SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 1, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4587N In re John Townson, Index 805103/16
Petitioner-Respondent,

-against-

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

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Zachary W. Carter, Corporation Counsel, New York (Max O. McCann of counsel), for appellant.

Blyer & Kurland, P.C., Jericho (Steven R. Blyer of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered June 24 2016, granting the petition for leave to serve a late notice of claim, affirmed, without costs.

The issue on this appeal is whether Supreme Court properly exercised its discretion in granting petitioner's application for leave to serve on respondent New York City Health and Hospitals Corporation a notice of claim after the statutory 90 days had

expired. We hold that it did.

On December 12, 2014, petitioner John Townson (Townson), an electrician, was treated at Bellevue Hospital's (Bellevue) emergency room for a deep laceration to his right thumb. Townson had cut his thumb while cutting electrical wire with an "electric knife." X-rays taken at the emergency room indicated no broken bones or metal left behind in the wound. Townson's laceration was sutured and he was discharged the same day. He was told he could go back to work in two days.

A few days later, Townson found he could not bend or flex his thumb. Townson never returned to Bellevue, or to any other Health and Hospitals Corporation (HHC) facility for further treatment of his thumb. After a few months, he consulted with Dr. Goldstein, not affiliated with HHC, who recommended physical therapy for his thumb. On March 19, 2015, an MRI of Townson's thumb revealed a torn flexor tendon.

In or about April 2015 — less than a month after the 90-day notice of claim period expired — Townson retained an attorney. The attorney proceeded to send three separate letter requests for Townson's medical records to HHC and Bellevue in April, June and July of 2015. After not receiving any reply, Townson's attorney telephoned Bellevue's medical records department in August 2015.

By March 2016, Townson still had not received medical records from HHC, and petitioned Supreme Court for leave to file a late notice of claim before the applicable statute of limitations expired.

Supreme Court granted Townson's petition finding that although the medical records did not provide actual notice to HHC because they did not contain the essential underlying facts, Townson adequately pleaded excusable error due to HHC's refusal to forward the requested medical records to Townson. The court also found no substantial prejudice to HHC as a result of the delay because HHC was not "hindered in its attempt to investigate" or defend the claim. HHC has appealed.

Under General Municipal Law § 50-e(1)(a), a notice of claim must be served on a public corporation "within ninety days after the claim arises." However, a court may, in its discretion, permit a plaintiff to serve a notice of claim on a municipal entity after the 90-day period (*see Cartagena v New York City Health & Hosps. Corp.*, 93 AD3d 187, 190 [1st Dept 2012]). In making this determination, the court may consider whether there was a reasonable excuse for the delay, actual knowledge on the part of HHC of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time

thereafter and substantial prejudice due to the delay (General Municipal Law § 50-e[5]; *Wally G. v New York City Health & Hosps. Corp [Metro. Hosp.]*, 27 NY3d 672, 675 [2016]); *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]; *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 825 [1st Dept 2010]). None of these enumerated factors is controlling (*Dardzinska v City of New York*, 123 AD3d 483 [1st Dept 2014]). However, "[w]hile the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance" (*Matter of Rojas v New York City Health & Hosps. Corp.*, 127 AD3d 870, 872 [2d Dept 2015] [internal quotation marks omitted]).

General Municipal Law § 50-e "contains a nonexhaustive list of factors that the court should weigh, and compels consideration of all relevant facts and circumstances" (*Williams*, 6 NY3d at 539). Therefore, Supreme Court's decision to grant or deny a motion to serve a late notice of claim is purely a discretionary one so long as the determination is based on the factors set forth in General Municipal Law § 50-e and is supported by record evidence (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 465 [2016]; *Wally G.*, 27 NY3d at 675. Here, when

weighing all the relevant facts and circumstances, Supreme Court properly exercised its discretion in allowing service of a late notice of claim, even though not all factors weighed in Townson's favor.

The dissent notes, and it is undisputed, that the medical records do not contain any indication of Townson's torn tendon. However, a hospital's actual knowledge of a potential malpractice claim may be imputed where it possesses medical records that "'*evince* that the medical staff, by its acts or omissions, inflicted an[] injury on plaintiff'" (*Wally G.*, 27 NY3d at 677, quoting *Williams*, 6 NY3d at 537). HHC has actual knowledge "of a claim when it creates a contemporaneous medical record containing the essential facts constituting the alleged malpractice" (*Cartagena*, 93 AD3d at 190).

The actual knowledge requirement "contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" (*Wally G.*, 27 NY3d at 677, quoting *Williams*, 6 NY3d at 537). Facts found in medical records that merely "suggest" the possibility of malpractice are insufficient, as a plaintiff must demonstrate a hospital's actual knowledge of negligent acts or omissions which result in injury to a plaintiff (*Wally G.*, 27 NY3d at 677). Supreme Court

correctly found that HHC did not acquire actual knowledge of Townson's malpractice claim through the medical records. The dissent concedes that Townson, Bellevue, Dr. Goldstein and the physical therapy practitioners did not learn of Townson's torn tendon until March 19, 2015, after the 90-day period had expired. The dissent argues that Townson's excuse may have been reasonable had he requested leave to file shortly after March 19, 2015, when he learned of the torn tendon. In the dissent's view the delay in serving the notice of claim is not excusable.

We disagree. Townson's claim of malpractice is premised upon a theory that the emergency room failed to evaluate whether internal, connective soft tissue damage resulted from the deep laceration. Townson's counsel, at the time he was retained, which was immediately after Townson had learned of the torn tendon, promptly sent a request to HHC for the medical records to discern the viability of Townson's malpractice claim, but HHC failed to respond on multiple occasions (*see e.g. Matter of Rojas*, 127 AD3d at 872 [the petitioner's one-year delay in seeking leave to file a late notice of claim was reasonable, in light of evidence that HHC failed to respond to "multiple, prompt requests" for the autopsy report during an eight month period]; *see also Cassidy v County of Nassau*, 84 AD2d 742 [2d Dept 1981]

[delay in seeking leave to file a late notice of claim excused where delay could be attributed to the county's failure to respond to the petitioner's counsel's multiple requests for medical records that were needed to demonstrate the claim]).

The dissent's reliance upon *Alexander v City of New York* (2 AD3d 332 [1st Dept 2003]) and *Potts v City of N.Y. Health & Hosps. Corp.* (270 AD2d 129 [1st Dept 2000]) is misplaced. In *Alexander* we rejected the excuse that the petitioner was awaiting an accident report as liability was not based on the report. Here, HHC's potential liability is necessarily predicated upon the medical records of Townson's treatment at Bellevue. In *Potts* we found that HHC's delay in responding to counsel's multiple requests did not justify counsel's delay in filing the petition *as* the hospital records were unnecessary to the petitioner filing a late notice of claim. Here, unlike *Potts*, Townson needed to fully review the medical records to determine whether HHC failed to examine the soft tissues supporting the thumb.

Moreover, an attorney and client should not be penalized for waiting for medical records to file a complete and accurate notice of claim. Under these circumstances, the motion court providently exercised its discretion in finding that Townson had a reasonable excuse for not serving a timely notice of claim.

The burden on the issue of substantial prejudice potentially associated with a late notice of claim rests in the first instance with the petitioner (*see Matter of Newcomb*, 28 NY3d at 466-467). This showing "need not be extensive, but … must present some evidence or plausible argument that supports a finding of no substantial prejudice" (*id.* at 466).

Townson has met this initial burden. Townson sent multiple letters from his counsel seeking his treatment records within four to seven months of his treatment, including HIPAA information and treatment dates, thereby alerting HHC to the potential for a claim. Additionally, HHC's own delay in responding to Townson's multiple requests for medical records is responsible for much of Townson's delay in filing the notice of claim, and any resultant prejudice. The nature of the serious wound, the photographic evidence of the wound, and the issue of whether the medical records reflected a negligent omission to fully evaluate the extent of his injuries, involved circumstances where faded memories are less likely to be an issue, and less likely to compromise a defense against the negligent "omission" malpractice claim. Although Supreme Court erred by placing the initial burden on HHC, on this record, we find that Townson met his burden by presenting some evidence to show no substantial

prejudice to HHC.

Once a petitioner has made this initial showing, "the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed" (*Matter of Newcomb*, 28 NY3d at 467). Although lack of actual knowledge and lengthy delays may be important factors in determining substantial prejudice, mere inferences cannot support this finding without support in the record, including changes in personnel and the fading memories of witnesses (*id.* at 465-466). HHC has not satisfied its burden of establishing that it is substantially prejudiced by the late notice of claim.

Indeed, "there may be scenarios where, despite a finding that the public corporation lacked actual knowledge during the statutory period or a reasonable time thereafter, the public corporation nonetheless is not substantially prejudiced by the late notice" (*id.* at 467). We find this is the case here. HHC has only made general assertions that memories fade with time where emergency room physicians treat thousands of patients throughout a year. There is nothing in the record supporting these conclusory

assertions, which are adopted by the dissent. HHC does not allege that Townson's treating emergency physician is no longer in its employ, or that such physician has claimed a lack of recollection of the treatment in question. As the record is absent of any particularized evidentiary showing, HHC has failed to show how it will be substantially prejudiced if the late notice of claim is allowed.

Finally, it is worth emphasizing that the motion court's decision in granting Townson's application for an extension is "'purely a discretionary one'" (*Wally G.*, 27 NY3d at 675, quoting *Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 265 [1980]). Accordingly, the proper inquiry is whether the motion court providently exercised its discretion in granting Townson's application (*Pearson v New York City Health & Hosps. Corp.*, 10 NY3d 852 [2008]). As was aptly pointed out in *Gecaj v Gjonaj Realty & Mgt. Corp.* (149 AD3d 600, 612 [1st Dept 2017, Friedman, J., dissenting]), this Court's "power to substitute its own discretion for that of Supreme Court. . .should be *sparingly exercised*" (emphasis added). Under the liberal standard of General Municipal Law § 50-e(1)(a), the motion court providently exercised its discretion in granting the petition, where, among other things, Townson proffered a reasonable excuse for the

filing delay, and HHC has not established substantial prejudice even though it did not receive timely actual knowledge of Townson's malpractice claim.

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

FRIEDMAN, J.P. (dissenting)

I respectfully dissent from the majority's affirmance of the order granting the petition for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e(5). In considering this petition by a competent adult claimant, there are three relevant factors: (1) whether respondent had actual knowledge of the claim within the 90-day notice period or within a reasonable time thereafter; (2) whether petitioner had a reasonable excuse for his delay in serving the notice; and (3) whether respondent suffered any prejudice as a result of the delay (*see e.g. Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 467 [1st Dept 2012], *affd* 21 NY3d 983 [2013]). While "the presence or absence of any one factor is not determinative" (*Plaza*, 97 NY3d at467 [internal quotation marks omitted]), in my view, the record establishes that petitioner failed to satisfy any of the three factors. Accordingly, notwithstanding Supreme Court's "broad discretion" (*Matter of Newcomb v Middle Country Central Sch. Dist.*, 28 NY3d 455, 465 [2016]) in considering applications of this kind, that discretion was abused in this instance or, at a minimum, so improvidently exercised that this Court should substitute its own discretion for that of Supreme Court. I would therefore reverse and deny

the petition.

The petition is supported by petitioner's affidavit, sworn to May 6, 2015 — about 10 months before the petition itself was filed in Supreme Court on March 4, 2016. Petitioner, an electrician, states that he lacerated his right thumb with an electric knife while working on December 12, 2014. He was treated that day at the Bellevue Hospital emergency room, operated by respondent New York City Health and Hospitals Corporation (HHC). At Bellevue, petitioner's right hand was x-rayed "to determine if the bone was fractured and whether a piece of metal was still in [his] thumb." The x-rays were negative, and the wound was sutured by a resident. Petitioner was discharged with instructions that he could return to work after two days. When petitioner subsequently found himself unable to flex the thumb, he sought further attention for this injury from Dr. Goldstein, a physician in private practice, who sent him to a physical therapist. When the condition failed to improve after 12 weeks of physical therapy, Dr. Goldstein referred petitioner to an orthopedist, Dr. Wertlieb, who examined him on March 5, 2015, and thereupon ordered an MRI. On March 19, 2015, Dr. Wertlieb told petitioner that the MRI had revealed a torn flexor tendon, and that the stiff condition of his thumb might not

improve.[1]

Shortly after learning about his torn tendon on March 19, 2015, petitioner engaged his present counsel. In his affirmation, counsel avers that, after consulting with petitioner, he sent the medical records department at Bellevue a form letter, dated April 6, 2015, requesting a copy of the records of petitioner's treatment, with an attached authorization. Having received no response from Bellevue, counsel resent the same letter (marked "SECOND REQUEST") on May 19, 2015, and then again (marked "THIRD REQUEST") on July 7, 2015. On August 4, 2015, having still received no response, counsel called the Bellevue records department to ask when the records would be sent. As of the date of the filing of the petition — March 4, 2016, seven months after his last contact with Bellevue — counsel still had received no records. Counsel

[1]While I recognize that it has no bearing on whether the petition should be granted, I find it notable that Dr. Goldstein, the private physician with whom petitioner first consulted after the treatment at Bellevue, did not initially order an MRI in response to petitioner's continuing inability to flex his thumb. Rather, Dr. Goldstein first referred petitioner to physical therapy. It was only when the stiffness of the thumb persisted after 12 weeks of physical therapy that Dr. Goldstein referred petitioner to the orthopedist who finally ordered an MRI. In this regard, it should be borne in mind that the deviation from the standard of care with which petitioner charges HHC is the failure of the Bellevue emergency room staff to order an MRI.

states that he filed the petition without having received the records because "the one year and 90 days limit [was] fast approaching."[2]

The majority and I are in agreement that petitioner failed to make a favorable showing on the first factor to be considered on this application, namely, whether HHC had actual knowledge of the claim within the 90-day notice period or a reasonable time thereafter — a factor that the majority acknowledges to be "of great importance" (*Matter of Rojas v New York City Health & Hosps. Corp.*, 127 AD3d 870, 872 [2d Dept 2015] [internal quotation marks omitted]). The Court of Appeals has recently reaffirmed that "[a] medical provider's mere possession or creation of medical records does not ipso facto establish that it had 'actual knowledge of a potential injury where the records do not *evince* that the medical staff, by its acts or omissions, inflicted any injury on plaintiff'" (*Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672, 677 [2016], quoting *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]). In *Wally G.*, the Court of Appeals explained that, under this standard, it is not enough to negate prejudice to a medical

[2]Specifically, the applicable statute of limitations expired on March 11, 2016, a week after the petition was filed.

provider from late service of notice that a medical expert might opine, "based on . . . the medical records, [that] the medical staff deviated from the standard of care" (27 NY3d at 677). Rather, the Court reiterated, "[T]he medical records must 'evince that the medical staff, by its acts or omissions, inflicted an[] injury on plaintiff' in order for the medical provider to have actual knowledge of the essential facts" (*id.*, quoting *Williams*, 6 NY3d at 537).

Here, the claim against HHC is based on Bellevue's failure to diagnose the torn flexor tendon during the treatment of petitioner's lacerated thumb. Even if petitioner ultimately presents an expert affidavit opining that the records of petitioner's treatment, by themselves, reveal that the medical staff deviated from the standard of care by failing to take some step — such as performing an MRI — that, if taken, would have revealed the torn tendon, it is undisputed that the medical records themselves contain no indication of the torn tendon and, therefore, cannot be said to "evince" that any such deviation from the standard of care "inflicted any injury on [petitioner]" (*Williams*, 6 NY3d at 537).

Notwithstanding its acknowledgment that the record provides no basis for finding that HHC had actual knowledge of

petitioner's claim within the notice period, the majority affirms the granting of the petition based on its view that petitioner made a favorable showing on the other two relevant factors, namely, a reasonable excuse for the delay in serving the notice and lack of prejudice to HHC. For the reasons discussed below, I disagree with the majority's view that petitioner demonstrated either a reasonable excuse for the full extent of his delay in serving a notice of claim or that HHC did not suffer substantial prejudice as a result of that delay.

I turn first to the issue of reasonable excuse. The proposed notice of claim that petitioner seeks leave to serve was verified by petitioner on May 6, 2015 — the same date on which he executed his supporting affidavit — and states in pertinent part (paragraph numbers omitted):

> "The nature of the claim: Claim for medical malpractice in failing to properly treat a torn tendon of the right thumb and closing the claimant's wound without repairing the tendon.
>
> "The time when, the place where, and the manner in which the claim arose:
>
> "The claim arose on Dec. 12, 2014 at approx. 4:30 p.m. in the emergency room of Bellevue Hospital Center in NYC. The claim arose when the claimant was improperly treated by the doctor's [sic] and nurses of Bellevue Hospital Center. The claimant was improperly

> treated when the doctor who treated the claimant for a deep laceration to the right thumb neglected and failed to properly evaluate and treat the injury to claimant's thumb. The defendants further misdiagnosed the nature and extent of the injury, failed to properly suture the injury, failed to perform the appropriate diagnostic tests, made an incorrect clinical diagnosis[.] Failure to repair torn tendon of the right thumb."

To reiterate, the foregoing proposed notice of claim was prepared without the benefit of the relevant medical records. So were petitioner's supporting affidavit and the accompanying affirmation of counsel. In fact, both the proposed notice of claim and petitioner's affidavit were executed on May 6, 2015, 10 months before the petition was filed.

As is evident from the fact that the proposed notice of claim was drafted and verified before any medical records had been received, Bellevue's delay in sending those records to counsel does not constitute a reasonable excuse for waiting to seek leave to serve that notice of claim until March 4, 2016, nearly a year after Dr. Wertlieb advised petitioner of the torn tendon on March 19, 2015. As of the latter date, petitioner knew that the Bellevue emergency room had failed to diagnose or treat his torn tendon, and he knew that Bellevue had not used the diagnostic means (an MRI) that ultimately revealed the torn

tendon. He had enough information to consult counsel about a potential claim, and counsel knew enough to prepare a notice of claim and an affidavit by petitioner requesting leave to file it after the expiration of the 90-day period. Indeed, had the petition been filed in or about March 2015, when petitioner learned of his torn tendon and retained counsel, or within a reasonable time thereafter, the delay in serving the notice of claim unquestionably would have been excusable. I see no excuse, however, for waiting 11 months from the hiring of counsel, and 10 months from the drafting and verification of the proposed notice of claim, to file the petition. The medical records will be needed, of course, to try the case, but were not needed to prepare a notice of claim.[3]

This Court has held that waiting to receive a report on the incident giving rise to a claim does not constitute a reasonable excuse for delay in serving a notice of claim where the claimant, even without the report, "had all the information necessary to

[3]The majority states that petitioner "needed to fully review the medical records to determine whether HHC failed to examine the soft tissues supporting the thumb." However, the above-quoted proposed notice of claim, which was prepared without benefit of the medical records, makes just that assertion, albeit in conclusory fashion. There is no requirement that a notice of claim be as detailed as a bill of particulars or that it be accompanied by an expert affidavit.

file a . . . notice" (*Alexander v City of New York*, 2 AD3d 332 [1st Dept 2003]). In a case in which we rejected the claimant's lack of medical records as an excuse for the late filing of a notice of claim against HHC, we stated: "Although plaintiff asserts that the delay was attributable to the circumstance that she was awaiting hospital records, it is plain that those records were not necessary to the composition and filing of her claim" (*Potts v City of N.Y. Health & Hosps. Corp.*, 270 AD2d 129, 129 [1st Dept 2000]). Here, as in *Potts*, "it is plain that [the hospital] records were not necessary to the composition and filing of [the] claim" (*id.*); *see also Rechenberger v Nassau County Med. Ctr.*, 112 AD2d 150, 152 [2d Dept 1985] [in finding that there was no reasonable excuse for a nine-month delay in serving a notice of claim, the Court observed that the hospital records, for which the petitioners claimed they were waiting during part of the period of the delay, "were not necessary to preserve their malpractice claim"]).[4]

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[4]The majority's assertion that petitioner, "unlike [the plaintiff in] *Potts*, . . . needed to fully review the medical records," does not change the fact that petitioner's counsel prepared a notice of claim and the supporting papers (based on the known failure to diagnose the torn tendon), and served and filed them, all without having received the records of petitioner's treatment at Bellevue. I do not understand how the majority can say that petitioner needed the Bellevue medical

The two Second Department cases relied upon by the majority are not to the contrary. In *Rojas*, the Court found that it was reasonable for the petitioner to wait to serve a notice of claim until after the hospital finally provided her with the autopsy report for her stillborn fetus in response to her "multiple, prompt requests" (127 AD3d at 872). The *Rojas* petitioner had no basis on which to claim that the death of the fetus in utero was due to the hospital's neglect without knowing the cause of the fetal death. Similarly, in *Cassidy v County of Nassau* (84 AD2d 742 [2d Dept 1981]), a hysterectomy was performed on the plaintiff based on a misdiagnosis of a fibroid uterus, and the plaintiff did not learn that she actually had been pregnant with a viable fetus until the hospital finally sent her the record of

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records to prepare a notice of claim when it is granting leave to serve a notice of claim that was, in fact, prepared and served without the benefit of those records. And, to reiterate, petitioner knew, without having received the medical records, that Bellevue had not taken an MRI of his injury. The majority's attempt to distinguish *Alexander* also fails, as the principle for which that decision stands — that waiting to receive documents unnecessary to the preparation of a notice of claim does not excuse delaying the service of the notice of claim — applies here, notwithstanding that the documents in question ultimately would be needed to adjudicate the case. Plainly, in requiring that a public corporation be given notice of a claim within 90 days, the legislature did not intend to require a claimant to support the notice with a fully fleshed-out prima facie case for imposing liability.

her treatment (*see id.* at 743). In contrast to the claimants in *Rojas* and *Cassidy*, petitioner herein did not need the medical records to know that the hospital had failed to diagnose his torn tendon when he presented at the emergency room with a lacerated thumb.

Petitioner also failed to establish that HHC did not suffer substantial prejudice as a result of his waiting nearly a year after he learned of his torn flexor tendon — from March 19, 2015, to March 4, 2016 — to file his petition to serve a late notice of claim. At the outset, as the majority acknowledges, Supreme Court was mistaken in stating that HHC bore the initial burden to show that it had been prejudiced by the delay. Only last year, the Court of Appeals held that "the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation" (*Newcomb*, 28 NY3d at 466). The majority asserts that petitioner met this burden, but I disagree.

The majority contends that petitioner carried his burden of negating prejudice by pointing to his requests to Bellevue for his treatment records beginning in April 2015, by attributing responsibility for his delay in filing the petition to HHC's delay of its own response to petitioner's requests for medical records, and by contending that the case will likely be tried on

the basis of the medical records, not on the basis of "faded memories." In my view, none of this amounts to a "plausible argument" (*Newcomb*, 28 NY3d at 466) that HHC was not substantially prejudiced by petitioner's lengthy delay. First, petitioner's requests for his medical records are not relevant to the prejudice analysis because, as petitioner's counsel acknowledges, those requests were sent to Bellevue's records department. I see no basis in the record for the majority's implicit assumption that requests directed to the records department of a large urban hospital like Bellevue would have come to the attention of any person with responsibility for handling legal claims against the institution. Nor, for the reasons already discussed, do I see how responsibility for petitioner's lengthy delay in filing the petition can be shifted from petitioner to HHC based on HHC's delay in producing records that, as previously noted, were not needed to prepare the notice of claim. As to HHC's ability to defend this matter based on the medical records, as previously discussed, even the majority concedes that the records did not provide HHC with actual knowledge of the claim. Further, whatever memory of petitioner's treatment his Bellevue healthcare providers may have had in March 2015, when the torn tendon was diagnosed, was surely gone by

March 2016, when this petition was finally filed nearly a year after the diagnosis and the hiring of petitioner's counsel. Since petitioner did not carry his initial burden of negating prejudice, that factor weighs against granting the petition, regardless of the strength of HHC's response.

For the foregoing reasons, I would reverse and deny the petition to serve a late notice of claim. As previously stated, I believe that the granting of the petition, notwithstanding petitioner's inexcusable delay of almost an entire a year in serving a notice of claim that had already been drafted for a known claim, was an abuse of discretion as a matter of law. Even if it could be said that the granting of the petition was not an abuse of discretion, I believe that this is one of the infrequent instances in which we should invoke our "sparingly exercised"

(*Gecaj v Gjonaj*, 149 AD3d 600, 612 [1st Dept 2017, Friedman, J.P., dissenting]) power to substitute our own discretion for that of Supreme Court. Accordingly, I respectfully dissent.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Friedman, J.P., Renwick, Tom, Kahn, Kern, JJ.

5262 Bertrand Tchouke, et al., Index 305891/11
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant,

Montefiore Medical Center,
Defendant-Respondent.

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Wobby Groner Edelman LLP, White Plains (Michael L. Taub of counsel), for appellants.

Furman Kornfeld & Brennan LLP, New York (John Gizunterman of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered May 24, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Montefiore Medical Center for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Bertrand Tchouke was injured when, upon exiting his car, which he had parked parallel to the curb, he slipped and fell on an accumulation of snow on ice alongside the sidewalk abutting Montefiore's property. The record establishes, as a matter of law, that Montefiore's conduct was not a proximate cause of plaintiff's injury because, even if, as plaintiff

claims, Montefiore negligently failed to clear a path between the street and the sidewalk somewhere on the block (*see McKenzie v City of New York*, 116 AD3d 526, 527 [1st Dept 2014]), it had no duty to place such a path at the precise spot where plaintiff parked his car. Moreover, the record is devoid of any evidence that plaintiff intended to use a cleared path but none existed. In this regard, plaintiff, who had been driving the car, testified that, for medical reasons, he could not shift himself over the gear shift to the passenger side to exit the car. We also note that the record establishes that the main part of the sidewalk itself had been cleared of snow and that plaintiff fell as he stepped onto the accumulation of snow that had been created alongside the sidewalk when it was cleared.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5570 The People of the State of New York, Ind. 3173/12
Respondent,

-against-

Franklin Garces,
Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered December 20, 2013, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second and seventh degrees, and sentencing him to an aggregate term of three years, unanimously affirmed.

We find no procedural or substantive basis for suppressing the drugs recovered from defendant. Based on our examination of confidential materials, including minutes of a hearing under *People v Darden* (34 NY2d 177 [1974]), we find that the court properly employed the procedures discussed in *People v Castillo* (80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]), and that the confidential informant provided reliable information, based on personal knowledge, establishing probable cause for

defendant's arrest. Confidential *Darden* hearing testimony may be used to establish, not only the informant's existence, but probable cause itself, where the security concerns and other requirements of *Castillo* are present (*see e.g. People v Lowe*, 50 AD3d 516 [1st Dept 2008], *affd* 12 NY3d 768 [2009]).

The court also properly declined to compel disclosure of the informant's identity either at the suppression hearing or at trial. The record demonstrates a continuing need to conceal the informant's identity, notwithstanding his termination as an informant. Furthermore, defendant did not meet his burden of showing that he needed to call the informant as a trial witness (*see People v Pena*, 37 NY2d 642, 644 [1975]; *People v Goggins*, 34 NY2d 163, 169-170 [1974], *cert denied* 419 US 1012 [1974]).

The People provided reasonable assurances as to the identity and unchanged condition of the drugs seized from defendant, including the fact that the drugs were kept in identifiable containers (*see People v Miller*, 209 AD2d 187, 188 [1st Dept 1994], *affd* 85 NY2d 962 [1995]). The absence of testimony from the chemist who initially tested the drugs, and minor inconsistencies in testimony describing the drugs' appearance, went only to the weight to be accorded the evidence, not its

admissibility (*see People v Julian*, 41 NY2d 340 [1977]; *People v Adderley*, 105 AD3d 505 [1st Dept 2013], *lv denied* 22 NY3d 1154 [2014]).

We have considered and rejected defendant's remaining claims.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5571 In re 222 East 12 Realty, Index 570277/15
Petitioner-Respondent,

-against-

Yuk Kwan So,
Respondent-Appellant,

"John Doe", etc., et al.,
Respondents.

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Mobilization For Justice Inc., New York (Brian J. Sullivan of counsel), for appellant.

Kossoff, PLLC, New York (Alexander B. Fotopoulos of counsel), for respondent.

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Order, Appellate Term, First Department, entered January 12, 2017, which affirmed an order of the Civil Court, New York County (Jack Stoller, J.), entered on or about December 31, 2014, granting petitioner's motion for a judgment of possession pursuant to a stipulation settling a summary holdover proceeding, unanimously affirmed, without costs.

Civil Court's conclusion that respondent was in breach of the parties' stipulation is supported by a fair interpretation of the evidence (*see 409-411 Sixth St., LLC v Mogi*, 22 NY3d 875 [2013]). Pursuant to the stipulation, respondent agreed to refrain from "all conduct specified [in the termination notice]"

(the "Alleged Nuisance Conditions"). Respondent's contention that, to establish a breach, petitioner was therefore required to prove that he had engaged in "all" the conduct that created the Alleged Nuisance Conditions is a distortion of the plain meaning of the stipulation and is illogical. The photographs presented by petitioner at the hearing amply demonstrate the existence of an Alleged Nuisance Condition.

Civil Court properly ruled that respondent was not entitled to an additional opportunity to cure. The stipulation said that if petitioner prevailed at the hearing the court would enter a final judgment of possession providing for a warrant of eviction "with no further stays." In effect, the stipulation itself was the cure, providing respondent with ample opportunity to remedy the nuisance conditions present.

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5572 In re Sa'Fiyah D.,

A Child Under Eighteen Years of Age, etc.,

Mahogany R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondent.

Dawn A. Mitchell, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 7, 2016, to the extent it brings up for review an order of fact-finding, same court and Justice, entered on or about May 4, 2016, which determined, after a hearing, that respondent mother had neglected the subject child due to mental illness, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the subject child was neglected, since the child was at imminent risk of harm due the mother's mental condition (*see*

Matter of Cerenithy Ecksthine B. [Christian B.], 92 AD3d 417 [1st Dept 2012]; *see also* Family Ct Act § 1012[f]). The mother has a documented, long-standing history of mental illness and noncompliance with her treatment and medication regimen, continuing through the filing of the petition and thereafter. In addition, the mother exhibited confrontational, impulsive and violent behavior, in the child's presence, and at times appeared delusional and paranoid, all of which placed the child at imminent risk of harm (*see Matter of Zariah O. [Zuleika O.]*, 143 AD3d 494 [1st Dept 2016]). The mother also showed a clear lack of insight into her behavior and untreated mental illness (*see Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]; *see also Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]).

The evidence of the mother's erratic behavior and untreated mental illness alone justifies Family Court's findings.

Accordingly, we need not address the impact of the mother's alleged marijuana use.

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5574 Kawasi Asante-Tannor, Index 805015/14
Plaintiff-Appellant,

-against-

Betty Chia-Wen Chang M.D., et al.,
Defendants-Respondents,

Winthrop University Hospital,
Defendant.

_____

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (George J. Silver, J.), entered October 12, 2016, dismissing the complaint as against defendants Betty Chia-Wen Chang M.D., and New York Presbyterian Hospital/Columbia University Medical Center, and bringing up for review an order, same court and Justice, entered October 3, 2016, which, to the extent appealed from as limited by the briefs, granted said defendants' motion for summary judgment dismissing the medical malpractice claim as against them, unanimously affirmed, without costs.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting medical records,

deposition testimony, and the affirmation of an expert in emergency medicine demonstrating that they did not depart from accepted medical practice (*see e.g. Kristal R. v Nichter*, 115 AD3d 409, 411 [1st Dept 2014]). In response, plaintiff failed to raise an issue of fact. The affirmation of plaintiff's expert in emergency medicine was based on assumptions not supported by the record and set forth general conclusions and misstatements of evidence that were insufficient to demonstrate that any of defendants' alleged departures from accepted practice was the proximate cause of plaintiff's injuries (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Plaintiff's expert opined that plaintiff was experiencing a "hypertensive emergency" when he presented at the emergency room with elevated blood pressure, and defendants failed to properly evaluate his condition and admit him to the hospital, resulting in his stroke three days later. However, the medical records and deposition testimony do not support his expert's repeated assertions that plaintiff suffered from end organ damage to his kidneys characteristic of a "hypertensive emergency," which required hospitalization, nor was there any other indication that medical

intervention would have prevented his subsequent stroke. Accordingly, plaintiff was unable to raise a triable issue as to proximate cause sufficient to defeat summary judgment (*id.*; *Kristal R.*, 115 AD3d at 412).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5575 The People of the State of New York, Ind. 1442/12
Respondent,

-against-

Ruben Sanabria,
Defendant-Appellant.

_____

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

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

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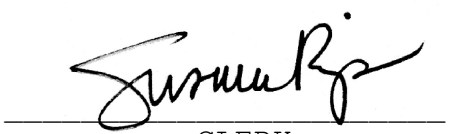
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Juan M. Merchan, J.), rendered February 11, 2013,

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

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

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

ENTERED: FEBRUARY 1, 2018



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

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5577 In re 125 St. James Place LLC, Index 100219/16
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

_____

Hagan, Coury & Associates, Brooklyn (Paul Golden of counsel), for appellant.

Mark F. Palomino, New York (Anita Shia of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered August 24, 2016, denying owner's petition to annul and vacate the order of respondent New York State Division of Housing and Community Renewal (DHCR), dated December 21, 2015, which denied owner's petition for administrative review (PAR) of a determination finding a rent overcharge and awarding treble damages, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination of a rent overcharge was rationally based and neither arbitrary nor capricious, based upon its rejection of petitioner owner's documentation of claimed

improvements (*see Matter of Graham Court Owners Corp. v Division of Hous. & Community Renewal*, 71 AD3d 515 [1st Dept 2010]; *Matter of 985 Fifth Ave., Inc. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574-575 [1st Dept 1991], *lv denied* 78 NY2d 861 [1991]). Given the identity of interest between petitioner and the general contractor, DHCR was justified in requesting additional proof of cost and payment of the work (*see* DHCR Policy Statement 90-10; *see also Matter of 201 E. 81st St. Assoc. v New York State Div. of Hous. & Community Renewal*, 288 AD2d 89 [1st Dept 2001]; *Matter of Waverly Assoc. v New York State Div. of Hous. & Community Renewal*, 12 AD3d 272 [1st Dept 2004]).

DHCR also properly held that certain expenses, including for painting, plastering, and repairing wood floors, were for normal maintenance and repair, and not "improvements" (*see* 9 NYCRR § 2522.4; *Matter of Yorkroad Assoc. v New York State Div. of Hous. & Community Renewal*, 19 AD3d 217 [1st Dept 2005]; *Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158 [1st Dept 1997]).

As petitioner failed to establish that the overcharge was not willful, the imposition of treble damages was proper (*see Matter of Century Towers Assoc. v State of N.Y. Div. of Hous. &*

Community Renewal, 83 NY2d 819 [1994]; *Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453 [1st Dept 2004]).

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: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5578-
5579-
5580 Index 161128/15

Chip Fifth Avenue LLC,
Plaintiff-Respondent,

-against-

Quality King Distributors, Inc.,
Defendant-Appellant,

Pro's Choice Beauty Care, Inc.,
et al.,
Defendants.
- - - - -
[And a Third-Party Action]

_____

Mintz Levin Cohn Ferris Glovsky and Popeo, PC, New York (Anthony J. Viola of counsel), for appellant.

Proskauer Rose LLP, New York (Lee Popkin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered or about October 17, 2016, awarding plaintiff landlord the aggregate amount of $308,743.89 as against defendant guarantor Quality King Distributors, Inc. (QKD), unanimously affirmed, with costs. Appeal from order, same court and Justice, entered on or about July 26, 2016, which granted the landlord's motion for partial summary judgment on its claim against QKD on a guaranty to cover outstanding rent and additional rent of a defaulting tenant, and from order, same

court and Justice, entered on or about October 11, 2015, which, upon reargument, adhered to its prior determination, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The landlord established entitlement to judgment as a matter of law by submitting evidence that QKD executed an absolute and unconditional guaranty of the defaulting tenant's rental obligations under a commercial lease. Such evidence included an affidavit and supporting spreadsheet submitted by the landlord's officer that established the accrued unpaid rental obligations of the defaulting tenant, and that QKD has declined to perform its obligations under the guaranty (*see Gansevoort 69 Realty LLC v Laba*, 130 AD3d 521 [1st Dept 2015]).

In opposition, QKD failed to raise a triable issue of fact. QKD's argument that its guaranty was expressly limited to the base rent amounts set forth in the lease is refuted by the plain, unambiguous language of the lease, its rider, the guaranty at issue and a consent agreement executed by the landlord consenting to a sublease between its defaulting tenant and the tenant's subtenants. QKD's contention that the defaulting tenant was wrongfully evicted from the premises due to an alleged deactivation of its access cards, as per an instruction by the

landlord to its building representatives, and that no rental obligation accruing after the date of such event should have been factored by the motion court into the judgment amount, is unavailing. Pursuant to the express terms of the guaranty, QKD waived the benefit of, or enforcement of, any defense affecting the defaulting tenant's liability to the landlord (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d 516 [1st Dept 2017]). Where, as here, the guarantor broadly waives rights precluding its reliance on the effect of possible defenses on obligations it has guaranteed, the guarantor's liability can be greater than that of the obligor tenant, inasmuch as the lease and guarantees were separate undertakings, and the latter is enforceable without qualification or reservation (*see Raven El. Corp. v Finklestein*, 223 AD2d 378 [1st Dept 1996], *lv dismissed* 88 NY2d 1016 [1996]).

QKD's further challenge to the sufficiency of the evidence submitted by the landlord in support its claims as to the defaulting tenant's outstanding rental obligation claims is unavailing. QKD has not refuted the landlord's calculations, as reduced by the trial court, as to the amount owed, nor has it raised a triable issue as to any specific line-item on the spreadsheet submitted by the landlord's principal (*see Royal Equities Operating, LLC v Rubin*, 154 AD3d at 517). Furthermore,

the court properly found the guaranty entitled the landlord to attorney fees, costs and disbursements (*see One Ten W. Fortieth Assoc. v Isabel Ardee, Inc.*, 124 AD3d 500 [1st Dept 2015]).

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5581 The People of the State of New York, Ind. 830/15
Respondent,

-against-

Darron Crenshaw,
Defendant-Appellant.

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

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

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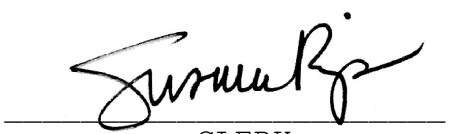
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered April 25, 2016,

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: FEBRUARY 1, 2018



CLERK

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

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5583-
5584 Patrick Hu, et al.,
Plaintiffs-Respondents,

-against-

Richard Leff, et al.,
Defendants-Appellants.

Index 651417/16

J. Kaplan & Associates, PLLC, New York (Joseph D. DePalma of counsel), for appellants.

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), for respondents.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 27, 2017, which, to the extent appealed from as limited by the briefs, upon reargument, adhered to the determination on the original motion granting plaintiffs' motion for summary judgment on the claims for breach of contract and for a declaration that they are entitled to keep defendants' down payment, and denied defendants' motion for summary judgment on their counterclaim for return of the down payment, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 20, 2016, unanimously dismissed, without costs, as superseded by the appeal from the order on reargument.

After the parties entered into a contract for sale of a

condominium apartment, but before the closing, building-wide structural defects were discovered that required remediation work to the ceiling of the apartment. As a result, there were two foot by two foot holes in the ceiling at the time of the scheduled closing. The building's engineers estimated that work to repair the ceiling would cost $30,000 to $50,000 and would take approximately three weeks to complete. The sellers advised the buyers of this and provided them with documentation the day after they learned of it, and the buyers performed a walk-through a few days later, but raised no objection until the day of the closing, when, even after the sellers offered to give the buyers a $50,000 credit, the buyers refused to tender the balance of the purchase price.

As the motion court ruled, the structural defects in the ceiling, which existed at the time the contract was executed, are covered under the "as is" clauses in the contract and rider, even if they were unknown to the parties at that time (*see West 17th St. & Tenth Ave. Realty, LLC v The N.E.W. Corp.*, 155 AD3d 478 [1st Dept 2017]). The "risk of loss" provision of the sale contract does not apply, since it covers damage caused by "fire or other casualty" that would have been covered by the sellers's insurance (*see 45 Broadway Owner LLC v NYSA-ILA Pension Trust*

Fund, 107 AD3d 629 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]). Even if we accept the argument that the seller is in default, the purchaser must show the seller is unable to correct the default in reasonable time or has refused to do so upon the purchaser's demand (*Cohen v Kranz*, 12 NY2d 242, 246 [1963]; *Martocci v Schneider*, 119 AD3d 746, 748 [2d Dept 2014]). The purchaser failed to do so.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5585 Keron Dinkins, Index 305567/11
Plaintiff-Appellant,

-against-

Kansas Fried Chicken, Inc.
doing business as Soundview Chicken,
Inc., et al.,
Defendants-Respondents,

Ez Runner Construction Corp., et al.,
Defendants.

_____

The Altman Law Firm PLLC, New York (Michael T. Altman of counsel), for appellant.

McManus Ateshoglou Adams Aiello & Apostolakos PLLC, New York (Thomas S. Reilly of counsel), for Kansas Fried Chicken, Inc., respondent.

Rawle & Henderson LLP, New York (Derek E. Barrett of counsel), for ROGA, respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered November 17, 2016, which, to the extent appealed from, granted defendants Kansas Fried Chicken, Inc.'s and ROGA's motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendant Kansas Fried Chicken established prima facie that it cannot be held liable for plaintiff's injuries by submitting the lease agreement for the premises showing that at the time of

the accident it was an out-of-possession landlord with no duty to perform non-structural repairs (*see Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507 [1st Dept 2011]). In opposition, plaintiff failed to raise a triable issue of fact, since his expert affidavit does not say that the condition of the drop ceiling that collapsed and fell on plaintiff violated a specific statutory safety provision (*see Torres v West St. Realty Co.*, 21 AD3d 718, 721 [1st Dept 2005], *lv denied* 7 NY3d 703 [2006]).

The record demonstrates that defendant ROGA, which provided architectural consultation services pursuant to a contract with the owner of the restaurant where plaintiff was injured, owed no duty of care to plaintiff, who was not a party to the contract, and that there is no applicable exception here to the rule that a contractual duty will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Plaintiff contends that ROGA launched a force of harm (*id.* at 140) by negligently designing the plans that the general contractor used to construct the drop ceiling. However, pursuant to its contract with the restaurant owner, ROGA had no obligations in connection with providing and installing the drop ceiling, for which the general contractor was responsible (*see* 87

Chambers, LLC v 77 Reade, LLC, 122 AD3d 540 [1st Dept 2014]). Nor did plaintiff raise an issue of fact through his expert affidavit, since the record shows that ROGA had no control over the drop ceiling that would be installed (*see Davies v Ferentini*, 79 AD3d 528, 530 [1st Dept 2010]).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5586 The People of the State of New York, SCI 362N/14
Respondent,

-against-

Antonio Pequero,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Neil E. Ross, J. at plea; Richard M. Weinberg, J. at sentencing), rendered May 1, 2015, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of six months, held in abeyance, and the matter remanded for further proceedings in accordance herewith.

Defendant was deprived of effective assistance when his counsel advised him that his plea would have "potential immigration consequences," where it is clear that his drug-related conviction would trigger mandatory deportation under 8 USC § 1227(a)(2)(B)(I) (*see Padilla v Kentucky*, 559 US 356, 368-369 [2010]; *People v Doumbia*, 153 AD3d 1139 [1st Dept 2017]; *People v Corporan*, 135 AD3d 485 [1st Dept 2016]). The remarks

made by counsel on the record are sufficient to permit review on direct appeal (see *Doumbia*, 153 AD3d at 1139). Thus, we hold this matter in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5587 The People of the State of New York, Ind. 2788N/15
Respondent,

-against-

James Braxton,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (James Burke, J.), rendered August 12, 2015, 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: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5588 Susan Hall, Index 155066/16
Plaintiff-Respondent,

-against-

Juan Camacho, et al.,
Defendants-Appellants.

_____

Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, New York (Peter A. Frucchione of counsel), for appellants.

Law Offices of Alan R. Chorne, New York (Alan R. Chorne of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about December 9, 2016, which denied defendants' motion to dismiss the complaint pursuant to CPLR 327(a), unanimously affirmed, without costs.

This action arises from a bus-pedestrian accident that occurred in New York County. All the parties are New Jersey residents. However, in addition to the fact that the accident occurred in New York, plaintiff received considerable medical treatment here, including at a hospital emergency room, as well as continuing treatment at orthopedic and general practitioners' offices in New York (*see Krieger v Glatter*, 129 AD3d 536 [1st Dept 2015]; *Brodherson v Ponte & Sons*, 209 AD2d 276 [1st Dept 1994]; *see also generally Islamic Republic of Iran v Pahlavi*, 62

NY2d 474 [1984], *cert denied* 469 US 1108 [1985]). Other proposed witnesses are New York residents, including one, and potentially more than one, eyewitness to the accident, as well as the responding police officer. Moreover, given the relative proximity of New York and New Jersey, and the regularity with which defendants cross from one state to the other, it is not likely that they will experience any undue hardship as a result of litigating in New York (*see Brodherson*, 209 AD2d at 277).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Renwick, J.P., Richter, Tom, Gesmer, Oing, JJ.

5590N London Paint & Wallpaper Co., Inc. doing business as London True Value Hardware, etc., et al., Plaintiffs-Appellants, Index 152878/15

-against-

Sidney Kesselman, etc., et, al., Defendants-Respondents,

Evelyn Kesselman, etc., Defendant.

_____

Wasser & Russ, LLP, New York (Adam H. Russ of counsel), for appellants.

Anderson Kill P.C., New York (Andrew J. Wagner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered June 28, 2016, which denied plaintiffs' motion to amend the complaint, and granted defendants Sidney Kesselman, as Trustee of Kesselman Living Trust, dated October 6, 1997, Sidney Kesselman and Terri Zimmerman's cross motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

To the extent plaintiffs contend that the court erred in granting defendants' motion for summary judgment after having granted plaintiffs' motion for a preliminary injunction (2015 NY

Slip Op 31398[U] [Sup Ct, NY County July 27, 2015], *mod* 138 AD3d 632 [1st Dept 2016]), this contention is misplaced; the granting of the preliminary injunction does not constitute the law of the case (*Walker Mem. Baptist Church, Inc. v Saunders*, 285 NY 462, 474 [1941]; *see also Gee Tai Chong Realty Corp. v GA Ins. Co. of N.Y.*, 283 AD2d 295 [1st Dept 2001] [doctrine prohibits one Supreme Court justice from reviewing a ruling by another]).

Plaintiffs contend that their claims, which arise from or seek enforcement of alleged oral "Family Agreements," are not barred under the Statute of Frauds (*see* General Obligations Law § 5-703; EPTL 13-2.1), because they fall within the statutory exception for part performance (General Obligations Law § 5-703[4]). However, plaintiffs' conduct is not, as required to invoke that exception, unequivocally referable to the alleged agreements (*see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]). Nor is the parties' written rental agreement anything more than an unenforceable agreement to agree (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105 [1981]). Moreover, defendants demonstrated as a matter of law that plaintiffs cannot prove that defendant Terri Zimmerman unduly influenced her parents to revoke, breach, or otherwise fail to perform under

these unenforceable agreements.

Plaintiffs' proposed amendment to the complaint, which alleges Terri's undue influence with respect to the 2014 trust restatement, is "palpably insufficient" (*see Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 421 [1st Dept 2014]), given plaintiffs' inability to allege facts showing her actual exercise of such influence (*see Matter of Kotick v Shvachko*, 130 AD3d 472, 473 [1st Dept 2015]).

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5591 The People of the State of New York, Ind. 3651/08
Respondent,

-against-

Vernon Sharp,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered May 11, 2010, as amended June 3 and June 4, 2010, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Two eyewitnesses who knew defendant identified him as the person who shot the deceased, and there was extensive corroborating evidence, including, among other things, evidence of a revenge-related motive, and an incriminating statement made by defendant

to an acquaintance.

Defendant's claim that his murder conviction should be reduced to first-degree manslaughter under a theory of extreme emotional disturbance (Penal Law § 125.25[1]) is beyond the scope of our weight-of-the-evidence review because no such defense was raised at trial, and no instruction on that defense was requested by defendant or delivered by the court (*see People v Noble*, 86 NY2d 814, 815 [1995]). In any event, there is nothing in the record to support either the objective or subjective elements of that defense (*see generally People v Roche*, 98 NY2d 70, 75-76 [2002]).

The record established an overriding interest in partially, and later completely, closing the courtroom during the testimony of an identifying eyewitness (*see Waller v Georgia*, 467 US 39, 48 [1984]), and the other requirements of *Waller* were likewise satisfied as to both closures. The witness's "extreme fear of testifying in open court was sufficient to establish an overriding interest" (*People v Frost*, 100 NY2d 129, 137 [2003]), because the witness's inability to testify without the closures at issue "could have severely undermined the truth seeking function of the court" (*People v Ming Li*, 91 NY2d 913, 917 [1998]) in this gang-related murder case.

Although the initial partial closure consisted of the exclusion of several persons, defendant only challenges the exclusion of his cousin. Before the partial closure, the court conducted a hearing at which the witness testified that he previously had been threatened for cooperating with the prosecution in another trial, that he had heard threats made against potential prosecution witnesses in the present case, and that he and his family lived in the same neighborhood where the shooting occurred. The court was entitled to credit the witness's testimony that he felt threatened by defendant's cousin and could not testify in his presence (*see People v Williams*, 132 AD3d 439 [1st Dept 2015], *lv denied* 26 NY3d 1093 [2015]; *People v Montgomery*, 205 AD2d 259, 261-62 [1st Dept 1994], *affd on other grounds*, 88 NY2d 1041 [1996]). Although the cousin did not make any direct threats to the witness, he appeared to be closely associated with a person who did so.

The record also supports the complete closure of the courtroom after the witness refused to continue his testimony upon the arrival of other spectators whom he feared. Initially, we find that defendant withdrew or waived any claim that the court was required to reinterview the witness regarding his fears, and we decline to review it in the interest of justice.

In any event, the court providently exercised its discretion (*see People v Jones*, 47 NY2d 409, 414 [1979]) in relying on statements by the prosecutor and a court officer that the witness would not return to the stand even if threatened with jail for contempt, and that he became terrified after his brother phoned and told him not to testify out of fear for his and his family's safety. Moreover, the witness's own court-appointed counsel provided confirmation that his client needed to testify in a closed courtroom. The record also establishes that after defendant's cousin was excluded, he escorted to the courtroom two new spectators whom the witness knew and feared, who sat with the defense, and that one of these men kissed one of defendant's relatives hello. In light of that fact, the witness's brother's phone call, and the previously stated factors, the evidence "raised serious concerns about witness safety and intimidation," and established an overriding interest in closing the courtroom (*People v Ford*, 133 AD3d 442, 443 [1st Dept 2015], *lv denied* 27 NY3d 1150 [2016]). Given the intimidating atmosphere, and the apparent close connection between defendant's family and the particular persons whom the witness feared, the record establishes a need for a complete closure, even to family members.

The trial court properly denied defendant's constitutional speedy trial motion, made on the ground of prearrest delay (*see People v Decker*, 13 NY3d 12, 14 [2009]; *see also United States v Lovasco*, 431 US 783, 790 [1977]; *People v Taranovich*, 37 NY2d 442, 445 [1975]). The People satisfactorily explained that the delay between the murder and defendant's arrest was the product of difficulty in obtaining the cooperation of witnesses, and we find no basis for dismissing the indictment. We have considered and rejected defendant's procedural arguments regarding the motion, including his claim that a remand for a hearing is necessary.

To the extent defendant is claiming a violation of his right to counsel at trial, that claim is unreviewable on direct appeal because it is based on information outside the record.

We perceive no basis for reducing the sentence

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5592-
5592A In re Shanirca D.,

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

Jawnetta D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about August 30, 2016, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 30, 2016, which found that respondent mother had neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner agency proved by a preponderance of the evidence

that the mother had neglected the child (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). The record shows that the mother's untreated mental illness, lack of insight into the effect of her illness on the child, and misuse of alcohol created a "substantial probability" that the child would not receive her mental health treatment and would be placed at "imminent risk of harm" (*Matter of Michael P. [Orthensia H.]*, 137 AD3d 499, 500 [1st Dept 2016] [internal quotation marks omitted]; *see Matter of Jalicia G. [Jacqueline G.]*, 130 AD3d 402, 403 [1st Dept 2015]).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5593 Barbara Bradshaw, Index 114078/05
Plaintiff-Appellant,

-against-

Lenox Hill Hospital, et al.,
Defendants-Respondents.

_____

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

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Deirdre E. Tracey of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered August 3, 2016, upon a jury verdict in favor of defendants, unanimously affirmed, without costs.

The trial court properly instructed the jury that, in determining whether Dr. Moses had obtained informed consent from plaintiff prior to her procedure, it could consider the acts of Dr. Moses as well as those individuals under his supervision, control, and employment. In any event, the jury found that plaintiff consented to the procedure after receiving sufficient information concerning the reasonably foreseeable risks of the procedure, and alternatives thereto, prior to the procedure, necessarily defeating the claim (*see Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347 [1st Dept 1995],

lv denied 87 NY2d 895 [1995]).

As this Court previously held, an issue of fact existed as to whether Lenox Hill could be vicariously liable on plaintiff's claim against Dr. Moses for lack of informed consent, requiring a trial on that issue (126 AD3d 484, 485 [1st Dept 2015]). Any error in not instructing the jury on such a claim, however, is harmless in light of the jury's finding that plaintiff provided informed consent, and thus the jury would not have reached the issue (*see Lebron v St. Vincent's Hosp. & Med. Ctr.*, 261 AD2d 246 [1st Dept 1999]; *O'Neill v Spitzer*, 160 AD2d 298 [1st Dept 1990]).

Lastly, the court did not abuse its discretion in denying plaintiff use of square plastic boxes as demonstrative evidence. Their use to demonstrate the alleged size of hematomas, which were neither square, nor solid, had the possibility of misleading

the jury (*see Harvey v Mazal Am. Partners*, 79 NY2d 218, 224 [1992]).

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5594 Andrew Fraser, Index 153101/12
Plaintiff-Respondent,

-against-

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

_____

Cozen O'Connor, New York (Edward Hayum of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered December 9, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

The record does not support defendants' argument that plaintiff was the sole proximate cause of the accident or was a recalcitrant worker since a proximate cause of his accident was the failure of the chain fall to adequately support the load that

spun down and struck him, knocking him from the beam on which he was working to the ground below (*see Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552, 553 [1st Dept 2011]*; Ray v City of New York*, 62 AD3d 591 [1st Dept 2009]).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5595 2922 LLC, Index 303212/15
Plaintiff-Respondent,

-against-

Vicki Been, etc., et al.,
Defendants-Appellants.

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

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 5, 2017, which denied defendants' motion to dismiss the complaint, and granted plaintiff's cross motion to summarily vacate, cancel, annul and discharge defendant's notice of lien filed April 29, 2015, unanimously reversed, on the law, without costs, defendant's motion to dismiss granted, and plaintiff's cross motion denied. The Clerk is directed to enter judgment accordingly.

As conceded by plaintiff, based on the Court of Appeals' recent holding in *Rivera v Department of Hous. Preserv. & Dev. of the City of N.Y.* (29 NY3d 45 [2017]), this dispute regarding the reasonableness of expenses claimed by defendants in an otherwise facially valid notice of lien must be resolved through a foreclosure trial, rather than a summary discharge proceeding

(*see id.* at 50). Moreover, the notice of lien, filed within one year of the date on which the latest relocation expenses reflected in the notice of lien were incurred, was timely filed (*see* Administrative Code of City of New York § 26-305[4][a]).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5596-
5597 82 Retail LLC,
Plaintiff-Respondent,

-against-

The Eighty Two Condominium, et al.,
Defendants-Appellants.

Index 152956/12

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for appellants.

Coritsidis & Lambros, PLLC, New York (Jeffrey A. Gangemi of counsel), for respondent.

Judgment, Supreme Court, New York County (Arlene P. Bluth, J.), entered March 8, 2017, in favor of plaintiff and against defendants in the amount of $616,635, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion for summary judgment on the first and fifth causes of action denied, and the matter for further proceedings. Order and judgment (one paper), same court and Justice, entered February 22, 2017, insofar as it declared that the bylaw amendment adopted on May 19, 2011 and the Second Amendment of Declaration dated September 22, 2011 (together, the 2011 amendments) are null and void, unanimously reversed, on the law, without costs, and the declaration vacated. Appeal from said order and judgment,

insofar as it granted plaintiff's motion for summary judgment on the first cause of action, for declaratory relief, and the fifth cause of action, for breach of contract, and denied defendants' motion for summary judgment dismissing those claims, unanimously dismissed, without costs, as subsumed in th the appeal from the March 8, 2017 judgment.

This Court previously found that the language of the fifth amendment to the offering plan for defendant condominium was ambiguous with respect to whether a frozen yogurt shop was a permissible use of plaintiff's commercial unit (*see 82 Retail LLC v Eighty Two Condominium*, 117 AD3d 587, 588 [1st Dept 2014]). This Court also stated that it could not conclude, as a matter of law, "that the 2011 amendments constituted mere clarifications as opposed to changes in the permitted use of plaintiff's unit" (*id.* at 588-589).

This Court's prior ruling constitutes the law of the case, and there is no basis to disturb it (*see Kenney v City of New York*, 74 AD3d 630 [1st Dept 2010]). Accordingly, the motion court should not have determined as a matter of law that the fifth amendment permitted frozen yogurt shops, and that the 2011 amendments violated the condominium's declaration because they constituted a change in the permitted use of the space, without

plaintiff's consent (*see id.*).

There are issues of fact to be resolved by a jury as to whether the fifth amendment was intended to prohibit a lease to a frozen yogurt shop (*see Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]). Although there was testimony that food establishments that were not noisy and did not involve cooking were permitted, defendants offered evidence that all of the parties understood that any food establishment was prohibited in the commercial unit.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5600 The People of the State of New York, SCI 4014N/15
Respondent,

-against-

Kashawn Crippen,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler 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 Weinberg, J. at plea; Tamiko Amaker, J. at sentencing), rendered June 25, 2015,

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

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5601 The People of the State of New York, Ind. 3707/13
Respondent,

-against-

Christina Yarborough,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ann M. Donnelly, J.), rendered June 18, 2015, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing her to an aggregate term of 3½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury's mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The course of conduct of defendant and her companion, viewed as a whole, supports inferences that she knew her bag contained a pistol (*see generally People v Reisman*, 29

NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]), and that she handed the pistol to her companion with the intent to assist him in using it unlawfully (*see People v Ramirez*, 140 AD3d 545 [1st Dept 2016], *lv denied* 28 NY3d 973 [2016]). The evidence also supports the conclusion that the pistol was operable, notwithstanding that it had jammed (*see People v Cavines*, 70 NY2d 882 [1987]).

Defendant's challenges to the prosecutor's summation are entirely unpreserved, notwithstanding defendant's postsummations mistrial motion (*see People v Romero*, 7 NY3d 911, 912 [2006]; *People v LaValle*, 3 NY3d 88, 116 [2004]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). We reject defendant's ineffective assistance of counsel claims relating to these issues.

The court properly denied defendant's request for an intoxication charge, since the evidence, viewed most favorably to defendant, did not support such a charge (*see People v Gaines*, 83 NY2d 925, 927 [1994]; *People v Rodriguez*, 76 NY2d 918, 920 [1990]). While there was evidence of defendant's consumption of

alcohol and drugs, there was no evidence suggesting that her faculties were so impaired at the time of the crime that she could not have formed the requisite intent.

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5602 Liberty Mutual Fire Insurance Company, as subrogee of Edison Properties, LLC, et al., Plaintiffs-Respondents,

-against-

Navigators Insurance Company, Defendant-Appellant.

Index 653341/13

Saiber LLC, Florham Park (Gregory T. Dennison of counsel), for appellant.

Jaffe & Asher, LLP, White Plains (Marshall T. Potashner of counsel), for respondents.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about March 20, 2017, which denied the motion of defendant Navigators Insurance Company (Navigators) for summary judgment dismissing the complaint, and granted the motion of plaintiff Liberty Mutual Fire Insurance Company (Liberty Mutual) as subrogee of Edison Properties, LLC, Edison Construction Management, LLC and 5030 Broadway Properties, LLC for summary judgment awarding Liberty Mutual the amount of $850,000, plus statutory interest and costs as against Navigators, unanimously affirmed, with costs.

An insurer's duty to cover the losses of its insured "is not triggered unless the insured gives timely notice of loss in

accordance with the terms of the insurance contract" (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 42 [1st Dept 2002] [internal quotation marks omitted]). "Even if the insurance policy were construed as specifying that only the named insured . . . was required to provide notice of occurrences, demands and suits to [the insurer], the duty to give reasonable notice as a condition of recovery is implied in all insurance contracts. . . and is applicable to an additional insured" (*Structure Tone v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1st Dept 1998]). Where notice to an excess carrier is at issue, "the focus is on whether the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger its excess coverage, and whether any delay between acquiring that knowledge and giving notice to the excess carrier was reasonable under the circumstances" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Connecticut Indem. Co.*, 52 AD3d 274, 276 [1st Dept 2008]).

Here, we find that Liberty Mutual's November 17, 2010 letter was sufficient to provide notice of claim to Navigators. However, even if the June 2010 supplemental bill of particulars implicated Navigators' excess policy (*see Nova Cas. Co. v Interstate Indem. Co.*, 42 Misc 3d 1229[A], 2014 NY Slip Op

50250[U] [Sup Ct, Kings County 2014]), and the notice was untimely, Navigators' disclaimer, issued 37 days later, was untimely as a matter of law (*see e.g. Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 88-89 [1st Dept 2005]; *West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co.*, 290 AD2d 278 [1st Dept 2002], *lv denied* 98 NY2d 605 [2002]).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5603 The People of the State of New York, Ind. 5040/13
Respondent,

-against-

Paola Garcia,
Defendant-Appellant.

_____

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

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

_____

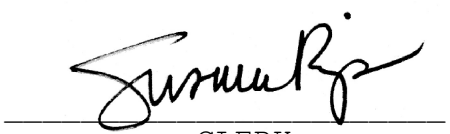
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ann M. Donnelly, J.), rendered October 14, 2015,

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

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

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

ENTERED: FEBRUARY 1, 2018



CLERK

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

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5604 D. Penguin Brothers Ltd., et al., Index 153494/15
Plaintiffs-Appellants,

-against-

City National Bank,
Defendant-Respondent,

NBUF Development, Ltd., et al.,
Defendants.

_____

Gordon & Haffner, LLP, Harrison (David Gordon of counsel), for appellants.

Reed Smith LLP, New York (John B. Webb of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 29, 2016, which granted defendant City National Bank's (CNB) motion to dismiss the complaint as against it pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to make the dismissal without prejudice, and otherwise affirmed, without costs.

The complaint alleges that "each of the Defendants conspired and participated in the commission of some or all of the frauds and Thefts, and other breaches of legal duties, . . . and each, at a minimum, aided and abetted in their commission." These conclusory allegations fail to plead conspiracy against CNB,

i.e., to connect CNB's actions with the otherwise actionable torts (fraud and conversion) allegedly committed by defendants James Robert Williams and David Spiegelman (*see Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968 [1986]). Similarly, the present allegations fail to state a cause of action for aiding and abetting fraud (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Without conspiracy or aiding and abetting, plaintiffs have no fraud claims against CNB, as opposed to Williams and Spiegelman (*see National Westminster Bank v Weksel*, 124 AD2d 144, 147 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]). The complaint also fails to state a cause of action against CNB for conversion (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]).

However, plaintiffs may be able to cure the defects in the complaint with respect to CNB. Accordingly, the question is whether the fraud and conversion claims are time-barred.

Because the complaint asserts causes of action for fraud and conversion, the longer statute of limitations for fraud applies (*Petrou v Ehmer Intl. Foods*, 167 AD2d 338 [2d Dept 1990]). The limitations period for fraud is "the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with

reasonable diligence have discovered it" (CPLR 213[8]). The complaint alleges that plaintiff Avraham Glattman was induced to provide $1.5 million on or about July 31, 2008. Plaintiffs commenced actions in federal court in January 2013, less than six years later. Hence, the fraud claim is timely at least as to the $1.5 million.

As for the money that plaintiffs provided in 2005, the complaint alleges that they discovered the thefts on or after February 3, 2011. CNB contends that plaintiffs should have discovered the fraud in the spring of 2008, but we are not persuaded (*see Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]; *K&E Trading & Shipping v Radmar Trading Corp.*, 174 AD2d 346, 348 [1st Dept 1991]). Given Williams's and Spiegelman's alleged pattern of forging documents, it is unclear whether plaintiffs would have discovered the fraud even if they had made inquiry in 2008.

In light of our finding that plaintiffs' claims are not time-barred, we need not reach their arguments about equitable estoppel and continuous representation.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5605 The People of the State of New York, Ind. 4021/10
Respondent,

-against-

Roberto Marcucci,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered March 28, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of seven years, unanimously reversed, on the law, and the matter remanded for a new trial.

As in cases such as *People v Velez* (131 AD3d 129 [1st Dept 2015]), the court's charge failed to convey that an acquittal on the top count of attempted second-degree murder based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and that it warrants reversal in the interest of justice (*see e.g. People v Kareem*, 148 AD3d 550 [1st Dept 2017], *lv dismissed* 29

NY3d 1033 [2017]). We have considered and rejected the People's arguments for affirmance.

Since we are ordering a new trial, we find it unnecessary to reach defendant's remaining contentions.

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5607 The People of the State of New York, Ind. 2760/15
Respondent,

-against-

Victor Thomas,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case, LLP, New York (Louis O'Neill of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Samuel L. Yellen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (April A. Newbauer, J. at hearing; Michael A. Gross, J. at plea and sentencing), rendered August 24, 2016, as amended October 20, 2016, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

Defendant made a valid general waiver of his right to appeal, which encompassed his suppression claims (*see People v Kemp*, 94 NY2d 831 [1999]). The court's on-the-record explanation of the appeal waiver "was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*,

25 NY3d 337, 341 [2015]; *see also People v Bryant*, 28 NY3d 1094 [2016]). The written waiver properly supplemented the court's oral explanation, and did not contain any language this Court has previously found to be unenforceable, or that would otherwise require the invalidation of the waiver. There was no language that "discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself" (*People v Santiago*, 119 AD3d 484, 485-486 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]). On the contrary, unlike the form used in *People v Powell* (140 AD3d 401 [1st Dept 2016], *lv denied* 28 NY3d 1074 [2016]), the form did not limit the unwaived issues to constitutional speedy trial and legality of sentencing, but expressly stated that defendant could raise on appeal "the voluntariness of this appeal and waiver." Furthermore, the form here did not contain anything to suggest that the filing of a notice of appeal could be deemed a motion to vacate, or that it would have any other unwanted consequences (*see Santiago*, 119 AD3d at 485).

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the hearing court properly denied defendant's suppression motion. The record supports the court's

finding that defendant's statement was spontaneous and was not the product of interrogation requiring *Miranda* warnings. A detective's act of showing defendant an incriminating photograph was, under the circumstances, a permissible response under *People v Rivers* (56 NY2d 476, 480 [1982]) to defendant's demand to know why he was being arrested (*see People v Wilson*, 279 AD2d 381 [1st Dept 2001], *lv denied* 96 NY2d 869 [2001]).

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

ENTERED: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5608 The People of the State of New York, Ind. 469/15
Respondent,

-against-

Alfred Diaz also known as Jimmy Diaz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered August 3, 2015, 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: FEBRUARY 1, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

5609N James Rohan, et al., Index 154552/12
Plaintiffs-Respondents,

-against-

Turner Construction Company, et al.,
Defendants-Appellants.

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Camacho Mauro Mulholland, LLP, New York (Andrea S. Camacho of counsel), for Turner Construction Company, Gladden Properties LLC, Boston Properties, Inc., Boston Properties Limited Partnership and Boston Properties LLC, appellants.

Lynch Daskal Emery LLP, New York (Daniel Gagliardi of counsel), for W.R. Grace & Co. and W.R. Grace & Co.-Conn, appellants.

Silberstein, Awad & Miklos, P.C., Garden City (Michael Lauterborn of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about April 18, 2017, which, among other things, denied defendants' motions to compel plaintiffs to produce certain discovery, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying defendants' discovery motions (*Estate of Mojica v Harlem Riv. Park Houses, Inc.*, 140 AD3d 579, 580 [1st Dept 2016]). The court properly determined that defendants did not demonstrate that the additional information sought, relating to a 1987 automobile accident in which plaintiff broke his legs, was

relevant to his traumatic brain injury claims in this action involving a 2012 construction site accident (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]).

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

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

ENTERED: FEBRUARY 1, 2018

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4583 The People of the State of New York, Ind. 627/08
Respondent,

-against-

David J. Palmer,
Defendant-Appellant.

_____

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

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

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Appeal from judgment, Supreme Court, Bronx County (Patricia Di Mango, J. at plea; Michael Gross, J. at sentencing), rendered December 17, 2013, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

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

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Sallie Manzanet-Daniels
Barbara R. Kapnick
Cynthia S. Kern
Anil C. Singh, JJ.

4583
Ind. 627/08

_____x

The People of the State of New York,
Respondent,

-against-

David J. Palmer,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Patricia Di Mango, J. at plea; Michael Gross, J. at sentencing), rendered December 17, 2013, convicting him of sexual abuse in the first degree, and imposing sentence.

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

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

MANZANET-DANIELS, J.

Defendant was born in Jamaica in 1971, and immigrated to the United States in 1994, when he was 23 years old. The Department of Probation's presentence report indicates that defendant was born in Jamaica, that he was a citizen of Jamaica, and that his alien status was "undocumented".

Defendant has a long and documented history of mental illness, including schizophrenia and hallucinations. Among other things, he believes that he had the ability to heal others through his "exhaled gases," or what defendant refers to as his "vapor powers." From the time of his arraignment on March 31, 2008, until he pleaded guilty more than five years later, on December 6, 2013, defendant was repeatedly found unfit to assist in his own defense and confined to psychiatric prison wards. Even when found fit to proceed after a regimen of forced medication, doctors noted that he continued to suffer from persistent delusional and disordered thinking.

On December 6, 2013, defendant entered a plea of guilty to sexual abuse in the first degree, a class D felony, with the understanding that he would receive a 5-year sentence with 10 years' postrelease supervision. After swearing defendant in, the court asked whether he had the opportunity to consult with his attorney, to which defendant replied yes. He expressed

satisfaction with the advice received from counsel.

In response to further questioning, defendant replied that he was pleading guilty of his own volition. The court asked defendant whether he understood the rights he was waiving by pleading guilty, and defendant replied in the affirmative. The court then asked whether defendant had committed the crime to which he was pleading guilty, and he replied yes. He denied being under the influence of drugs or alcohol.

When the court asked defendant whether he was a citizen of the United States, he summarily responded, "Yes, your Honor." Defense counsel did not correct defendant. While the dissent reads much into the bare-bones colloquy at the plea proceedings concerning defendant's immigration status, the matter was not further discussed.

On December 17, 2013, defendant appeared before a different judge and was sentenced in accordance with the agreement. The sentencing judge did not make inquiry concerning his immigration status, notwithstanding the indication in the presentence report that he was "undocumented."[1] When asked whether he wished to

[1] It is self-evident that the presentence report was prepared in the period immediately preceding sentencing, as the dissent notes. A purpose of such a report is to advise the sentencing court of any pertinent issues that might pose an impediment to the plea or to the sentencing proceedings.

make a statement before the court imposed sentence, defendant made a reference to "the principles of [the] tree of life," and stated that he "was not getting response based upon what were the fullness of these principles," and asked that he "be obliged that I can care for these principles and use them for the best of my abilities and to help others." The court replied, "So noted," and did not probe further.[2]

On May 23, 2014, defendant was paroled to the United States Immigration and Customs Enforcement. At some point thereafter, he was released from immigration detention to postrelease supervision, and is currently detained at the Bronx Psychiatric Center.[3]

In *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US —, 135 S Ct 90 [2014]), the Court of Appeals held that before accepting a plea, due process requires that a court "apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony" (*id.* at 176). The Court reasoned

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[2] The dissent construes these statements concerning the tree of life as "an apology" for the sexual abuse of defendant's half sister, but there is no basis for this in the record.

[3] At argument, counsel indicated that the immigration authorities are awaiting a final decision of this Court before proceeding with deportation proceedings.

that "fundamental fairness . . . requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty" (*id.* at 193). Accordingly, "a noncitizen defendant convicted of a removable crime can hardly make a 'voluntary and intelligent choice among the alternative courses of action'" unless informed of the possibility of deportation (*id.* at 192-193).

Defendant's statement to the court that he was a citizen did not absolve the court of its obligations pursuant to *Peque*. Notably, *Peque* did not condition the need to give this warning on whether or not the court has reason to believe the defendant is not a citizen. The warning mandated by *Peque* is required whether the defendant is a citizen or not. Indeed, the Court of Appeals recognized that in order to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in the state, it was necessary to "make all defendants aware that, if they are not United States citizens," pleading guilty to a felony might lead to deportation (*id.* at 197 [emphasis added]; *People v Diallo*, 113 AD3d 199, 201 n 1 [3d Dept 2013]; *see also People v Belliard*, 135 AD3d 437, 438 [1st Dept 2016] [court required to give *Peque* warning even where defense counsel affirmatively represented, "It's not applicable in this case"]).

As the Court noted, changes in immigration enforcement have increased the likelihood of deportation following a guilty plea (22 NY3d at 188). The Court observed that at the time of the passage of amendments to the Immigration and Nationality Act in 1996, the number of deportations flowing from criminal convictions was 36,909, whereas in 2011, the United States deported 188,382 noncitizens following their criminal convictions (*id.*). The Court further noted that since 1995, joint initiatives between state and federal authorities had enabled New York to transfer thousands of convicted noncitizens to ICE prior to the expiration of their prison terms (*id.*).

The dissent acknowledges that *Peque* contains broad language to the effect that a warning concerning immigration consequences is required whether or not the court has reason to believe the defendant is a noncitizen.

The dissent rests its argument on the premise, purportedly enunciated in *People v Brazil*, 123 AD3d 466 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]), that a court is entitled to dispense with an admonition regarding deportation where the defendant "affirmatively misrepresent[s]" that he is a U.S. citizen (*id.* at 167). In *Brazil*, we found it "highly unlikely" that defendant believed himself to be an American citizen, given the lengthy discussion at a prior bail proceeding at which his status was

discussed (*id.*). *Brazil* is a memorandum decision from which little can be divined.[4] In any event, it cannot be seriously alleged here that defendant purposefully misrepresented his immigration status as had, apparently, the defendant in *Brazil*. There is no indication that the defendant in *Brazil* suffered from mental illness or other defect which might call into question his ability to apprehend the effect of his statements; here, on the other hand, defendant suffers from persistent delusions, including a belief that he has "vapor powers." These clear indications of persistent symptoms of mental illness, which were recognized even by the examining psychiatrists who found defendant competent to stand trial, warranted a more probing inquiry concerning his immigration status, particularly where court records indicated that defendant was "undocumented" and at risk of deportation for a felony conviction, and at the time of sentencing he gave a rambling monologue concerning his powers and "the principles of the tree of life."

The dissent also fails to recognize the import of *Belliard*, wherein we found that a court was required to give a *Peque* warning even where defense counsel affirmatively represented that

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[4]Our characterization of *Brazil* as a memorandum decision is merely observational, and not, as the dissent extravagantly opines, an "implicit[] acknowledg[ment]" that it is indistinguishable from the present case.

"[i]t's not applicable in this case" (135 AD3d at 438). The dissent reasons that "It's not applicable" is not a representation as to citizenship status. Erroneously stating, "It's [i.e., *Peque*] not applicable," and incorrectly representing the defendant to be a citizen are distinctions without a meaningful difference.

We accordingly hold the appeal in abeyance pending remand for a prejudice hearing. Defendant should be afforded the opportunity to move to vacate his plea upon a showing of a "reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial" (*Peque*, 22 NY3d at 176).

Accordingly, the appeal from the judgment, Supreme Court, Bronx County (Patricia Di Mango, J., at plea; Michael Gross, J., at sentencing), rendered December 17, 2013, convicting defendant of sexual abuse in the first degree, and sentencing him to a term of five years, should be held in abeyance, and the matter remitted for further proceedings in accordance herewith.

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

FRIEDMAN, J.P. (dissenting)

In 2008, defendant, then in his mid-thirties, was indicted for several sex crimes, including an alleged rape, perpetrated against his much younger half sister in three separate incidents that occurred over a four-year period. For five years thereafter, the prosecution stalled due to defendant's repeated failures to take the medication prescribed to control his long-standing mental illness. Finally, in 2013, after defendant became compliant with his medication schedule, two examining psychiatrists attested to his fitness to stand trial, an opinion that is uncontradicted on the existing record. Defendant's counsel and the prosecutor subsequently negotiated a highly favorable plea agreement, under which defendant would plead guilty to one count of sexual abuse in the first degree (Penal Law § 130.65[2]), for which he would receive a determinate sentence of five years of imprisonment — time he had already served while in detention — and 10 years of postrelease supervision.

On December 6, 2013, defendant pleaded guilty to the agreed-upon charge. At the plea hearing, defendant answered the court's questions directly and responsively, conducted himself appropriately, and did not manifest any symptoms of the mental illness for which he was being treated. He swore to tell the

truth, the whole truth and nothing but the truth, and then admitted to having had sexual intercourse with his half sister while she was incapable of consent by reason of being physically helpless. Shortly after allocuting to this crime, the court asked defendant, "Are you a citizen of the United States?" To this question, defendant answered, "Yes, your Honor."

In fact, contrary to what he told the court at the plea hearing, defendant was not a citizen of the United States. Therefore, had the court been aware of his true status, a warning by the court of the possible adverse immigration consequences of his plea should have been given under *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]). However, because defendant told the court that he was a citizen (a representation that his counsel did not correct), the court did not give such a warning.[1] On appeal, defendant now argues that his guilty plea should be set aside because the court — misled by defendant's own misrepresentation that he was a citizen — failed to give him the warning mandated

[1]It bears mention that the plea hearing in this case took place less than a month after the Court of Appeals issued the *Peque* decision on November 19, 2013. Thus, it is clear that, in asking defendant whether he was a citizen, the plea court was attempting to comply with a new rule established by the Court of Appeals only 17 days before. When defendant told the court that he was a citizen, the court reasonably concluded that no *Peque* warning was needed, since a citizen cannot be deported.

by *Peque*. Contrary to the majority's view and defendant's argument, this case is not controlled by *Peque*, which did not address a fact pattern in which a defendant inaccurately claims at his plea hearing to be a citizen. Rather, the applicable precedent is *People v Brazil* (123 AD3d 466 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]), a case this Court decided under *Peque*, in which we held that the failure to give a *Peque* warning does not constitute grounds for setting aside a plea where "[the] defendant affirmatively misrepresented to the court that he was a United States citizen" (*id.* at 467). Moreover, *Brazil* held that the failure to give a *Peque* warning in this scenario did not provide grounds for relief even if the misrepresentation had been innocent, since, "if that was [the defendant's] belief [i.e., that he was a citizen], he would not have had any reason to be concerned about deportation" (*id.*), and thus would not have been influenced by the warning had it been given.[2]

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[2]The majority, in resorting to the conclusory deprecation of *Brazil* as "a memorandum decision from which little can be divined," implicitly acknowledges that it cannot convincingly distinguish that case from this one. Moreover, the majority's position draws no support from *People v Belliard* (135 AD3d 437 [1st Dept 2016]). In *Belliard*, we remitted the matter for a hearing to determine whether a *Peque* warning would have influenced the defendant's decision whether to plead guilty or stand trial (*see* 22 NY3d at 176, 198) because defense counsel — *not* the defendant himself — told the court, inaccurately, that advice about the possible immigration consequences of the plea was "'not applicable in this case'" (135 AD3d at 438). That

I am not persuaded by the majority's efforts to portray *Peque* as mandating a warning about the possible immigration consequences of a felony guilty plea in *all* cases, even where the court reasonably believes, based upon the defendant's own representation, that he or she is an American citizen. In none of the three cases under review in *Peque* did the defendant himself tell the court that he was a citizen, as the present defendant did here.[3] Thus, whether the failure to give a *Peque*

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statement, apart from the fact that the defendant himself did not make it, was not an affirmative misrepresentation that the defendant was a citizen. However, even if (as the majority contends) there is no "meaningful difference" between defense counsel's statement in *Belliard* and defendant's misrepresentation here, the majority fails to acknowledge that here, unlike in *Belliard*, defendant himself, not his lawyer, made the misrepresentation to the court. While we did not hold the *Belliard* defendant responsible for his counsel's misstatement on a matter of such great import, here, only defendant himself can be held responsible for personally misstating a factual matter within his direct knowledge, after solemnly swearing to tell the truth.

[3]While I acknowledge that two of the Court of Appeals' statements of its holding in *Peque* are more naturally read to extend the warning requirement to all defendants (*see* 22 NY3d at 176 ["due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to felony"]; *id.* at 197 ["trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation"]), a third statement of the holding plainly limits it to noncitizen defendants (*see id.* at 176 ["a trial court must notify a pleading *noncitizen defendant* of the possibility of deportation"] [emphasis added]). In any event, none of the cases before the Court of Appeals when it decided *Peque* involved a defendant who personally misrepresented

warning renders a guilty plea infirm in a case such as the one at bar is a question left open by *Peque* itself.[4]

As previously noted, the question left open by the Court of Appeals in *Peque* was answered in the negative by this Court in *Brazil*. Defendant attempts to distinguish *Brazil* on the ground that, as he reads the case, "the record [in *Brazil*] established that [the] defendant [therein] was aware that his guilty plea had immigration consequences[.]" As the People correctly note, this attempted distinction is untenable. First, there is no indication in the *Brazil* decision that the possibility that the defendant in that case actually had been aware of the potential immigration consequences of his plea, even without a *Peque* warning, played any role in our disposition of that appeal. Moreover, in deciding *Brazil*, this Court, as previously noted,

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his immigration status to the court, and the Court's opinion nowhere discusses such a hypothetical fact pattern. Accordingly, *Peque* cannot be read to address whether the failure to give a warning constitutes grounds for relief where the defendant himself or herself has led the court to believe the defendant to be a citizen.

[4]I note that, if the basis of the majority's remitting of this matter for a *Peque* hearing is that every defendant — citizen and noncitizen alike — must receive a *Peque* warning, the majority's discussion of this particular defendant's psychiatric history would seem to be beside the point. The majority's focus on defendant's mental condition (which I address more fully later in this writing) suggests that the majority realizes that it is extending, and not simply applying, *Peque*.

expressly held that the court's failure to give him a *Peque* warning afforded no grounds for relief even if "[he] mistakenly believed he was an American citizen" (123 AD3d at 467). We explained that, "if that was his belief, he would not have had any reason to be concerned about deportation" (*id.*), and therefore would not have been influenced by the warning had it been given.[5]

Defendant also attempts to distinguish *Brazil* on a different ground, namely, that the defendant in *Brazil*, unlike defendant here, did not suffer from mental illness at the time of his plea. In this regard, defendant points to evidence that, in this case, his treatment, even after the competency finding, had not negated all of his symptoms. In particular, defendant notes that the psychiatrists who found him competent acknowledged that he continued to express certain delusional beliefs, such as his claim to possess mystical healing powers. Notwithstanding this persisting symptom of his illness, the examining psychiatrists, counsel and the court all were satisfied that defendant would be

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[5]For the same reason, the majority cannot distinguish *Brazil* from this case based on our observation that it was "highly unlikely that [the *Brazil*] defendant mistakenly believed he was an American citizen" (123 AD3d at 467). As just noted, we expressly stated that we would reach the same result in *Brazil* "if that was his belief" (*id.*), i.e., even if that defendant actually did believe that he was a citizen.

able to assist in his defense at trial or, alternatively, to enter a guilty plea knowingly and voluntarily. Further, as previously noted, defendant's speech and conduct at the plea hearing were appropriate in all respects. Nonetheless, defendant argues that his psychiatric history should have alerted the court — even as it relied on defendant's other statements at the plea hearing — not to rely on defendant for an accurate report of his immigration status. This factor, according to defendant, renders our holding in *Brazil* inapplicable. The majority finds this line of argument persuasive, but I do not.

Contrary to the majority's view, *Brazil* cannot be distinguished from this case on the ground that the *Brazil* defendant did not suffer from psychiatric illness. In the context of the determination in the present case that defendant — once compliant with his medication schedule — was competent, the majority's position that defendant's psychiatric condition meant that the court could not trust defendant's claim to be a citizen makes no sense. The psychiatric certification of his fitness to stand trial entitled the court to believe defendant when he admitted to having committed a felony sex offense and when he stated that he understood the significance of his waiver of the right to defend himself at trial and of his acceptance of the consequences of the guilty plea. I fail to see how defendant

could have been qualified to make definitive representations to the court on these matters of the gravest consequence to himself while, at the very same time, according to the majority, his representation that he was a citizen could not be relied upon without "a more probing inquiry." The majority offers nothing to square this circle.[6]

When one considers the foregoing inconsistency in the majority's position, it becomes plain that defendant's *Peque* argument is a disguised attack on the competency finding that enabled him to enter the guilty plea in the first place. However, as defendant himself acknowledges, a direct appeal from the judgment is not the proper avenue for an initial attempt to have a guilty plea set aside on the ground that the plea was not entered knowingly and voluntarily. Such a claim — except in the "rare case" where the record of the allocution itself "calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]) — must be preserved for appellate review (*see* CPL 470.05[2]) by first being raised in the trial court by a motion to withdraw the plea before sentencing (CPL 220.60[3]) or

[6]The majority states that the need for "a more probing inquiry" was indicated by, inter alia, "court records indicat[ing] that defendant was 'undocumented'." As more fully discussed below, the sole court record to which the majority refers is the presentence report, which was not in existence at the time of the plea hearing.

by a motion to vacate the judgment after sentencing (CPL 440.10; *see Peque*, 22 NY3d at 182; *see also People v Williams*, 27 NY3d 212, 214 [2016]; *People v Davis*, 24 NY3d 1012 [2014]; *People v Toxey*, 86 NY2d 725, 726 [1995]; *People v Douglas*, 148 AD3d 822, 822- 823 [2d Dept 2017]; *People v Jackson*, 114 AD3d 807 [2d Dept 2014], *lv denied* 22 NY3d 1199 [2014]; *People v Ovalle*, 112 AD3d 971, 972 [2d Dept 2013], *lv denied* 23 NY3d 966 [2014]). Here, defendant has not made a motion of either kind.

Notably, defendant himself does not go so far as to argue that the existing record on this direct appeal provides an evidentiary basis for vacating his guilty plea on the ground that the psychiatric report finding him competent was erroneous. The final report preceding defendant's plea concluded that, as of that time, defendant's medication had brought his illness under control to the extent that, while he was "still having some residual delusional thinking of [a] religious nature[,] . . . he d[id] not directly link this type of thinking to his charges." The two examining psychiatrists who signed this report found that defendant's

> "residual symptoms . . . d[id] not interfere with his ability to stand trial. He was able to demonstrate understanding of court procedures; plea options, his charges, the role of court personnel and has indicated that he will work with his attorney in resolving his legal issues."

With respect to plea options, the psychiatrists found:

> "[Defendant] was able to describe four plea options available to him with the understanding and implications of these options. He understands the guilty and not guilty plea options. He understands that if he accepts an insanity plea it means that he will be sent to a hospital and that he was sick at the time the crime was committed. He also knows that if he takes a plea bargain it means that he has to plea[d] guilty to a lesser charge and does less time."

Nothing in the existing record contradicts the examining psychiatrists' expert finding that, at the relevant time, defendant's illness was sufficiently controlled by his medication to render him fit to stand trial or, alternatively, to enter a guilty plea. Although earlier psychiatric reports had found defendant incompetent during periods when he was refusing to take his medication, the record contains no medical evidence to contradict the opinion stated in the final report before the plea that defendant's illness had finally been brought under sufficient control to render him competent. Further, the aforementioned "rare case" exception to the preservation rule noted in *Lopez* does not apply here (71 NY2d at 666), since defendant's plea allocution does not cast doubt on the finding of competency or otherwise throw into question the voluntariness of his plea. To reiterate, the record reflects that, at the plea hearing, defendant responded appropriately and logically to all of the court's questions; that he engaged in no disruptive or

improper behavior; and that he made no delusional statements.[7]

The trial court was entitled to rely on the most recent psychiatric report finding defendant competent, as well as its own observations at the plea hearing, to conclude that defendant was able to understand the charges against him, to assist in his defense, and to comprehend the consequences of the plea (*see People v Jimenez*, 144 AD3d 402, 403 [1st Dept 2016], *lv denied* 29 NY3d 1128 [2017]). It logically follows that the court was entitled also to presume defendant's ability to understand its simple question concerning his citizenship status and to rely on him to give a truthful response to that question. While the majority complains that the "colloquy" at the plea hearing concerning defendant's immigration status was "bare-boned," I cannot see what was left to be discussed once defendant answered in the affirmative when asked whether he was a citizen. It was, after all, a yes-or-no question, and defendant's answer indicated to the court that the plea would have no immigration consequences. To reiterate, if defendant was competent to stand trial or to plead guilty to a felony (as two psychiatrists had

[7]Notably, defendant — who was not a stranger to the criminal justice system, having been convicted on a felony attempted narcotics sale charge in 1996 — made a cogently written pro se motion to dismiss his indictment on speedy-trial grounds in 2010, during a period in which he had been found unfit to stand trial.

determined), he was also competent to tell the court whether or not he was a citizen.[8]

Defendant's appellate brief, while acknowledging that this direct appeal is not the proper avenue for challenging the finding that he was competent, coyly suggests that his psychiatric history "might also call into question his competency to enter a knowing and voluntary guilty [plea]." Of course, defendant is free, if so advised, to move in Supreme Court to vacate his conviction under CPL 440.10(1)(e), based on an argument that the competency finding that enabled his plea was erroneous, assuming that he can marshal evidence from outside the existing record to support that conclusion (*see* CPL 440.10[2][c]). Defendant is not entitled, however, to pursue the same argument, in the guise of a *Peque* claim, on direct appeal, when the finding of his competence is uncontradicted on the

[8]Notably, defendant's appellate counsel conceded at oral argument that nothing in the record of this case, up to and including the minutes of the plea hearing, indicates that defendant did not hold American citizenship. Nonetheless, defendant's appellate brief makes the puzzling suggestion that the court at the plea hearing should have been alerted to the possible unreliability of his claim to be a citizen by the notice it had of the facts (1) that he had been born in Jamaica in 1971, (2) that he had immigrated to this country in 1994 (about 14 years before his arraignment in this matter), and (3) that he spoke English with a Jamaican accent. Given the large number of naturalized citizens living in New York today, I cannot see how any of these facts cast doubt on defendant's representation that he was a citizen.

existing record and, but for his own affirmative misrepresentation to the court taking his plea, there would be no *Peque* claim.

Unable to identify anything in the plea hearing transcript raising a genuine possibility of an infirmity in defendant's plea, the majority deems the record of the sentencing hearing to cast retroactive doubt on the validity of the plea. In this regard, the majority points to the presentence report's description of defendant as an "undocumented" alien, and apparently faults the sentencing court for failing to reconsider the validity of the plea in light of this postplea indication that defendant was not a citizen.[9] However, since defendant (who was represented by counsel at all times) did not move for leave to withdraw his plea at or before sentencing, the validity of the plea was not a matter for the sentencing court to consider.[10] Thus, the indication in the presentence report that defendant was

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[9]In fact, according to the prosecution's uncontradicted representation at the argument of this appeal, defendant is not an undocumented alien but a legal permanent resident of the United States. In any event, on this appeal, it is undisputed that defendant is not an American citizen.

[10]Neither the majority nor defendant cites any appellate authority supporting the proposition that a sentencing court is required to reexamine the validity of a guilty plea entered by a counseled defendant in the absence of a motion, either by counsel or by the defendant pro se, for leave to withdraw the plea.

not a citizen gave the sentencing court (which was not the same justice who had taken the plea) no reason to inquire into defendant's citizenship status, to investigate whether he had been given all appropriate warnings at the plea hearing, or otherwise to reexamine the validity of the plea.

Nor does defendant's single brief statement at the sentencing hearing cast doubt on the finding that he was competent. That statement — in which defendant referred to his "principles of tree [sic] of life" and stated that, "when these incidents occurred," he had "not [been] getting response based upon what were the fullness of these principles" — appears to have been intended as an apology for the sexual abuse of his half sister.[11] In any event, even if the statement is viewed as referring to defendant's belief in his mystical powers, it is consistent with the uncontradicted expert assessment in the

[11]The apologetic nature of defendant's statement at sentencing is apparent on the face of the record. When the court invited him to make a statement before sentence was imposed, defendant said: "I just want to say that I — you understand I went psychiatric treatment and I have been, you know, been experiencing a lot of different episodes and when, when these incidents occurred I was, you know, very unstable and was not under medication, oral medication. I try to reach to my — psychiatrically speaking, about the principles of tree of life. I was not getting response based upon what were the fullness of these principles and I just ask the Court that I be obliged that I can care for these principles and use them for the best of my abilities and to help others."

competency finding that, as a result of his treatment, the delusional beliefs that defendant continued to express "d[id] not interfere with his ability to stand trial."[12]

An interesting question is raised by the majority's holding that, in spite of the uncontradicted expert finding of defendant's competence, an issue exists on this record as to whether the court should have relied on his claim to be a citizen. Specifically, if the record raises an issue as to the reliability of defendant's citizenship claim, would it not also raise an issue as to his ability to understand a *Peque* warning, had one been given? Stated otherwise, it seems to me that the logic of the majority's position would require us to remand for a hearing even if the court actually had given a *Peque* warning. Thus, the implication of the majority's decision is that the standard of competence for a noncitizen to plead guilty to a felony is somehow higher than the usual standard by which defendants are judged fit to stand trial. I see no basis, either

[12]It is also noteworthy that the record reflects that defense counsel conveyed to the sentencing court defendant's request that the court recommend that the Department of Correction not cut his hair, which he had grown long for religious reasons. This request demonstrates that, even if he continued to hold certain delusional beliefs, defendant was in touch with the reality of his situation and, to a significant extent, had the presence of mind to deal with it rationally and logically.

in precedent or in justice, for establishing a standard of hypercompetence applicable only to noncitizens pleading guilty to felonies.

I further note that, as in *Brazil*, if defendant truly believed himself to be an American citizen (and whether he was merely mistaken or psychotically deluded in holding that belief), a *Peque* warning — which is specifically about the potential consequences of a guilty plea for *noncitizens* — would have had no effect on his decision whether to proceed with the allocution. As we stated in *Brazil*, one who believes himself or herself to be an American citizen does not "have . . . any reason to be concerned about deportation" (123 AD3d at 467). If defendant honestly held such a belief, he will be unable, upon remand, to make the showing required to have his conviction overturned — "the existence of a reasonable probability that, had the court warned [him] of the possibility of deportation, he . . . would have rejected the plea and opted to go to trial" (*Peque*, 22 NY3d at 176) — simply because, based on his mistaken belief in his citizenship, he would have understood the warning not to apply to himself. On the other hand, if defendant consciously misrepresented himself as a citizen to the court, I see no just reason to reward him for such calculated dishonesty by deeming the omission of the *Peque* warning — an omission that defendant

himself induced — to provide grounds for vacating his plea.[13]

Finally, I acknowledge that the blanket rule that the majority attempts to draw from *Peque* — that the warning about the possible immigration consequences for a noncitizen of a guilty plea to a felony charge should be given to every defendant, citizen or noncitizen — might well make sense as a prophylactic measure to protect the interests the Court of Appeals recognized in that decision. However, as previously discussed, *Peque* itself did not impose such a rule, and even if such a rule were adopted, it would not necessarily follow that failure to give a *Peque* warning to a defendant who affirmatively misrepresented to the Court that he or she was a citizen would constitute grounds for vacating the plea.[14] In any event, in *Brazil*, this Court has

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[13]Given the uncontradicted competency finding, I see no basis for the majority's assertion that there is no possibility that defendant "purposely misrepresented his immigration status." In any event, as just discussed, as was the case with the defendant in *Brazil*, if defendant here actually did believe that he was a citizen, a *Peque* warning would not have influenced him. I further note that, contrary to the majority's unfounded suggestion, no one on this bench is "alleg[ing]" anything about what was in defendant's mind when he answered the court's question about his immigration status.

[14]Certainly, even if a rule requiring the giving of a *Peque* warning to every defendant pleading guilty to a felony were adopted, a defendant holding American citizenship — or, as previously discussed, erroneously believing that he or she was a citizen — could not show that he or she was prejudiced by the omission of such a warning so as to warrant vacating the plea under the standard established by *Peque*. Neither an actual

already considered and rejected the argument that failure to give a *Peque* warning to a defendant who falsely claims to be a citizen at a plea hearing may constitute grounds for setting aside the plea. I believe that whether the rule of *Peque* should be extended to require all defendants to receive a warning is a policy determination that is best left to the Court of Appeals. In the meantime, this Court should adhere to its own applicable precedent. Accordingly, I would affirm the judgment, and I

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citizen, nor one genuinely but mistakenly believing himself or herself to be a citizen, would have reason to fear deportation, whether or not the warning had been given. Accordingly, such a person could not show "a reasonable probability that, had the court warned the defendant of the possibility of deportation, he or she would have rejected the plea and opted to go to trial" (22 NY3d at 176).

respectfully dissent from the majority's order holding the appeal in abeyance and remanding the matter for a *Peque* hearing.

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

ENTERED: FEBRUARY 1, 2018

CLERK