

owed plaintiff was a matter of contract between him and Interasian, and that plaintiff and defendant Rosenthal were not parties to a written agreement.

Plaintiff's unjust enrichment claim is not, as defendant contends, barred by the statute of frauds (General Obligations Law §5-701 [a] [10]). An unjust enrichment claim is founded on a "quasi contract theory of recovery . . . imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011] [internal quotation marks omitted], *affd* 19 NY3d 511 [2012]). The Court of Appeals in *Georgia Malone* upheld an unjust enrichment claim, in the absence of a writing between the relevant parties, under nearly identical facts (*id.*). The statute of frauds is inapplicable to this unjust enrichment claim, which is not based on an alleged oral agreement with

defendant (*compare Snyder v Bronfman*, 13 NY3d 504 [2009]; *MP Innovations, Inc. v Atlantic Horizon Intl., Inc.*, 72 AD3d 571 [1st Dept 2010])).

The Decision and Order of this Court entered herein on January 28, 2016 is hereby recalled and vacated (see M-959 and M-964 decided simultaneously herewith).

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

ENTERED: MAY 10, 2016

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CLERK

Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative NewsMedia, Association of American Publishers, Inc., Bloomberg L.P., BuzzFeed, Daily News, LP, the E. W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech, amici curiae.

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 8, 2015, which, to the extent appeal appealed from as limited by the briefs, granted the petition brought pursuant to CPLR article 78 to the extent of compelling respondent New York City Police Department (NYPD) to disclose certain records requested by petitioner pursuant to the Freedom of Information Law (FOIL) with redactions ordered by the court, ordering NYPD to submit an affidavit describing its search for certain other records, and granting petitioner's request for attorney's fees and costs and referring that issue to a special referee to hear and determine, unanimously modified, on the law, to deny the petition except as to those records seeking health and safety information as described herein, to vacate the order directing NYPD to submit an affidavit, to deny petitioner's request for attorney's fees and other litigation costs, and otherwise affirmed, without costs.

As part of its counterterrorism operations, NYPD employs a Z-backscatter van, which is a mobile X-ray unit that scans vehicles or buildings for evidence of explosives, drugs and other materials. Unlike traditional X rays that penetrate an object, backscatter technology sends X rays that bounce back from the object and create an image. When a backscatter van is used to scan vehicles, occupants of the vehicle and nearby pedestrians are exposed to low doses of ionizing radiation. Petitioner alleges that this type of radiation is known to mutate DNA and cause cancer, although it is difficult to determine the long-term health effects of low doses.¹

Petitioner filed a FOIL request with NYPD seeking various documents pertaining to the Z-backscatter vans. NYPD denied the request, and after an administrative appeal was rejected, petitioner brought this article 78 proceeding. Supreme Court granted the petition to the extent of compelling NYPD to disclose the following, with certain redactions: (a) reports of past deployments of the vans that are not related to any ongoing

¹ According to petitioner, the manufacturer of the vans has determined that they deliver a radiation dose forty percent larger than the dose delivered by backscatter technology used in airport scanners. Petitioner further alleges that due to health concerns, the European Union has banned backscatter machines from its airports.

investigation; (b) policies, procedures and training materials regarding the vans; (c) records sufficient to disclose the total number and aggregate cost of vans purchased by or for NYPD; and (d) tests or reports regarding the radiation dose or other health and safety effects of the vans. NYPD now appeals.

The court erred in ordering disclosure of records relating to past deployments, policies, procedures, training materials, aggregate cost and total number of the vans. These materials are exempt from disclosure under FOIL's law enforcement and public safety exemptions (Public Officers Law § 87[2][e][iv] [exempting records "compiled for law enforcement purposes" that would "reveal [nonroutine] criminal investigative techniques or procedures"]; Public Officers Law § 87[2][f] [exempting from disclosure information that "could endanger the life or safety of any person"]; see *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.*, 125 AD3d 531 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]).

NYPD has articulated a "particularized and specific justification for not disclosing" these records (*Mater of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). NYPD submitted an affidavit of Richard Daddario, NYPD's Deputy Commissioner of Counterterrorism,

who averred that the vans are a highly specialized and nonroutine technology used to combat terrorism in New York City. Daddario explained that in light of the ongoing threat of terrorism, releasing information describing the strategies, operational tactics, uses and numbers of the vans would undermine their deterrent effect, hamper NYPD's counterterrorism operations, and increase the likelihood of another terrorist attack.

Daddario further explained that disclosing information about the locations in which NYPD has used the vans in the past, as well as the times and frequency of their deployment, would allow terrorists to infer the inverse, namely, locations and times when NYPD does not use them, and would permit a terrorist to conform his or her conduct accordingly. Daddario's affidavit provides a sufficient basis for finding the records exempt under both the law enforcement and public safety exemptions (*see Matter of Asian Am. Legal Defense*, 125 AD3d at 532 [disclosure of NYPD Intelligence Division documents containing sensitive information about the unit's methods and operations would identify nonroutine investigative techniques, could potentially be exploited by terrorists, and would create a possibility of endangerment to life]).

The court, however, properly directed NYPD to disclose tests

or reports regarding the radiation dose or other health and safety effects of the vans. Daddario's affidavit does not explain how general health and safety information about the van's radiation could be exploited by terrorists. Nor does Daddario sufficiently articulate how revealing the dosage of the radiation used by the vans would allow terrorists to tailor their conduct so as to thwart detection. Further, as petitioner points out, information about the safety risks of backscatter technology is already widely available to the public. Thus, release of NYPD's records containing health information about the vans would neither reveal nonroutine investigatory techniques or procedures, nor endanger public safety.

The court erred in ordering NYPD to submit an affidavit describing its search for certain other records requested by petitioner. NYPD certified that it had conducted a diligent search, and except for a few properly exempt records, it could not locate documents responsive to the request. This certification satisfied the requirements of Public Officers Law § 89(3)(a) (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001]). Nothing in Daddario's affidavit contradicts NYPD's certification, and petitioner has failed to articulate a demonstrable factual basis to support the contention

that the documents exist and are within NYPD's control (see *Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637 [1st Dept 2015]).

In light of our significant modification of Supreme Court's order, petitioner has not "substantially prevailed," and thus there is no basis for an award of attorney's fees and other litigation costs (Public Officers Law § 89[4][c]).

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

ENTERED: MAY 10, 2016

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CLERK

Mazzarelli, J.P., Manzanet-Daniels, Kapnick, Webber, JJ.

608 Phipps Houses Services, Inc., Index 651161/12
Plaintiff-Appellant,

-against-

New York Presbyterian Hospital,
etc., et al.,
Defendants-Respondents.

Phipps Houses, New York (James Robert Pigott, Jr. of counsel),
for appellant.

Epstein Becker & Green, P.C., New York (John Houston Pope of
counsel), for respondents.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered April 14, 2015, which, to the extent
appealed from, granted defendants' motion for summary judgment
dismissing the complaint and on their conversion counterclaim to
the extent of monies transferred by plaintiff to a BNY Mellon
account, and denied plaintiff's motion for summary judgment as to
liability, modified, on the law, to the extent of deny
defendants' motion, and otherwise affirmed, without costs.

Plaintiff provided property management services to
defendants pursuant to two agreements entered into in 1987 and
1991, respectively. Under the agreements, plaintiff hired
employees who "engaged in the maintenance and management" of

buildings owned by defendants, and defendants were obligated to reimburse plaintiff for all the "actual costs" related to those employees, including fringe benefits. The agreements each contain a survival clause specifying that defendants' reimbursement obligation survived termination of the agreement.

Plaintiff seeks a declaration that, following termination of the agreements in 2011, defendants remained contractually obligated to reimburse it for certain expenses related to the pension benefits provided to the employees that plaintiff had hired to maintain and manage defendants' buildings. Plaintiff contends that the reimbursement and survival clauses of the agreements unambiguously impose such a continuing obligation, or, at the least, that the agreements are ambiguous. Defendants contend that the agreements unambiguously limit their reimbursement obligation to the period in which the employees were "engaged in" providing services, and that they reimbursed plaintiff for all amounts billed annually for actual pension costs while the agreements were in effect.

Contrary to defendants' arguments, the relevant contractual provisions are "reasonably susceptible to more than one interpretation," and "the difficulty is not resolved by reading the agreement as a whole," or by examination of the extrinsic

evidence presented (*LoFrisco v Winston & Strawn LLP*, 42 AD3d 304, 307 [1st Dept 2007]; *Credit Suisse Sec. [USA] LLC v Ask Jeeves, Inc.*, 71 AD3d 590, 590 [1st Dept 2010]). Thus, the agreements are ambiguous, and the matter is not appropriate for summary disposition.

The account stated doctrine does not avail defendants, because there is no "agreement with respect to the balance due" following termination of the agreements (*Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572-573 [1st Dept 2012]).

As to defendants' conversion counterclaim, there are issues of fact precluding summary judgment on whether plaintiff's conduct with respect to the money in the Operating Accounts constituted conversion as a matter of law. "It is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself" (*Mandelblatt v Devon Stores*, 132 AD2d 162, 167-168 [1st Dept 1987]). Here, there is an issue of fact as to whether plaintiff breached a legal duty independent of the contract.

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

All concur except Kapnick, J. who dissents in part in a memorandum as follows:

KAPNICK, J. (dissenting in part)

I dissent only to the extent that I would affirm that portion of the motion court's order granting defendants' motion for summary judgment on their conversion counterclaim.²

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002] [internal quotation marks omitted]).³ Here, defendants established both elements of their conversion claim with respect to the funds transferred to the BNY Mellon account - their "possessory right or interest in the property," and plaintiff's "dominion over the property or interference with it, in derogation of [their] rights" (*Colavito*

² The motion court only granted defendants' conversion counterclaim to the extent of the monies transferred to the BNY Mellon account, and severed the portion of the counterclaim relating to the remaining balance in the Operating Accounts because the court was not able to determine from the record the amount of the remaining balance, if any. The record shows that the amount of the remaining balance was not clearly discernible and further fact-finding is necessary to adjudicate that portion of the conversion counterclaim.

³ "Money, if specifically identifiable, may be the subject of a conversion action" (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982]) and "[t]he funds of a specific, named bank account are sufficiently identifiable" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

v New York Organ Donor Network, Inc., 8 NY3d 43, 50 [2006]).

Although plaintiff's possession of the funds was initially lawful, it ceased being lawful as a result of plaintiff's refusal to return the funds upon defendants' demand and its transfer of a portion of the funds to a separate bank account without defendants' authorization.

I disagree with the majority's conclusion that there is an issue of fact as to whether this conduct constitutes a conversion. Although "an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (*Peters Griffin*, 88 AD2d at 884), "[t]he same conduct which constitutes a breach of a contractual obligation may also constitute the breach of a duty arising out of the contract relationship which is independent of the contract itself" (*Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 112-113 [2d Dept 2009] [internal quotation marks omitted] [alteration in original], *lv dismissed* 13 NY3d 900 [2009]; see also *Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447-448 [1st Dept 2010]). Here, the underlying contracts required that plaintiff "deposit all monies received by" plaintiff "for or on behalf of" defendants in a designated bank account (the Operating Accounts). While there was a contractual

obligation to deposit funds belonging to defendants into the Operating Accounts, these funds were merely collected by plaintiff "for or on behalf of" defendants and entrusted to plaintiff in its role as defendants' agent. As such, the funds belong to defendants regardless of the underlying contracts and plaintiff was obligated as a matter of common law to return the funds to their rightful owner upon request. Since defendants' right to a return of the funds does not stem (solely) from the contracts, plaintiff's refusal to return the funds upon request constitutes conversion as a matter of law.

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

ENTERED: MAY 10, 2016


CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

747 Maria Caminiti, as Administratrix Index 150298/13
 for the Estate of Pasquale Caminiti
 (deceased), etc.,
 Plaintiff-Appellant,

-against-

Extel West 57th Street LLC, et al.,
Defendants-Respondents.

Louis A. Badolato, Rosalyn Harbor, for appellant.

Marks, O'Neill, O'Brien, Doherty & Kelly, PC, New York (Joel M. Maxwell of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about February 11, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion to compel plaintiff to provide an authorization permitting them to contact a nonparty medic who initially treated the decedent, and denied plaintiff's cross motion for a protective order precluding defendants from relying on any information obtained through communications with the nonparty medic, unanimously affirmed, without costs.

On January 3, 2012, decedent Pasquale Caminiti was installing wires and cabling in apartments as part of a construction project in a building at 157 West 57th Street, in

Manhattan. Decedent complained of chest pain to his coworker and collapsed into him. The coworker summoned the elevator and escorted decedent to the work site's medic, nonparty David B. Cannamela. Cannamela took decedent's vital signs and asked him questions to determine his level of consciousness. Decedent showed signs of disorientation. Cannamela made the decision to call an ambulance to transport decedent to the hospital. Decedent was diagnosed with an aortic tear and underwent emergency surgery. He died on January 18, 2012 due to complications from surgery.

Plaintiff instituted this suit alleging personal injuries and wrongful death against the owner, developer, and general contractor of the project. On or about May 28, 2014, defendants served plaintiff with a notice for discovery and inspection demanding that plaintiff provide an authorization, pursuant to *Arons v Jutkowitz* (9 NY3d 393 [2007]), permitting defendants to conduct an interview with "non-party treating medical provider" Cannamela. Defendants also sought access to medical records in Cannamela's control, including but not limited to progress notes, narrative reports, written reports and diagnostic films. Defendants asserted that Cannamela was the individual in the best position to testify as to decedent's medical status following the

alleged accident.

Plaintiff objected on the ground that Cannamela was neither a medical doctor nor other medical professional within the contemplation of *Arons*.

The court properly granted defendants' motion to compel plaintiff to provide an authorization pursuant to *Arons* (9 NY3d 393). In *Arons*, "the Court of Appeals provided the framework for conducting discovery with regard to nonparty healthcare providers, which includes the use of speaking authorizations" (*McCarter v Woods*, 106 AD3d 1540, 1541 [4th Dept 2013]). An authorization is required because physicians, pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), "may not use or disclose an individual's protected health information to third parties without a valid authorization" (*Arons*, 9 NY3d at 413).

Cannamela may be considered decedent's "treating physician" or equivalent and thus a proper subject of such an authorization (*Arons*, 9 NY3d at 409). The medic observed decedent's physical and mental condition immediately following the alleged accident. He attempted to take decedent's blood pressure and to determine his level of alertness. Based on this brief evaluation, Cannamela made the decision to call an ambulance and have

decedent taken to the hospital. This is sufficient to classify Cannamela as a "treating physician" within the contemplation of Arons (see *Porcelli v Northern Westchester Hosp. Ctr.*, 65 AD3d 176, 185 [2d Dept 2009] [referring to "treating physician[s] (or other health care professional[s])" as being the proper subject of an Arons authorization]).

Plaintiff's cross motion for a protective order, pursuant to CPLR 3103(c), was properly denied because the email communications sent by the medic to defendants were not improperly obtained prior to defendants' request for authorization to interview the medic (see *Muzio v Anthony R. Napolitano, M.D., P.C.*, 82 AD3d 947, 948 [2d Dept 2011]). Although defendants received the emails before the request for an authorization, the emails did not contain any information that

reasonably could be used to identify decedent (see *Jackson v Jamaica Hosp. Med. Ctr.*, 61 AD3d 1166, 1169 [3d Dept 2009]).

We have considered and rejected plaintiff's remaining arguments.

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the scene of the crime, approximately an hour before the identification, was not "so clear that the identification could not be mistaken," thereby obviating the risk of undue suggestiveness (*People v Boyer*, 6 NY3d 427, 432 [2006]; see also *People v Pacquette*, 25 NY3d 575 [2015]).

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AD3d 488 [1st Dept 2010]).

The record is devoid of evidence of "affirmative wrongdoing" that would support the application of equitable estoppel against defendant (see *Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509, 510 [1st Dept 2007]). Contrary to plaintiff's contention, defendant was under no obligation to notify her before the statute of limitations had expired that her notice of claim was not timely (see *Wollins v New York City Bd. of Educ.*, 8 AD3d 30, 31 [1st Dept 2004]). Defendant's denial of the allegation in the complaint that the notice of claim was timely filed put plaintiff on notice of the issue before the statute of limitations had expired (see e.g. *Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606, 613 [2005]). Nor does the fact that defendant continued litigating the matter for approximately 10 years before moving to dismiss justify the application of estoppel (see *Walker*, 36 AD3d at 510).

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Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1084 In re Irma A.,
 Petitioner-Respondent,

-against-

 David A.,
 Respondent-Appellant.

Tennille M. Tatum-Evans, New York, for appellant.

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

 Order, Family Court, New York County (Mary E. Bednar, J.),
entered on or about March 13, 2015, which, upon a finding that
respondent had committed the family offense of menacing in the
second degree, granted petitioner an order of protection
directing respondent to, among other things, stay away from
petitioner and her children for one year, unanimously affirmed,
without costs.

 Petitioner established by a fair preponderance of the
evidence that respondent had committed the family offense of
menacing in the second degree (see Family Ct Act §§ 812[1]; 832;
Penal Law § 120.14[1]; see *People v Bartkow*, 96 NY2d 770, 772
[2001]). Petitioner testified that in October 2013, respondent
confronted her in her lobby, at 1:30 a.m., holding a broken

bottle, accused her of cheating on him with another man, and threatened to kill her and her family if she went to the police or took him to court. Petitioner's allegations in the petition adequately put respondent on notice of the October 2013 incident (see *Matter of Little v Renz*, 90 AD3d 757, 757 [2d Dept 2011]), and the record supports Family Court's determination to credit petitioner's testimony (see *Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 454 [1st Dept 2011]).

The doctrine of res judicata did not bar Family Court from making a finding based on the October 2013 incident. Petitioner's first petition regarding the incident was dismissed "without prejudice" based on her failure to appear; such a dismissal is not a final determination on the merits for res judicata purposes (see *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]).

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

ENTERED: MAY 10, 2016



CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1085 Susan Ormsby, Index 23730/13E
Plaintiff-Respondent,

-against-

750 Seventh Avenue LLC, et al.,
Defendants-Appellants,

750 Seventh Ave NY LLC,
Defendant.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of
counsel), for appellants.

Friedman Sanchez, LLP, Brooklyn (Jeffrey Bloomfield of counsel),
for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter,
Jr., J.), entered October 9, 2015, which denied the motion of
defendants 750 Seventh Avenue LLC and Hines Interest Limited
Partnership for summary judgment dismissing the complaint,
unanimously reversed, on the law, without costs, and the motion
granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleged that she was struck on the head by a piece
of ice that fell from a building owned and managed by defendants.
At her deposition, however, she testified that she did not know
the nature of the object that struck her in the head, and did not
know its provenance. Accordingly, her claim that the object was

both a piece of ice and that it came from defendants' premises was entirely speculative, justifying dismissal of her claim (see e.g. *Harrison v New York City Tr. Auth.*, 94 AD3d 512, 513 [1st Dept 2012]).

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defendant had sufficient access to information about the guard to make specific allegations. The discovery materials included the guard's identity and employment status, and stated with specificity that he was a store detective not acting as an agent of the police. Defendant could have subpoenaed the records of the store or its security provider to ascertain the facts relating to the guard's employment (*People v Manrique*, 57 AD3d at 265). Accordingly, defendant's speculative allegations that the guard appeared to have been trained in police procedures and was acting in furtherance of police objectives did not meet the statutory requirement of sufficient sworn allegations of fact to support the granting of a hearing.

Defendant did not preserve his contention that the court improperly relied on the grand jury minutes in summarily denying his motion (see *People v Bayron*, 119 AD3d 444 [1st Dept 2014], *lv denied* 25 NY3d 987 [2015]), and we decline to review it in the

interest of justice. As an alternative holding, we find that it was permissible for the court to review the minutes "simply to confirm the facts asserted in the People's response" (*id.* at 444).

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Mazzarelli, J.P., Renwick, Saxe, Gische, JJ.

1088 The People of the State of New York Index 101147/15
 ex rel. Titus McBride,
 Petitioner-Appellant,

-against-

Warden, et al.,
Respondents-Respondents.

Titus McBride, appellant pro se.

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

Judgment (denominated an order), Supreme Court, New York
County (Marcy L. Kahn, J.), entered October 2, 2015, which denied
the petition for a writ of habeas corpus, and dismissed the
proceeding, unanimously affirmed, without costs.

To the extent petitioner is making a claim of excessive bail,
that claim is without merit. None of petitioner's

remaining claims may be raised by way of habeas corpus (see e.g. *People ex rel. Douglas v Vincent*, 50 NY2d 901 [1980]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 10, 2016

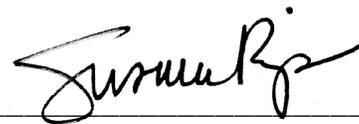
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§ 5-903), and thus does not fall within the ambit of the statute. The term was tolled and thereby extended during the period the sale agreement with the third party was in effect. Further, because the duration of the agreement could be determined from the terms of the agreement, although it was not expressly or specifically stated, the agreement was not of "indefinite" duration and thus was not terminable at will (see *Haines v City of New York*, 41 NY2d 769, 772 [1977]).

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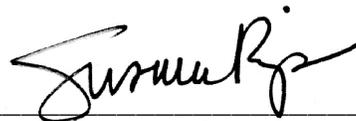
City-administered examination, in favor of national certification.

Petitioner lacks standing to make these challenges. The safety-related harm that it predicts will result from the amendments is too speculative to show “injury in fact,” meaning that [petitioner] will actually be harmed by the challenged [amendments]” (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). As in *Nurse Anesthetists*, the record shows nothing more than that the injury predicted “might[] or might not” result from the amendments (*id.* at 214).

In any event the Department of Buildings acted rationally in adopting the amendments which were not inconsistent with its prior position.

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

ENTERED: MAY 10, 2016

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Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1092 Steven Sterbinsky, et al., Index 103239/11
Plaintiffs-Respondents,

-against-

780 Riverside Drive, LLC,
Defendant-Appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Raphaelson & Levine Law Firm, P.C., New York (Steven C. November of counsel), for respondents.

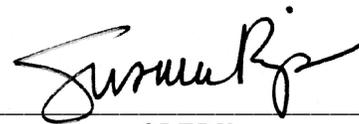
Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about March 13, 2015, which, to the extent appealed from, granted plaintiffs' motion for partial summary judgment on the issue of liability and denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly awarded partial summary judgment on the issue of liability based upon the doctrine of *res ipsa loquitur* in this action where plaintiff Steven Sterbinsky, a cable television technician, was injured when, while walking on a metal grate on defendant's property, the grate collapsed causing him to fall down an air shaft. Defendant building owner failed to rebut the presumption of negligence arising from the collapse

of the grate due to the corroded condition of the metal frame supporting it (see *O'Connor v 72 St. E. Corp.*, 224 AD2d 246 [1st Dept 1996]; *Kai Chan v 1058 Corp.*, 200 AD2d 434 [1st Dept 1994]; *Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327 [1st Dept 1989]). Defendant's assertion that the condition of the frame was a latent defect, not observable upon reasonable inspection, is belied by, inter alia, the testimony of the building's porter, who stated that the edges of the grate were rusted, and by the contemporaneous observations of plaintiff's coworker and supervisor. Furthermore, defendant's claim of no notice is unavailing because notice is inferred when *res ipsa loquitur* applies (see *Ezzard v One East River Place* 120 AD3d 159).

THIS CONSTITUTES THE DECISION AND ORDER
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CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1093-

1093A In re Zhane A. F., and Another,

Dependent Children under the Age of
Eighteen Years, etc.,

Andrea V.F.,
Respondent-Appellant,

-against-

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

Larry S. Bachner, Jamaica, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Riti P.
Singh of counsel), attorney for the children.

Orders of disposition, Family Court, New York County (Susan
K. Knipps, J.), entered on or about May 12, 2015, which, upon a
fact-finding determination that appellant mother permanently
neglected the subject children, terminated her parental rights
and transferred custody and guardianship of them to petitioner
agency and the Commissioner of Social Services for the purpose of
adoption, unanimously affirmed, without costs.

The record demonstrates the agency's diligent efforts,

including formulating a service plan, meeting with the mother to discuss the plan, making referrals for services, and monitoring her compliance.

The findings of permanent neglect are supported by clear and convincing evidence, including the testimony of the case worker, and the agency's progress notes. The mother failed to visit the children for a seven-month time period and was noncompliant with services, including mental health treatment.

The court properly found that a preponderance of the evidence supported termination of the mother's parental rights based on her failure to complete the service plan and lack of insight into her mental health issues after three years. The court correctly rejected a suspended judgment because the mother had not made significant progress in overcoming the problems that led to placement and the children needed stability, which they obtained in the foster home, where they were thriving (*see Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]).

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

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

ENTERED: MAY 10, 2016



CLERK

afforded petitioner the relief to which he was entitled,
rendering moot this proceeding challenging the dismissal, in
light of the de novo review ordered, of his September 4, 2014
administrative appeal (see *Matter of Babi v David*, 35 AD3d 266
[1st Dept 2006]; *Matter of Johnson v Morgenthau*, 214 AD2d 348
[1st Dept 1995])).

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

ENTERED: MAY 10, 2016


CLERK

difficulty eating for three or four days, he had swelling under his eye (see e.g. *People v Mullings*, 105 AD3d 407 [1st Dept 2013], lv denied 21 NY3d 945 [2013]; *People v Deas*, 102 AD3d 464 [1st Dept 2013], lv denied 20 NY3d 1097 [2013]; *People v Mercado*, 94 AD3d 502 [1st Dept 2012], lv denied 19 NY3d 999 [2012]). The evidence also supports conclusions that defendant took the victim's phone during the attack, and that defendant used force for the purpose of stealing the phone.

We find, however, that the hearing court improperly denied defendant's suppression motion. Once the officers removed the backpack from the already handcuffed defendant and the backpack was within the officer's dominion and control and outside the grabbable area, there was no longer any safety concern present that would have justified a search of its contents. Nonetheless, we find that this error was harmless because the items of defendant's clothing found in the backpack added little to the People's case and could not have affected the verdict (see *People v Crimmins*, 36 NY2d 230 [1975]).

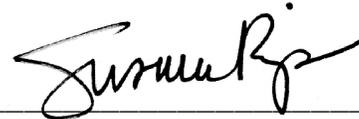
By failing to make timely and specific objections, defendant failed to preserve his challenges to the People's comments during the voir dire of the first panel of prospective jurors, and we decline to review them in the interest of justice. As an

alternative holding, we find that to the extent there were any improper questions, the court's instructions were sufficient to prevent any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 10, 2016

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CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1096-

Index 650079/14

1097 Sam Wietschner, derivatively on
behalf of JPMorgan Chase & Co.,
Plaintiff-Appellant,

-against-

James Dimon, et al.,
Defendants-Respondents,

JPMorgan Chase & Co.,
Nominal Defendant-Respondent.

Lifshitz & Miller, Garden City (Edward W. Miller of counsel), for
appellant.

Wachtell, Lipton, Rosen & Katz, New York (John F. Savarese of
counsel), for James Dimon and JPMorgan Chase & Co., respondents.

Shearman & Sterling LLP, New York (Stuart J. Baskin of counsel),
for Laban P. Jackson, Jr., James C. Crown, William C. Weldon,
Crandall C. Bowles, James A. Bell, Stephen B. Burke, Lee R.
Raymond, Timothy P. Flynn, David M. Cote, Ellen V. Futter, and
David C. Novak, respondents.

Orders, Supreme Court, New York County (Marcy S. Friedman,
J.), entered August 18, 2015, which granted defendants' motion to
dismiss the amended complaint, and denied plaintiff's motion for
leave to amend, unanimously affirmed, without costs.

The motion court dismissed one cause of action on the ground
of res judicata and the other on the ground of collateral
estoppel, based on federal rulings that plaintiffs in other

shareholder derivative actions had failed to allege particularized facts to support their claims of demand futility (see *Steinberg v Dimon*, 2014 WL 3512848, 2014 US Dist LEXIS 96838 [SD NY 2014]; *Central Laborers' Pension Fund v Dimon*, 2014 WL 3639185, 2014 US Dist LEXIS 100874 [SD NY 2014], *affd* ___ Fed Appx ___, 2016 WL 66501 [2nd Cir Jan. 06, 2016]). The amended complaint should be dismissed in its entirety as precluded under the doctrine of res judicata. The claims in this action and in the federal actions arose from the same series of transactions involving the directors' oversight of a corporate anti-money laundering program (see *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13 [2008]), and, aside from the different time periods alleged regarding the directors' lack of oversight, had the same origin and formed a convenient trial unit (see *Xiao Yang Chen v Fischer*, 6 NY3d 94, 100-101 [2005]). That the complaints set forth different theories of recovery and that the claims in the instant action were not actually raised in the federal actions present no impediments to application of the doctrine (see *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d at 12-13; *Matter of Hunter*, 4 NY3d 260, 269 [2005]). The dismissals for failure to adequately allege demand futility were on the merits and entitled to res judicata effect (see *Levin v*

Kozlowski, 13 Misc 3d 1236[A], 2006 NY Slip Op 52142[U] [Sup Ct, NY County 2006] [differentiating derivative demand rule from ordinary standing], *affd* 45 AD3d 387 [1st Dept 2007]; *Henik v LaBranche*, 433 F Supp 2d 372, 379 [SD NY 2006]; *cf. Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 177 [1st Dept 2013] [dismissal on the ground of demand futility in a limited liability company derivative action is not on the merits for res judicata purposes]).

In view of the foregoing, it is unnecessary to address whether collateral estoppel precludes any portion of the amended complaint; in any event, because the inadequacy of the demand futility allegations prevents this action from going forward, the effect of both preclusion doctrines is the same (see *Asbestos Workers Local 42 Pension Fund v Bammann*, 2015 WL 2455469, *15 [Del Ch 2015], *affd for reasons assigned* __ A3d __, 2016 WL 353210, 2016 Del LEXIS 40 [Del 2016]).

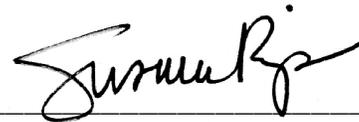
In any event, plaintiff failed to allege particularized facts evincing a reasonable doubt as to the board's ability to exercise its independent judgment in responding to a demand, such as a substantial likelihood of personal liability (see *Simon v Becherer*, 7 AD3d 66, 72 [1st Dept 2004]). The exculpatory clause in the nominal defendant's certificate of incorporation insulated

the directors from liability for breach of fiduciary duty, and plaintiff failed to sufficiently allege bad faith or breach of the duty of loyalty through the "utter" failure to attempt to implement the anti-money laundering compliance program or the "conscious disregard" of "red flags" providing notice of the alleged oversight deficiencies (see *Asbestos Workers Philadelphia*, 137 AD3d 680 (1st Dept 2016); *Wandel v Dimon*, 135 AD3d 515, 516, 518 [1st Dept 2016]).

Leave to amend was properly denied for lack of merit of the proposed pleading (see *Cadillac Resources, Inc. v DHL Exp. [USA], Inc.*, 129 AD3d 527 [1st Dept 2015]).

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

ENTERED: MAY 10, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

AD3d 218, 222 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]).

Therefore, the law of the case doctrine did not bar consideration of the motion (*compare Kenney v City of New York*, 74 AD3d 630 [1st Dept 2010]).

Nevertheless, factual issues still exist as to whether defendant violated Social Services Law § 413 by failing to report plaintiff's allegations of abuse to the appropriate authorities, and whether such failure was a proximate cause of her claimed psychological and emotional injuries.

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

ENTERED: MAY 10, 2016

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CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1100 Yolanda Feliciano, et al., Index 301093/10
Plaintiffs-Appellants,

-against-

St. Vincent De Paul Residence,
et al.,
Defendants-Respondents.

Krenstel & Guzman, LLP, New York (Somya Kaushik of counsel), for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmecci of counsel), for respondents.

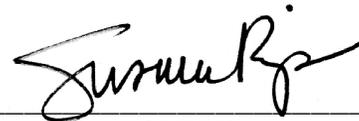
Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 13, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In opposition to defendants' prima facie showing that the care rendered to plaintiffs' decedent was within the accepted standards of medical and nursing home care, plaintiff's expert's

report failed to raise an issue of fact since it contained statements of fact unsupported by the record and speculative medical conclusions (see *Craig v St. Barnabas Nursing Home*, 129 AD3d 643 [1st Dept 2015]).

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

ENTERED: MAY 10, 2016

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CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1101N IP International Products, Inc., Index 652369/15
 Plaintiff-Appellant,

-against-

275 Canal Street Associates,
Defendant-Respondent.

Jaffe, Ross & Light LLP, New York (Bill S. Light of counsel), for
appellant.

Becker & Poliakoff, LLP, New York (Glenn H. Spiegel of counsel),
for respondent.

Order, Supreme Court, New York County (Shirley Werner
Kornreich, J.), entered August 5, 2015, which, to the extent
appealed from as limited by the briefs, denied plaintiffs'
application for a *Yellowstone* injunction, unanimously affirmed,
with costs.

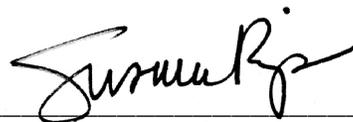
The court providently exercised its discretion in denying
plaintiff's application for a *Yellowstone* injunction, because
plaintiff failed to demonstrate a willingness to cure (see *Cemco
Restaurant, Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461, 463
[1st Dept 1987]; *Linmont Realty, Inc. v Vitocarl, Inc.*, 147 AD2d
618, 620 [2d Dept 1989]). Plaintiff's assertions to the contrary
are belied by its continued violation of the alterations

provision of the lease, even as it purports to "cure" defects.

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: MAY 10, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Mazzarelli, J.P., Renwick, Saxe, Gische, Kahn, JJ.

1102N Anderson & Anderson LLP - Guangzhou, Index 651010/11
et al.,
Plaintiffs-Appellants,

-against-

North American Foreign Trading Corp.,
Defendant-Respondent.

Anderson & Anderson LLP, New York (David C. Buxbaum of counsel),
for appellants.

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

Order, Supreme Court, New York County (Eileen Bransten, J.),
entered October 23, 2014, which, to the extent appealed from as
limited by the briefs, granted defendant's motion to disqualify
David Buxbaum, Esq. and Anderson & Anderson LLP from representing
plaintiffs, unanimously affirmed, with costs, without prejudice
to Anderson & Anderson LLP's making a motion for renewal (if so
advised) on the ground that it is now a party.

This fee dispute arises out of (1) a 2005 retainer agreement
between defendant (the former client) and plaintiff Guangdong
Huatu Law Firm (Huatu) and (2) a 2009 Supplementary Agreement
among defendant, plaintiffs Huatu and Beijing Kaiming Law
Offices, and former nonparty (now a plaintiff) Anderson &

Anderson LLP. The second amended complaint, which was the operative pleading at the time defendant made its disqualification motion, named "Anderson & Anderson LLP - Guangzhou" as a plaintiff.

Defendant submitted affirmations - which were not rebutted by plaintiffs on the relevant motion - saying it believed that "Anderson & Anderson LLP" and "Anderson & Anderson LLP - Guangzhou" were the same until plaintiffs' brief on their summary judgment motion, which clarified that the two were separate legal entities. After defendant realized that Anderson & Anderson LLP - Guangzhou was not acting pro se, it moved to disqualify Anderson & Anderson LLP and Buxbaum (the Anderson attorney handling the instant case for plaintiffs). Because defendant acted promptly after the facts changed, the branch of its motion based on Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9 is timely (see *Credit Index v RiskWise Intl.*, 192 Misc 2d 755, 766 [Sup Ct, NY County 2002], *affd* 296 AD2d 318 [1st Dept 2002]). The branch of its motion based on rule 3.7 (the advocate-witness rule) is not subject to laches (see *Grossman v Commercial Capital Corp.*, 59 AD2d 850 [1st Dept 1977]).

In their appellate reply brief, plaintiffs contend for the first time that Buxbaum did not represent defendant because he is

a party to neither the 2005 agreement nor the 2009 agreement. This argument is untimely (see e.g. *Shia v McFarlane*, 46 AD3d 320, 321 [1st Dept 2007]). Were we to consider it, we would find it unavailing. Although the 2005 agreement is between defendant and Huatu, it says that (a) defendant entrusted Huatu's attorneys as agents for enforcing its arbitral award in China and (b) Huatu appointed Buxbaum as one of the agents to handle the case. The Supplementary Agreement also recognized that Buxbaum would act on behalf of defendant and would conduct the entrusted work.

The motion court providently exercised its discretion (see e.g. *Matter of Ehrlich v Wolf*, 127 AD3d 613, 614 [1st Dept 2015], *lv dismissed* 26 NY3d 1114 [Feb. 11, 2016]) by disqualifying Buxbaum and Anderson & Anderson LLP pursuant to rule 1.9 (conflict between former client [defendant] and current clients [plaintiffs]). The former representation (enforcement of defendant's arbitral award against a nonparty in China) and the present litigation (plaintiffs' entitlement to fees for the work done in China) are substantially related (see e.g. *Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 135 [1996]; *Credit Index*, 296 AD2d at 318; *Forest Park Assoc. Ltd. Partnership v Kraus*, 175 AD2d 60, 61-62 [1st Dept 1991]).

Since the court properly disqualified Buxbaum and Anderson &

Anderson LLP under rule 1.9, it is unnecessary to decide whether the court (1) properly disqualified Buxbaum pursuant to rule 3.7(a) and (2) also should have disqualified Anderson & Anderson LLP pursuant to rule 3.7(b). Were we to reach those issues, we would find that the court's decision was a proper exercise of its discretion (see e.g. *Ehrlich*, 127 AD3d at 614 [court disqualified lawyer who had become a significant witness concerning the negotiation of the agreement at issue in the case]).

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

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

ENTERED: MAY 10, 2016


CLERK

570, 570-571 [1st Dept 2011]). Furthermore, defendant did not offer any basis for doubting the accuracy of the case summary (see *People v Irizarry*, 124 AD3d 429, 429 [1st Dept 2015] *lv denied* 25 NY3d 907 [2015]).

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

ENTERED: MAY 10, 2016

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CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1104 In re Myles M.,
 Petitioner-Appellant,

-against-

 Pei-Fong K.,
 Respondent-Respondent.

Leslie S. Lowenstein, Woodmere, for appellant.

Wilson Sonsini Goodrich & Rosati, P.C., New York (Tonia Ouellette Klausner of counsel), for respondent.

Larry S. Bachner, Jamaica, attorney for the child.

Order, Family Court, New York County (Monica Shulman, Referee), entered on or about August 20, 2014, which, to the extent appealed from as limited by the briefs, denied petitioner father's petition for overnight visitation with the parties' child, unanimously affirmed, without costs.

Family Court's determination that overnight visitation with the father is not in the child's best interest has a sound and substantial basis in the record (*see Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]). Family Court properly considered the testimony of the court-appointed expert and the court-appointed visitation supervisor concerning the father's resistance to participation in a batterer's program,

despite his history of domestic violence with respondent mother, and of his failure to fully accept responsibility for his prior actions. Although the father commenced individual therapy shortly before the hearing, ample evidence supported Family Court's concern that the child might be exposed to violence during overnight visits based on recent incidents of aggressive behavior by the father with third parties and his admitted continued use of alcohol, which in the past was a factor in the domestic violence.

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

ENTERED: MAY 10, 2016

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time of the entry.

The court properly denied suppression of defendant's videotaped statement, as it was sufficiently attenuated from a warrantless arrest made in violation of *Payton v New York* (445 US 573 [1980]) and from prior suppressed statements (see *People v Harris*, 77 NY2d 434 [1991]). The record supports the court's finding (24 Misc 3d 1232[A], 2009 NY Slip Op 51711[U], *7) that the passage of many hours and the other intervening events supporting a finding of attenuation outweighed the contrary factors cited by defendant.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 10, 2016

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CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1106-

Index 159428/14

1107 In re Marcus Sykes,
Petitioner-Appellant,

-against-

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

Block O'Toole & Murphy, LLP, New York (David L. Scher of
counsel), for appellant.

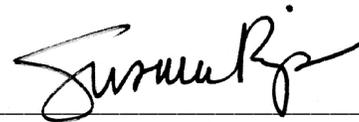
Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie
Herman of counsel), for respondents.

Judgment, Supreme Court, New York County (Frank P. Nervo,
J.), entered March 17, 2015, denying the petition for leave to
amend the notice of claim, and dismissing the proceeding
unanimously reversed, on the law, the facts and the exercise of
discretion, without costs, and the petition granted. Appeal from
order, same court and Justice, entered on or about August 7,
2015, which denied petitioner's motion for leave to "reargue,"
unanimously dismissed, without costs, as academic.

The notice of claim gave respondents notice of the incident giving rise to the claim and identified witnesses as well as the location.

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

ENTERED: MAY 10, 2016

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CLERK

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MAY 10, 2016

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CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1112-		Ind. 3850/11
1113-		615/13
1113A-		335/13
1113B	The People of the State of New York, Respondent,	3890/13

-against-

Desean Hill,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer of
counsel), respondent.

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.),
rendered January 24, 2014, as amended August 5, 2014, convicting
defendant, upon his plea of guilty, of robbery in the second
degree, and sentencing him, as a second felony offender, to a
term of 7 years, with 5 years' postrelease supervision, and
judgments, same court (Steven L. Barrett, J.), rendered April 9,
2014, convicting him, upon his pleas of guilty, of burglary in
the second degree, promoting prostitution in the second degree,
and assault in the third degree, and sentencing him, as a second
felony offender, to an aggregate term of 6 years, with 5 years'
postrelease supervision, consecutive to the sentence on the

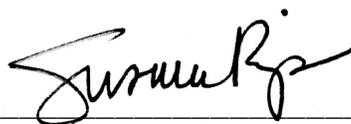
robbery conviction, unanimously affirmed.

On separate dates, defendant pleaded guilty to two felonies that carried terms of postrelease supervision. Although the prison terms for these felonies run consecutively, the PRS terms merge into a single term of five years by operation of law (see Penal Law § 70.45[5][c]). Therefore, since it is undisputed that, as to one of these pleas, defendant was properly warned that his sentence would include a five-year PRS term, defendant was not prejudiced by the lack of a warning, at the time of the first plea, that such a term would be part of his sentence in the event that he violated his plea agreement. Thus, defendant was never subject to PRS solely as a consequence of the plea that lacked the warning required by *People v Catu* (4 NY3d 242 [2005]), and there is now no reason to vacate the plea (*cf. People v Ferrell*, 76 AD3d 938 [1st Dept 2010], *lv denied* 15 NY3d 952 [2010] [defendant pleading guilty to murder and other crimes not prejudiced by lack of information about additional sentences that merged into life term]).

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

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

ENTERED: MAY 10, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1114-

1115 In re Daniel N.,
 Petitioner-Appellant,

-against-

Joy N.,
Respondent-Respondent.

Law Offices of Susan Barrie, New York (Susan Barrie of counsel),
for appellant.

Kaminer Kouzi & Associates LLP, New York (Jennifer Kouzi of
counsel), for respondent.

Order, Family Court, New York County (Gloria Sosa-Lintner,
J.), entered on or about October 9, 2014, which, to the extent
appealed from as limited by the briefs, after a hearing, denied
the petition to modify the parties' custody order, unanimously
affirmed, without costs. Appeal from order, same court and
Judge, entered on or about December 6, 2011, which ordered a
forensic evaluation, unanimously dismissed, without costs, as
abandoned.

Petitioner failed to establish that there has been a change
in circumstances warranting modification of the custody order
(see e.g. *Matter of Iris R. v Jose R.*, 74 AD3d 457 [1st Dept
2010]). That the custody order was entered on consent does not

relieve him of the burden of proof on that issue (*see id.*).
Petitioner failed to substantiate any ill effects on the child arising from respondent's move, any deficiencies in respondent's provision of medical care to the child, or any disruption of the child's mid-week communication with petitioner. Moreover, the move is within the area permitted by the custody order (*see Matter of Molinari v Tuthill*, 59 AD3d 722, 723 [2d Dept 2009]).

Although the requisite change in circumstances has not been shown, we note that a consideration of the best interests of the child supports the determination that the child should remain with respondent. Petitioner argues that the court failed to take into account the child's expressed preference to live with him. However, the child's desire is "but one factor to be considered," not determinative (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). Moreover, the child has since expressed a preference to refrain from taking a position.

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

ENTERED: MAY 10, 2016



CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1116 Samuel D. Isaly, Index 304183/13
Plaintiff-Respondent,

-against-

Sara Devlin,
Defendant-Appellant.

Port & Sava, Lynbrook (George S. Sava of counsel), for appellant.

Garr Silpe, P.C., New York (Emily R. Rubin of counsel), for
respondent.

Order, Supreme Court, New York County (Tandra L. Dawson,
J.), entered July 20, 2015, which, to the extent appealed from,
granted plaintiff husband's motion to permanently restrain and
enjoin defendant wife from challenging the parties' premarital
agreement, unanimously affirmed, without costs.

Supreme Court properly found that because it had in personam
jurisdiction over the parties, it also had "equity jurisdiction
over their rights with respect to foreign realty" (*Ralske v*
Ralske, 85 AD2d 598, 599 [2d Dept 1981], *appeal dismissed* 56 NY2d
644 [1982]; *see Tobjy v Tobjy*, 163 AD2d 303 [2d Dept 1990], *lv*
dismissed, denied 77 NY2d 937 [1991]; *Johnson v Dunbar*, 114 NYS
2d 845, 849-850 [Sup Ct, Kings County 1952], *affd* 282 AD 720 [2d
Dept 1953], *affd* 306 NY 697 [1954]). Contrary to defendant's

contention, the court did not find that it could exercise in rem jurisdiction over plaintiff's properties located in the UK (see *Johnson v Johnson*, 68 AD3d 1685, 1686 [4th Dept 2009]).

The court further did not award or grant ownership and control of the properties in the UK to plaintiff. Rather, the court properly found that plaintiff's real properties were addressed in the parties' 2004 premarital agreement, which was incorporated but not merged into their judgment of divorce, and thus, survived "as a separately enforceable contract" (*Rainbow v Swisher*, 72 NY2d 106, 109 [1988]). In the schedule attached to the premarital agreement, plaintiff indicated that he owned real estate valued at \$10,448,180. Defendant never challenged the lack of specific identification of the real property owned by plaintiff, even at the time of the 2012 modification agreement or the subsequent judgment of divorce. Defendant's claim that plaintiff orally promised her one of his separately owned properties in the UK is contradicted by her understanding that "no representations" had been made, oral or otherwise other than those expressly set forth in the premarital agreement.

The fact that the properties in the UK were not specifically identified in the premarital agreement, without more, does not render the agreement ambiguous. In the 10 years prior to the

commencement of this action, defendant never sought identification of the real property referenced in a schedule to the premarital agreement. In any event, the plain language in Article II-C and G of the premarital agreement reflects defendant's acknowledgment that she has "no right to or claim against" any real property owned then or subsequently acquired by plaintiff, including the appreciation in value, as well as her renunciation and waiver of any current or future right to claim an interest in any property, real or otherwise, separately owned by plaintiff husband. In the absence of ambiguity, defendant's claim that the court was required to hold an evidentiary hearing, is unavailing (see *Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25 [2008]).

While a conflict of laws analysis is required if parties disagree as to which jurisdiction's law should apply (see *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 200 [1st Dept 2013]; see also *Matter of Allstate Ins. Co. [Stolarz-New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]), the parties had expressly agreed that New York law would govern any challenges to

the validity and interpretation of the premarital agreement (see *Friedman v Roman*, 65 AD3d 1187 [2d Dept 2009]).

We have considered the parties' remaining contentions and find them either irrelevant or unavailing.

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

ENTERED: MAY 10, 2016

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CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1117-

1117A TADCO Construction Corp.,
Plaintiff-Appellant,

Index 600040/07

-against-

Dormitory Authority of the State
of New York,
Defendant-Respondent.

Bryan Ha, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Terri Feinstein Sasanow of counsel), for respondent.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered June 12, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's second, third, fifth, eighth, and tenth through thirteenth causes of action in the complaint, denied plaintiff's cross motion for summary judgment on the second, third, fifth, and eighth causes of action, and awarded plaintiff summary judgment in amounts less than the amounts requested on its fourth and sixth causes of action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 9, 2013, which, upon reargument, adhered to the court's original determination, unanimously dismissed,

without costs, as academic.

The motion court correctly determined that plaintiff failed to comply with any of the conditions precedent to recovering its claims for additional compensation for change orders and extra work (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20 [1998]).

The quasi contract claims were correctly dismissed as precluded by the existence of a valid and enforceable contract (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), and the claim for breach of the implied covenant of good faith and fair dealing was correctly dismissed, given the lack of any evidence of bad faith.

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: MAY 10, 2016

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CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1118 Lisa Pugliese, Index 103104/10
Plaintiff-Appellant,

-against-

Actin Biomed LLC, et al.,
Defendants-Respondents,

Stuart Green, Esq.,
Defendant.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Jesse M. Young of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Celena Mayo of counsel), for respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered January 13, 2015, which granted defendants-respondents' (defendants) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

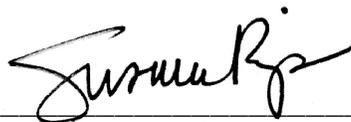
Plaintiff alleges, pursuant to Labor Law § 740, that she was constructively terminated from her employment with defendants in retaliation for objecting to defendants' violation of Food and Drug Administration (FDA) regulations in their conduct of certain clinical drug trials. Supreme Court erred when it granted defendants summary judgment, because there has been only limited

discovery in this case, and therefore summary dismissal of the complaint is premature.

In light of defendants' active litigation of this case since its commencement and the fact that they raised the issue of arbitration for the first time in the present motion, we find that they have waived any right to compel arbitration (see e.g. *Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481 [1st Dept 2009]).

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\$809,766 in taxes, and the record contains no basis for the award (see *People v Consalvo*, 89 NY2d 140 [1996]; *People v Massagli*, 51 AD3d 486 [1st Dept 2008]). This issue is nonwaivable, and it does not require preservation (*id.*).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 10, 2016

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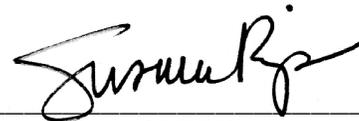
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class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." "In *American Pipe & Constr. Co. v Utah* (414 US 538, 553), the United States Supreme Court held that, under the federal class action rule, commencement of a class action suit tolls the running of the statute of limitations for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. New York courts have adopted this rule" (*Osarczuk v Associated Univs., Inc.*, 130 AD3d 592, 595 [2d Dept 2015], *lv dismissed* 26 NY3d 1126 [2016]; *see also Paru v Mutual of Am. Life Ins. Co.*, 52 AD3d 346, 348 [1st Dept 2008]; *Yollin v Holland Am. Cruises*, 97 AD2d 720 [1st Dept 1983]; *American Pipe & Constr. Co. v Utah*, 414 US 538, 551-554 [1974]). Thus, the putative class retains an interest in the action, and CPLR 908 is not rendered inoperable simply because the time for the individual plaintiff to move for class certification has expired. Notice to the putative class members

of the compromise in the instant case is particularly important under the present circumstances, where the limitations period could run on the putative class members' cases following discontinuance of the individual plaintiff's action.

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

ENTERED: MAY 10, 2016

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CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1121 Jason Goldfarb, Index 151904/14
Plaintiff-Appellant,

-against-

Jeffrey C. Hoffman, Esq., et al.,
Defendants-Respondents.

Jason Goldfarb, appellant pro se.

Hoffman & Pollok, L.L.P., New York (William A. Rome of counsel),
for respondents.

Order, Supreme Court, New York County (Debra A. James, J.),
entered on or about February 17, 2015, which, to the extent
appealed from as limited by the briefs, upon defendants' motion
to dismiss so much of the breach of contract cause of action as
is based on paragraphs 16-20, dismissed the complaint in its
entirety, and denied plaintiff's cross motion to compel
arbitration, unanimously modified, on the law, to reinstate so
much of the contract claim as is based on paragraph 15 and to
deem paragraphs 23 and 24 to allege breach of contract and add
those paragraphs to the reinstated contract claim, and otherwise
affirmed, without costs.

Plaintiff did not have a right to arbitrate his fee dispute
under the retainer agreement with defendants, his former counsel

(see *Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]). The parties' contract said that plaintiff had the right to arbitrate "as provided by 22 NYCRR [Part] 137." Part 137 does not apply to "representation in criminal matters" (22 NYCRR 137.1[b][1]). Defendants represented plaintiff in a federal criminal matter.

The court had the power to dismiss the entire complaint sua sponte, even though defendants only moved to dismiss five specific paragraphs (see *Wehringer v Brannigan*, 232 AD2d 206, 207 [1st Dept 1996], *appeal dismissed* 89 NY2d 980 [1997]).

We affirm the dismissal of the fraud claim, albeit on different grounds than the motion court cited. Plaintiff failed to allege any of the required elements of fraud, viz., "representation of a material existing fact, falsity, scienter, deception and injury" (*Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249, 257 [1st Dept 1989]).

The motion court correctly dismissed paragraphs 16-20 on the ground that allegations that an attorney failed to exercise due care do not state a cause of action for breach of contract (see *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38-39 [1st Dept 1998]). However, paragraph 15, which alleges that defendants breached the parties' contract by failing to return the unused

portion of the retainer to plaintiff, alleges the breach of a specific promise and therefore should be allowed to survive. Similarly, paragraphs 23 and 24, which allege that defendants, in violation of the retainer agreement, billed for work which was not actually done and billed for an employee who was not admitted to the bar at a billing rate commensurate with that for an attorney, should remain in the complaint as part of plaintiff's contract claim. Paragraph 24 arguably alleges the breach of a specific promise in the retainer agreement, viz., the schedule of rates.

By contrast, the parties' agreement says nothing about paying referral fees or the frequency with which defendants must provide plaintiff with billing statements, thereby refuting the claims in paragraphs 14 and 25 of the complaint.

We have considered and rejected plaintiff's remaining claims.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 10, 2016

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address at the time of the accident, and apparently registered other cars in Westchester County, in opposition, plaintiffs presented an affidavit and substantial documentary evidence showing that he lived in a home that he owned in Bronx County, with his wife, plaintiff Theresa Madia, at the time the action was commenced (see *Washington v Sow*, 127 AD3d 492, 492-493 [1st Dept 2015]). Accordingly, defendants failed to establish that venue was improperly placed in Bronx County.

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

ENTERED: MAY 10, 2016

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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische, JJ.

15595
Ind. 4033/09

x

The People of the State of New York,
Respondent,

-against-

Shaequawn Watson,
Defendant-Appellant.

x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Thomas A. Breslin, J.), rendered May 17, 2013, convicting her, after a jury trial, of assault in the second and third degrees and resisting arrest, and imposing sentence.

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver and Peter D. Coddington of counsel), for respondent.

MANZANET-DANIELS, J.

The issue in this case is whether the prosecution exercised its peremptory challenges in a discriminatory manner when it struck all African American males from a panel of prospective jurors.

During the first round of voir dire, nine jurors were selected, including a woman who stated that "sometimes the police are doing their job and sometimes they are not. They could be forceful at times if they feel threatened. They do what they have to do." The first panel did not include any black men.

During the second round, three jurors and two alternates were seated, including a woman who stated she had "seen things go both ways" with the police. An African American male, Smalls, was struck for cause after telling the court that he had been the victim of police harassment. Smalls admitted that he wasn't sure he could "take police testimony at face value and possibly be impartial to it."

Three African American males remained on the second panel of jurors: Hewitt, Prosser and Lortey. Hewitt was unemployed with no children. He stated that in high school he would usually take the lead in group projects. He agreed that he had a strong personality and stated that he would stick to his guns if he really believed in something. Hewitt had been stopped and

frisked "a couple of times," but denied that it had "sour[ed]" him on the police department, stating, "[I]t's just the breaks sometimes."

Prosser, an elevator mechanic, had no children and played basketball on the weekends. He had relatives in law enforcement, including a father in federal law enforcement and an uncle in Internal Affairs. When asked whether having family members in law enforcement would "color" his view of the witnesses in the case, he stated, "What they do doesn't affect what I think." He had no opinion as to whether a police officer would be more or less likely to twist the truth, while other prospective jurors pointedly referred to a police "brotherhood."

Lortey was a utility worker for Con Edison and the father of a son.

An unnamed juror replied, "Yes," when asked whether he had had a "[b]ad experience with cops," stating that he had the "same experience" mentioned by Smalls, the juror excused for cause. When asked whether his experience would affect how he evaluated the testimony of the police officer in the case, the juror responded, "I don't know. . . I'm not sure what it would trigger emotionally to impact my judgment."

After inquiry was made of Hewitt regarding his encounters with the police, an unnamed juror stated, "You know, the stop and

frisk policy, that happens to me every day, five days out of the week," but qualified that "that's . . . [the police] doing their job."

At the end of round two, the prosecutor exercised peremptory challenges to exclude Prosser, Hewitt and Lortey. Defense counsel requested that the prosecutor give a race-neutral reason for striking every black male juror on the panel, as per *Batson v Kentucky* (476 US 79 [1986]) (see *People v Payne*, 88 NY2d 172, 181 [1996]). The prosecutor explained that both Hewitt and Prosser¹ had been harassed by police officers and stated that he feared it would color their view of Officer Hobson's testimony.

The court asked whether counsel was "saying it's a gender bias, which is not a color bias." Defense counsel refused to choose, framing the challenge as "the interaction of both race and gender." The court asked if there was any law on the issue. Defense counsel did not know any "off the top" of his head, but asked for an opportunity to brief the court on the relevant case law.

The court thereupon stated, "[B]e that as it may, I've listened to your explanations. I find them to be absolutely race

¹The identity of the prospective juror who spoke of being harassed by the police is not evident from that record. It is not clear that the juror was Prosser, or Lortey, for that matter.

neutral." The court stated that it would have granted a for-cause challenge as to Lortey. The court noted that Hewitt had experiences being harassed. At the mention of Prosser's name, the prosecutor immediately interjected, stating that he had noticed Prosser "making faces" throughout the proceedings. The court stated, "You're covered. Denied."

When it appeared that it might be necessary to convene a third panel of prospective jurors in order to select an alternate, the court inquired whether the defense and prosecution might agree on an alternate from the second panel. Defense counsel argued for Hewitt, noting that he did not appear to be "stressed out" by his experiences and had stated that he would "stick to the letter of the law." He agreed that Lortey and Prosser had demonstrated that they "didn't want to be [t]here," but did not in any way allude to negative interactions either had had with the police. The parties settled on a female juror as an alternate, ending the process of jury selection.

The following day, before opening statements, defense counsel attempted to renew his *Batson* challenge. The court stated, "The record is done. What else?" Defense counsel reminded the court that it had asked for case law on the subject, and the court replied, "Fine. You got your appeal. Fine. Bring it up on appeal. I'm not changing it now." Defense counsel

asked to make a written submission, to which the court replied, "Sure," and the parties continued on to other pretrial matters.

Before resting, defense counsel moved for a mistrial based on the *Batson* challenge.

Defense counsel preserved the issue that a prima facie case of discrimination had been established by making the argument during jury selection and filing a written memorandum with the court (see CPL 470.05[2]). He also objected at subsequent stages of the *Batson* inquiry. However, as evidenced from the colloquy, the judge cut the defense attorney off in a peremptory manner - even stating at one point, "Fine. Bring it up on appeal. I'm not changing it now" - preventing counsel from explicating his arguments. We would in any event reach the issue in the interest of justice (see CPL 470.15[3][c] and [6]).

The dissent asserts that we have "consistently declined" to exercise interest of justice review in a *Batson* case. We would decline to so circumscribe a power that is unique to the Appellate Division. The result would be to deny a defendant the opportunity to have a fair jury seated merely because his or her counsel misapprehends the *Batson* three-step inquiry. It should be noted that when we have declined to exercise interest of justice jurisdiction in a *Batson* case we have almost invariably gone on to state, as an alternate holding, that the *Batson* claim

has no merit. Further, there is precedent to exercise interest of justice jurisdiction to entertain a *Batson* claim (see *People v Harris*, 151 AD2d 961 [4th Dept 1989]).

As a matter of federal and state constitutional law, neither the prosecution nor the defense may exercise peremptory challenges in a discriminatory manner (see *Batson v Kentucky*, 476 US 79 [1986]; *People v Payne*, 88 NY2d 172, 181 [1996]). When a *Batson* claim is raised, the trial court must engage in a three-step process. First, the opponent of the peremptory challenge must make a prima facie showing that the strike related to the stricken juror's protected class. The burden then shifts to the proponent of the strike to overcome the inference of intentional discrimination by giving a facially-neutral explanation for the peremptory strike. At step three, the burden shifts back to the moving party to "persuad[e] the court that [the proffered] reasons are merely a pretext for intentional discrimination" (*People v Hecker*, 15 NY3d 625, 656 [2010], cert denied, 563 US 947 [2011]).

Defense counsel made a prima facie showing of discrimination requiring the prosecutor to give racially-neutral reasons for exercising peremptory challenges against all of the eligible

black male jurors.²

It is necessary to discuss, at this stage, whether black males are a cognizable group for *Batson* purposes. *Batson* of course prohibits the striking of jurors on the basis of race. The *Batson* rationale was extended to gender in *J.E.B. v Alabama ex rel. T.B.* (511 US 127, 130-131 [1994]). The Court of Appeals instructs us that “[e]limination of a potential juror because of generalizations based on race, gender or other status that implicates equal protection concerns is an abuse of peremptory strikes” (*People v Allen*, 86 NY2d 101, 108 [1995]).

Although the Supreme Court has not yet ruled on whether *Batson* extends to combined race-gender groups, state courts examining the issue under their own constitutions have generally recognized an intersectional status based on race and gender as a cognizable group for *Batson* purposes (see e.g. *People v Guardino*, 62 AD3d 544, 545-546 [1st Dept 2009] [black females], *affd on other grounds sub nom People v Hecker*, 15 NY3d 625 [2010], *cert denied* 563 US 947 [2011]; *People v Garcia*, 217 AD2d 119, 122 [2d Dept 1995] [black females]; *People v Jackson*, 213 AD2d 335 [1st

²It may be noted that once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the court has ruled on the ultimate issue of purposeful discrimination, the preliminary issue of whether a defendant has made a *prima facie* showing becomes moot (see *Hernandez v New York*, 500 US 352, 359 [1991]).

Dept 1995] [black females], *appeal dismissed* 86 NY2d 860 [1995]; *Commonwealth v Jordan*, 439 Mass 47, 62, 785 NE2d 368, 380 [Mass 2003] [white males]; *People v Motton*, 39 Cal 3d 596, 605-606, 704 P2d 176, 181 [Cal 1985] [black females]).

In *Guardino*, the dissenting justice reasoned that an “intersectional status” of race and sex (in that case, black women) should be treated in the same manner as race and gender for *Batson* purposes (62 AD3d at 548 [Catterson, J., dissenting]). It would indeed be incongruous to consider race and gender as cognizable statuses, but not a combined race and gender status.

The wholesale exclusion of black men from the jury gives rise to a mandatory inference of discrimination at the first step of the *Batson* inquiry (*compare Hecker*, 15 NY3d at 653-54).³ The prosecutor used peremptory strikes to eliminate black male jurors while not excluding others who expressed skepticism about the credibility of police officers, such as the woman on the first panel who stated that “sometimes the police [were] not [doing their job],” and “could be forceful . . . if . . . threatened,”

³It is true, as the prosecutor asserts, that numerical arguments alone will not generally give rise to an inference of discrimination. Thus, in a case where, for example, 50% of a group has been excluded, a court will examine other factors to determine whether a *prima facie* case has been made. Such factors become less relevant as the number of excluded jurors of a cognizable group approaches and attains 100%.

and the woman on the second panel who said she'd "seen things go both ways" with the police. Prosser had close relatives in law enforcement, a factor which would generally predispose him to the prosecution, yet he too was eliminated.

The prosecutor's putatively neutral explanations cannot be assessed and resolved as a matter of law, given the ambiguities and lack of clarity in the record. The explanations could have been exposed as a pretext for intentional discrimination had the court conducted a proper *Batson* inquiry. Only two jurors claimed to have been harassed by the police: Smalls, the juror who had been struck for cause, and another unnamed juror who may or may not have been African American. Hewitt stated only that he had been stopped and frisked "a couple of times," but pointedly declined to accept the prosecutor's suggestion that it had left a bad "taste" in his mouth or "sour[ed]" him on the police. He stated, "[I]t is what it is," and "[I]t's just the breaks sometimes." Prosser had relatives in law enforcement, including an uncle in Internal Affairs and a father who worked in the federal system, a factor that would tend to dispose him favorably to the prosecution. There is no record concerning any alleged negative encounters between Prosser or Lortey and the police. As even the prosecutor recognizes, on this incomplete record, there is no way of definitively attributing the comments of unnamed

jurors to either Prosser or Lortey. The dissent's arguments at this stage presuppose that the comments of the unnamed jurors may be definitely assigned to Prosser. Even the dissent is compelled to admit that the prosecutor failed to give any explanation whatsoever for the challenge as to Lortey.

We do not subscribe to the People's reasoning that the judge's comments (to the effect that he would not expect the prosecutor to select Lortey or Prosser and that he would have struck Lortey for cause if asked) serve as record-based proof that the prosecutor's challenge was not merely pretextual. It is "the trial courts' responsibility to make a sufficient record to allow for meaningful appellate review that insures and reflects that each party fulfills its burden and has an opportunity for input" (*People v Payne*, 88 NY2d at 183). The record is pointedly deficient as to Lortey, as to whom nonpretextual explanations were not even offered, and Prosser, as to whom no record exists to support the assertion that he had been the victim of police harassment.

The court failed to follow the three-step *Batson* protocol. Although the prosecutor furnished some explanations for the strikes, he gave them only as to Hewitt and Prosser, not Lortey. Even if those explanations were accepted as facially neutral, the court was obliged to continue on to step three and afford defense

counsel the opportunity to show that the prosecutor's stated reasons for the strikes were pretextual. Defense counsel was never given the opportunity to argue that the prosecutor's explanations were a pretext for discrimination. The court improperly combined steps and deviated from the *Batson* protocol, which cannot be considered harmless or nonprejudicial to defendant (see *People v Payne*, 88 NY2d at 186 [trial court erred by "premature and summary compaction of steps two and three" and thereby "skewed and squeezed the process into a functional bypass of the key, final protocol we have put in place"]).

Accordingly, the appeal from the judgment of the Supreme Court, Bronx County (Thomas A. Breslin, J.), rendered May 17, 2013, convicting defendant, after a jury trial, of assault in the second and third degrees and resisting arrest, and sentencing her, as a second felony offender, to an aggregate term of four years, should be held in abeyance and the matter remanded to Supreme Court for further proceedings as are necessary to satisfy the requirements of *Batson v Kentucky* (476 US 79 [1986]).

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

FRIEDMAN, J. (dissenting)

Defendant's conviction for committing assault against police officers (not only by striking them, but also by biting and kicking them), and for resisting arrest, is based almost entirely on police testimony. During voir dire proceedings, in response to an objection raised by defendant under *Batson v Kentucky* (476 US 79 [1986]), the prosecutor explained that he had exercised peremptory challenges against all remaining African American men on the panel because these panelists had admitted to having had negative encounters with the police. Defendant made no effort to show that this explanation – obviously cogent if the People were to have a fair trial, given that defendant was charged with crimes against the police and that the People's case would stand or fall on the jury's assessment of police testimony – was pretextual. Now, on appeal, defendant, although conceding that her *Batson* claim is unpreserved, argues that we should, in the interest of justice, order a hearing to pursue the pretext claim that her trial counsel understandably did not think worth pursuing. I believe that this request should be denied, and respectfully dissent from the majority's order holding this appeal in abeyance for a hearing to determine whether the voir dire proceedings were conducted in a manner consistent with the requirements of *Batson*.

Simply put, defendant's *Batson* claim is unpreserved – as defendant concedes in her appellate brief – and we have consistently declined to review unpreserved *Batson* claims in the interest of justice; indeed, the majority cannot locate a single decision by this Court, in the three decades since *Batson* was decided, in which we reviewed an unpreserved *Batson* claim.¹ I see no reason to deviate from that practice in this case. In nonetheless granting review of these unpreserved claims, the majority ignores the failure of defendant's trial counsel to raise timely, specific objections to the actions of the trial court that are said to have violated defendant's *Batson* rights "when the court had an opportunity of effectively changing the same" (CPL 470.05[2]). Moreover, in the specific context of *Batson* claims, the Court of Appeals has "underscore[d] the importance both of trial court attention to each of *Batson*'s

¹The sole Appellate Division case cited by the majority in which an unpreserved *Batson* claim was reviewed in the interest of justice is *People v Harris* (151 AD2d 961 [4th Dept 1989]). This decision – apparently the only one the majority could find in which a *Batson* issue was reviewed in the exercise of the Appellate Division's interest-of-justice jurisdiction – does not constitute a precedent for reviewing an unpreserved *Batson* claim at this late date, 30 years after *Batson* was decided by the United States Supreme Court. The *Harris* court noted that the trial of that case "predated the Supreme Court's decision in *Batson*; thus defense counsel had no precedent upon which to rely in making a mistrial motion" (151 AD2d at 962). No such excuse was available for failing to preserve a *Batson* issue when defendant's case was tried in 2013.

well-articulated, sequential steps, and of *trial counsel attention to placing their objections on the record so they may be addressed by the court*" (*People v Smocum*, 99 NY2d 418, 423-424 [2003] [emphasis added]; see also *People v Payne*, 88 NY2d 172, 182 n 1 [1996] ["Defendant's general objection, however – 'to this whole (*Batson*) procedure' – did not adequately preserve this question for this Court's review, because counsel did not state the ground for the objection"]). Accordingly, I would proceed to consider the remaining issues that defendant raises on her appeal.

Because the nature of the charges against defendant are relevant to the *Batson* issue, I will briefly summarize the facts the People proved to the jury's satisfaction at trial. On the date of her arrest, defendant was attending a cookout at which a disturbance broke out. Police officers arrived at the cookout to restore order, and placed an individual under arrest. After the police had placed the arrested individual in a police car, defendant approached the car and started screaming at the officer within. The officer observed that defendant was "visibly intoxicated, . . . belligerent, screaming, [and] very uncooperative." Defendant ignored the officer's repeated demands that she step away from the vehicle. When the officer tried to move her away from the vehicle, defendant began fighting with

him, and two other officers at the scene responded to assist in restraining her. Defendant fought all of the officers, in the process biting one of them, inflicting a painful injury. After defendant was finally restrained and placed in the back seat of a police car, she kicked one of the officers in the back so forcefully that the officer was ejected from the vehicle. Based principally on police testimony giving the above account, defendant was charged with, and convicted of, assault in the second and third degrees and resisting arrest.

The *Batson* claim in this case is that the prosecution exercised peremptory challenges to exclude all African American men who remained in the jury pool after the exercise of for-cause challenges. At the outset, I note that I fully agree with the majority that a class defined by both race and gender – in this case, African American men – implicates *Batson*. However, the question of whether defendant made a prima facie showing of a *Batson* violation based on the People's peremptory challenges to black men was rendered moot by the trial court's ruling on the ultimate issue of discriminatory intent (see *Payne*, 88 NY2d at 182, citing *Hernandez v New York*, 500 US 352 [1991]). Although the trial court initially expressed skepticism as to whether African American men (as opposed to African Americans generally) constitute a class cognizable under *Batson*, the court then

effectively accepted defendant's position that black men do constitute such a class by proceeding to hear the prosecutor's proffer of facially nondiscriminatory explanations for the People's peremptory challenges. Whether correct or incorrect, the court's ruling that the People had provided nonpretextual and nondiscriminatory explanations for the challenges assumed that the use of peremptories for the purpose of excluding all black men from the jury would have been unlawful. Accordingly, the court's initial hesitation in recognizing black men as a protected *Batson* class provides no basis for disturbing defendant's conviction.²

The relevant venire panel included four black men. The People challenged one of these panelists (Smalls) for cause; defendant does not complain of the court's allowance of this for-cause challenge on appeal. The People then raised peremptory challenges to the three remaining black men on the panel, whose names were Prosser, Hewitt and Lortey. For the exclusion of two of these individuals (Prosser and Hewitt), the prosecutor, in

²The majority's statement that "[d]efense counsel preserved the issue that a prima case of discrimination had been established," while technically accurate, is irrelevant to this appeal because defendant is not aggrieved on the prima facie issue. To reiterate, the court, after initially expressing hesitation, assumed that a prima facie case had been made and proceeded to the next step in the *Batson* inquiry. Defendant cannot appeal on an issue on which he prevailed at trial.

response to defendant's *Batson* challenge, gave the nondiscriminatory explanation that these panelists had admitted to having had unpleasant encounters with the police.³ Presumably by oversight, the prosecutor failed to give an explanation for the challenge to Lortey.

As is evident from the majority's writing, defendant's claim of error on appeal boils down to two points: (1) that the court truncated steps two and three of the *Batson* inquiry (as more fully explained below) into one step, contrary to the Court of Appeals' admonition (see *Smocum*, 99 NY2d at 423); and (2) that the People never provided any explanation for the peremptory challenge of one of the three black men (Lortey). From the majority's own account of the trial proceedings, however, it is plain that defendant failed to preserve either of these objections.

At this point, it is helpful to review the procedure trial courts should follow when a *Batson* claim is raised. A claim that

³In response to defendant's *Batson* objection to the striking of all black male panelists, the prosecutor stated: "Mr. Prosser indicated that he had been harassed by police officers. So had Mr. Hewitt. He also indicated that he had been harassed by police officers every day. I was afraid strategically that that would color their view of Officer Hobson's testimony, who was on the street that night." The prosecutor later added that Prosser had been "constantly making faces" and had otherwise indicated that he did not "want to be here."

peremptory challenges have been used to exclude a class of potential jurors in violation of *Batson* triggers a three-step test described by the Court of Appeals as follows:

“As a first step, the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges. Second, the nonmoving party must give a race-neutral reason for each potential juror challenged. In step three, the court determines whether the reason given is merely a pretext for discrimination” (*Smocum*, 99 NY2d at 420).

On this appeal, as previously noted, I concur with the majority that defendant made out a prima facie *Batson* claim before the trial court, based on the exclusion of all black male prospective jurors. However, that point is moot, since the court proceeded to rule on the question of discriminatory intent after hearing the People’s explanation. Whether the court followed the proper procedure in making this ruling, and whether that ruling has sufficient support in the record, are, to reiterate, issues that defendant failed to preserve for appellate review.

“As with other trial rulings, appellate review of *Batson* objections sensibly requires preservation as mandated by CPL 470.05(2)” (*People v Jones*, 284 AD2d 46, 48 [1st Dept 2001], *affd* 99 NY2d 264 [2002]). A *Batson* challenge is not preserved when counsel fails to allege pretext to refute opposing counsel’s facially nondiscriminatory justification of a peremptory challenge (*People v Smocum*, 99 NY2d at 423; *see also Jones*, 284

AD2d at 48 ["A failure to controvert the explanations for the use of peremptory challenges constitutes a failure to preserve a *Batson* claim"], *affd* 99 NY2d at 272 ["By accepting the People's explanation without any additional objection at a time that it could have been addressed, defendant failed to preserve a challenge to (a panelist's peremptory exclusion)"]).

Furthermore, counsel's responsibility to preserve a *Batson* challenge is not automatically excused if the court fails to permit counsel to argue pretext. Rather, counsel has a duty to object on the record if the court does not adhere to proper procedures, and to call upon the court to permit counsel to argue that the explanation given for exclusions of the relevant panelists are pretextual.

The Court of Appeals made it abundantly clear in *Smocum* that the requirement of preservation fully applies to claims of *Batson* error. In that case, the Court of Appeals agreed with the defendant that the trial court had failed to adhere to the proper three-step *Batson* procedure in that it "melded steps two and three . . . by immediately concluding that the reasons [proffered by the People for their challenges] were acceptable . . . without first allowing defense counsel to make an argument that the reasons were pretextual" (*id.* at 423). Nonetheless, the Court of Appeals held that the *Batson* claim was unpreserved for appellate

review because defense counsel failed to press her objection to the exclusion of one panelist, after the trial court accepted the People's ambiguous explanation without giving the defense an opportunity to respond, "at a time when any ambiguity . . . could have been clarified" (99 NY2d at 423). Turning aside the defendant's argument that the trial court had somehow prevented his counsel from arguing that the People's reasons were pretextual, the Court of Appeals further stated:

"Finally, we reject defendant's argument that counsel was 'squashed' and not permitted to make her pretext case with respect to [one of the prospective jurors]. Despite the sometimes enormous pressures of trial, it is for courts to discharge their responsibilities under the law and for counsel to voice objection when they do not. In particular, we underscore the importance both of trial court attention to each of *Batson's* well-articulated, sequential steps, and of trial counsel attention to placing their objections on the record so they may be addressed by the court. In this way, the law can be observed and potential error avoided" (*id.* at 423-424).⁴

⁴The majority quotes the Court of Appeals' statement in an earlier decision that refers to "the trial court's responsibility to make a sufficient record to allow for meaningful appellate review [of *Batson* issues] that insures and reflects that each party fulfills its burden and has an opportunity for input" (*Payne*, 88 NY2d at 183). While it is indeed the trial court's responsibility to adhere to the *Batson* protocol (as the Court of Appeals reaffirmed in *Smocum*), nothing in the quoted statement from *Payne* absolves defense counsel of the obligation, explicitly recognized in *Smocum*, to preserve *Batson* issues for appellate review by raising an express objection when the court errs by deviating from the three-step protocol. As previously noted, the Court of Appeals declined to review one of the *Batson* issues raised in *Payne* because trial counsel failed to preserve it by

While this Court, unlike the Court of Appeals, has the power to review unpreserved claims of error in the interest of justice, we have consistently declined to exercise this power to review unpreserved *Batson* claims. For example, in *People v Washington* (56 AD3d 258 [1st Dept 2008], *lv denied* 11 NY3d 931 [2009]), “[a]fter the prosecution explained its reasons for the challenges at issue, defense counsel remained silent and raised no objection when the court accepted these reasons as nonpretextual” (*id.* at 259). We held that this inaction by defense counsel in *Washington* failed to preserve both defendant’s “substantive objections to the court’s ultimate ruling” and “his claim that, in arriving at its ruling, the court failed to follow the proper *Batson* procedure,” and we declined to review either the substantive claim or the procedural claim in the interest of justice (*id.*). As we observed in another case, “This Court has consistently declined review where a ‘[d]efendant failed to preserve his current claim that the court did not follow the three-step *Batson* protocols in determining various claims of discriminatory exercise of peremptory challenges’” (*People v McLeod*, 281 AD2d 325, 326 [1st Dept 2001], *lv denied* 96 NY2d 893 [2001], quoting *People v Swails*, 250 AD2d 503 [1998], *lv denied*

articulating a sufficiently specific objection (see *Payne*, 88 NY2d at 182 n 1).

92 NY2d 906 [1998]; see also *People v Tucker*, 22 AD3d 353 [1st Dept 2005], *lv denied* 6 NY3d 760 [2005]; *People v Thomas*, 275 AD2d 234 [1st Dept 2000], *lv denied* 96 NY2d 893 [2000]; *People v Hedian*, 258 AD2d 363 [1st Dept 1999], *lv denied* 94 NY2d 824 [1999]).

Here, defendant raised the objection that the People had violated *Batson* by using peremptory challenges to strike all of the black men on the voir dire panel. In response, the People offered as a nondiscriminatory justification for these peremptory challenges the panelists' previous interactions with the police that might affect their impartiality in considering police testimony. The court, after hearing the People's explanation, and discussing with counsel whether African American men constituted a protected class under *Batson*, accepted the People's explanation for the challenges without first affording the defense an opportunity to argue that the explanation was pretextual. However, as the following excerpt from the transcript of the proceedings on March 4, 2013, shows, after the court made its ruling, defense counsel neither objected that the ruling was procedurally premature nor attempted to argue that the People's explanations were pretextual. Defense counsel also failed to point out that the People had not offered a specific nondiscriminatory justification for the challenge to one of the

black male panelists, Lortey. Rather, counsel simply moved on to exercise defendant's remaining peremptory challenges:

"THE COURT: But be that as it may, I've listened to your [the prosecutor's] explanations. I find them to be absolutely race neutral. In fact, I would have knocked Lortey off for cause if asked. Hewitt, clearly he's had such experiences himself with being harassed himself, and Prosser -

"MR. MARAYNES [the prosecutor]: Also just to add to my record, Mr. Prosser both, you know, I noticed him during the last panel and during this panel, he was constantly making faces and it was just - he said I don't want to be here, so I think that it was [sic] that he wouldn't have been a good juror for race neutral reason[s].

"THE COURT: You're covered. Denied.

"MR. FERNANDEZ [defense counsel]: We'd ask to use defense seven, sorry, defense eight for seat two, Ms. Ramphal. Defense nine, seat three, Mr. Singh. And the last . . ."

The next day, March 5, 2013, before the jurors were called into the courtroom to begin the trial, defense counsel offered to provide the court with case law concerning the *Batson* issue. The court stated that, while it would not change its ruling, it would accept a written brief on the issue. As he had done before, defense counsel then moved on to a different issue, without asking the court to give him the opportunity to argue that the prosecution's explanation was pretextual:

"MR. FERNANDEZ [defense counsel]: Good morning, your Honor. With respect to the *Batson* challenge that I had -

"THE COURT: The record is done. What else?

"MR. FERNANDEZ: Well, your Honor –

"THE COURT: I said the record is done. What else?

"MR. FERNANDEZ: Your Honor asked me whether there's case law –

"THE COURT: Fine. You got your appeal. Fine. Bring it up on appeal. I'm not changing it now.

"MR. FERNANDEZ: I would like to put the case –

"THE COURT: Submit it in writing. That's what I told you yesterday. What else?

"MR. FERNANDEZ: Can I have a brief on the issue?

"THE COURT: Sure. Absolutely. What else?

"MR. FERNANDEZ: With respect to missing Rosario for Officer Bradley who I understand will testify today, she's issued a summons to a witness at the scene Shamala Miller. The summons itself has been destroyed, I understand."

During trial, just before the defense rested its case, counsel moved for a mistrial based on the *Batson* issue and filed a written submission in support of that application. The court denied the motion but noted that the written *Batson* submission was "part of the record."

The foregoing excerpts from the transcripts of the proceedings on March 4 and 5, 2013, demonstrate that defense counsel never brought to the court's attention that, after the People offered *Batson*-compliant reasons for the peremptory

challenges to which the defense had objected, defendant was entitled to an opportunity to attempt to persuade the court that the proffered reasons were pretextual. This omission is particularly glaring in the colloquy on March 4, which took place when further questioning of the panelists was still possible, before the selected jurors had been sworn and the challenged panelists had been excused. Thus, any uncertainty in the existing record as to which panelist gave which responses, and any ambiguity as to what the panelists' responses meant, is entirely due to defense counsel's evidently deliberate judgment not to pursue the issue of pretext. I see no reason to presume, as the majority evidently does, that this was an oversight on defense counsel's part. Rather, he may well have reached a reasoned determination, based on factors not apparent on the cold record, that a pretext argument would fail and was not worth pursuing. While the court apparently overlooked that the defense was entitled to an opportunity to argue pretext, nothing stopped defense counsel from raising that point with the court before moving on to other issues. The majority makes on defendant's behalf exactly the kind of "'squelch[ing]'" argument that the Court of Appeals rejected in *Smocum* (99 NY2d at 423).

Defendant's very brief written submission in support of the application for a mistrial under *Batson* failed to preserve the

specific *Batson* errors now raised on appeal, apart from the issue of whether black men constitute a cognizable class – which, as previously discussed, is a red herring on this appeal.⁵ The written submission focuses on defense counsel’s inaccurate perception that the court had “dismissed the suggestion that black men could be considered a cognizable class.” Although defense counsel wrote that the court had prevented him from “ask[ing] for a non-pretextual, race and gender neutral explanation for striking [Prosser, Hewitt and Lortey],” the record shows that counsel did ask for such an explanation, and that the prosecutor explained his challenges to Prosser and Hewitt. The written submission does not point out either the court’s failure to follow the three-step *Batson* protocol or the prosecutor’s failure to explain the striking of Lortey specifically. Nor does the written submission offer any argument that the explanations the prosecutor gave for challenging Prosser and Hewitt were pretextual.⁶

⁵Indeed, defendant’s appellate brief, by asking us to reach the *Batson* issue in the interest of justice “[t]o the extent that preservation was required,” essentially concedes that his trial counsel’s written submission did not succeed in preserving any issues that would provide grounds for reversal.

⁶Thus, defendant plainly did not preserve any issue concerning whether the record supports the prosecutor’s statement that Prosser and Hewitt had experienced negative encounters with the police. If the prosecutor, in explaining the striking of

In sum, defendant's *Batson* claims are not preserved for appellate review, and I would not deviate from our precedents to review them in the interest of justice. The majority's statement that declining to review unpreserved *Batson* claims "den[ies] a defendant the opportunity to have a fair jury seated" baselessly assumes that an unfair jury necessarily results any time defense counsel fails to preserve a *Batson* claim. Where a potential *Batson* claim that can be discerned on a cold record has not been asserted, or – as here – has been dropped, it may well be that, for reasons not appearing on the record, defense counsel made a

these panelists, mischaracterized what they had said during voir dire, it was defense counsel's responsibility to raise this point before the trial court during jury selection, when the facts could have been easily clarified (see *Smocum*, 99 NY2d at 423 [defense counsel failed to preserve a *Batson* issue when she failed to press for clarification of the People's reason for a challenge "at a time when any ambiguity – if indeed she actually perceived any ambiguity – could have been clarified"]). Contrary to the majority's assertion, my position is not based on any "presuppos[ition]" about which statements by jurors unidentified in the trial transcript "may be definitely assigned to Prosser," but on the undeniable fact that it was the responsibility of defense counsel, if he believed that his client might have a viable *Batson* claim, to make a clear record as to which panelist said what "at a time when any ambiguity . . . could have been clarified" (*Smocum*, 99 NY2d at 423). Further, the majority's suggestion – not made even in defendant's appellate brief – that the prosecutor did not challenge panelists, other than black men, who had expressed skepticism about the credibility of the police, is another point that defense counsel made no effort to raise before the trial court, even in his written submission. In any event, a person who merely expresses skepticism about the police is not similarly situated to a person who has actually had a negative experience with the police.

reasonable judgment that the *Batson* claim was not viable. The disturbing implication of the majority's statement is that we should uniformly review unpreserved *Batson* claims, turning the preservation requirement into a dead letter, and necessitating numerous hearings and retrials based on claims that were not pursued because defense counsel reasonably judged that they were not viable.

Further, not only are defendant's *Batson* claims unpreserved, but, in addition, the concessions of defense counsel on the existing trial record are sufficient to support rejecting those claims on the merits.⁷ After the court had ruled on the exclusions at issue, the court and counsel reconsidered the excluded jurors for possible service as an alternate to avoid having to call a new panel. At that point, defense counsel stated that he "would agree that Lortey and Prosser demonstrated in a variety of ways that they didn't want to be here" – plainly a concession that the People had race-neutral grounds for excluding these panelists. As to the third panelist, Hewitt, defense counsel stated: "Mr. Hewitt sounded to me not as, *not as*

⁷Thus, even if correct, there is no force in the majority's statement that our decisions declining interest-of-justice review to unpreserved *Batson* claims "almost invariably . . . state, as an alternate holding, that the *Batson* claim has no merit." Such an alternate holding would be appropriate in this case, as well.

stressed out by the situation, the experiences he's had" (emphasis added). In other words, defense counsel recognized that even Hewitt had been "stressed out" by his encounters with the police, albeit not to the same extent as Lortey and Prosser.⁸ Thus, defense counsel ultimately conceded that all three of the peremptorily challenged black men at issue had been excluded for valid, nondiscriminatory reasons. While Hewitt stated that he would try to assess the evidence impartially in spite of his past experience with the police, the prosecutor's judgment not to take those assurances at face value was not a *Batson* violation.

For the reasons discussed in the preceding paragraph, I conclude that, even upon a review of defendant's unpreserved *Batson* claims in the interest of justice (contrary to our precedents consistently declining to do so), those claims should be rejected on the merits on the existing record, and no further *Batson* hearing is required. But, as previously noted, I believe that we should adhere to our precedents and decline interest of justice review of defendant's unpreserved *Batson* claims. Either

⁸The majority renders defense counsel's statement on the record that Hewitt "sounded to me . . . not as stressed out by the situation" (emphasis added) as "he [Hewitt] did not appear to be 'stressed out' by his experiences." This is plainly an unfair presentation of the record, since it turns a statement comparing Hewitt's reaction to those of the other two men into a denial that Hewitt had any negative reaction at all to his experiences.

way, the *Batson* claims should be found unavailing, and we should proceed to consider the remaining issues defendant raises on her appeal.

It is apparently the majority's view that the Bronx County prosecutor, in striking the three potential jurors at issue, may have been motivated by prejudice against African American men. It seems to me, rather, that, in striking these panelists, the prosecutor was motivated by a desire to empanel a jury that would be fair to the People in a case involving a violent confrontation between the accused and police officers, in which police officers were the victims and chief witnesses for the prosecution. Indeed, defendant's trial counsel apparently took a similar view, since he did not press the *Batson* objection after the prosecutor articulated the basis for his exercise of the peremptory challenges. I see no justification for a further *Batson* hearing in view of defense counsel's choice not to pursue the claim further after the prosecutor gave a valid, race- and gender-neutral reason for his actions, and in view of defense counsel's concessions on the record that essentially defeat the claim in any event. For this Court to consider the issue nonetheless, and to remand the matter for a hearing, contrary to our consistent

practice of declining to review unpreserved claims of this nature, derails our *Batson* jurisprudence and establishes a precedent that we will struggle to distinguish in deciding future appeals.

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

ENTERED: MAY 10, 2016


CLERK