SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 10, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

7076 The People of the State of New York, Dkt. 6864/16
Respondent,

-against-

Grevelle Bartley,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered March 9, 2017, convicting defendant, after a nonjury trial, of attempted assault in the third degree, attempted obstruction of breathing or blood circulation and harassment in the second degree, and sentencing him to an aggregate term of 20 days in jail and one year of probation, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court's verdict was not against the weight of the

evidence (*see People v Danielson*, 9 NY3d 348-349 [2007]). Inconsistencies in the victim's testimony, including those related to prior acts of domestic violence, presented the court with issues of credibility that it properly resolved.

The court providently exercised its discretion in denying defendant's request for a mistrial, or declining to impose any other sanction, based on the People's loss of the victim's handwritten statements in two previous domestic incident reports. Initially, we note that while defense counsel first asked for an adverse inference, she immediately replaced that request with a motion for a mistrial, which was the only request ruled upon by the court, and we conclude that a mistrial would have plainly been a unwarranted remedy. In any event, the reports at issue were transcribed into typewriteen reports, which were provided to defendant. Defendant has failed to show any likelihood of any errors or omissions in the transcription, or any other prejudice (*see People v Martinez*, 22 NY3d 551, 557 [2014]). Moreover, even if the court had chosen to draw an adverse inference, there is no reasonable possibility that it would have thus reached a different verdict as trier of fact.

Defendant did not preserve his argument that he was constitutionally entitled to a jury trial on class B domestic

violence misdemeanors rendering him deportable, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see People v Suazo*, 146 AD3d 423, 423-424 [1st Dept 2017] *lv granted* 29 NY3d 1087 [2017]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 10, 2018

CLERK

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

7077 Iykeland Ricketts, et al., Claim 124046
Claimants-Appellants,

-against-

State of New York,
Defendant-Respondent.

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Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky of counsel), for respondent.

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Order of the Court of Claims of the State of New York (Faviola A. Soto, J.), entered April 13, 2016, which granted defendant's motion for summary judgment dismissing the claim, unanimously affirmed, without costs.

Claimants' argument that Correction Law § 147 imposed upon defendant a statutory duty to accurately record the guilty plea of claimant Iykeland Ricketts is unpreserved insofar as it specifically invokes section 147 as the alleged source of statutory duty. In any event, by its terms, section 147 directs the Commissioner of the Department of Corrections and Community Services to investigate and forward alien inmates' records to Federal immigration authorities. The statute imposes no duty on the New York City Criminal Court (or any other branch of the

judiciary), the entity which claimants contend erred. Thus, the statute fails as a source of duty for the state actor that claimants allege erred (*see McLean v City of New York*, 12 NY3d 194, 199 [2009]; *Pelaez v Seide*, 2 NY3d 186, 200 [2004]).

Claimants' contention that the motion court should have denied summary judgment to permit them to conduct discovery is unavailing. Claimants do not state in what way discovery was incomplete, or explain what essential facts further discovery might uncover (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

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

ENTERED: JULY 10, 2018

CLERK

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

7078-
7078A In re Carmen L.,
Petitioner-Appellant,

-against-

Rafael R.,
Respondent-Respondent.

Law Offices of Paul Matthews, New York (Paul W. Matthews of counsel), for appellant.

Orders, Family Court, New York County (Marva A. Burnett, Referee), entered on or about August 10, 2015, which, upon a fact-finding determination that respondent committed the family offense of menacing in the second degree, granted petitioner a one-year order of protection, and denied her request for a full two-year stay-away order, unanimously affirmed, without costs.

A fair preponderance of the evidence established that respondent committed the family offense of menacing in the second degree (*see* Family Ct Act § 832; Penal Law § 120.14). The hearing testimony showed that in the midst of an acrimonious and ongoing dispute purportedly over petitioner's apartment, which involved respondent's ex-wife and children, respondent threatened petitioner with physical violence, on at least two occasions, on the street and over her cell phone, thereby placing petitioner in

reasonable fear of physical injury. However, the Referee's decision not to issue a full stay-away order of protection for a period of two years was not unreasonable under the circumstances presented (*compare Barbara E. v John E.*, 44 AD3d 426 [1st Dept 2007]).

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

ENTERED: JULY 10, 2018

CLERK

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

7079-
7080 The People of the State of New York,
Respondent,

-against-

Johnny Rodriguez,
Defendant-Appellant.

Ind. 3051/12

Rosemary Herbert, Office of the Appellate Defender, New York (Ondrej Staviscak Diaz of counsel), for appellant.

Johnny Rodriguez, appellant pro se.

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 24, 2013, as amended August 13, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree (two counts), criminal sale of a controlled substance in the second degree (four counts), criminal sale of a controlled substance in the third degree (15 counts), criminal possession of a controlled substance in the third and fourth degrees, criminal possession of a weapon in the second degree, criminal sale of a firearm in the third degree, attempted criminal possession of a weapon in the second and third degrees, attempted criminal sale of a firearm in

the third degree, resisting arrest, and two counts of criminally using drug paraphernalia in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 30 years to life, and order (same court and Justice), entered on or about September 27, 2016, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom during an undercover officer's testimony (*see Waller v Georgia*, 467 US 39 [1984]), and the closure did not violate defendant's right to a public trial. The evidence established that the officer had investigations pending, had received threats, was likely to return to the area of the sales at issue because of his wide-ranging activities, and was specifically likely to operate at a housing complex that is a short distance from the location of many of the charged sales. The court also considered special factors such as the officer's distinctive appearance, which made him especially prone to being recognized, and the courtroom's location, which created a heightened likelihood that the officer might encounter persons involved with drugs (*see People v Pepe*, 235 AD2d 221 [1st Dept 1997], *lv denied* 89 NY2d 1039 [1997]; *People v Gross*, 179 AD2d 138, 142 [1st Dept 1992], *lv denied* 80

NY2d 832 [1992]). A fair reading of the record indicates that the court implicitly or explicitly considered alternatives to full closure (*see Presley v Georgia*, 558 US 209 [2010]; *People v Echevarria*, 21 NY3d 1, 14-19 [2013]).

Defendant's argument regarding an adverse inference charge is similar to an argument this Court rejected on a codefendant's appeal (*People v Reyes*, 149 AD3d 478 [1st Dept 2017], *lv denied* 29 NY3d 1085 [2017]). This Court has rejected similar arguments in other cases (*see e.g. People v Austin*, 134 AD3d 559 [1st Dept 2015], *revd on other grounds* 30 NY3d 98 [2017]).

We have considered and rejected defendant's pro se ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 10, 2018

CLERK

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

7081 Carl E. Person, Index 155763/15
Plaintiff-Appellant,

-against-

Victor Dedvukaj, et. al.,
Defendants-Respondents,

John Does, et al.,
Defendants.

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Carl E. Person, New York, appellant pro se.

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Order, Supreme Court, New York County (Carol Edmead, J.), entered February 20, 2017, which denied plaintiff's motion for summary judgment, and granted defendants' cross motion to dismiss the complaint for failure to state a cause of action, unanimously affirmed, without costs.

The court correctly dismissed the complaint for failure to state a claim. It correctly ruled that under the bankruptcy code and reorganization plan, plaintiff's claims to recover any legal fees related to his representation in a state foreclosure action of entities that had already filed bankruptcy petitions had to be raised in the proceedings before the bankruptcy court. Plaintiff claims that he can proceed against defendants individually to enforce his legal fees because the legal work he performed was in

the state foreclosure action, not the bankruptcy court. His claims for legal fees, however, arise only in connection with his employment as special litigation counsel to the debtors in the bankruptcy action. Supreme Court correctly decided that dismissal of the complaint was warranted because the bankruptcy court retained jurisdiction over the issue of hid legal fees, even if some work postdated the confirmation of the entities' reorganization plan (*see* 11 USC § 328; *Matter of Futuronics Corp.*, 655 F2d 463 [2d Cir 1981], *cert denied* 455 US 941 [1982]).

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

ENTERED: JULY 10, 2018

CLERK

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

7082 New Rainbow Heaven LLC, et al., Index 655648/16
Plaintiffs-Respondents,

-against-

Wesco Insurance Company,
Defendant-Appellant.

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Mound Cotton Wollan & Greengrass LLP, New York (Kevin F. Buckley of counsel), for appellant.

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Order, Supreme Court, New York County (Arthur F. Engeron, J.), entered December 20, 2017, which, inter alia, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record does not demonstrate as a matter of law that the fire that destroyed plaintiff Lin's restaurant and the building she owned in which it was located was caused by Lin herself and that therefore defendant was entitled to deny Lin's claims under its insurance policy on the ground of fraud during the investigation of the loss. The evidence indicates that the property, located in Hornell, New York, may have been destroyed by arson and that Lin may have had a motive to destroy it (*see Phillips v State Farm Fire & Cas. Co.*, 225 AD2d 457 [1st Dept 1996]). However, while email correspondence between a related

insurance company's personnel and an independent claims adjuster shows that the fire was suspicious and was under investigation as possible arson, there is no "unrefuted evidence . . . by a fire marshal that the fire was of incendiary origin" (*708 Estates Corp. v Royal Globe Ins. Co.*, 160 AD2d 621, 622 [1st Dept 1990]). While defendant's internal telephone notes state that the police and the state crime bureau determined that Lin's alibi that she was in New York City on the day of the fire "checked out," a Hornell police officer said in an affidavit that he had seen Lin's car parked outside the restaurant on the night of the fire, and a store employee testified that he had sold wood shingles to Lin the day before the fire. These conflicts pose credibility issues to be resolved by a factfinder (*see Castillo v General Acc. Ins. Co. of Am.*, 111 AD2d 112, 113 [1st Dept 1985] [insured not entitled to summary judgment in action for insurance benefits for stolen car where "circumstances disclosed in the record raise an issue of plaintiff's credibility with regard to a matter within his exclusive knowledge sufficient to require a trial"]). Lin testified that she used her cell phone to call a seafood company while she was on her way to New York City. In light of the other factual issues presented by the record, defendant's

cell phone expert's report of three outgoing calls from Lin's phone from a tower near her restaurant on the night of the fire is conclusive of neither arson nor Lin's whereabouts on that night.

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

ENTERED: JULY 10, 2018

CLERK

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

7083 The People of the State of New York, Ind. 969/15
Respondent,

-against-

Giovanni Santiago,
Defendant-Appellant.

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

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

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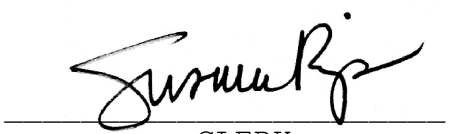
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered July 5, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: JULY 10, 2018



CLERK

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

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

7084 The People of the State of New York, Ind. 3834/09
Respondent,

-against-

Latwoine Parker,
Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered July 29, 2014, convicting defendant, after a jury trial, of murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress out-of-court and in-court identifications by an eyewitness to the shooting. Although detectives failed to preserve records of a computer-generated series of photographs[1] displayed to the witness, and although the witness subsequently identified defendant from a single photo, the People met their burden of

[1] In addition, the evidence shows that defendant's photo was not among those included in the computer-generated array.

establishing that the identification was confirmatory, thus rendering moot any suggestiveness in the identification procedure (*see People v Rodriguez*, 79 NY2d 445, 450 [1992]; *People v Bryant*, 253 AD2d 672 [1st Dept 1998], *lv denied* 92 NY2d 980 [1998]). Two detectives testified at the hearing that the eyewitness had told them he had seen defendant in the neighborhood "all the time" in the two years preceding the murder, that he was "always associated with" another man whom the eyewitness knew since childhood, and that he had been in two fights with defendant before the murder, one a month or two earlier, and one on the same day. That testimony sufficed, and testimony from the identifying witness was unnecessary under the circumstances. There is no basis for disturbing the hearing court's credibility determinations.

Defendant did not preserve any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The vast majority of comments were responsive to defense counsel's attacks on the credibility of prosecution witnesses (*see People v Halm*, 81 NY2d 819, 821 [1993]). To the extent that a few isolated comments might be deemed error, there

was no pattern of inflammatory remarks, nor any conduct so egregious as to warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 10, 2018

CLERK

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

7085 Carlos Sampedro, et al., Index 307054/09
Plaintiffs-Appellants,

-against-

Ellwood Realty, LLC, et al.,
Defendants-Respondents.

_____

Simonson Hess Leibowitz & Goodman, PC, New York (Alan B. Leibowitz of counsel), for Carlos Sampedro and Gina Sampedro, appellants.

Richard Janowitz, PC, Mineola (Richard Janowitz of counsel), for Belarminio Ramirez, appellant.

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered October 4, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record establishes that the subject building's superintendent was not responsible for performing flooring renovations on defendants' behalf, and that defendants did not undertake to perform, contract for, or pay for flooring work in tenants' apartments. Although the superintendent recommended plaintiffs to a tenant who was interested in having flooring work in her apartment, he assisted plaintiffs in performing some of

the work, and recommended that plaintiffs use paint or lacquer thinner as part of the flooring work, the work he performed was not part of his duties for the building owner or manager. Since the superintendent was not acting within the scope of his employment, defendants cannot be held liable for his actions (*see Davis v City of New York*, 226 AD2d 271 [1st Dept 1996], *lv denied* 88 NY2d 815 [1996]; *Stavitz v City of New York*, 98 AD2d 529, 531 [1st Dept 1984]).

Furthermore, "[a]s a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work" (*Saini v Tonju Assoc.*, 299 AD2d 244, 245 [1st Dept 2002]). Here, the relationship between defendants, as property owner/manager, and plaintiffs, as independent contractors, is even more attenuated than the typical principal-independent contractor relationship. Plaintiffs were not retained by defendants to perform the flooring work, but by a third party, namely a tenant in defendants' building. Accordingly, defendants cannot be held liable for the results of the means and methods of an independent

contractor which they did not hire in the first instance, and over whose work they had no control.

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

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

ENTERED: JULY 10, 2018

CLERK

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

7086 The People of the State of New York, Ind. 4155/14
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Richard Carruthers, J. at plea; James Burke, J. at sentencing), rendered November 2, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: JULY 10, 2018

CLERK

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

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

7090-
7091 The People of the State of New York, Ind. 15/15
Appellant,

-against-

Bonhof Gaston, etc.,
Defendant-Respondent.

_____

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

Christina Swarns, Office of the Appellate Defender, New York (Caitlin Glass of counsel), for respondent.

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Order, Supreme Court, Bronx County (William I. Mogulescu, J.), entered on or about August 15, 2017, which granted defendant's CPL 440.10 motion to vacate a June 10, 2015 judgment of conviction, unanimously reversed, on the law, and the matter remanded for a hearing on defendant's claim of ineffective assistance of counsel as to the issue of prejudice, and for a decision de novo on the motion.

The court improvidently exercised its discretion in summarily granting, without holding a hearing, defendant's motion seeking to vacate of the judgment on the ground that, with respect to the immigration consequences of his guilty plea, his counsel failed to advise him (*see Padilla v Kentucky*, 559 US 356,

367-369 [2010]), or misadvised him *(see People v McDonald*, 1 NY3d 109, 113-14 [2003]).

In 2014, defendant was indicted for assault-related felonies. In 2015, defendant pleaded guilty to third-degree assault under Penal Law § 120.00(1), and was sentenced to a term of one year. During the plea colloquy, the court asked defense counsel, "[H]ave you discussed the immigration consequences of this guilty plea with your client?" Counsel replied, "There are none." The court then gave defendant a warning of possible deportation in accordance with *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US —, 135 S Ct 90 [2014]). At the time of his guilty plea, defendant was also under indictment in Supreme Court, Kings County for attempted murder in a separate incident involving his pressing a firearm against a man's head and shooting him.

By pro se papers dated March 24, 2016, defendant moved to vacate his third-degree assault conviction pursuant to CPL 440.10. In a written decision dated July 11, 2016, the court denied defendant's pro se motion. Defendant then obtained new counsel, who filed a second CPL 440.10 motion dated March 9, 2017 seeking the same relief, which, as stated above, was granted by the court in its August 15, 2017 order.

Counsel's statement on the record that there were no immigration consequences to the plea was incorrect because defendant pleaded guilty to a crime involving moral turpitude for immigration purposes (*see* Immigration and Nationality Act § 212[a][2][i][II]), and as such this conviction formed a part of the basis for a deportation order issued for defendant. We find that counsel's misadvice regarding the immigration consequences of defendant's plea, as established by the record of the plea proceeding, fell below an objective standard of reasonableness, thereby satisfying the first prong of the federal test for evaluating an ineffective assistance claim (*see Strickland v Washington*, 466 US 668, 687 [1984]; *McDonald*, 1 NY3d at 113-114 ["A 'defendant must show that counsel's performance was deficient' and 'that the deficient performance prejudiced the defense'"].

As to *Strickland's* second prong, in support of his counseled CPL 440.10 motion, defendant provided (1) his own affidavit stating that plea counsel did not discuss with him the immigration consequences of the plea, and that he would not have pleaded guilty had he known it could result in his deportation; and (2) an affirmation by counsel, who had no recollection of whether he discussed immigration consequences with defendant but

did not dispute the accuracy of the plea minutes. The People opposed the motion, inter alia, on the grounds that defendant had, only weeks after entering his guilty plea in the instant case, pleaded guilty in the Kings County case to attempted second-degree assault, an aggravated felony, which he was informed during his plea was a deportable offense. The People thus argued that immigration consequences could not have been at the forefront of defendant's mind when he pleaded guilty three weeks earlier in this case.

CPL 440.30 authorizes the summary granting of a motion to vacate a judgment of conviction where the moving papers allege a ground constituting a legal basis for the motion (CPL 440.30[3][a]); where that ground, if factually based, is supported by sworn allegations of fact essential to support the motion (CPL 440.30[3][b]); and where the sworn allegations of essential fact are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof (CPL 440.30[3][c]). If all three of these statutory criteria are not met, the court may not grant a CPL 440.10 motion without first conducting a hearing (CPL 440.30[5]).

Here, only two of the three CPL 440.30[3] statutory criteria for granting defendant's CPL 440.10 motion without a hearing were

satisfied. Defendant's moving papers alleged that his plea counsel provided him ineffective assistance by failing to advise him of the immigration consequences of his plea and that, had defendant known that his guilty plea could result in deportation, he would not have entered the plea. Furthermore, at the plea proceeding, when the court inquired whether plea counsel had discussed "the immigration consequences of this guilty plea with [his] client," plea counsel replied, "There are none." Thus, defendant satisfied the first statutory criterion by alleging a legal basis for his CPL 440.10 motion (CPL 440.30[3][a]). Defendant's affidavit in support of the motion contained sworn allegations of fact to the effect that defense counsel never spoke to him about the immigration consequences of his plea, and that his defense counsel stated before the court and in his presence that there would be none.

Defendant's affidavit includes his sworn allegations that he was born in Haiti in 1985, that he came to the United States at the age of five, that he was a lawful permanent resident, that his parents became naturalized United States citizens and that his wife, who was also a lawful permanent resident, was in the process of becoming a United States citizen. The affidavit also contained defendant's sworn statement that he would not have

entered his guilty plea had he known of its immigration consequences at the time he entered it. Because these sworn factual allegations were essential to support the objective standards of reasonableness and prejudice prongs of defendant's motion, the second statutory criterion is satisfied (*see* CPL 440.30[3][b]).

Nevertheless, the People did not concede the essential factual allegations on the issue of prejudice. Indeed, they expressly noted that defendant's allegations of longstanding ties to the United States and lack of any connection to Haiti were entirely unsubstantiated. Neither did defendant proffer documentary proof conclusively substantiating his sworn factual allegations in support of his claim that "but for [his plea] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (*Hill v Lockhart*, 474 US 52, 59 [1985]; *People v Hernandez*, 22 NY3d 972, 975 [2013]). Moreover, before the motion court, the People questioned defendant's claim that his guilty plea was attributable to his lack of awareness of its immigration consequences, given defendant's having obtained cancellation of removal for his 2006 conviction by plea to criminal possession of a weapon in the third degree after a final order of removal had been issued against him for conviction of an

aggravated felony. Thus, defendant's CPL 440.10 motion failed to satisfy the third criterion of CPL 440.30(3), and for that reason, the motion court abused its discretion in granting defendant's CPL 440.10 motion without first conducting a hearing and making findings of fact (*see* CPL 440.30[5]).

Accordingly, an evidentiary hearing on this motion is required (*see People v Sanchez*, 150 AD3d 589, 589-590 [1st Dept 2017] [hearing required on *McDonald* claim, despite the defendant's sworn factual averments and plea counsel's affidavit abjuring any recollection of her advice she may have given to the defendant]). With respect to the prejudice prong of defendant's ineffective assistance claim, appropriate factors to be weighed at the hearing include, among other things, evidence of defendant's incentive to remain in the United States rather than return to Haiti, his respective family and employment ties to the United States and his country of origin, the strength of the People's case and defendant's sentencing exposure (*see People v Chacko*, 99 AD3d 527, 527 [1st Dept 2018], *lv denied* 20 NY3d 1060 [2012]; *People v Picca*, 97 AD3d 170, 183-186 [2d Dept 2012]). Moreover, especially in light of possible inconsistencies in the factual averments made by defendant in his earlier pro se motion and his counseled motion, the hearing court should also consider

the credibility of defendant's claim that he would have rejected the plea had he been properly informed of its consequences (*see People v Samuels*, 143 AD3d 401, 403 [1st Dept 2016] [credibility of the defendant's *Padilla* and *McDonald* claims should be determined only after a hearing]).

Although the court warned defendant of the potential for deportation, his counsel's contrary advice, that there was no such potential, undermined the court's warning (*see People v Corporan*, 135 AD3d 485 [1st Dept 2016]). Thus, the court's warning did not obviate the need for a hearing on defendant's claim of ineffective assistance of counsel (*see People v Mebuin*, 158 AD3d 121, 130 [1st Dept 2017] [ordering hearing on *McDonald* claim notwithstanding plea court's warning of deportation consequences of guilty plea]).

For purposes of considering the prejudice prong of defendant's claim at the hearing, it is of no moment that when taken into custody by immigration authorities, defendant chose to fight deportation and spent over a year in immigration detention, rather than being deported to Haiti, and also moved to vacate his plea, as these events occurred subsequent to defendant's entry of his guilty plea. The appropriate inquiry on the issue of prejudice is limited to the defendant's circumstances as they

were at the time of entry of the guilty plea (*see Roe v Flores-Ortega*, 528 US 470, 480 [2000]). Thus, defendant's factual assertions that he and his wife are lawful permanent residents, that his parents are naturalized United States citizens and that his wife is in the process of becoming one may be considered only if those were among defendant's circumstances at the time of his plea, rather than at the time of his 2017 sworn affidavit.

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

ENTERED: JULY 10, 2018

CLERK

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

7092 The People of the State of New York, Ind. 2465/15
Respondent,

-against-

Dwayne Pearson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J. at counsel application; Ruth Pickholz, J. at jury trial and sentencing), rendered March 25, 2016, as amended July 11, 2016, convicting defendant of burglary in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In this burglary of a store, the evidence amply supported the jury's conclusion that defendant knowingly entered the premises unlawfully. A trespass notice, signed by defendant, clearly and unequivocally informed him that he was prohibited from entering the store again (*see*

People v Ramnarain, 52 AD3d 348, 349 [1st Dept 2008], *lv denied* 11 NY3d 793 [2008]; *People v Polite*, 302 AD2d 227 [1st Dept 2003], *lv denied* 99 NY2d 657 [2003]). The evidence also showed that defendant intended to commit a crime in the store, because his conduct clearly evinced an attempt to steal merchandise (*see e.g. People v Brunson*, 294 AD2d 104 [1st Dept 2001], *lv denied* 98 NY2d 695 [2002]).

When viewed in context, an isolated remark during the prosecutor's summation, to which defendant objected on the ground that the prosecutor was "testifying," constituted permissible comment on the evidence. Defendant did not preserve any other challenges to the summation, and we decline to review them in the interest of justice. As an alternative holding, we conclude that the challenged remarks generally constituted fair comment on the evidence, including the drawing of reasonable inferences, and were responsive to defendant's summation. To the extent that some of the comments were better left unsaid, they were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D' Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's ineffective assistance of counsel claims are

unreviewable on direct appeal because they principally involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffective assistance claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or had a reasonable probability of affecting the outcome of the case, including the length of the sentence.

Under the totality of circumstances, defendant's unelaborated, eve-of-trial request for yet another attorney, made

a few months after a prior request had been granted, did not require the court to make a minimal inquiry (*see People v Porto*, 16 NY3d 93, 100-101 [2010]; *People v Sides*, 75 NY2d 822, 824-825 [1990]).

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

ENTERED: JULY 10, 2018

CLERK

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

7093N Darcel D. Clark, etc., Index 42224/17E
Plaintiff-Appellant,

-against-

Derrick Richardson,
Defendant-Respondent.

_____

Darcel D. Clark, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Derrick Richardson, respondent pro se.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered September 7, 2017, which, in this civil forfeiture action, denied plaintiff's motion for a default judgment, and dismissed the complaint sua sponte, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff District Attorney established entitlement to judgment by submitting the complaint, which was verified by an Assistant District Attorney who was "acquainted with the facts" of the underlying criminal action (CPLR 3020[d][2]). The verified complaint was properly submitted in lieu of an affidavit of merit (*see* CPLR 3215[f]), since it was supported by the arresting detective's allegations in the felony complaint and a laboratory report finding that substances found in defendant's

possession were heroin and cocaine. It is not dispositive that defendant was convicted only of the misdemeanor of criminal possession of a controlled substance in the seventh degree, since the People met their burden of establishing by clear and convincing evidence that the subject money was the proceeds of defendant's commission of a Penal Law article 220 felony, namely criminal possession of a controlled substance in the third degree (*see Johnson v Miller*, 41 AD3d 250 [1st Dept 2007]; *see also* CPLR 1310[6], 1311[1][b]). The People also established proper service of the summons and complaint and the notice of motion (*see* CPLR 3215[f], [g][1]).

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

ENTERED: JULY 10, 2018

CLERK

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

7097N Good Gateway, LLC, et al., Index 160660/16
Plaintiffs-Appellants,

-against-

Rohan Thakkar,
Defendant-Respondent.

_____

Strassberg & Strassberg, P.C., New York (Todd Strassberg of counsel), for appellants.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered January 10, 2018, which denied plaintiffs' motion for a default judgment setting aside a loan forgiveness document and awarding them $2,720,849.63 against defendant, unanimously modified, on the law, to grant the motion to the extent of setting aside the loan forgiveness document, and to remand the matter for a hearing on the appropriate remedy, and otherwise affirmed, without costs.

Plaintiffs allege, and submitted proof demonstrating, that they obtained final judgments in the total amount of $14.5 million against defendant's father, Chittranjan Thakkar, in a lawsuit in Florida; that, during the pendency of the Florida lawsuit, Chittranjan executed a document in Florida forgiving a debt in the amount of $2,720,849.63 that was owed to him by

defendant, without receiving any consideration in return; and that Chittranjan has not paid any part of the judgments entered against him. Under Florida law, this evidence is sufficient to raise a rebuttable presumption that Chittranjan's forgiveness of his son's debt was a conveyance made with actual intent to hinder or delay creditors, including plaintiffs (*see General Elec. Co. v Chuly Intl., LLC*, 118 So 3d 325, 328 [Fla Dist Ct App 2013]; Fla Stat § 726.105 [2013]). If New York law were applied, the loan forgiveness would also be constructively fraudulent (*see* Debtor and Creditor Law § 273-a), since there was a transfer for no consideration after the commencement of the action in which the unsatisfied judgments were entered (*see Garden City Co. v Kassover*, 251 AD2d 9 [1st Dept 1998], *lv dismissed* 93 NY2d 848 [1999]).

Having defaulted, defendant "admit[ted] all traversable allegations in the complaint, including the basic allegation of liability, but [did] not admit [plaintiffs'] conclusion as to damages" (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]; *see also Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Thus, plaintiffs are entitled to the entry of a judgment setting aside the loan forgiveness and reinstating defendant's debt to Chittranjan, the judgment debtor. Under Florida law, plaintiffs

are further entitled to judgment for the "value of the asset transferred," to the extent that value is less than the value of their claims (*see McCalla v E.C. Kenyon Constr. Co., Inc.*, 183 So 3d 1192, 1194-95 [Fla Dist Ct App 2016]; Fla Stat § 726.109[2]). Since the terms of the forgiven loan are not before us, we are unable to determine the value of the loan or otherwise fashion an appropriate remedy. Accordingly, the matter is remanded for an inquest.

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

ENTERED: JULY 10, 2018

CLERK

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

7098N In re John S. Matthews, Index 654285/16
Petitioner-Appellant,

-against-

Mark Altstetter,
Respondent-Respondent.

_____

Perkins Coie LLP, Seattle, WA (Eric D. Miller of the bar of the State of Washington, the District of Columbia and the State of California, admitted pro hac vice of counsel), for appellant.

Dayton P. Haigney, New York, for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered June 30, 2017, which denied the petition to vacate an arbitration award, confirmed the award and dismissed the proceeding, unanimously affirmed, with costs.

The motion court properly found that the award was not in manifest disregard of the law (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480-482 [2006], *cert dismissed* 548 US 940 [2006]), given the basis for inferring that the arbitrator found that petitioner, as chief executive officer of a brokerage house, was a "control person" under the governing Oregon statute

(OR Rev Stat § 59-115[3]), and failed to carry his burden under that statute of proving that he lacked constructive knowledge of the broker's misconduct.

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: JULY 10, 2018

CLERK

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

7099 In re Sharif King, Index 5848/15
[M-1940] Petitioner, OP 146/18

-against-

Hon. Neil Ross, etc.,
Respondent.

_____

Sharif King, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Allison J. Gill of counsel), for 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.

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

ENTERED: JULY 10, 2018

CLERK