SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 10, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Saxe, Moskowitz, JJ.

16528 & M-3566 Macy's Inc., et al., Plaintiffs-Appellants, Index 650197/12

-against-

Martha Stewart Living Omnimedia, Inc., Defendant,

J.C. Penney Corporation, Inc., Defendant-Respondent.

Jones Day, New York (Theodore M. Grossman of counsel), for appellants.

Munger, Tolles & Olson LLP, Los Angeles, CA (Mark Epstein of the California bar, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 11, 2015, which denied plaintiffs' (collectively, Macy's) motion to clarify a judgment, same court and Justice, entered June 16, 2014, or, in the alternative, to vacate an order, same court and Justice, entered April 1, 2015, which denied Macy's motion to stay the proceedings before the judicial hearing officer to hear and report on Macy's damages on its cause

of action for tortious interference with contract pending the resolution of Macy's two remaining claims, unanimously affirmed with respect to the denial of the motion for clarification, and appeal therefrom, to the extent it denied so much of the motion as sought to vacate the aforesaid April 2015 order, dismissed, without costs, as moot.

Macy's purported request for clarification of the June 2014 judgment with respect to the measure of damages on Macy's cause of action for tortious interference with contract is effectively a motion for reargument, the denial of which is not appealable (*see Mendelson v Empire Assoc. Realty Co. Assn.*, 57 AD3d 413 [1st Dept 2008], *lv denied* 12 NY3d 707 [2009]; *Mordas v Shenkein*, 19 AD3d 182 [1st Dept 2005]). As a motion for reargument, it also is untimely (*see* CPLR 2221[d][3]). Likewise, if considered as a motion to set aside the judgment, then, it is untimely (*see* CPLR 4404[b]; 4405).

Because the proceedings before the judicial hearing officer to hear and report on Macy's damages on its claim for tortious interference with contract have concluded, the portion of the appeal challenging the denial of a stay of those proceedings has become moot. In any event, in the absence of any compelling reason to resolve the second and third causes of action before the judicial hearing officer reached a determination as to

damages on the first cause of action, the court's denial of the stay was a proper exercise of discretion.

M-3566 - *Macy's Inc., et al. v Martha Stewart Living Omnimedia, Inc.*, et al.

Motion to dismiss appeal denied as academic.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1734 William Tate-Mitros, Index 112752/08
Plaintiff-Appellant,

-against-

MTA New York City Transit, also known as New York City Transit Authority, et al.,
Defendants-Respondents.

_____

Theodore H. Friedman, New York, for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered November 24, 2015, dismissing the complaint upon a jury verdict in defendants' favor, unanimously reversed, on the law and in the interest of justice, without costs, the judgment vacated and the matter remanded for a new trial.

The jury found that the rear tire of an MTA articulated bus had not run over plaintiff's right foot, causing a crush injury, after he was caused to fall on the sidewalk by the bus. On appeal plaintiff argues that defendants' medical expert disclosure notice under CPLR 3101(d)(1) was insufficiently detailed and did not allow him to prepare a complete case, and that the court incorrectly precluded the testimony of his medical expert on rebuttal, and unnecessarily limited the rebuttal testimony of his expert engineer.

The CPLR 3101(d) disclosure notice for Dr. Robert Kurtz, a specialist in surgical critical care and trauma, indicated that he would testify "within a reasonable degree of medical certainty that the plaintiff's injury was inflicted by something less massive than the bus in question," and that in his opinion, "it would be unlikely that these injuries had occurred as stated by the plaintiff." Dr. Kurtz testified that in his experience, a heavy vehicle rolling over any part of the anatomy leaves tire tread marks, which plaintiff's foot did not have. The doctor opined that for the accident to have happened as plaintiff claimed, his ankle would have been at the very least twisted unnaturally, the long bones of the feet, the metatarsals, would have been broken in addition to the toes, and there would have been significantly more soft tissue trauma from the weight of the bus. Therefore, Dr. Kurtz opined plaintiff was not injured by a bus. On cross-examination, Dr. Kurtz conceded that he was not an accident reconstructionist and did not have the professional expertise to state that plaintiff could not have fallen and been injured as claimed.

The CPLR 3101(d)(1) notice for Joseph Covelli, an MTA supervisor and an expert in accident and incident investigations stated that he would testify "within a reasonable degree of engineering certainty that the bus could not have mounted the

sidewalk as the plaintiff stated"; his opinion was that "the front and center of an articulated M15 bus would have had to mount the front tires [sic] of a sidewalk before the rear tires would be able to mount the same sidewalk." His testimony was consistent with his notice, although he also opined that if the entire bus had mounted the sidewalk, its right-side mirror would have been knocked off by the trees planted in the sidewalk. On cross-examination, he admitted that he had not measured the distance of the trees from the curb, and did not know where on the sidewalk plaintiff claimed he was standing, and could not actually determine if the bus would have been driven deeply enough on the sidewalk to have been damaged by the trees.

After the defense rested, plaintiff's attorney sought permission to call two rebuttal witnesses. He submitted a CPLR 3101(d)(1) notice for an expert in biomechanical medicine, arguing that the disclosure notice for Dr. Kurtz had provided no indication that the doctor's opinion was based on the lack of tread marks or injury to the metatarsals and ankle. He argued that the notice's insufficiency had not allowed him to prepare an expert witness to address these issues directly. His proposed expert would demonstrate, by use of an anatomical model of a foot, that plaintiff's foot could have been positioned after he fell in such a manner that when the bus wheel rolled over his

foot, his ankle and upper foot would not have been injured as Dr. Kurtz claimed. The court denied his request based on the timing of the notice and its reasoning that no rebuttal was needed.

The court granted permission for testimony by Nicholas Bellizzi, a transportation engineer for whom CPLR 3101(d)(1) notice had been provided, to dispute Covelli's description of the turning function in an articulated bus. He was precluded from presenting the exact measurements of the sidewalk, curb, and trees and any discussion of how the bus could have caused plaintiff to fall.

We find that Dr. Kurtz's CPLR 3101(d)(1) disclosure notice was legally sufficient; it provided plaintiff with notice that the doctor would question whether a bus would have caused the injuries sustained by plaintiff. It is improper for a party to request the facts and opinions upon which another party's expert is expected to testify (*see Krygier v Airweld, Inc.*, 176 AD2d 700, 701 [2d Dept 1991]; *see also Weininger v Hagedorn & Co.*, 203 AD2d 208, 209 [1st Dept 1994]; *Conway v Elite Towing & Flatbedding Corp.*, 135 AD3d 893, 894 [2d Dept 2016] ["no requirement that (an) expert set forth the specific facts and opinions upon which he or she is expected to testify, . . . only the substance"]).

"The question of whether to permit the introduction of

rebuttal evidence rests within the sound discretion of the trial court, and the court's decision in that regard should not ordinarily be disturbed on appeal absent a clear abuse of discretion" (*Wilmot v Methodist Hosp.*, 202 AD2d 304, 304 [1st Dept 1994]). However, a party should not be precluded from presenting expert testimony merely because of noncompliance with CPLR 3101(d)(1)(i), unless there is evidence of a willful failure to disclose and a showing of prejudice by the opposing party (*see Green v William Penn Life Ins. Co. of N.Y.*, 74 AD3d 570, 575 [1st Dept 2010]; *Colome v Grand Concourse 2075*, 302 AD2d 251, 252 [1st Dept 2003]). The burden is on the party seeking to introduce the evidence to show a good cause reason for the delay (*see Green* at 575).

Any error in limiting the rebuttal testimony by Bellizzi was insubstantial given that the limitations related to minor issues that defendants did not rely upon.

However, notwithstanding the delay by plaintiff in providing a CPLR 3101(d)(1) disclosure for his medical expert, the trial court, in the interest of justice, should have permitted the medical expert to testify in rebuttal. The court had allowed Dr. Kurtz to opine that there were inconsistencies between the claim of how the accident occurred and the resulting injuries, and although the testimony was not in his expertise, it was heard by

the jury and opened the door to the necessity for plaintiff to produce a medical expert to attempt to rebut those opinions. It simply cannot be presumed, had plaintiff been allowed to present his accident reconstructionist in rebuttal, that the jury would have found that plaintiff had not been injured by an MTA bus. Accordingly, we remand for a new trial.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1782 Nexbank, SSB, Index 652072/13
Plaintiff-Respondent,

-against-

Jeffrey Soffer, et al.,
Defendants-Appellants.

_____

Meister Seeling & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 4, 2015, which granted plaintiff's motion for summary judgment on the issue of liability and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

For the past several years, the parties herein have been involved in extensive litigation in both Nevada and New York over the terms of a construction loan and a guaranty provision contained therein. A recitation of the history of this litigation will provide the necessary background for the present appeal.

On October 25, 2006, Turnberry/Centra Sub LLC (Borrower), a company controlled by defendants, entered into a construction loan agreement with a group of lenders in an aggregate principal

amount of up to $475,000,000. Pursuant to the agreement, plaintiff is presently the lenders' authorized agent. The purpose of the loan was to finance the Borrower's construction of a mixed-use retail and office development in Las Vegas, Nevada, called Town Square Las Vegas. The loan was secured by Town Square's property, located in Nevada.

As part of the loan agreement, defendants personally executed a nonrecourse carve-out guaranty, known colloquially in the industry as a "bad boy guaranty." This guaranty requires defendants to compensate the lenders in the event they or the Borrower engage in certain acts that could harm the lenders' interest in the collateral or the lenders' ability to enforce their rights under the loan agreement. As pertinent to this appeal, the guaranty bound defendants to pay plaintiff, as agent for the lenders, for "[a]ny loss (which may include loss of principal or interest and reasonable attorneys' fees and collection costs) . . . arising out of or connected with . . . the placing voluntarily of a Lien on any portion of the Mortgaged Property by Borrower." The term "Lien" is defined in the loan agreement to include "any . . . encumbrance or charge on or affecting the Collateral."

On March 2, 2009, the Borrower defaulted by failing to pay the loan at maturity, and a nonjudicial foreclosure sale was

scheduled to take place on March 1, 2011. On February 25, defendant Jeffrey Soffer and the Borrower filed a complaint in the District Court of Clark County, Nevada, alleging, among other things, that plaintiff's predecessor, as agent for the lenders, breached an alleged agreement to extend or restructure the construction loan. On February 28, Jeffrey Soffer and the Borrower filed an ex parte application in the Nevada court for a temporary restraining order enjoining the nonjudicial sale. The next day, March 1, they recorded a lis pendens on the Town Square property. The foreclosure sale proceeded on March 4 and an affiliate of the lenders acquired title to the property.

Thereafter, Jeffrey Soffer and the Borrower filed an amended complaint in the Nevada action asserting a claim for specific performance of the alleged loan restructuring agreement and seeking an order directing plaintiff's predecessor to transfer the property either to defendants or to a new business entity controlled by them. A second amended complaint was filed in November 2011, adding claims against the buyer at the foreclosure sale and also seeking an injunction against the transfer of the property to a third party and/or a declaration that the buyer must transfer the property back to defendants. The litigation proceeded over the next 17 months.

On August 31, 2012, the Nevada court granted plaintiff's

predecessor summary judgment dismissing the action. The court entered an order judicially cancelling the lis pendens on September 6, 2012. Defendants appealed that decision to the Nevada Supreme Court, and on July 25, 2014, the court affirmed the dismissal of the claims to recover the property on the ground that no enforceable agreement to restructure the loan existed as a matter of law. The Supreme Court remanded the case to the District Court for consideration of unrelated claims concerning management fees.

While the Nevada proceedings were pending, on June 11, 2013, plaintiff commenced this action to enforce the guaranty, alleging that the lis pendens and the claims for specific performance and to recover the real property constituted an "encumbrance on the property, thus falling within the definition of 'Lien,'" and therefore triggering the guaranty. Defendants moved to dismiss the action on the ground that the claims advanced in the Nevada action did not trigger the guaranty. The motion was denied, and defendants appealed.

On June 11, 2015, we affirmed the motion court's decision, ruling that Nevada law applied to the definition of "lien" as found in the guaranty and that "[d]efendants triggered the guaranty when they filed a lis pendens on the property, since the lis pendens falls within the definition of lien as an

'encumbrance' under Nevada law" (*NexBank, SSB v Soffer*, 129 AD3d 485, 485 [1st Dept 2015]).

While the appeal was pending in this Court, on July 25, 2014, plaintiff moved in Supreme Court for partial summary judgment against defendants, seeking damages under the guaranty, including costs and attorneys' fees incurred in the Nevada action. Defendants opposed, and cross-moved for summary judgment, arguing that their claims to ownership of the property in the Nevada action and the lis pendens constituted neither a "lien" nor an encumbrance under New York law and thus did not trigger the guaranty provision of the loan agreement.

On February 3, 2015, Supreme Court granted plaintiff's motion for partial summary judgment and denied defendants' cross motion. The court correctly held that the lis pendens encumbered the property and that the pendency of the specific performance action also constituted an "encumbrance" on the property as it constituted a cloud on title. Thus, the specific performance action also triggered the guaranty. This appeal followed.

The principles applicable to the issues herein are straightforward. There is no question that defendants signed a guaranty and that it was a nonrecourse guaranty.

Since the guaranty here is enforceable, the issue is whether the lis pendens and/or the underlying specific performance action

in Nevada constitute an "encumbrance" that would trigger defendants' obligation under the guaranty. It is clear from the facts herein that, under Nevada law, they do.

Defendants now argue, for the first time on this appeal, that once the Nevada court cancelled the lis pendens, the relief they sought in the underlying action seeking transfer of the property back to them no longer constituted an "encumbrance" on the property. As a result, defendants contend that from that point forward, the guaranty could no longer be invoked. This argument is akin to trying to recall a bullet fired from a gun because it missed its mark.

Plaintiff correctly contends that defendants' new argument —— which was not raised in either the pleadings, the motion papers below, or in the prior appeal —— is not preserved for appellate review and should not be considered (*see Mendelsohn v City of N.Y. [19th Precinct]*, 89 AD3d 569, 569-570 [1st Dept 2011], *lv denied* 19 NY3d 804 [2012]). In fact, nowhere in any of the prior proceedings did defendants cite the statute in question. Rather, they advanced and relied on an incorrect interpretation of New York's law regarding the construction of "bad boy guaranties." Defendants give no reason why the Nevada statute was not raised below. Therefore, there is no reason why this Court should consider this argument at this juncture in the

proceedings.

In any event, defendants' contention is without merit. As we concluded in our prior decision, "Defendants triggered the guaranty when they filed a lis pendens on the property, since the lis pendens falls within the definition of a lien as an 'encumbrance' under Nevada law" (*Nexbank, SSB v Soffer*, 129 AD3d at 485). Defendants' new argument, that the claims advanced in the Nevada action for the return of the property could not constitute an "encumbrance" once the lis pendens was judicially cancelled, ignores the fact that, while the action, including the appeal, was pending, a subsequent purchaser of the property would have taken title subject to the claims made by defendants, despite the provisions of the Nevada statute. Notably, defendants continued to pursue their claims for a return of the property on their appeal to the Nevada Supreme Court, even after the lis pendens was judicially cancelled. As plaintiff correctly notes, under Nevada law, a lis pendens gives notice of a lawsuit "affecting the title or possession of real property" (Nev Rev Stat § 14.010[1]). The plain import of the statute is that the *lawsuit*, not merely the lis pendens, constitutes an "encumbrance" on the real property. A mere breach of contract claim that does not cloud title does not constitute an "encumbrance" on property. The complaint in the Nevada litigation clearly makes allegations

that defendants sought a return of the property. These claims clearly constitute a cloud on title to the property and therefore create an "encumbrance" that would permit plaintiff to invoke the guaranty. The mere fact that the Nevada Supreme Court ultimately ruled against defendants and dismissed their action does not change the fact that those claims, while still pending, constituted a cloud on title and were sufficient to permit plaintiff to invoke the guaranty contained in the loan documents.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1822 The People of the State of New York, Respondent, Ind. 519/13

-against-

Raymond Crespo,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered December 19, 2014, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life and 3½ to 7 years, respectively, unanimously reversed, on the law, and the matter remanded for a new trial.

Prior to the start of jury selection, defendant's counsel moved to withdraw, telling the trial court that defendant would no longer speak with him. The court denied the motion. During jury selection, defendant told the court that he did not want his lawyer representing him and that he wished to represent himself. The court responded that it was "too late to make that request," but offered to reconsider the issue after jury selection was

complete. Defendant reaffirmed that representing himself "is exactly what I want to do." Shortly after, defendant again told the court that he wanted to represent himself, and the judge again denied the request as untimely. The court did not make any inquiry into defendant's request to proceed pro se, even after the trial prosecutor asked the court to do so. Nor did the court revisit the issue after the jury was seated.

On appeal, defendant contends that the trial court violated his right to self-representation when it denied, without inquiry, his requests to proceed pro se. It is well-settled that a criminal defendant has a constitutional right to forgo the advantages of counsel and represent himself or herself at trial (*People v Arroyo*, 98 NY2d 101, 103 [2002]; *People v McIntyre*, 36 NY2d 10, 15 [1974]). "It is a 'nearly universal conviction . . . that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so'" (*Arroyo*, 98 NY2d at 103, quoting *Faretta v California*, 422 US 806, 817 [1975]).

The right to self-representation, however, is not absolute, and is subject to several restrictions (*McIntyre*, 36 NY2d at 16-17). Thus, "[a] defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent

waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*id.* at 17). When a defendant timely invokes the right to self-representation, "the trial court should conduct a thorough inquiry to determine whether the waiver was made intelligently and voluntarily" (*People v Smith*, 68 NY2d 737, 738 [1986], *cert denied* 479 US 953 [1986]).

Judged by these principles, we conclude that defendant's right to self-representation was violated. Contrary to the trial court's finding, defendant's requests to proceed pro se, made during jury selection, were timely asserted (*see McIntyre*, 36 NY2d at 18 [finding the defendant's motion timely because it was made before the prosecution's opening statement]; *People v Atkinson*, 111 AD3d 1061, 1062 [3d Dept 2013]; *People v Herman*, 78 AD3d 1686, 1686 [4th Dept 2010], *lv denied* 16 NY3d 831 [2011]). We reject the People's argument that the request to proceed pro se must be made before jury selection (*see People v Matsumoto*, 2 Misc 3d 130[A], *1 [App Term, 1st Dept 2004], *lv denied* 3 NY3d 741 [2004]).

Defendant's requests to represent himself were clear and unequivocal. On multiple occasions during jury selection, defendant unambiguously expressed his desire to proceed pro se, stating that it was "exactly" what he wanted to do. The trial

court erred in concluding that the requests were equivocal simply because they were made shortly after the court refused to appoint new counsel. "The fact that [the] defendant's request to proceed pro se had been preceded by an unsuccessful request for new counsel did not render the request equivocal" (*People v Lewis*, 114 AD3d 402, 404 [1st Dept 2014]; *see People v LaValle*, 3 NY3d 88, 107 [2004] ["conditioning a request for new attorneys with a request for self-representation does not necessarily make the latter request equivocal"]). Indeed, a criminal defendant's desire to proceed pro se is "[f]requently . . . motivated by dissatisfaction with the trial strategy of defense counsel or a lack of confidence in his attorney" (*McIntyre*, 36 NY2d at 16; *see Lewis*, 114 AD3d at 404 [the defendant's right to represent himself was violated where his request to proceed pro se was made after the court made it clear that new counsel would not be appointed]).

There is no merit to the People's argument that defendant forfeited his right to represent himself by engaging in "conduct which would prevent the fair and orderly exposition of the issues" (*McIntyre*, 36 NY2d at 17). Contrary to the People's view, the record does not reflect any disruptive behavior before the trial court denied defendant's repeated requests to proceed pro se. Nor did the court make any explicit findings that

defendant would not comply with the court's directives if he were allowed to proceed pro se. In any event, even if the trial court believed defendant's motion was "a disingenuous attempt to subvert the overall purpose of the trial," it was nevertheless required "to conduct a dispassionate inquiry into the pertinent factors" (*id.* at 19). Here, the court summarily rejected defendant's request to represent himself without determining whether it was knowingly or intelligently made (*see Smith*, 68 NY2d at 739). Accordingly, defendant's right to self-representation was violated and a new trial is required (*see Lewis*, 114 AD3d at 404-405 [reversing conviction where court did not ask a single question, let alone conduct a thorough inquiry into the defendant's request to represent himself]).

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2147 The People of the State of New York, Respondent, Ind. 1406/11

-against-

Wendell Reyes, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J. at suppression hearing; Ralph A. Fabrizio, J. at jury trial and sentencing), rendered April 12, 2013, convicting defendant of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 12 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the hearing court's finding that defendant lacked standing to seek suppression of a firearm that he deposited in his fiancée's family's house. Defendant had far less than "unfettered access" to the house (*see People v Leach*, 21 NY3d 969, 971 [2013]); on the contrary, defendant, who was estranged from his fiancée's family, was not even permitted to

enter the house if his fiancée's mother was at home. The record also supports the court's alternative finding that the police conduct was lawful in all respects. Defendant met a detailed radioed description of a man with a handgun, and his flight from a lawful common-law inquiry created reasonable suspicion of criminality justifying pursuit (*People v Martinez*, 80 NY2d 444, 448 [1992]; *People v Leung*, 68 NY2d 734, 736 [1986]).

The court properly declined to submit fourth-degree criminal possession of a weapon as a lesser included offense of the second and third-degree counts. There was no reasonable view of the evidence, under any of the theories posited by defendant, that would support a finding that defendant committed the lesser offense but not the greater offenses (*see generally People v Glover*, 57 NY2d 61, 63 [1982]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2148 In re Lesly Noel, Index 653097/14
Petitioner-Appellant,

-against-

Carmen Bianco, etc., et al.,
Respondents-Respondents.

_____

Law Office of Kevin P. Sheerin, Mineola (Kevin P. Sheerin of counsel), for appellant.

James B. Henly, Brooklyn (Robert K. Drinan of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered August 12, 2015, denying the petition seeking to vacate an arbitration award dated July 14, 2014 terminating petitioner's employment with respondent New York City Transit Authority upon a finding of misconduct, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

The arbitration award is not subject to a heightened level of judicial scrutiny, because it was held pursuant to a voluntarily-entered collective bargaining agreement (*see Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996]; *Matter of Tarantino v MTA N.Y. City Tr. Auth.*, 129 AD3d 738, 738 [2d Dept 2015], *lv denied* 26 NY3d 917 [2016]).

Petitioner failed to demonstrate that the award should be

vacated under the applicable standard of review (*see* CPLR 7511[b][1]; *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]; *Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 [1995]). Under that standard, courts are not permitted to review an arbitrator's findings of fact, including credibility determinations (*see* 94 NY2d at 328; *Matter of New York City Tr. Auth. v Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332, 336 [2005]).

We perceive no reason to disturb the imposed penalty of termination (*see generally* 94 NY2d at 326, 328).

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2149 In re Jayden Isaiah O., also known as Jayden O.,

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

Rossely R.-O.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Robert D. Hettlemen, J.), entered on or about April 1, 2015, which, upon a fact-finding determination of permanent neglect, terminated respondent mother's parental rights and transferred custody and guardianship of the subject child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]; [3][g][i]). The agency engaged in diligent efforts to encourage and strengthen the mother's relationship with the child by

developing an individualized plan for the mother, which included, among other things, domestic violence counseling, a parenting skills program, individual counseling, visitation, and random drug testing (*id.* § 384-b[7][f]; *Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572, 573 [1st Dept 2013]). Despite these diligent efforts, the mother failed to attend or benefit from the services offered to her and continued to deny responsibility for the conditions that led to the child's removal from her care (104 AD3d at 573; *see also Matter of Samantha C.*, 305 AD2d 167, 168 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]). Moreover, the mother routinely failed to appear for visitation, including for an extended period of more than six months, despite her awareness of the visitation schedule and the emotional toll her absence was having on the child (*Matter of Emily A.*, 216 AD2d 124, 124-125 [1st Dept 1995]).

The mother's purported excuses for her failure to comply with services or to visit the child — namely, that her Medicaid was inactive and that she feared that her older children's father would show up at the agency on the days of her scheduled visits — are unavailing. Family Court found these excuses to be incredible, and there is no basis to disturb that finding (*Matter of Madeline S.*, 3 AD3d 13, 19 [1st Dept 2003]).

The preponderance of the evidence supports Family Court's

determination that termination of the mother's parental rights is in the best interests of the child (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has been in a stable and loving foster home for several years, all of his basic needs are being met, and his foster parents wish to adopt him (*Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]). The circumstances do not warrant a suspended judgment (*id.*). While the mother had completed her service plan at the time of the dispositional hearing, albeit belatedly, she testified that she had learned nothing from her parenting course, and the child displayed no interest in seeing her. In fact, the mother has not seen the child since August 2014 when her visits were suspended, and the record suggests that the child's well-being depends on not seeing her (*compare Matter of Lorenda M. [Lorenzo McG.]*, 2 AD3d 370, 371 [1st Dept 2003] [suspended judgment not warranted where, among other things, the mother had no feasible plan for the child], *with Matter of Christian Lee R.*, 9 AD3d 275 [1st Dept 2004] [suspended judgment warranted where, among other things,

the mother had benefitted from treatment and had bonded with the child]).

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2150 Damon James, Index 157296/14
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

Assistant Deputy Warden Mingo,
et al.,
Defendants.

_____

The Law Office of Fred Lichtmacher P.C., New York (Fred Lichtmacher of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about April 2, 2015, which granted the motion of defendant City of New York to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to reinstate plaintiff's claims relating to facially timely allegations arising after July 25, 2011, as well as his claim relating to the alleged ongoing policy of preventing him from searching inmates, and otherwise affirmed, without costs.

Crediting the allegations in the complaint for purposes of this motion to dismiss, we find that plaintiff, a correction officer and captain during the relevant time periods, has adequately alleged a claim for sexual orientation-based

discrimination in violation of the New York City Human Rights Law (*see Anderson v Edmiston & Co., Inc.*, 131 AD3d 416 [1st Dept 2015]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621 [1st Dept 2013]). Plaintiff's allegations that he is an openly gay man and was qualified for the positions of correction officer and captain meet the first two elements of his discrimination claim. Plaintiff's allegations that he was written up, twice suspended, and ultimately demoted meet the third element of disadvantageous treatment (*see Santiago-Mendez v City of New York*, 136 AD3d 428 [1st Dept 2016]; *Rollins v Fencers Club, Inc.*, 128 AD3d 401 [1st Dept 2015]). Defendant's argument that plaintiff has not alleged that he was treated worse than similarly situated captains — as opposed to correction officers — is unavailing. Suspension and demotion are, on their faces, adverse employment actions. Defendant's argument is, effectively, that those actions were warranted by plaintiff's conduct while a captain, but this argument goes more properly to the second leg of the *McDonnell Douglas* burden-shifting framework (*see McDonnell Douglas Corp. v Green*, 411 US 792 [1973]), namely rebuttal of a prima facie claim of employment discrimination by showing a legitimate, nondiscriminatory reason for the adverse action (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), and is misplaced at

this early procedural juncture.

Plaintiff's allegation that, in about April 2013, defendant Assistant Deputy Warden Mingo followed him into a control room and poked him in the "derriere" with her radio antenna, saying, in the presence of other personnel, "Now I have your attention," coupled with his allegation that, beginning in 2007, his superiors prevented him from searching the cells and persons of inmates who objected on the ground that plaintiff is "homosexual," sufficiently allege the fourth element, discriminatory animus (*see Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]).

Plaintiff's allegation relating to inmate cell searches, adequately alleges "a single continuing pattern of unlawful conduct extending into the [limitations] period immediately preceding the filing of the complaint," permitting consideration under the continuing violations doctrine of all actions relevant to that claim, including those that would otherwise be time-barred (*Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-498 [1st Dept 2014]; *accord Jeudy v City of New York*, 142 AD3d 821, 823 [1st Dept 2016]). However, plaintiff's remaining allegations relating to alleged events transpiring prior to July 25, 2011, including the denial of his right to

carry a firearm, are too vague and disconnected from his timely allegations to benefit from the continuing violations doctrine.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2151 Eli Jemal, Index 113398/11
Plaintiff-Respondent,

-against-

ZTI Corp.,
Defendant-Appellant.

_____

Lonuzzi & Woodland, LLP, Brooklyn (John Lonuzzi of counsel), for appellant.

Schwartz & Blumenstein, New York (Clifford Schwartz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered June 11, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Summary judgment is precluded by issues of fact as to whether the parties' brokerage agreement, which was executed with respect to a lease to be entered into by defendant, applies to a second lease executed by defendant. The brokerage agreement named the tenant with which the lease was to be entered, described the premises, stated the lease term, inter alia, and further provided, "Should a sale of *this property* occur in place of *this Lease* to this Tenant the same amount of commission shall be Earned . . . $125,000.00 . . . The Broker shall receive *only One Full Commission* from the Landlord" (emphasis added).

The lease referred to in the brokerage agreement was executed on March 31, 2004, for a portion of certain property owned by defendant, with a 99-year term and an initial rent of $25,466.67 per month, and gave the tenant a right of first refusal to purchase the entire property. In 2005, defendant entered into a second lease with the same tenant, for the entire property, with a 10-year term, and rent of $39,583.33 per month.

In light of the differences in the leases' terms, demised premises, and amounts of rent, and the fact that the second lease did not refer to the existence of the first, we cannot conclude as a matter of law, as defendant urges, that the second lease was a mere modification of the first and therefore that the written brokerage agreement's limitation on the commission to be earned by plaintiff applies to plaintiff's efforts in connection with the 2005 lease.

The record also presents an issue of fact as to whether the parties entered into a separate oral brokerage agreement for the sale of the entire property. Plaintiff's January and February 2005 letters to defendant's president and a letter from defendant's attorney support the existence of such an agreement. As plaintiff is a licensed real estate broker, an oral agreement would be enforceable and would not violate the statute of frauds (*see* General Obligations Law § 5-701[a][1], [10]; *Sholom &*

Zuckerbrot Realty Corp. v Citibank, 205 AD2d 336, 338 [1st Dept 1994]).

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

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2152 The People of the State of New York, SCI 512/13
Respondent,

-against-

Oscar Perry,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Alvin Yearwood, J., at plea; Raymond L. Bruce, J., at sentence), rendered March 19, 2015, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2153 Fernando Alvarez Jimenez, et al., Index 155292/13
Plaintiffs-Respondents,

-against-

Glenn Henderson,
Defendant-Appellant.

_____

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellant.

Platte, Klarsfeld, Levine & Lachtman, LLP, New York (Jeffrey Klarsfeld of counsel), for respondents.

_____

Amended order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 16, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiffs partial summary judgment on the issue of liability on the breach of contract claim, and granted defendant's cross motion for summary judgment on his counterclaim for return of the security deposit, based on plaintiffs' commingling of the deposit funds, but stayed entry of judgment on defendant's counterclaim pending a final determination in the action, unanimously modified, on the law, to vacate so much of the order as granted plaintiffs' motion for summary judgment on the breach of contract claim as it pertains to plaintiffs' claim for repair costs, staging costs, and electricity charges, and deny plaintiffs' motion to this extent, and to vacate so much of the order as stayed entry of the

judgment on defendant's counterclaim for the return of his deposit, and otherwise affirmed, without costs.

Plaintiffs landlords made a prima facie showing of entitlement to judgment as to liability for five months of unpaid rent for the period starting July 1, 2012 through November 30, 2012. Defendant tenant failed to raise a triable issue of fact as to this unpaid rent.

Landlords met their prima facie burden with respect to the repair costs, staging costs, and electricity costs, by submitting the lease and various invoices. However, tenant raised triable issues of fact as to each of these costs through his affidavit, in which he contested that the repairs were necessary for alleged damages caused by him and his family, contested that the staging costs were covered by the lease, and asserted that he had already paid the electricity bills.

The defense of surrender by operation of law is inapplicable here, as landlords consistently reserved their rights to collect the remaining rent from tenant (*Ring v Printmaking Workshop, Inc.* 70 AD3d 480, 480 [1st Dept 2010]; *Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221, 222 [1st Dept 2006]). Landlords' termination letter also conditioned such termination on repayment of unpaid rent and other charges under the lease. Moreover, with respect to listing the apartment for resale, landlords explicitly

told tenant they were doing so for tenant's benefit and would reduce the rent in accordance with the timing of the sale.

Supreme Court properly granted tenant's motion for summary judgment on his counterclaim for return of his $58,000 security deposit that landlords admittedly, improperly commingled, in violation of General Obligations Law § 7-103(1). However, the court erred in staying entry of that judgment. Improper commingling under General Obligations Law § 7-103(1) provides tenant with an "immediate right" to receive his deposit intact (*Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 440 [1st Dept 2009]). Moreover, "[a] landlord who violates [General Obligations Law § 7-103(1)] cannot use the security as an offset against unpaid rents" (*23 E. 39th St. Mgt. Corp. v 23 E. 39th St. Dev., LLC*, 134 AD3d 629, 631 [1st Dept 2015]). Rather, a landlord "forfeits" any right it had to avail itself of the security deposit for any purpose, including to offset debts

owed by tenant due to tenant's breach of a lease (*Tappan Golf Dr. Range, Inc.*, 68 AD3d at 441; *see also Dan Klores Assoc. v Abramoff*, 288 AD2d 121, 122 [1st Dept 2001]).

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2154 Jocelyn Blanc-Kousassi, Index 652374/15
Plaintiff-Respondent,

-against-

Joyce A. Carrington also known as
Joyce Rookwood,
Defendant-Appellant.

_____

Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for appellant.

Wasserman PLLC, New York (Kenneth T. Wasserman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 5, 2016, which denied defendant's motion for summary judgment dismissing the complaint and declaring her the surviving widow of decedent, unanimously affirmed, with costs.

The court properly concluded that plaintiff provided sufficient evidence to raise a triable issue of fact concerning whether plaintiff and decedent were divorced in the Ivory Coast, as defendant contends (*see Ahmad v City of New York*, 129 AD3d 443, 444 [1st Dept 2015]). Plaintiff produced an attestation by the administrator of legal services in the Ivory Coast stating that there was no record of a judgment involving plaintiff and decedent since 1985.

Although the document failed to include a certification as

to the genuineness of the administrator's signature, as mandated by CPLR 4542(a), hearsay evidence is admissible to defeat a motion for summary judgment provided that it is not the only evidence (*see Uncyk v Cedarhurst Prop. Mgt., LLC*, 137 AD3d 610, 611 [1st Dept 2016]). Here, plaintiff stated in her affidavit that she withdrew her divorce petition in the Ivory Coast and never divorced decedent. She also provided the affidavit of her son, an attorney, concerning the steps he took to obtain the attestation from the administrator in the Ivory Coast.

Defendant argued that plaintiff was collaterally estopped from asserting that she was still married to decedent at the time of his death because a California court had granted decedent's motion to quash her divorce petition in that state. However, collateral estoppel requires an identity of issues which were necessarily decided in the first action and are decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]).

Evidence was presented that the California action may have been dismissed for lack of personal jurisdiction over decedent,

rather than because plaintiff and decedent were already divorced. Thus, there may not have been an identity of issues necessarily decided.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2155 The People of the State of New York, Ind. 1344/12
Respondent,

-against-

Ronnie Smith,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered March 7, 2014, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2156 Swift Funding, LLC, Index 155770/12
Plaintiff-Respondent,

-against-

Yousef Isacc also known as Yousef Isaac, et al.,
Defendants,

Peter Sim, also known as Sang J. Sim, etc.,
Defendant-Appellant.
- - - - -
[And a Third-Party Action]

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Law Office of Raul J. Sloezen, Yonkers (Raul J. Sloezen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about June 11, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Sim for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

The record presents triable issues of fact regarding whether Sim had notice of the existence of assignments of a portion of litigation proceeds by a client of defendant law firm, Sim & Park, LLP, in which Sim was a partner, to plaintiff. One who interferes with another's possessory rights in property by

disposing of it, as plaintiff alleges here, may be liable for conversion, and thus, Sim is not entitled to summary judgment dismissing the conversion claim as against him (*see Glass v Weiner*, 104 AD2d 967, 968-969 [2d Dept 1984]). Moreover, any determination by the trier of fact that Sim had knowledge of the assignment but disbursed the money anyway without making payment to plaintiff may raise an inference that he aided and abetted the client's alleged conversion and tortiously interfered with plaintiff's right to repayment under the funding agreement, or both. Accordingly, Sim was not entitled to summary judgment dismissing the aiding and abetting conversion and tortious interference with contract claims against him. Because he was not entitled to summary judgment dismissing the tort claims against him, Partnership Law § 26(b) does not shield him from liability (*see* Partnership Law § 26[c][i]).

Furthermore, where attorneys are on notice of an assignment of their client's recovery of litigation proceeds and they disburse such proceeds in disregard of the assignment, they may be held liable to the assignees (*see Leon v Martinez*, 193 AD2d 788 [2d Dept 1993], *affd* 84 NY2d 83, 88-89 [1994]). While plaintiff did not plead such a cause of action, any defect in the pleading would not be the basis for summary judgment against plaintiff where, as here, plaintiff adduced evidentiary facts in

support of such an unpleaded cause of action (*see Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 280 [1978]; *see also Rubenstein v Rosenthal*, 140 AD2d 156, 158 [1st Dept 1988]).

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2157 In re James Geist, Index 654135/13
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 (Kathy Chang Park of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered March 26, 2015, granting respondents' cross motion to, among other things, dismiss the amended petition seeking to vacate an arbitration award terminating petitioner's employment with respondent New York City Department of Education upon findings of misconduct, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously modified, on the law, to vacate the award insofar as it sustains specifications 10 and 23, and dismiss those specifications, and otherwise affirmed, without costs.

There is no evidence in the record to support specifications 10 and 23, which involve the 2012-2013 school year. However, the award sustaining the specifications involving prior school years is rational and supported by adequate evidence (*see Lackow v*

Department of Educ. [or "Board"] of City of N.Y., 51 AD3d 563, 567-568 [1st Dept 2008]; *see also Matter of Davis v New York City Bd./Dept. of Educ.*, 137 AD3d 716, 717 [1st Dept 2016]). Although the hearing officer addressed the specifications in groupings, his opinion and award indicates that he carefully weighed all of the evidence, as several specifications were dismissed (*see Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420-421 [1st Dept 2013]). There is no basis to disturb his credibility determinations (*id.*).

Based on the evidence showing petitioner's insubordination, inadequate teaching performance, failure to fulfill professional duties, and denial of many of the allegations against him, the penalty imposed does not shock the conscience, despite his 14-year teaching career (*Matter of Webb v City of New York*, 140 AD3d 411, 411 [1st Dept 2016]; *Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425, 425-426 [1st Dept 2013]).

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: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2159 The People of the State of New York, Ind. 3274/12
Respondent,

-against-

William Davidson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered December 11, 2013, 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: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2160-
2161 Index 150667/12

Joe A. Nunez, et al.,
Plaintiffs-Respondents,

-against-

Lookout, LLC,
Defendant-Appellant-Respondent,

Up 2 Code, LLC,
Defendant-Respondent-Appellant.

_____

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Paul Wooten, J.), entered April 14, 2015,

And said appeals having been withdrawn, before argument, by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 14, 2016,

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2162 The People of the State of New York, Respondent,

-against-

Clinton King,
Defendant-Appellant.

Ind. 3645/12

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

Judgment, Supreme Court, New York County (Juan Merchan, J.), rendered September 30, 2013, as amended October 1, 2013, 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: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2164 The People of the State of New York, Ind. 483/13
Respondent,

-against-

Cynthia Garrett,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 7, 2013, convicting defendant, upon her plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing her, as a second felony drug offender, to a term of 2 years, with 2 years' postrelease supervision, unanimously affirmed.

Upon our review of the sealed affidavit in support of the search warrant application, we find that "the confidential informant existed," "the information from the informant provided ample basis to conclude that the informant had a basis for his or her knowledge," and "it further sufficed to establish probable cause" to search the apartment (*People v Vasquez*, 140 AD3d 571, 572 [1st Dept 2016] [internal quotation marks and citation omitted]).

We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2165 Michelle A. Goldberg, Index 301394/12
Plaintiff-Respondent,

-against-

Glenn M. Goldberg,
Defendant-Appellant.

_____

Glenn Goldberg, appellant pro se.

Michelle A. Goldberg, respondent pro se.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered February 5, 2016, which, insofar as appealed from, denied defendant father's cross motion and declared that he is not entitled to any credit against his child support payments for his payments toward his youngest son's college expenses, unanimously affirmed, without costs.

The parties' agreements are clear that defendant is responsible for the college expenses, including room and board, for the parties' youngest son. Defendant is not entitled to a credit against his obligation to pay the child's room and board expenses in the amount of his child support payments because no such credit was contemplated by the agreements (*see Matter of Eagar v Suchan*, 128 AD3d 961, 963 [2d Dept 2015]; *Matter of Filosa v Donnelly*, 94 AD3d 760, 761 [2d Dept 2012]).

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

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2169-
2169A
[M-4896]

Citibank, N.A.,
Plaintiff-Respondent,

-against-

K.L.P. Sportswear, Inc.,
doing business as Luxe Eleven,
Defendant,

Yaacov Golob,
Defendant-Appellant.

Index 651688/10

_____

Schlacter & Associates, New York (Jed R. Schlacter of counsel), for appellant.

Riemer & Braunstein LLP, New York (Alissa L. Poynor of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered September 29, 2015, which granted plaintiff's motion to confirm a special referee's report and recommendation, denied defendant-appellant's (defendant) cross motion to reject the report, and denied defendant's prior motion to vacate the default judgment against him, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 3, 2015, which, among other things, granted defendant's motion to vacate the default judgment against him to the extent of referring the issue of service of process to a special referee, unanimously dismissed, without costs, as academic.

In this action alleging defendant's failure to make payments

in accordance with the terms of a business banking credit agreement, defendant seeks to vacate a default judgment entered against him, arguing that the court lacked jurisdiction to render the judgment (*see* CPLR 5015[a][4]). Specifically, defendant contends that service was not proper under CPLR 308(2) because plaintiff failed to show that the process server requested and was denied access to defendant's apartment before delivering the papers to the building's concierge.

Plaintiff met its burden at the traverse hearing of demonstrating proper service of process by a preponderance of the evidence (*see Blue Spot v Superior Mdse. Elecs. Co.*, 150 AD2d 175, 176-177 [1st Dept 1989]). The process server testified that it was his general practice not to deliver papers to a concierge without first seeking permission to go up to the relevant apartment. The property manager of the building in which defendant resides likewise testified that it was the building's policy to not allow anyone to enter without the resident's permission. This testimony regarding general practices was sufficient to raise a presumption of proper service (*see Spangenberg v Chaloupka*, 229 AD2d 482, 483 [2d Dept 1996]; *see also F.I. duPont, Glore Forgan & Co. v Chen*, 41 NY2d 794, 797-798 [1977]), and defendant failed to rebut this presumption (*see* 229 AD2d at 483). The process server's failure to preserve his

contemporaneous logbook is not sufficient to rebut the presumption, especially since the property manager's testimony corroborated the testimony of the process server (*see Kardanis v Velis*, 90 AD2d 727, 728 [1st Dept 1982]; *Weissman v Ryan*, 37 Misc 3d 136[A], 2012 NY Slip Op 52143[U] [App Term, 1st Dept 2012]).

There is no merit to defendant's claim that, even assuming proper service, the default judgment should be vacated pursuant to CPLR 5015(a)(1). Defendant's only proffered excuse for his default — that he never received the complaint — is negated by a finding of proper service. Absent a reasonable excuse, vacatur is not appropriate regardless of whether defendant has a meritorious defense (*Caba v Rai*, 63 AD3d 578, 582 [1st Dept 2009]; *Time Warner City Cable v Tri State Auto*, 5 AD3d 153, 153 [1st Dept 2004], *lv dismissed* 3 NY3d 656 [2004]).

M-4896 - *Citibank v K.L.P Sportswear, etc., et al.*

Motion seeking to strike the reply brief denied.

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

ENTERED: NOVEMBER 10, 2016

CLERK

Tom, J.P., Sweeny, Richter, Manzanet-Daniels, Webber, JJ.

2170 In re Calvin Brooks, Ind. 1184/14
[M-4137] Petitioner,

-against-

Cyrus R. Vance, Jr., etc., et al.,
Respondents.

_____

Calvin Brooks, petitioner pro se.

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

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Ellen Biben, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 10, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1868 In re Niki Rossakis, Index 101546/14
Petitioner-Respondent,

-against-

The New York State Board of Parole,
Respondent-Appellant.

_____

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne of counsel), for appellant.

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

_____

Judgment Supreme Court, New York County (Alice Schlesinger, J.), entered December 22, 2015, modified, on the law and the facts as follows: (1) the Board shall schedule a new parole hearing for petitioner to take place within 60 days of the issuance of this decision before a board of Commissioners who have not sat on her previous hearings; (2) the Commissioners shall render a decision on the new hearing within 30 days from its completion; and (3) to the extent that the judgment directs the Commissioners to place any greater emphasis on any particular statutory parole factor(s), that directive is vacated; and the judgment should otherwise be affirmed, without costs.

Opinion by Gesmer, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Karla Moskowitz
Ellen Gesmer, JJ.

1868
Index 101546/14

_____x

In re Niki Rossakis,
Petitioner-Respondent,

-against-

The New York State Board of Parole,
Respondent-Appellant.
_____x

Respondent appeals from the judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered December 22, 2015, granting the petition to annul respondent's determination, dated August 6, 2013, which denied petitioner parole, and remanded the matter to respondent for a new hearing.

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne and Steven C. Wu of counsel), for appellant.

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

GESMER, J.

In this appeal, we take the unusual step of affirming the annulment of a decision of respondent-appellant the New York State Board of Parole (the Board) denying parole to petitioner-respondent Niki Rossakis (petitioner). We agree with the motion court that the Board's decision was so irrational as to border on impropriety and was therefore arbitrarily and capriciously rendered. However, we vacate the portion of the motion court's judgment which directed how the Board was to weigh the statutory factors.

FACTS[1]

On May 17, 1996, petitioner was convicted of murder in the second degree for shooting her husband Gary (decedent) on January 21, 1993. Petitioner has consistently maintained for two decades that decedent abused her physically and sexually throughout their marriage. She claims that he raped her in early 1993, leading to her having an abortion two weeks prior to the shooting. At that

[1] We rely for our statement of facts solely on the record before this Court. That record does not include the minutes of petitioner's underlying criminal trial. In a prior decision of this Court, we denied the Board's motion asking us to take judicial notice of the transcripts of petitioner's criminal trial (*see Niki Rossakis v New York State Parole Bd.*, M-3414/16, 3417/16 [1st Dept 2016]). Despite our ruling, the Board nonetheless improperly cited to those transcripts in their briefs. Accordingly, we have disregarded these portions of the Board's briefs.

time, her physician advised the couple that she should not have sex for six weeks, so that she could heal from the procedure. Nevertheless, on the night before the shooting, decedent forced his fingers inside of her, and threatened to force her to have intercourse. She managed to extricate herself and spent the night downstairs. On the morning of the shooting, decedent reached for her crotch. When she pushed his hand away, he said, "I will get you later bitch." Petitioner then took decedent's gun from a nearby night stand drawer and shot him in the head.

At trial, petitioner testified that she shot decedent because she feared he would rape her. Her expert witness testified that her behavior was not inconsistent with that of an abused woman. The jurors were instructed as to the defenses of justification and extreme emotional disturbance. On May 17, 1996, petitioner was convicted of murder in the second degree and criminal possession of a weapon in the second degree. The Appellate Division Second Department found that her initial sentence of 23 years to life was excessive, and reduced it in the interests of justice to 15 years to life, the minimum for murder in the second degree (*see People v Rossakis*, 256 AD2d 366 [2d Dept 1998], *lv denied* 93 NY2d 929 [1999]).

Petitioner has now been in prison for over 20 years. During that time, she has obtained two associate degrees from Marymount

Manhattan College and Bard College; successfully completed every rehabilitative program offered to her, including anger management and nonviolent conflict resolution techniques; acted as a teaching assistant and tutor to other inmates; served on the Inmate Grievance Resolution Committee, a committee composed of correctional staff and inmates hearing inmate complaints against the facility; and won praise for her work as a telephone operator for the Department of Motor Vehicles. She has been offered a job at a family violence agency upon her release. If released, she intends to complete her bachelor's and master's degrees, continue in therapy, and become involved with her church. Petitioner, who has no prior history of violent crime, received the best score possible on her Correctional Offender Management Profiling for Alternative Sanction (COMPAS) evaluation, indicating a low likelihood for violence, substance abuse, or criminal behavior.[2]

Petitioner has sought and been denied parole three times: in 2009, 2011, and, most recently, 2013. She challenged the Board's 2011 denial in a proceeding pursuant to article 78 of the CPLR.

---

[2] Implemented in conjunction with a 2011 revision to the Executive Law, the COMPAS assessment is an "[e]vidence-based . . . assessment tool . . . . [It] delves deeply into the offender's criminal record and disciplinary history, family and social support network, use of drugs and readiness for employment in predicting risk" (John Caher, *Effect of Risk Assessment Rule on Parole Decisions is Unclear*, NYLJ, April 30, 2012 at 1, col 3).

In a decision dated May 2, 2013 (the May order), Justice Kathryn E. Freed found that the Board had improperly focused on the seriousness of petitioner's offense without considering the other statutory factors, and ordered a new parole hearing. The Board appealed, triggering a stay of the May order. However, before the Board could perfect its appeal, petitioner appeared for a routine parole hearing in 2013.

At the 2013 parole hearing, petitioner testified, "I did the worst thing someone could do, and I killed . . . Gary, and I'm very, very sorry for that . . . . When I first started my bid, I saw myself as the victim. Today I know that Gary is the victim. I no longer harp on the abuse just to justify what I did to my husband. I was wrong. I should have just gotten up and left. I should have made more of an attempt to reach out and talk to people. I didn't do that. I isolated and started to self-destruct . . . . I made a horrible decision, and I'm sorry." The Board denied her most recent request for parole on August 6, 2013, and withdrew its appeal of the May order.

The Board's denial consisted of a brief four-paragraph decision. In its first paragraph, the Board asserted that petitioner's release was incompatible with the welfare of society, largely mirroring the text of the Executive Law itself. The Board's second paragraph described the facts of the

underlying offense and made mention of petitioner's substance use around the time of decedent's death. The Board's third paragraph summarily listed petitioner's institutional achievements with no further analysis. In its final paragraph, the Board concluded that petitioner lacked remorse, finding that she continued to blame decedent for his death and continued to identify as an abuse victim despite the jury's guilty verdict. Petitioner then commenced this proceeding, now on appeal before this Court, challenging the 2013 denial.

In an extensive opinion, the motion court found that the Board's 2013 decision was again based almost exclusively on consideration of petitioner's crime, and ignored the other applicable statutory parole factors, including petitioner's institutional achievements and remorse. The motion court ordered that petitioner receive a new parole hearing before a new panel of Commissioners. The order also directed "in the strongest way possible, that the Board consider all of the other factors which emphasize forward-thinking and planning. In other words, this new Board is not authorized to re-sentence or unduly consider the crime. That is but one factor. In other words, . . . the Board is instructed to evaluate the applicant as she is today and how she has prepared herself for her release back into society."

ANALYSIS

In an article 78 petition challenging a parole decision, the petitioner bears the burden to show that the decision is the result of "'irrationality bordering on impropriety,'" and is thus arbitrary and capricious (*Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000], quoting *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]). The Board must consider eight statutory factors enumerated in the Executive Law in determining whether an inmate should be released on parole, of which the following five are relevant to this appeal:

> "(i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; . . . ; (iii) release plans including community resources, employment, education and training and support services available to the inmate . . . ; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated . . . ; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement" (Executive Law § 259-i[2][c][A]).

The Board is not obligated to refer to each factor, or to give every factor equal weight (*Matter of King v New York State*

Div. of Parole, 190 AD2d 423, 431 [1st Dept [1993], *affd* 83 NY2d 788 [1994]). However, as this Court has previously held, "[i]t is unquestionably the duty of the Board to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Board did in fact fail to consider the proper standards, the courts must intervene" (*id.* at 431). In particular, "[t]he role of the Parole Board is not to resentence petitioner according to the personal opinions of its members as to the appropriate penalty for murder, but to determine whether, as of this moment, given all the relevant statutory factors, he should be released. In that regard, the statute expressly mandates that the prisoner's educational and other achievements affirmatively be taken into consideration in determining whether he meets the general criteria relevant to parole release" (*id.* at 432). The Board may not deny parole based solely on the seriousness of the offense (*Matter of Ramirez v Evans*, 118 AD3d 707 [2d Dept 2014]; *Matter of Gelsomino v New York State Bd. Of Parole*, 82 AD3d 1097 [2d Dept 2011]).

Based on the record before us, we conclude that the motion court correctly determined that the Board acted with an irrationality bordering on impropriety in denying petitioner parole. The Board focused exclusively on the seriousness of

petitioner's conviction and the decedent's family's victim impact statements (which it incorrectly described as "community opposition to her release") without giving genuine consideration to petitioner's remorse, institutional achievements, release plan, and her lack of any prior violent criminal history.

The Board's statement that, "[d]espite your assertions of abuse being rejected by a jury after hearing you testify for eight days, and having no corroboration on record of the abuse, you continue to blame your victim for his death," disregards petitioner's testimony accepting responsibility and expressing remorse for her actions. It also fails to recognize that petitioner may legitimately view herself as a battered woman, even though the jury did not find that she met New York's exacting requirements for the defenses of justification (Penal Law § 35.15[2]) and extreme emotional disturbance (Penal Law § 125.25[1][a]). Indeed, her criminal trial attorneys submitted letters to this effect. As one of those attorneys, now a law professor, highlighted, our collective understanding of domestic violence is far greater today than when petitioner was arrested and tried, and this dearth of knowledge may very well have affected how the jury viewed the instructions as to these defenses. While we cannot and do not attempt to retry petitioner, we agree with the motion court that apologizing for

the shooting while steadfastly maintaining that she was an abuse victim does not indicate a lack of remorse for her actions.

The Board summarily listed petitioner's institutional achievements, and then denied parole with no further analysis of them, in violation of the Executive Law's requirement that the reasons for denial not be given in "conclusory terms" (Executive Law § 259-i[2][a]). Moreover, the Board's decision began by stating that petitioner's release "would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law." These statements came directly from the language of Executive Law § 259-i(2)(c), further violating the Executive Law's ban on the Board making conclusory assertions (*see* Executive Law § 259-i[2][a]).

Despite petitioner's impressive COMPAS score, evidencing her low risk for violence or substance abuse upon release, the Board asserted that there is a "reasonable probability" that petitioner would again violate the law, based on the crime of which she was convicted, her addiction to prescription medication around the time of her arrest and trial in the early 1990s, and her use of drugs in the early 1980s, prior to her marriage to decedent. The Board's unsupported finding echoes decedent's family's victim impact statements, which emphasized petitioner's prior drug use and their belief that she is a dangerous person. Decedent's

family also emphasized that petitioner would have nowhere to go if released; however, the record makes clear that petitioner had secured a job offer and was taking concrete steps to secure housing. As noted by our sister court in the Third Department, "When the Legislature required the Board to consider victims' statements, it undoubtedly realized that these submissions would often be emotional and at times even touch upon inappropriate matters" (*Matter of Duffy v New York State Dept. of Corr. & Community Supervision*, 132 AD3d 1207, 1209 [3d Dept 2015]). In this case, we find that the Board inappropriately relied on claims in decedent's family's victim impact statements that were affirmatively rebutted by the objective evidence supporting petitioner's release.

Among the many factors the Board must consider in granting or denying parole is the "recommendations of the sentencing court" (Executive Law § 259-i[2][c][A][vii]). Here, the court that pronounced the sentence petitioner is currently serving is the Second Department. That court reduced petitioner's sentence to 15 years to life, holding that the trial court's sentence of 23 years to life was excessive (*see Rossakis*, 256 AD2d at 366). However, as the motion court noted, the Board's repeated denials to petitioner of parole have had the effect of undermining this sentence reduction.

For all these reasons, we affirm the motion court's finding that the Board acted with irrationality bordering on impropriety and therefore arbitrarily and capriciously denied petitioner parole. However, we have previously held that "[w]hile the court is empowered to determine whether the administrative body acted arbitrarily, it may not usurp the administrative function by directing the agency to proceed in a specific manner, which is within the jurisdiction and discretion of the administrative body in the first instance" (*Burke's Auto Body v Ameruso*, 113 AD2d 198, 200-201 [1st Dept 1985]). Accordingly, we vacate so much of the motion court's order as may be read to direct the Board to emphasize factors which emphasize forward thinking and planning over the other statutory factors.

We hold that petitioner is entitled to a new parole hearing to take place before new Commissioners who have not sat on any of petitioner's earlier parole hearings (*see Matter of Quartararo v New York Stat Div. of Parole*, 224 AD2d 266 [1st Dept 1996]; *King* 190 AD2d at 434-435). The hearing shall take place within 60 days from the issuance of this decision, and the Board shall render its decision within 30 days after the new hearing.

Accordingly, the judgment of the Supreme Court, New York County (Alice Schlesinger, J.), entered December 22, 2015, granting the petition to annul the Board's determination, dated

August 6, 2013, which denied petitioner parole, and remanded the matter to the Board for a new hearing, should be modified, on the law and the facts as follows: (1) the Board shall schedule a new parole hearing for petitioner to take place within 60 days of the issuance of this decision before a board of Commissioners who have not sat on her previous hearings; (2) the Commissioners shall render a decision on the new hearing within 30 days from its completion; and (3) to the extent that the judgment directs the Commissioners to place any greater emphasis on any particular statutory parole factor(s), that directive is vacated; and the judgment should otherwise be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 10, 2016

CLERK