Acosta, P.J., Manzanet-Daniels, Kapnick, Singh, González, JJ.

11787 The People of the State of New York, Respondent, Ind. 3058N/14 1162/15

-against-

James Moore, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered March 1, 2017, convicting defendant, after a jury trial, of two counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of seven years, unanimously affirmed.

"[L]aw enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination" (*People v Smith*, 27 NY3d 652, 661-662 [2016]). Thus, a police officer "may be cross-examined on 'prior specific criminal, vicious or immoral conduct,' provided that 'the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility'" (*id.* at 660, quoting *People v Sandoval*, 34 NY2d 371, 376 [1974]; *see also People v Rouse*, 34 NY3d 269, 275-280 [2019]). In *Rouse*, the Court of Appeals noted that in its *Smith* decision, it had

> "established an uncomplicated rule for determining whether a defendant should be permitted to ask a law enforcement officer about allegations that the officer had committed prior bad acts (*Smith* at 662). That is, provided that they have a good faith basis for the inquiry, . . . defendants should be permitted to explore specific allegations of wrongdoing relevant to the credibility of the law enforcement witness, subject to the discretion of the trial court (*see id.*). . . The same standard for good faith basis and specific allegations relevant to credibility applies—as does the same broad latitude to preclude or limit cross-examination (*id.* at 661-662)'" (*People v Rouse*, 34 NY3d at 276).

Applying these principles to the case at hand, the court providently exercised its discretion in limiting cross-examination of some of the police witnesses regarding civil lawsuits in which they were named as defendants, and prior adverse judicial rulings on their credibility (*see People v Rouse*, 34 NY3d at 275-280 [2019]; *People v Smith*, 27 NY3d at 660 [2016]). With regard to lawsuits, the court precluded questions that were in improper form, or that lacked specificity as to particular officers' acts of misconduct, whether committed personally or by aiding other officers. While the court made clear that it would consider a revised proposal, defendant never attempted to modify the form or the specific allegations in the questions. With regard to adverse judicial credibility findings, the court correctly found that defendant's proposed questions were in improper form, and defendant never attempted to cure the defect. As an alternative holding, we find that even if the court acted improvidently, any error was harmless (*see People v Smalls*, 162 AD3d 555, 556 [1st Dept 2018]). We also find that

defendant waived his objections to the court's rulings on this issue, and it is otherwise unpreserved.

When a defense fact witness testified that defendant was not known to him as someone from whom he could buy drugs, this did not constitute character evidence, because the witness was relaying his personal knowledge of whether defendant sold drugs, and not about defendant's reputation. Accordingly, the People should not have been permitted to impeach that testimony by asking the witness if he was aware of prior drug sales by defendant. However, we find the error to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]), particularly in light of the court's thorough limiting instructions.

Regardless of whether the court should have instructed the jury not to consider certain evidence pertaining to a dismissed possession charge, we find no reasonable possibility that defendant was prejudiced.

The challenged portions of the prosecutor's summation generally constituted permissible, evidence-based comment on credibility issues, made in response to defendant's summation, and we do not find anything in the summation that deprived defendant of a fair trial (*see People v Overlee*, 236 AD2d 133

[1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 16, 2020

CLERK

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

11396 Angel Espinosa, Index 22761/14E
Plaintiff-Respondent,

-against-

Montefiore Medical Center,
Defendant-Appellant.

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Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Calano & Culhane, LLP, New York (Michael A. Calano of counsel), for respondent.

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Order, Supreme Court, Bronx County (George J. Silver, J.), entered on or about July 17, 2019, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff suffered a severe hand injury at work, requiring admission to defendant Montefiore Medical Center (Montefiore) to receive care that included surgery. After discharge, plaintiff was prescribed physical and occupational therapy for his hand, to be performed at Montefiore. The therapy was not commenced on the original date scheduled, however, due to a delay in plaintiff's medical insurer authorizing treatment. The complaint, which alleges that Montefiore was negligent in failing to timely commence outpatient hand therapy, fails to state a cause of action, as a medical provider generally has no duty at common law to accept any particular patient for treatment generally, or

where there is no payment specifically (*see Van Campen v Olean Gen. Hosp.*, 210 App Div 204 [4th Dept 1924], *affd* 239 NY 615 [1925]; *see also Palmieri v Cuomo*, 170 AD2d 283, 284 [1st Dept 1991], *lv denied* 78 NY2d [1991]).

Nor has plaintiff stated a cause of action pursuant to the Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA) (42 USC § 1395dd). The treatment that Montefiore refused to begin was not for an emergent condition requiring admission, and its duty to plaintiff under EMTALA ended when his condition stabilized during the original admission (*see Bryan v Rectors & Visitors of Univ. of Virginia*, 95 F3d 349, 352 [4th Cir 1996]; *Thornton v Southwest Detroit Hosp.*, 895 F2d 1131, 1134 [6th Cir 1990]). EMTALA was designed to prevent hospitals from either turning down or "dumping" indigent patients, and is not a measure intended to require hospitals to provide long-term, non-emergency care for uninsured patients (*id.*).

As for plaintiff's argument that he stated a claim pursuant to Public Health Law § 2805-b, that statute does not provide a private right of recovery for monetary damages (*see Cygan v Kaleida Health*, 51 AD3d 1373 [4th Dept 2008]; *Quijije v Lutheran Med. Ctr.*, 92 AD2d 935 [2d Dept 1983], *appeal dismissed* 59 NY2d 1025 [1983]; *Yates v Cohoes Mem. Hosp.*, 64 AD2d 726 [3d Dept

1978], *appeal dismissed* 45 NY2d 838 [1978]). In any event, even if the statute were to permit such a private right, plaintiff's condition, which did not require immediate need of hospitalization, would not trigger the provision's application.

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

ENTERED: JULY 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11399 HSBC Bank USA, N.A., Index 35755/15
Plaintiff-Respondent,

-against-

Jose M. Santos also known as
Jose Santos, et al.,
Defendants.
- - - - -
A&E R.E. Management Corp.,
Nonparty Appellant.

_____

Shiryak, Bowman, Anderson, Gill & Kadochnikov LLP, Kew Gardens (Matthew J. Routh of counsel), for appellant.

Knuckles, Komosinski & Manfro, LLP, Elmsford (Owen M. Robinson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 30, 2019, which granted plaintiff's motion to disqualify the law firms of Anderson, Bowman & Zalewski, PLLC and Steven Zalewski & Associates, P.C. from representing either defendant Jose M. Santos a/k/a Jose Santos or defendant-appellant A&E R.E. Management Corp. in this mortgage foreclosure action, unanimously reversed, on the law, without costs, and the motion denied.

Defendant Jose M. Santos initially executed two mortgages and notes on the subject property in 2005. On January 9, 2007, Santos and plaintiff's predecessor in interest executed a new note in the amount of $485,000, and a consolidation, extension, and modification agreement which consolidated the existing mortgages.

On July 29, 2015, plaintiff commenced this foreclosure action, alleging that Santos failed to make the required payments on the debt commencing with the payment due on November 1, 2009. Santos, represented by Steven Zalewski & Associates, timely filed a verified answer.

On April 20, 2016, plaintiff moved for a default judgment against the nonanswering defendants and for summary judgment against Santos. Santos opposed, asserting that there was an issue of fact as to whether plaintiff was the holder or owner of the promissory note. Supreme Court granted the motion on November 29, 2016. On June 2, 2017, the court granted plaintiff's motion for a judgment of sale and foreclosure.

One week before the scheduled auction, A&E R.E. Management Corp. (A&E) brought an order show cause (OSC), inter alia, to stay the auction, dismiss the complaint, or in the alternative for permission to intervene. A&E claimed that it was the record owner of the subject property, and therefore a necessary party. It produced a deed that reflected that Santos transferred ownership of the property to A&E on February 28, 2014, before the commencement of this foreclosure proceeding. A&E did not mention that ACRIS, the City's online database for certain property records, also contains a purported rescission of that deed by Santos pursuant to Real Property Law § 265-a(8). This rescission was filed February 25, 2016.

A&E's counsel on the order to show cause was the law firm of

Anderson, Bowman & Zalewski, PLLC (ABZ). This firm has substantial overlap in personnel with Steven Zalewski & Associates, P.C. (SZA), the firm that represents Santos. Screen shots of ABZ's website in the record indicate that Stephen Zalewski of SZA is a member of ABZ. No lawyer from ABZ or SZA has explained the relationship of the two firms in any of its written submissions.

A&E's initial OSC was denied when A&E failed to appear, but its subsequent OSC seeking the same relief was granted to the extent that Supreme Court vacated the order of reference and the judgment of foreclosure and sale and allowed A&E to intervene. Santos, but not A&E, filed a notice of appeal of this decision to the extent that Supreme Court's decision did not dismiss the foreclosure proceeding outright for failure to name A&E as a necessary party. This notice of appeal indicates that Santos is represented by ABZ, not by SZA. Again, appellant's counsel does not trouble itself to explain this discrepancy.[1]

In January 2018, plaintiff moved to disqualify both SZA and ABZ, on the ground that the two related firms had a conflict, as both Santos and A&E claimed to be the owner of the subject property. In opposition, defendants argued that plaintiff did not have standing to bring a motion to disqualify since it was

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[1]The confusion concerning defendants' counsel persists in this appeal. The cover page of Appellant's Appellate Brief identifies appellant's counsel as Shiryak, Bowman, Anderson, Gill & Kadochnickov, LLP. The signature line of this brief identifies appellant's counsel as ABZ.

undisputed that neither ABZ nor SZA had ever represented plaintiff. Defendants' papers were silent concerning the relationship between the two firms. The court granted the motion and disqualified both firms from representing either defendant. We now reverse.

DISCUSSION

The basis for a disqualification motion is the alleged breach of the fiduciary duty owed by an attorney to a current or former client *(Rowley v Waterfront Airways, Inc.,* 113 AD2d 926, 927 [2d Dept 1985], citing *Greene v Greene*, 47 NY2d 447, 453 [1979]). When the law firm targeted by the disqualification motion has never represented the moving party, that firm owes no duty to that party. "[I]t follows that if there is no duty owed there can be no duty breached" (*Rowley at 927; see Develop Don't Destroy Brooklyn v Empire State Dev. Corp.*, 31 AD3d 144, 150 [1st Dept 2006], *lv denied* 8 NY3d 802 [2007]). Since plaintiff never had an attorney-client relationship with either SZA or ABZ, plaintiff had no standing to bring a motion to disqualify (*Rowley* at 927).

To be sure, a court has the authority to act sua sponte to disqualify counsel if it finds a conflict of interest warranting disqualification (*see Flushing Sav. Bank v FSB Props.*, 105 AD2d 829, 830–831 [2d Dept 1984]; *see also Disla v City of New York*, 142 AD3d 826, 828 [1st Dept 2016], *lv dismissed* 29 NY3d 980 [2017]; *Commissioner of Social Servs. v Samuel E.*, 173 AD2d 413,

413 [1st Dept 1991]). However, the record before us does not support disqualification. The two defendants present a united front to plaintiff at this juncture. Their answers raise virtually the same affirmative defenses and counterclaims to the complaint, and the defenses and counterclaims of one defendant do not undermine the position of the other (*cf. Roddy v Nederlander Producing Co. of Am., Inc.*, 96 AD3d 509 [1st Dept 2012] [in personal injury action where two defendants have competing interests in minimizing their proportional share of damages, disqualification of counsel representing both defendants is warranted]). If defendants' interests do come to diverge in this

litigation then counsel of course has a duty to ensure compliance with rule 1.7 of the New York Rules of Professional Conduct (22 NYCRR 1200.0).[2]

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

ENTERED: JULY 16, 2020

CLERK

[2]We take judicial notice of the most recent filing on ACRIS concerning the subject property, which seems to indicate that plaintiff assigned its interests in the mortgage and note on July 7, 2017, to a nonparty, MTGLQ Investors. This assignment is not mentioned in the parties' papers. While we take judicial notice of this filing we assign no dispositive weight to it on appeal, as its effect on the litigation is not clear. Given this lack of clarity, the parties should be heard below concerning the relevance, if any, of this apparent assignment (*see Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 127 [2d Dept 2018]).

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Moulton, JJ.

11449-
11450 Wind Point Partners VII-A, L.P., Index 653955/18
654666/18
Plaintiff-Respondent,

-against-

Hoya Corporation,
Defendant-Appellant.

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Locke Lord LLP, New York (R. James DeRose, III of counsel), for appellant.

White & Case LLP, New York (Joshua A. Berman of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Jennifer G. Schecter, J.), entered December 22, 2018, which granted plaintiff's motion to dismiss defendant's counterclaim pursuant to CPLR 3211 and declared, in essence, that $22,380,660 of the amount sought in defendant's June 15, 2018 letter could not be part of a valid escrow claim, unanimously affirmed, without costs. Order, same court and Justice, entered April 9, 2019, which declared that $23,920,174 must be released from the escrow account established by the parties' contract, unanimously reversed, on the law, without costs.

Read in light of the contract as a whole (*see e.g. Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]), section 10.01(a) unambiguously sets forth the parties' intention to shorten the period within which defendant could sue for the breach of certain representations and warranties to less than the statutory six years (*see* CPLR 213[2]) from date of breach. A comparison of

that section with section 10.01(b) shows that defendant had to file a claim in court, as opposed to sending a written notice to plaintiff, by June 15, 2018.

The court correctly declared in plaintiff's favor in index No. 653955/18, despite defendant's affirmative defenses of ratification, waiver, and estoppel. Ratification is inapplicable because plaintiff is not trying to repudiate the contract (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]). Waiver is unavailing because the contract provides that a waiver requires a signed writing (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]), and there is no writing signed by plaintiff waiving the June 15, 2018 deadline. Estoppel is unavailing because, on June 26, 2018, when plaintiff told defendant that it was considering defendant's claims and its own response, the representations and warranties at issue in index No. 653955/18 had already expired; hence, defendant was not prejudiced by the fact that plaintiff seemed to want to engage in negotiations (*see Lynn v Lynn*, 302 NY 193, 205 [1951], *cert denied* 342 US 849 [1951]).

In index No. 654666/18, the bulk of the disputed escrow claim ($20,645,000 of $23,920,174) pertains to sales and use taxes in 11 states. Plaintiff contends that Vision Ease (one of the companies sold to defendant) is a business-to-business operation and therefore cannot owe sales taxes. However, plaintiff did not argue this before Supreme Court, and it fails

to provide any citations to the record supporting its contention. This may be a valid argument, but it does not warrant granting a CPLR 3211 motion.

To keep funds in escrow past August 2018, defendant had to make a good-faith claim that it was entitled to funds to satisfy the indemnification obligations of the sellers of Performance Optics and its subsidiaries. We cannot conclude, on plaintiff's motion to dismiss defendant's counterclaim, that defendant failed to make a good-faith claim as to the putative categories of pre-closing tax liabilities set forth in its letter to plaintiff dated August 7, 2018. The parties' agreement defines "Taxes" as "taxes . . . *imposed by* any government or taxing authority" (emphasis added). However, section 8.01(a) states that the sellers of Performance Optics "agree to indemnify [defendant] . . . against the following Taxes and . . . against any Loss incurred in contesting or otherwise in connection with any such Taxes . . .: (i) Taxes imposed on *or payable by* the Company, any Subsidiary or AcquisitionCorp for any taxable period that ends on or before the Closing Date" (emphasis added). By contrast, other subsections – ii and vii – mention only taxes *imposed* on the Company, any Subsidiary, or AcquisitionCorp. Thus, "or payable by" must have some meaning; it is not mere surplusage. Taxes can be payable even if a state does not send a demand for payment (*see e.g. United States v Associated Developers of Fla., Inc.*, 400 So 2d 17, 18 [Fla App 1980]; *Pierce v Pacini*, 127 Ill App 2d

1, 8, 261 NE2d 515, 518 [1970]; *Central Credit Union v Comptroller of Treasury*, 243 Md 175, 183, 220 A2d 568, 572 [1966]; *Liberty Steel Co. v Oklahoma Tax Commn.*, 554 P2d 8, 10-11 [Okla 1976]; *Macias v Rylander*, 40 SW3d 679, 684 [Tex App 2001]). This concept also applies to federal income taxes (*see United States v Regan*, 713 F Supp 629, 633 [SD NY 1989]). Finally, defendant's reliance on its tax advisor is evidence of good faith (*see Estate of Thompson v Commissioner of Internal Revenue*, 370 Fed Appx 141, 144 [2d Cir 2010]).

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

ENTERED: JULY 16, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11582 The People of the State of New York, Ind. 2922/09
Respondent,

-against-

Rabindra Singh,
Defendant-Appellant.

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Janet E. Sabel, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered May 10, 2010, as amended January 21, 2011, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the third and fourth degrees, and sentencing him, as a second felony offender, to concurrent prison terms of two to four years, unanimously affirmed.

The court did not advise defendant that if he was not a United States citizen, he could be deported as a result of his plea, as subsequently required under *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US 840 [2014]). While the question of whether a defendant was prejudiced by the lack of such advice from the court is generally to be determined by way of a hearing (*id.* at 200-01; *People v Lantigua*, 123 AD3d 95, [1st Dept 2020]); *People v Martinez*, 180 AD3d 190 [1st Dept 2020]), under the unique circumstances of this case, we find no reasonable possibility that defendant could make

the requisite showing of prejudice at a hearing.

Indeed, at the time that defendant pleaded guilty in 2009, he had a June 2005 grand larceny state conviction, which rendered defendant deportable according to federal law. Moreover, two months after he pled guilty and before he was sentenced in the instant case, defendant pled guilty to a federal conviction of conspiracy to transport stolen vehicles, an aggravated felony requiring deportation. Thus, regardless of whether defendant pleaded guilty to the charges in 2009, had been found guilty after trial or had been acquitted, his status as a deportable non-citizen would not have been affected (*see People v Haley*, 96 AD3d 1168, 1169 [3d Dept 2012] [Defendant's immigration status was not affected by guilty plea because he already was deportable based on his prior convictions]). Accordingly, the alleged failure of the sentencing court to inform him of the immigration consequences of his guilty plea in 2009 did not prejudice defendant in any way.

The Decision and Order of this Court entered herein on May 28, 2020 is hereby recalled and vacated (see M-2036, decided simultaneously herewith).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11816 The People of the State of New York, Ind. 769/16
Respondent,

-against-

Marco Lugo,
Defendant-Appellant.

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Christina Swarns, Office of The Appellate Defender, New York (Dana B. Wolfe of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo 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 (Marc Whiten, J.), rendered July 11, 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: JULY 16, 2020

CLERK

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

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11817 Radames Guzman, et al., Index 156792/13
Plaintiffs,

-against-

Edickson Cruz,
Plaintiff-Appellant,

The Manhattan and Bronx Surface Transit Operating Authority, et al.,
Defendants-Respondents.

- - - - -

Pedro Marine,
Counterclaim Defendant-Respondent.

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Law Offices of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for The Manhattan and Bronx Surface Transit Operating Authority, New York City Transit Authority and Yevgeniy Golub, respondents.

Robert D. Grace, Brooklyn, for Pedro Marine, respondent.

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Order, Supreme Court, New York County (Lisa Ann Sokoloff, J.), entered February 4, 2019, which granted counterclaim defendant Pedro Marine's motion and defendants' cross motion for summary judgment dismissing plaintiff Edickson Cruz's complaint for failure to satisfy the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to Cruz's claims of serious injury to his cervical spine and right shoulder, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff did not sustain an injury causing "significant limitation of use" or "permanent consequential limitation of use," by submitting the

affirmed reports of an orthopedist and neurologist, who noted normal ranges of motion in plaintiff's cervical spine and right shoulder and found no other evidence of abnormality (*see Cattouse v Smith*, 146 AD3d 670 [1st Dept 2017]; *Mejia v Rosa*, 95 AD3d 402, 403 [1st Dept 2012]). As to causation, defendants' radiologist found that plaintiff's MRI films showed longstanding degeneration in his right shoulder and cervical spine, which were unrelated to the accident (*see Campbell v Drammeh*, 161 AD3d 584 [1st Dept 2018]).

In opposition, plaintiff raised issues of fact as to his cervical spine claim through the affirmed report of his radiologist, who found multiple bulging discs, and his treating physician, who provided evidence of limited range of motion about a week after the accident and four years later and opined that the cervical spine conditions were causally related to the accident. Since plaintiff's own medical records did not reveal any degenerative conditions in his spine, he was not required to submit evidence from a medical expert detailing why degenerative conditions were not the cause of the reported symptoms (*see Jenkins v Livo Car Inc.*, 176 AD3d 568, 569 [1st Dept 2019]).

As for the right shoulder, plaintiff's treating physician found limitations in range of motion shortly after the accident, and his orthopedist averred that he performed arthroscopic surgery which included repair of a labral tear, and found limited range of motion four years later, which he opined was causally

related to the accident (*see Charlie v Guerrero*, 60 AD3d 570 [1st Dept 2009]). Although plaintiff did not initially complain to his doctor about his shoulder, he testified that his shoulder was bruised after the accident and then sought treatment within a month when pain developed. Such delay does not require a finding of lack of a causal connection, but rather presents an issue of fact (*see Swift v New York City Tr. Auth.*, 115 AD3d 507 [1st Dept 2014]).

Defendants were entitled to dismissal of plaintiff's 90/180 claim based on plaintiff's pleadings and deposition testimony concerning his activities after the accident (*see Anderson v Pena*, 122 AD3d 484, 485 [1st Dept 2014]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11818 In re Lisa B., Dkt. F-41352-16/18F
Petitioner-Respondent,

-against-

Bruce C.,
Respondent-Appellant.

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Leslie S. Lowenstein, Woodmere, for appellant.

_____

Appeal from order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about August 14, 2018, which reversed an order of dismissal, same court (Tionnei Clarke, Support Magistrate), entered on or about June 21, 2018, and reinstated the petition alleging violation of a child support order, unanimously dismissed, nostra sponte, without costs, as moot.

Respondent argues on appeal that Family Court's reinstatement of the petition in its August 14, 2018 order was in error. He filed his notice of appeal on February 23, 2019. However, by the time of the filing, the Support Magistrate after a hearing of the petition on remand, dismissed the petition, and,

in an order entered on or about February 6, 2019, Family Court affirmed the dismissal, thus rendering this appeal moot (*see Matter of Jayding S. [Vanessa S.]*, 140 AD3d 542, 543 [1st Dept 2016]; *Matter of Quayshawn B.*, 253 AD2d 697 [1st Dept 1998]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11819 In re Maxver LLC doing business as Calle Dao Chelsea, Petitioner-Respondent, Index 160647/18

-against-

The Council of the City of New York, Respondent-Appellant.

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Georgia M. Pestana, Acting Corporation Counsel, New York (Jamison Davies of counsel), for appellant.

_____

Judgment (denominated an order), Supreme Court, New York County (Carol R. Edmead, J.), entered February 22, 2019, which granted the petition to annul a determination of respondent The Council of the City of New York (The Council), dated November 15, 2018, disapproving petitioner's application for a revocable consent to operate an unenclosed sidewalk café, ordered the Council to grant petitioner a revocable consent to operate an unenclosed sidewalk café, and denied respondent's cross motion to dismiss the petition, unanimously reversed, on the law, without costs, the petition denied, the cross motion granted and the proceeding brought pursuant to CPLR article 78 dismissed.

The Council's determination disapproving the petition for a new revocable consent to establish, maintain and operate an unenclosed sidewalk café had a rational basis in the record and was not arbitrary and capricious (*see Cummings v Town Bd. of N. Castle*, 62 NY2d 833 [1984]). Having reserved for itself the authority to either grant or deny a petition for revocable

consent without delineating standards for the exercise of its own discretion (*see* Administrative Code § 20-226), The Council is not bound by the standards set forth in the New York City Zoning Resolution addressing unenclosed sidewalk cafés which circumscribed the Department of Consumer Affairs' review (*see Matter of Liska NY, Inc. v City Council of the City of N.Y.*, 134 AD3d 461 [1st Dept 2015], *lv denied* 27 NY3d 912 [2016]; *see also Cummings* at 834). The Council providently exercised its discretion in denying the petition based upon evidence concerning problems specific to this petitioner and location, and the denial was not based on generalized community objections to sidewalk cafés (*cf. Matter of Pleasant Val. Home Constr. v Van Wagner*, 41 NY2d 1028, 1029 [1977]; *Matter of PDH Props. v Planning Bd. of Town of Milton*, 298 AD2d 684, 686-687 [3d Dept 2002]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11821 The People of the State of New York, Respondent, Ind. 1391/16

-against-

Phillip Santo Feliciano, Defendant-Appellant.

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 28, 2018, convicting defendant, after a jury trial, of course of sexual conduct against a child in the second degree, and sentencing him to a term of three years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that 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. Evidence elicited of defendant's conduct in subjecting the young victim to repeated unwanted touching of her intimate parts clearly warranted the inference that he was acting for purposes of sexual gratification (Penal Law § 130.00[3]).

Defendant did not preserve his challenges to the

prosecutor's summation and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11822 The People of the State of New York, Respondent, Ind. 6792/93

-against-

Corey R., Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about June 8, 2018, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant do not justify a departure, in view of the egregious nature of the underlying multiple violent sex crimes committed against female strangers. The fact that the Parole Board granted parole release has little bearing on defendant's risk level determination, which is concerned not only with his risk of reoffense, but also the

harm he might create if he reoffended. Furthermore, we do not find that the court's assessment of points under the risk factor for nonacceptance of responsibility/refusing sex offender treatment overassessed defendant's risk of reoffense.

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11823 Ashton Goundan, et al., Index 155989/14
Plaintiffs,

-against-

Pav-Lak Contracting Inc., et al.,
Defendants-Respondents.
- - - - -
Pav-Lak Contracting Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

D&D Electrical Construction Company Inc.,
Third-Party Defendant-Appellant.
- - - - -
Norguard Insurance Company,
Non-Party Intervenor-Appellant.

_____

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for appellant.

Cartafalsa, Turpin & Lenoff, New York (David S. Pasternak of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 29, 2019, which, to the extent appealed from, denied intervenor's motion for summary judgment dismissing the third-party claims for common-law indemnification and contribution, unanimously affirmed, without costs.

Intervenor, the workers' compensation insurance carrier for third-party defendant D&D Electrical Construction Company Inc. (D&D), established prima facie that the injuries allegedly sustained by plaintiff Ashton Goundan in a construction site accident while he was employed by D&D, i.e., cerebral concussion with postconcussion syndrome and other brain injuries, were not

grave injuries within the meaning of the Workers Compensation Law.

In opposition, defendants submitted a decision by an administrative law judge of the Social Security Administration that determined, among other things, that plaintiff is unable to perform any "past relevant work" and that there are no jobs in the national economy that he can perform, due at least in part to the nature of the brain injuries that he sustained. This evidence is sufficient to raise an issue of fact as to whether plaintiff's claimed brain injuries have resulted in his permanent total disability and, therefore, constituted a grave injury within the meaning of Workers' Compensation Law § 11 (*see Way v Grantling*, 289 AD2d 790 [3d Dept 2001]; *see also Miranda v Norstar Bldg. Corp.*, 79 AD3d 42, 49 [3d Dept 2010]; *Sergeant v Murphy Family Trust*, 292 AD2d 761, 762 [4th Dept 2002]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11824 The People of the State of New York, Respondent, Ind. 1974/16

-against-

Matthew Pierre, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered July 16, 2018, convicting defendant, after a jury trial, of assault in the second degree, criminal mischief in the third degree and auto stripping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 9 to 11 years, unanimously affirmed.

The court providently exercised its discretion when it modified its *Sandoval* ruling after defendant's direct testimony, finding that his testimony that he was "not [] a trouble maker" opened the door to limited inquiry regarding two prior assault convictions (*see e.g. People v Feliciano*, 133 AD3d 469 [1st Dept 2015], *lv denied* 27 NY3d 1150 [2016]). However, the court erroneously determined, and instructed the jury, that evidence of the two prior convictions could be considered as affirmative evidence of guilt, relevant to the charged mental state and the validity of defendant's justification defense (*see People v*

Bradley, 20 NY3d 128, 133-34 [2012]). In that context, the evidence at issue cannot be differentiated from propensity evidence. Nevertheless, any error in either the *Sandoval* or *Molineux* aspects of the court's rulings was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence that defendant brutally attacked an elderly tourist and damaged a bus, and there is no reasonable possibility that the jury would have accepted his incredible testimony (*see People v Hall*, 18 NY3d 122, 132 [2011] [considering defendant's "ridiculous explanation" in harmless error analysis]).

Defendant did not preserve his challenge to a remark by the prosecutor in summation, and we decline to review it in the interest of justice. As an alternative holding, we find that this isolated use of disapproved language (*see People v Jones*, 125 AD3d 403, 406 [1st Dept 2015]) was not so egregious as to require reversal, and that the error was harmless. Defendant's related ineffective assistance of counsel claim is unavailing, because he has not established that his counsel's lack of

objection was unreasonable or prejudicial (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, Gonzàlez, JJ.

11825 David James Murphy, Index 156466/17
Plaintiff-Appellant,

-against-

Citigroup Global Markets, Inc., et al.,
Defendants-Respondents.

_____

David James Murphy, appellant pro se.

Proskauer Rose LLP, New York (Joseph Baumgarten of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about April 12, 2019, which granted defendants' CPLR 3211 motion to dismiss the complaint and denied plaintiff's cross motion to compel arbitration, unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's discrimination claims as precluded by res judicata (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Fajemirokun v Dresdner Kleinwort Wasserstein Ltd.*, 27 AD3d 320, 321-322 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]). The discrimination claims which plaintiff seeks to assert in the first two causes of action of the instant complaint "aris[e] out of the same transaction or series of transactions" as the claims resolved in the prior arbitration between himself and the corporate defendants herein (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Carol v Madison Plaza Apts. Corp.*, 137 AD3d 453, 453 [1st Dept 2016]). Plaintiff offers no response to the defense of res judicata, other than

that his discrimination claims were not arbitrable. Plaintiff, however, has failed to make any showing in support of the non-arbitrability of those claims at the time they were decided[1] (*see Sphere Drake Ins. Ltd. v Clarendon Natl. Ins. Co.*, 263 F3d 26, 31 [2d Cir 2001]; *McCaddin v Southeastern Marine Inc.*, 567 F Supp 2d 373, 379 [ED NY 2008]).

Plaintiff's third cause of action, against defendant Okan Pekin, fails to state a claim, as the conduct he complains of is simply not substantial enough to support a claim for hostile work environment, even under the maximally protective New York City Human Rights Law (*see Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18, 26 [1st Dept 2014]).

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

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

ENTERED: JULY 16, 2020

CLERK

[1]Effective October 11, 2019, well after the facts of plaintiff's discrimination claims were adjudicated in arbitration, the New York State Discrimination Laws were amended to prospectively prohibit mandatory arbitration clauses, except where inconsistent with federal law (CPLR 7515). There was no such prohibition in effect at the time of plaintiff's arbitration.

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11826 In re Tanya H., Dkt. V-29156-13/18D
Petitioner-Appellant,

-against-

Dennis H.,
Respondent-Respondent.

_____

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for appellant.

_____

Order, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about April 11, 2019, which dismissed petitioner mother's petition to modify an order of visitation, unanimously affirmed, without costs.

The change in circumstances identified by the mother, namely respondent father's refusal to comply with provisions of the existing visitation order requiring him to confirm his visitation in advance and pick the child up from the police precinct, his failure to consistently exercise visitation, and his irrational and combative attitude toward the Family Court, did not demonstrate that modification of the visitation order would serve the best interests of the child (*see Matter of Jose M.C. v Liliana C.*, 150 AD3d 514 [1st Dept 2017]*; see generally* Family Ct Act § 652[a]; *Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). The visitation order adequately dealt with the father's failure to confirm visitation with the mother in advance by allowing her to cancel the visit in those circumstances. Although the father violated the visitation order when he picked up the child from

school instead of the police precinct, it appears that the father's actions were caused by the mother's own failure to timely bring the child to the precinct. The father's failure to consistently exercise visitation and his somewhat combative demeanor in the Family Court are not extraordinary and there is no indication that those actions affected the child negatively.

The remainder of the mother's arguments regarding change in circumstances are not preserved for appellate review (*see Matter of Christina T. v Thomas C.T.*, 173 AD3d 614 [1st Dept 2019]) and we decline to review them in the interest of justice. Were we to review them, we would find that although the mother showed that the father's actions were negatively affecting her, she did not offer any proof that the visitation order was no longer serving the best interests of the child (*see Steck v Steck*, 307 AD2d 819, 820 [1st Dept 2003]).

The court was not required to hold a full evidentiary hearing before dismissing the petition. The court acquired sufficient information to render an informed decision on the child's best interests during the multiple appearances on the

petition, and the mother made no showing that would have affected the disposition of her petition (*see Matter of Antoine D. v Kyla Monique P.*, 168 AD3d 476 [1st Dept 2019], *lv denied* 32 NY3d 917 [2019]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11827 Starr Insurance Holdings, Inc., et al., Plaintiffs-Appellants, Index 652164/16

-against-

United States Specialty Insurance Company, et al., Defendants-Respondents,

Westchester Fire Insurance Company, Defendant.

_____

Cahill Gordon & Reindel LLP, New York (Thorn Rosenthal of counsel), for appellants.

Frenkel Lambert Weiss Weisman & Gordon, LLP, New York (Eric M. Eusanio of counsel), for United States Specialty Insurance Company, respondent.

Eckert Seamans Cherin & Mellott, LLC, White Plains (Riyaz G. Bhimani of counsel), and Eckert Seamans Cherin & Mellott, LLC, Washington, DC (F. Joseph Nealon of the bar of the Commonwealth of Pennsylvania and District of Columbia, admitted pro hac vice, of counsel), for Great American Insurance Company, respondent.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 27, 2019, which granted defendants U.S. Specialty Insurance Company's and Great American Insurance Company's motions for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Plaintiffs (Starr) seek to recover under a fidelity bond issued by defendants for alleged defalcations by Global Warranty Group (GWG), with which Starr had entered into an agreement to provide warranties on consumer electronics. The period of the bond was the calendar year 2014. The bond provided that it

terminated as to any employee upon the discovery by Starr or any of its officers or directors of any "dishonest or fraudulent act" committed at any time by the employee. Assuming GWG was an employee of Starr within the definition of the bond, the bond terminated as to GWG in November 2013 at the latest, when Starr became aware that more than $740,000 was missing from its claims account, i.e., before the inception of the 2014 bond (*see Capital Bank & Trust Co. v Gulf Ins. Co.*, 91 AD3d 1251, 1253-1254 [3d Dept 2012] [where dishonest acts were discovered in 2001, "coverage . . . terminated immediately upon the inception of the bond" in 2002]; *see also Drexel Burnham Lambert Group v Vigilant Ins. Co.*, 157 Misc 2d 198, 207-208 [Sup Ct, New York County 1993]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11828 In re Kendra E., Dkt. V-23579/18
Petitioner-Respondent, V-26864/18

-against-

Jared T.,
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

_____

Appeal from temporary order of visitation, Family Court, Bronx County (Jennifer S. Burtt, Referee), entered on or about November 21, 2019, which awarded the father supervised temporary visitation with the subject child, unanimously dismissed, without costs, as moot.

Application by the father's attorney to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with his assigned counsel that there are no non-frivolous issues which could be raised on this appeal from the temporary order of visitation, as it has been rendered moot by the expiration of the terms of that order, and was superseded by a

subsequent order (*see Matter of Crystal G. v Marquis E.*, 170 AD3d 557 [1st Dept 2019]). In any event, we agree with counsel that the court's decision was well within the bounds of its discretion.

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11829 & M-8460 Index 651331/19

Tufamerica, Inc.,
Plaintiff-Respondent,

-against-

Universal Music Group, Inc.,
Defendant-Appellant.

_____

Pryor Cashman LLP, New York (Frank P. Scibilia of counsel), for appellant.

Law Office of Julie Stark, New York (Julie Stark of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered October 28, 2019, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's causes of action for a declaratory judgment, anticipatory breach of the "express terms" of the agreement, breach of the covenant of good faith and fair dealing, unjust enrichment and unfair competition fail to state claims on the ground that the unambiguous agreement does not give plaintiff a 50% interest in the copyright to the master recording. Any argument that there could have been a modification of the agreement by the parties' subsequent conduct after the agreement was executed is precluded by the Copyright Act, which requires that any assignment or transfer of an interest in a copyright be in writing (*see* 17 USC § 204[a]; *Tjeknavorian v Mardirossian*, 56

F Supp 3d 561, 567 [SD NY 2014]).

Plaintiff's business defamation claim must also be dismissed. The first alleged defamatory statement, that "[plaintiff] is firm on claiming 75% of the master recording of "Let Me Clear my Throat," is not actionable because it is not a false statement as it is an expression of intention, not fact. Moreover, plaintiff asserts that such statement is defamatory based solely on its incorrect belief that the agreement gives plaintiff a 50% interest in the copyright to the master recording. The other alleged defamatory statement, that "'The 900 Number' clearly seems to sample Marva Whitney's 'Unwind Yourself,'" is not actionable because it is clearly an expression of defendant's opinion for which the basis was disclosed and thus, there is no claim for defamation (*see Gross v New York Times Co.*, 82 NY2d 146, 152 [1993]).

Finally, plaintiff's claim for tortious interference with prospective contractual relations fails to state a claim because plaintiff fails to allege any unlawful conduct (*see Leonard v Gateway II, LLC*, 68 AD3d 408, 409 [1st Dept 2009]). The only alleged unlawful conduct here is the business defamation. As there was no defamation, there is no unlawful conduct and thus,

there can be no claim for interference with prospective contractual relations.

M-8460 - *Tufamerica, Inc. V Universal Music Group*

Motion for stay, denied as moot.

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kahn, González, JJ.

11831 The People of the State of New York, Ind. 2692/16
Respondent,

-against-

Alexander Nizich,
Defendant-Appellant.

_____

Law Office of Cèsar de Castro, P.C., New York (Cèsar de Castro of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ann E. Scherzer, J.), entered on or about February 25, 2019, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's assessment of 30 points under the risk factor for having three or more victims, based on defendant's viewing of over 1200 images and videos of child pornography on his computer (*see People v Labarbera*, 140 AD3d 463, 464 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016]).

Defendant did not preserve his arguments relating to a possible downward departure, which he never requested. In any event, we find no basis for a departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kahn, González, JJ.

11833N Kenia L. Cabrera, Index 25303/15E
Plaintiff-Appellant-Respondent,

-against-

The Port Authority of New York
and New Jersey, et al.,
Defendants-Respondents-Appellants.

_____

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

Port Authority Law Department, New York (Cheryl N. Alterman of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about April 15, 2019, which denied plaintiff's motion to set aside so much of a jury verdict that set the award for future pain and suffering at three years, and granted defendants' motion to set aside the verdict only to the extent of setting aside the damage verdict and ordering a new trial on damages, unanimously modified, on the law, to grant defendants' motion to set aside the jury verdict as to liability, the matter remanded for a new trial, and otherwise affirmed, without costs.

Plaintiff, an employee at a Dunkin Donuts franchise in LaGuardia Airport, was involved in an accident with a salt spreading truck operating in parking lot 10 of the airport during a snowfall. The trial court erred in truncating proof on the issue of whether lot 10 was public or private. This error then directly impacted whether the jury should have been charged with the recklessness standard as set forth in Vehicle and Traffic Law

§ 1103, or Vehicle and Traffic Law § 1163 (*see also Groninger v Village of Mamaroneck*, 17 NY3d 125 [2011]; *Krausch v Incorporated Vil. of Shoreham*, 87 AD3d 715 [2d Dept 2011]). The error in the charge warrants a new trial (*see Reis v Volvo Cars of N. Am.*, 24 NY3d 35 [2014]).

The court also erred in precluding defendants' accident reconstructionist from testifying (*compare Vinci v Ford Motor Co.*, 45 AD3d 335, 337 [1st Dept 2007]; *Marsh v Smyth*, 12 AD3d 307, 307-308 [1st Dept 2004]). The court's in limine inquiry of the expert concerning scientific studies was not relevant, as the subject of the testimony, accident reconstruction and perception reaction time are not novel scientific theories, such as to require a *Frye* hearing (*see Obey v City of New York*, 29 NY3d 958 [2017]; *Thorne v Grubman*, 40 AD3d 375 [1st Dept 2007]). The proposed expert testimony was based on evidence in the record concerning the accident, and was not entirely speculative (*see generally Soto v New York City Tr. Auth.*, 6 NY3d 487, 494 [2006]). Similarly, defendants' notice of expert exchange was not insufficient such as to warrant his in toto preclusion. The remedy for any alleged failures in specificity could have been handled by limiting his testimony to the subject matters listed in the exchange (CPLR 3101[d]).

Plaintiff failed to preserve her argument that the jury's verdict was inconsistent, because it awarded future damages for a period of only three years, yet awarded twelve million dollars on

that claim (*see Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 518 [1st Dept 2008]). Nevertheless, in light of the excessive nature of the jury's award (*e.g. Dacaj v New York City Tr. Auth.*, 170 AD3d 561 [1st Dept 2019]; *Williams v City of New York*, 105 AD3d 667 [1st Dept 2013]), the court properly ordered a new trial on damages. Retrial on damages is also necessary because defendants' expert medical witness was improperly barred from testifying on the issues of whether there was evidence of a traumatically induced injury, whether the surgeries undergone by plaintiff were necessary or appropriate, and whether he believed future surgery would be necessary.

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

ENTERED: JULY 16, 2020

CLERK

Gische, J.P., Kapnick, Webber, Kern, González, JJ.

11834N-
11834NA Index 160032/15

Vincent Alfani, et al.,
Plaintiffs-Appellants,

-against-

Rivercross Tenants Corporation, et al.,
Defendants-Respondents.

_____

Reingold & Tucker, Brooklyn (Abraham Reingold of counsel), for appellants.

Goldberg Segalla LLP, White Plains (Michael P. Kandler of counsel), for Rivercross Tenants Corporation, respondent.

Hoffman Roth & Matlin, LLP, New York (William Matlin of counsel), for Roosevelt Island Visual Art Association, Inc., respondent.

Babchik & Young LLP, White Plains (Matthew C. Mann of counsel), for Hudson Related Retail, LLC, respondent.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered October 12, 2018, which, inter alia, granted the motions of defendants Rivercross Tenants Corp. (Rivercross), Hudson Related Retail, LLC (Hudson) and Roosevelt Island Visual Art Association, Inc. (RIVAA) for summary judgment dismissing the complaint, unanimously modified, on the law, to deny the motion of Rivercross, and otherwise affirmed, without costs. Order, same court and Justice, entered January 2, 2019, which denied plaintiffs' motion to reargue (denominated a motion to renew and reargue), unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff Vincent Alfani alleges that he fell as a result of uneven brick pavers in the sidewalk adjoining two buildings on

Roosevelt Island. Rivercross, Hudson, and RIVAA all demonstrated prima facie through admissible evidence that they did not own that area of the sidewalk, did not create the defect in the brickwork, and were not obligated by contract or otherwise to maintain or repair the sidewalk (*see* Karczewicz v 473 Owners Corp., 272 AD2d 137 [1st Dept 2000]).

In opposition, plaintiffs did not submit any evidence sufficient to raise an issue of fact as to Hudson or RIVAA. However, as to Rivercross, plaintiffs referred to and quoted from Rivercross's ground lease with the New York State Urban Development Corp. (UDC), which purportedly required Rivercross to "take good care" of the premises, including "all sidewalks . . . and curbs in front of or adjacent to the leased premises" and to "make all repairs . . . interior and exterior, structural and non-structural . . . to keep the same in good and safe order and condition." The existence of such an agreement would contradict the representations by Rivercross's manager and president that there was no agreement, oral or written, requiring it to maintain that area. Accordingly, Rivercross's motion should have been denied to permit plaintiffs an opportunity to obtain discovery concerning the nature of the relationship between Rivercross and nonparty Roosevelt Island Operation Corporation (RIOC), the entity that in 2011, through an assignment, received UDC's rights under the ground lease, and their respective obligations for the premises and sidewalk (*see* CPLR 3212[f]).

Plaintiffs' motion denominated as one for leave to renew and reargue was not based on new facts unavailable at the time of defendants' motion, and was therefore a motion to reargue, the denial of which is not appealable (*see Matter of Pettus v Board of Directors*, 155 AD3d 485 [1st Dept 2017], *lv denied* 31 NY3d 1113 [2018]).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11836 The People of the State of New York, Ind. 2580/17
Respondent,

-against-

Jesus Quinones,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (John T. Komondorea 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 (George R. Villegas, J.), rendered January 10, 2018,

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

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

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

ENTERED: JULY 16, 2020

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11837 In re Danny Santiago, Index 100856/18
Petitioner-Respondent,

-against-

James O'Neill, etc., et al.,
Respondents-Appellants.

_____

James E. Johnson, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for appellants.

Goldberg & McEnaney, LLC, Port Washington (Jeffrey L. Goldberg and Timothy McEnaney of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (John J. Kelley, J.), entered February 19, 2019, annulling the determination, dated March 15, 2018, of respondent Board of Trustees of the Police Pension Fund, Article II, which denied petitioner accidental disability retirement (ADR) benefits, unanimously reversed, on the law, the judgment vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78, dismissed, without costs.

The denial of ADR benefits to petitioner is not arbitrary and capricious because members of the Board of Trustees determined that petitioner's traversing of unfamiliar staircases in unfamiliar locations is a routine risk of a police officer's job (*see Matter of Starnella v Bratton*, 92 NY2d 836, 839 [1998]).

Moreover, the Board observed that the steps on which petitioner tripped do not appear to be defective or damaged, and the lip that caused the injury appears to be a permanent part of the design of the staircase and was painted yellow.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11838 In re Georgianna N., Dkt. V43479-80/13
Petitioner-Appellant,

-against-

Carmen V., et al.,
Respondents-Respondents.

_____

Law Office of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondents.

Andrew J. Baer, New York, attorney for the child, Albert G.

Larry S. Bachner, New York, attorney for the child, Linda Rose G.

_____

Appeal from order, Family Court, New York County (Pamela Scheininger, Referee), entered on or about February 1, 2019, which dismissed petitioner grandmother's petition seeking an order of visitation with her two biological grandchildren, unanimously dismissed, without costs, for lack of subject matter jurisdiction.

This case should have been dismissed for lack of continuing jurisdiction under Domestic Relations Law (DRL) 76-a[1][b] as the parents and children no longer reside in New York, but in Florida

(*see Matter of Kevin McK. v Elizabeth A.E.*, 151 AD3d 600, 600 [1st Dept 2017], *lv denied* 32 NY3d 944 [2018]). In view of our dismissal on this basis, we need not reach the balance of appellant's arguments.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11839 The People of the State of New York, Ind. 2511/17
Respondent,

-against-

Deborah Roberts,
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 (Lee M. Pollack of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J. at plea, Guy Mitchell, J. at sentence), rendered November 7, 2018), convicting defendant, upon her plea of guilty, of burglary in the third degree, and sentencing her to a term of 3½ to 7 years, unanimously modified, as a matter of discretion in the

interest of justice, to the extent of reducing the sentence to a term of 2 to 4 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11840 The People of the State of New York, Ind. 3477/17
Respondent,

-against-

Amin Powell,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Anjali Pathmanathan 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 (Curtis J. Farber, J.), rendered June 7, 2018, as amended June 18, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

Defendant's claim that his attorney rendered ineffective assistance by failing to go forward with the litigation of allegedly meritorious suppression issues before defendant pleaded guilty is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). These matters include plea bargaining considerations, counsel's strategic evaluation of the likelihood of obtaining suppression of evidence, and defendant's personal input into accepting the offered disposition. Accordingly, because defendant has not made a CPL 440.10 motion, the merits of

the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]). The record establishes that counsel knew that the People had disclosed an error in a search warrant affidavit, and that prior counsel had obtained a hearing to challenge the warrant. However, the record fails to establish that the error in the affidavit was dispositive and would have led to suppression of the evidence recovered under the warrant, or that there was no "strategic or other legitimate explanation" for not going forward with the hearing before defendant pleaded guilty (*Rivera* at 709).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11841 Myra Ruiz, Index 150224/15
Plaintiff-Appellant,

-against-

Stop 1 Gourmet Deli, et al.,
Defendants-Respondents.

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Harnick & Harnick, P.C., New York (Daniel Berke of counsel), for appellant.

McMahon, Martine & Gallagher, LLP, Brooklyn (Daniel Reiser of counsel), for Stop 1 Gourmet Deli, respondent.

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for SHK Realty LLC, respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered April 3, 2019, which, to the extent appealed from as limited by the briefs, granted the cross motion of defendant Stop 1 Gourmet Deli (Stop 1) for summary judgment dismissing the complaint as against it, unanimously reversed, to deny defendant Stop 1's motion for summary judgment and reinstate the complaint as against it, without costs.

Defendant (Stop 1) did not meet its initial burden of demonstrating "that it neither created a hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]), as it made no specific, affirmative showing that it did not have actual or constructive notice of the hazardous condition. Defendants failed to establish their prima facie entitlement to summary judgment as they "failed to offer specific evidence as to their

activities on the day of the accident, including evidence indicating the last time [the area in question] was inspected, cleaned, or maintained before [the] fall" (*Carter v Double Down Realty Corp.*, 101 AD3d 506, 506 [1st Dept 2012]). Witness Nashwen Nagi testified that he was not in the bodega at the time of plaintiff's accident because he was on vacation, and did not have any knowledge of the accident until Stop 1 received a letter from plaintiff's lawyer. According to Nagi, Stop 1 did not maintain employment or repair records for the bodega.

The record in any event raises triable issues of fact sufficient for trial, as the affidavit from a nonparty witness

presents an issue as to how long before the accident the rain had started.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11843 In re Martyna B., Dkt. V-05613-13/18H
Petitioner-Appellant,

-against-

Marlo M.,
Respondent-Respondent.

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Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

The Law Offices of Salihah R. Denman, PLLC, New York (Salihah R. Denman of counsel), for respondent.

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), attorney for the child.

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Order, Family Court, Bronx County (Aija M. Tingling, J.), entered on or about March 22, 2019, which granted respondent-father's motion to dismiss the mother's petition seeking modification of a custody order, unanimously affirmed, without costs.

The record supports the court's decision to grant the father's motion to dismiss at the conclusion of the mother's case. Modification of the custody order was not warranted due to the mother's failure to demonstrate a substantial change in circumstances that negatively impacted the child's best interests (*Matter of Nava v Kinsler*, 85 AD3d 1186 [2d Dept 2011], *lv denied* 17 NY3d 714 [2011]). The mother failed to prove her allegations that the father committed excessive corporal punishment against the child, that he committed acts of domestic violence against his ex-wife in the child's presence, that the father had pending

criminal cases against him for violations of orders of protection, or that the father's living situation was less stable than the mother's. The mother admitted that the report of child maltreatment against the father was determined to be "unfounded" by the Administration for Children's Services.

Finally, the mother claimed that the father failed to consistently produce the child for visits as required by the 2015 custody order entered on the parties' consent. However, her testimony was unclear as to the dates of alleged missed visits. Moreover, she admitted that the parties frequently agreed to informal oral modifications to the order as to the logistics of pick up and drop off for visitation, and that her definition of "on time" for pick ups included the grace period permitted under the order. In addition, the mother testified that she missed most of her visits for the entire time that the custody order had been in place, but she did nothing about the father's alleged failure to produce the child, except for one prior petition, which she withdrew in 2017, until filing the instant modification petition. Under these circumstances, the mother failed to show that her missed visits were due to the father's interference

rather than to the parties' informal agreements to modify visitation, in which she acquiesced, or to other factors that did not constitute changed circumstances requiring a change in custody in the child's best interests.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11844 The People of the State of New York, Ind. 826/17
Respondent,

-against-

Leverett Spinac,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered June 27, 2018, convicting defendant, after a jury trial, of assault in the second degree, aggravated harassment in the second degree (two counts), criminal possession of a weapon in the fourth degree and stalking in the third degree (two counts), and sentencing him to an aggregate term of 3½ years, with three years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison components of all sentences to time served, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the determinations. The trial evidence established that the defendant engaged in a 10-month campaign of harassment, wherein he terrorized the attorneys and two female staff at the law firm

representing his wife in divorce proceedings. The defendant called the firm more than 1,500 times during that period, and engaged in vile communication which became progressively more sexual, racist and threatening in nature. The evidence likewise supports the conclusion that defendant caused physical injury to his wife's matrimonial lawyer when defendant hit the victim in the shin with his four-pronged cane during a court proceeding. To establish physical injury, the People were only required to prove that the victim's injury went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]). Relatively minor injuries causing moderate, but "more than slight or trivial pain" may suffice (*see People v Chiddick*, 8 NY3d 445, 447 [2007] [fingernail injury]), as may injuries that did not require any medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]). The victim testified that the assault caused a bruise lasting over a week, that it caused her to favor the injured leg, that she treated it with ice, and that it caused pain rating a 7 on a scale of 1 to 10 when she touched it. In addition, the evidence included photographs of the victim's bruise, and eyewitness testimony that the victim appeared to be in pain at the time of the attack and that her leg changed colors. Accordingly, the jury could have reasonably drawn an inference of substantial pain (*see e.g. People v Ross*, 163 AD3d 428, 429 [1st Dept 2018]; *People v Black*, 156 AD3d 413 [1st Dept 2017], *lv denied* 30 NY3d 1113 [2018]).

While we otherwise find no basis to disturb defendant's sentence and do not consider him deserving of this court's leniency, we exercise our interest of justice jurisdiction. In so doing, we extend to him the compassion and consideration he neglected to show the four women simply doing their jobs, and reduce his sentence to time served because of defendant's age and chronic health conditions (including coronary artery disease, hypertension and diabetes), and the fact that he has only a few months to serve before his release date.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11845 Jansons Associated Inc., Index 656755/16
Plaintiff-Respondent,

-against-

12 E. 72nd LLC, et al.,
Defendants-Appellants,

Steven Croman,
Defendant.

_____

Rose & Rose, New York (Dean Dreiblatt of counsel), for appellants.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 13, 2018, which, insofar as appealed from as limited by the briefs, denied the cross motion of defendants 12 E. 72nd LLC (Owner) and Merrick Real Estate Group, Inc. (Merrick) to vacate their default in appearing and answering the complaint, unanimously affirmed, with costs.

The motion court providently exercised its discretion when it determined that Owner and Merrick failed to articulate a reasonable excuse for their default under CPLR 5015(a)(1) (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 142 [1986]; *Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [1st Dept 2011]). Merrick admits that it received a timely copy of the complaint in January 2017, and provides no basis for its assumption that Owner would defend against the action on its behalf (*see D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 90 AD3d 403, 405 [1st Dept 2011]).

Moreover, Owner's unspecified problems with mail and its member's bare denial of receipt of the complaint do not constitute a reasonable excuse (*see e.g. State Farm Mut. Auto. Ins. Co. v Dr. Ibrahim Fatiha Chiropractic, P.C.*, 147 AD3d 696, 697 [1st Dept 2017], *lv denied* 29 NY3d 912 [2017]).

Owner and Merrick also failed to establish that they did not receive notice of the summons in time to defend against the action under CPLR 317 (*see Eugene Di Lorenzo, Inc.*, 67 NY2d at 141-142).

In view of the foregoing, we need not reach the issue of whether a meritorious defense was set forth (*see Cusumano v Riley Land Surveyors, LLP*, 179 AD3d 593, 594 [1st Dept 2020]; *M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [1st Dept 2009]).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11846 In re P.C., III, Dkt. V-12071-18/19A
Petitioner-Appellant,

-against-

R.W.,
Respondent-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

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Order, Family Court, Bronx County (Keith E. Brown, J.), entered on or about October 10, 2019, which dismissed the petition for a writ of habeas corpus, unanimously affirmed, without costs.

Application by petitioner's assigned counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). A review of the record demonstrates that there are no nonfrivolous issues that could be raised on this appeal. As the subject child had not resided in New York for six consecutive months immediately before the habeas petition was filed, the court lacked subject matter

jurisdiction to entertain the petition (*see* Domestic Relations Law § 76-b; 76[1][a]; 75-a[7]; *Matter of Renaldo R. v Chanice R.*, 131 AD3d 885 [1st Dept 2015]).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11847 The People of the State of New York, Ind. 9946/94
Respondent,

-against-

Wayne Gardine,
Defendant-Appellant.

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Emery Celli Brinckerhoff & Abady LLP, New York (Emma L. Freeman of counsel), for appellant.

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

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Order, Supreme Court, New York County (Gilbert C. Hong, J.), entered on or about April 18, 2019, which denied defendant's CPL 440.10 motion to vacate a judgment rendered July 24, 1996, unanimously affirmed.

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]; *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). Initially, while we recognize that affidavits in support of such a motion may be made on information and belief, we note that defendant only supplied the affidavit of an investigator recounting his telephone conversations with two persons, who identified themselves as two known eyewitnesses to the homicide of which defendant was convicted. Even putting aside the lack of affidavits from anyone with personal knowledge, the fact that defendant has not satisfactorily explained the decades-long delay in investigating

these matters, and the reliability issues arising from the fact that the witnesses were recalling events that occurred in 1994, we find that these witnesses' statements did not support any ground for vacating the judgment, and that no hearing was necessary.

Defendant asserts that his conviction should be vacated under CPL 440.10(1)(g) because the information contained in the investigator's phone conversations with the two witnesses constituted newly discovered evidence. However, as to both witnesses, defendant failed to satisfy the requirements of such a claim (*see generally People v Velazquez*, 143 AD3d 126, 131-132 [1st Dept 2016], *lv denied* 28 NY3d 1189 [2017], with particular regard to due diligence and materiality.

The first witness at issue testified at defendant's trial, where he maintained that the only person who shot the victim was defendant. Decades later, this witness allegedly told defendant's investigator that the victim was fired upon by both defendant and a second man, who shared defendant's motive to take revenge on the victim. However, in defendant's own statement to the police at the time of his arrest, he sought to blame this other man for the homicide. Accordingly, defendant was in a position to develop this issue at his trial, by cross-examination of the testifying eyewitness or otherwise, and thus the belated revelation to the investigator does not qualify as newly discovered. Furthermore, defendant has not shown that the

evidence would probably change the outcome of the trial. Even if the witness now believes that he saw two people shooting at the victim, he still maintains that defendant shot the victim, and the assertion that there were two men firing weapons would directly contradict the ballistics evidence that all 10 cartridge cases found at the scene came from the same pistol.

The second witness, who was a child at the time, refused to testify at defendant's trial, and was the subject of a missing witness application by the defense. In the phone call related by defendant's investigator, this witness said that he was with the above-discussed testifying witness at the time of the homicide, but that it was too dark and they were too far from the scene for either of them to identify the assailant. This evidence also fails to qualify as newly discovered, because defendant has not established that, through the exercise of due diligence, he could not have interviewed this witness at the time of his trial, or, in any event, why it took defendant so many years to do so. In addition, defendant has not shown that this evidence would probably change the result, because it would be subject to impeachment by the child witness's statement to police shortly after the crime, and because the lighting and the testifying witness's distance from the shooting were highly contested issues that were thoroughly explored at trial.

Defendant has also failed to establish a claim under *Brady v Maryland* (373 US 83 [1963]). Defendant bases this claim on the

portion of the investigator's account of his phone conversation with the testifying witness in which the witness allegedly claimed to have told a detective that there were two gunmen (including defendant). However, all other available evidence contradicts, or fails to support any claim that there was an undisclosed, unrecorded statement by this witness to the police. In any event, for the reasons discussed previously, this information was not exculpatory of defendant, and there is no reasonable possibility that it could have affected the verdict.

Finally, we find defendant's claim of actual innocence unavailing (*see Velazquez*, 143 AD3d at 136).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11848 Gjon Lulgjuraj, Index 153643/14
Plaintiff,

-against-

Brown Harris Stevens Residential Management LLC,
Defendant-Appellant,

Centennial Elevator Industries, Inc.,
Defendant-Respondent.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph P. Wodarski of counsel), for appellant.

Gottlieb Siegel & Schwartz, LLP, New York (Gabriel R. Blum of counsel), for respondent.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered June 25, 2019, which to the extent appealed from, denied the branch of defendant Brown Harris's motion for summary judgment seeking dismissal of codefendant Centennial Elevator's cross claims for contractual indemnification and contribution, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff, who worked as a building porter, commenced this action against Centennial Elevator, the owner's elevator maintenance company, and Brown Harris, the building manager. Upon granting Brown Harris's motion for summary judgment dismissing plaintiff's claims against it, the court should also have dismissed all of Centennial's cross claims against Brown Harris. The contractual indemnification cross claim should have

been dismissed because there is no agreement or contractual language requiring Brown Harris to indemnify Centennial (see *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). The cross claim for contribution is also unavailing. Plaintiff's negligence claims against Brown Harris were dismissed based on findings that it did not owe plaintiff any duty of care and did not have complete and exclusive control over building maintenance, and there is no other basis for finding that Brown Harris breached a duty owing to either plaintiff or to Centennial. Accordingly, there is no basis for Centennial to seek contribution from Brown Harris (*see Casey v New York El. & Elec. Corp.*, 107 AD3d 597, 599 [1st Dept 2013]; *see generally* CPLR 1401; *Trump Vil. Section 3 v*

New York State Hous. Fin. Agency, 307 AD2d 891, 896-897 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11849 In re Sergeant Hugh Barry, Index 157969/18
Petitioner-Appellant,

-against-

James P. O'Neill, etc., et al.,
Respondents-Respondents.

_____

Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

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Judgment (denominated an order), Supreme Court, New York County (Arthur F. Engoron, J.), entered July 8, 2019, which denied the amended petition seeking the disclosure of documents under the Freedom of Information Law (FOIL), and granted respondent's cross motion to dismiss this proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the amended petition granted to the extent of ordering disclosure of withheld documents, and the proceeding remanded to Supreme Court for review of any necessary redactions in all documents disclosed both before entry of judgment and as a result of this decision, pursuant to the exemptions based upon invasions of personal privacy, preserving the safety of persons, and the attorney-client privilege, as well as for consideration of petitioner's request for attorneys' fees and litigation costs.

In October 2016, petitioner responded to a call, which resulted in him fatally shooting an emotionally disturbed person

(EDP). In February 2018, he was acquitted of murder and manslaughter charges after a trial. In the meantime, respondent Police Department (NYPD), which brought disciplinary charges in 2016, amended those charges after the acquittal.

In May 2018, petitioner's union submitted a FOIL request seeking "complete copies of any communications" between respondent O'Neill or the NYPD and the Mayor or the Mayor's Office related to the incident. The union also sought "complete copies of any documents" related to an NYPD task force convened to review its EDP policy and make recommendations for changes thereto. Respondents denied the request in its entirety, invoking the exemption pertaining to interference with a law enforcement investigation or judicial proceeding, in both the NYPD FOIL Unit's June 21, 2018 decision and the Records Access Appeals Officer's July 9, 2018 decision upon administrative appeal (Public Officers Law § 87[2][e][i]). Petitioner commenced this proceeding on August 27, 2018.

On December 21, 2018, respondents issued a second decision on the same administrative appeal, producing over 3,200 pages of responsive documents, with numerous redactions, and withholding 462 pages pursuant to, inter alia, the inter- and intra-agency materials exemption (Public Officers Law § 87[2][g]). For the redactions, they relied on, inter alia, exemptions for nonroutine criminal investigation techniques and preserving the integrity of agency information technology assets (Public Officers Law § 87

[2][e][iv], [2][i]). They also raised protection of individuals' privacy and safety, and the attorney-client privilege (Public Officers Law § 87[2][a], [2][b], [2][f]; CPLR 4503), which petitioner does not challenge. There was no mention of the previously raised law enforcement exemption.

After petitioner filed an amended petition challenging respondents' reliance on exemptions not previously raised, respondents cross-moved to dismiss, asserting that the proceeding was moot, relying only on those new exemptions, and arguing that judicial review was not limited to the original determination since the proceeding was in the nature of mandamus to compel. Supreme Court granted the cross motion. We now reverse. First, respondents' challenge to petitioner's standing, although reviewable for the first time on appeal (*Matter of Fleisher v New York State Liq. Auth.*, 103 AD3d 581, 584 [1st Dept 2013], *lv denied* 21 NY3d 856 [2013]), is unavailing. Petitioner's union filed the FOIL request on his behalf and respondents specifically referenced him in their administrative appeal determinations (*see Matter of Norton v Town of Islip*, 17 AD3d 468, 470 [2d Dept 2005], *lv denied* 6 NY3d 709 [2006]).

This proceeding is not in the nature of mandamus to compel. Instead, the standard of review is whether the denial of the FOIL request was "affected by an error of law" (CPLR 7803[3]; *see Matter of Empire State Beer Distribs. Assn., Inc. v New York State Liq. Auth.*, 158 AD3d 480, 481 [1st Dept 2018], *lv denied* 31

NY3d 907 [2018]), for which judicial review is "limited to the grounds invoked by the agency" in its determination (*Matter of Madeiros v New York City Educ. Dept.*, 30 NY3d 67, 74 [2017] [internal quotation marks omitted]). Since respondents abandoned the exemption raised in their initial decision, they cannot meet their burden to "establish[] that the . . . documents qualif[y] for the exemption" (*id.* [internal quotation marks and ellipsis omitted]). Further, as respondents "did not make any contemporaneous claim that the requested materials" fit the newly raised exemptions, "to allow [them] to do so now would be contrary to [Court of Appeals] precedent, as well as to the spirit and purpose of FOIL" (*id.* at 74-75).

Contrary to respondents' contention, the disclosure of documents did not moot this proceeding. Hundreds of pages were still withheld and petitioner challenged the bases for both the failure to produce and the redactions made to the documents disclosed (*see Matter of Madeiros*, 30 NY3d at 72; *compare Matter of Corbett v New York City Police Dept.*, 160 AD3d 415 [1st Dept 2018], *lv denied* 31 NY3d 913 [2018]).

Petitioner's demand for the metadata of documents disclosed must be denied. An agency is only required to produce "a record reasonably described" (Public Officers Law § 89[3][a]). Contrary to petitioner's contention, the FOIL request for "complete copies" of communications and documents cannot fairly be read to have implicitly requested metadata associated with those copies.

His reliance on a Fourth Department case, which held that a request for "all computer records that are associated with published [photographs] . . . included a demand for the metadata associated with those images," is misplaced, as petitioner's request is distinguishable and the Fourth Department "decision is limited to the facts of th[e] case" (*Matter of Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314, 319 [4th Dept 2010]). Respondents emailed petitioner records maintained in electronic form, as required (*see* Public Officers Law § 89[3][a]; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454 [2007]).

The issue of attorneys' fees and litigation costs is remanded to Supreme Court, which failed to address it (*see Matter of Reiburn v New York City Dept. of Parks & Recreation*, 171 AD3d 670, 670-671 [1st Dept 2019]). Petitioner "substantially prevailed" even prior to this appeal (Public Officers Law § 89[4][c][ii]), as respondents made "*no* disclosures, redacted or otherwise, prior to petitioner's commencement of this . . . proceeding," and he "ultimately succeeded in obtaining substantial . . . post-commencement disclosure responsive to [his] FOIL request" (*Matter of Madeiros*, 30 NY3d at 79). On remand, the court must determine whether there was "no reasonable

basis" for the NYPD to deny access based on the law enforcement exemption, and if so, it "shall assess" fees and costs (Public Officers Law §89[4][c][ii]).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11850 The People of the State of New York, Ind. 1631/16
Respondent,

-against-

Walter Wright,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about January 19, 2018, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to risk level three (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). There was clear and convincing evidence to establish aggravating factors that were not otherwise adequately accounted for by the risk assessment instrument, including defendant's criminal history that demonstrated an increased risk of sexual recidivism, including reoffense toward children. The People provided reliable evidence of defendant's history, and the aggravating factors outweighed the mitigating factors cited by defendant.

The court properly assessed 15 points under the risk factor

for a history of drug abuse. The totality of the information before the court supported a finding that defendant's admitted use of marijuana was sufficiently serious to warrant the assessment (*see People v Ramos*, 171 AD3d 483, 484 [1st Dept 2019], *lv denied* 33 NY3d 912 [2019]). In any event, the upward departure was justified with or without the points at issue.

We have considered and rejected defendant's remaining claims, including those relating to the sufficiency of the court's findings.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11851 The People of the State of New York, Ind. 5103/08
Respondent,

-against-

Andre Fields,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

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

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Judgment of resentence, Supreme Court, New York County (Thomas Farber, J.), rendered January 19, 2016, resentencing defendant to an aggregate term of 10 years, unanimously affirmed.

The court properly denied youthful offender treatment. The record supports the court's finding that defendant was ineligible for such an adjudication because he was convicted of armed felonies and his participation was not "relatively minor" (CPL 720.10[2][a]; [3][ii]). In any event, we find no basis to disturb the court's alternative determination that, regardless of eligibility, youthful offender treatment was not warranted.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11852 Center Sheet Metal, et al., Index 309853/08
Plaintiffs-Appellants,

-against-

Cannon Design, Inc., et al.,
Defendants-Respondents.

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Perry, Van Etten, Rozanski & Kutner, LLP, Melville (Leonard Porcelli of counsel), for appellants.

Ahmuty, Demers & McManus, Albertson (Nicholas P. Calabria of counsel), for Cannon Design, Inc. and Hartford Insurance Company, respondents.

Weg & Myers, P.C., New York (Joshua L. Mallin of counsel), for Martin Associates, Inc., respondent.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Richard C. Imbrogno of counsel), for Lexington Insurance Company, respondent.

Adrian & Associates, LLC, New York (Charles B. Bergin of counsel), for Burlington Insurance Company, respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about March 13, 2019, which denied plaintiffs' motion to allow the deposition of plaintiff Aspen Specialty Insurance Company to proceed, and precluded Aspen from offering any witness to testify at trial, unanimously affirmed, with costs.

Plaintiffs violated the court's third conditional order of preclusion by failing to produce a witness for Aspen's scheduled deposition, and failed to demonstrate either a reasonable excuse for their failure to comply or a meritorious claim. Accordingly, the court properly denied their motion to allow the deposition to

proceed (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 83 [2010]). Contrary to plaintiffs' argument, the court was not required to find that their failure to comply was willful (*Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532, 533 [1st Dept 2013]).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11854N & M-1690 & M-2043
Booston LLC,
Plaintiff-Appellant,

-against-

35 West Realty Co. LLC,
Defendant-Respondent.

Index 654308/19

Morrison Cohen LLP, New York (Latisha V. Thompson of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Warren A. Estis of counsel), for respondent.

Order, Supreme Court, New York County (Andrew S. Borrok, J.), entered September 12, 2019, which denied plaintiff's motion for a Yellowstone injunction, unanimously affirmed, without costs.

Although plaintiff otherwise met the criteria for obtaining a *Yellowstone* injunction, "[w]here the claimed default is not capable of cure, there is no basis for a *Yellowstone* injunction" (*Bliss World LLC v 10 W. 57th St. Realty LLC*, 170 AD3d 401, 401 [1st Dept 2019]). We note that denial of a *Yellowstone* injunction does not resolve the underlying merits of the dispute or whether

the default requires termination of the lease (*id*).

M-1690 ***Booston LLC v 35 West Realty Co. LLC***

Motion to waive use and occupancy denied as moot.

M-2043 ***Booston LLC v 35 West Realty Co. LLC***

Motion to vacate order or, in the alternative, to enlarge the record, denied.

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11855N-
11855NA Starr Russia Investments III B.V., Index 652251/17
Plaintiff-Respondent,

-against-

Deloitte Touche Tohmatsu Limited, et al.,
Defendants,

Deloitte LLP, et al.,
Defendants-Appellants.

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Kramer Levin Naftalis & Frankel LLP, New York (Michael J. Dell of counsel), for appellants.

Boies Schiller Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for respondent.

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Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about October 24, 2019, which, inter alia, granted plaintiff's motion to compel discovery from defendants Deloitte LLP, Deloitte CIS Limited, and Deloitte CIS Holdings Limited (the UK Deloitte defendants), unanimously reversed, on the law, with costs, and the motion denied. Appeal from order, same court and Justice, entered December 19, 2019, which, inter alia, denied the UK Deloitte defendants' motion to renew, unanimously dismissed, without costs, as academic.

On the prior appeal, we determined that the court had personal jurisdiction over defendant ZAO Deloitte & Touche CIS (ZAO) under CPLR 302(a)(2) (*see* 169 AD3d 421, 422 [1st Dept 2019]). However, we also determined that plaintiffs had not adequately alleged that the UK Deloitte defendants exercised

domination over ZAO with respect to the alleged fraudulent inducement of plaintiff's 2008 investment and therefore found that jurisdiction had not yet been established over the UK Deloitte defendants as to that claim.

Nevertheless, this Court concluded that plaintiff sufficiently demonstrated that there were facts that might give rise to alter ego jurisdiction so that jurisdictional discovery as to the UK Deloitte defendants was warranted.

Consequently, plaintiff sought all documents showing the UK Deloitte defendants' control over ZAO. However, defendants objected. We agree with defendants that plaintiff is only entitled to documents showing their control over ZAO "with respect to the claim that plaintiff did not exercise its exit option after 2010 based on misrepresentations" (*id.*). Accordingly, the UK Deloitte defendants appropriately limited their production to documents from November 26, 2010 that are related to plaintiff's decision to maintain its investment in Investment Trade Bank (ITB) and ZAO's audits of ITB's financial statements.

Similarly, because we found jurisdiction over ZAO based on CPLR 302(a)(2) and potential alter ego jurisdiction over the UK Deloitte defendants, plaintiff is not entitled to documents about

their international revenue and marketing, which would only be relevant if it were trying to assert personal jurisdiction over them pursuant to CPLR 302(a)(3)(ii).

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

ENTERED: JULY 16, 2020

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Gesmer, Oing, Singh, JJ.

11856 In re John E. Hutchinson, IV, AD No. 2403/20
Petitioner,

-against-

Hon. Kelly O'Neill-Levy, etc., et al.,
Respondents.

_____

Marisa Falero, Brooklyn, for petitioner.

Letitia James, Attorney General, New York (Shawn Schatzle of counsel), for Hon. Kelly O'Neill-Levy, respondent.

Glassman & Brown, LLP, White Plains (Susan S. Brown of counsel), for Ann M. Hutchinson, respondent.

Law Offices of Michael M. Mascetti, Astoria (Michael Morley Mascetti of counsel), for Michael M. Mascetti, respondent.

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

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

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

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

ENTERED: JULY 16, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Judith J. Gische, J.P.
Ellen Gesmer
Jeffrey K. Oing
Peter H. Moulton, JJ.

11322
Ind. 3184/12

_____x

The People of the State of New York,
Respondent,

-against-

Terrell Jenkins,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered June 11, 2014, convicting him, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life.

Christina A. Swarns, Office of the Appellate Defender, New York (Gabe Newland and Rosemary Herbert of counsel), for appellant.

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

OING, J.

Defendant Terrell Jenkins appeals from a judgment convicting him after a jury trial of murder in the second degree and sentencing him to 20 years to life. Defendant and his victim, Edward Meyers, were childhood friends, and had been friends until November 9, 2009, when they had an argument that escalated to the point where Meyers stabbed defendant in the arm with a steak knife. Defendant left the scene vowing he would "be back . . . to get" Meyers. When questioned by the police at the hospital where he was seeking medical attention, defendant declined to identify Meyers. Thereafter, he left New York to resume his employment activities.

Defendant remained in touch with Lester Marrow, another childhood friend of his and Meyers, and returned to New York on occasion to see Marrow and other friends, but not Meyers. On one of those occasions, July 3, 2010, eight months after Meyers stabbed defendant, he returned to have "some fun" and spend July 4 with his son. He had fireworks, and his plan was to "buy a couple of bottles [of Moet]," "smoke some weed," and "shoot the sh*t on 114th Street with my boys." Defendant called Marrow to see "what's up with him" and "[w]hat's going on for the night." In the early morning hours of July 4, defendant saw Meyers across the street from where he was standing. He approached Meyers, who

was speaking with a woman outside a Manhattan store, from the side and, after a brief exchange of words, fatally stabbed him in the chest with a knife he had been carrying.

There was no dispute at trial that defendant inflicted the fatal stabbing. The only dispute was whether defendant intended to fatally harm his victim. In that regard, in addition to submitting to the jury the charge of murder in the second degree that was set forth in the indictment, the court also submitted to the jury for its consideration the lesser included offenses of manslaughter in the first and second degrees, and criminally negligent homicide. The jury convicted defendant of murder in the second degree.

On appeal, defendant does not challenge the sufficiency and weight of the evidence. Instead, he contends that the court erred in failing to disqualify the prosecutor after she read his non-legal mail intercepted pursuant to a court order, that the court erred in denying his motion for a mistrial, that was based on the prosecutor's assumption of the role of an unsworn witness when she demonstrated how the folding knife he used to inflict the fatal stab wound could be opened, and that that his conviction should be reversed because the display of the knife upon the jury's request unbeknownst to the court and counsel violated both his right to meaningful notice of a jury note and

his right to a jury trial. Defendant also claims that his sentence should be reduced from 20 years to 15 years. For the reasons that follow, each of these complaints is without merit.

Turning to his first challenge, in August 2013, the People filed an ex parte motion under seal to seize defendant's incoming and outgoing letters. The prosecutor denominated the application as one for a "Mail Cover Order." A Mail Cover consists of the compiling of a record by a letter carrier of information appearing on the face of the envelopes of letters addressed to specific persons (*United States v Schwartz*, 283 F2d 107 [3d Cir 1960], *cert denied* 364 US 942 [1961]). To support the application, the prosecutor stated in her affirmation that Erica Easton, the prosecution's eyewitness, who was near Meyers and witnessed the stabbing, was initially cooperative by voluntarily testifying before the grand jury in July 2012, viewing a photo array on April 4, 2012 in which she identified defendant, and participating in a lineup at the police precinct on May 5, 2013, where, however, she was unable to identify defendant.

The prosecutor further averred that in a telephone conversation with Easton on August 22, 2013, after the lineup viewing, Easton refused to continue to cooperate because she feared for her life, having received threats in connection with her involvement in this case. According to the prosecutor,

Easton remarked that she would rather stay alive and go to jail for perjury than die. The prosecutor then stated that in defendant's recorded telephone conversations while incarcerated pending trial he had told an individual that he was not going to discuss the details of his lineup identification over the telephone because the District Attorney's office was monitoring his telephone conversations. Rather, according to the prosecutor, defendant told the person that he would discuss this case in a letter, and, in later calls, he asked if the person had read the letter. The prosecutor took the position that there was reasonable cause to believe that defendant was sending letters concerning threats against Easton to thwart her anticipated trial testimony.

The court (Neil Ross, J.) granted the People's motion in a sealed order dated August 23, 2013, and ordered that defendant's incoming and outgoing mail be opened, reviewed, and copied, and made available to the prosecutor, excluding mail involving defendant's attorney, or any other Legal Aid Society employee. The order further provided that this mail would constitute necessary and material evidence to the continued investigation of defendant's case and the investigation of future crimes planned by defendant, namely, witness tampering in the third degree.

The prosecutor received the first packet of copies of

defendant's non-legal letters in October 2013. She received a second packet on November 12, 2013. Later that day, the prosecutor's review disclosed that there was no reasonable cause to believe that defendant had communicated any threats aimed at preventing Easton from testifying. She promptly filed an ex parte motion to terminate the order, which the court (Rena K. Uviller, J.) granted. On or about November 19, 2013, the prosecutor provided all copies of the intercepted mail to defense counsel.

In December 2013, defense counsel moved to suppress the disclosed mail, arguing that defendant had a reasonable expectation of privacy concerning his non-legal mail and that the prosecutor could not open that mail without a search warrant. Defense counsel also moved to have the prosecutor disqualified. The People opposed the motion.

On February 13, 2014, the court (Robert M. Stolz, J.) granted defendant's motion to suppress the disclosed mail, finding that the order was mislabeled a "mail cover" order and that assuming it was convertible to a search warrant the People had not established probable cause to support issuance of the warrant to search defendant's mail. On the other hand, finding "no ethical breach or improper behavior" on the part of the prosecutor or "persuasive legal authority" for disqualifying her,

the court denied the branch of the motion seeking to disqualify the prosecutor.

In arguing that the court erred in denying his disqualification motion, defendant advances two alternative arguments, that the prosecutor's interception of defendant's non-legal mail created a substantial risk of abuse of confidence and that the interception gave rise to an appearance of impropriety. Both arguments are without merit.

A court may disqualify a prosecutor "*only* to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence" (*People v Adams*, 20 NY3d 608, 612 [2013] [internal quotation marks omitted]). The phrase "a substantial risk of an abuse of confidence" refers to the "opportunity for abuse of confidences entrusted to [an] attorney" (*id.* [internal quotation marks omitted]). A defendant seeking disqualification must demonstrate either actual prejudice arising from a demonstrated conflict of interest or so substantial a risk of an abuse of confidence entrusted to his or her attorney that it could not be ignored (*id.*).

The critical fact underpinning this "actual prejudice" or "substantial risk" factor is the existence of an attorney-client relationship in which the client would have entrusted

confidential information to his or her attorney. Unquestionably, a client deserves unswerving and exclusive loyalty from attorneys representing him or her. Here, given the undisputed absence of an attorney-client relationship between defendant and the prosecutor, neither actual prejudice arising from a conflict of interest nor a substantial risk of an abuse of confidences arising out of such a relationship could have occurred (*Cf.* People v Shinkle, 51 NY2d 417, 420-421 [1980] [per se disqualification of the prosecutor's office where its Chief Assistant District Attorney just prior to joining the office was defendant's cocounsel actively involved in defense strategy and intimately familiar with defendant's file]).

Recognizing that this bedrock principle is moored to an attorney-client relationship, defendant, nonetheless, urges us to extend the principle to instances where there is no relationship of any kind in order to safeguard a defendant's confidences. This extension cannot be countenanced. It would impermissibly impose on a prosecutor a duty of loyalty to a defendant -- a result that is repugnant to the criminal adversarial process and turns on its head a prosecutor's role. Further, if we were to extend the principle, the negative implication would be obvious -- a new per se rule of prosecutorial disqualification would be adopted in situations where a prosecutor, by happenstance or not,

obtained a defendant's confidences. This rule would be impermissibly broad, and would unnecessarily impede the administration of justice. Indeed, rather than disqualification, the remedy would be, inter alia, an appropriate suppression ruling, which occurred in this matter. That said, the question that remains is whether the facts herein give rise to an appearance of impropriety, warranting the prosecutor's disqualification.

Defendant argues that the prosecutor's interception of his non-legal mail to third parties unrelated to his legal team provided her with the opportunity to craft and develop her trial strategy, that this encroachment was prejudicial, and that she should have been disqualified because under these circumstances there is an appearance of impropriety. To that end, defendant points out that his letters disclosed to her that defendant was planning to testify and to admit to killing Meyers, that defendant was planning to argue that he acted recklessly, rather than intentionally, that he was drinking on the day of the incident, that he did not know Easton, and that he was dissatisfied with his counsel's representation.

Defendant's argument is flawed. He fails to indicate the prejudice he allegedly suffered as a result of the disclosures. Regardless, the contents of defendant's intercepted letters are

not privileged, given that they were disseminated to third parties (*see People v Osorio*, 75 NY2d 80 [1989]). Whether the sum and substance of the letters are privileged, however, is not relevant to resolution of this issue. Rather, "the appearance of impropriety itself is a ground for disqualification" only "in rare situations . . . when the appearance is such as to discourage public confidence in our government and the system of law to which it is dedicated" (*People v Adams*, 20 NY3d at 612 [internal quotation marks and brackets omitted]).

Defendant does not take issue with the notion of preventing witness tampering. Instead, he asserts that the prosecutor's motivation had nothing to do with thwarting this perceived threat. He argues vigorously that the prosecutor deliberately masqueraded a search warrant application as an ex parte application for a mail cover order so as to avoid a warrant's probable cause requirements. That said, defendant posits that the facts underlying the ex parte application did not demonstrate reasonable cause to believe that he threatened the prosecution's eyewitness. He continues by asserting that the prosecutor in her zeal wanted to secure a conviction, losing sight of the fact that defendant was entitled to a full measure of fairness. In pressing his arguments that an appearance of impropriety exists, defendant repeatedly utters the term "illegal" to describe the

prosecutor's conduct.

Resolution of this issue requires review of the factual predicate proffered to support the mail cover order. As an initial matter, although finding that the order's factual predicate was insufficient to show probable cause to support a search warrant, the court did not find that reasonable cause did not exist to support issuance of the mail cover order. Thus, the absence of probable cause does not render the mail cover order infirm at its issuance. That said, if the factual predicate is found to have a good faith basis, then the order is presumptively valid and the prosecutor's conduct pursuant to the order does not give rise to an appearance of impropriety. The ex parte application set forth the following essential information: the prosecution's eyewitness who had been cooperating suddenly became uncooperative because she stated in a telephone conversation with the prosecutor that she had been threatened concerning her anticipated trial testimony against defendant; the eyewitness feared for her life and indicated to the prosecutor that defendant was the source of the threats; the change in attitude and the report of the threats occurred after the eyewitness, whose identity was previously unknown, viewed a lineup that included defendant at a police precinct, although she was unable to identify him; defendant stated in a telephone call

from prison to an individual that he wanted to discuss the details of his lineup identification, but not over the telephone because his calls were being monitored; defendant stated in the same telephone call that he would put the information in a letter to the individual.

Nowhere does defendant claim that the prosecutor manufactured these statements. Rather, his reading of these averments amounts to nothing more than disagreements with the prosecutor's time line and her interpretation of the telephone conversation she had with the eyewitness concerning the threats against her. Contrary to defendant's contention, these statements clearly rise to the level of reasonable cause to believe that defendant's written communication would contain information relevant to witness tampering. Failing to articulate any other argument supported by evidentiary proof justifying the questioning of the prosecutor's integrity or claiming that her conduct will "discourage public confidence," defendant's repeated incantation of "illegal" rings hollow. Under these circumstances, the record facts do not give rise to an appearance of impropriety.

Accordingly, defendant failed to satisfy the high standard for removing the prosecutor. Thus, we find that the court providently denied the motion to disqualify the prosecutor.

Next, defendant contends that the court should have granted his counsel's motion for a mistrial based on the prosecutor's becoming an unsworn witness during his cross-examination when she demonstrated for defendant and the jury that the knife could be opened not only the way he testified, but two other ways. The argument is preserved for review upon the court's denial the motion, contrary to the People's argument that the issue is unpreserved given counsel's three-day delay in raising an objection (*see People v Bailey*, 58 NY2d 272, 275 [1983]).

During his direct examination, defendant testified that as a truck driver he regularly carried a knife for work and that he purchased this particular knife at a truck stop eight months before the fatal stabbing. On cross-examination, the prosecutor asked defendant about the different ways the knife could be opened, to which he responded that he needed two hands to open it. He further testified that it was "not greased where it [could] be flipped out." At that point, the prosecutor gave the following demonstration of the knife's operability:

"Q Are you saying that this is a knife that can't be flipped open?

"A No, it can't.

* * *

"Q This knife can't be flipped open, is that what you are telling this jury?

"A I never tried it.

* * *

"Q You had this [knife] for nine months and you never did this?

"A No, never.

"Q And what about this little handle that it has on it; it could be opened with one hand with this handle?

"A I never tried it.

* * *

"Q You don't know this knife very well, do you?

"A I know it, yeah. It is just a knife.

"Q It is called a Bradley knife, this knife, a knife that can open like that, correct?

"A I guess that's the name of it.

* * *

"Q What about the fact that it can open like this?

"A I never tried to open it like that. I never opened it like that at all. Never. I didn't know it could do that."

On redirect, defense counsel asked, "Did you ever flip it open so that you could quickly try to stab anyone?" Defendant answered, "No."

Three days later, counsel raised an objection. Outside of the jury's presence, he argued that the better course would have been for the prosecutor to ask one of the witnesses or defendant

to demonstrate how the knife could be opened, and then he would have been given the opportunity to conduct further questioning on redirect. He then argued that the prosecutor by her demonstration became an unsworn witness and that he had no opportunity to question her, which denied defendant his right to confront a witness. On those grounds, defense counsel moved for a mistrial. Alternatively, he asked the court to instruct the jury to put that "demonstration" "out of their mind," and to preclude the prosecutor from referring to the demonstration in summation.

Upon the court's inquiry as to why the knife's "flickability" was an issue, the prosecutor explained that she sought to counter defendant's testimony that "he had this knife for nine months," and "used it many, many, many times." To do that, she wanted to present to the jury evidence that defendant did not usually carry a knife, that he was unfamiliar with the knife because it was a recent acquisition, and that the only reason he had it on July 4, 2010 was because he was planning to kill Meyers.

After hearing both sides, the court stated that the demonstration was "not inflammatory when viewed in the context of this case where there was all kinds of other evidence which [was] considerably more graphic." Nonetheless, it did find the

demonstration "not appropriate." The court then stated that "the unsworn witness issue" was "an interesting issue but . . . it is clearly different . . . if the item is not in evidence [which was not the case]." Ultimately, it denied the motion for a mistrial because the demonstration did not "compromise the fairness of the trial." Having denied the mistrial motion, the court asked defense counsel for an appropriate curative charge. Counsel replied, "The jury should disregard the demonstration with regard to the knife," and the prosecutor "should not comment about it on summation." The court agreed with his suggestion, and stated that it would tell the jury to disregard the demonstration and that the prosecutor would be precluded from arguing in summation that "this is a gravity knife which can be flicked open ... in anticipation of committing a crime." Upon the jury's return to the court room, the court gave the curative instruction framed by defense counsel just before summations.

The principle is well settled that the decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is necessary to protect the defendant's right to a fair trial (*see People v Ortiz*, 54 NY2d 288, 292 [1981]; *People v Ruiz*, 171 AD3d 486 [1st Dept 2019], *lv denied* 33 NY3d 1073 [2019]). That said, in balancing considerations as to whether or not to abort a

trial, the court should consider "the availability of less drastic means of alleviating whatever prejudice may have resulted" from a prosecutor's misstep (*People v Young*, 48 NY2d 995, 996 [1980]). An appropriate curative charge that dispels any prejudice to defendant's right to a fair trial serves that purpose (*see People v Williams*, 29 NY3d 84, 89 [2017]; *People v Boyd,* 31 NY3d 953, 955 [2018]; *People v Jean*, 176 AD3d 585, 586 [1st Dept 2019], *lv denied* 34 NY3d 1129 [2020]; *People v Rosario,* 175 AD3d 1222, 1222-1223 [1st Dept 2019]).

Defendant relies on *People v Williams* (90 AD2d 193 [4th Dept 1982]) and *People v Melendez* (140 AD3d 421 [1st Dept 2016]) to support his argument that the court erred in denying his mistrial motion. His reliance on both of these cases is misplaced. To be sure, in both cases, the prosecution overstepped the bounds of fair advocacy when the prosecutors engaged in demonstrations in which they assumed the role of an unsworn witness. The critical difference between those two cases and the one at bar is the absence of a curative charge.

Here, the court's curative instruction to the jury could not have been more clear or stern, openly chastising the prosecutor for her conduct:

> "[I]n the course of the cross examination of the defendant, the prosecutor . . . flicked open the knife in this case.

> "You are to disregard that. The flickability or non-flickability of this knife is not an issue in this case. She shouldn't have done that and the knife will be available to you in the course of deliberations like all the other exhibits but it will simply be displayed to you by a court officer, I expect, in an open position . . . but whether it is flickable or non-flickable or any such issue is not part of this case and should not have been made part of this case . . . So disregard that to the extent that you paid attention to it."

This instruction, in the form requested by defense counsel, was intended to ameliorate any perceived prejudice flowing from the prosecutor's role as an unsworn witness, and the jury is presumed to have followed it (*People v Davis*, 58 NY2d 1102, 1104 [1983]). That said, defendant was never placed in a position of having to, but being denied the right to, confront that particular theory of the case, namely the knife's operability. In that regard, we note that the jury viewed the knife in the open position and was not permitted to touch the knife. Nor were the jurors allowed any demonstration as to the knife's operability. We further note that the jury's two notes concerning the knife did not concern the knife's operability; one note asked to view the knife, and the other note asked for the weight of the knife, with the jury rendering a verdict shortly after this note.

To the extent defendant argues that the charge was not sufficient, the argument is without merit, because the charge that the court provided to the jury was prepared with the

assistance of defense counsel. Further, defendant's reliance on *People v Calabria* (94 NY2d 519 [2000]) to support his claim of insufficiency is misplaced. In that case, as in the case at bar, the court gave a strong instruction in response to the prosecution's trial conduct. That is where the similarity ends. Unlike the single incident in this case, the *Calabria* Court held that the prosecutor's multiple contumacious acts, the cumulative effect of being his persistent disregard of the trial court's rulings to the defendant's prejudice, rendered the court's "strong rebuke and threat of sanction" in the presence of the jury insufficient and warranted the drastic remedy of a new trial (*id.* at 522-523).

Complaints that the prosecutor's summation concerning the knife defied the court's directive are unpreserved, given that defense counsel raised no objections to her commentary on that issue (*see People v Bailey*, 32 NY3d 70, 78 [2018]). Further, defense counsel's failure to move for a mistrial on this ground precludes our review as a question of law, and we decline to review it in the interest of justice (*see id.*; *People v De Tore*, 34 NY2d 199, 204, 207-208 [1974], *cert. denied sub nom. Wedra v New York*, 419 US 1025 [1974]). As an alternative holding, we reject defendant's arguments on the merits.

In her summation, the prosecutor argued that the knife was

"a very big piece of evidence" because it was "not just any knife," but one that "looks very much like a weapon," rather than "a box cutter" or "a folding knife." She further pointed out to the jury that defendant testified that he possessed the knife for nine months because he routinely needed to use it in his work as a truck driver. She further urged that if defendant's testimony were true, one would expect to see "a scuffed up trucker's knife," but this knife did not have "a scuff, a dent, a scratch" on it. The prosecutor argued that the knife looked "pristine" and that the jury did not need an expert to tell them that it looked new. Contrary to defendant's reading of her summation, the prosecutor did not disregard the court's stern admonition. Specifically, she did not make any reference to the knife's "flickability," to her demonstration, to defendant's unfamiliarity with the knife, or to defendant's not knowing the other ways to open the knife.

The foregoing circumstances compel us to find that the curative instruction in the form requested by defense counsel was sufficient to prevent any prejudice to defendant's right to a fair trial. Accordingly, the court did not abuse its discretion in denying defendant's motion for a mistrial.

We turn now to defendant's final complaint, that the court erred in denying his motion for a mistrial based on the fact that

the court officer's display of the knife to the deliberating jury at its request was without the court's knowledge, which deprived the court of the opportunity to notify the prosecutor and defense counsel of the request. He argues that this occurrence usurped the court's function, and deprived defense counsel of meaningful notice of the jury's request and an opportunity to respond.

At the charge conference, the court told the parties that if the jury asked to see the knife, "I think they should do that in the courtroom." The prosecutor suggested "send[ing] the court officer in[to]" the jury room. The court said that the knife should be presented in the open position. Defense counsel argued that the knife should be shown to the jury in court, to prevent jurors from attempting "tests" on the knife. The court responded, "If it went in[to the jury room], it would remain continually in the custody of the court officer." The court asked, "Do you think they should be allowed to flick it open and see if it is flick-able?" The prosecutor responded, "I don't see why not." Defense counsel objected, "I think they can't do those kinds of tests. I object to [the] exhibit going into the jury room. That can't happen without my consent and I'm not consenting to the knife going in." The court responded, "I'll think about it . . . I'm not sure it can't happen without you consenting."

In its charge to the jury concerning the viewing of the knife, the court stated:

> "The knife, if you want to see it, you will send us a note and let us know. . . .
>
> "If the knife is brought in for you at your request, it will be brought in by a court officer who will display it to you, take it around the room. Do not engage in any colloquy or conversations with the court officer about the knife. Don't engage in any colloquy or conversation among yourselves about the knife while the court officer is there. Just he will display it to you as you need and he will bring it back. He will not do any experiments with the knife in front of you. He will be instructed not to open or close it or engage in any sort of activities with it. He's just going to show it to you to the extent you need to see it."

Both defense counsel and the prosecutor found the entire jury charge to be satisfactory.

On the first day of deliberation, the court read a jury note from 2:10 p.m. stating, "We request to view the knife." Another note at 2:25 p.m. asked, "How heavy is the knife?" In response to the first note, the court proposed "to send an officer in there to display the knife." The prosecutor asked, "Hasn't that happened already?" The court officer then revealed that he had "held it for them." The court responded, "We have to make a record of that. I did not know that that was actually done. We had said we would do that." Defense counsel at that point moved for a mistrial, arguing:

"I have to think for a moment as to whether that was appropriate, to respond to a note where there is a request to see the knife and before counsel convenes and is heard, the knife is displayed. That's our understanding of what happened. I'm not saying any court officer obviously did anything wrong.

* * *

"I had stated that I wouldn't consent to the knife going in without being present and I think we had a discussion then as to what the law on that was and if I remember correctly, it was indicated that what has to happen is the parties have to convene and determine how to respond to a note in that fashion. In fact, I also think, this was the one thing that we didn't consent [to] going in so I think a mistrial has to be declared."

In response, the prosecutor stated:

"I believe that what they didn't consent to was having the jurors actually touching the knife."

Having heard both sides, the court stated:

"My understanding is that nothing would have gone into the jury without us reconvening.

* * *

"I would have preferred to proceed in the way that Mr. Klein said.

"That being said, what I would have ruled had we discussed all of this, in the detail that we are doing ... now is [to] send the knife in, have a court officer display it.

"In other words, I would have had the sergeant do exactly what the sergeant did and we did discuss and in point of fact, you may recall in the course of my charge to the jury and this may, in fact, be why it went this way, I said to them, if you want to see the knife, we will bring the knife in to you, right. A

court officer will display it to you.

"Do not engage in any colloquy with the court officer, do not ask him to open or close it.

"That's exactly what I said was going to happen and as I understand it, that's exactly what did happen.

* * *

"That was properly done as, in fact, confirmed by their next note which they wrote a note saying, how heavy is this knife?

"Obviously they didn't handle it, they didn't do anything other than exactly what I said in my charge as to which there were no exceptions. So I think this is consistent with good practice.

"So the mistrial motion is denied.

"That being said, I don't want any notes responded to in any way without counsel reconvening for discussion for that purpose."

Just before the jury indicated that it had reached a verdict, the court conducted the following inquiry:

"THE COURT: Just to put this on the record to complete the record about the knife going into the jury.

Sergeant, you took the knife into the jury, am I right?

"THE SERGEANT: Yes.

"THE COURT: And you displayed it to the jury in an open position?

"THE SERGEANT: Yes, in the box.

"THE COURT: In the box? Anything else?

"THE SERGEANT: No. We didn't let them touch it or anything

like that.

"THE COURT: And then you brought it out?

"THE SERGEANT: Yes."

Defendant contends that a mode of proceedings error under *People v O'Rama* (78 NY2d 270 [1991]) occurred when the jury requested to see the knife, and the court officer displayed the knife to the deliberating jury without the knowledge of the court, the prosecutor, and defense counsel, in violation of CPL 310.30. That section provides the procedures that must be followed when the jury requests "further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case." The People respond that *O'Rama* and CPL 310.30 are inapplicable to the jury's request to see an exhibit, and that the request is governed by CPL 310.20[1], which permits jurors to "take with them" "[a]ny exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take." These procedural rules clearly distinguish between the mere examination of a physical exhibit (CPL 310.20[1]), and a request for "instruction or information" about the "content or substance" of "any trial evidence" (CPL 310.30). Contrary to defendant's

argument, *O'Rama* is inapplicable to the resolution of this issue.

As to the complaint of lack of notice and an opportunity to be heard on the jury's request, we note that defense counsel failed to object to the court's charge to the jury that clearly and unequivocally indicated that the knife would be brought into the jury room for the jury to view when requested, particularly after counsel stated that he would not consent to the knife going into the jury room. Regardless, the challenged error is without merit.

Here, the court officer's act of taking the knife into the jury room in response to the jury note asking to view the knife, without informing the court and counsel, "did not violate defendant's rights under CPL 310.30 and . . . *O'Rama*," because "[n]otes that only require the ministerial act of sending exhibits into the jury room do not implicate the requirements of *O'Rama*" (*see People v Dunham*, 172 AD3d 524, 524 [1st Dept 2019], *lv denied* 34 NY3d 930 [2019]). Further, this case is analogous to *People v Kelly* (5 NY3d 116 [2005]). There, a court officer performed a demonstration of the weapon allegedly used to stab the victim in front of the jury but without the court's knowledge. Afterwards, the court gave a curative instruction to disregard the demonstration (*id.* at 118). The Court of Appeals found that upon learning of the court officer's "unauthorized"

demonstration the trial court properly "took hold of the proceedings and summoned the lawyers to discuss the options" (*id.* at 120). The Court reasoned that "the court officer did not have the last word; the court did, after it continued to exercise full and proper control of the trial" (*id.* at 121).

Similarly, here, the court officer did not take control of the deliberative process. Instead, the court promptly informed counsel of the jury's request and the court officer's demonstration. It then found that the court officer had responded to the jury's request in exactly the manner prescribed by the court, consistent with its final jury charge. Critically, defense counsel did not object to the instruction. Under these circumstances, the court officer did not usurp the court's authority, and the court, rather than the court officer, had the last word. Based on the foregoing, we find that the court providently denied the motion for a mistrial.

Under the circumstances presented, we perceive no basis for reducing defendant's sentence.

Accordingly, the judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered June 11, 2014, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, should be affirmed.

All concur.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered June 11, 2014, affirmed.

Opinion by Oing, J. All concur.

Gische, J.P., Gesmer, Oing, Moulton, JJ.

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

ENTERED: JULY 16, 2020

CLERK