SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 3, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Friedman, Freedman, Feinman, JJ.

10355-
10356-
10357 The People of the State of New York,
Respondent,

-against-

Cleveland Lovett,
Defendant-Appellant.

Ind. 6013/02

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 19, 2003, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first and third degrees and reckless endangerment in the first degree, and sentencing him to an aggregate term of 27⅓ years to life, modified, on the law, to the extent of vacating the sentence on the reckless endangerment count and remitting for resentencing pursuant to CPL 470.20; order, same court and Justice, entered on or about December 7,

2005, which denied defendant's CPL 440.10 motion to vacate the judgment, affirmed; and order, same court and Justice, entered on or about February 14, 2006, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act (L 2004, ch 738), affirmed.

The court properly determined that substantial justice dictated the denial of defendant's resentencing application (*see generally People v Gonzalez*, 29 AD3d 400 [1st Dept 2006], *lv denied* 7 NY3d 867 [2006]). Resentencing "involves a complex balancing of several sets of compelling and in some respects competing concerns" (*People v Sosa*, 18 NY3d 436, 442 [2012]), requiring the "exercise of judicial discretion to determine whether relief to an eligible applicant is in the end consonant with the dictates of substantial justice" (*id.* at 443), and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]).

The record demonstrates that the court considered the totality of the circumstances and found that defendant did not deserve relief from his original sentence, only after the court balanced defendant's extensive criminal history, defendant's denial of any responsibility at trial and sentencing, and the circumstances of the underlying offenses, against the evidence of

defendant's postincarceration rehabilitation. Defendant's extensive criminal record in New York and New Jersey, including five felonies, is replete with crimes of violence that were very serious, regardless of whether they would technically qualify as New York violent felonies. Among other crimes, defendant has been convicted of possession of a loaded handgun and ammunition, aggravated assault with a deadly weapon, and home invasion robbery and burglary of another drug dealer's home, during which defendant covered a 12-year-old boy's head in a pillow case. This last offense was committed after defendant absconded after being released on bail on drug charges in New York. Defendant also has prior convictions for possession of large quantities of drugs, including near a school, and drug selling paraphernalia. The instant crimes not only involved a large quantity of drugs, but also a reckless high-speed car chase that resulted in injuries to innocent persons, property damage, and the complete sealing off of the West Side Highway for hours.

When interviewed by the Probation Department following his conviction, defendant "adamantly maintain[ed] his innocence." He reiterated this at sentencing, stating, "I don't think I deserve any sentence. I think I deserve my freedom." Defendant's insistence on his innocence notwithstanding the overwhelming evidence underscores his complete lack of insight into the

wrongful nature of his conduct and a lack of acceptance of responsibility for the harm he caused himself and others.

Thus, notwithstanding any injudicious remarks the court may have made at the time of sentencing and resentencing, the record supports the court's conclusion that the aggravating factors outweighed the mitigating factors cited by defendant, such as family ties and participation in prison rehabilitation programs (*see e.g. People v Ford*, 103 AD3d 492 [1st Dept 2013]), and the court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see People v Vargas*, 113 AD3d 570 [1st Dept 2014]).

With regard to defendant's direct appeal, there is a sentencing error which warrants remitting this case for further proceedings in accordance with CPL 470.20. At sentencing, the Assistant District Attorney pointed out that defendant, due to his extensive felony record, was actually eligible for sentencing on the reckless endangerment count to a life sentence as a discretionary persistent felony offender. However, the People only sought to have him sentenced as a second felony offender. The sentencing minutes reflect that the court sentenced defendant as a second felony offender to 3 1/2 to 7 years on the reckless endangerment count, consistent with the judge's stated intention to impose the maximum sentence for that count and to run it

consecutive to the concurrent sentences on the drug counts. Such a sentence would also be consistent with defendant having been sentenced as a second felony offender on one of the drug counts. However, in what can only be understood to be a scrivener's error by the clerk of the court that was then endorsed by the court, the worksheet and the commitment papers transmitted to the Department of Correction reflect a sentence of 2 1/3 to 7 years, which is not a legal sentence for a second felony offender.

We recognize that this particular legal error is not raised by defendant, but there are several cases that hold that courts may correct their own sentencing errors, as this is within their "'inherent power to correct their records, where the correction relates to mistakes, or errors, which may be termed clerical in their nature, or where it is made in order to conform the record to the truth'" (*People v Minaya,* 54 NY2d 360, 364 [1980], *cert denied* 455 US 1024 [1982], quoting *Bohlen v Metropolitan El. Ry. Co.*, 121 NY 546, 550-551 [1890]). This power is limited to "situations where the record in the case clearly indicates the presence of judicial oversight based upon an accidental mistake of fact or an inadvertent misstatement that creates ambiguity in the record" (*People v Richardson,* 100 NY2d 847, 853 [2003]). The corrective actions an intermediate appellate court may take on criminal appeals are circumscribed by CPL 470.20. This provision

allows the Appellate Division, upon finding that an illegal sentence was imposed, to choose whether to remit to the trial court for resentencing or to substitute its own legal sentence (*see People v LaSalle*, 95 NY2d 827 [2000]). Under these circumstances, we remit to the trial court for resentencing on the reckless endangerment count. In light of this remittitur, it is premature to reach the issue of whether imposition of a consecutive sentence for this count would constitute an abuse of discretion.

The court properly denied defendant's motion to vacate the judgment made on the ground of ineffective assistance of counsel. Although several portions of the court's jury instructions were similar to language we disapproved in *People v Johnson* (11 AD3d 224 [1st Dept 2004], *lv denied* 4 NY3d 745 [2004]), counsel's failure to object to them in a case tried before *Johnson* was decided fell within the range of reasonable competence. Unlike the instructions in *Johnson*, the disapproved language in the charge was made in the context of the requirement of a unanimous verdict, and did not misstate the constitutionally required standard of proof or compromise defendant's right to a fair trial. Since the jury could not have been misled as to the People's burden, which the court consistently defined as beyond a reasonable doubt, counsel's failure to object to the challenged

portions did not deprive defendant of his right to effective assistance of counsel (*see People v Miller*, 64 AD3d 471 [1st Dept 2009], *lv denied* 13 NY3d 798 [2009]; *People v Alvarez*, 54 AD3d 612 [1st Dept 2008], *lv denied* 11 NY3d 853 [2008]).

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

All concur except Tom, J.P. and Freedman, J. who dissent in part in separate memoranda as follows:

TOM, J.P. (dissenting in part)

Defendant appeals, as excessive, a sentence of 27⅓ years to life, aggregating concurrent sentences of 25 years to life and 12½ years to 25 years for criminal possession of a controlled substance in the first and third degrees with a consecutive sentence of 2⅓ years to 7 years for reckless endangerment in the first degree. While I concur in the majority's disposition of the appeal from the orders, I find the sentence imposed to be excessive to the extent that it subjects defendant to a harsher penalty than that prescribed for murder. Because public confidence in the fairness of the criminal justice system is promoted by consistency between the severity of the penalty imposed and the seriousness of the offense, I would modify the judgment to provide that the sentences run concurrently.

Defendant's reckless endangerment conviction resulted from his attempt to flee from two detectives who had stopped his vehicle for running a red light. This Court recognizes the public hazard presented by the use of an automobile in the attempt to evade police (*People v Nieves* 205 AD2d 173 [1st Dept 1994], *affd* 88 NY2d 618 [1996]; *see also People v Stokes*, 215 AD2d 225 [1st Dept 1995], *affd* 88 NY2d 618 [1996]). A primary consideration in imposing sentence is "the harm caused or

contemplated by the defendant" (*People v Notey*, 72 AD2d 279, 283 [2d Dept 1980], citing Model Penal Code § 7.01[2]).[1] Thus, in *Nieves* and *Stokes*, which involved the death of a pedestrian struck by a getaway vehicle, the driver was sentenced to a cumulative prison term of 25 years to life for felony murder, reckless endangerment and other crimes (*Stokes*, 215 AD2d at 225) and an accomplice was sentenced to a term of 20 years to life for felony murder (*Nieves*, 205 AD2d at 185-186).

The only life-threatening injuries involved in the matter at bar are those sustained by defendant when he fled from the rented car he was driving and jumped from an overpass, in the dark, without realizing that there was a 60-foot drop to the pavement below. As a result of the fall, defendant underwent extensive surgery, including the fusion of his elbow joints and the placement of screws in his arms, legs and pelvis. At the time of sentence, he was confined to a wheelchair, and his upper-body movement is permanently limited. Another appropriate consideration is the hardship that imprisonment presents to the

[1] The relevant considerations in determining sentence suggested by the American Law Institute are "the harm caused or contemplated by the defendant, the excuse or provocation, if any, for the defendant's conduct, the restitution which may compensate for the harm done, the prior criminal history of the defendant, the likelihood of recurrence of the defendant's conduct, and whether imprisonment would result in excessive hardship to the defendant" (*Notey* at 283; Model Penal Code § 7.01 [2]).

disabled defendant (*Notey*, 72 AD2d at 283). Furthermore, even if defendant is deemed to be beyond rehabilitation, he now represents a significantly reduced threat to public safety, which greatly diminishes the imperative to isolate him from the public. And while defendant's criminal history is extensive, those offenses involving violence are, given his present condition, unlikely to be repeated, which would include the instant crime of reckless endangerment and prior offenses of car theft and vehicular assault, as well as home invasion and burglary. As to deterrence, a would-be felon is unlikely to be further dissuaded from committing a criminal act in the furtherance of eluding police when faced with a prospective sentence of 28½ years to life (as corrected) rather than a mere 25 years to life. The distinction is not apt to be appreciated by a felon preoccupied with the immediate task of evading imminent capture. Thus, the deterrent effect of imposing consecutive sentences is negligible.

Retribution is a recognized objective of criminal punishment (*Notey* at 282). But if a sentence of 25 years to life is appropriate for a getaway driver convicted of felony murder and reckless endangerment, why is a greater punishment warranted for defendant in the present case, convicted of only drug possession and reckless endangerment? Finally, to visit greater retribution on a defendant who was permanently disabled as a result of his

crime serves no compelling penological objective (*Notey*, 72 AD2d at 282). The consecutive sentences imposed in this matter do not promote fairness in our criminal justice system and can only be regarded as unduly harsh and excessive.

Accordingly, the judgment should be modified to provide that the sentences be served concurrently.

FREEDMAN, J. (dissenting in part)

I respectfully dissent only to the extent that, in the interests of justice, I would vacate the sentence imposed for the A-1 narcotic felony conviction and grant defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2004, ch. 738 § 23 and Penal Law § 70.71 (4)(b)(i) for narcotic felonies committed prior to January 13, 2005, and would replace it with a determinate sentence of 20 years plus five years of post-release supervision. I would deny defendant's CPL 440.10 motion to vacate his conviction based on ineffective assistance of counsel, despite failure to object to a clearly erroneous charge, because of the overwhelming evidence of defendant's guilt.

After allegedly running a red light, defendant resisted an attempt by officers in an unmarked vehicle to pull him over, and led them in a high speed chase, colliding with several cars, injuring passengers in those cars, abandoning his wrecked car, and ultimately climbing over a wall on the West Side Highway. He then fell 60 feet to the road below where he was found unconscious and gravely injured. The pursuing police officers found 8 3/8 ounces of cocaine secreted in the trunk under the spare tire of defendant's rented vehicle. Defendant was charged with criminal possession of a controlled substance in the first degree (Penal Law § 220.21[1]), criminal possession of a

controlled substance in the third degree (Penal Law § 220.16[1]) and reckless endangerment in the first degree (Penal Law § 120.25) and was offered a sentence of 12 years to cover all of the charges. He rejected the offer, went to trial, and was convicted of all three felonies.

Defendant, then age 29, had five prior felony convictions, four of which occurred in New Jersey and three of which involved drug possession. All occurred between 1991 and 1997. None of his prior convictions constituted violent predicates, and he was not sentenced here as a prior violent predicate felon. Nevertheless, on August 19, 2003, the court imposed the maximum sentence of 25 to life for the first-degree possession count, 12 ½ to 25 years for the third-degree possession count, with the sentences to run concurrently, and 2⅓ to 7 years for the first-degree reckless endangerment count, with that sentence to run consecutively to the drug crime sentences.

On June 10, 2005 defendant moved for resentencing of the maximum 25-to-life sentence for the A-I felony under ch. 738 § 23, of the DLRA of 2004, which the court denied on February 14, 2006. Defendant argued that the underlying possession crime was nonviolent and was unrelated to gang activity or any major trafficking network, for which he claimed the severest sentences were designed. Although the quantity of drugs obtained from the

rented vehicle that he drove, wrecked and abandoned, was sufficient even under the most recent DLRA to constitute an A-1 felony, defendant averred that it was barely above the 8-ounce minimum and that sentencing to the maximum for an A-1 felony, 25 to life, was excessive.

Defendant points to his near perfect prison record in the 11 years that he has been incarcerated, with one tier-3 infraction caused by other inmates setting fire to his cell while he was in the library and resulting in his being put into protective custody, and two minor tier-2 infractions. He has been described as pleasant, polite and cooperative by prison personnel. He also furnishes a large number of letters from family members, community members, and friends attesting to his devotion to his family and concern for his community and church. Defendant also avers that he was accepted into the Family Reunion Plan based on being on the list for recommended programs and his record of positive behavioral comportment. Defendant further contends that he was addicted to alcohol and drugs and that his prior felonies were related to drug use, as indicated by his presentence report. Finally, it is noted that defendant was unconscious after his 60-foot fall, was hospitalized for four months thereafter and underwent multiple surgeries to repair the fractures in his arms, legs and pelvis. As a result of fusions to both of his elbows,

he very limited upper-body mobility. Because of his severe physical limitations, he has not been able to take advantage of all of the prison programs offered, but he has participated in all that he is able to.

The People respond by pointing to defendant's five felony convictions, noting that defendant spent 5 of the 10 years immediately prior to the current conviction incarcerated, but also describe facts relating to those convictions for which there is no support in the record. They also point to defendant's failure to take responsibility for his actions at the time of sentencing denying the charges against him despite the jury's verdict.

Although defendant was eligible under the statute, Justice McLaughlin, in denying defendant's request for resentencing, demonstrated the same contempt for him that he had when he first sentenced him. At the first sentencing, the Justice said, "If there is a parole officer, if there is a parole board, who ever thinks there is a reason to release you from jail, they should be fired. You are sentenced as best as possible to die in jail." At the resentencing denial, while acknowledging that defendant may have become "somewhat altered" he called defendant "a totally amoral individual" and stated that defendant's rehabilitation "simply [did not] change [the court's] assessment of his

complicity." The court also said that defendant "does not merit the consideration that the law had in mind for the weak, the misguided, the duped, who are traditionally the mule-like people or the addicted sellers of drugs who were within the contemplation of the statute." People like defendant "simply cannot fall appropriately within the contemplation of the statute."

The 2004 DLRA law specifically charges the court with

> "offering an opportunity for a hearing and . . . [u]pon its review of the submissions and findings of fact made in connection with the application, the court shall, unless substantial justice dictates that the application should be denied, in which event the court shall issue an order denying the application, specify and inform such person of the term of a determinate sentence of imprisonment it would impose upon such conviction as authorized for a class A-1 felony . . . ."

The court "may . . . consider the institutional record of confinement of such person." I believe that substantial justice, together with consideration of defendant's excellent institutional record, warrants granting resentencing on the A-1 felony in this case. The 8⅜ ounces of cocaine found in defendant's car is just above the minimum for an A-1 felony under current law, and defendant has participated in as many rehabilitative programs during his 11 years of incarceration as he could. The letters from his family, including his wife, son, mother-in-law and cousin, and from others in the community,

indicate that he has an extensive support network. Although defendant's total recklessness, for which he has also received the maximum consecutive sentence, contributed to the court's assessment of him as an "amoral" person, he has been severely punished for those utterly reckless actions by his self-inflicted wounds and permanent disabilities. His arrogant behavior at trial and sentencing, while not commendable, can be attributed, at least in part, to his lack of memory of the events that led to his long hospitalization and multiple surgeries. He did not, as the court implied, accuse police officers of pushing him over the wall, and did have a history of substance abuse dating back to his early teens.

I find the court's manifestation of utter contempt for defendant at the time of sentencing, both the initial sentencing and in response to the resentencing application, both injudicious and violative of the strong presumption favoring resentencing. We have reversed denials of re-sentencing applications where favorable prison records indicate rehabilitation (*People v Pratts*, 93 AD3d 435 [1st Dept 2012]; *see also People v Nunziata*, 87 AD3d 555 [2d Dept 2011]), in the face of an extensive record of felony and misdemeanor convictions (*People v Cephas*, 90 AD3d 557 [1st Dept 2011]), including violent felonies (*People v Lattimore*, 92 AD3d 617 [2012]).

The sentence of 25 to life, consecutive to the 2⅓ to 7 years for the reckless endangerment count, is greater than that given to most murderers. While defendant's recklessness, for which he duly received the maximum sentence, caused property damage and soft-tissue injuries, nothing that he did indicated an intent to cause injury or death to any individual, nor was he charged with or convicted of any intent to cause bodily harm. Moreover, the majority alleges details about defendant's New Jersey convictions which derive from hearsay contained in the People's affirmation in response to defendant's petition to be resentenced and which are not in the record before us. Defendant was sentenced to or incarcerated for relatively short periods for those prior crimes, which was why he was not incarcerated at the time of this crime. For these reasons, I would reduce defendant's drug conviction sentence to a determinate sentence of 20 years, five years above the minimum.

Simultaneously with his application for resentencing under the DLRA of 2004, on June 10, 2005, defendant moved to have his conviction vacated pursuant to CPL 440.10, alleging ineffective assistance of counsel based on his attorney's failure to object to jury instructions that seemingly shifted the burden of proof and called into question the beyond a reasonable doubt standard. Specifically, the court gave the following instructions:

"During the course of a criminal trial every accused, every defendant in a criminal case is entitled to every reasonable inference which can be drawn from the evidence. And if there's a situation where two inferences are of equal weight and strength, one inference–one factual inference that is consistent with guilt and the other factual inference is consistent with innocence, then any jury is required to find the factual inference of innocence.

"Now that relates to when you are trying to find facts in the jury room . . . . my suggestion, which you do not have to follow, is that you attend to and address and try to resolve only the factual things that are necessary for you to make a decision about whether or not the prosecution has proven the elements of the crime beyond a reasonable doubt . . . ."

The court further charged:

"Now, when you get into the jury room there may be differences of opinion. You may hear things that surprise you, that is what happens in deliberations in elections. 50.1 beats 49.9 each and every time, whether you're voting for president or the new American Idol, it's 50.1 beats 49.9 all the time. For over 225 years juries have been unanimously deciding cases, and they come from the same pool, do the voting jurors as the voting electorate.

"So how is it possible that people in elections can't agree at all on a candidate, they have never voted anybody in unanimously, and yet unanimously decide cases? The clear and obvious answer is during the course of deliberations, people change their minds."

In 2004, this Court reversed a conviction and remanded the case for a new trial when the same Justice gave the exact same charge(*People v Johnson,* 11 AD3d 224 [1st Dept 2004], *lv denied* 4 NY3d 745 [2004]). The Court stated that it had "repeatedly expressed its disapproval of the 'two inference' charge." The

Court went on to find the 50.1 beats 49.9 language as potentially confusing and undermining of the jury's understanding of the presumption of innocence, implying that the jury could use the preponderance of evidence rather than the beyond a reasonable doubt standard (*People v Johnson at* 227). However, unlike counsel in *Johnson,* defense counsel in this case, failed to object to the charge.

Since the Justice did articulate the beyond a reasonable doubt burden and the overall tenor of the charge was accurate, together with the overwhelming evidence of reckless behavior presented by the People, I do not believe that the failure to object to the erroneous charge alone constituted ineffective assistance of counsel. Therefore, I would not reverse the convictions based on ineffective assistance of counsel and would affirm the 2⅓ to 7 years consecutive sentence for reckless endangerment.

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

ENTERED: APRIL 3, 2014

CLERK

Sweeny, J.P., Renwick, Feinman, Clark, JJ.

10861 Betty Luna, Index 300764/09
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

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Michael Gunzburg, P.C., New York (Michael Gunzburg of counsel), for appellant.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered September 18, 2012, which, inter alia, granted defendants' motion to set aside the jury's award of $500,000 for past pain and suffering and $500,000 for future pain and suffering over 34 years to the extent of ordering a new trial on those damages unless plaintiff stipulated to a reduced award of $100,000 for past pain and suffering and $250,000 for future pain and suffering, unanimously reversed, on the facts, without costs, the motion denied, and the jury's verdict reinstated.

We find that the jury's award for past and future pain and suffering is fully supported by the trial record and is consistent with what constitutes reasonable compensation under the circumstances presented. The record shows that the time between the date of the incident and the date of verdict is 3

years and 6 months, and plaintiff's life expectancy is 34.5 years. The evidence at trial established that as a result of the fall on defendants' bus, the 47-year-old plaintiff suffered a torn meniscus in her right knee, underwent arthroscopic surgery, was unable to work for three months, used a cane for more than one month, underwent 12 extremely painful sessions of physical therapy, continues to experience significant pain requiring her to take medication and limit her activities, and has permanently aggravated and activated arthritis in her knee that is progressive. In addition, medical doctors explained that she sustained a permanent partial disability and that it is "highly probable" that she will require a future knee replacement. Given the severity of plaintiff's injury, ongoing problems and expected future limitations, the jury's award for past and future pain and suffering cannot be said to deviate materially from what is reasonable compensation (*see* CPLR 5501[c]; *see e.g. Diaz v City of New York*, 80 AD3d 425 [1st Dept 2011]; *Harris v City of N.Y. Health & Hosps. Corp.*, 49 AD3d 321 [1st Dept 2008]; *Calzado v New York City Tr. Auth.*, 304 AD2d 385 [lst Dept 2003]). Thus, the trial court should not have reduced the jury's estimation of damages and we reinstate the original awards for those categories of damages.

The Decision and Order of this Court entered herein on November 21, 2013 is hereby recalled and vacated (*see* M-6356 decided simultaneously herewith).

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

ENTERED: APRIL 3, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, DeGrasse, Gische, JJ.

11701 Karen Manor Associates LLC, et al., Index 307128/09
Plaintiffs-Respondents,

-against-

Virginia Surety Company, Inc., et al.,
Defendants-Appellants,

Arch Insurance Group, Inc., et al.,
Defendants-Respondents.

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Carroll, McNulty & Kull L.L.C., New York (Kristin V. Gallagher of counsel), for Virginia Surety Company, Inc., appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Greenwich Insurance Company, appellant.

Goldberg & Carlton, PLLC, New York (Michael S. Leyden of counsel), for Karen Manor Associates and Finkelstein Morgan LLC, respondents.

Clausen Miller PC, New York (Melinda S. Kollross of counsel), for Arch Specialty Insurance Company, respondent.

Manuel Moses, New York, for Comba Gogo, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 4, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment declaring that, from the date of the order forward, defendants Virginia Surety Company, Inc. and Greenwich Insurance Company shall share the costs of defending them in the underlying personal injury action on a time-on-the-risk basis,

granted defendants Arch Insurance Group Inc. and Arch Specialty Insurance Company's (together, Arch) motion for summary judgment dismissing the complaint as against them, and denied Virginia's motion for summary judgment declaring that it has no obligation to indemnify plaintiffs in the underlying action, declaring instead that Virginia is obligated to indemnify plaintiffs on a time-on-the-risk basis, unanimously affirmed, without costs.

The motion court correctly determined that an issue of fact exists whether the infant suffered a physical injury, i.e., sickness or disease resulting from exposure to and ingestion of lead paint, during the Virginia policy period. The motion court also correctly concluded that Arch was entitled to summary judgment dismissing the complaint. Unrefuted evidence showed that the lead paint condition was abated before the Arch policy period commenced. The April 7, 2003 notification from the New York City Department of Mental Health and Hygiene is prima facie evidence that the lead paint condition had been abated (Public Health Law § 10). In addition, plaintiff testified that repairs to correct the conditions were made in all relevant rooms in the apartment.

The motion court also correctly declined to, at this time, apportion defense or indemnification costs to the New York Liquidation Bureau (NYLB) for the liquidated nonparty Villanova

Insurance Company, since it has not been brought into this action. This Court's decision in *State of N.Y. Ins. Dept., Liquidation Bur. v. Generali Ins. Co.* (44 AD3d 469 [1st Dept 2007]) was properly relied upon by the motion court to conclude that the insurance companies that are before the Court in this action should proportionately share, according to time on risk, all defense and indemnification costs, including those, if any, that may ultimately be attributable to the NYLB. The insurers retain the right to later obtain contribution from other applicable policies.

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

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12006N-
12007N Index 603408/08

Campion A. Platt Architect, P.C., et al.,
Plaintiffs-Respondents,

-against-

Dolly Lenz, et al.,
Defendants-Appellants.

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Jamie Andrew Schreck, P.C., New York (Jamie Andrew Schreck of counsel), for appellants.

Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Paul Wooten, J.), entered June 18, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiffs' cross motion to strike defendants' answer, defenses, and counterclaims, unanimously dismissed, without costs, as untimely. Appeal from amended order, same court and Justice, entered on or about August 6, 2012, unanimously dismissed, without costs.

Defendants' appeal from the June 18, 2012 order is untimely since their notice of appeal was filed months after the order was served on them with notice of entry (*see* CPLR 5513; *Ahmed v Zamor-Sadek*, 282 AD2d 381 [1st Dept 2001]). Plaintiffs properly served notice of entry upon defendants' former counsel, who was then counsel of record, and counsel, in turn, served defendants

with a copy of the order with notice of entry, and filed proof of service, in compliance with the motion court's order. Defendants' denials of receipt of the certified mail packages, which were returned marked "refused," is insufficient to rebut the showing of service. The record as presented does not permit review of the August 6, 2012 order.

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

ENTERED: APRIL 3, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12023 The People of the State of New York, Respondent,

Ind. 4349/05

-against-

Austen Ugweches,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered May 22, 2009, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of six months, concurrent with five years' probation, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendant is entitled to a new trial because he received ineffective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Counsel's performance, in this case in which defendant was convicted of assaulting a police officer with his motor vehicle, was objectively deficient in several respects. These deficiencies, viewed cumulatively, deprived defendant of a fair trial and tend to undermine confidence in the outcome. We

conclude that defendant's claims are reviewable on the basis of the trial record, and that he has made the necessary showing of prejudice.

Most prominently, in a case that depended heavily on the credibility of the complainant, counsel failed to object to hearsay testimony indicating that several unnamed out-of-court declarants supported the complainant's version of the incident. These bystander statements were not admissible under any theory, and we reject the People's arguments to the contrary. These declarations did not qualify as excited utterances, and, under the circumstances of the case, they were not admissible as background information to complete the narrative and explain police actions. At a prior trial, at which defendant was represented by different counsel, and which ended in a hung jury, the content of these declarations was not placed in evidence.

We are unable to discern any strategic basis for counsel's failure to object to this highly prejudicial hearsay evidence. Any benefit that defendant may have gained when his counsel attempted to suggest that a police witness fabricated the existence of the bystander declarations was clearly outweighed by the prejudicial effect of having the jury hear the declarations in the first place. Defendant had nothing to lose, and much to gain, by keeping the declarations completely out of the case.

Furthermore, the trial record reveals that counsel was unaware, and apparently surprised, that the content of these declarations was not in evidence at the first trial. This tends to suggest that counsel's failure to object had nothing to do with strategy.

We find this to be one of the rare cases where the unexpanded trial record establishes both the unreasonableness of an attorney's failure to make objections and the prejudicial effect of that failure upon a defendant's right to a fair trial (*see People v Fisher*, 18 NY3d 964 [2012]; *compare People v Cass*, 18 NY3d 553, 564 [2012]).

Counsel's failure to subpoena the police officer's medical records or to call the medical expert who testified at the first trial to testify that the officer's records did not corroborate her allegation that she sustained a physical injury as a result of the incident constitutes an additional deficiency in counsel's performance. Finally, defense counsel's failure to impeach the complaining witness' testimony with her prior inconsistent statement before the Civilian Complaint Review Board concerning whether she was knocked down is not explainable as a reasonable defense tactic. We note that the complainant denied making the statement before the Review Board, and we note that at defendants' first trial, prior counsel took proper steps to establish the inconsistency.

The People's case was not overwhelming, and defendant's claim of prejudice is further supported by the fact that there was a hung jury in defendant's prior trial at which the offending evidence was absent and defendant's medical evidence and evidence concerning the prior inconsistent statement was introduced.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12127 The People of the State of New York, Respondent, Ind. 2676/10

-against-

Todd Holley, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Boies, Schiller & Flexner LLP, New York (Stephen Kyriacou, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered March 1, 2011, convicting defendant of attempted robbery in the third degree and two counts of assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly denied defendant's motion to suppress identification testimony. Viewing, as a whole, the entire procedure whereby a witness identified defendant from a series of photo arrays generated by the police photo manager computer system, we conclude that the procedure was not unduly suggestive. The detective's testimony about how the computerized procedure

operates sufficiently established its fairness. The fact that the police failed to preserve the arrays viewed by the witness does not warrant a different conclusion (*see People v Patterson*, 306 AD2d 14 [1st Dept 2003], *lv denied* 1 NY3d 541 [2003]; *People v Campos*, 197 AD2d 366 [1st Dept 1993], *lv denied* 82 NY2d 892 [1993]). We also conclude that the detective entered sufficient information about the description of the perpetrator to ensure that the computer generated a fair selection of photos.

Based on our review of the photograph of the ensuing lineup, we conclude that the record also supports the hearing court's finding that the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Any differences between defendant and the other participants, including an age disparity not fully reflected in the participants' actual appearances, and a weight disparity that was minimized by having the participants seated, was not so noticeable as to single defendant out (*see e.g. People v Amuso*, 39 AD3d 425 [1st Dept 2007], *lv denied* 9 NY3d 862 [2007]).

We have considered defendant's arguments concerning a detective's brief background testimony about his "investigation," as well as his arguments about events that occurred during the

defense and prosecution summations, and we find no basis for reversal.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12128 Nicholas Joplin, Index 310197/09
Plaintiff-Appellant,

-against-

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

_____

Ephrem J. Wertenteil, New York, for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Victoria Scalzo of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 15, 2013, which, to the extent appealed from, granted defendants' motion to renew plaintiff's motion for partial summary judgment on the issue of liability and, upon renewal, denied plaintiff's motion, unanimously reversed, on the law, without costs, and the motion to renew denied.

In its prior order, the court granted plaintiff's motion based on the undisputed evidence that plaintiff's car was stopped at an intersection when it was hit in the rear by defendants' vehicle. Defendants' motion for renewal should have been denied. The purported new evidence consisting of plaintiff's deposition testimony did not warrant a different outcome (*see Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628 [1st Dept 2011]; CPLR 2221[e][2]). A rear-end collision with a stopped vehicle is

prima facie evidence of negligence on part of the operator of the moving vehicle (*see Renteria v Simakov*, 109 AD3d 749 [1st Dept 2013] [affirmance of an order granting plaintiff's cross motion for summary judgment in a case involving a rear-end collision]). Defendants' evidence that plaintiff's vehicle suddenly stopped was insufficient to raise an issue of fact with respect to their liability (*see Williams v Kadri*, 112 AD3d 442 1st Dept 2013]; *Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]).

There is no merit to defendants' argument that *Maniscalco v New York City Transit Authority* (95 AD3d 510 [1st Dept 2012] and *Calcano v Rodriguez* (91 AD3d 460 [1st Dept 2012]) represent a change in the law that would have affected the outcome of the motion. We reject the argument because both cases were decided before *Renteria*.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12129 Rodney H. Brown, Index 153803/12
Plaintiff-Appellant,

-against-

Deutsche Bank National Trust Company, etc., et al.,
Defendants-Respondents.

_____

Carl E. Person, New York, for appellant.

Bryan Cave LLP, New York (Scott H. Kaiser of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 14, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly rejected plaintiff's claim that securitization of his mortgage notes was improper (*see Stafford v Mortgage Elec. Registration Sys., Inc.*, 2012 WL 1564701, *4, 2012 US Dist LEXIS 61413, *13 [ED Mich 2012]; *Rodenhurst v Bank of Am.*, 773 F Supp2d 886, 898 [D Haw 2011]), and aptly discerned that plaintiff's contention that defendants lack standing to enforce the notes was a mere semantic variation of that claim. To the extent plaintiff claimed that the securitization was procedurally improper, and to the extent that such a claim is cognizable (*see Johnson v HSBC Bank USA, NA*, 2012 WL 928433, *2, 2012 US Dist LEXIS 36798, *6-7 [SD Cal 2012]), his allegations

were conclusory.

Plaintiff's allegations of improper increased mortgage payments and improper notices of such increases were flatly contradicted by provisions in the loan documents (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]). The motion court correctly found that plaintiff had failed to allege that his next mortgage payments of the minimum amount authorized under the loan documents would not have triggered defendants' right to increase his monthly payment obligations; his assertion that he had not triggered such right at the time of the notices avoided the issue.

The loan documents lacked any provision imposing on defendants a duty to modify the notes or negotiate a workout (*see New York City Educ. Constr. Fund v Verizon N.Y. Inc.*, 114 AD3d 529 [1st Dept 2014]), and such terms cannot be added pursuant to the covenant of good faith (*see D & L Holdings v Goldman Co.*, 287 AD2d 65, 73 [1ST Dept 2001], *lv denied* 97 NY2d 611 [2002]).

Plaintiff's cause of action for violation of General Business Law § 349 was properly held untimely, as it accrued upon

defendants' first notice of mortgage payment increases in April 2009, more than three years before the July 2012 service of the pleadings in this action (*see* CPLR 214).

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

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12130 The People of the State of New York, Respondent, Ind. 8104/00

-against-

Julio Nova, also known as Rivera Jones, Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered June 21, 2012, resentencing defendant, as a second violent felony offender, to a term of nine years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise

unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). At the time of resentencing, defendant had not completed his aggregated sentence (*see People v Brinson*, 21 NY3d 490 [2013]).

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12131 RK Solutions, LLC, Index 652128/10
Plaintiff-Appellant,

-against-

George Westinghouse Information Technology High School, et al.,
Defendants-Respondents.

_____

Law Office of Allen Bodner, New York (Allen Bodner of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about February 15, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims for breach of contract, promissory estoppel and unjust enrichment, unanimously affirmed, without costs.

The complaint alleges that defendants contracted with plaintiff for the use of plaintiff's online communications product at no charge for more than a year, in exchange for defendants recommending the product to other public schools and assisting plaintiff's marketing efforts. However, as the court correctly noted, the record is bereft of a signed contract between the parties which includes these terms. The only

executed document in the record is silent as to the terms of the agreement alleged in the complaint. The court properly dismissed plaintiff's breach of contract claim based on the statute of frauds in that the alleged contract by its terms could not be performed within one year (*see* General Obligations Law § 5-701[a][1]; *Tradewinds Fin. Corp. v Repco Sec.*, 5 AD3d 229 [1st Dept 2004]).

The court also correctly dismissed the promissory estoppel cause of action because, "[a]bsent an unusual factual situation [not present here,] estoppel is not available against a governmental agency engaging in the exercise of its governmental functions" (*see Advanced Refractory Tech. v Power Auth. of State of N.Y.*, 81 NY2d 670, 677 [1993]). Based on the allegations of the complaint, defendants were engaged in the governmental function of providing students with resources to further their education, insulating defendants from an estoppel claim.

An unjust enrichment claim "'rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another'" (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010] [emphasis omitted]). The unjust enrichment claim was also properly dismissed because the complaint fails to allege how

defendants benefitted from the use of plaintiff's product for a limited time period, where defendant expended time and resources in training personnel to use the product, that may not have satisfied defendants' security requirements.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, DeGrasse, Freedman, JJ.

12132 Michael Lambe, Index 108486/10
Plaintiff-Appellant,

-against-

Lenox Hill Hospital,
Defendant-Respondent,

Hayt, Hayt & Landau, LLP, et al.,
Defendants.

_____

Silver & Silver, LLP, New York (Herbert J. Silver of counsel), for appellant.

Law Office of Andy S. Oh, PLLC, Forest Hills (Andy S. Oh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered April 8, 2013, which granted defendant Lenox Hill Hospital's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

The time to commence this action against Lenox Hill Hospital for negligent handling of a claim for insurance coverage began to run in July 2005, when plaintiff's insurers denied the claim (*see Lavandier v Landmark Ins. Co.*, 44 AD3d 501 [1st Dept 2007], *lv denied* 10 NY3d 713 [2008]). Since plaintiff did not commence

this action until June 28, 2010, the action is untimely (*see* CPLR 214[4]). Plaintiff's contention that he was unaware of the denial of the insurance claim is belied by his admitted receipt of a "Final Notice" from the hospital in December 2005.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12133 In re Contest Promotions-NY LLC, Index 100779/13
Petitioner-Appellant-Respondent,

-against-

New York City Board of Standards
and Appeals, et al.,
Respondents-Respondents-Appellants.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 1, 2013, to the extent appealed from, granting the petition to the extent of annulling the revocation of 10 accessory sign permits which had been issued to petitioner and ordering respondent New York City Department of Buildings to issue such permits, and denying so much of the petition as sought declaratory relief, unanimously modified, on the law, to the extent of denying the petition insofar as it seeks to annul respondents' determination, reinstating respondents' determination, and dismissing the proceeding brought pursuant to CPLR article 78, and otherwise affirmed, without costs.

Respondent New York City Board of Standards and Appeals' (BSA) determination that the signs at issue constituted

"advertising" signs, rather than "accessory" signs, under New York City Zoning Resolution § 12-10, was not arbitrary and capricious (*see Matter of Atlantic Outdoor Adv., Inc. v Srinivasan*, 110 AD3d 598 [1st Dept 2013]). The court should have deferred to BSA's fact-sensitive analysis of whether the accessory use of the sign was conducted on the same zoning lot as the principal use to which it is related, was clearly incidental to and customarily found in connection with the principal use of the property, and was substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 420 [1998]). Similarly, the court properly denied petitioner's requests for declaratory relief as to the subject permits and similar permits.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12134-
12135 In re Contest Promotions-NY LLC, Index 112333/10
103868/12
Petitioner-Respondent,

-against-

New York City Department of Buildings,
et al.,
Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellants.

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

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 16, 2012, granting petitioner's order to show cause and petition to the extent of annulling the determination, dated August 30, 2012, which reinstated five notices of violation issued against petitioner's signs at two locations and imposed fines on petitioner, unanimously reversed, on the law, without costs, the petition denied, respondents' determination reinstated, and the proceeding brought pursuant to CPLR article 78 dismissed. Order, same court and Justice, entered June 19, 2013, which consolidated the index numbers, unanimously dismissed, without costs, as academic.

The determination of respondent New York City Environmental Control Board (ECB) that the signs at issue constituted

"advertising" signs, rather than "accessory" signs, under New York City Zoning Resolution § 12-10, was not arbitrary and capricious (*see Matter of Atlantic Outdoor Adv., Inc. v Srinivasan*, 110 AD3d 598 [1st Dept 2013]). The court should have deferred to ECB's fact-sensitive analysis of whether the accessory use was clearly incidental to and customarily found in connection with the principal use of the property (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 420 [1998]).

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12136 In re Jadaquis B., and Others,

Children Under the Age
of Eighteen Years, etc.,

Sameerah B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child Jadaquis B.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children Dashell J., Joshua B. and Jaziah B.

_____

Order of fact-finding, Family Court, Bronx County (Fernando Silva, J.), entered on or about November 29, 2011, which, to the extent appealed from, after a hearing, found that respondent mother neglected two of her children and derivatively neglected the other two, unanimously affirmed, without costs.

The finding that respondent neglected Joshua and Jaziah by failing to provide them with a proper education is supported by a preponderance of the evidence, including evidence of excessive school absences during the 2009-2010 academic year, which had a

detrimental effect on the children's school performance and caused each to repeat a grade (*see* Family Court Act § 1012(f)(i)(A); *Matter of Annalize P. [Angie D.]*, 78 AD3d 413 [1st Dept 2010]). Respondent failed to offer credible evidence in support of a reasonable justification for failing to send the children to their designated school, or to establish that the children were in any physical danger at their school, which would support a safety transfer to another school.

A preponderance of the evidence supports the finding that respondent was also medically neglectful of Joshua and Jaziah, including evidence that, although she acknowledged the children's serious behavioral problems, she failed to follow through on numerous referrals to engage them in mental health services (*see e.g. Matter of Charlie S. [Rong S.]*, 82 AD3d 1248 [2d Dept 2011], *lv denied* 17 NY3d 704 [2011]).

The credible evidence supports the court's finding that respondent also subjected Joshua and Jaziah to excessive corporal punishment with the use of belts and a plastic bat (*see e.g. Matter of Alysha M.*, 24 AD3d 255 [1st Dept 2005], *lv denied* 6 NY3d 709 [2006]). Joshua and Jaziah each provided a detailed account of how they were disciplined by respondent. Their out-of-court statements are further corroborated by the caseworker's testimony that she saw marks on the children's legs that were

partially attributed to being hit by respondent, as well as their older brother's independent statements (*see e.g. Joshua B.*, 28 AD3d 759, 761 [2d Dept 2006]; *Matter of Anahys V. [John V.]*, 68 AD3d 485, 486 [1st Dept 2009], *lv denied* 14 NY3d 705 [2010]).

The court's finding of derivative neglect of Jadaquis and Dashell is supported by a preponderance of the evidence of respondent's neglect of Joshua and Jaziah, which "'demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [her] care'" (*see Matter of Ian H.*, 42 AD3d 701, 704 [3d Dept 2007] [internal quotation marks omitted], *lv denied* 9 NY3d 814 [2007]).

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12137 Olsenhaus Pure Vegan, LLC, Index 651448/10
Plaintiff-Appellant-Respondent,

-against-

Electric Wonderland, Inc., doing business as Showroom Seven,
Defendant-Respondent-Appellant.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant-respondent.

Santamarina & Associates, New York (Gil Santamarina of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 11, 2013, which, after a nonjury trial, held that defendant Electric Wonderland, Inc. d/b/a Showroom Seven breached an agreement with plaintiff Olsenhaus Pure Vegan, LLC (Olsenhaus), denied Olsenhaus's request to recover lost profits, and awarded Olsenhaus damages in the amount of $17,000 representing "showroom rent" paid under the contract, unanimously modified, on the law, the damage award vacated, and otherwise affirmed, without costs.

Showroom Seven agreed to the terms of an addendum, by signing the agreement, which clearly states that "S7 agrees to terms of Addendum provided by Designer- page attached." A "writing should as a rule be enforced according to its terms"

(*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). To the extent two versions of the addendum were submitted, it is undisputed that the first paragraph of each version provides that Showroom Seven "agreed to represent, promote in every way possible and take orders for Designer, to reach growth in sales as discussed." The court's finding that defendant did not use "best efforts" to promote or to promote Olsenhaus' line "in every way possible" was supported by a fair interpretation of the evidence (*Thoreson v Penthouse Intl.*, 179 AD2d 29, 31 [1st Dept 1992], *affd* 80 NY2d 490 [1992]).

Nevertheless, the court properly concluded that Olsenhaus was not entitled to recover lost profits. To the extent Olsenhaus seeks lost profits for a five-year period, such damages are speculative, as its assumption that it would have remained in contract with Showroom Seven for five years could not be established with reasonable certainty. To the extent it seeks lost profits in the amount of $1 million for 2010 (i.e., $500,000 for two seasons), such lost profits were not within the contemplation of the parties as a probable result of a breach at the time they entered into the agreement and could not be established with reasonable certainty (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). The evidence surrounding the negotiation and execution of the contract does not show that the

parties expected Showroom Seven to bear the responsibility for any lost profits sustained by Olsenhaus. Indeed, all the witnesses acknowledged that sales revenue of $500,000 per season was mere expectation, and Showroom Seven's principal testified that he would not guarantee minimum sales in his sales agreements, especially with emerging designers, as there were "too many variables involved in procuring success in sales in our very competitive and fickle industry." Such evidence undermines the conclusion that the parties contemplated that Showroom Seven would assume liability for Olsenhaus' loss of anticipated revenue (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-321 [1989]; *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183-185 [1st Dept 2007], *affd* 14 NY3d 791 [2010]).

The record also shows that it was not reasonably certain that Olsenhaus could have made $1 million in sales in 2010. Olsenhaus was an emerging brand and had been in the business for only 15 months before it entered into the agreement with Showroom Seven. Olsenhaus' and Showroom Seven's principals both describe the fashion industry as "fickle," and the evidence shows that success of a line depends on numerous factors, such as the economy, buyers' taste, market position, and price points (*see Kenford*, 67 NY2d at 262-263). Also, the profit history of Olsenhaus, an emerging eco-friendly clothing line, does not

support a finding of projected profits of $1 million a year with reasonable certainty (*see Awards.com*, 42 AD3d at 185; *Zink v Mark Goodson Prods.*, 261 AD2d 105 [1st Dept 1999], *lv dismissed* 94 NY2d 858 [1999]).

The court erred in awarding Olsenhaus $17,000 representing "showroom rent" that Olsenhaus paid during the 5½ month relationship. The payment of showroom rent was not caused by the breach of contract, and the award of rent would not place it in as good a position as it would have been had the contract been performed (*Brushton-Moira Cent. School Dist. v Thomas Assoc.*, 91 NY2d 256, 261 [1998]).

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12138- Ind. 944/09
12138A The People of the State of New York,
Respondent,

-against-

Keith Fagan,
Defendant-Appellant.

_____

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

Keith Fagan, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Clara Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered July 6, 2010, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 18 years to life, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing in accordance with this decision, and otherwise affirmed. Order, same court and Justice, entered July 3, 2013, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously reversed, on the law, and the motion granted as indicated above.

Under the circumstances of the case, defense counsel

rendered ineffective assistance at the July 6, 2010 sentencing proceeding when he failed to challenge the constitutionality of defendant's 2000 New York County conviction, which was used as a predicate conviction in adjudicating defendant a persistent violent felony offender (*see* CPL 400.15[7][b]; 400.16[2]). It is undisputed that at his 2000 plea proceeding, defendant was not advised that his sentence would include postrelease supervision (*see People v Catu*, 4 NY3d 242 [2005]).

In connection with the 2000 conviction, Supreme Court, New York County added postrelease supervision to the sentence in 2009 to cure an unlawful administrative imposition of PRS (*see People v Sparber,* 10 NY3d 457 [2008]). In May, 2010 that court removed PRS from the sentence in accordance with *People v Williams* (14 NY3d 198 [2010]). Contrary to the People's sole argument on appeal addressing the *Catu* issue, the vacatur of defendant's PRS could not cure the *Catu* error, or give defendant the benefit of his plea, since at the time of the vacatur he had already served four years of PRS, and had also spent time in jail in violation of that supervision. Accordingly, neither Penal Law § 70.85 nor *People v Pignataro* (22 NY3d 318 [2013]) has any applicability to the issues here.

In connection with the instant CPL 440.20 motion, the attorney who represented defendant at his 2010 persistent violent

felony offender adjudication and sentencing acknowledged that he had no strategic reason for failing to challenge the 2000 conviction, and that he never inquired into whether defendant had been advised about PRS at his 2000 plea proceeding. He further affirmed that had he been aware that the conviction was obtained in violation of *Catu*, he would have in fact challenged its use to enhance defendant's sentence in this case. Thus, this was not a case where an attorney may have reasonably believed that it would have been futile to raise a *Catu* issue regarding the constitutionality, for predicate felony purposes, of defendant's 2000 conviction, or that the law was unclear on this issue (*see People v Catalanotte*, 72 NY2d 641, 644-645 [1988], *cert denied* 493 US 811 [1989]; *see also People v Alvarado*, 67 AD3d 430, 431 [2009], *lv denied* 13 NY3d 936 [2010]; *People v Menjivar*, 9 Misc 3d 1108[A], 2005 NY Slip Op 51451[U] [Sup Ct Queens County 2003}). Instead, failure to raise the issue was the product of a lack of investigation (*see People v Droz*, 39 NY2d 457, 462 [1976]). Accordingly, defendant is entitled to have his persistent felony offender status litigated with proper assistance of counsel, at a new adjudication and sentencing.

Turning to issues raised on defendant's direct appeal from his 2010 judgment of conviction, we find that defendant's

purported waiver of his right to appeal was invalid (*see People v Braithwaite*, 73 AD3d 656 [1st Dept 2010], *lv denied* 15 NY3d 849 [2009]). However, defendant's excessive sentence claim is academic because we are ordering a plenary sentencing proceeding, and his pro se claims are without merit.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12141 Thomas Monaco, Index 301950/09
Plaintiff-Respondent,

-against-

Tracey Monaco,
Defendant-Appellant.

_____

Law Office of Yonatan Levoritz, P.C., Brooklyn (Jose Medina of counsel), for appellant.

Rottenstreich & Ettinger LLP, New York (Arthur D. Ettinger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about July 25, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion for an order of protection, to adjudicate plaintiff in contempt, to modify custody, to appoint a forensic evaluator and attorney for the children, and for counsel fees, unanimously affirmed, with costs.

Defendant failed to show that plaintiff violated an unequivocal mandate or that she was prejudiced, and thus a finding of contempt was not warranted (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). The language in the parties' agreement regarding the parties' obligation to foster a feeling of affection between the children and the other parent did not clearly prohibit the parties from disparaging each other in

emails. Similarly, while plaintiff was to provide his credit card to certain medical providers, the provision setting forth this requirement did not provide a deadline for this obligation, and thus did not constitute a clear and unequivocal mandate (*see Rienzi v Rienzi*, 23 AD3d 447 [2d Dept 2005]). Defendant also failed to set forth any facts regarding this failure, and thus failed to meet her burden of showing that she was prejudiced thereby.

Defendant failed to make an evidentiary showing sufficient to warrant a hearing on her custody modification request (*see (Matter of Collazo v Collazo*, 78 AD3d 1177 [2d Dept 2010]). The fact that the parties, who have joint decision-making authority, have different views on education or extracurricular activities does not mean that they cannot co-parent. The parties anticipated they may have such disagreements and provided for a procedure to deal with them in their stipulation of settlement. The fact that plaintiff is residing outside of the country was also anticipated in the parties' agreement.

Supreme Court providently exercised its discretion in granting defendant's request for an order of protection only to the extent of permitting her to request a hearing when plaintiff next returns to New York. Defendant did not show any imminent risk, especially in light of the fact that plaintiff resides in

Hong Kong. None of defendant's allegations warranted an immediate hearing or rose to the level of the family offenses outlined in Family Court Act § 812.

Having properly determined that a hearing on custody was not warranted, the court also properly denied the requests to appoint a neutral forensic evaluator and an attorney for the children.

Under the circumstances, Supreme Court providently exercised it discretion in denying defendant an award of counsel fees (*see* Domestic Relations Law §§ 237[b], 238).

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, JJ.

12142- Index 603770/07
12143-
12143A Hellenic American Educational Foundation,
Plaintiff-Respondent,

-against-

The Trustees of Athens College in Greece, et al.,
Defendants-Appellants.

[And Another Action]

_____

Pillsbury Winthrop Shaw Pittman LLP, New York (E. Leo Milonas of counsel), for appellants.

Reed Smith LLP, New York (Gil Feder of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 9, 2013, which granted plaintiff's motion for partial summary judgment terminating the relationship between the parties and a transfer of certain endowment funds to it and dismissal of defendants' counterclaims, unanimously reversed, on the law, without costs, and the motion denied. Orders, same court and Justice, entered May 21, 2013 and July 19, 2013, which, respectively, pursuant to the April 9, 2013 order, directed that the funds be transferred to plaintiff pursuant to certain conditions, and modified certain of those conditions, unanimously reversed, on the law, without costs, and the matter remanded for

further proceedings.

While the relationship of the parties to each other and Athens College is sui generis, we believe that equitable dissolution of the relationship is available upon a showing of deadlock or misfeasance (*see generally* Partnership Law § 63, Business Corporation Law §§ 1104; 1104-a). However, sharp disputes of fact over the misfeasance and existence of deadlock preclude the granting of summary judgment to either side. As such, the subsequent orders governing escrow of the funds must also be reversed.

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12144 The People of the State of New York, Respondent, Ind. 1729/12

-against-

Nelson Alvarez, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered July 25, 2012, convicting defendant, upon his plea of guilty, of criminal mischief in the third degree and auto stripping in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

Since defendant was sentenced to term of incarceration of longer than 60 days (*see* Penal Law § 60.35[8]), he is required to seek relief from his mandatory surcharge payments by way of a CPL 420.10(5) motion for resentencing. Defendant's claims that he was entitled to a financial hardship hearing pursuant to CPL 420.40, and that the hearing should have been held at the time of his sentencing, are not supported by the applicable statutes.

Rather, any application for relief from defendant's surcharge is to be entertained in postsentence proceedings (*see People v Bradley*, 249 AD2d 103 [1st Dept 1998], *lv denied* 92 NY2d 923 [1998]; *People v Wheeler*, 244 AD2d 277 [1st Dept 1997]).

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

ENTERED: APRIL 3, 2014

CLERK

Tom, J.P., Acosta, Saxe, DeGrasse, Freedman, JJ.

12145 The People of the State of New York, Ind. 1479/07
Respondent,

-against-

Alan Vega,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John S. Moore, J. at dismissal and severance motions; David Stadtmauer, J. at jury trial and sentencing), rendered May 19, 2008, convicting defendant of rape in the first degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

The motion and trial courts properly exercised their respective discretion in denying defendant's motion to sever counts charging two unrelated rapes. The counts were properly joined as "similar in law" pursuant to CPL 200.20(2)(c), and defendant did not make a sufficient showing to warrant a discretionary severance (see CPL 200.20[3]; *People v Lane*, 56 NY2d 1, 8 [1982]; *People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]). Furthermore, the fact that the

jury convicted defendant of only one of the rapes and failed to reach a verdict on the other suggests that the jury was able to separate the two cases. Defendant's assertion that the presence of two rape counts nevertheless influenced his conviction of one of them is speculative.

The trial court properly exercised its discretion in making an advance ruling that, if defendant testified as to certain matters, he would open the door to his impeachment by way of inconsistent statements he made in connection with one or more prior arrests. Defendant, who ultimately chose not to testify, claims that the prior inconsistent statements were improperly derived from records of his prior cases that had been sealed pursuant to CPL 160.50. However, the record does not establish that the specific impeachment material at issue had actually been sealed. In any event, sealing would not have necessarily rendered this evidence inadmissible (*see People v Patterson*, 78 NY2d 711, 716-718 [1991]; *People v Torres*, 291 AD2d 273 [2002], *lv denied* 98 NY2d 681 [2002]). The record also fails to support defendant's argument that the proposed impeachment would have been unduly prejudicial.

The court properly denied defendant's motion to dismiss the indictment as time-barred. The applicable five-year statute of limitations was tolled pursuant to CPL 30.10(4)(a)(ii) because

defendant's identity and whereabouts were unknown and were unascertainable by the exercise of reasonable diligence (*see People v Seda*, 93 NY2d 307 [1999]; *People v Rolle*, 59 AD3d 169 [2009], *lv denied* 12 NY3d 920 [2009]). The police exhausted reasonable investigative steps, and were not required to take clearly futile measures simply to establish their futility.

The constitutional aspects of the above-discussed claims are unpreserved (*see e.g. People v Lane*, 7 NY3d 888, 889 [2006]; *People v Green*, 27 AD3d 231, 233 [2006], *lv denied* 6 NY3d 894 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 3, 2014

CLERK

Acosta, J.P., Renwick, Andrias, Saxe, Manzanet-Daniels, JJ.

11028-
11029-
11030 The People of the State of New York
Respondent,

-against-

Sherman Adams,
Defendant-Appellant.

Ind. 7581/99

_____

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

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

_____

Judgment, Supreme Court, New York County (Edwin Torres, J. at jury trial, sentencing and first resentencing; Daniel P. Conviser, J. at second resentencing), rendered July 9, 2003, as amended August 2, 2007 and July 31, 2012, modified, on the law, to the extent of directing that all sentences run concurrently, and otherwise affirmed.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Richard T. Andrias
David B. Saxe
Sallie Manzanet-Daniels, JJ.

11028-
11029-
11030
Ind. 7581/99

_____x

The People of the State of New York
Respondent,

-against-

Sherman Adams,
Defendant-Appellant.

_____x

Defendant appeals from the judgment the Supreme Court, New York County (Edwin Torres, J. at jury trial, sentencing and first resentencing; Daniel P. Conviser, J. at second resentencing), rendered July 9, 2003, as amended August 2, 2007 and July 31, 2012, convicting him of murder in the first degree (two counts), murder in the second degree (two counts), attempted murder in the second degree, and criminal possession of a weapon in the second and third degrees, and imposing sentence.

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

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

ANDRIAS, J.

Defendant was accused of firing shots into a car, killing two of the occupants and seriously injuring a third. A second gunman was not apprehended. The theory of the defense was that defendant was an innocent bystander who was misidentified by two police officers to cover their miscue after they mistakenly shot and wounded him when they arrived at the scene after the shooting. Following two mistrials in which the juries were unable to agree on a unanimous verdict, defendant was convicted of murder in the first and second degrees, attempted murder in the second degree, and criminal possession of a weapon in the second and third degrees.

Defendant's argument that the trial court intervened excessively during the questioning of the People's gunshot residue experts, FBI analyst Cathleen Lundy and private examiner Alfred Schwoeble, who linked a denim jacket worn by defendant to a 9 millimeter semiautomatic handgun used in the shooting, is not preserved (CPL 470.05[2]; *see People v Charleston*, 56 NY2d 886, [1982]; *People v Whitecloud*, 110 AD3d 626 [1st Dept 2013]; *People v Rios-Davilla*, 64 AD3d 482 [1st Dept 2009], *lv denied* 13 NY3d 838 [2009]), and we decline to review it in the interest of justice. No objections to the court's conduct were raised by defendant at trial. As an alternative holding, we find no basis

for reversal. The prosecution's case, which included a police identification that was corroborated by other eyewitness testimony and forensic and circumstantial evidence, was extremely strong, and the trial court's interventions, even where imprudent, did not prevent the jury from reaching an impartial verdict based upon the evidence presented.

At the month-long trial, Officer Peter Anselmo and his partner, Officer Edward Polstein, testified that they were canvassing an area in an unmarked police van, with a witness to a unrelated crime, when they heard shots. As they approached the intersection of West 26th Street and 10th Avenue, the officers saw two black males firing handguns into a green car. One was on the driver's side, and the other was on the passenger's side. Both wore dark clothing, and the driver's-side shooter was wearing a baseball cap. This testimony was corroborated by the witness who had been canvassing with the officers, who testified that there were two men shooting into the green car when the police van turned onto 10th Avenue and that one of the shooters was wearing dark jeans and a coat, with something on his head.

Anselmo and Polstein testified that they exited the van and yelled, "Police, stop." Defendant turned toward the officers and raised his arm as if he were pointing a weapon at them. In response, the officers fired their weapons at defendant, who

(according to Anselmo) initially fell, but then continued running along West 26th Street and across 9th Avenue into a New York City housing project. This testimony was corroborated by a resident of a building on West 26th Street, who testified that one of the two men turned and pointed a gun at the officers, and that the two men, both of whom were wearing dark clothing, ran away after the officers fired their weapons.

Anselmo testified that as he and Polstein pursued the perpetrators, Polstein fell and hurt his knee, and thus was not able to continue the direct pursuit. This testimony was corroborated by another resident of a building overlooking the scene, who testified that she was awakened by gunfire and saw two men followed by a police officer running along 26th Street towards the Hudson Guild Community Center.

After losing sight of the shooters for a few seconds, Anselmo saw defendant's accomplice move his hand as if to help defendant remove his jacket, under a lamppost by a chain link fence near the Hudson Guild.[1] Defendant looked toward Anselmo and threw something behind an iron fence. This testimony was

[1]Anselmo testified before the grand jury that he never lost sight of defendant. After revisiting the scene with two assistant district attorneys, he realized he was wrong. In a letter dated June 5, 2000, the prosecutor advised defense counsel that Anselmo's grand jury testimony was wrong.

corroborated by an independent eyewitness who saw two men running through the Hudson Guild area and saw one of them struggling to remove his jacket.

Officer John DiCarlantonio, responding to a radio transmission, came over to Anselmo, who pointed out defendant, who was running out of the housing project. DiCarlantonio followed, and repeatedly shouted at defendant to stop, but defendant continued north on 10th Avenue. After DiCarlantonio tackled him, Anselmo identified defendant, who was bleeding from his wounds, as the one who had pointed a gun at him, and noted that his hat distinguished him from his accomplice. When Polstein arrived at the scene of the arrest, he recognized defendant's dark clothing, and noticed a baseball cap on the ground.

Anselmo retraced his route and observed a trail of blood. He located a black denim jacket right over the fence from where he had seen defendant and his accomplice throw something; the jacket was processed by the Crime Scene Unit. A medical examiner conducted DNA tests of the blood taken from the trail on the street, the cap, the denim jacket, and the clothing defendant was wearing at the hospital. The testing revealed that all samples came from defendant.

Detectives recovered two handguns on the street near the

intersection of 26th Street and 10th Avenue, a 9 millimeter Glock semiautomatic and a .40 caliber Glock semiautomatic. A total of 30 shell casings were found near the victims' car; 18 were 9 millimeter, and 12 were .40 caliber. Consistent with Anselmo's testimony, most of the 9 millimeter casings were on the driver's side, and most of the other casings were on the passenger's side.

After the first trial, FBI analyst Lundy conducted the first gunshot residue tests of the denim jacket and of the two handguns recovered by the police. A year later, private examiner Schwoeble conducted a second examination. Both experts concluded that based on the amount of tin particles on the objects, which were not typically found on ammunition manufactured by American companies, it was likely that the person who wore the jacket (defendant) also fired the 9 millimeter handgun or was standing next to someone who did so. Schwoeble rejected the possibility that the tin particles found on the jacket resulted from cross-contamination after the jacket had been spread out by police on the precinct's muster room floor, since the tin was found on the front of the jacket, and the jacket was spread with its back touching the floor. He also testified that his test results would not have been obtained from a person who had, after picking up the 9 millimeter Glock and putting it down, handled the jacket. While he acknowledged that the handling of firearms and

ammunition could contribute to the transfer of gunshot residue onto an item, that would not account for the residue on the jacket unless the gun had been banged on the floor to dislodge the particles from inside the barrel.

Defendant does not challenge the legal sufficiency of this evidence. He maintains that he was deprived of a fair trial because the trial court took over the questioning of Lundy by intervening with questions or comments on 30 of the 36 pages spanning her cross-examination, and participated equally with defense counsel in the cross-examination of Schwoeble by intervening on 14 of the 34 pages spanning his testimony. Defendant contends that by virtue of this interference, the court reinforced the experts' testimony that denim was the type of fabric that did not shed gunshot residue easily and that tin found both in the 9 millimeter handgun and on defendant's jacket.

The guarantee of a fair trial does not "inhibit a Trial Judge from assuming an active role in the resolution of the truth" (*People v De Jesus*, 42 NY2d 519, 523 [1977]). Thus, a trial judge is permitted "to question witnesses to clarify testimony and to facilitate the progress of the trial," and, if necessary, to develop factual information (*People v Yut Wai Tom*,

53 NY2d 44, 55, 57 [1981]; *see People v Hinton*, 31 NY2d 71, 76 [1972], *cert denied* 410 US 911 [1973]; *People v Moore*, 6 AD3d 173 [1st Dept 2004], *lv denied* 3 NY3d 661 [2004]). However, a judge may not "take [] on either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]).

The "substance and not the number of questions asked is the important consideration" (*Yut Wai Tom*, 53 NY2d at 58). Even if a trial judge makes intrusive remarks that would better have been left unsaid, or questions witnesses extensively, the defendant is not thereby deprived of a fair trial so long as the jury is "not prevented from arriving at an impartial judgment on the merits" (*People v Moulton*, 43 NY2d 944, 946 [1978]) *People v Abdul-Khaliq*, 43 AD3d 700 [1st Dept 2007], *lv denied* 9 NY3d 989 [2007]). Notably, although the exercise of a trial court's power to question witnesses should be exercised "sparingly" *(Yut Wai Tom*, 53 NY2d at 57), "in the case of expert testimony, the court's intervention is often necessary to assist the jurors in comprehending matters of specialized knowledge" (*People v Gonzalez*, 228 AD2d 340, 340 [1st Dept 1996], *lv denied* 88 NY2d 1021 [1996]), and the trial judge is afforded greater leeway.

The record before us establishes that the trial court did not take on the function and appearance of an advocate. Certain of the court's interventions were attempts to clarify expert

testimony. Others, even if ill-advised, may be characterized as light-hearted banter. However, taken as a whole, the court's interventions during the gun residue experts' testimony, which occurred on 44 of 70 pages of an almost 2000-page transcript, did not endorse the People's case and did not infect the jury's evaluation of that testimony (*see People v Jones*, 176 AD2d 174, 174 [1st Dept 1991] [rejecting defendant's largely unpreserved claims of excessive and partisan interference where "examination of the record reveal[ed] that the court's questions and comments served to clarify otherwise confusing testimony by expert witnesses, to elicit significant facts from the witnesses, and to assist the jurors in comprehending the evidence"], *lv denied* 79 NY2d 859 [1992]). Nor did the court's intervention convey to the jury that the court had any personal opinion regarding defendant's guilt or prevent the jury from arriving at an impartial judgment on the merits (*see People v Sample*, 45 AD3d 450 [1st Dept 2007], *lv denied* 10 NY3d 771 [2008]; *People v Martinez*, 35 AD3d 156 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]; *People v Melendez*, 31 AD3d 186 [1st Dept 2006], *lv denied* 7 NY3d 927 [2006]; *People v Straniero*, 17 AD3d 161 [1st Dept 2005], *lv denied* 5 NY3d 795 [2005]).

Defendant argues that the court's intervention "diminished" his claim that the residue on his jacket could have been placed

there by cross-contamination. However, some of the court's questions were designed to expedite matters and ensure that the witness understood what was being asked after the prosecutor posed a confusing hypothetical (*see People v Gagot*, 61 AD3d 461 [1st Dept 2009], *lv denied* 12 NY3d 853 [2009], *lv denied* 12 NY3d 853 [2009]). Other questions were designed to ensure that the jury understood the expert's answers, which often employed technical jargon, and the court did not express skepticism with the defense theory that the residue on defendant's jacket came either from his being shot at or from a transfer when the jacket was placed on the floor. In other instances, the court intervened where defense counsel was attempting to prevent an expert from providing complete answers or was repeating a portion of testimony that defense counsel appeared not to have heard.

Defendant's reliance on *People v Retamozzo* (25 AD3d 73 [1st Dept 2005]), which involved the same trial judge, is misplaced. In *Retamozzo*, we held that the defendant was denied a fair trial on drug possession charges by the trial court's repeated questioning of the defendant during his direct testimony and of prosecution witnesses during cross-examination. However, in *Retamozzo*, the court posed questions that assumed facts that had not yet been testified to in order to bolster the People's witnesses, repeatedly interrupted the defense cross-examination

of the People's eyewitnesses in order to "devalu[e]" and "denigrat[e]" the defense, and engaged in extensive questioning of the defendant to attack his credibility (25 AD3d at 76-78). This significant interference, which advocated the prosecution's case and completely undermined the defense, does not exist here.

Furthermore, although it is true that a "claim that the intrusion of the Trial Judge deprived [the defendant] of his constitutional right to a fair trial is not subject to harmless error analysis" (*People v Mees*, 47 NY2d 997, 998 [1979]), the strength or weakness of the evidence may be considered as a factor in determining whether the defendant received a fair trial *(see e.g. People v Russo*, 41 NY2d 1091, 1091-1092 [1977]; *People v Broom*, 200 AD2d 515 [1st Dept 1994], *lv denied* 83 NY2d 964 [1994]). As set forth above, the strong identification testimony of Officer Anselmo, which was corroborated by, among other things, other eyewitness testimony, ballistics evidence, DNA evidence linking defendant to the denim jacket, and gunshot residue evidence linking the denim jacket to the 9 millimeter handgun used in the shooting, constituted overwhelming evidence of defendant's guilt (*see People v Corchado*, 299 AD2d 843 [4th Dept 2002], *lv denied* 99 NY2d 581 [2003]).

Lastly, while it is by no means dispositive, the court admonished the jury that

> "you are not to consider anything that I may have said during the trial or any questions that I may have asked or any facial expression you may have thought you learned or anything I may say during the very course of this charge as some kind of indicia that I have an opinion on this case one way or the other.
>
> "I have ladies and gentlemen no opinion whatsoever. And I have no power to tell you what the facts are or tell you that this fact was more important than this fact. That this witness was truthful. This witness was accurate. This witness was inaccurate. Etcetera. These are all matters in your exclusive power as the sole exclusive judges of the facts in this case"

(*see People v Whitecloud*, 110 AD3d at 627 ["To the extent that any of the court's interventions were inappropriate, they were not so egregious as to affect the verdict or deprive defendant of a fair trial, particularly in light of the court's jury charge" [internal citation omitted]).

In light of all of these circumstances, while "[it] is unfortunate that the court could not resist the temptation to take over the examination of [certain] witnesses" and asked "questions that would have been better left for the [attorneys]" (*Melendez*, 31 AD3d at 197), its comments and questions, even where inappropriate, did not deprive defendant of a fair trial.

Although the gunshot residue evidence may have been important, it was not the only evidence that corroborated Officer Anselmo's eyewitness identification of defendant as the shooter on the driver's side of the car. There is strong evidence of defendant's guilt, and the court instructed the jury that its interventions were not intended to convey any opinion or bias, or to endorse the prosecution's case.

While on occasion the court may find it helpful or even necessary to clarify or expand on a complex issue or subject unfamiliar to jurors, particularly where expert witnesses are involved, we once again caution trial judges against engaging in overly intrusive involvement in the questioning of witnesses, and unduly interfering with the orderly presentation of proof in the trial of a criminal case (*see id*. at 198).

Defendant failed to preserve his argument that he was deprived of his constitutional rights to due process, to present a defense, and to confront his accusers by various rulings precluding defense counsel from asking certain questions of the forensic examiners on cross-examination, and we decline to review it in the interest of justice. In any event, it is without merit. The challenged rulings were well within the court's discretion.

Defendant also argues that a *Frye* hearing should have been

held on some of the methodologies described in Schwoeble's testimony (*see Frye v United States*, 293 F 1013[DC Cir 1923]). However, defendant failed to preserve his Frye argument by requesting a hearing at the third trial. In any event, a *Frye* hearing was not warranted (*see People v Hayes*, 33 AD3d 403 [1st Dept 2006], *lv denied* 7 NY3d 902 [2006]). Other challenges raised by defendant go to the weight or credibility of the testimony, not its admissibility.

Defendant's argument that the court should have precluded the admission of the jacket and gun and testimony about the tin found on them because there were gaps in the chain of custody is not preserved. In any event, it is without merit.

As the People concede, defendant's sentence must be modified so that the terms imposed on the two first-degree murder counts run concurrently with the terms imposed on the two second-degree murder counts. The term of 15 years on the second-degree weapon possession must run concurrently with the aggregate sentence of life without parole (*see People v Parks*, 95 NY2d 811 [2000]), which remains unchanged.

Accordingly, the judgment of the Supreme Court, New York County (Edwin Torres, J. at jury trial, sentencing and first resentencing; Daniel P. Conviser, J. at second resentencing), rendered July 9, 2003, as amended August 2, 2007 and July 31,

2012, convicting defendant of murder in the first degree (two counts), murder in the second degree (two counts), attempted murder in the second degree, and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of life without parole, should be modified, on the law, to the extent of directing that all sentences run concurrently, and otherwise affirmed.

All concur.

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

ENTERED: APRIL 3, 2014

CLERK