SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JUNE 2, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13890 The People of the State of New York, Ind. 47/12
Respondent,

-against-

Uquinn Banks,
Defendant-Appellant.

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Law Offices of Dennis J. Doody, Tarrytown (Dennis J. Doody, of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered April 16, 2013, as amended on May 8, 2013 and June 3, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the second degree and three counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of 20 years, unanimously affirmed.

We find that the court below providently exercised its discretion in denying defendant's motion to withdraw his guilty

plea. By indictment filed on January 28, 2012, defendant was charged with one count of conspiracy in the first degree, one count of conspiracy in the third degree, 24 counts of criminal sale of a controlled substance in the third degree, 14 counts of criminal sale of a controlled substance in the fourth degree, 13 counts of criminal possession of a controlled substance in the fourth degree and 48 counts of criminal possession of a controlled substance in the fifth degree. The indictment charged defendant and 35 other individuals with membership in a drug ring that was run by Bernard Moultrie and his brother, Lamont Moultrie. The charges against defendant related to his direct participation in 35 separate undercover sales of cocaine or phencyclidine between December 23, 2010 and November 11, 2011.

By papers filed on August 13, 2012, defendant moved pursuant to CPL 200.40 for an order severing his trial from any trial that would include the Moultries. The motion was made on the ground of a purported likelihood that defendant would assert an affirmative defense of duress under Penal Law § 40.00 that would be antagonistic to the defenses of the Moultries. In support of the motion, it was asserted that defendant would "likely testify and recount the numerous threats of imminent physical force by Bernard and Lamont Moultrie against Defendant and Defendant's family

members if Defendant did not do as he was told by Bernard and Lamont Moultrie." By written decision dated September 14, 2012, the trial court denied defendant's motion for a severance, finding that his papers failed "to allege the existence of threats made against him that coerced him to engage in criminal conduct."

On September 27, 2012, defendant pleaded guilty as indicated above. In entering his guilty plea, defendant admitted to unlawfully making drug sales on August 11, September 9 and November 10, 2011. This plea followed guilty pleas that had been entered by the Moultries and others earlier that day. The prosecution originally required that all codefendants plead guilty in order for any defendant to benefit from the global plea bargain. That requirement was withdrawn by the time defendant entered his plea. Defendant was told that he would be tried alone if he rejected the plea. Before sentence was imposed, defendant moved to withdraw his guilty plea. The motion was based on the ground that defendant's guilty plea was rendered involuntary by the ineffective assistance of his counsel. Specifically, defendant's cited his counsel's failure to advise him that once the Moultries pleaded guilty he was "free to assert the Duress Defense at trial." Defendant also cited counsel's failure to advise him of the existence of an allegedly "exculpatory" surveillance video that depicted an August 5, 2011

assault by the Moultries and others upon defendant and his uncle. Defendant argued that the video corroborated his duress defense. The court denied the motion, finding the proffered duress defense to be as unviable as it was before the Moultries' guilty pleas. The court also rejected defendant's additional claim that his guilty plea was the product of threats by the Moultries that he did not disclose to his counsel. We affirm.

At any time before imposing sentence a court in its discretion may permit a defendant to withdraw a guilty plea (*see* CPL 220.60[3]). As stated, defendant moved to vacate his guilty plea on the ground that he was denied the effective assistance of counsel. Under the federal constitutional standard, which defendant solely invokes, a defendant claiming ineffective assistance of counsel must meet a two-pronged test by showing that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense" (*Strickland v Washington*, 466 US 668, 687 [1984]; *see also People v McDonald*, 1 NY3d 109, 113 [2003]). Under *Hill v Lockhart* (474 US 52 [1985], which defendant cites, the second prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process" (*id.* at 59). To meet this prong, defendant was required to show that "there is a reasonable probability that, but

for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*id.*).

We find that the court did not improvidently exercise its discretion in denying defendant's motion to withdraw his guilty plea. There is ample reason for the court's rejection of defendant's claim that he would have proceeded to trial if apprised of the availability of his purportedly revitalized duress defense. The defense of duress requires a showing that a defendant engaged in "proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist" (*see* Penal Law § 40.00[1]). As duress is an affirmative defense, defendant would have had the burden of establishing the same at trial by a preponderance of evidence (*id.*; Penal Law § 25.00[2]). Defendant did not make a prima facie showing of the requisite "threatened imminent use of unlawful physical force" because he did not allege the existence of force or a threat of force capable of "'immediate exercise of realization'" at the time of any of the crimes specified in his guilty plea (*see People v Hai Guang Zheng*, 268 AD2d 443, 444 [2d Dept 2000], *lv denied* 95 NY2d 835 [2000]; *People v Staffieri*, 251 AD2d 998 [4th Dept 1998]; *see*

*also* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 40.00). Defendant's claim of duress is further undermined by the absence of a showing that he sought the assistance of law enforcement authorities during his 15-month participation in the conspiracy (*see People v Moreno*, 58 AD3d 516, 518 [1st Dept 2009], *lv denied* 12 NY3d 819 [2009]). Moreover, the aforementioned surveillance video, depicting events occurring weeks to months before defendant committed the crimes to which he pleaded guilty, would not have rehabilitated his infirm duress defense. Defendant's criminal record would have also severely compromised a duress defense. As reflected by the plea minutes, in 2008 defendant pleaded guilty before a Pennsylvania court to the crime of possession of a controlled substance with intent to deliver. Evidence of this prior conviction would have been admissible to rebut the claim of coercion and prove a criminal intent or design (*see People v Urbaez*, 219 AD2d 568 [1995], *lv denied* 87 NY2d 908 [1995]). As aptly noted by the court, defendant, who faced a maximum sentence of life imprisonment, pleaded guilty simply to accept the significant benefit of the plea offer. Accordingly, the court properly exercised its discretion in rejecting defendant's claim that he would not have pleaded guilty and would have gone to trial on a duress defense but for counsel's alleged errors (*see*

*Hill*, 474 US at 59). In addition, the court properly rejected defendant's assertion that his guilty plea was the product of threats that the Moultries and others made in order to ensure a global disposition of the indictment. As found by the court, the claim was refuted by the fact that defendant entered his guilty plea after the others had already done so.

We see no reason to disturb the court's sentence particularly in light of the evidence that defendant played a major role in an extensive drug operation. We have considered defendant's remaining contentions and find them unavailing.

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

ENTERED: JUNE 2, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14811 The People of the State of New York, Ind. 924/13
Respondent,

-against-

Sylvia Mitchell,
Defendant-Appellant.

_____

Thomas Theophilos, Buffalo, for appellant.

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

_____

Appeal from judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 14, 2013, convicting defendant, after a jury trial, of grand larceny in the second degree, grand larceny in the third degree (seven counts), grand larceny in the fourth degree (two counts) and scheme to defraud in the first degree, and sentencing her to an aggregate term of 5 to 15 years, held in abeyance, and the matter remanded to the Supreme Court for a reconstruction hearing as to the circumstances surrounding the entry into the record of jury note nine.

The jury note in question appeared in the court file but the transcript contains no reference to it. Before this Court can consider defendant's claim that Supreme Court's failure to address the note pursuant to CPL section 310.30 constituted a mode of

proceeding error (*see People v O'Rama*, 78 NY2d 270 [1991]), the record should be reconstructed as completely as possible to determine the facts surrounding the submission of the note and how the note was handled by the court.

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15051 In re Leonardo Enriquez, Index 260045/12
Petitioner-Appellant,

-against-

Department of Housing Preservation
and Development of the City of New York,
Respondent-Respondent.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 26, 2013, which denied petitioner's application to summarily discharge a lien for relocation expenses filed by respondent Department of Housing Preservation and Development (HPD), and granted HPD's cross motion to dismiss the proceeding, unanimously reversed, on the law, without costs, the petition for summary discharge granted, and the cross motion to dismiss the proceeding denied.

HPD filed a lien on premises owned by petitioner for expenses related to HPD's relocation of a tenant from an illegal cellar apartment. The amount included $16,425 in hotel expenses, incurred between June 23, 2010 and June 24, 2011. Petitioner commenced the

instant proceeding to summarily discharge the lien, arguing, inter alia, that it was unreasonable to charge him $16,425 to house one person in a hotel for a year.

Administrative Code of the City of New York § 26-305 authorizes HPD to incur, on behalf of a tenant displaced from his or her home as a result of the enforcement of applicable housing laws, and to recoup from the landlord, "moving expenses or other *reasonable* allowances" related to relocation of the tenant (Administrative Code § 26-305[1], [2] [emphasis added]). Rules promulgated by HPD state that it shall offer temporary shelter to a displaced tenant and shall "pay *temporary* shelter benefits" (28 RCNY 18-01[b][3] [emphasis added]).

Hotel expenses are recoverable pursuant to Administrative Code § 26-305 (*Matter of Retek v City of New York*, 14 AD3d 708, 709 [2d Dept 2005]). However, HPD's financing of the tenant's residence in a hotel for an entire year was not reasonable (*see* Administrative Code § 26-305[2]). Nor does HPD's payment of a year's worth of hotel charges qualify as "temporary shelter benefits" (*see* 28 RCNY

18-01[b][3]). Accordingly, because the notice of lien states that it is based on one year's worth of hotel charges, it is facially invalid and should be summarily discharged.

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

ENTERED: JUNE 2, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, Moskowitz, Gische, JJ.

15133-
15134 Index 654112/13

250 West 78 LLC,
Plaintiff-Appellant-Respondent,

-against-

Pildes of 83rd Street, Inc.,
Defendant-Respondent-Appellant,

Dan Pildes,
Defendant-Respondent.

_____

Rose & Rose, New York (David P. Haberman of counsel), for appellant-respondent.

Weiner, Millo, Morgan & Bonanno, LLC, New York (David Skochil of counsel), for respondent-appellant and respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about April 8, 2014, which granted defendants' motion for summary judgment dismissing the complaint and all cross claims as against defendant Dan Pildes (Mr. Pildes), and dismissed the complaint as against Pildes of 83rd Street, Inc. (Pildes of 83rd) and Pildes of 83rd's counterclaim, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated as against Mr. Pildes and Pildes of 83rd, and Pildes of 83rd's counterclaim reinstated.

On November 19, 1996, Pildes of 83rd, by its president Mr. Pildes, leased premises from plaintiff's predecessor-in-interest.

Paragraph 68 of the original lease contains a guaranty requiring Mr. Pildes to guarantee payment of Pildes of 83rd's rent and additional rent obligations as set forth in paragraphs 29 and 30 of the lease. Paragraph 29 of the lease, in turn, expressly requires Pildes of 83rd to pay rent and additional rent "which may come due during the term of this lease or any extension hereof." The guaranty further provided "that Landlord [plaintiff] may . . ., without releasing, affecting, or impairing the obligations and liabilities of Guarantor [Mr. Pildes], . . . modify or amend or change any provisions of this Lease."

The original lease was due to expire on November 30, 2006. On January 30, 2006, plaintiff and Pildes of 83rd entered into a two-page letter agreement that changed certain terms of the lease (e.g. the base rent) and said, "All other terms and conditions of the Lease shall remain in full force and effect during . . . the extended term," i.e. through November 30, 2009. Mr. Pildes signed the 2006 renewal as president of Pildes of 83rd. On May 9, 2008, plaintiff and Pildes of 83rd similarly extended the lease through November 30, 2014.

Mr. Pildes's guaranty remained effective through November 30, 2014 (*see e.g. Jones & Brindisi, Inc. v Breslaw*, 250 NY 147 [1928]; *Brooklyn Pa. CVS v Starrett City Assoc.*, 294 AD2d 108 [1st Dept

2002]). Contrary to defendants' contention, the increases in the rent in the 2006 and 2008 renewals did not relieve Mr. Pildes from his obligation as guarantor, because the guaranty expressly guaranteed rent and additional rent through any extended term and otherwise allowed for changes in its terms (*see White Rose Food v Saleh*, 292 AD2d 377, 378 [2d Dept 2002], *affd* 99 NY2d 589 [2003]; *see also Davimos v Halle*, 60 AD3d 576 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]). Nor was the lease terminated by plaintiff upon the occurrence of an event of default.

Since defendants moved to dismiss the complaint as against Mr. Pildes only, and the parties' motion papers focused on the guaranty and did not discuss surrender by operation of law, Supreme Court did not have the authority to grant summary judgment to Pildes of 83rd dismissing the complaint as against it (*see Castlepoint Ins. Co. v Moore*, 109 AD3d 718, 719 [1st Dept 2013]), and neither do we (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425 [1996]).

Supreme Court erred in dismissing Pildes of 83rd's counterclaim for the return of its security deposit on the grounds that plaintiff was entitled to apply the security deposit against outstanding rent and costs relating to Pildes of 83rd's default and that the security deposit had been subsumed by such rent and costs (*see Mr. Ham, Inc. v Perlbinder Holdings, LLC*, 116 AD3d 577, 579

[1st Dept 2014]).

Nor is Pildes of 83rd entitled to summary judgment on the counterclaim since, contrary to its contention, plaintiff did not admit that it had commingled the security deposit (*cf. Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 440 [1st Dept 2009] [landlord "admitted that . . . it deposited [the security deposit] into its own corporate account," thereby "vest[ing] in plaintiff an 'immediate right' to receive those monies"]).

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15275 The People of the State of New York, Ind. 448/10
Respondent,

-against-

Justin Waller,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered May 24, 2011, convicting defendant, upon his plea of guilty, of murder in the second degree and two counts of identity theft in the second degree, and sentencing him to an aggregate term of 23 years to life, unanimously affirmed.

The record does not cast doubt on defendant's competency to stand trial, and the court was not obligated, sua sponte, to order a CPL article 730 examination (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). Defendant was examined by a psychologist and a psychiatrist in contemplation of a possible psychiatric defense and as part of a prepleading investigation. While both doctors diagnosed defendant with

psychiatric illnesses, neither expressed any concern that defendant's mental condition could affect his ability to understand the charges and proceedings or to assist in his defense. Furthermore, defense counsel never requested a CPL 730 examination or indicated any difficulty in communication, and the plea colloquy further demonstrated defendant's ability to understand the proceedings (*see People v Majors*, 73 AD3d 1382 [3d Dept 2010], *lv denied* 15 NY3d 775 [2010]).

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15276 Michael C. DiGennaro, Index 112249/07
Plaintiff-Appellant,

-against-

New York City Transit Authority (MTA),
Defendant-Respondent,

"John Doe,"
Defendant.

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Pollack, Pollack, Isaac & De Cicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for respondent.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered July 30, 2014, after a jury trial, in favor of defendant New York City Transit Authority, unanimously affirmed, without costs.

There is no basis for setting aside the jury's verdict. Regardless of wether it was error to charge the emergency doctrine as part of negligence, plaintiff failed to adequately preserve its objection (*Goldberg v Winsoto*, 182 AD2d 3509 (1st Dept 1992). Defense counsel's statements during summation as to why the bus driver may have stopped as it did were fair comments on the evidence (*see Selzer v New York City Tr. Auth.*, 100 AD3d 157, 163

[1st Dept 2012]).

Plaintiff's arguments regarding the prejudicial effect of the bus driver's absence at trial are unavailing. The court instructed the jury that it could accept or reject defendant's explanation for the driver's absence, and permitted the jurors to draw a negative inference from the absence. Defendant did not improperly use the driver's absence as both a "sword and a shield."

The jury's verdict, finding that defendant was not negligent, is supported by a fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]), given the evidence that, among other things, none of the other passengers fell (*see Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 829-830 [1995]).

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische JJ.

15277-
15278 In re Steven S.,
Petitioner-Respondent,

-against-

Yelena M.,
Respondent-Appellant.

- - - - -

In re Yelena M.,
Petitioner-Appellant,

-against-

Stephen Dean S.,
Respondent-Respondent.

_____

Michael N. Klar, Carle Place, for appellant.

Garr Silpe, P.C., New York (Ira E. Garr of counsel), for respondent.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about July 3, 2014, which denied respondent mother's motion for attorneys' fees, unanimously affirmed, without costs.

The order denying the mother attorneys' fees is properly before this Court, as the appeal was taken from that order. We exercise our discretion to disregard any defect in the notice of appeal (*see* CPLR 5520[c]).

The Family Court properly exercised its discretion in denying

the mother's motion for attorneys' fees (*Lee v Lee*, 68 AD3d 622 [1st Dept 2009]). The court properly considered the particular circumstances of the case, "including the financial circumstances of the parties and the relative merit of the parties' positions" (*Matter of Talty v Talty*, 110 AD3d 908, 908 [2d Dept 2013]) and reasonably concluded that the financial circumstances of the parties are not so disparate that an award of counsel fees is necessary to preserve parity between them (*see Kaplan v Kaplan*, 28 AD3d 523, 523 [2d Dept 2006]; *Matter of Dalessandro v O'Brien*, 285 AD2d 592 [2d Dept 2001]).

The mother's argument that she is entitled to fees as the prevailing party is without merit. An award of counsel fees may be based in part on the relative merit of the parties' positions, "'but should not be predicated solely on who won and who lost'" (*Matter of Feng Lucy Luo v Yang*, 104 AD3d 852, 852 [2d Dept 2013]). "[T]he court may consider 'whether or not either party here has improperly prolonged the litigation, or created needless

litigation'" (*Tenore v Tenore*, 110 AD3d 711, 713 [2d Dept 2013]). The mother's delayed revelation that she was relocating prolonged the litigation and resulted in motion practice that could otherwise have been avoided.

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15279 Alima Keita, Index 305454/09
Plaintiff-Respondent,

-against-

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

- - - - -

The City of New York, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Internal Intelligence Services
Third-Party Defendant,

Beau Dietl & Associates,
Third-Party Defendant-Respondent.

_____

O'Connor Redd LLP, Port Chester (Joseph A. Orlando of counsel), for appellants.

Edelman, Krasin & Jaye, PLLC, Carle Place (Kara M. Rosen of counsel), for Alima Keita, respondent.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (John K. McElligott of counsel), for Beau Dietl & Associates, respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 29, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the negligence cause of action, and granted third-party defendants' motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant defendants'

motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Defendants established prima facie that they neither created nor had actual or constructive notice of the alleged hazardous icy condition of the stairway on which plaintiff fell (*Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]). The certified climatological data showed that there was no precipitation in the area the day before plaintiff's accident and that only trace amounts had fallen on that day, at approximately 1:51 a.m., about 20 hours before plaintiff's fall (*see* CPLR 4528; *Daley v Janel Tower L.P.*, 89 AD3d 408 [1st Dept 2011]). Even if, as plaintiff contends, snow had fallen from the roof of the parking garage, melted, and dripped onto the staircase below, ice would not have formed, since the temperature remained at 40 degrees for approximately 18 hours before plaintiff's accident (*see Perez v Canale*, 50 AD3d 437 [1st Dept 2008]). Indeed, plaintiff had gone up and down that staircase between 5 and 10 times during the hours preceding her accident without noticing any snow or ice on it. Nor did she observe the alleged icy condition immediately before falling (*see Roman v Met-Paca II Assoc., L.P.*, 85 AD3d 509 [1st Dept 2011]).

The motion court correctly dismissed defendants/third-party

plaintiffs' claim for contractual indemnification since plaintiff's accident did not arise out of, nor was it connected to, the security work identified in defendant Parking Systems Plus, Inc.'s contract with third-party defendant Beau Dietl & Associates (Dietl), which did not include the removal of snow or ice from the garage.

Defendants' claim for common-law indemnification and contribution against Dietl, plaintiff's employer, is statutorily barred, since plaintiff did not suffer a "grave injury" within the meaning of Workers' Compensation Law § 11 (*see Aramburu v Midtown W. B, LLC*, 126 AD3d 498 [1st Dept 2015]).

We have considered defendants/third-party plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15280 In re Costco Wholesale Corporation, Index 101398/13
Petitioner,

-against-

New York State Division of Human Rights, etc., et al.,
Respondents.

_____

Seyfarth Shaw LLP, New York (Lorie E. Almon and Courtney S. Stieber of counsel), for petitioner.

Caroline J. Downey, Bronx (Michael K. Swirsky of counsel), for New York State Division of Human Rights, respondent.

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Determination of respondent New York State Division of Human Rights, dated August 14, 2013, which, after a hearing, found that petitioner violated the State Human Rights Law (Executive Law §296) and ordered it to pay $40,000 in civil fines and penalties, unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Doris Ling-Cohan, J.], entered December 4, 2013), granted.

The determination sustaining charges that petitioner violated Executive Law §296(15) and Article 23-A of the Corrections Law is not supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181–182 [1978]). The

evidence did not show that petitioner's online employment application system automatically disqualified applicants with a prior criminal conviction. Rather, the evidence revealed that the only automatic disqualifiers concerned answers to questions about legal documentation to work in the United States, willingness to undergo a criminal background check and employment reference check, willingness to submit to a drug test, whether the applicant is able to perform the essential functions of the job, and whether the applicant is 18 years of age or older.

The evidence further established that the answer to the prior conviction question was specifically not an automatic bar to employment, as stated in the application itself. This is further corroborated by the fact that the complainant's application was designated as "pre-screened" indicating that it had passed through the online portion of the hiring process and was not marked ineligible. There is no evidence that petitioner's grading criteria for applicants with convictions was used in connection with the online application. Instead, the evidence showed that this non-mandatory guideline was used only when an applicant had reached the background check stage of the hiring process.

The evidence also does not support a conclusion that applicants moved to the "pool" were inaccessible to local managers

for consideration. Such applicants were available for consideration by the local managers in the entire region should they be looking to hire additional employees. The fact that none of the 13 applicants with convictions (out of 625 total) advanced in the hiring process does not establish that there was an illegal automatic disqualifier.

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15281 The People of the State of New York, Ind. 3905/10
Respondent,

-against-

Keyewanie Blackledge,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered April 9, 2013, as amended July 2, 2013, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of four years, unanimously affirmed.

The court properly granted the prosecutor's request for a missing witness charge regarding defendant's mother and girlfriend, who were potential alibi witnesses given defendant's testimony about his whereabouts at the time of the crime. Each of these witnesses could have been expected to provide material noncumulative testimony (*see generally People v Gonzalez*, 68 NY2d 424, 427-428 [1986]).

Contrary to defendant's argument, his own testimony established that his girlfriend was in a *position* to support his

alibi. Whether or not her testimony would actually have been helpful is "the precise question[] which [s]he could have answered if [s]he had been called to testify" (*People v Kitching*, 78 NY2d 532, 538 [1991]; *compare People v Dianda*, 70 NY2d 894 [1987] [no evidence that uncalled witness was present at critical time]). Furthermore, defendant's girlfriend's testimony would not have been cumulative to his own testimony. Defendant essentially presented an alibi defense without any alibi witnesses, and the credibility of his testimony was at issue (*see People v Smith*, 240 AD2d 600 [2d Dept 1997], *lv denied* 90 NY2d 898 [1997]).

Defendant also asserts, for the first time on appeal, that his mother was not under his control for missing witness purposes because she had filed some sort of charge against defendant. While defense counsel made a reference to this charge, it was in a different context from the issue of control, and the court did not "expressly decide[ ]" (CPL 470.05[2]) the particular issue raised on appeal (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]).

Accordingly, we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that the record supports the inference that defendant's mother, with whom defendant resided, was a presumably favorable witness.

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15282 In re Gaye Wiesner, Index 100829/13
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered October 16, 2013, denying the petition seeking to annul respondent Department of Education's (DOE) determination, dated February 14, 2013, which sustained petitioner's unsatisfactory rating for the 2011-12 school year, granting respondents' cross motion to dismiss the petition, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination sustaining the unsatisfactory annual rating was not arbitrary and capricious or contrary to law (*see Matter of Brennan v City of New York*, 123 AD3d 607, 608 [1st Dept 2014]). Petitioner's contention that her supervisor administered the lesson observation on which the rating was based in an arbitrary and

capricious manner is not supported by the record. Similarly, petitioner's contention that the determination was made "in violation of lawful procedure" (CPLR 7803[3]), because respondents failed to follow procedural safeguards set forth in their own guidelines, lacks merit. DOE's rating handbook does not impart any substantive right to receive a written warning that failure to improve "may result in an unsatisfactory rating" (*see Matter of Richards v Board of Educ. of the City Sch. Dist. of City of N.Y.*, 117 AD3d 605, 606 [1st Dept 2014]). Even assuming that petitioner should have been provided with some written warning, she has not established that the unsatisfactory rating was made in violation of a lawful procedure or substantial right. Additionally, the process was cut short when petitioner went on terminal leave two months after the unsatisfactory observation report, and retired one month later precluding respondents from performing a second observation which is the normal course (*see Matter of Giraldez v Bratton*, 215 AD2d 210, 211 [1st Dept 1995]).

In light of, among other record evidence, the principal's hearing testimony clarifying the reasoning behind the unsatisfactory annual rating, petitioner's contention that the principal violated procedures in the manner in which he completed the annual rating report is unavailing (*see Matter of Brown v Board*

*of Educ. of the City Sch. Dist. of City of N.Y.*, 89 AD3d 486, 487-88 [1st Dept 2011]).

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

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15283 Rafael Mejia, Index 115609/10
Plaintiff,

-against-

West 27th Street Rental,
LLC, et al.,
Defendants,

537 West 27th Street Owners,
LLC, et al.,
Defendants-Appellants.

- - - - -

537 West 27th Street Owners,
LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

J&R Glassworks, Inc., et al.,
Third-Party Defendants-Respondents.

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Cascone & Kluepfel, LLP, Garden City (Howard B. Altman of counsel), for appellants.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for J&R Glassworks, Inc., respondent.

Gambeski & Frum, Elmsford (Karen A. Jockimo of counsel), for Walsh Glass & Metal, Inc., respondent.

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Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 30, 2014, which denied defendants/third-party plaintiffs' motion to stay the trial, accept as timely their motion for summary judgment on their claim against

third-party defendants for contractual indemnification or grant leave to move for summary judgment based on good cause for the delay, grant them summary judgment, and, to the extent the court previously ruled on issues raised in their prior motion to vacate the note of issue, accept the motion as one for reargument, unanimously dismissed, without costs.

In a prior order, the motion court denied in its entirety defendants/third-party plaintiffs' motion, inter alia, to extend the time for moving for summary judgment. To the extent defendants/third-party plaintiffs subsequently seek leave to file a late motion for summary judgment, their motion is one for reargument, the denial of which is not appealable (*see Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011]).

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15285 The People of the State of New York, Ind. 5987/11
Respondent,

-against-

Joel Vasquez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (C. Scott McAbee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Lewis Bart Stone, J. at plea; Jill Konviser, J. at sentencing), rendered on or about March 5, 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.

ENTERED: JUNE 2, 2015

CLERK

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

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15286 Kresimir Sovulj, Index 303325/09
Plaintiff-Appellant, 83728/10

-against-

Procida Realty and Construction Corp. of New York, et al.,
Defendants,

Seventeen Development, LLC, et al.,
Defendants-Respondents.

[And a Third-Party Action]

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Law Offices of John P. Grill, P.C., Carmel (John P. Grill of counsel), for appellant.

Miranda, Sambursky, Slone, Sklarin, Verveniotis LLP, Mineola (Andrew Giuseppe Vassalle of counsel), for respondents.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 25, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when a grinder he was using to cut a groove in a floor kicked back on him, cutting his hand and wrist. Plaintiff admitted that he was using the grinder in a manner inconsistent with its recommended use, in that he had placed a saw tooth blade in the grinder and removed the grinder's safety guard to make the blade fit.

The motion court correctly determined that under these circumstances, defendants were not liable for plaintiff's injuries. Plaintiff alleged defendants' liability under Labor Law § 241(6), predicated on a violation of 12 NYCRR § 23-1.12(c). It is well settled that that section of the code does not pertain to the power tool plaintiff was using (*see e.g. Conforti v Bovis Lend Lease LMB, Inc.*, 37 AD3d 235, 236 [1st Dept 2007]).

Plaintiff also alleged defendants' liability under Labor Law § 200, however, the record demonstrates that defendants did not supervise or control plaintiff's work (*Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508 [1st Dept 2014]). Here, the decision to remove the grinder's safety guard was solely plaintiff's own.

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: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15287 Karen Leitner, Index 101499/11
Plaintiff-Respondent,

-against-

304 Associates, LLC,
Defendant,

Central Parking Systems of
New York, Inc.,
Defendant-Respondent,

City of New York,
Defendant-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellant.

Leitner Varughese PLLC, Melville (Brett R. Leitner of counsel), for Karen Leitner, respondent.

Fixler & LaGattuta, LLP, New York (Jason L. Fixler of counsel), for Central Parking Systems of New York, Inc., respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered July 26, 2013, which, to the extent appealed from as limited by the briefs, denied defendant City of New York's (the City) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of the City.

The City is entitled to summary judgment because it met its

prima facie burden of demonstrating that it did not receive prior written notice of the pothole that plaintiff identified as the cause of her fall (*see* Administrative Code of City of NY § 7-201 [c] [2]), and plaintiff and codefendant Central Parking Systems of New York, Inc. have failed to show that an exception to the statutory notice requirement applies (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

The City's 311 record of a citizen's April 9, 2010 telephonic report of numerous potholes on West 49th Street between Eighth Avenue and Ninth Avenue at the curbside did not provide the City with prior written notice of the particular pothole that was in the roadway in front of 304 West 49th Street where plaintiff fell on July 20, 2010 (*see Stoller v City of New York*, _ AD3d _, 2015 NY Slip Op 01876, *1-2 [1st Dept 2015]; *Boniello v City of New York*, 106 AD3d 612 [1st Dept 2013]). Moreover, the April 29, 2010 FITS report, which indicates that eighteen potholes on West 49th Street between Eighth Avenue and Ninth Avenue were closed, is insufficient to establish that any of the potholes that were repaired that day was the subject pothole that caused plaintiff's fall (*see Haulsey v City of New York*, 123 AD3d 606, 607 [1st Dept 2014]; *Abott v City of New York*, 114 AD3d 515, 516 [1st Dept 2014]).

A deposition of the repair crew that fixed the potholes at the

accident location prior to the accident is not required, because plaintiff has stated that she does not allege that the City caused or created the alleged defect, and the allegation that the City somehow missed the subject defect when it repaired the area on April 29, 2010, is speculative (*see DeHoyos v City of New York*, 121 AD3d 632 562 [1st Dept 2014]). Lastly, plaintiff's purported claim that the City may be held liable for her personal injuries because it failed to maintain the manhole cover which is allegedly six inches away from the subject defect (*see* 34 RCNY 2-07 [b] [1) was not preserved for appellate review (*see Mendelsohn v City of N.Y. [19th Precinct]*, 89 AD3d 569, 569-570 [1st Dept 2011], *lv denied* 19 NY3d 804 [2012]).

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15291 In re Brydyn R.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about April 10, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

Probation was the least restrictive alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The court properly concluded that notwithstanding certain positive strides, appellant was still in need of the supervision that would be provided by a

year of probation, rather than six months' supervision under an adjournment in contemplation of dismissal, given the seriousness of the underlying assault, as well as appellant's continuing need for services.

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15292N Sebastian Arevalo, Index 160855/13
Plaintiff-Appellant,

-against-

Seymour M. Burg,
Defendant-Respondent.

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Borrelli & Associates, P.L.L.C., New York (Anthony P. Malecki of counsel), for appellant.

Bond Schoeneck & King, PLLC, New York (Barbara V. Cusumano of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 23, 2014, which denied plaintiff's motion for leave to amend his complaint to add a claim for retaliation under Labor Law § 215, unanimously affirmed, without costs.

The court properly denied plaintiff's motion for leave to amend the complaint because the proposed retaliation claim is insufficient (*see Bishop v Maurer,* 83 AD3d 483, 485 [1st Dept 2011]). As we have previously noted, "It is the rare case that the filing of a counterclaim can serve as the basis for a retaliation claim" (*Klein v Town & Country Fine Jewelry Group,* 283 AD2d 368, 369 [1st Dept 2001]). There is nothing to indicate that the interposition of defendant's counterclaims in any way chilled plaintiff's exercise of his rights (*id.*). Plaintiff's contention

that *Klein* is distinguishable because it involved discrimination rather than the Labor Law is unavailing. The cases cited by plaintiff state that the retaliation analysis under Title VII of the Civil Rights Act of 1964 (42 USC § 2000e *et seq.)*, an antidiscrimination statute, applies to the Labor Law (*see Torres v Gristede's Operating Corp.*, 628 F Supp 2d 447, 471-472 nn 18-19 [SD NY 2008]); *Fei v WestLB AG,* 2008 WL 594768, *2 n 2, 2008 US Dist LEXIS 16338, *6-7 n 2 [SD NY, March 5, 2008, No. 07CV8785(HB)(FM)]).

In addition, defendant's interposition of what appear to be valid counterclaims would not dissuade a reasonable worker from suing his or her employer for violating the Labor Law (*see Burlington N. & Santa Fe Ry. Co. v White,* 548 US 53, 68-69 [2006]).

Finally, plaintiff's proposed retaliation claim is insufficient because it contains no factual allegations that "sufficiently suggest that [defendant]'s counterclaims could have a

direct, adverse impact on [plaintiff]'s present employment or future employment prospects" (*Kreinik v Showbran Photo, Inc.*, 2003 WL 22339268, *7, 2003 US Dist LEXIS 18276, *23 [SD NY, Oct. 14, 2003, No. 02Civ.1172(RMB)(DF)]).

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

ENTERED: JUNE 2, 2015

CLERK

Friedman, J.P., Saxe, Manzanet-Daniels, Feinman, Gische, JJ.

15295N Francine Kellman, Index 653142/11
Plaintiff-Appellant-Respondent,

-against-

Stephen R. Whyte, et al.,
Defendants-Respondents-Appellants.

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Law Offices of Gail I. Auster & Associates, P.C., New York (Gail I. Auster of counsel), for appellant-respondent.

Davis Wright Tremaine LLP, New York (Christopher Robinson of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered November 18, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel arbitration of plaintiff's claims against defendants Whyte and Vitus Group Inc., stayed plaintiff's claims against those defendants pending a final determination of arbitration of plaintiff's claims against the other defendants, and denied plaintiff's motion for leave to amend the complaint, unanimously modified, on the law, to grant defendants' motion, vacate the stay, and dismiss the complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

This dispute involves monies purportedly owed pursuant to an employment letter and a related limited liability company operating

agreement. The arbitration clause in the operating agreement, which plaintiff signed, compels plaintiff to arbitrate all of her claims, even her claims against nonsignatories to the agreement, because plaintiff's claims are intertwined with the agreement (*Hoffman v Finger Lakes Instrumentation, LLC*, 7 Misc 3d 179, 184-185 [Sup Ct, Monroe County 2005]; *see also Carroll v Lebeouf, Lamb, Greene & MacRae, LLP*, 374 F Supp 2d 375, 378 [SD NY 2005]). In determining whether plaintiff's claims are subject to arbitration, the employment letter and operating agreement should be read together. The employment letter expressly incorporates the operating agreement by stating, among other things, that the operating agreement would set forth the detailed profit-sharing agreement between the parties (*see Progressive Cas. Ins. Co. v C.A. Reaseguradora Nacional de Venezuela*, 991 F2d 42, 47 [2d Cir 1993]). Plaintiff cannot disavow the operating agreement because she failed to read it before she signed it (*see Matter of Continental Stock Transfer & Trust Co. v Sher-Del Transfer & Relocation Servs.*, 298 AD2d 336 [1st Dept 2002]).

Because all of plaintiff's claims are subject to arbitration, the stay should be vacated and the complaint should be dismissed (*see Rubin v Sona Intern. Corp.*, 457 F Supp 2d 191, 198 [SD NY 2006]). Plaintiff's proposed amendments to the complaint do not

warrant a different result (*see Norte & Co. v New York & Harlem R.R. Co.*, 222 AD2d 357, 358 [1st Dept 1995], *lv denied* 88 NY2d 811 [1996]).

We have considered plaintiff's remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: JUNE 2, 2015

CLERK

**CORRECTED ORDER - JUNE 3, 2015**

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Dianne T. Renwick
Judith J. Gische
**Barbara R. Kapnick** JJ.

13450-13451-13452
Ind. 643/10

_____x

The People of the State of New York,
Respondent,

-against-

Thomas Cruz,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Kareem Santiago,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Dimitri Marshall,
Defendant-Appellant.

_____x

Defendant Thomas Cruz appeals from the judgment of the Supreme Court, New York County (Michael J. Obus, J. at hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered December 3, 2010, as amended January 7, 2011, convicting him of

robbery in the second degree (two counts), criminal possession of a controlled substance in the fourth degree, criminal possession of stolen property in the fourth degree, and resisting arrest, and imposing sentence. Defendant Kareem Santiago appeals from the judgment of the same court and Justices, rendered February 1, 2011, as amended February 15, 2011, convicting him of robbery in the second degree (two counts), criminal possession of stolen property in the fourth degree, and resisting arrest, and imposing sentence. Defendant Dimitri Marshall appeals from the judgment of the same court and Justices, rendered December 3, 2010, as amended December 15, 2010, convicting him of robbery in the second degree (two counts), criminal possession of stolen property in the fourth degree, criminal possession of a weapon in the fourth degree, and resisting arrest, and imposing sentence.

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for Thomas Cruz, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno and James D. Gibbons of counsel), for Kareem Santiago, appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Victorien Wu and Jennifer L. Colyer of counsel), for Dimitri Marshall, appellant.

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

GISCHE, J.

Central to each of these appeals is the issue of whether a showup identification of the defendants made by the complainant in a nearby garage, approximately one hour after a 911 call reporting a crime, is unreliable because it was the product of an unduly suggestive procedure. Police officers Myskowsky and Mitchell were the only witnesses who testified at a Wade hearing challenging the identification. They were credible witnesses and the facts regarding the circumstances of the showup identifications are not disputed.

In reviewing the propriety of the showup identification we are, of course, limited to consideration of only the evidence presented at the suppression hearing (*People v Riley*, 70 NY2d 523, 531-532 [1987]; see *People v Gagner*, 59 AD3d 963, 963 [4th Dept 2009], *lv denied* 12 NY3d 815 [2009]). The dissent's consideration of facts later adduced at trial cannot be relied upon to substantiate an otherwise improper pretrial identification.

The following facts were adduced at the suppression hearing: The complainant was attacked at night by a group of men as she walked home from work along West 90th Street on the uptown side between Columbus and Amsterdam Avenues. She was thrown to the ground, punched, and kicked, and her bag was taken from her. Her

assailants then fled through a housing complex, heading uptown towards 91st Street. Officers Myskowsky and King, who were first to respond by patrol car to the 911 call, picked up the complainant at her apartment building and proceeded to drive her around the neighborhood for 15 to 20 minutes looking for suspects. According to Officer Myskowsky, the complainant described her attackers as "three or four male blacks, teens..." No other description was given.

Several other officers responded to the call as well. Officer Mitchell, who was in a separate patrol car, initially canvassed the area with no success, but the search for suspects then focused on a garage with a roll down gate located about 1/4 of a block away from where the complainant had been attacked. Officer Myskowsky was directed to bring his car to the garage. Once he observed that the other officers had gained access to the garage on foot, he left and drove the complainant to the precinct on 100th Street, where she was treated by EMS.

Officer Mitchell was one of seven officers who searched the garage, which was located down a flight of stairs. The officers found a purse outside a locked boiler room. The Emergency Services Unit of the New York Police Department was contacted to come break open the locked door. Once inside the boiler room, the officers found defendant Dimitri Marshall lying on the floor.

A plastic bank or credit card belonging to the complainant was located near him and to his left was a gun. Defendants Thomas Cruz and Kareem Santiago were found inside an opening or well in the floor of the boiler room. The well, which was covered by a grate, was described as being dirty and sooty when opened. A plastic bag containing one eighth of an ounce of crack cocaine was recovered from that area. Following a physical struggle between the officers and defendants, defendants were arrested and placed in handcuffs.

Approximately 15 minutes after he returned to the precinct, Officer Myskowsky was instructed to drive the complainant back to the garage for a showup identification. They arrived at the garage shortly after defendants had been arrested and approximately one hour after the 911 telephone call had been placed. During their ride from the precinct to the garage, Officer Myskowsky explained to the complainant "that [there are] people stopped in the garage" and told her that "she was to look at them and let me know if [she's] seen them before."

Officer Myskowsky drove into the garage where he encountered a "large group of people" inside. The group included defendants who were standing side by side, just outside the boiler room. Although no handcuffs were readily visible, each defendant had his hands behind his back and Officer Myskowsky stated he assumed

they were handcuffed "because they had their hands behind their backs in that position." Officer Mitchell was physically holding onto Santiago, who had sustained a laceration to his face during his struggle with police. Other than the complainant, defendants were the only civilians present. Two uniformed officers stood to the right of defendants and two other uniformed officers stood on their left side. Another three or four uniformed officers stood behind them. Including ESU, there may have been eight or more officers in the garage surrounding defendants. All three defendants, particularly Cruz and Santiago, were visibly dirty and, as Officer Mitchell described it, covered with soot from head to toe, including their faces. No effort was made to clean up defendants before they were shown to the complainant.

When Officer Myskowsky drove his patrol car into the garage, he already had his headlights on. He then turned on the takedown lights mounted on the hood of his car, pointing them directly ahead in the direction of the defendants. The garage was well lit, even without the patrol car lights. As Officer Myskowsky described it, the overhead lighting was "pretty good" and "it wasn't dark before the car came in." He stopped his vehicle approximately 20 to 30 feet away from the group and got out of the patrol car, leaving the complainant seated in the rear. Officer Myskowsky then positioned himself to speak with the

complainant and asked her to look at the individuals. Although there was a mesh divider between the back and front seats of the car, and the complainant looked at the individuals through the front windshield, Officer Myskowsky testified, without contradiction, that the complainant had a clear view of the individuals she was asked to identify. After looking at the three men, she identified them as the men who had robbed her, but according to Officer Myskowsky, the complainant also stated that they looked different than when they had attacked her because they were "dirty."

Officer Mitchell, who testified that he pulled Santiago out of the well and was holding on to him, stated that when Santiago was shown to the complainant, he was covered with soot and had a laceration on his nose. The officer could not tell if the cut was bleeding, because "he was still covered in it," an apparent reference to the soot. Despite his appearance, Officer Mitchell stated that no effort was made to clean up Santiago's face. When asked at the Wade hearing whether it was reasonable to say that Santiago's face was much darker in the garage than it appeared "right now" (in court), Officer Mitchell responded "it was a little darker, yes." Santiago is not black, but a light skinned Hispanic. None of the defendants were teenagers at the time of the crime.

The Court of Appeals has repeatedly held that showup identifications are strongly disfavored because they are suggestive by their very nature (*People v Ortiz*, 90 NY2d 533 [1997]; *People v Johnson*, 81 NY2d 828 [1993]; *People v Riley*, 70 NY2d 523 [1987]). However, they are not presumptively infirm and are permissible where exigent circumstances exist requiring immediate identification (*see People v Rivera*, 22 NY2d 453, 455 [1968] *cert denied* 395 US 964 [1969]) or if the suspects are captured at or near the crime scene and can be viewed immediately (*see Riley*, at 529).

Examples of exigency include the police needing to know whether they have apprehended the right person or whether they should keep looking for other suspects, or when the victim has been mortally wounded and is not expected to survive his or her injuries to later identify his or her attacker (*see People v Howard*, 22 NY3d 388, 402 [2013]). Even in the absence of exigent circumstances, a showup identification may still be permissible if it took place at or near the scene of the crime, shortly after it was committed and in the context of a continuous, ongoing investigation (*People v Brisco*, 99 NY2d 596, 597 [2003]).

Although prompt showup identifications which are conducted in close geographic and temporal proximity are not presumptively infirm, they are not routinely admissible either (*see Ortiz*, at

537), but must be examined further to see whether they are part of an unbroken chain of events, or ongoing investigation (*People v Duuvon*, 77 NY2d 541, 543-545 [1991]). "Promptness" varies from case to case (*see Howard,* at 402*; Duuvon*, at 544). Even when a showup identification satisfies the temporal and geographic proximity requirements, it cannot be unduly suggestive (*id*, at 543).

The burden is initially on the People to produce evidence validating the admission of such evidence (*Ortiz*, at 537). A defendant challenging a showup identification, however, bears the ultimate burden of proving that the procedure employed by law enforcement was unduly suggestive and the identification should be suppressed (*id.*). Whether a showup is unduly suggestive under the circumstances usually presents a mixed question of law and fact, and the trial court is entitled to deference (*Howard*, at 403). There are circumstances, however, when a showup identification is unduly suggestive as a matter of law, requiring its suppression (*Johnson*, at 831).

The People argue they have met, and in fact exceeded, their initial burden of showing that all the components of a permissible showup were satisfied, including the requirements of temporal and geographical proximity, exigency and reasonableness. We disagree. Although the complainant's identification of

defendants was made in close geographic and temporal proximity to the crime, this was not a situation where the showup was unavoidable because of a fast paced situation (*see Rivera*, at 455). The complainant had already been driven away from the scene to the precinct, where she was being tended to by EMS for her injuries. Her treatment was interrupted so that she could return to the garage, one hour after the crime, to identify the suspects who were already under arrest (*see Brisco*, at 597; *Johnson*, at 831).

Nor were there were exigent circumstances warranting a showup identification. The 55 year old complainant, though bruised and visibly shaken, was not suffering from any life threatening wounds that would have made her otherwise unable or unavailable to make an identification at a later time or at the precinct where she was already located (*see Rivera*, at 455). Furthermore, after Officer Myskowsky ascertained that other officers had suspects confined to the garage, he left the scene because, as he testified, "there was no point guarding the gate of somebody [sic] trying to get away." Thus, having determined that there were suspects detained in a confined area where they could not escape, the police stopped canvassing the area (*see Duuvon; Riley*) and public safety was no longer an issue (*see Howard*, at 594).

We disagree with the dissent's conclusion that exigent circumstances existed because without a showup identification, the police could not have detained the defendants. By the time the defendants were shown to the complainant they were already cuffed and arrested. Moreover, there was sufficient probable cause to arrest them for the assault and other crimes without conducting a showup identification.

Although the dissent takes into consideration the People's argument that the burden of arranging a lineup at the precinct, particularly given the late hour, is an additional factor lending exigency to the situation, the additional time and resources required to conduct a separate lineup for each defendant are nothing more than the administrative burdens generally attendant to conducting lineup identifications. Inconvenience does not excuse the utilization of the preferable method of lineup identification (*see Riley*, at 530 [undue burden not established by renovation of station house or effort to minimize time defendant was detained]).

In any event, the showup identifications in this case were unduly suggestive. While suggestiveness is inherent and tolerated in all showup identifications, that does not mean that such law enforcement procedures are without limitations. The cumulative techniques the police employed in the showup

identification before us renders it unduly suggestive.

Here, the three suspects were standing side by side after the complainant had described her attack by multiple attackers. Defendants were flanked by as many as eight officers and, apart from the complainant, they were the only civilians present. Defendants were visibly restrained. This was obvious, not only from the fact that their hands were behind their backs, but also from the fact that defendant Santiago, who had visible physical injuries to his face indicative of a recent scuffle, was being physically restrained by one of the officers as the complainant made her identification. Defendants were covered in soot, such that it affected their appearance, particularly as to skin color. Previously, the complainant had described her assailants' "black" skin color as a prominent identifying feature, along with their ages. As the complainant was driven from the precinct to the location of the showup identification, she was told that she would be looking at people, and that she should tell the officers if she had seen them before. When defendants were shown to the complainant, they were illuminated by the patrol car's headlights and takedown flood lights, even though the garage lighting itself was good.

We recognize that some of these factors, either alone or even in combination do not necessarily make a showup

identification unduly suggestive. A showup identification may be acceptable, even where a defendant is handcuffed and guarded by police officers when shown to the complainant (*Duuvon*, at 545). Nor is the fact that remarks are made to a complainant before being taken to a lineup itself a basis for a prohibited showup identification (*People v Gatlin*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). This is because a person of ordinary intelligence would realize that the police are showing them someone suspected of having committed a crime (*see People v Santiago*, 83 AD3d 1471 [4th Dept 2011], *lv denied* 17 NY3d 800 [2011]). Even shining lights on a suspect is not by itself unduly suggestive (*People v Gifford*, 16 NY3d 864 [2011]). It is the cumulative effect of what otherwise might be individually permissible that makes this particular showup identification unduly suggestive. The showup was clearly beyond the high water mark set forth by the Court of Appeals in *Duuvon*.

In *Duuvon*, the Court of Appeals held that although a showup identification in which the defendant was shown while handcuffed in the back seat of a patrol car was suggestive, it was not unduly so, given the fast paced events which transpired in rapid succession within 3 to 4 minutes after the commission of the crime making misidentification unlikely. The court cautioned, however, that the manner in which the defendant was shown "is

suggestive and not preferred. It presses judicial tolerance to its limits" (*id*. at 545). At bar, the circumstances of the showup identification were much more suggestive, surpassing the limits of judicial tolerance set in *Duuvon*.

Contrary to the dissent, there is no binding precedent mandating a different conclusion from the one we reach in this case. There is no case in which so many suggestive practices and procedures simultaneously converged, but were found acceptable by this, or any other, appellate court. In fact, the binding precedent is quite the contrary. As the Court of Appeals has held: "Generally, a showup identification will be inadmissible when there was no effort to make the least provision for a reliable identification and the combined result of the procedures employed establish that the showup was unduly suggestive" (*Riley,* at 529, citing *People v Adams*, 53 NY2d 241, 249 [1987] [internal quotation marks omitted]).

Having failed to show that the showup identification was reasonable, the People nonetheless maintain that the complainant sufficiently described her attackers to the police before the showup. Since the reliability of the complainant's identification is at issue, and the Supreme Court, by finding the showup was not unduly suggestive did not conduct an independent source hearing, we reverse and vacate the robbery and stolen

property convictions of all three defendants, remand for a pretrial independent source hearing, and a new trial on the robbery and criminal possession of stolen property counts (*People v Wilson*, 5 NY3d 778 [2005]; *People v Foster*, 200 AD2d 196, 200-201 [1st Dept 1994]).

The issue of the undue suggestiveness of the showup identification was raised by all three defendants below. While Santiago only indirectly raised that issue on appeal, it was directly raised by both his codefendants. Since we find the showup identification was unduly suggestive and it was necessarily defective as to all three defendants, we reach that issue as to Santiago in the interest of justice.

We find, however, that the trial court properly exercised its discretion under CPL 200.70 when it amended a count of the indictment by changing the description of the stolen property from "credit card" to "debit card" (*see People v Grist*, 98 AD3d 1061, 1062 [2d Dept 2012], *lv denied* 20 NY3d 1061 [2013]). Penal Law § 165.45[2] states that a person is guilty of criminal possession of stolen property in the 4th degree "when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof" and "[t]he property consists of a credit card, debit card or public benefit card." While there are

some differences between a credit card and a debit card, the language of the statute encompasses both, the elements of the crime are the same, and the amendment of the indictment was within the category of amendments relating to "matters of form . . . and the like" contemplated by CPL 200.70(1). It did not improperly change the prosecution's theory of the case, nor have any of the defendants explained how their defense was impacted.

Marshall's arguments concerning the sufficiency and weight of the evidence on the weapons possession charge are likewise unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Accordingly, the judgment of the Supreme Court, New York County (Michael J. Obus, J. at hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered December 3, 2010, as amended January 7, 2011, convicting defendant Thomas Cruz of robbery in the second degree (two counts), criminal possession of a controlled substance in the fourth degree, criminal possession of stolen property in the fourth degree and resisting arrest, and sentencing him to an aggregate term of six years should be modified, on the law and the facts, to vacate the judgments of conviction on the two counts of robbery in the second degree and the count of criminal possession of stolen property in the fourth degree, remand for an independent source hearing and retrial, and otherwise affirmed. Judgment, same court and Justices, rendered

February 1, 2011, as amended February 15, 2011, convicting defendant Kareem Santiago of robbery in the second degree (two counts), criminal possession of stolen property in the fourth degree and resisting arrest, and sentencing him to an aggregate term of 4½ years, should be modified, on the law and the facts, to vacate the judgments of conviction on the two counts of robbery in the second degree and on the criminal possession of stolen property in the fourth degree count, remand for an independent source hearing and retrial, and otherwise affirmed. Judgment, same court and Justices, rendered December 3, 2010, as amended December 15, 2010, convicting defendant Dimitri Marshall of robbery in the second degree (two counts), criminal possession of stolen property in the fourth degree, criminal possession of a weapon in the fourth degree and resisting arrest, and sentencing him, as a second violent felony offender, to an aggregate term of 8½ years, should be modified, on the law and the facts, to vacate the judgments of conviction on the two counts of robbery in the second degree and on the criminal possession of stolen property in the fourth degree count, remand for an independent source hearing and retrial, and otherwise affirmed.

**All concur except Gonzalez, P.J. and Tom, J.**
**who dissent in a separate Opinion by Tom, J.**

TOM, J. (dissenting)

Defendants appeal from convictions arising out of a robbery of a female victim. Their primary contention is that a showup identification, made approximately one hour after the commission of the crime, was unduly suggestive and should not have been admitted into evidence. They further argue that the verdict is against the weight of the evidence and that the trial court erred in constructively amending the indictment. The issues raised by defendants are without merit.

In the early morning hours of February 5, 2010, the victim was returning home from work as a nurse's aide. She exited the subway on West 86th Street and was walking along 90th Street between Columbus and Amsterdam Avenues in Manhattan, when she noticed defendant Dimitri Marshall just a few feet away from her, running towards her with two figures silhouetted behind him. She was carrying a large blue bag containing a book, cell phone, charger, keys, cigarettes and an expired, pre-paid MasterCard. Marshall grabbed her left arm and began punching her in the face, knocking her to the ground. She attempted to get up, but Marshall and defendant Thomas Cruz knocked her down and kicked her. She saw defendant Kareem Santiago standing with them, but he took no part in beating her. The location of the area of the attack was well lit by street lights and lights from a nearby

parking lot, and the victim was able to observe her assailants. She described Marshall as a dark-skinned African-American man with a wide face and Santiago as tall and skinny with a "narrow face." She stated that Cruz wore a gray or partially gray jacket, and she was able to see his face. As a result of the attack, the victim's jawbone was displaced and swollen, and she had pain in her left shoulder, knee and leg.

While Marshall took the bag and ran toward Columbus Avenue, the victim stood up and saw that Cruz and Santiago were still standing nearby. She ran toward Amsterdam Avenue and did not see where the two men went. She arrived at her apartment in about four minutes, where a neighbor called the police. Two officers responding to a radio call arrived within minutes. They placed the victim in their car and drove her around the neighborhood in search of her attackers. Lieutenant Seamus Lavin and another officer were also in the vicinity in a patrol car and responded to the radio call. Upon getting out of their car, they saw three men descending the stairway to the public entrance of a garage approximately a quarter of a block from the crime scene. They were only able to see the back of the men's heads but observed that one wore a baseball cap. They heard one of the men say, "Oh shit. The cops," as another marked police car approached, and then observed the men immediately going down the staircase to the

garage, which had two entrances. Lieutenant Lavin immediately secured both entrances. He directed Officers Christopher Mitchell and Laquidara to drive their patrol car to the 90th Street entrance to prevent anyone from entering or leaving while Lavin and other officers entered the 91st Street entrance to search the garage. Officer Mitchell later left his patrol car to assist other officers in the search.

Officers Mitchell and Myskowsky testified at the suppression hearing. Officer Mitchell testified that the victim's blue bag was found outside a locked door of a room in the garage. An emergency services unit was called and pried open the door, which led to a six-foot by ten-foot maintenance room. The three suspects were found hiding in the small room. Two were found in a hole in the floor, and were covered in soot. Officer Mitchell testified that among items found in the maintenance room with defendants were the victim's wallet, cell phone, cell phone charger and ATM card. Defendant Santiago resisted arrest when he was pulled out of the hole in the room. Once the suspects were secured, the victim was brought to the garage by Officer Myskowsky within "a couple of minutes" to make an identification. Officer Mitchell stated that the lighting at the scene was provided by both the garage ceiling lights as well as the headlights and "take down lights" of a police car. Once the

victim was brought to the scene, she identified all three suspects as the individuals who had robbed her.

Officer Myskowsky, who responded to the victim's 911 call, was told by the victim of the vicious attack and robbery by three young men. He testified that he later drove the victim to the garage to make an identification of the defendants. She was driven back to the garage where, she was told, she was to view some people who had been stopped and to let the police know if she had ever seen them. Defendants were standing outside the maintenance room, with their hands behind them and with two uniformed officers standing to their right, two to their left, and two or three other officers standing behind them. Though the victim remarked to Officer Myskowsky that defendants looked different because they were dirty, she identified all three as her assailants. Officer Myskowsky further testified that approximately one hour elapsed from the time the police had received the 911 call to the victim's identification of the defendants as her assailants.

Defendants' motions to suppress identification testimony were properly denied. The showup procedure utilized by police was justified in the interest of prompt identification (*see People v Duuvon*, 77 NY2d 541 [1991]; *People v Love*, 57 NY2d 1023, 1024 [1982]) and conducted within approximately one hour of the

crime despite delay occasioned by defendants, who locked themselves inside the maintenance room of the garage and resisted arrest (*see People v Brisco*, 99 NY2d 596 [2003]). The alternative lineup procedure would have been time-consuming, allowing the victim's memory to fade while the police processed the defendants and tried to locate three sets of suitable fillers to participate (*see People v Parker*, 50 AD3d 603 [1st Dept 2008], *lv denied* 11 NY3d 740 [2008]). Contrary to the majority's contention, no facts presented at trial are being relied on to substantiate the showup identification. Rather, much of the testimony given at the suppression hearing and trial overlapped.

As an initial consideration, at the suppression hearing both Marshall and Cruz complained generally that the identification procedure was unduly suggestive. However, the particular grounds now advanced by Cruz as improper – the use of a police car's take-down lights to illuminate the suspects and the insufficiency of the victim's opportunity to view her attackers – were not raised before the suppression court and are unpreserved for appellate review (*see e.g. People v Williams*, 99 AD3d 495 [1st Dept 2012], *lv denied* 20 NY3d 1066 [2013]). The enhanced illumination would have only assisted the victim in clearly viewing the suspects and making an accurate identification, foreclosing objection that the lighting was inadequate for that

purpose (*see People v Maynard*, 40 AD2d 779, 780-781 [1st Dept 1972, Murphy, J., dissenting]).

While Marshall further complained that resort to the identification procedure was unwarranted due to the lack of exigent circumstances, it is settled that a showup is nevertheless permissible as long as it is conducted within reasonable geographic and temporal proximity to the crime (*see e.g. Brisco*, 99 NY2d at 597). Defendants were identified at the location of their arrest and approximately one quarter of a block from the crime scene. The majority's argument that this was not a "fast paced situation" to justify a showup identification is without substance. The police were already canvassing the area approximately four minutes after the robbery. A very short time thereafter, defendants were cornered inside a locked room of the garage. The police acted as promptly as they could and, in fact, any delay in the identification by the victim was caused by defendants. Notably, locking themselves in a maintenance room and refusing to open the door required responding officers to arrange for an emergency services unit to arrive at the scene and wait until a forcible entry could be effected. Defendants then resisted efforts to take them into custody. Once they were secured, the victim was promptly brought to the scene to make an identification. Any alleged lack of promptness in conducting the

identification is entirely attributable to defendants. The showup identification, which took place approximately one hour after the commission of the robbery and in the context of an immediate and continuous investigation, cannot be said to have been unreasonable under the circumstances (*id.* at 597 [upholding identification made within an hour in the course of a continuous, ongoing investigation]; *People v Howard*, 22 NY3d 388 [2013] [identification made two hours after crime]; *see also People v Cannon*, 306 AD2d 130 [1st Dept 2003]). Thus, the People fulfilled their obligation to produce evidence validating the admission of the victim's identification of her assailants (*People v Ortiz*, 90 NY2d 533, 537 [1997]).

The conditions asserted by defendants and by the majority to have been unduly suggestive are merely those that are generally unavoidable in view of reasonable security concerns inherent in any show-up, to wit, "the likelihood that an identifying witness will realize that the police are displaying a person they suspect of committing the crime, rather than a person selected at random" (*People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). Given the violence of the crime and the struggle with police to avoid being handcuffed and arrested, the presence of multiple police officers in the vicinity of the three suspects was an appropriate and necessary security measure (*see*

*People v Brujan*, 104 AD3d 481 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *People v Sanchez*, 66 AD3d 420 [1st Dept 2009, *lv denied* 13 NY3d 862 [2009]]). In addition, it is conceded that at least two ESU officers were still on the scene. On remarkably similar facts, this Court held that viewing a defendant with his hands cuffed behind him, surrounded by police officers with an officer holding his arm in the vicinity of a number of marked patrol cars and illuminated with an "alley light," does not render the circumstances unduly suggestive (*People v McNeil*, 39 AD3d 206, 209 [1st Dept 2007], and we are obliged to abide by established precedent (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 388 [1983, Wachtler, J., dissenting]; *Matter of Eckart*, 39 NY2d 493, 498-499 [1976]; *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 79 AD3d 630, 642 [1st Dept 2010, Nardelli, J., dissenting], *affd* 18 NY3d 446 [2012] ["it is the role of this Court to follow its precedents"]). Further, defendants had their hands behind their backs and thus, their handcuffs were not visible to the victim.

The judicial policy of accepting showup identifications is founded upon the "objective that the police have reasonable assurances that they have arrested or detained the right person" (*Duuvon*, 77 NY2d at 545), and it is clear that this policy was promoted on the facts at bar. Here, within a very short time

after the robbery, the police cornered the perpetrators locked inside a maintenance room of a garage, less than a block from the crime scene. The victim's bag was located outside the locked door, and the incriminating evidence consisting of the victim's stolen personal property was found inside the small room with defendants. Simply, defendants were apprehended within close geographic and temporal proximity to the crime in possession of the stolen goods. Under the facts of this case, the police clearly had reasonable assurance that they had detained the right suspects (*id.*).

Cruz argues that the victim did not have a long time to view him and that he was dirty when she viewed him. The maintenance room was extremely dusty, and when defendants were pulled from the room they were covered with dust and soot. At the showup, the victim remarked that defendants looked somewhat different because they appeared dirty. However, the victim had an adequate opportunity to view Cruz at the time of the attack, and she recognized him as one of her robbers at the showup, even though she was aware that defendants appeared dirtier than when they had robbed her. The victim also identified defendants at trial. She testified that Marshall was the one who had run up to her initially and punched her, and that Cruz was the one who had kicked her while she was on the ground. She then identified

Santiago as the third man and the one who had remained with Cruz while Marshall ran off with her purse.

Moreover, the showup was warranted by exigent circumstances – particularly, to establish that defendants and not some other individuals were the correct suspects and that they were not, as defendant Santiago testified, merely in the wrong place at the wrong time. If, as Santiago claimed, defendants' presence in the garage, locked in a maintenance room, was attributable to smoking marijuana and avoiding apprehension for a drug offense by hiding from the police, a prompt identification was necessary to rule out defendants as suspects in the robbery (*cf. People v Seegars*, 172 AD2d 183 [1991], *lv dismissed* 78 NY2d 1069 [1991] [victim's identification of suspect precluded further suggestive procedures to obtain identification by other witnesses]).

At trial, testimony elicited from the officers at the scene and Lieutenant Lavin showed that Marshall was found in the maintenance room lying on the ground, his hands beneath his body and his feet on top of a metal plate. A gun was next to him. It was dusty and without either ammunition or a magazine. Marshall struggled, but one of the officers was able to handcuff him and take him out of the room. Removing the metal plate disclosed a hole or sump, some three or four feet deep and two feet wide, in which Cruz and Santiago were hiding. The two men would not

voluntarily climb out of the hole and had to be forcibly removed. During the struggle, Santiago sustained a laceration to his nose and had blood on his face. From the maintenance room in close proximity to defendants, the officers recovered, among other things, a package containing over one eighth of an ounce of crack cocaine, located in the area where Cruz had been hiding.

The convictions are supported by sufficient evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The sequence of events, both during and after the robbery, demonstrates Santiago's accomplice liability for the robbery, supporting a reasonable inference that he participated by "placing himself where he could intimidate the victim and be ready to render immediate assistance" to his companions (*Matter of Fabian J.*, 103 AD3d 564 [1st Dept 2013]). We have considered and rejected Santiago's and Marshall's challenges to the evidence supporting the possessory charges.

The court properly exercised its discretion under CPL 200.70 in amending a count of the indictment to change the description of the stolen property from "credit card" to "debit card" (*see People v Grist*, 98 AD3d 1061, 1062 [2d Dept 2012], *lv denied* 20 NY3d 1061 [2013]). While there are differences between the two, the change in nomenclature is within the category of amendments

relating to "matters of form . . . and the like" contemplated by CPL 200.70 (1), and the amendment did not improperly change the prosecution's theory of the case.

Accordingly, the judgments should be affirmed.

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

ENTERED: JUNE 2, 2015

CLERK