SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 18, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

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

-against-

Marcelino Allende,
Defendant-Appellant.

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

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

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

Except as indicated, defendant's arguments concerning the weight of the evidence are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the

jury's credibility determinations. Defendant's accessorial liability could be reasonably inferred from the entire course of conduct of defendant and his codefendant before, during and after the crime (*see generally Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]).

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

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

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

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

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

Although vicariously liable for the codefendant's actions, significantly, it is undisputed that it was the codefendant,

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

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7359 The People of the State of New York, Dkt. 17898/13
Respondent,

-against-

Danny Figueroa,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Jeanette Rodriguez-Morick, J. at motion; Diane Kiesel, J. at nonjury trial and sentencing), rendered February 18, 2014, convicting defendant of attempted criminal contempt in the second degree, and sentencing him to a term of 30 days, unanimously affirmed.

Defendant waived any challenge to the purported hearsay defect in the accusatory instrument by not filing a written motion challenging the information within 45 days of arraignment (*see* CPL 170.30[1][a],[2]; 255.20[1]; *see also People v Casey*, 95 NY2d 354, 362-363, 367 [2000]). Defendant could not avoid this procedural bar simply by placing his claim in a speedy trial motion.

In any event, the court properly denied defendant's speedy trial motion because the accusatory instrument was not

jurisdictionally defective and therefore, the People's statement of readiness was not illusory. The misdemeanor information was sufficient because it established by nonhearsay evidence every element of the offense of attempted second-degree criminal contempt (*see People v Casey*, 95 NY2d at 359-360 [2000]). The information was based on the statement of the victim, who had firsthand knowledge of defendant's violation of an order of protection that was in effect, and of which defendant had been duly informed. It was therefore, unnecessary for the People to affix a certified copy of the order of protection to render the accusatory instrument sufficient (*see id.*). Defendant's attempt to distinguish *Casey* is unavailing. The victim's personal knowledge sufficed to establish the necessary facts and there was no requirement of "corroboration."

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 court's credibility determinations.

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7360 In re Genesis R.,

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

Marcelino C.,
Respondent-Appellant,

Graham Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 12, 2017, which, insofar as appealed from, determined that respondent father's consent was not required for the adoption of the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

There is no basis for disturbing the court's determination that the father's consent to the adoption of the child was not required. The record supports the findings that the father had not paid "a fair and reasonable sum" toward the child's support

and that he did not visit the child at least monthly. When visitation was not feasible, the father did not communicate regularly with the child (*see* Domestic Relations Law § 111[1][d]; *Matter of Seth Jacob S.*, 134 AD3d 636 [1st Dept 2015]).

The record further supports the determination to free the child for adoption. The now almost six-year-old child has been in foster care her entire life, and living with her foster mother since she was about one year old. The foster mother has provided a stable, loving and nurturing environment for her, and the child is well-bonded to the foster mother and her adult children (*see e.g. Matter of Christian D. [Marian R.]*, 157 AD3d 599, 600 [1st Dept 2018], *lv denied* 31 NY3d 904 [2018]). By contrast, at the time of disposition, the father was incarcerated and was awaiting trial. Moreover, the father did not have a bond with the child, who was extremely afraid of the father, to the point that she exhibited symptoms of extreme anxiety, which required therapy.

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

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7362 The People of the State of New York, Respondent, Ind. 1542N/14

-against-

Freilyn Holquin, Defendant-Appellant.

_____

Gotlin & Jaffe, New York (Lawrence Fleischer of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered January 10, 2017, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees and criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The verdict was based on legally sufficient evidence. Moreover, the evidence overwhelmingly established defendant's guilt. There was no rational explanation for the presence of a large quantity of drugs and packaging materials in defendant's own apartment other than his constructive possession of the contraband (*see e.g. People v Diaz*, 220 AD2d 260, 260 [1st Dept 1995]). The evidence also established defendant's guilt under

the correctly applied drug factory presumption of Penal Law § 220.25(2), based on defendant's close proximity to contraband in open view at the time a search warrant was executed.

Since defendant objected at trial on different grounds from those raised on appeal (*see People v Graves*, 85 NY2d 1024, 1026-1027 [1995]), he has not preserved his present challenges to expert testimony, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The expert testimony on drug trafficking involved matters beyond the knowledge of the average juror, and the witness did not intrude on the jury's fact-finding function.

The court providently exercised its discretion in denying defendant's motion for a mistrial based on allegedly prejudicial testimony. The court sustained defendant's objection and curtailed the testimony, before the witness had a chance to say anything that could have caused any prejudice. Thus, the drastic

remedy of a mistrial was not warranted (*see People v Santiago*, 52 NY2d 865 [1981]; *see also People v Young*, 48 NY2d 995 [1980]).

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7363-
7364-
7465-
7366-
7367-
7368 Index 651010/11

Anderson & Anderson LLP-Guangzhou, et al.,
Plaintiffs-Appellants-Respondents,

-against-

North American Foreign Trading Corp.,
Defendant-Respondent-Appellant.

- - - - -

Anderson & Anderson LLP-Guangzhou, et al.,
Plaintiffs-Respondents,

-against-

North American Foreign Trading Corp.,
Defendant-Appellant.

_____

Cox, Padmore Skolnik & Snakarcny, LLP, New York (Stefan Kalina of counsel), for appellants-respondents/respondents.

Schlam Stone & Dolan LLP, New York (Niall D. O'Murchadha of counsel), for respondent-appellant/appellant.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered November 29, 2017, dismissing the complaint without prejudice, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered on or about November 2, 2016 and June 6, 2017, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeals from orders entered on or about February 27, 2017, and September 25, 2017,

unanimously dismissed, without costs.

The motion court properly granted defendant's motion to strike the complaint after plaintiffs failed to comply with a conditional order striking the complaint unless they produced the written discovery and witnesses for depositions within a specified period (*see Casas v Consolidated Edison Co. of N.Y., Inc.*, 116 AD3d 648 [1st Dept 2014]; *see also Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 82-83 [2010]).

Plaintiffs failed to demonstrate that they were entitled to relief from the conditional order. Their proffered excuses for their noncompliance - including their claimed difficulties in locating suitable counsel - are not reasonable (*see Gibbs*, 16 NY3d at 80). Plaintiffs had plenty of time and opportunities to obtain new counsel but failed to do so (*see 135 Bowery LLC v 10717 LLC*, 145 AD3d 1225, 1227-1228 [3d Dept 2016]; *Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1099 [4th Dept 2013]). Plaintiffs moved for an appellate stay of discovery (which was ultimately denied) and requested that the court permit depositions to be conducted via written questions. However, they were not free simply to do nothing while awaiting rulings on those motions. As they did not submit an affidavit of merit by someone with personal knowledge of the evidentiary facts, plaintiffs also failed to demonstrate that they had a meritorious

claim (*see Gibbs*, 16 NY3d at 80; *Oversby v Linde Div. of Union Carbide Corp.*, 121 AD2d 373 [2d Dept 1986]).

Plaintiffs failed to demonstrate that the conditional order was improperly entered. It is undisputed that plaintiffs failed to comply with the court's October 19 and December 13, 2016 status conference orders or to respond substantively to defendant's request to meet and confer (*see* CPLR 3126[3]; *Gibbs*, 16 NY3d at 79; *Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]). As indicated, plaintiffs' noncompliance is not excused by their purported difficulties in obtaining adequate counsel.

The fact that plaintiffs timely produced documents responsive to defendant's earlier requests in 2012-2013 does not excuse their failure to comply with defendant's later requests or the court's later discovery orders. The fact that plaintiffs disagreed with those orders is also not a reasonable excuse for noncompliance (*see Seril v Belnord Tenants Assn.*, 139 AD2d 401, 401 [1st Dept 1988], citing *Margulies v Margulies*, 42 AD2d 517, 517 [1st Dept 1973], *lv dismissed* 33 NY2d 894 [1973]). Defendant's own alleged wrongful withholding of documents demanded in 2012 until 2016 is similarly not relevant, as plaintiffs resolved these grievances by stipulation and took the position that no further discovery was necessary.

Nevertheless, we find that the motion court properly declined to hold plaintiffs in civil contempt (*see El-Dehdan v El-Dehdan*, 114 AD3d 4, 10, 16 [2d Dept 2013], *affd* 26 NY3d 19 [2015]) or to award monetary sanctions against their counsel, Courtney Delano West (*see* Rules of Chief Admin of Cts [22 NYCRR] § 130-1.1[a], [c]; *Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34-35 [1st Dept 1999]).

Additionally, we cannot conclude that the motion court erred as a matter of law in dismissing the complaint without prejudice (*see* CPLR 5013; *Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614, 615-616 [1985]; *Daluise v Sottile*, 40 AD3d 801, 802-803 [2d Dept 2007]).

The February 2017 order, which denied plaintiffs' motion to vacate an October 2014 order that disqualified counsel for plaintiffs, and the September 2017 order, which denied plaintiffs' motion for leave for West to appear as counsel, are not brought up for review by the instant appeal from the judgment, because they do not "necessarily affect[] the final judgment" (*see* CPLR 5501[a][1]; *Paul v Cooper*, 100 AD3d 1550, 1552 [4th Dept 2012], *lv denied* 21 NY3d 855 [2013]). However, the November 2016 order, which granted defendant's motion to vacate the note of issue and denied plaintiffs' motion for summary judgment, is reviewable, because, if reversed, it could

be dispositive (*see* CPLR 5501[a][1]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 20 NY3d 37, 41-43 [2012]).

The court correctly vacated the note of issue on the ground that there was significant fact and expert discovery outstanding at the time it was filed (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.21[a]-[b]; *Tirado v Miller*, 75 AD3d 153, 156 [2d Dept 2010]; *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390-391 [1st Dept 2006]). Plaintiffs' claim that defendant's deposition notices were fabricated is unpersuasive.

The court correctly denied plaintiffs' motion for summary judgment both as premature (*see* CPLR 3212[f]) and because issues of fact existed as to what was required by the contingency fee agreements to trigger defendant's payment obligation, whether plaintiffs met those requirements, whether the agreements automatically terminated on December 31, 2009, and whether plaintiffs were entitled to payment even if the agreements terminated on that date. Further discovery could prove illuminating on these issues - particularly expert discovery on the correct interpretation of these agreements under Chinese law (*see JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 305 [1st Dept 2007]). Although both parties produced expert affidavits despite the absence of any expert discovery, plaintiffs did not submit their affidavit until reply, and

therefore cannot rely on it to make their prima facie showing (*see L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692 [2d Dept 2013]).

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: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7369- SCI 31/17
7369A The People of the State of New York, Ind. 1945/16
Respondent,

-against-

Daniel Martin,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Michael A. Gross, J. at first plea; Raymond L. Bruce, J. at second plea and sentencing), rendered March 23, 2017,

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

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

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

ENTERED: OCTOBER 18, 2018

CLERK

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

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7370 The People of the State of New York, Ind. 3842/14
Respondent,

-against-

Angel Rivera,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alvin Yearwood, J.), rendered October 20, 2016, unanimously affirmed.

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

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7371 In re Joseph R., Jr.,

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

Administration for Children's Services,
Petitioner-Respondent,

Eldra J.,
Respondent.

- - - - -

Joseph R., Sr.,
Nonparty Appellant.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jessica Miller of counsel), for respondent.

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

_____

Appeal from order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about May 8, 2017, which found that petitioner agency made reasonable efforts to further the plan of permanent placement of the subject child with a fit and willing relative, pursuant to Family Court Act § 1089, and ordered that the child continue to be in the custody of the Commissioner of Social Services, unanimously dismissed, without costs.

Although father contends that ACS should have, but failed

to, make reasonable efforts to establish a plan for the child's return to him once he is released from prison, the father's appeal challenges an issue not addressed by the order on appeal and, therefore, that issue is not properly before this Court. The "reasonable efforts" finding in the order pertains only to the goal of placement with a "fit and willing relative," and not a "return-to-parent" permanency goal.

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7372 In re Restaurant Action Alliance NYC, et al., Petitioners-Appellants, Index 100734/15

-against-

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

_____

Gibson Dunn & Crutcher LLP, New York (Randy M. Mastro of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

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Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered June 11, 2018, denying the petition to annul a determination of respondent Department of Sanitation, dated May 12, 2017, pursuant to Local Law 142, that the City's expanded polystyrene single service articles cannot be recycled in a manner that is environmentally effective and economically feasible, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination of the Commissioner of the Department of Sanitation, made upon remand, was neither arbitrary and

capricious nor without a rational basis (*see Matter of Farrell v New York City Police Dept.*, 37 NY2d 843 [1975]; *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

The Commissioner properly considered the evidence submitted upon remand, as well as reconsidering the evidence in the original record, and, based on that record, rationally concluded that the City's expanded polystyrene single service articles cannot be recycled in a manner that is environmentally effective and economically feasible, even taking into account petitioners' proposal to pay for the infrastructure costs and subsidize the market for the purchase of the recycled materials for five years. The Commissioner concluded that even if, during the period of the subsidy, petitioners' proposed plan succeeded in collecting and converting the material into marketable recycled products, the plan most likely would result in significant landfilling of expanded polystyrene after the five-year subsidy period. This conclusion is supported by the record, including the historical

evidence of efforts to undertake such recycling in other jurisdictions and the evidence indicating that no viable, non-subsidized market for the material would exist or emerge absent the subsidy.

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7373 The People of the State of New York, Respondent, Ind. 212/15

-against-

Manny Romeo, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered June 30, 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: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7374- Ind. 1386/15
7374A The People of the State of New York, 1020/16
Respondent,

-against-

Jean Moise,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Anthony J. Ferrara, J. at suppression hearing; Maxwell Wiley, J. at trial, plea and sentencing), rendered June 9, 2016, convicting defendant, after a jury trial, of robbery in the second degree, and, upon his plea of guilty, of burglary in the third degree, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed.

The court properly denied defendant's suppression motion. Although the description of defendant was general, and he had been described as riding a bicycle, but was no longer doing so when the police observed him, the police had reasonable suspicion

for the stop based on a combination of factors (*see e.g. People v Cook*, 161 AD3d 708 [1st Dept 2018]; *People v Williams*, 146 AD3d 410, 411 [1st Dept 2017], *lv denied* 29 NY3d 954 [2017]; *People v Brujan*, 104 AD3d 481 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]). The police encountered defendant in very close spatial and temporal proximity to the crime, and he behaved suspiciously by first running in apparent flight, then suddenly entering and standing idly in a store, and then walking out and taking off a shirt that figured in the description of the suspect. Even if the officer's taking of the shirt from defendant's hand amounted to an improper seizure, this would be harmless, because the stop was legal and the victim independently identified defendant during the showup.

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. The physical injury element of the robbery conviction was established by evidence that amply supported the conclusion that the victim's injury resulted in substantial pain (*see generally People v Chiddick*, 8 NY3d 445, 447–448 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

Although otherwise admissible, a reference to a purported hospital diagnosis of a concussion, contained in the record of a

pain and wellness center that treated the victim, should have been redacted on the ground that the treating hospital had made no such diagnosis. Nevertheless, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The People made no claim that the element of physical injury was supported in any way by proof of a concussion, instead relying on overwhelming proof of substantial pain. There was no significant probability that the verdict would have been different had the redaction been made.

In light of the foregoing, there is no basis for reversal of the plea conviction.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7378 The People of the State of New York, Ind. 2561/16
Respondent,

-against-

Christian Marrero,
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 (Rebecca Hausner 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 (Larry Stephen, J.), rendered November 9, 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: OCTOBER 18, 2018

CLERK

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

Sweeny, J.P., Mazzarelli, Webber, Kahn, JJ.

7379 The People of the State of New York, Ind. 1872/14
Respondent,

-against-

Julio Neal,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered January 12, 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: OCTOBER 18, 2018

CLERK

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

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7380 The People of the State of New York, Ind. 2749/14
Respondent,

-against-

Amedee Santiago,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, Bronx County (William Mogulescu, J.), rendered June 15, 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: OCTOBER 18, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7381N In re State Farm Fire and Casualty Company,
Petitioner-Respondent,

-against-

Ambers Jackson, et al.,
Respondents,

G. Martinez,
Proposed Additional Respondent,

American Transit Insurance Company,
Proposed Additional Respondent-Appellant.

Index 27149/15E

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Law Offices of Richard A. Reinstein, P.C., Kew Gardens, (Michael I. Josephs of counsel), for appellant.

Kelly Rode & Kelly, LLP, Mineola (Mary J. Joseph of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered February 17, 2017, which granted petitioner State Farm Fire and Casualty Company's order to show cause to permanently stay the uninsured motorist arbitration, unanimously affirmed, without costs.

The deposition testimony of respondent driver and his passenger, who were hit by another vehicle that fled the scene, was admissible under both the present sense impression exception

to the hearsay rule (*People v Brown*, 80 NY2d 729, 734-735 [1993]) and the past recollection recorded exception (*see People v Somarriba*, 192 AD2d 484, 485 [1st Dept 1993]). The testimony included photographs of the license plate of the offending vehicle, shown to the police officers who arrived pursuant to their call, and corroborated by respondents' description of the vehicle.

Moreover, the court did not improvidently exercise its discretion is denying a continuance to allow a nonparty witness, the owner of the vehicle that left the accident, to testify, given that he failed to appear despite prior knowledge of the date of the hearing on coverage, which had previously been adjourned (*Halloran v Spina Floor Covering*, 185 AD2d 149, 149 [1st Dept 1992]).

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7383 In re Ahdawantazalam A.,
Petitioner-Appellant,

-against-

Georgilia A.,
Respondent-Respondent.

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Ahdawantazalam A., appellant pro se.

Kenneth M. Tucillo, Hastings on Hudson, attorney for the child.

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Appeal from order, Family Court, New York County (Gail A. Adams, Referee), entered on or about June 19, 2017, which, after a trial, awarded sole legal and physical custody of the subject child to respondent mother, unanimously dismissed, as moot, without costs.

During the pendency of this appeal the subject child has reached the age of majority and, accordingly, can no longer be the subject of a custody order (*see Matter of Darisa D. v Bienvenida D.*, 26 AD3d 222, 222-223 [1st Dept 2006]). Further,

the exception to the mootness doctrine does not apply here, as the issues involved in a custody dispute will not typically evade review (*see e.g. Matter of Chenier v Richard W.*, 82 NY2d 830, 832 [1993]).

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7385- Index 654349/13
7386 Everest Reinsurance Company,
Plaintiff-Appellant,

-against-

Galileo Weather Risk Management
Advisors, LLC, et al.,
Defendants-Respondents.

- - - - -

Everest Reinsurance Company,
Plaintiff-Respondent,

-against-

Galileo Weather Risk Management
Advisors, LLC, et al.,
Defendants-Appellants.

_____

Saiber LLC, New York (Joseph J. Schiavone of counsel), for appellant/respondent.

Stevens & Lee, New York (Bradley L. Mitchell of counsel), for respondents/appellants.

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Order, Supreme Court, New York County (Melissa Crane, J.), entered December 5, 2017, which denied plaintiff's motion for summary judgment on the issue of liability on its breach of contract claim as against defendant Galileo Weather Risk Management Advisors, LLC (Galileo), unanimously affirmed, with costs. Order, same court and Justice, entered December 4, 2017, which denied defendants' motion for summary judgment dismissing the breach of contract and unjust enrichment claims as against

Galileo, unanimously modified, on the law, the motion granted to the extent of dismissing the unjust enrichment claim, and otherwise affirmed, without costs.

In 2011, plaintiff and Galileo entered into an arrangement whereby Galileo would locate potential weather-related insurance and/or derivative transactions for plaintiff, which would pay Galileo a fee on such transactions that closed. For purposes of these appeals, the parties agree that in 2012, plaintiff and Galileo reached an agreement memorialized solely in two emails and pursuant to which plaintiff would provide Galileo with $300,000 to hire a particular individual and, in exchange, Galileo's fees on future transactions that it located in Europe would be reduced by $330,000. After Galileo subsequently sold its assets and discontinued doing business, plaintiff commenced this action to recoup the $330,000 called for under the agreement.

Plaintiff argues that Galileo repudiated the agreement by selling its assets and ceasing to do business, which disabled its ability to pay back the agreed amount from future commissions (*see Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 77 [1st Dept 2002], *lv denied* 100 NY2d 504 [2003]). Galileo does not dispute that, to the extent it had an obligation at the time of the asset sale to continue locating deals for plaintiff,

it repudiated the agreement. However, it contends that it had no such obligation. Because the agreement here is silent on any duration of time that Galileo was required to locate potential deals for plaintiff, an issue of fact exists as to whether Galileo repudiated the agreement by selling its assets and rendering itself unable to continue to do so (*see Michael Leibman & Assoc., Inc. v Ultimate Combustion Co., Inc.*, 145 AD3d 467, 468 [1st Dept 2016]; *see also Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993] ["When a contract does not specify time of performance, the law implies a reasonable time"]).

However, Supreme Court erred in denying defendants' motion insofar as they sought dismissal of the unjust enrichment claim. To the extent that the dispute is not within the scope of the agreement, the agreement does not preclude an unjust enrichment claim (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). However, no such claim lies here. In the absence of a contractual provision entitling plaintiff to recoup a certain sum, it suffered no loss from providing Galileo with $300,000 to generate business for plaintiff, which resulted in plaintiff earning more than $1 million on a single transaction.

Thus, "equity need not intercede" (*Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 593 [1st Dept 2011]; *see Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]).

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7387- Ind. 5199/12
7388 The People of the State of New York,
Respondent,

-against-

Edmund Pinnacle,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered October 21, 2014, as amended December 15, 2014 and January 2, 2015, 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 to an aggregate term of 24 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 20 years to life, and otherwise affirmed.

Defendant was not entitled to be present, or to have his counsel present, at a proceeding where the People sought a material witness order. Initially, we note that all of defendant's arguments are made for the first time on appeal. However, we find it unnecessary to determine which, if any, of

defendant's claims are exempt from the requirement of preservation.

"Neither the defendant nor the prosecution is entitled to notice of an application for a material witness hearing, and neither party has standing to contest or to participate in a hearing on an application made by the other" (*People v Fermin*, 150 AD3d 876, 878 [2d Dept 2017], *lv denied* 30 NY3d 1060 [2017]). The proceeding was held only to determine what steps should be taken to secure the witness's continued appearance, and had "nothing to do with the content of the witness's testimony or any legal or factual issue that might involve the opposing party in the underlying criminal case" (*People v Mauro*, 49 AD3d 268, 269 [1st Dept 2008], *lv denied* 10 NY3d 961 [2008]). Contrary to defendant's contention, the proceeding did not implicate the witness's credibility or the reasons for her refusal to continue testifying (*see People v Valenzuela*, 234 AD2d 219, 219-221 [1st Dept 1996], *lv denied* 89 NY2d 1041 [1997]; *People v Lovett*, 192 AD2d 326 [1st Dept 1993], *lv denied* 82 NY2d 722 [1993]).

Moreover, defense counsel received a transcript of the material witness proceeding and was able to use it in cross-examination of the witness. There is no merit to defendant's claim that he or his counsel needed to observe the witness's demeanor at the ex parte proceeding in order to cross-examine her

at trial. Likewise, defendant has not shown that anything in the court's comments to the witness at the proceeding could have influenced her testimony or triggered any requirement that defendant or his counsel be present.

By failing to object, or by failing to request further relief after the court sustained an objection and gave a curative instruction, defendant failed to preserve his challenges to the prosecutor's opening statement and summation, 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 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). The challenged remarks, when viewed in context, generally constituted fair comment on the evidence. To the extent some comments could be viewed as improper appeals for sympathy, the error was harmless.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7389 The People of the State of New York, Ind. 4459/11
Respondent,

-against-

Dioris Rivera,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yan Slavinskiy 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 (Abraham Clott, J.), rendered March 2, 2016,

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

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

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

ENTERED: OCTOBER 18, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7390 The People of the State of New York, Ind. 856/12
Respondent,

-against-

Mor Ndiaye,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Christine M. DiDomenico of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered October 16, 2012, as amended October 24, 2012, convicting defendant, upon his guilty plea, of criminal possession of stolen property in the fifth degree, and sentencing him to a term of 11 months, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). Review of defendant's unpreserved claim in the interest of justice is unwarranted.

Defendant claims that his counsel provided him with ineffective assistance regarding the immigration consequences of his plea (*see Padilla v Kentucky*, 559 US 356 [2010]). This claim involves matters not reflected in, or fully explained by, the

record, which includes an ambiguous statement by counsel on the subject of deportation. Accordingly, this claim is unreviewable without the benefit of a fuller record generated by way of a CPL 440.10 motion (*see People v Pastor*, 28 NY3d 1089, 1091 [2016]; *Peque*, 22 NY3d at 202-203).

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7391 Intrepid Investments, LLC, etc., Index 654291/13
Plaintiff-Respondent-Appellant,

-against-

Selling Source, LLC, et al.,
Defendants,

White Oak Global Advisors, LLC,
Defendant-Appellant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Niall D. O'Murchadha of counsel), for appellant-respondent.

Tseitlin & Glas, P.C., New York (Eduardo J. Glas of counsel) and McCarter & English, LLP, New York (Clement J. Farley of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 1, 2015, which denied defendant White Oak Global Advisors, LLC's motion to dismiss the complaint as against it, and granted plaintiff's motion to amend the complaint to add claims for breach of the intercreditor agreement and tortious interference with contract as against White Oak, unanimously modified, on the law, to deny plaintiff's motion as to claims for breach of the intercreditor agreement based upon alteration of the maturity date of plaintiff's note, and to dismiss any claim or defense based on allegations that the First Priority or Second Priority Obligations have been paid in full or paid off, and otherwise affirmed, without costs.

The court correctly rejected plaintiff's argument that the remedies standstill provision of section 5(a) of the parties' intercreditor agreement (ICA) bars actions by Third Priority Lenders but not by the Third Priority Representative, because the Third Priority Representative's authority derives solely from the Third Priority Lenders (*see American States Ins. Co. v Huff*, 119 AD3d 478, 479 [1st Dept 2014]). Plaintiff's reading of the provision would impermissibly render the limitation on remedies meaningless (*see Matter of Trump [Refco Props.]*, 194 AD2d 70, 75 [1st Dept 1993], *lv denied* 83 NY2d 754 [1994]).

The court correctly found that the exception to the standstill provision in section 5(b)(ii) is inapplicable, because this is not an action to protect collateral; even the causes of action related to collateral simply seek compensatory damages. The court correctly found section 5(b)(iv) inapplicable, because the phrase "to prevent the running of any applicable statute of limitations" in that section means to prevent the statute of limitations from expiring; this action was brought within a year of the alleged breaches.

Nor is there a conflict between section 5(a) and section 16 ("Governing Law; Forum"). The language upon which plaintiff relies indicates merely that the choice of a New York forum is not mandatory.

Defendant White Oak's documentary evidence demonstrates that the senior loans were merely refinanced, not "paid off," under its subsequent agreement with borrower defendant Selling Source, LLC (and its guarantor affiliates) (the White Oak Agreement [WOA]). In particular, the so-called "confirmation letter," a related agreement signed by all parties to the refinancing, expressly states that the disputed transaction is a replacement financing. Contrary to the court's ruling, the document is an agreement at arm's length, not merely a letter, and thus establishes conclusively that the loan was never "paid off" and that section 5(a) continued to apply to junior lenders, such as plaintiff (*see Nanto MK Corp. v J & E Realty*, 147 AD3d 695 [1st Dept 2017]; CPLR 3211[a][1]).

Thus, the remedies standstill provision of ICA section 5(a) bars this action unless White Oak is precluded from asserting it by having committed a material breach of the ICA.

The court correctly found that the complaint adequately alleges that White Oak breached the ICA by restricting payments from borrowers on plaintiff's junior note (the right to the payments is provided for in section 2[b]). The section of the WOA that plaintiff alleges bars these payments is ambiguous. Moreover, while ICA section 10 gives White Oak the right to amend its own loan documents, even to plaintiff's detriment, it appears

to be in conflict with ICA section 14, which requires plaintiff's consent to amend the ICA. Nor can it be concluded as a matter of law that such a breach would be immaterial.

The court correctly sustained the claim that White Oak breached the ICA by removing plaintiff's lien on the assets of guarantor defendant Kitara Media, LCC. White Oak's right to remove that lien turns on whether the transaction with nonparty Ascend Acquisition Corp. was a "sale" or "disposition" of Kitara. Ascend's SEC filings suggest that it was a "reverse merger," rather than a sale, with Kitara the surviving entity and Selling Source, the borrower on White Oak's and plaintiff's notes, retaining over 50% of the stock of the surviving entity. This transaction is not necessarily a "sale" under the ICA (*see e.g. New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 13 AD3d 425, 428 [2nd Dept 2004]).

The court correctly found that, in light of the exculpatory clause of section 10, the claim that White Oak breached the ICA by concealing the WOA from plaintiff is not viable. While intentional misconduct can be a basis for vitiating an exculpatory clause, where, as here, the conduct is merely intentional breach of contract, the clause will still be enforced (*see Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 192 AD2d 83, 88 [1st Dept 1993], *affd* 84 NY2d 430 [1994]).

However, the court should have also dismissed the claim that White Oak breached the ICA by changing the maturity date of plaintiff's note. The provisions of the WOA do not require a change of maturity date of that note. By its terms the WOA gives borrowers three choices: pay off plaintiff's note early, renegotiate the note so it is due after the refinanced senior loans, or default on the senior loans. These are essentially the choices that borrowers had even without that term in the WOA.

In view of the foregoing, plaintiff's motion to amend must be denied as to the claim for breach of the ICA based on the delayed maturity date of plaintiff's note.

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7393 The People of the State of New York, Ind. 3685/16
Respondent,

-against-

Dale Rose,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis 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, Bronx County (William Mogulescu, J.), rendered January 12, 2017,

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

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

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

ENTERED: OCTOBER 18, 2018

CLERK

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

Richter, J.P., Kapnick, Kern, Moulton, JJ.

7394-
7395 In re Luis P.,

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

_____

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

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about November 20, 2017, which adjudicated appellant a juvenile delinquent upon his admission that he had committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal. The mitigating factors that appellant cited, including the absence of previous contact with the juvenile justice system, did not outweigh the seriousness of appellant's violent act. Thus, the court providently exercised its

discretion in deciding that a 12-month period of probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7396 & M-4257 Blackrock Balanced Capital Portfolio (FI), et al.
Plaintiffs-Respondents-Appellants,

-against-

U.S. Bank National Association,
Defendant-Appellant-Respondent.

Index 652204/15

Jones Day, Cleveland, OH (Louis A. Chaiten of the bar of the State of Ohio, admitted pro hac vice, of counsel), for appellant-respondent.

Bernstein Litowitz Berger & Grossmann LLP, New York (Robert S. Trisotto and Timothy A. DeLange of the bar of the State of California, admitted pro hac vice, of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 17, 2018, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss to the extent of dismissing the tort claims based on conflict of interest allegations and the breach of contract claims based on post-event of default servicer breaches as to all but 77 plaintiffs, and denied its motion to dismiss the remaining breach of contract claims, unanimously modified, on the law, to grant the motion to dismiss the breach of contract claims based on post-event of default servicer breaches as to another 56 trusts, and otherwise affirmed, without costs.

Plaintiffs are the holders of certificates issued by

residential mortgage-backed securities trusts of which defendant is the trustee. The complaint alleges that the trustee breached its obligations pursuant to the governing Pooling and Service Agreements (PSAs) by failing to provide notices to cure to servicers once it gained knowledge of certain servicing breaches and by failing to make prudent decisions concerning the events of default.

As to the post-event of default claims, the PSAs provide that a Servicer Event of Default occurs when a servicer fails to cure a breach of its obligations within a specific time frame "after the date on which written notice of such failure, requiring the same to be remedied, shall have been given to the [Servicer] by the Depositor or the Trustee or to the Master Servicer, the Depositor and the Trustee by the Holders of Certificates entitled to at least 25% of the Voting Interests . . ." The parties do not dispute that in September 2012, notice of servicing breaches was sent on behalf of investors in 77 of the trusts that are plaintiffs herein to the trustee and the servicer of those particular trusts. It is also not disputed that investors held more than 25% of the voting rights in 21 of the 77 trusts on whose behalf the notice was sent.

Based on the foregoing, an event of default occurred as to

the 21 trusts because the notice was sent "to the Master Servicer, the Depositor and the Trustee by the Holders of Certificates entitled to at least 25% of the Voting Interests. . . ." As to those trusts, the complaint asserts a proper post-Event of Default breach of contract claim as it is not disputed that the trustee failed to enforce the event of default after the requisite time lapsed. As to the other 56 trusts, we reject plaintiffs' argument that defendant had an obligation to send notices to cure to servicers as the PSAs do not require US Bank to send a notice to cure, but merely designate it as one of the parties that is permitted to send such a notice. Moreover, the prevention doctrine, which precludes a party from arguing that its performance under a contract has not been triggered by a condition precedent, when its non-performance has been caused by that party, is not applicable because it requires "the party's active conduct . . . preventing or hindering the fulfillment of the condition" (*Fixed Income Shares: Series M v Citibank N.A*,, 157 AD3d 541, 542 [1st Dept 2018][internal quotation marks omitted]). A defendant's failure to send a notice to cure to the servicers is not "active conduct" within the meaning of the prevention doctrine (*id*.).

As to the pre-Event of Default breach of contract claims, US Bank's argument that the complaint fails to allege loan specific

breaches by each of the relevant sellers is unavailing at this stage of the litigation (*see Fixed Income*, 56 Misc3d 1205(A) [NY County 2017], *affd in part* 157 AD3d 541, 542 [1st Dept 2018] [rejecting the argument that plaintiffs were "required to allege loan-specific breaches"]; *Commerce Bank v Bank of N.Y. Mellon*, 141 AD3d 413, 414 [1st Dept 2016]).

We reject defendant's argument that all of the breach of contract claims must be dismissed because plaintiffs have failed to assert that they have complied with all of the requirements of the no-action clauses in each of the PSAs. Compliance with the clauses was excused because it would be futile to demand that the trustee commence an action against itself for breaches of the PSA (*see Quadrant Structured Prods. Co. Ltd. v Vertin*, 23 NY3d 549, 566 [2014]; *see also Cruden v Bank of New York*, 957 F2d 961, 968 [2d Cir 1992] (no-action clause will not bar security holder suit against Trustee because "it would be absurd to require the debenture holders to ask the Trustee to sue itself"). Once performance of the demand requirement in the no-action clause is excused, performance of the entire provision is excused, including the requirement that demand be made by 25% of the certificate holders. Under the plain language of the no-action clause, there is no basis for requiring that the suit be

supported by 25% of certificate holders (*BlackRock Core Bond Portfolio v US Bank Natl. Assn.*, 165 F Supp3d 80, 97-99 [SD NY 2016]).

As for plaintiffs' cross appeal, the court correctly determined that the tort claims are barred by the economic loss doctrine (*see 17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 [1st Dept 1999]), and plaintiffs have not sufficiently alleged the breach of any professional duty that could support a malpractice claim, as opposed to the breach of a contractual duty (*see Blackrock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, N.A.*, 247 FSupp3d 377, 399 [SD NY 2017]).

We have considered the remaining arguments and find them unavailing.

M - 4257 - *Blackrock Balanced Capital Portfolio (FI) v U.S. Bank Natl. Assn.*

Motion to strike reply brief denied.

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7397 The People of the State of New York, Ind. 75/13
Respondent,

-against-

Vincent Coleman,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered June 16, 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: OCTOBER 18, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7398 The People of the State of New York, Respondent, Ind. 4648/10

-against-

Douglas Hampton, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Eduardo Padró, J.), rendered April 24, 2013, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of one year, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea does not come within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 665-666 [1988]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. In the thorough plea allocution, defendant clearly

admitted his participation in a drug sale, and said nothing that would raise an agency defense (*see generally People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]) or warrant any further inquiry.

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7400-
7401 Index 301861/13

NYCTL 1998-2 Trust, et al.,
Plaintiffs-Respondents,

-against-

Frederick H. Siemon,
Defendant-Appellant,

Dollar Savings Bank of New York,
etc., et al.,
Defendants.

_____

Frederick H. Siemon, appellant pro se.

Windels Marx Lanes & Mittendorf, LLP, New York (Josef F. Abt of counsel), for respondents.

_____

Appeal from order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about June 21, 2017, which denied defendant's motion to dismiss the complaint with prejudice and for sanctions, deemed appeal from judgment of foreclosure and sale, same court and Justice, entered on or about June 22, 2017, and, as so considered, said judgment unanimously affirmed, without costs.

Defendant's motion under CPLR 3211(a)(7) was properly denied, as plaintiffs stated a claim under Title 11, Chapter 3 of the New York City Administrative Code. Plaintiffs are holders of a tax lien on defendant's property and produced the tax lien certificate in support of their foreclosure action, and defendant

neither disputes the validity of the lien nor his failure to pay amounts owed thereunder; as such, the action was appropriately allowed to proceed (*see* Administrative Code § 11-331 *et seq.*; *see also NYCTL 1996-1 Trust v Railroad Maintenance Corp.*, 266 AD2d 39 [1st Dept 1999], *lv dismissed* 94 NY2d 899 [2000]). Defendant offers no support for his claim that plaintiffs were required to obtain a discharge of a mortgage on his property held by Emigrant Savings Bank before seeking foreclosure relief, and the relevant statutes impose no such requirement. To the contrary, they contemplate that the holders of other mortgages will be notified of the foreclosure action (*see* Administrative Code § 11-335). In any event, Emigrant no longer has an interest in the subject property, as its loan was written off.

Defendant also fails to show why the complaint should have been dismissed under CPLR 3211(a)(10). Plaintiffs named and served Emigrant as successor to original defendant Dollar Savings Bank, and Jeanette Siemon, in accordance with the parties' so-ordered stipulation dated February 23, 2015. Defendant provides no support for his claim that, out of a conflict of interest, plaintiffs sought to protect Emigrant from this litigation, and no support for his assertion that plaintiffs should have named Ms. Siemon as a defendant any earlier than they did. Moreover, as defendant does not dispute, Ms. Siemon had transferred her

interest in the property in 1998, and should not have been a party at all.

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

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7402 The People of the State of New York, Respondent, Ind. 3957/13

-against-

Herman Rodriguez, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at plea; Melissa C. Jackson, J. at sentencing), rendered September 1, 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: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7403 The People of the State of New York, Ind. 4779/15
Respondent,

-against-

Rubicel Sanchez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alexander Michaels 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 (Gregory Carro, J.), rendered October 26, 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: OCTOBER 18, 2018

CLERK

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

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7404- Ind. 3929/11
7405 The People of the State of New York,
Respondent,

-against-

Jose Delorbe,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David Bernstein and Robin Nichinsky of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 23, 2012, as amended June 14, 2012, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him to a prison term of five years, and order (same court and Justice), entered on or about July 27, 2016, denying defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

Defendant has not established that the narrow exception to the preservation requirement applies to his *Peque* claim (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). Defendant was informed of his potential deportation by a notice of immigration consequences served upon him in the presence of his attorney over a year before the guilty

plea (*see e.g. People v Barry*, 149 AD3d 494 [1st Dept 2017], *lv denied* 29 NY3d 1123 [2017]; *People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 AD3d 1131 [2016]), which gave him the opportunity to raise the issue. Review of defendant's unpreserved claim in the interest of justice is unwarranted.

The court providently exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Defendant alleged no facts to support his claim that had he known that his guilty plea could result in his deportation, he would not have pleaded guilty and instead would have proceeded to trial, and his conclusory allegations were insufficient to warrant a hearing (*see* CPL 440.30[4][b],[d]).

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

ENTERED: OCTOBER 18, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7406N- Index 158800/16
7406NA Bindu Manne,
Plaintiff-Appellant,

-against-

Berkowits School of Electrolysis, Inc.,
Defendant-Respondent.

_____

The Law Office of Gregory A. Goodman, P.C., Jericho (Gregory A. Goodman of counsel), for appellant.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., Elmsford (James M. Skelly of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Erika M. Edwards, J.), entered October 27, 2017, which denied plaintiff's motion for a default judgment, and granted defendant's order to show cause to deem its late answer timely filed, nunc pro tunc, unanimously affirmed, without costs.

Given that defendant asserted a reasonable excuse for its delay, namely, ongoing settlement negotiations between plaintiff and defendant's insurance carrier, the court exercised its discretion providently in denying the default judgment (*see Zwicker v Emigrant Mtge. Co., Inc.*, 91 AD3d 443, 444 [1st Dept 2012]). Given the strong public policy favoring resolution of cases on their merits, the court properly accepted defendant's

answer, deeming it timely filed nunc pro tunc (*see Berardo v Guillet*, 86 AD3d 459 [1st Dept 2011]).

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

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

ENTERED: OCTOBER 18, 2018

CLERK

CORRECTED OPINION - NOVEMBER 09, 2018

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Peter Tom
Ellen Gesmer, JJ.

7062-
7062A
Index 530245/99

_____x

In re New York State Office of Mental Health,
Petitioner-Respondent,

-against-

Marco G.,
Respondent-Appellant.

- - - - -

Eric Gonzalez, Kings County District Attorney,
Nonparty Respondent.

_____x

Respondent Marco G. appeals from the amended order of the Supreme Court, New York County (Lisa A. Sokoloff, J.), entered on or about January 23, 2018, which denied his petition pursuant to Mental Hygiene Law § 9.35 and CPL 330.20(16) for a jury rehearing and review.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin and Sadie Zea Ishee of counsel), for appellant.

Barbara D. Underwood, Attorney General, New York (Linda Fang and Steven C. Wu of counsel), for New York State Office of Mental Health, respondent.

Eric Gonzalez, District Attorney, Brooklyn (Avshalom Yotam, Leonard Joblove, Ann Bordley and David C. Kelly of counsel) for Eric Gonzalez, respondent.

GESMER, J.

After a criminal defendant is found not responsible by reason of mental disease or defect, the court must hold an initial hearing, and then successive hearings, to determine if the defendant has a dangerous mental disorder or is mentally ill, and must, therefore, be committed to the custody of the Commissioner of Mental Health (CPL 330.20). A defendant who is dissatisfied with an order resulting from such a hearing may request, as of right, a rehearing and review de novo before a jury (CPL 330.20[16]; Mental Hygiene Law §9.35; *Matter of Norman D.*, 3 NY3d 150, 155 [2004]). In this case, respondent Marco G. (defendant) made such a request and the motion court denied it, wrongfully.

The Office of Mental Health (OMH) and the District Attorney argue that we should not consider the merits of defendant's appeal because defendant has no right to appeal under CPL 330.20. We reject that argument. The Court of Appeals has held that retention orders affect a "basic liberty issue" (*Matter of Jamie R. v Consilvio*, 6 NY3d 138, 142 [2006]). Consequently, the order being appealed from affects a "substantial right" and is properly before us as of right under CPLR 5701(a)(2)(v). Accordingly, we consider the merits of the appeal and reverse the trial court.

Background

In 1998, after a nonjury trial for multiple sex offenses and attempted assault, defendant was found not responsible by reason of mental disease or defect. As is required by statute, the court then ordered an examination of defendant to evaluate his mental condition (*see* CPL 330.20[2], [4], and [6]). After receiving a report, the court held a hearing pursuant to CPL 330.20(6) and found that defendant suffered from a "dangerous mental disorder."[1] As a result of this finding, defendant was committed to the custody of the Commissioner of Mental Health for confinement in a secure facility for a period of six months and [2] was committed to Kirby Forensic Psychiatric Center, a secure facility operated by OMH.

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[1] In this context, "'[d]angerous mental disorder' means(i) that [the] defendant currently suffers from a 'mental illness' as that term is defined in subdivision twenty of section 1.03 of the Mental Hygiene Law, and (ii) that because of such condition he currently constitutes a physical danger to himself or others" (CPL 330.20[1][c]).

[2] CPL 330.20 defines three categories of defendants and an appropriate level of confinement for each. A defendant who suffers from a dangerous mental disorder is committed to secure confinement (*Jamie R.*, 6 NY3d at 142; CPL 330.20[6]. A defendant who is "mentally ill" but does not have a dangerous mental disorder is committed to non-secure confinement under an order of conditions (*Jamie R.*, 6 NY3d at 142-143; CPL 330.20[7]). A defendant who is neither "mentally ill" nor suffering from a "dangerous mental disorder" is discharged, either unconditionally or under an order of conditions (*Jamie R.*, 6 NY3d at 143; CPL 330.20[7]). The three levels are referred to as tracks one, two and three respectively. The "track" language is not found in the statute but in the accompanying Law Revision Commission report (*Jamie R.*, 6 NY3d at 142 n 3).

After his initial commitment, the court held the required periodic hearings on defendant's mental condition. After a hearing in 2013, Supreme Court, New York County determined that defendant was "mentally ill" but no longer suffered from a "dangerous mental disorder." Based on that, defendant was transferred from Kirby Psychiatric Center to Manhattan Psychiatric Center (MPC), a non-secure facility (*see* CPL 330.20[11]).

On or about November 10, 2015, OMH applied, under CPL 330.20(14), for a recommitment order, seeking a determination that defendant had a dangerous mental disorder and should be confined in a secure facility for a period of six months. OMH supported its application with an updated forensic report, which in return referred to alleged incidents of misconduct by defendant.

Supreme Court held a nine day hearing over a span of approximately seven months on OMH's application, and issued its decision on September 29, 2017. At the hearing, defendant's expert testified, inter alia, "[W]e are really doing the hearing only about, does [defendant] stay in a civil hospital or is he going to the maximum security." During summation, defendant's counsel stated, inter alia, "[Defendant is] locked up. We are not releasing him to the community . . . . He's not going into the community. He is at Manhattan Psych. . . .He's staying in a

locked facility . . . . [Defendant] is dangerous enough to be held in MPC, granted, but not to be sent to a secure facility . . . ."

In its decision, Supreme Court, New York County, found that OMH had established that defendant suffered from a dangerous mental disorder in that he had a mental illness and a level of dangerousness to himself or others which warranted secure confinement. Therefore, it ordered that he be recommitted to a secure facility for a term of six months.

By order to show cause dated October 5, 2017, defendant made a request for a trial de novo before a jury "on the question of the alleged mental illness and need for retention of the Defendant"[3] pursuant to CPL 330.20(16). Under that statute, the judge to whom the application is made is required to convene a jury and try the question raised.[4]

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[3] Defendant also sought interim relief, but that is not an issue on appeal.

[4] Under CPL 330.20(16), "[a]ny defendant who is in the custody of the commissioner pursuant to a commitment order, a retention order, or a recommitment order, if dissatisfied with such order, may, within thirty days after the making of such order, obtain a rehearing and review of the proceedings and of such order in accordance with the provisions of section 9.35 . . . of the mental hygiene law." Mental Hygiene Law § 9.35 provides, as relevant here, "If a person who has been denied release or whose retention, continued retention, or transfer and continued retention has been authorized pursuant to this article, . . . be dissatisfied with any such order he may, within thirty days after the making of any such order, obtain a rehearing and a review of the proceedings already had and of such order upon a petition to a justice of the supreme court other than the judge

OMH cross-moved to dismiss defendant's petition. OMH argued that rehearing and review is only available as to the "basic liberty issue" of whether a defendant should be confined at all, citing *Jamie R.* (6 NY3d at 152-153). It then argued that the question of whether defendant should be confined at all was not an issue, since both his counsel and his expert had conceded at the hearing that defendant was mentally ill and should be maintained in a locked facility. Essentially, OMH argued that defendant had disputed only whether he was dangerous but not whether he was mentally ill.

In reply, defendant's counsel stated that defendant was seeking jury review of the underlying question of his mental illness. He argued that he was entitled, under the statute and the Federal and State Constitutions, to a jury review of the "basic liberty issue" of whether he was mentally ill and could be held in custody at all.

In a decision and order dated January 19, 2018, the motion court denied defendant's petition. The motion court held defendant may not seek rehearing and review to challenge his track designation. Defendant promptly filed a notice of appeal.

During oral argument, the parties were granted leave to

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or justice presiding over the court making such order. *Such justice shall cause a jury to be summoned* and shall try the question of the mental illness and the need for retention of the patient so authorized to be retained" (emphasis added).

submit post-argument submissions to address two issues: 1) whether defendant's appeal is moot; and 2) the relevance of the Second Department's recent decision in *People v Charles* (162 AD3d 125 [2d Dept 2018], *lv denied* __ NY3d __, 2018 NY Slip Op 83094 [2018]) to the issue of whether the motion court's order is appealable.

Analysis

"Under CPL 330.20, an insanity acquittee dissatisfied with a commitment, recommitment or retention determination has two avenues of redress: a permissive appeal under CPL 330.20(21) or a rehearing and review proceeding under CPL 330.20(16)" (*Jamie R.*, 6 NY3d at 148 [footnote omitted]). These two procedural options are "not coextensive" (*Norman D.*, 3 NY3d at 155; *see also* CPL 330.20[21][a][ii]), and they serve different purposes. As is the case in most appeals, a court hearing an appeal under CPL 330.20(21) conducts "a review of the lower court's determination based on the record at the time of the earlier proceeding" (*Norman D.*, 3 NY3d at 156). By contrast, a rehearing and review under CPL 330.20(16) is a "second trial-level proceeding" (*Jamie R.*, 6 NY3d at 141), in which the trier of fact reviews "the earlier record as well as any new evidence presented by the parties concerning the acquittee's mental status at the time of the rehearing and review" (*Norman D.*, 3 NY3d at 155). This second-level trial is de novo (*see Norman D.*, 3 NY3d at 155 n 2).

Since the only issue to be decided at a rehearing and review is the defendant's alleged "mental illness and the need for retention" (*see* CPL 330.20[16]; MHL § 9.35; *see also Jamie R.*, 6 NY3d at 150), it provides "a second chance to obtain release from OMH custody in the event of an erroneous deprivation of liberty" (*Jamie R.*, 6 NY3d at 153). Accordingly, other issues, such as a defendant's track status or the issue of whether a defendant is suffering a dangerous mental disorder, cannot be raised on a rehearing and review but only on appeal (*see Jamie R.*, 6 NY3d at 154; *Norman D.*, 3 NY3d at 157).

Here, defendant limited his application for a jury trial to those issues properly considered at a rehearing and review: the issues of his alleged mental illness and the need for retention. Moreover, his application, made within 30 days of the recommitment order, was timely. Accordingly, defendant's application complied with the core requirements of CPL 330.20(16). Respondents do not dispute this, but argue instead that defendant, through his expert and his counsel, conceded his mental illness, and therefore waived his right to seek rehearing and review on those issues. They further raise preliminary procedural issues as a bar to our consideration of these issues, which we address first.

I. Mootness

We reject OMH's argument that defendant's appeal should be

dismissed as moot. This case satisfies the exception to the mootness doctrine because there is "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Commitment and retention proceedings generally involve orders of short duration, which typically evade review (*see Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 505-506 [1998]; *Matter of State of N.Y. ex rel. Giffen v Hoffman*, 161 AD3d 512 [1st Dept 2018]).[5] Moreover, the issue before us is substantial, as it requires us to decide whether statements by defendant's counsel and his expert could operate to deprive a defendant of his statutory right to demand a jury trial de novo on the "basic liberty issue" of whether he can be confined (*see Jamie R.*, 6 NY3d at 154).

II. Appealability

We hold that defendant's appeal is properly before us under CPLR 5701(2)(a)(v) as an appeal as of right from an order affecting a substantial right.

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[5] Today's holding is not inconsistent with our decision in *Matter of Crumpley v Wack* (212 AD2d 299 [1st Dept 1999]). In that case, we declined to apply an exception to the mootness doctrine where, the defendant's "tardiness" in his motion practice contributed to the underlying order's expiration (*see Crumpley*, 212 AD2d at 303). Here, by contrast, defendant exhibited no tardiness in the litigation of this case.

"Appealability to the appellate division is broad" (Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5701:1), and appeals taken in CPL 330.20 proceedings are "civil in nature" (*see* CPL 330.20[21][c]; *People v Escobar*, 61 NY2d 431, 437-438 [1984]). Under CPLR 5701(a)(2)(v), an appeal to this Court lies as of right where an order of the Supreme Court entered upon notice "affects a substantial right."

The Court of Appeals has been clear that the de novo jury trial provided for under CPL 330.20(16) protects a fundamental liberty interest (*see Jamie R.*, 6 NY3d at 152). As it explained in *Jamie R.*, rehearing and review is authorized only for retention, commitment and recommitment orders which have in common "the basic liberty issue of whether a patient should be held in OMH custody" (*id.* at 152–53). Accordingly, there can be no serious dispute that the order of the motion court, which denied defendant the opportunity to present his case before a jury, as provided for under CPL 330.20(16), affected a substantial right.[6]

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[6] For this reason, the District Attorney's citation in his post-argument submission to *Matter of Allen B. v Sproat* (23 NY3d 364, 376 [2014]) is unavailing. In *Allen B.*, the Court of Appeals noted that CPL 330.20(21)(a)(ii) does not permit a defendant to appeal from an order of conditions, which insulates from review a prophylactic order imposed by the supervising judge (*id.*). However, as the Court of Appeals explained in *Jamie R.*, an order of conditions does not relate to the "liberty question of whether inpatient treatment is warranted but to specific

In reaching this result, we adopt the analysis laid out by our sister court in *People v Charles* (162 AD3d 125 [2d Dept 2018], *lv denied* __ NY3d __, 2018 NY Slip Op 83094 [2018]). In *Charles*, the defendant's petition for a downward modification of his Sex Offender Registration Act (SORA) level was denied (*id.* at 132). The People argued that defendant could not appeal, since the relevant statute did not give him the right to do so (Correction Law § 168-o[2]).

The Second Department held that the appeal was properly before it, as one taken as of right under CPLR 5701(a)(2)(v), even though the applicable statute, like the one at issue here, was silent as to defendant's right to appeal (*Charles*, 162 AD3d 125). As the Second Department explained, "Correction Law § 168-o(2) does not diminish, detract, or disturb this Court's jurisdiction to consider the instant appeal under CPLR 5701(a)," and "[w]e will not read Correction Law § 168-o(2) as curtailing this Court's jurisdiction to entertain an appeal under CPLR 5701(a), especially where, as here, there are serious due process implications" (*id.* at 138), noting that a SORA determination "undeniably ha[s] a profound impact on a defendant's liberty interest . . ." (*id.* [internal quotation marks omitted]).

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aspects of patient treatment" (*see Jamie R.*, 6 NY3d at 152). Accordingly, the appealability of an order of conditions is not comparable to the appealability of an order denying a defendant's application for rehearing and review. The former is not related to a liberty interest while the latter clearly is.

Since the motion court's order affected a substantial right of defendant, we hold that his appeal is properly before us as one taken as of right under CPLR 5701(a)(2)(v).

OMH and the District Attorney argue that, since CPL 330.20(21) does not specifically state that a defendant may appeal from an order denying an application for rehearing and review, this Court may not hear defendant's appeal.[7] Their analysis is based on an excessively narrow view of our jurisdiction.

Notably, they do not cite to any case which holds that a defendant does not have an appeal as of right under CPLR 5701(a)(2)(v) to this Court from an order denying an application

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[7] CPL 330.20(21) states that a defendant "may take an appeal to an intermediate appellate court by permission of the intermediate appellate court" as follows:

> "a defendant, or the mental hygiene legal service on his or her behalf, may appeal from any commitment order, retention order, recommitment order, or, if the defendant has obtained a rehearing and review of any such order pursuant to subdivision sixteen of this section, from an order, not otherwise appealable as of right, issued in accordance with the provisions of section 9.35 or 15.35 of the mental hygiene law authorizing continued retention under the original order, provided, however, that a defendant who takes an appeal from a commitment order, retention order, or recommitment order may not subsequently obtain a rehearing and review of such order pursuant to subdivision sixteen of this section" (CPL § 330.20[21][a][ii]).

for rehearing and review.[8] In fact, it may well be that the statute is silent as to the denial of a rehearing because the legislature never contemplated that a defendant would be denied a rehearing to which the statute gives him an automatic right. Certainly, if a statute confers an absolute right to a hearing, we should permit an appeal from an order denying such a hearing.

Accordingly, where, as here, a fundamental liberty interest is clearly implicated, and the relevant statute and case law do not explicitly preclude us from invoking our jurisdiction under CPLR 5701(a)(2)(v), we should not "close the doors" of this Court to defendant (*see Charles*, 162 AD3d at 140).

III. Merits

On the merits, we hold that defendant did not waive his right to seek rehearing and review by any statements made by his counsel or his expert at the underlying recommitment hearing. In analyzing this claim, we must keep in mind the instruction by the Court of Appeals that rehearing and review "is not a rehearing in the conventional sense, but a de novo evidentiary proceeding, with the findings a snapshot of the acquittee's condition *at that moment*" (*Norman D.*, 3 NY3d at 155 (emphasis added); *accord Jamie R.*, 6 NY3d at 150). With that in mind, we reject the arguments

[8] OMH and the District Attorney cite only to *Matter of Gushea* (134 AD2d 965 [4th Dept 1987]), a one-sentence memorandum decision that is not binding on us and does not address the critical issue before us.

of OMH and the District Attorney in favor of waiver for four reasons.

First, any statements made at the original hearing are not dispositive since a rehearing and review is a trial de novo. By its very definition, a "trial de novo" is "[a] new trial on the entire case - that is, on both questions of fact and issues of law - conducted as if there had been no trial in the first instance" (Black's Law Dictionary [10th ed. 2014], trial de novo). Indeed, among the two "avenues of redress" available to a CPL 330.20 defendant, the opportunity to proceed de novo is one of the key distinguishing factors between rehearing and review and a permissive appeal. Consequently, while the statements made by or on behalf of defendant might present issues for cross-examination at the jury trial, they cannot provide a basis for the court to deny the jury trial to which defendant is entitled.

Second, "[u]nlike an appellate proceeding, which reviews the record on appeal for error, a rehearing and review seeks to ascertain an insanity acquittee's mental condition *at the time the rehearing and review is conducted*" (*Matter of Jamie R. v Consilvio*, 17 AD3d 52, 59 [1st Dept 2005], *affd* 6 NY3d 138 [2006] [emphasis added]). Rehearing and review "guarantee[s] that the conditions of supervision originally imposed are appropriate at the time of the new proceeding" (*Norman D.*, 3 NY3d at 155–56). While any statements made by or on behalf of defendant at the

initial hearing might be relevant to defendant's mental status at the time of the rehearing, they cannot provide a basis for the court to deny defendant a jury trial to prove his mental condition at that later time.

Third, we have previously held that "[r]egardless of the [defendant's] own assessment, or a court's or doctor's opinion as to his mental health, he is entitled, under both the Federal and State Constitutions, to be provided with a jury trial on the question of involuntary commitment in a psychiatric hospital" (*Richard H. v Consilvio*, 6 AD3d 7, 15 [1st Dept 2004], *lv denied* 3 NY3d 601 [2004], *abrogated on other grounds by Jamie R.*, 6 NY3d at 151 n 10). While *Richard H.* concerned a defendant's own testimony that he was mentally ill, there is no appreciable difference between a defendant's concessionary testimony being insufficient to waive or forfeit his right to a jury trial and counsel's litigation strategy itself.[9]

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[9] To the extent we stated in *Richard H.* that a jury could act in an advisory capacity on the issue of dangerousness (*see Richard H.*, 6 AD3d at 14), that part of our decision was unquestionably abrogated by *Jamie R.* (6 NY3d at 151 n 10). However, contrary to the suggestion of the District Attorney, *Jamie R.* in no way disturbed our conclusion that the defendant in *Richard H.* did not waive his right to rehearing and review based on his testimony at the underlying hearing that he was mentally ill. Our conclusion on that issue did not rely on our now-abrogated statement about a jury's ability to act in an advisory capacity (*see Richard H.*, 6 AD3d at 15 ["We reject the contention that because petitioner admitted that he was mentally ill, the jury's review and rehearing should not have been conducted"]). Indeed, we have continued to cite *Richard H.* for its other, still valid, points of law (*see e.g. Matter of New York State Off. Of*

Finally, MHL § 9.35 states that a patient (or in this case, the defendant) "may waive the trial of the fact by a jury and consent in writing to trial of such fact by the court." As the Court of Appeals has stated, "[T]he decision whether to have a jury resolve the pertinent issues is vested in the patient, not the court" (*Jamie R.*, 6 NY3d at 151 n 10). Accordingly, a holding that a defendant's right to a jury trial could be waived by his counsel's or his expert's statements at an underlying hearing is simply illogical. Under such a holding, a defendant would still need, pursuant to MHL § 9.35, to produce a written waiver in order to have a rehearing and review before the court in lieu of a jury. However, a defendant would be able to waive the right to rehearing and review and a jury trial itself, without any proceeding conducted to establish that this waiver was knowing and voluntary, based solely on his counsel's or his expert's statements at an underlying hearing. That is an untenable result, one which is inconsistent with our holding in *Richard H.*, as well as the Court of Appeals' unequivocal directive that rehearing and review be conducted de novo.

Here, defendant timely expressed his dissatisfaction with a recommitment order that was based on a threshold finding that he had a mental illness. Once defendant met those core

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Mental Health v Joseph C., 126 AD3d 477 [1st Dept 2015] [citing *Richard H.* on the issue of the sufficiency of the evidence establishing dangerous mental disorder]).

requirements, he was entitled to a de novo trial at which a jury would decide whether he was mentally ill based on the evidence then existing.

Accordingly, the amended order of the Supreme Court, New York County (Lisa A. Sokoloff, J.), entered on or about January 23, 2018, which denied defendant insanity acquittee's petition pursuant to Mental Hygiene Law § 9.35 and CPL 330.20(16) for a jury rehearing and review, should be reversed, on the law, without costs, and the petition granted.

All concur.

Amended order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered on or about January 23, 2018, reversed, on the law, without costs, and the petition granted.

Opinion by Gesmer, J. All concur.

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

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

ENTERED: OCTOBER 18, 2018

CLERK