaris, et al.,
Defendants-Appellants-Respondents.

_____

The DeIorio Law Group, PLLC, Rye Brook (Alan Kachalsky of counsel), for appellants-respondents.

Lichtenstein & Schindel, LLP, Mamaroneck (Sande E. Lichtenstein of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about January 29, 2018, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, leave to amend the answer to add a second counterclaim, and sanctions, and denied plaintiff's cross motion for summary judgment as to liability, unanimously modified, on the law, to grant defendants' motion for leave to amend the answer and for summary judgment dismissing the complaint in its entirety and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

The first and second causes of action allege that plaintiff was damaged by defendants' false representation in the lease that the leased premises were suitable for and could be used as a

health food deli and by defendants' failure to provide an adequate certificate of occupancy. These causes of action must be dismissed, because there are no such affirmative representations in the lease, which in fact provides that "Landlord makes no representations as to the suitability of the Premises for use by the Tenant for the business purpose intended, or for any other business or non-business purpose or use" and that "Tenant shall, at its own cost and expense, obtain and maintain any and all proper licenses, certificates, permits, authorizations and Certificate of Occupancy necessary to comply with all applicable laws, rules and regulations and to allow Tenant to lawfully conduct its business."

The third cause of action alleges that plaintiff was damaged by defendants' entering into an illegal lease, which resulted in the certificate of occupancy not being curable. This cause of action must be dismissed, because it was plaintiff who assumed the risk of the impossibility of obtaining the certificate of occupancy for the intended use of the leased premises, and, in fact, plaintiff used the premises, as intended, as a health food deli until he was evicted for nonpayment of rent.

The court improvidently exercised its discretion in denying defendants leave to amend the answer to assert a second

counterclaim. The extent of defendants' right to collect any additional rent above the amount pleaded in the first counterclaim, including the right to collect the full rent due under the lease term, has not been established, and the effect of the stipulations pursuant to which defendants agreed to waive all additional rent owed remains unresolved. However, the proposed amendment is not palpably improper or insufficient as a matter of law, and the resulting delay will cause plaintiff no prejudice or surprise (*see CIFG Assur. N. Am., Inc. v J.P. Morgan Sec. LLC*, 146 AD3d 60, 64-65 [1st Dept 2016]).

We find that sanctions are not warranted.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8092- Ind. 3050/15
8093 The People of the State of New York,
Respondent,

-against-

Randy Ortiz,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 26, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of one year, and judgement of resentence, same court and Justice, rendered March 23, 2017, denying youthful offender treatment and reimposing the original sentence, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we find that the resentencing court providently exercised its discretion in denying youthful offender

treatment and reimposing its original sentence (*see People v Drayton*, 39 NY2d 580 [1976]), particularly in light of defendant's commission of a subsequent offense involving drug and weapon possession.

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

ENTERED: JANUARY 10, 2019

CLERK

Acosta, P.J., Renwick, Manzanet-Daniels, Webber, Kahn, JJ.

8094N Jose Luis Diaz, Index 304367/10
Plaintiff-Appellant,

-against-

Gary Perlson,
Defendant-Respondent.

_____

Raiser & Kenniff, P.C., Mineola (Ethan D. Irwin of counsel), for appellant.

Bader & Yakaitis, LLP, New York (Jeffrey W. Bader of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 7, 2017, which denied plaintiff's motion to vacate a prior order dismissing the action for failure to appear at a court conference, unanimously affirmed, without costs.

"A motion to vacate a dismissal for failure to appear at a scheduled court conference (22 NYCRR 202.27) must be supported by a showing of reasonable excuse for the failure to attend the conference and a meritorious cause of action" (*Biton v Turco*, 88 AD3d 519, 519 [1st Dept 2011]). Even assuming that plaintiff set forth a reasonable excuse for the failure to appear at the conference, the court providently exercised its discretion in denying the motion since plaintiff failed to show a meritorious

cause of action (*see e.g. Barclay v Etim*, 129 AD3d 591 [1st Dept 2015], *lv dismissed* 28 NY3d 948 [2016]).

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

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

ENTERED: JANUARY 10, 2019

CLERK

Renwick, J.P., Gische, Kahn, Kern, Moulton, JJ.

7219 The People of the State of New York, Respondent, Ind. 3597/15

-against-

Marcelino Allende, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Megan D. Byrne of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered May 13, 2016, convicting defendant, after a jury trial, of robbery in the first degree and two counts of robbery in the second degree, and sentencing him to concurrent terms of eight years, modified, on the facts, to the extent of vacating the first-degree robbery conviction and dismissing that count, and otherwise affirmed.

Except as indicated, defendant's arguments concerning the weight of the evidence are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's accessorial liability could be reasonably inferred from the entire course of conduct of defendant and his codefendant before, during and after

the crime (*see generally Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]).

However, the evidence did not establish the element of display of what appeared to be a firearm (*see People v Smith*, 29 NY3d 91, 96 [2017]). The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw the display of what appeared to be a firearm, there was no evidence that the victim ever saw it (*see People v Moon*, 205 AD2d 372, 372 [1st Dept 1994], *lv denied* 84 NY2d 870 [1994]).

We perceive no basis for reducing the remaining sentences.

The Decision and Order of this Court entered herein on October 18, 2018 (165 AD3d 507 [1st Dept 2018]) is hereby recalled and vacated (*see* M-5305 decided simultaneously herewith).

All concur except Renwick, J.P. and Moulton, J. who dissent in part and concur in part in a memorandum by Renwick, J.P. as follows:

RENWICK, J.P. (concurring in part and dissenting in part)

While I agree to vacate defendant's conviction for robbery in the first degree and affirm the conviction for robbery in the second degree, a sentence of imprisonment of five years on the second-degree count would be more appropriate under the facts of this case than the term of imprisonment of eight years imposed by the court.

Defendant was only 21 years old when he was involved in the instant crime and this is his first felony conviction. Defendant's mother died when he was 16 years old and he has struggled with untreated depression and bipolar disorder. Under the circumstances, "I do not see how the principal objectives of societal protection, rehabilitation, and deterrence are served by the punishment imposed by the Supreme Court as affirmed by this Court" (*People v Watson*, 163 AD3d 855, 880 [2d Dept 2018] [Barros dissent]; *see also People v Farrar*, 52 NY2d 302, 305 [1981]: *People v Oliver*, 1 NY2d 152, 160 [1956]). Instead, in my view, incarceration in state prison for a term of imprisonment of five years would be sufficient to impress upon defendant the seriousness of his actions, and to ensure that he receives the medical treatment and counseling which he needs.

Although vicariously liable for the codefendant's actions,

significantly, it is undisputed that it was the codefendant, Nicholas Caldwell, who violently punched the victim, resulting in his fall to the sidewalk. Yet, the codefendant received only a five-year sentence of imprisonment, while defendant, who went to trial, received the harsher term of eight years. Under the circumstances, the imposition of eight years of imprisonment appears to be an unnecessarily harsh response to defendant's exercise of his right to go to trial.

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

ENTERED: JANUARY 10, 2019

CLERK

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

7739 Joanne Perez, Index 21864/14
Plaintiff-Respondent,

-against-

River Park Bronx Apartments, Inc.,
et al.,
Defendants-Appellants,

River Park Towers Associates,
et al.,
Defendants.

_____

Chartwell Law, New York (Leonid Kushnir of counsel), for appellants.

The Yankowitz Law Firm, P.C., Great Neck (Jack Yankowitz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 10, 2018, which denied defendants-appellants' (defendants) motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie that they did not cause, create or have actual or constructive notice of the wet condition on the staircase on which plaintiff allegedly slipped and fell (*see Pagan v New York City Hous. Auth.*, 121 AD3d 622 [1st Dept

2014]). The building superintendent testified that he had no knowledge of the condition and received no complaints about it on the day of the accident. On the issue of constructive notice, although he described a reasonable cleaning and inspection routine (*see Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012]), there was no evidence when the stairs were last inspected or cleaned before plaintiff's accident so as to satisfy defendant's burden (*see Sager v Waldo Gardens Inc.*, __ AD3d __ 2018 NY Slip Op 07359 [1st Dept 2018]; *Guzman v 922 Broadway Ent., LLC*, 130 AD3d 431, 432 [1st Dept 2015]; *Sartori v JP Morgan Chase Bank N.A.*, 127 AD3d 1157, 1158 [2d Dept 2015]).

Plaintiff's deposition testimony offered in support of defendant's motion, however, established that the water condition did not exist for a sufficient period of time to discover and remedy the problem (*see Pagan*, 121 AD3d at 623-624). Thus, there was neither actual nor constructive notice of the wetness. Although plaintiff testified that she had complained about a wet condition on the stairs on three occasions between 2009 and 2013, she presented no evidence of a recurring condition unaddressed by defendants. Plaintiff also testified that she had no reason to believe that the stair was wet when she left her apartment at 5 p.m. and that she slipped on the stairs when she returned, less

than an hour later. Thus, any wet condition was present for less than an hour, and might have been there only minutes or seconds before plaintiff slipped on it (*see Harrison*, 94 AD3d at 513-514). Plaintiff failed to raise any issue of fact requiring a trial.

Plaintiff's argument that the absence of a handrail on both sides of the staircase raises an issue of fact as to defendants' negligence is speculative, as there is no evidence that the absence of a handrail played any role in her accident (*see Jenkins v New York City Hous. Auth.*, 11 AD3d 358, 359-360 [1st Dept 2004]).

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

ENTERED: JANUARY 10, 2019

CLERK

Sweeny, J.P., Manzanet-Daniels, Gische, Tom, Moulton, JJ.

7802 The People of the State of New York, Ind. 3162/15
Respondent,

-against-

Islam Ataroua,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. at suppression hearing; John W. Carter, J. at jury trial and sentencing), rendered July 27, 2016, convicting defendant of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years to life, unanimously reversed, on the law, the conviction vacated, and the matter remanded for a new trial.

In connection with the larceny element of attempted robbery, the offense underlying the felony murder charge, the court, upon defense counsel's request, should have instructed the jury on the definition of "deprive" (Penal Law § 155.00[3][a]; *see People v Medina*, 18 NY3d 98 [2011]). The failure to so charge the jury as requested constitutes reversible error, since such omission

"could have misled the jury into thinking that *any* withholding, permanent or temporary, constituted larceny" (*People v Blacknall*, 63 NY2d 912, 914 [1984]). Indeed, "the concepts of 'deprive' and 'appropriate' . . . 'are essential to a definition of larcenous intent' and they 'connote a purpose . . . to exert permanent or virtually permanent use thereof'" (*People v Medina*, 18 NY3d at 105 quoting *People v Jennings*, 69 NY2d 103, 118 [1986]). It is the function of the jury to determine whether defendant intended to rob the victim and permanently keep the property taken from him. By failing to give the requested charge, the court usurped that function.

While there are some cases in which the court's omission of the definition of a term or terms may constitute harmless error, under the facts of this case, the error was not harmless (*Medina*, 18 NY3d at 105).

In view of the foregoing, we need not reach the other issues raised by defendant on this appeal, except that we find that defendant's suppression motion was properly denied.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Kapnick, Kahn, Kern, JJ.

7863 Richard Pino III, Index 805632/15
Plaintiff-Appellant,

-against-

David A. Behrman, DMD,
Defendant-Respondent,

Richard D. Faber, DDS,
Defendant.

_____

Joel M. Kotick, New York, for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 10, 2017, which, to the extent appealed from, granted the motion of defendant David A. Behrman, DMD (Behrman), for summary judgment dismissing the dental malpractice cause of action, and denied plaintiff's cross motion for summary judgment on the same cause of action, unanimously modified, on the law, to deny Behrman's motion, and otherwise affirmed, without costs.

Behrman failed to establish entitlement to judgment as a matter of law on the dental malpractice cause of action. In support of his motion, Behrman relied on his own affidavit, which set forth a factual account of plaintiff's appointments and

treatment and provided broad statements that he did not deviate from accepted standards of dental practice. Although Behrman opined that the surgeries were reasonable and indicated for plaintiff, he did not explain, objectively, what the accepted standards of dentistry were that supported such determination. Nor did Behrman explain why the surgeries were appropriate to achieve better occlusion. Accordingly, Behrman's conclusory statements were insufficient to show that he did not depart from good and accepted dentistry and did not rely on any objective evidence (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]*; Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006]).

Plaintiff also failed to make a prima facie showing that Behrman deviated or departed from accepted standards of dental practice in his treatment of plaintiff, proximately causing his injuries (*see Jackson v Presbyterian Hosp. in City of N.Y.*, 227 AD2d 236 [1st Dept 1996], *lv denied* 88 NY2d 812 [1996]). Neither of plaintiff's experts stated that the surgeries Behrman performed were contraindicated for plaintiff or that those surgeries were not acceptable treatments to achieve better occlusion. Although plaintiffs' experts opined that Behrman should have consulted with a dentist or periodontist prior to the

second surgery, there is no evidence that Behrman's failure to consult proximately caused plaintiff's injuries.

Furthermore, Behrman did not appeal from the motion court's denial of his summary judgment motion with respect to the lack of informed consent cause of action, and we decline his request to search the record and dismiss the claim. In any event, the record shows that triable issues exist as to whether plaintiff was informed of the elective nature of the surgeries. Behrman's notes and the consent forms signed by plaintiff indicate that plaintiff was informed of unspecified alternative treatments, including no treatment. Behrman also stated that he informed plaintiff of the elective nature of the treatment prior to the first surgery and discussed the nature of the second surgery prior to that procedure. On the other hand, plaintiff stated that he was never informed of the elective nature of the procedures and that he would not have undergone that treatment if

he had known it was elective.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Oing, Singh, Moulton, JJ.

8050 The People of the State of New York, Ind. 2936/11
Respondent,

-against-

Devon Taylor,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered August 9, 2016, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 25 years, unanimously affirmed.

The record establishes the voluntariness of defendant's plea, and the court properly denied defendant's motion to withdraw it (*see People v Frederick*, 45 NY2d 520 [1978]). Defendant did not raise an intoxication defense during the plea colloquy (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]), and, to the extent he did so at sentencing, the court properly rejected his claim that his plea should be withdrawn on that basis. Defendant's claim that his plea was the product of a

misunderstanding about his predicate felony status is unpreserved, and is in any event unsupported by the record.

Furthermore, the court appointed new counsel for purposes of the pro se plea withdrawal motion. When the new attorney declined to adopt the motion and stated there were no legal grounds for making such a motion, this did not reach the level of taking an adverse position to his client, and there was no need to appoint yet another attorney (*see People v Moore*, 132 AD3d 496 [1st Dept 2015], *lv denied* 27 NY3d 1003 [2016]; *People v Foxworth*, 25 AD3d 481 [1st Dept 2006], *lv denied* 7 NY3d 756 [2006]). In any event, the claims made in the motion were "patently insufficient" (*People v Mitchell*, 21 NY3d 964, 967 [2013]),

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, 158 AD3d 434 [1st Dept 2018], *lv granted* 31 NY3d 1088 [2018]), which forecloses his suppression and excessive sentence arguments. Regardless of whether defendant made a valid

waiver of his right to appeal, we find that the warrantless taking of a blood sample from defendant while he was hospitalized was supported by exigent circumstances, and we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8051 Carlos Alulema, Index 23539/13E
Plaintiff,

-against-

ZEV Electrical Corp., et al.,
Defendants.

- - - - -

ZEV Electrical Corp., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Nationwide Maintenance & General Contracting Inc., et al.,
Third-Party Defendants-Appellants.

_____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants.

Hardin Kundla McKeon & Poletto, P.A., New York (Joseph A. DiPisa of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 20, 2017, which denied third-party defendants' motion for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, and summary judgment granted in favor of third-party defendants. The Clerk is directed to enter judgment accordingly.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an

employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). Under Workers' Compensation Law § 11, the definition of "grave injury" includes "an acquired injury to the brain caused by an external physical force resulting in permanent total disability," meaning, the injured worker is no longer employable "in any capacity" (*Rubeis* at 417).

Plaintiff's treating neurologist's records were dated through December 13, 2013, which was almost four years prior to plaintiff's evaluation by defendants' neuropsychologist, who concluded that plaintiff's testing failed to substantiate his claims of cognitive and emotional symptoms emanating from his accident. Although plaintiff continued to treat with Dr. Brown, he admitted that he only went for cognitive therapy once a month, and saw "Maria," not Dr. Brown. More importantly, plaintiff testified that he was looking for jobs and that he had obtained his GED. Plaintiff is able to drive his vehicle. On this record, there is no proof through competent medical testimony that plaintiff sustained an acquired injury to the brain caused by an external physical force that effected his ability to be employed in any capacity.

This Court has found that the evidence that a plaintiff suffered from certain brain conditions, such as depression and post-concussion syndrome, does not constitute grave injury absent proof that the individual was rendered unemployable in any capacity (*see Purcell v Visiting Nurses Found. Inc.*, 127 AD3d 572, 574 [1st Dept 2015]; *Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 501 [1st Dept 2015]; *Anton v West Manor Constr. Corp.*, 100 AD3d 523, 524 [1st Dept 2012]).

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8052-
8053 In re Jeff Edelson,
Petitioner-Respondent,

-against-

Jennifer Warren,
Respondent-Appellant.

_____

Elayne Kesselman, New York, for appellant.

Lawrence B. Goodman, New York, for respondent.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about October 31, 2017, which denied respondent's objections to the Support Magistrate's award of attorneys' fees to petitioner, unanimously affirmed, without costs.

Respondent argues that the award of attorneys' fees to petitioner for her willful failure to comply with the prior child support order (*see* Family Court Act §§ 438[b]; 454[3]) erroneously included fees incurred in the proceeding in which she sought modification of her child support obligation.

Respondent does not dispute petitioner's statement that the Support Magistrate deemed the modification and willfulness issues "interrelated," and the parties acknowledge that, upon the conclusion of the modification proceedings, they agreed that the

evidence and testimony would be adopted for purposes of the violation proceedings.

Given the interrelatedness of issues in both proceedings – respondent's stated inability to pay both prompted her modification petition and was a defense to the violation petition – it would not be feasible, and it would be inconsistent with the parties' agreement not to hold a separate hearing on the violation petition, to try to disentangle the fees associated solely with the willfulness finding.

Respondent failed to show that, in awarding counsel fees under Family Court Act §§ 438(b) and 454(3), the Support Magistrate failed to consider her ability to pay such fees (*see Matter of Westergaard v Westergaard*, 106 AD3d 926 [2d Dept 2013]). The Support Magistrate acknowledged that the ability to pay was a factor to be considered. Moreover, she had an opportunity to assess respondent's overall financial picture as a result of the hearings on the modification petition, after which she concluded that respondent's testimony about her finances was not credible, given respondent's commingling of personal and business expenses, and her failure, in the Support Magistrate's view, to seek employment opportunities diligently after the demise of her business.

Because credibility determinations were the basis of the Support Magistrate's findings as to respondent's income (including how much income to impute to her), which necessarily encompassed questions of respondent's ability to pay support and any fee award, Family Court appropriately accorded considerable deference to the findings (*see Matter of Grant v Grant*, 265 AD2d 19, 22 [1st Dept 2000], *lv denied* 95 NY2d 758 [2000]).

We reject respondent's claim that the fee award was unreasonable. While respondent blames petitioner and his counsel for the protracted proceedings, the Support Magistrate found that the proceedings were protracted because of respondent's efforts to reduce her child support obligation. Respondent objects to petitioner's counsel's interrogating her over her expenditures, but the examination revealed, at least in the opinion of the Support Magistrate, that respondent was commingling her business and personal expenses and making expenditures while failing to comply with her support obligation. Moreover, petitioner reasonably argues that this case is not as simple as respondent portrays it, pointing out that respondent was not a salaried employee, and, given the way she accounted for her expenses, more

attorney time was necessary to obtain an accurate picture of her finances.

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

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8054 Hadassa Carlebach, Index 153753/14
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent.

_____

Bernstone & Grieco, LLP, New York (Matthew A. Schroeder of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered July 13, 2017, which granted defendant City of New York's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff alleges that she tripped and fell when, while crossing the street at an intersection, she placed her cane into a small opening within a manhole cover. The City may be held liable for a discretionary traffic planning decision only where either (1) its study of a known hazard was plainly inadequate or (2) where there was no reasonable basis for its plan (*see Affleck v Buckley*, 96 NY2d 553, 556 [2001]). Here, the City's papers in support of its summary judgment motion demonstrated, prima facie, that it was unaware that the design or placement of the manhole

would give rise to any hazard requiring a study (*see Turturro v City of New York*, 28 NY3d 469, 486 [2016]). The City made a further prima facie showing that it had a reasonable basis both for the design of the manhole cover (which had trapezoid-shaped openings to capture water buildup) and for its placement of the manhole to facilitate drainage at the intersection (*see Nowack v New York City Tr. Auth.*, 40 AD3d 510, 511 [1st Dept 2007], *lv denied* 14 NY3d 712 [2010]). In opposing the motion, plaintiff failed to present evidence (such as of prior similar accidents or of a violation of any mandatory safety standard) that would raise an issue of fact as to whether the City lacked a reasonable basis for its design or placement of the manhole (*see Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 60 [2006]).

We note that, to the extent that plaintiff's injuries were caused by a dangerous condition within the purview of Administrative Code of the City of NY § 7-201(c)(2), we find that the City met its initial burden of establishing that it received no prior written notice of the defective condition (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2018]). The City, which owns the manhole cover, submitted records demonstrating that the manhole at issue was installed in the subject location at least two years prior to plaintiff's accident

and there were no repairs or complaints about the condition of the manhole cover, thereby shifting the burden to plaintiff. In opposition, plaintiff has failed to raise an issue as to whether the City caused the condition through affirmative negligence, which "immediately result[ed]" in a defective condition (*Brown v City of New York*, 150 AD3d 615, 616 [1st Dept 2017], *citing Bielecki v City of New York*, 14 AD3d 301, 301 [1st Dept 2005]; *see also Tomashevskaya v City of New York*, 161 AD3d 511 [1st Dept 2008]; *cf. Bania v City of New York*, 157 AD3d 612, 614 [1st Dept 2018] [accident occurring within 10 days of the City's work found to be "immediate"]).

Accordingly, the City was entitled to summary judgment.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8056 The People of the State of New York, Ind. 249/15
Respondent,

-against-

Deryck Jackson,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Alexandra J. Paslawsky of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J. at hearing; Michael R. Sonberg, J. at jury trial and sentencing), rendered January 28, 2016, convicting defendant of two counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 12 years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. The police had probable cause to arrest defendant where his appearance and that of his companion matched the two robbers depicted in a surveillance video of a robbery in a building elevator 11 days earlier, even though the men's faces were not discernable on the video. When the police encountered the two

men, defendant's companion was wearing a jacket with a highly distinctive design or insignia on the back. Defendant was wearing a red-brimmed variation on the standard Pittsburgh Pirates cap, a mask-like garment over part of his face, a black bubble vest, and gray and black batting gloves. This was the exact combination of clothing items worn by the robbers on the videotape. Furthermore, the police saw the men about two blocks from where the robbery occurred, at approximately the same time of day as the crime (*see People v Williams*, 273 AD2d 79, 80 [1st Dept 2000], *lv denied* 95 NY2d 940 [2000]). Defendant was not arrested merely because he was in the company of another man who met a more specific description, but because the totality of circumstances created a very high probability that the police had encountered the same two men shown in the video (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]).

The court's *Sandoval* ruling, which precluded the People from identifying or eliciting any information about defendant's unspecified felony and misdemeanor convictions balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]).

The court providently exercised its discretion in precluding evidence that the victim failed to identify defendant in a

lineup. This evidence was irrelevant in the context of the case (*see generally People v Wilder*, 93 NY2d 352 [1999]) because neither the victim, nor anyone else, identified defendant at trial, and the People's case was based entirely on other types of evidence. Under the circumstances, the victim's inability to identify defendant at the lineup did not tend to exclude or exculpate defendant. To the extent that defendant is raising a constitutional claim in this regard, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8057 Eugenia Pinkard, Index 101971/15
Plaintiff-Appellant,

-against-

New York City Department of Education, et al.,
Defendants-Respondents.

_____

Eugenia Pinkard, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo DiSilvio of counsel), for New York City Department of Education, respondent.

Lichten & Bright, P.C., New York (Stuart Lichten of counsel), for United Federation of Teachers and NYSUT, respondents.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered August 15, 2017, which, insofar as appealable, denied plaintiff's motion for renewal with respect to an earlier order dismissing the complaint, unanimously affirmed, and the appeal is otherwise dismissed, without costs, as taken from an nonappealable paper.

The court properly denied plaintiff's motion for renewal since she presented the same facts and exhibits as she did in opposition to defendants' motion to dismiss, albeit in support of a different theory (*see generally Matter of Weinberg*, 132 AD2d 190, 209-210 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988];

CPLR 2221[e]). Furthermore, the instant action is a rehash of plaintiff's prior federal actions, which were dismissed, and from which she did not appeal.

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

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8058-
8059 Index 152829/14

Old Republic General Insurance Corp., as subrogee of J.E. Levine Builders, Inc., et al.,
Plaintiffs-Appellants,

-against-

K&M Architectural Window Products, Inc., etc.,
Defendant-Respondent.

- - - - -

Old Republic Insurance Corp., as subrogee of J.E. Levine Builders, Inc., et al.,
Plaintiffs-Appellants,

-against-

K&M Architectural Window Products, Inc., etc.,
Defendant-Respondent.

_____

Ken Maguire & Associates, PLLC, Wantagh (Kenneth R. Maguire of counsel), for appellants.

Goldberg Segalla, White Plains (Michael P. Kandler of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Melissa Crane, J.), entered September 13, 2017 and November 1, 2017, which denied plaintiff's motions for summary judgment declaring the antisubrogation rule inapplicable and dismissing the ninth affirmative defense, declared the antisubrogation rule applicable, and granted defendant's motions for summary judgment

dismissing the complaint, unanimously affirmed, with costs.

Plaintiff's claims are barred by the antisubrogation rule (*see Parache v DD 11th Ave. LLC*, 126 AD34d 441, 442 [1st Dept 2015]).

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8060 The People of the State of New York, Ind. 1044/15
Respondent,

-against-

Jose Perez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margaret Bierer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered August 31, 2015, convicting defendant of seven counts of petit larceny, and sentencing him to an aggregate term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. Although there was a substantial gap between the larceny observed by the identifying witness and the showup identification, which occurred shortly after the witness saw defendant again, exigent circumstances justified the showup because the officers, who were in the midst of an undercover operation, needed to know whether they had apprehended the right person or whether they should keep looking for other suspects (*see People v Howard*, 22 NY3d 388, 402

[2013]). Even assuming the police already had probable cause to arrest defendant, that did not render the showup improper in these circumstances (*id.* at 403). The allegedly suggestive overall effect of the manner in which the showup was conducted, and an officer's comments to the witness, was not significantly greater than what is inherent in a showup itself (*see e.g. People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]).

In any event, regardless of the showup, we find no basis for reversal (*see People v Adams*, 53 NY2d 241, 252 [1981]), because the record also supports the hearing court's finding that the witness had an independent source for her in-court identification (*see People v Williams*, 222 AD2d 149, 152-153 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). The witness, a store loss prevention agent trained to watch the store for shoplifters, had

an ample opportunity to observe defendant on surveillance videos and during a face-to-face encounter at the time of a larceny, as well as shortly before the showup.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8061 In re Antoine D.,
Petitioner-Appellant,

-against-

Kyla Monique P.,
Respondent-Respondent.

_____

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

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

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

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about May 1, 2018, which summarily dismissed, with prejudice, the father's petition to modify a final order of custody and visitation awarding respondent mother sole custody of the subject child, unanimously affirmed, without costs.

Contrary to the father's contention, the court properly determined that a full evidentiary hearing was not necessary because it possessed sufficient information to render an informed decision on the child's best interests and because he made no offer of proof that would have affected the outcome (*see Matter of Tony F. v Stephanie D.*, 146 AD3d 691 [1st Dept 2017]; *Matter*

*of Fayona C. v Christopher T.*, 103 AD3d 424 [1st Dept 2013]; *compare S.L. v J.R.*, 27 NY3d 558, 564 [2016]). The court, having recently conducted an extensive fact-finding hearing, determined that it was in the child's best interest for the mother to retain sole custody. A court need not conduct a hearing on conclusory or speculative allegations (*see Matter of Antonio Dwyane G. v Erika Monte E.*, 137 AD3d 647 [1st Dept 2016], *lv denied* 27 NY3d 909 [2016]).

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8062 The People of the State of New York, Ind. 682/16
Respondent,

-against-

Roberto Aquero,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven Barrett, J.), rendered April 26, 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: JANUARY 10, 2019

CLERK

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

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8063 The People of the State of New York, Ind. 4731/08
Respondent,

-against-

Samad Wadir,
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 (Michael J. Yetter 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 (Bonnie Wittner, J.), rendered March 9, 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: JANUARY 10, 2019

CLERK

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

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8064 Sutton 58 Associates LLC, Index 654917/16
Plaintiff-Respondent,

-against-

Philip Pilevsky, et al.,
Defendants-Appellants.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Ronald S. Greenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 8, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's claims, in which the sole damages plaintiff claims are losses resulting from the delay of a real estate project due to the bankruptcy filing of two nonparty entities, are preempted by federal law (*see Astor Holdings, Inc. v Roski*, 325 F Supp 2d 251, 262-263 [SD NY 2003]). We note that in the bankruptcy proceedings, plaintiff moved to dismiss Mezz Borrower's petition as filed in bad faith but voluntarily withdrew that motion. As in *National Hockey League v Moyes* (2015

WL 7008213, 2015 US Dist LEXIS 153262 [D Ariz, Nov. 12, 2015, No. CV-10-01036-PHX-GMS]), and unlike *Davis v Yageo Corp.* (481 F3d 661 [9th Cir 2007]), plaintiff's damages arise only because of the bankruptcy filings.

In light of the above disposition, we need not reach the parties' arguments about the *Noerr-Pennington* doctrine and veil-piercing.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8065 The People of the State of New York, Ind. 2604N/13
Respondent,

-against-

Adan Diaz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at suppression motion and plea; A. Kirke Bartley, Jr., J. at sentencing), rendered July 17, 2014, as amended December 16, 2015, convicting defendant of criminal possession of a controlled substance in the second degree, and sentencing him to a term of three years, held in abeyance, and the matter remanded to Supreme Court for a hearing on defendant's motion to suppress evidence.

The People concede that defendant is entitled to a *Mapp/Dunaway* hearing because his moving papers created a factual issue warranting a hearing, based on the information available to

him at the time of the motion (*see generally People v Mendoza*, 82 NY2d 415 [1993). Furthermore, there are unresolved issues regarding the existence and validity of a GPS search warrant for defendant's car.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8066 The People of the State of New York, Ind. 4158/14
Respondent,

-against-

Jermaine Combs,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Bonnie Wittner, J.), rendered April 30, 2015,

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: JANUARY 10, 2019

CLERK

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

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8067 The People of the State of New York, Ind. 5076/13
Respondent,

-against-

Alfred Wilcott,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at dismissal motion; Daniel P. Conviser, J. at first trial; Ann M. Donnelly, J., at second trial and sentencing), rendered March 23, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and menacing in the second degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

Defendant's motion to dismiss the indictment was properly denied because he was not entitled to grand jury notice pursuant to CPL 190.50(5)(a) and did not file written notice of his intention to testify before the grand jury prior to the filing of the indictment. A defendant is only entitled to notice of a

grand jury presentation as to charges contained in a pending felony complaint (*see People v Thomas*, 27 AD3d 292, 293 [1st Dept 2006], *lv denied* 6 NY3d 898 [2006]), and here there was only a misdemeanor complaint. The notice statute should be construed according to its plain language (*People v Small*, 26 NY3d 253, 259 [2015]).

Defendant's decision to represent himself was knowing and voluntary. The combination of the colloquy conducted at defendant's first trial, which ended in a mistrial, and the second trial court's colloquy with defendant was sufficient to warn defendant of the disadvantages and risks of representing himself and of the important role of an attorney (*see People v Torres*, 157 AD3d 458 [1st Dept 2018], *lv denied* 31 NY3d 1088 [2018]; *People v Peterson*, 273 AD2d 88, 89 [1st Dept 2002]). Furthermore, at the second trial, the court carefully ascertained that defendant still wanted to proceed pro se, and there is no evidence that defendant wanted an attorney at the second trial, or vacillated about representing himself at that trial. In context, defendant's unelaborated remark that he had "no choice"

but to represent himself did not cast any doubt on the voluntariness of his waiver of counsel.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8068 In re Sean Combs, Index 405987/01
Claimant-Respondent,

-against-

Superintendent of Financial Services
of the State of New York as Ancillary
Receiver for Reliance Insurance Company,
Ancillary Receiver-Appellant.

_____

Simpson Thacher & Bartlett LLP, New York (Andrew T. Frankel of counsel), for appellant.

Jonathan D. Davis, P.C., New York (Derek A. Williams of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered September 19, 2017, awarding claimant (Combs) the amount paid in settlement of certain claims, plus interest, against Reliance Insurance Company in Ancillary Receivership, unanimously affirmed, without costs.

The Receiver breached its duty to defend when it disclaimed coverage for Combs in a personal injury action brought against him by three individuals who were injured in a 1999 shooting at a nightclub on the ground that no valid covered claims against Combs remained in the action (*see Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 423-424 [1985]; *see also Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311-312

[1984]). Claims for respondeat superior and negligent hiring, retention and supervision were asserted by two of the plaintiffs in the underlying action and survived summary judgment.

Having breached its contractual duty to defend Combs in the personal injury action, and having conceded that the settlement with the injured parties was reasonable, the Receiver failed to meet its burden of establishing that it is not obligated to indemnify Combs for the amounts paid in settlement (*see Servidone*, 64 NY2d at 424-425). Contrary to the Receiver's contention, the evidence it presented is inconclusive as to whether Combs employed the person convicted of shooting the three people (*see People v Barrow*, 19 AD3d 189 [1st Dept 2005], *lv denied* 6 NY3d 809 [2006]), and therefore fails to demonstrate that Combs could not be subject to liability on the injured plaintiffs' claims for negligent hiring, retention and supervision, even if the respondeat superior claims are found to be excluded from coverage.

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

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8069N John Hon, et al., Index 602236/04
Plaintiffs-Respondents,

-against-

Prince Development Company LLC, et al.,
Defendants.
- - - - -
Roug Kang Wang, et al.,
Nonparty Appellants.

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Wang Law Office, PLLC, Flushing (Jean Wang of counsel), for appellants.

Aronauer & Yudell, LLP, New York (Joseph Aronauer of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 10, 2017, which denied nonparty appellants' motion to stay the sale of certain real property and to maintain the status quo, unanimously affirmed, with costs.

The motion court correctly concluded that this action is barred by the doctrine of res judicata (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Nejeidi v Republic Natl. Bank of N.Y.*, 227 AD2d 392 [2d Dept 1996]). In December 2014, appellants brought a special proceeding pursuant to CPLR 5239 in Supreme Court, Queens County (index no. 18415/2014), seeking a declaration that the respondents therein (including plaintiffs herein) did not have a

judgment lien against the subject property. By judgment entered August 5, 2015, the petition was denied and the proceeding dismissed. Having either raised or had the opportunity to raise in that proceeding the precise arguments that they have raised in this action, appellants may not further contest the validity of plaintiffs' judgment lien against the property.

We have considered appellants' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 10, 2019

CLERK

Friedman, J.P., Gische, Oing, Singh, Moulton, JJ.

8070N In re Ana Rodriguez, Index 152230/18
Petitioner-Appellant,

-against-

City of New York, etc.,
Respondent-Respondent.

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Geoffrey Schotter, Brooklyn, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Shannon Colabrese of counsel), for respondent.

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Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered April 17, 2018, which denied petitioner's motion for leave to serve a late notice of claim upon respondent, unanimously affirmed, without costs.

The court did not abuse its discretion in denying petitioner's leave application, because she failed to establish that respondent had actual knowledge of the essential facts constituting the claim within the statutory period, or a reasonable time thereafter. The documentation petitioner submitted to the Workers' Compensation Board does not establish that respondent obtained timely actual notice of her claims, because it fails to set forth any facts that suggest her injuries were caused by respondent's negligence and there is no evidence

that her workers' compensation claim was received by respondent (*see Matter of Grajko v City of New York*, 150 AD3d 595, 595-596 [1st Dept 2017], *appeal dismissed* 30 NY3d 1011 [2017], *lv denied* 31 NY3d 910 [2018]). The fact that the City's Law Department acted as counsel for petitioner's employer, the New York City Health and Hospitals Corporation (HHC), during a workers' compensation proceeding regarding the injuries she allegedly sustained as a result of the incident with an inmate does not establish that respondent obtained timely notice of her negligence claims against it, because respondent has no control over the HHC, which is a separate and distinct statutory entity (*see Skelton v City of New York*, 176 AD2d 664 [1st Dept 1991]).

Contrary to petitioner's contention, the seven-month delay has prejudiced respondent's ability to investigate who was present during the incident and collect testimony from witnesses whose memories were fresh (*see Alexander v City of New York*, 2 AD3d 332 [1st Dept 2003]). The fact that petitioner twice spoke with an employee of the Department of Correction about the incident and told him of her intention to commence an action against respondent does not establish that respondent had timely actual notice of her claims, because knowledge that she was assaulted by an inmate does not connect the accident to the claim

that respondent was negligent for failing to have a correction officer present while she spoke with her assailant (*see Matter of Schifano v City of New York*, 6 AD3d 259 [1st Dept 2004], *lv denied* 4 NY3d 703 [2005]).

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

ENTERED: JANUARY 10, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische
Angela M. Mazzarelli, JJ.

15595
Ind. 4033/09

_____x

The People of the State of New York,
Respondent,

-against-

Shaequawn Watson,
Defendant-Appellant.
_____x

Defendant appeals from a judgment of the Supreme Court, Bronx County (Thomas A. Breslin, J.), rendered May 17, 2013, convicting him, after a jury trial, of assault in the second and third degrees and resisting arrest, and imposing sentence.

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight and Peter D. Coddington of counsel), for respondent.

MANZANET-DANIELS, J.

On the prior appeal (141 AD3d 23 [1st Dept 2016]), we held that the trial court failed to follow the three-part protocol set forth in *Batson v Kentucky* (476 US 79 [1986]), thus precluding us from determining whether the prosecution had exercised its peremptory challenges in a discriminatory manner when it struck all African American males from a panel of prospective jurors. We remanded for a new hearing to properly apply *Batson*, as well as to clarify certain portions of the voir dire record where prospective jurors made statements relevant to the present inquiry but the transcript failed to identify them by name.

At step one, we held that *Batson* extends to combined race-gender groups such as black males (141 AD3d at 28). We found that the wholesale exclusion of African American males gave rise to a mandatory inference of discrimination at the first step of the *Batson* inquiry, noting, inter alia, that the prosecutor chose not to strike similarly situated jurors who expressed skepticism about the credibility of police officers. At step two of the inquiry, we found that the prosecutor's putatively race neutral explanations could not be assessed and resolved as a matter of law given, inter alia, the ambiguities and lack of clarity in the record (*id.* at 29). Among other things, there was no record evidence concerning any alleged negative encounters between two

of the three jurors struck (Prosser and Lortey) and the police. A so-called "unnamed juror" expressed having had such encounters; however, those comments could not be definitively attributed to any of the venire persons.

At the *Batson* reconstruction hearing, a different ADA than the one who conducted the jury selection appeared on behalf of the People. The People did not turn over the notes of the ADA who did conduct the jury selection. Nonetheless, the trial court proceeded to solicit and to rely on statements from the new ADA with respect to why Lortey had been struck. It should be noted that the new ADA never claimed that his colleague believed the unnamed juror to be Lortey.

The trial court ascribed the comments of the unnamed juror to Lortey, based on its recollection of details from the voir dire four years earlier, and without the benefit of any contemporary notes or other evidence, which, again, was not presented at the hearing. The trial court did not conduct an analysis at stage three, despite this Court's explicit instruction (*id.* at 30), and failed to address the peremptory challenge of Hewitt in any way.

We now hold that the reconstruction hearing failed to satisfy the requirements of *Batson*.

The Court in *Batson* held that the People must exercise their

peremptory challenges in accordance with the mandate of the Equal Protection Clause. "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors" (*Batson*, 476 US at 86 [internal citations omitted]). The Court in *Batson* recognized that the harm flowing from discrimination in the selection of a jury "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. . . . [thereby] undermin[ing] public confidence in the fairness of our system of justice" (*id.* at 87). In order to avoid such harm, the burden is on the State, at stage two of the inquiry, to proffer race-neutral reasons for the striking of venire persons in a cognizable group (*id.* at 97).

The purpose of a *Batson* reconstruction hearing is to attempt to recreate, after the fact, a record of the prosecutor's proffered justifications for striking certain venire persons. At such a hearing, it is typical to rely on the contemporaneous notes of the prosecutor and to elicit testimony from him or her. The prosecutor testifies as a sworn witness, and is subject to cross-examination concerning the strike or strikes (*see* Jonathan Abel, *Baston's Appellate Appeal and Trial Tribulations*, 118 Colum L Rev 713, 749-750 [2018]).

"[T]here is no better evidence of a prosecutor's intent than her notes from jury selection" (*id.* at 738); indeed, seminal opinions on *Batson* have referred to jury selection notes as evidence of prosecutorial bias (*see e.g. Foster v Chatman*, ___ US ___, 136 S Ct 1737, 1755 [2016]). In *Foster*, the prosecutor's notes were not disclosed until post-conviction proceedings years later. The notes showed the letter "B" next to the names of the African American jurors and their names highlighted in green pen. Three decades after trial, the contents of the notes led the Supreme Court to reverse the defendant's conviction.

No testimony or notes were offered at this *Batson* reconstruction hearing. The ADA who conducted the voir dire did not appear and his notes were never disclosed. The ADA at the reconstruction hearing could only speculate as to the motives of his colleague. This procedure was insufficient to satisfy the requirements of *Batson*.[1]

The People argue that defense counsel was given an adequate opportunity, at stage three of the protocol, to argue that the prosecutor's explanations were a pretext for discrimination. The People note that although other venirepersons who were seated

[1]The dissent faults the defense for presenting no evidence at the hearing, but it is undisputably the prosecution's burden, at step two, to come forth with race-neutral explanations for the questioned strikes.

expressed hostility toward the police, those jurors had not been the victims of police harassment.

We cannot agree with the People's logic. Indeed, refusing to seat any and all jurors who have been unfairly stopped and frisked or otherwise been the victim of police harassment is effectively a pretext for excluding a particular protected group as prospective jurors (*see City of Seattle v Erickson*, 188 Wash2d 721, 738 [2017] [McCloud, J., concurring] [noting that frequently advanced race-neutral reasons for striking potential jurors, such as expressions of distrust of the police or belief that police engaged in racial profiling, served to exclude racial and ethnic minorities from juries]). It is a lamentable fact that a disproportionately high number of black males in this City have had occasion to be stopped and frisked by the police in a manner that does not comport with the Constitution (*see* New York State Office of the Attorney General, A Report on Arrests Arising from the New York City Police Department's Stop-and-Frisk Practices [Nov. 2013]). To allow exclusion solely on this basis would bring us close to a reality where African American males are effectively barred from serving on juries in criminal trials, a proposition we cannot endorse. As sagely observed by the Court in *Batson*, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of

race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race" (*Batson*, 476 US at 97-98). We do not establish a "per se" prohibition on the People's exercise of peremptory challenges for race-neutral reasons that apply disproportionately to a protected group, as Justice Friedman asserts; indeed, it is the hearing court's decision that threatens to establish a per se rule excluding all African American males as venirepersons.

Not content to discuss the merits of the current appeal – delimited in scope to the question of whether the trial court abided by our instructions concerning the parameters of the *Batson* remand hearing – Justice Friedman rehashes the merits of our determination on the prior appeal. As his contentions are largely redundant we decline to address them; it is plainly not the prerogative of our colleague to revisit the merits of an already decided appeal on which he has already authored a lengthy dissent.

Finally, the hearing court had no basis for concluding that the prosecution's decision to strike Prosser was nondiscriminatory, as our colleague Justice Richter recognizes. Justice Richter also recognizes that the hearing court made no findings whatsoever on pretext (as to any of the jurors), and that the record does not support the hearing court's conclusion

that the defense conceded that the People's striking of two of the jurors at issue was non-pretextual.

There is no basis to remand for a second *Batson* hearing, given the hearing court's utter failure to abide by our instructions on the prior remand. Defendant has fully served the incarceratory portion of her sentence, and remanding the case for a new trial would not be in the interest of judicial economy (*see People v Flynn*, 79 NY2d 879, 882 [1992]; *People v Johnson*, 88 AD2d 552 [1st Dept 1982]).

Accordingly, the judgment of the Supreme Court, Bronx County (Thomas A. Breslin, J.), rendered May 17, 2013, convicting defendant, after a jury trial, of assault in the second and third degrees and resisting arrest, and sentencing her, as a second felony offender, to an aggregate term of four years, should be reversed, on the law, and the indictment dismissed.

All concur except Friedman, J.P. who dissents in an Opinion and Richter, J. who dissents in an Opinion.

FRIEDMAN, J.P. (dissenting)

Initially, for the reasons discussed in my dissent from our previous decision holding the appeal in abeyance pending a *Batson* reconstruction hearing (141 AD3d 23, 30-41 [1st Dept 2016]), I continue to believe that we improvidently exercised our discretion to entertain defendant's unpreserved claim of a *Batson* error during jury selection at her trial (*see Batson v Kentucky*, 476 US 79 [1986]). To the extent there is any doubt on appeal as to what each prospective juror stated upon questioning during voir dire, that doubt results from the fact that the transcript does not identify the panelists by name. There is no reason to believe that, during the voir dire proceedings, the court and counsel — who had just seen and heard the panelists give their answers — were similarly in doubt. Therefore, the absence of any objection by defendant's trial counsel to the race-and-gender-neutral rationale offered by the prosecutor for his exclusion of two panelists (Prosser and Hewitt), or to the prosecutor's failure to articulate a rationale for excluding a third panelist (Lortey), is presumably attributable to defense counsel's knowledge that all three of these panelists had spoken of having had negative encounters with the police, as the prosecutor had characterized the responses of Prosser and Hewitt. Similarly, the absence of any objection by defense counsel to the court's

omission of an express offer to the defense of an opportunity to show that the People's rationale for the exclusions was pretextual is presumably attributable to defense counsel not having had any substantial pretext argument to make. I see no justification for our having relieved defendant's trial counsel of the responsibility placed on him by the Court of Appeals "to plac[e] [his] objections on the record so they may be addressed by the court" (*People v Smocum*, 99 NY2d 418, 424 [2003]).

Now that the *Batson* reconstruction hearing ordered by our previous decision has been conducted, I see no basis either for finding (as the majority does) that a *Batson* violation occurred or for remanding for yet another hearing (as Justice Richter would have us do).[1] The record of the new hearing, which was presided over by the same justice who presided over the trial, clarifies — to the extent the record was not already clear — that each of the three panelists at issue disclosed that he had experienced negative encounters with the police. Further, none of the pretext arguments offered by defense counsel at the reconstruction hearing has any merit. Accordingly, I would

[1]I am particularly troubled by the majority's assertion that the record of this case evidences an attempt by the office of the Bronx County District Attorney to effect "the wholesale exclusion of African American males" from the jury. I do not believe that the exercise of these three peremptory exclusions amounts to such a "wholesale" exclusion.

reject defendant's *Batson* argument and proceed to consider her remaining argument for the reversal of her conviction.

Before going further, I note my agreement with Justice Richter that there is no basis for the majority's apparent discrediting of the independent recollection of the voir dire proceedings by the justice who presided at both the trial and the reconstruction hearing. At the reconstruction hearing, when questioned by defense counsel about his ability to recall the trial, the justice stated: "I only tried three cases in the Bronx so I have a distinct recollection of the case. I have a distinct recollection of dealing with the case and my recollection is clear so thank you." In this regard, upon review of the outcome of a reconstruction hearing, a high degree of deference is owed to the trial justices's resolution of any ambiguities in the record of the original proceedings over which he presided:

> "[T]he final arbiter of the record should be the Judge who presided at the original proceedings sought to be reviewed, if he is available. At a minimum, he should take charge of the reconstruction proceeding. In such a proceeding he is not merely, or not at all, a witness; he is the official who certifies to the appellate court — if he can — what took place before him" (*People v Carney*, 73 AD2d 9, 12 [1st Dept 1980]).

While, for the foregoing reasons (as more fully explained below), I would dissent even if the majority were merely remanding for a new trial based on its finding of a *Batson* error,

I even more emphatically dissent from the majority's dismissal of the indictment. In so doing, the majority — on the pretext of a procedural error having no relevance to the question of guilt or innocence — wipes from defendant's record the serious felony charges of assault in the second degree, which is supported by police officers' testimony that she violently and unjustifiably attacked them. I do not see why the procedural error perceived by the majority should constitute a reason to reward a person convicted of biting a police officer with the dismissal of her indictment. I agree with Justice Richter that, even if the majority were correct in finding that a *Batson* error occurred, defendant's proper remedy for any such error would be a new trial.

At the outset of its decision, the majority appears to suggest that the People — who were not represented at the reconstruction hearing by the same prosecutor who appeared at trial — could not meet their obligation to offer a race-and-gender-neutral reason for the peremptory challenges at issue without offering sworn testimony by the trial prosecutor and producing his notes. I am not aware of any case law supporting such an argument, and the majority cites none; indeed, as noted by Justice Richter, the Court of Appeals has specifically rejected the contention that, at a *Batson* reconstruction hearing,

the trial prosecutor must testify as a sworn witness and be subject to cross examination (*see People v Hameed*, 88 NY2d 232 [1996], *cert denied* 519 US 1065 [1997]). As to the nonappearance of the trial prosecutor, it may well be that he had left the District Attorney's office by the time of the reconstruction hearing. The prosecutor who appeared at the reconstruction hearing stated that he had discussed the matter with the trial prosecutor, and I see no reason that his representation of the trial prosecutor's reasons should not be sufficient. Again, the majority cites no precedent supporting the imposition of the requirement that the existence of a nondiscriminatory rationale for the exercise of a peremptory challenge be proven at a *Batson* reconstruction hearing by evidence that would be admissible at trial, or that the right of confrontation applies at such a hearing.[2] As for the trial prosecutor's notes, there is no indication that defense counsel even requested such notes — which in any event may no longer exist — at any time before the reconstruction hearing was underway. Nor does the majority suggest the parameters of the right it would confer on defendants

[2]Certainly, at the trial itself, a prosecutor is not subject to cross-examination by the defense on a *Batson* issue.

to examine the prosecution's notes in this context.[3]

In its previous decision, the majority remanded for a *Batson* reconstruction hearing based, in part, on its view that "[t]he record is pointedly deficient as to Lortey, as to whom nonpretextual explanations were not even offered, and Prosser, as to whom no record exists to support the assertion that he had been the victim of police harassment" (141 AD3d at 30). Turning first to Prosser, contrary to the majority's statement in the

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[3]At the beginning of the reconstruction hearing, defense counsel asserted that defendant was "entitled to . . . any notes on any conversations on which the People relied." Although the court did not render a decision at the hearing, and both sides submitted posthearing memoranda, it appears that defense counsel did not further pursue defendant's asserted "entitle[ment]" to any surviving notes of the trial prosecutor. In *Foster v Chatman* (__ US __, 136 S Ct 1737 [2016]), which the majority cites, the defendant had obtained the prosecution's notes on jury selection at his trial pursuant to a state open records statute, and those notes were admitted into evidence at his postjudgment habeas corpus proceeding in state court (*see id.*, 136 S Ct at 1743). The defendant's entitlement to production of the prosecution's voir dire notes in *Foster* — a matter of state statutory law — was not at issue upon the defendant's appeal to the United States Supreme Court from the state courts' denial of his petition for habeas relief. Accordingly, *Foster* does not stand for the proposition that the prosecution must produce its trial notes for a *Batson* reconstruction hearing. In any event, here, defendant did not seriously make and pursue any claim to entitlement to production of the trial prosecutor's notes. To reiterate, if defense counsel believed that the notes were vital to the reconstruction hearing, was it not incumbent upon her to tell the court, in sum and substance, that counsel could not meaningfully proceed without the notes? Absent some indication that counsel communicated that message to the court, I do not see how the failure to turn over the notes can set this case on a path to dismissal of the indictment.

previous decision, there was no "deficien[cy]" as to him in the voir dire record, both because the People offered a race-and-gender-neutral reason for challenging him (as is undisputed) and because — even if, as the majority wrongly assumes, that the proffered neutral reason must be supported by record evidence — the voir dire record contains such evidence.

The question for purposes of the second step of *Batson* is whether the prosecutor offered a neutral reason for the challenge, not whether the evidentiary support for the proffered reason made it into the record (*see Foster*, 136 S Ct at 1747 [the second step of *Batson* requires the prosecution to "offer a race-neutral basis for striking the juror in question"] [internal quotation marks omitted]). Plainly, the trial prosecutor in this case — who stated on the record at voir dire that "Mr. Prosser indicated that he had been harassed by police officers" (*see* 141 AD3d at 33 n 3 [internal quotation marks omitted]) — offered such a reason as to Prosser. The majority cites no support for its view that this statement by the trial prosecutor — which defendant's trial counsel did not dispute as a matter of fact — is not sufficient, by itself, to satisfy the second step of the *Batson* inquiry.[4] In this regard, the view of the majority (and

[4]Of course, the defense is entitled to attack the factual basis for the reason proffered by the prosecution for the

also apparently of Justice Richter) that the proffer of a neutral reason for a peremptory challenge is void unless the factual basis for the reason is obvious from the cold record clashes with the teaching of the Court of Appeals that it is "for the trial court to determine if the prosecutor's explanation was pretextual or real and *justified by the answers and conduct of the . . . jurors during voir dire*" (*People v Hernandez*, 75 NY2d 350, 356 [1990] [emphasis added], *affd sub nom. Hernandez v New York*, 500 US 352 [1991]). Thus, the trial court's acceptance of the prosecutor's representation at voir dire that Prosser had "indicated that he had been harassed by police officers" should be viewed as a finding that Prosser actually made such a statement. Regardless of any ambiguity on the face of the cold transcript as to which panelists stated that they had been subject to police harassment, the trial court's finding of fact that Prosser had made such a statement — a finding that, to reiterate, was not challenged by defendant's trial counsel at voir dire — is "entitled to 'great deference'" (*id.*, quoting

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exercise of a peremptory challenge under *Batson*. As just stated, however, defendant's trial counsel never even attempted to mount such an attack at voir dire in this case — presumably because he well knew that the prosecutor had accurately characterized the responses of the panelists at issue. Moreover, defendant's belated attempt to mount such an attack at the reconstruction hearing is, in my view, unavailing, for the reasons discussed below.

*Batson*, 476 US at 98 n 21). I regret that the majority fails to rectify at this juncture its previous failure to accord the trial justice's fact-finding at voir dire the deference it deserves.[5]

In any event, contrary to the majority's view, it is discernible from the voir dire record itself that Prosser was the "unnamed juror" who, as the majority noted in its prior decision, "stated, 'You know, the stop and frisk policy, that happens to me *every day*, five days out of the week'" (141 AD3d at 25-26 [emphasis added]). As the majority also noted in the prior decision, the trial prosecutor's inquiry of this "unnamed juror" (in which the foregoing statement was made) immediately followed the prosecutor's inquiry of Hewitt "regarding his encounters with the police" (*see id.* at 25).[6] Thereafter, in asserting the

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[5]In taking the position that "an appellate court . . . [cannot] assess the validity of a proffered race-neutral reason for a peremptory challenge without adequate record support," Justice Richter overlooks the deference that is owed to a trial court that, having actually seen and heard the responses of the juror in question, either accepted or rejected the proffered reason. Thus, where it cannot be determined from the cold record which jurors gave which voir dire responses (as will not infrequently be the case, given that transcripts typically do not identify jurors by name), an appellate court should defer to a trial court's finding that a given juror's responses did or did not support the race-neutral reason proffered for a peremptory challenge.

[6]That Hewitt was the panelist questioned immediately before the "unnamed juror" is plain from the transcript, inasmuch as the prosecutor addressed Hewitt by name.

peremptory challenges to Prosser and Hewitt, the prosecutor stated: "Mr. Prosser indicated that he had been harassed by police officers. So had Mr. Hewitt. He also indicated that he had been harassed by police officers *every day*" (141 AD3d at 33 n 3 [internal quotation marks omitted; emphasis added]).

Although, on its face, the foregoing statement by the prosecutor might be deemed ambiguous as to which panelist claimed to have been harassed by the police "every day," any ambiguity is resolved by a review of the record of the questioning of Hewitt and of the unnamed following panelist. Hewitt (whom, to reiterate, the prosecutor addressed by name) made no claim that he had been subjected to police harassment every day — on the contrary, he said that he had been stopped and frisked only "a couple of times" (141 AD3d at 29 [internal quotation marks omitted]). It was the panelist who was questioned immediately after Hewitt, rather, who complained that he was stopped and frisked "every day, five days out of the week, while I'm at work, during work, on my way to work." Since Hewitt did not make the "every day" statement, it logically follows that the prosecutor was attributing that statement to Prosser, the other panelist he was discussing. Prosser's statement that the police stopped him "every day" — as well as his preceding statement that the police "do judge people the way they want to, meaning you shouldn't

judge a book by its cover" — gave the People reasonable grounds, neutral as to both race and gender, to question Prosser's ability to give police officers' testimony a fair hearing.

Prosser's statement about being stopped and frisked "every day" did not exhaust the People's race-and-gender-neutral reasons for challenging him. As the trial prosecutor noted at voir dire, "Mr. Prosser . . . was constantly making faces and it was just — he said I don't want to be here, so I think that it was that he wouldn't have been a good juror for race neutral reason[s]." Even defendant's trial counsel conceded that he "agree[d] that Lortey and Prosser demonstrated in a variety of ways that they didn't want to be here." While I realize that this is not determinative, in the reconstruction proceedings, the People also pointed out to the court that Prosser could reasonably be suspected of bias against police testimony based on the fact that he had an uncle who worked in internal affairs, the "arm of the police department charged with investigating the criminal activity of police officers[.]"

The majority dismisses the foregoing analysis of the record with respect to Prosser as somehow "redundant" (of what it does not say), and asserts that "it is plainly not the prerogative of our colleague to revisit the merits of an already decided appeal on which he has already authored a lengthy dissent." This

Court's previous decision, however, emphatically did *not* decide this appeal, but held it in abeyance pending a *Batson* reconstruction hearing to be conducted on remand (*see* 141 AD3d at 30). That hearing having been held, the same bench is now resuming consideration of the same appeal, on the same record (albeit with certain additions), and I see no impediment to our reexamining the original voir dire record to determine whether we previously overlooked grounds for resolving the *Batson* issue as to either Prosser or Lortey. For the reasons just explained, the majority, in its previous decision, overlooked that the original voir dire record, by itself, establishes that the prosecution's proffered race-and-gender-neutral reason for the peremptory challenge to Prosser (1) was supported by Prosser's responses and (2) that the trial justice made a finding of fact to that effect, to which this Court owes deference (*see Hernandez*, 75 NY2d at 356). Accordingly, without regard to the results of the proceedings held on remand, there never has been any step-two *Batson* issue with respect to Prosser, and we should correct our previous oversight by saying so now. I see no justification for closing our eyes to what is shown by a careful examination of the original voir dire record.

With respect to Lortey, to the extent there was any deficiency of the trial record to establish that the People

offered a "facially neutral reason for the challenge" to him (*People v Allen*, 86 NY2d 101, 109 [1995]), it has been remedied by the record of the reconstruction hearing.[7] As noted in my previous dissent (141 AD3d at 33), upon the original *Batson* application, the People did not offer a specific rationale for challenging this panelist — an omission to which, again, defendant's trial counsel did not object. At the reconstruction hearing, the People clarified that they had challenged Lortey for the same reason they had challenged Prosser and Hewitt, namely, because he had "expressed reservations about [his] ability to listen fairly to police testimony." Shortly thereafter, the reconstruction court — to reiterate, the same justice who had presided at trial — stated, in response to an objection by defense counsel, that it was his "distinct recollection" that Lortey was an "unnamed juror" referenced in this Court's previous decision as having indicated that he had been harassed by the police (141 AD3d at 25-26). That, the reconstruction court

[7]Although my analysis of the *Batson* issue with respect to Lortey is based on the voir dire record as clarified by the reconstruction proceedings held on remand, the majority offers no response to it. I note that I continue to believe, as stated in my dissent from the previous decision, that defendant's trial counsel's concession, when Lortey was being considered for service as an alternate, that he had "demonstrated in a variety of ways that [he] didn't want to be here," is sufficient to defeat the *Batson* claim defendant raises on appeal as to him (*see* 141 AD3d at 40).

explained, was "why I said on the record I would have granted the challenge [of Lortey] for cause." In subsequently denying the *Batson* motion, the reconstruction court implicitly approved, based on what the court described as its "distinct recollection of dealing with the case," the People's attribution to Lortey, in their posthearing memorandum, of a panelist's statement that he had had "[b]ad experience with cops" and that, as a result, he was "not sure what it would trigger emotionally to impact my judgment" — one of the two statements by an "unnamed juror" discussed in this Court's previous decision (*see* 141 AD3d at 25).[8]

The attribution to Lortey of the statement concerning "[b]ad experience with cops" is consistent with the court's subsequent statement at voir dire that it would have excused Lortey "for

[8]In the previous decision (*see* 141 AD3d at 25, 26 n 1, 29), the majority appears to assume that the same "unnamed juror" made the just-quoted statement concerning "[b]ad experience with cops" (which the reconstruction court implicitly attributed to Lortey, as just stated) and the previously discussed statement concerning "the stop and frisk policy . . . happen[ing] to me every day" (which is plainly attributable to Prosser, viewing the voir dire record as a whole, as previously discussed). I see no basis in the record for the majority's apparent assumption that both statements — which are separated by eight pages in the voir dire transcript — were made by the same panelist. Thus, the court's statement at the reconstruction hearing, in response to defense counsel, that it was his "distinct recollection" that Lortey was an "unnamed juror" referenced in our previous decision (*id.* at 25) is entirely consistent with attributing the former statement to Lortey and the latter statement to Prosser.

cause," had it been asked to do so, and with defendant's trial counsel's statement that "Lortey and Prosser demonstrated in a variety of ways that they didn't want to be here." Thus, in my view, the People have satisfied their obligation, on the second step of the *Batson* inquiry, to offer a neutral explanation for challenging Lortey, and have, in addition, identified evidentiary support for that reason, as the majority believes they must also do.[9]

Although the hearing court's decision after the reconstruction hearing failed to address, on the merits, the third step of the *Batson* inquiry — whether defendant had shown that the People's proffered neutral reason for the challenges were pretextual — the court had afforded defense counsel an opportunity to make arguments concerning pretext at the hearing.[10] I see no reason to send the case back to Supreme Court to make findings on the pretext issue when defendant's arguments in this regard are on the record and this Court can

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[9]Contrary to the majority's assertion, nowhere do I "fault[] the defense for presenting no evidence at the [reconstruction] hearing." However, if defendant's counsel at the reconstruction hearing believed that the prosecution's interpretation of the voir dire record was in error, it was incumbent on her to make a reasoned argument to that effect.

[10]Again, at trial, defense counsel failed to object to the court's failure to give him an opportunity to make arguments concerning pretext.

assess their merits. Having reviewed these arguments, I find them to be entirely without merit. That the panelists in question may have asserted that they would try to be fair, or that they understood that the police have an important role to perform, would not necessarily have negated the effect of their own negative interactions with the police, and the prosecutor had no obligation to assume that it would (*see Foster*, 136 S Ct at 1753 [in setting forth reasons for the exercise of a challenge under *Batson*, "(a) prosecutor is entitled to disbelieve a juror's *voir dire* answers"]; *People v Cunningham*, 21 AD3d 746, 748 [1st Dept 2005] ["the prosecutor was not required to accept the prospective juror's statements at face value"], *lv dismissed* 6 NY3d 775 [2006]). Nor were the People required to assume that the fact that Prosser had relatives who worked in law enforcement meant that, notwithstanding his unpleasant encounters with the police, he would assess police testimony fairly.

Defendant also argued at the reconstruction hearing that the record reflected that the People had not struck from the jury two "similarly situated" panelists, neither of whom was an African-American man, whose impartiality toward the police could be questioned. In fact, neither of these prospective jurors (both of whom were African-American women), although each expressed some wariness toward the police, testified to having been

personally involved in a negative interaction with the police. Thus, they were not similarly situated to the panelists here at issue, who testified to having had such personal experiences. In this regard, the majority loses sight of the principle that a facially neutral reason for a challenge to a juror passes muster under *Batson* "even if that reason is ill-founded — so long as the reason does not violate equal protection" (*People v Allen*, 86 NY2d at 109).

Finally, like Justice Richter, I cannot agree with the majority's argument that there should be a per se prohibition on the People's exercise of peremptory challenges for race-neutral reasons that might apply disproportionately to a protected group (*see Hernandez v New York*, 500 US at 361 ["disproportionate impact does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause"]). I note that, while the majority takes me to task for disagreeing with it on this issue, I have simply concurred with Justice Richter on this point.

For the foregoing reasons, I respectfully dissent, and would, after rejecting defendant's *Batson* claim, proceed to consider the remaining issue she raises on her appeal.

RICHTER, J. (dissenting)

I dissent from the majority's dismissal of the indictment and instead would remand for a reopened *Batson* hearing. We previously held this appeal in abeyance (141 AD3d 23 [1st Dept 2016]) and remanded the matter due to certain deficiencies in the original *Batson* hearing. The pertinent facts can be briefly stated. During voir dire, defense counsel objected to the prosecutor's use of peremptory challenges to remove the only three male African-American jurors: Hewitt, Prosser and Lortey. The prosecutor responded that he struck Hewitt and Prosser because of their prior interactions with police officers, stating that both men indicated that they had been harassed by the police, but failed to give any explanation for his challenge as to Lortey. The trial judge summarily denied the *Batson* application, finding the prosecutor's explanations to be race-neutral, and remarking that he "would have knocked Lortey off for cause if asked."[1]

In our previous decision, we found that although defense counsel had made a prima facie showing of discrimination against African-American males, the prosecutor's putatively neutral

[1] As the court was rendering its decision, the prosecutor added that he struck Prosser because he was making faces and said he did not want to be there.

explanations could not be properly assessed due to "ambiguities and lack of clarity in the record" (141 AD3d at 29). In particular, we noted that the transcript did not show that either Prosser or Lortey stated that they had any negative encounters with police officers. Although one or more unnamed jurors had made reference to having bad experiences with the police, we found that "on this incomplete record, there is no way of definitively attributing [those comments] to either Prosser or Lortey" (*id.*).

In remanding the matter, we identified two problems with the *Batson* hearing. First, we found that the record was "pointedly deficient as to Lortey, as to whom nonpretextual explanations were not even offered, and Prosser, as to whom no record exists to support the assertion that he had been the victim of police harassment" (*id.* at 30). Second, we found that the trial judge failed to properly follow the three-step *Batson* protocol because it did not "afford defense counsel the opportunity to show that the prosecutor's stated reasons for the strikes were pretextual" (*id.*).

On remand, the judge who presided over the trial conducted a renewed *Batson* hearing at which neither the original prosecutor nor defense counsel testified or participated. At the hearing, the judge stated that the record was "already clear as to [Hewitt

and Prosser]," and asked the People to explain their reason for striking Lortey. The People responded that, as with Hewitt and Prosser, Lortey was struck because he had expressed reservations about his ability to fairly listen to police testimony. The judge stated his "distinct recollection" that comments by an unnamed juror about negative experiences with police officers were made by Lortey, and explained that that was the reason he later said he would have granted a cause challenge as to Lortey. The court subsequently issued a written decision denying defendant's *Batson* motion.

I reject defendant's argument that we should not credit the trial judge's independent recollection that Lortey had made comments about his negative experiences with the police. No basis exists on this record to question the judge's explanation that he had a "distinct" and "clear" recollection of the case because he had only tried three cases in the Bronx. The majority appears to discredit the judge's finding, but fails to address the fact that defense counsel presented no evidence at the hearing, such as testimony or notes from the original defense attorney, to contradict the judge's recollection. Nor did defense counsel seek to call the original trial prosecutor as a witness to determine if his recollection might be different from

the judge's.[2] Likewise, I find no merit to defendant's complaint that the judge's statements were not sworn (*see People v Alomar*, 93 NY2d 239, 247 [1999] [in a reconstruction hearing, the trial judge is not a witness, but rather the official who certifies what originally took place]).

Although the trial judge made findings as to Lortey, the same cannot be said for Prosser. At the beginning of the hearing, the judge stated that the record from the original *Batson* proceeding was "already clear" with respect to Prosser. However, we concluded just the opposite in our original decision (141 AD3d at 30 ["no record exists to support the assertion that [Prosser] had been the victim of police harassment"]). At the hearing, neither the prosecutor nor the judge attempted to ascribe any of the unnamed jurors' comments to Prosser, or otherwise shed further light on the reasons for striking him. Thus, the record as to Prosser remains as ambiguous and unclear as before.[3]

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[2] Contrary to the majority's suggestion, I am not shifting the step-two burden of proof to defendant. I am simply pointing out that there is no evidence in the record to warrant rejection of the trial court's recollection.

[3] I do not agree with Justice Friedman's view that we, as an appellate court, can assess the validity of a proffered race-neutral reason for a peremptory challenge without adequate record support.

In accord with our remand, the trial judge gave defense counsel the opportunity to argue that the prosecutor's explanations were a pretext for discrimination. However, in his decision, the judge made no findings whatsoever on pretext. Instead, he mistakenly concluded that it was the "understanding" of the court and the parties at the original *Batson* hearing that defense counsel was not challenging the proffered reasons as being pretextual. No fair reading of the record supports the judge's misapprehension that defense counsel conceded that the prosecutor's strikes were based on nonpretextual reasons.

Because the trial judge failed to fully comport with our previous remand, and neglected to address significant issues identified therein, I would again remand this matter for a reopened *Batson* hearing. At that hearing, the court should clarify the record as to the People's reasons for challenging Prosser, and make findings as to whether the proffered reasons for striking all three jurors are pretextual. Although the majority agrees with me that the court erred in concluding that defense counsel had conceded the lack of pretext, it inexplicably goes on to determine as a matter of law, on an incomplete record, that the prosecutor's reasons for the challenges were pretextual, and then proceeds to dismiss the indictment. In my view, the fact that the judge misunderstood defense counsel's position on

pretext requires a remand so that the judge can make findings on that issue (*see People v Payne*, 88 NY2d 172, 186 [1996] [remanding matter where trial judge failed to complete *Batson* protocols]).

In light of the ambiguities in the record of the original *Batson* proceeding, I believe that, as is typical with such reconstruction hearings, the original attorneys who tried the case should be present at the reopened hearing, along with any notes they may have taken during the voir dire.[4] Although the majority suggests that the prosecutor must testify as a sworn witness and be subject to cross-examination, the Court of Appeals has held otherwise (*see People v Hameed*, 88 NY2d 232 [1996], *cert denied* 519 US 1065 [1997]).

The majority concludes that even if the struck jurors had been the victim of police harassment, excluding them on this basis would necessarily be a pretext for discrimination. I believe that such a finding cannot be made by us on this incomplete record. Nor is there a basis for the majority's apparent adoption of a per se rule, which is inconsistent with this State's jurisprudence (*see People v Turner*, 294 AD2d 192 [1st Dept 2002], *lv denied* 98 NY2d 732 [2002] [that a prospective

[4] There is no indication in this record that the original attorneys would be unavailable at the reopened hearing.

juror had expressed hostility to police undercover operations was both a race-neutral and nonpretextual reason]; *People v Ramos*, 124 AD3d 1286, 1287 [4th Dept 2015], *lv denied* 25 NY3d 1076 [2015] [finding no pretext in prosecutor's striking two African-American prospective jurors who expressed dissatisfaction with how the police investigated crimes committed against them]).

Rather, the determination of whether a proffered reason is pretextual must be made on an examination of the entire voir dire record, including an exploration of the motives and credibility of the challenging party (*see People v Smocum*, 99 NY2d 418, 422 [2003] [ultimate determination of discriminatory intent is based on all of the facts and circumstances presented and is focused on the credibility of the race-neutral reasons]). That is why a hearing was ordered in our earlier decision. In the absence of a fully-developed record, we cannot decide the issue of pretext, particularly as to Prosser.

Finally, even if a *Batson* error occurred, the remedy is not, as the majority concludes, to dismiss the indictment, but rather to remand for a new trial. "The Criminal Procedure Law provides that, upon reversal for error or defect which resulted in prejudice to a defendant or deprived him of a fair trial, a new trial must be ordered" (*People v Allen*, 39 NY2d 916, 917 [1976]). Although in rare cases, some courts have dismissed an indictment

where the defendant, as here, has served the incarceratory part of her sentence, those cases are the exception, and involve relatively minor offenses where no penological purpose would have been served in remanding the matter (*see e.g. People v Tyrell*, 22 NY3d 359 [2013] [misdemeanor marijuana offense]).

Here, in contrast, defendant was convicted of a violent felony assault as a result of her punching and biting police officers who were in the process of arresting her. The majority does not explain why no penological purpose would be served by remanding this case for a new trial (*see People v Peters*, 157 AD3d 79, 85 [1st Dept 2017], *lv denied* 30 NY3d 1118 [2018] [finding a penological purpose in remanding where the defendant was convicted of a serious felony, despite fact that sentence was completed]; *People v Roopchand*, 107 AD2d 35, 38 [2d Dept 1985], *affd* 65 NY2d 837 [1985] [finding penological purpose in remanding

because should a defendant be convicted on retrial, it would be relevant for sentencing enhancement purposes if he were to commit another felony]).

Judgment, Supreme Court, Bronx County (Thomas A. Breslin, J.), rendered May 17, 2013, reversed, on the law, and the indictment dismissed.

Opinion by Manzanet-Daniels, J. All concur except Friedman, J.P. who dissents in an Opinion, and Richter, J. who dissents in an Opinion.

Friedman, J.P., Richter, Manzanet-Daniels, Gische, Mazzarelli, JJ.

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

ENTERED: JANUARY 10, 2019

CLERK