SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 6, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, JJ.

13469-
13470 Index 190339/11

Ivana Peraica, etc., et al.,
Plaintiffs-Respondents,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Crane Co.,
Defendant-Appellant.

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K&L Gates LLP, Pittsburgh, PA (Michael J. Ross of the Pennsylvania bar, admitted pro hac vice, of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondents.

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Judgment, Supreme Court, New York County (Martin Shulman, J.), entered December 3, 2013, after a jury trial, awarding plaintiffs $9,900,000 for past pain and suffering against defendant Crane Co., unanimously modified, on the facts, to vacate the award for past pain and suffering, and order a new

trial as to such damages, unless plaintiffs stipulate, within 30 days of service of a copy of this order with notice of entry, to a reduced award for past pain and suffering of $4.25 million, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered November 21, 2012, which denied Crane Co.'s motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's verdict is based on sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The evidence adduced at trial demonstrates that, while defendant did not manufacture asbestos, for decades it heavily promoted the use of the type of asbestos insulation to which the decedent was exposed. Further, defendant often sold asbestos products along with its boilers and advertised asbestos as the preferred insulation product to use for its boilers. The evidence also shows that defendant was aware of the dangers of asbestos exposure well before the decedent's first exposure in the late 1970s, and that the decedent was never advised by defendant or his employers about those dangers. Accordingly, there is no reason to disturb the

jury's determination that defendant had a legal obligation to warn workers such as the decedent of the hazards of asbestos exposure, and that defendant's failure to warn proximately caused the decedent's mesothelioma (*see Matter of New York Asbestos Litig. [Dummitt]*, __ NY3d __, 2016 NY Slip Op 05063 [2016]).

In supplemental submissions filed after the Court of Appeals' ruling in *Dummitt*, defendant unpersuasively argues that the Court of Appeals created a new rule focused on the concept of "economic necessity" and that this rule should not be applied retroactively (*id.* at *14). *Dummitt*, however, applied existing law and did not overrule controlling precedent. Indeed, the *Dummitt* decision cites precedent such as *Liriano v Hobart Corp.* (92 NY2d 232, 240-241 [1998]), which predates the trial in the instant case, and the *Dummitt* ruling specifically notes that "[t]he endorsement of a manufacturer's duty to warn against certain combined uses of its product and a third-party product comports with the longstanding public policy underlying products liability in New York" (*Dummitt* at *13). The Court of Appeals also states that its ruling is "no radical innovation" and is consistent with long-standing Appellate Division principles (*id.* at *16).

We reject defendant's contention that a new trial is

required because the jury here was not specifically instructed that financial or economic necessity is a factor in establishing a duty to warn. Defendant's argument on this point, raised in its supplemental submissions, misreads *Dummitt*. The Court of Appeals did not create a standard that turns solely on the issue of economic necessity. Rather, it held that "the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics *or* economic necessity, is necessary to enable the manufacturer's product to function as intended" (emphasis added)(*Dummitt* at *2).

At trial, plaintiffs argued that the asbestos insulation was practically necessary for defendant's boilers to operate, and by rendering a verdict in plaintiffs' favor, the jury necessarily resolved this issue against defendant. Furthermore, the evidence showed that for many years, defendant knew, based on its customers' needs, that valves used with its products would contain asbestos, and that even for products manufactured by others, defendant essentially assured its customers of the quality of those products.

Although the charge on the heeding presumption could have more clearly explained that the presumption is rebuttable

(*Dummitt* at *24), no basis exists to reverse on this ground. There was a sufficient basis for the jury to conclude that decedent would have followed warnings if they had been there. The decedent testified that once he and his coworkers became aware of problems with asbestos, they considered preparations for masks and clothing. Later in his career, decedent used a respirator when one was provided to him in his employment.

The court correctly decided to submit the issue of recklessness to the jury. However, defendant's argument that the language of the court's instruction on the recklessness charge was erroneous is unpreserved, as defendant "never objected to the terms of the disputed charge as given" (*see Dummitt* at *24 n 9), and we decline to reach the issue in the interest of justice. Were we to do so, we would find no reason to reverse in light of the evidence showing defendant's long-standing knowledge of the dangers of asbestos.

Plaintiffs' case was properly consolidated with seven other claims, and defendant was not unduly prejudiced by the consolidation (*see Matter of New York City Asbestos Litig.*, 111 AD3d 574 [1st Dept 2013]).

The jury's allocation of fault is supported by the evidence. Under the circumstances, however, we find that the award as

reduced by the trial court, for past pain and suffering over a period of approximately 17 months, deviates materially from what is reasonable compensation to the extent indicated (CPLR 5501[c]). We recognize that this Court's further-reduced damages award is significant and exceeds amounts set in some of our precedent. The jury and trial judge, who had an opportunity to hear the testimony firsthand, believed a substantial award was appropriate in light of the testimony about the extent of decedent's suffering. The record supports the conclusion that decedent experienced severe and crippling symptoms, as well as tremendous physical and emotional pain, which justifies the amount we are awarding.

We have considered defendant's remaining arguments and find

them unavailing.

M-5068 - Ivana Peraica, etc. v A.O. Smith Water Products Co., et al.

Motion to dismiss the appeals denied as academic.

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

ENTERED: OCTOBER 6, 2016

CLERK

Friedman, J.P., Acosta, Renwick, Richter, JJ.

429- Index 190017/13
430-
431 In re New York City Asbestos
Litigation.

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Laraine Sweberg, etc.,
Plaintiff-Respondent,

-against-

ABB, Inc., et al.,
Defendants,

Crane Co.,
Defendant-Appellant.

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K & L Gates, LLP, Pittsburgh, PA (Michael J. Ross of the Pennsylvania bar, admitted pro hac vice of counsel), and K & L Gates LLP, New York (Eric R.I. Cottle of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondent.

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Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 11, 2015, upon a jury verdict, awarding plaintiff damages against defendant Crane Co., including, upon remittitur (CPLR 5501[c]) and stipulation by plaintiffs, $5 million for future pain and suffering over 1.5 years, unanimously modified, on the facts, to vacate the award for future pain and suffering and order a new trial as to such damages, unless plaintiff stipulates, within 30 days of service of a copy of this

order with notice of entry, to a reduced award for future pain and suffering of $4.5 million, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered January 20, 2015, which granted Crane Co.'s motion pursuant to CPLR 4404(a) to set aside the verdict, only to the extent of remitting the damages for future pain and suffering, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's verdict is based on sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The evidence adduced at trial demonstrates that, while defendant did not manufacture asbestos, it promoted for decades the use of asbestos-containing materials for insulating its products. Defendant sold these asbestos-containing products alongside its own in its "house stores," marketing the materials in catalogs sent to its customers. The evidence also shows that defendant was aware of the dangers of asbestos exposure since the 1930's, and that decedent was never advised by defendant or his employers about those dangers. Finally, with regard to "practical necessity," Crane's own witness, while claiming that Crane's products did not

require insulation to work mechanically, conceded that it would be extremely inefficient and a safety concern for users to operate its boilers without insulating them (*see Matter of New York City Asbestos Litig [Dummitt v A.W. Chesterton, et al.]*, __ NY3d __, 2016 NY Slip Op 05063 **38-39,*46-47 [2016]). Accordingly, it was rational for the jury to conclude that defendant had a legal obligation to warn workers such as the decedent of the hazards of asbestos exposure, and that defendant's failure to warn proximately caused the decedent's mesothelioma (*id.*).

Appellant's contention that the court's instructions to the jury on foreseeability were improper is unpreserved and we decline to review it in the interest of justice. Were we to do so, we would find any error to be harmless.

Plaintiff also set forth sufficient evidence that defendant's failure to warn was the proximate cause of decedent's injuries. Decedent testified that, over a period of years as an electrician working in the same rooms as defendant's boilers, he was exposed to dust created by, inter alia, installation, renovations, and demolition of those boilers and their asbestos-containing insulation. Decedent also testified that he had been regularly exposed to the dust created when mixing asbestos

concrete powder for use as finishing insulation on the boilers. Decedent further testified that this dust filled the air and settled on everything in the room, including his clothes (*see Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011]; *Matter of New York Asbestos Litig.*, 28 AD3d 255 [1st Dept 2006]). Plaintiff's expert testified that such exposure was the proximate cause of decedent's development of mesothelioma (*see Lustenring v AC&S, Inc.*, 13 AD3d 69 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]). Any objection defendant could have made to the jury being charged with a presumption that decedent would heed warnings, if given, is academic, since decedent testified that he would have followed such a warning (*see Asbestos Litig.*, 121 AD3d at 253).

The court correctly submitted the issue of recklessness to the jury. To the extent that defendant argues that the language of the court's instruction on the recklessness charge was erroneous, defendant has failed to preserve that issue for appellate review as defendant "never objected to the terms of the disputed charge as given" (*see Dummitt* at **24 n 9), and we decline to reach the issue in the interest of justice. In any event, there would be no reason to reverse in view of defendant's

longstanding knowledge of the dangers of asbestos.

Under the circumstances, however, we find that the award for future pain and suffering deviates materially from what is reasonable compensation to the extent indicated (CPLR 5501[c]).

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

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

ENTERED: OCTOBER 6, 2016

CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

668 In re New York City Asbestos Litigation. Index 190022/13

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Dorcas Hackshaw, etc.,
Plaintiff-Respondent,

-against-

ABB, Inc., etc., et al.,
Defendants,

Crane Co.,
Defendant-Appellant.

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K & L Gates LLP, Pittsburgh, PA, (Michael J. Ross of the Pennsylvania bar, admitted pro hac vice, of counsel), and K & L Gates LLP, New York (Eric R.I. Cottle of counsel), for appellant.

Weitz & Luxenberg, LLP, New York (Alani Golanski of counsel), for respondent.

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Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 11, 2015, after a jury trial, awarding plaintiff damages against defendant Crane Co., upon plaintiff's stipulation to reduce the award for past pain and suffering from $10 million to $6 million, unanimously modified, on the facts, to vacate the award for past pain and suffering, and ordering a new trial as to such damages, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduced award for past pain and suffering of $3,000,000, and to

entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The jury's verdict is based on sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). The trial evidence demonstrates that, while defendant Crane did not manufacture asbestos, for decades it promoted the use of asbestos-containing materials for insulating its products. Defendant Crane sold these asbestos-containing products alongside its own products in its "house stores," marketing the materials in catalogs sent to its customers. The evidence also demonstrates that defendant had been aware of the dangers of asbestos exposure since the 1930s, and that the decedent was never advised by defendant or his employers about those dangers. In addition, since defendant's own witness conceded that it would be extremely inefficient and a safety concern for operators of its boilers to operate them without insulating them, plaintiff satisfied the standard for liability recently articulated by the Court of Appeals in *Matter of New York City Asbestos Litig. [Dummitt]*, __ NY3d __, 2016 NY Slip Op 05063 [2016]). Accordingly, it was rational for the jury to conclude that defendant had a legal obligation to warn workers such as the decedent of the hazards of asbestos exposure and that

defendant's failure to warn proximately caused the decedent's mesothelioma (*id.*).

Defendant's contention that the court's instructions to the jury on foreseeability were improper is unpreserved and we decline to review it in the interests of justice. Were we to do so, we would find any error to be harmless.

Plaintiff also set forth sufficient evidence to demonstrate that defendant's failure to warn was the proximate cause of decedent's injuries. The decedent testified that he was employed both as a mechanic and as an electrician, working, over a period of years, with asbestos-containing insulation being removed from defendant's valves and mixing asbestos-containing insulation cement, both of which generated asbestos dust that could be seen flying in the air (*see Penn v Amchem Prods.*, 85 AD3d 475, 476 [1st Dept 2011]; *Matter of New York Asbestos Litig.*, 28 AD3d 255, 256 [1st Dept 2006]). Plaintiff's expert testified that that dust contained enough asbestos to cause the decedent's mesothelioma (*see Lustenring v AC&S, Inc.*, 13 AD3d 69, 70 [1st Dept 2004], *lv denied* 4 NY3d 708 [2005]).

It was rational for the jury to conclude that defendant acted recklessly in light of the evidence showing its longstanding knowledge of the dangers of asbestos.

We find that the award, as reduced by stipulation, for past pain and suffering over a period of approximately 12 months, deviates materially from what is reasonable compensation to the extent indicated (CPLR 5501[c]). Although this Court's damages award is significant and exceeds amounts set in some of our precedents, the jury and trial judge, who had an opportunity to hear the testimony firsthand, concluded that a substantial award was appropriate in light of the testimony about the extent of decedent's suffering. The record suggests the conclusion that decedent experienced severe and crippling symptoms, as well as tremendous physical and emotional pain, which justifies the amount we are awarding.

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

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

ENTERED: OCTOBER 6, 2016

CLERK

Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1383 The People of the State of New York, Ind. 2635/08
Respondent,

-against-

Reginald Wiggins,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 7, 2014, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 12 years, modified, on the law, to the extent of reducing the amounts of the mandatory surcharge and the crime victim assistance fees from $300 to $250 and $25 to $20, respectively, and otherwise affirmed.

Because of the unusual facts of this case, a detailed chronology is necessary to put our analysis into proper context.

On May 24, 2008, at approximately 1:00 a.m., defendant and codefendant Jamal Armstead were outside 133 West 90th Street in Manhattan where a sweet sixteen party was ending. They were approached by a female partygoer who told them that a person

named Trimel Branford had insulted her at the party. Defendant and Armstead then proceeded to confront Branford. Intending to "avenge" the slight to her, Armstead pointed a gun at Branford and pulled the trigger twice, but the gun misfired. Armstead handed the gun to defendant who, after hitting it with his hand, pointed it at Branford and fired. The shot missed Branford but struck a 15-year-old bystander, who died from his wounds later that morning.

On May 28, 2008, the police arrested both Armstead and defendant. Armstead made statements to the police that implicated defendant in the shooting.

On July 2, 2008, both defendant and Armstead were charged, in a single indictment, with murder in the second degree, attempted murder in the second degree (two counts) and criminal possession of a weapon in the second degree. They were arraigned on these charges on July 7, 2008.

Defendant filed an omnibus motion on August 26, 2008, seeking, among other relief, severance of his case from Armstead's on the ground that they had antagonistic defenses and that Armstead's statements ran afoul of defendant's right to confrontation under *Bruton v United States* (391 US 123 [1968]). The People responded to the motion on October 15 and, on October

23, 2008, the motion court denied defendant's request to sever on antagonistic defense grounds, finding that defendant had not made any allegations demonstrating an antagonistic defense. The motion to sever on *Bruton* grounds was held in abeyance until resolution of Armstead's motion to suppress his statements. The court adjourned the case for discovery until March 2, 2009, because defendant was awaiting receipt of the medical examiner's report.

From March 2, 2009 to August 28, 2012, the date the court ruled on the admissibility of Armstead's statements, the court adjourned the case numerous times either at the request of, or on consent of, defendant or Armstead. Additionally, between January 9, 2009 and June 30, 2011, Armstead consented to numerous adjournments requested by the People as the prosecutor attempted to negotiate a cooperation agreement with his counsel, meeting with Armstead and his counsel on several occasions.[1]

On June 24, 2011, Armstead moved pro se for assignment of new counsel, which application was granted on July 14, 2011.

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[1]Although the dissent complains that our chronology failed to make explicit that defendant's severance motion was not decided until over four years after it was made, and that the requests for adjournments between January 9, 2009 and June 30, 2011 were made by the People, these facts are clearly denoted herein.

Armstead's case was adjourned from March 2, 2010 to March 16, 2010 due to a fire in the courthouse. On September 21, 2010, the assigned ADA went on maternity leave, resulting in an adjournment to November 18, 2010. From July 14, 2011 until May 29, 2012, every adjournment was requested by Armstead's counsel, either to prepare for trial or for personal reasons.

On July 21, 2011, the People announced their readiness for trial with respect to Armstead. It was the People's intention to try Armstead first, on the theory that a conviction would give Armstead the incentive to testify against defendant. Armstead's counsel was not ready for trial until May 29, 2012.

During this period, and while the current action was pending, defendant was involved in two assaults resulting in two additional indictments. The first, charging defendant with conspiracy and gang assault, was handed down on April 1, 2009 and was pending until March 8, 2013, when the indictment was dismissed. The second incident occurred on October 5, 2011 at the Manhattan Detention Center, where defendant and two other men assaulted another inmate. This indictment charged defendant with attempted gang assault in the first degree, attempted assault in the first degree and assault in the second degree. Defendant was convicted after trial of assault in the second degree and on June

10, 2013, was sentenced to a prison term of 4 ½ years.

Between May 29 and June 12, 2012, a *Huntley* hearing was held with respect to the statements made by Armstead to the police. Armstead's motion to suppress those statements was denied on August 28, 2012. At the conclusion of the hearing, Armstead's counsel advised the court that he needed emergency cataract surgery and requested an adjournment. The People opposed further adjournments, noting the effect further adjournments might have on defendant's case. Defendant joined in the People's objection but the court granted Armstead's request for an adjournment.

On October 9, 2012, Armstead's first trial began and a partial verdict convicting him of criminal possession of a weapon in the second degree was rendered on October 25, 2012. Due to Hurricane Sandy, the court could not reconvene until November 7, 2012. Only 11 jurors returned and the court declared a mistrial on the remaining counts. The People informed the court that they intended to retry Armstead before trying defendant. Armstead's counsel requested and received an adjournment to April 2013. On January 14, 2013, defendant, at his request, was assigned new counsel and his case was adjourned to February 14, 2013, so that new counsel could familiarize himself with the case.

On April 22, 2013, Armstead's second trial began. On the

same day, defendant's unrelated gang assault trial also commenced. On May 15, 2013, Armstead's second trial ended in a mistrial. The People immediately announced their readiness and requested a second retrial. However, Armstead's counsel was not available to proceed until January 2014.

On May 7, 2013, defendant moved, for the first time, to dismiss the indictment on constitutional speedy trial grounds, which motion was denied on December 5, 2013.

On January 8, 2014, Armstead's third trial began. It ended on January 31, 2013 when the jury acquitted him of murder in the second degree but could not reach a verdict on the two attempted murder counts, resulting in yet another mistrial as to those counts. On April 10, 2014, Armstead's fourth trial was scheduled to begin on August 21, 2014. On June 11, 2014, defendant filed a second constitutional speedy trial motion, which he subsequently withdrew as part of his plea bargain.

Defendant pleaded guilty to manslaughter in the first degree on September 23, 2014 in full satisfaction of the indictment. He was promised a sentence of 12 years to run nunc pro tunc from the date of his arrest and concurrent with the 4 ½ year sentence he was currently serving on the conviction for assault in the second degree. The agreed upon sentence was imposed on October 7, 2014.

The lodestar guiding our analysis of the speedy trial issue raised in this case is, of course, *People v Taranovich* (37 NY2d 442 [1975]). The Court held that "there is no specific temporal duration" that would mandate a dismissal on speedy trial grounds (*id.* at 444-445). Rather, a court must "examine the claim in light of the particular factors" present in the case before it, with the realization that "there are no clear cut answers in such an inquiry" (*id.* at 444-445). The analysis involves "a sensitive weighing process of the diversified factors present in the particular case" (*id.*). These factors "must be evaluated on an *ad hoc* basis" as they apply to the facts of each case (*id.*). Finally, the Court stressed that "no one factor or combination of the factors . . . is necessarily decisive or determinative of the speedy trial claim, but rather the particular case must be considered in light of all the factors as they apply to it" (*id.*).

The Court went on to list five factors that must be considered in any analysis of a speedy trial claim: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by

reason of the delay" (*id.*).

There is no question that the six-year delay between the shooting in 2008 and defendant's guilty plea in 2014 was "extraordinary" (*People v Staley*, 41 NY2d 789, 792 [1977]). The burden is on the People to show good cause for the delay (*People v Singer*, 44 NY2d 241, 254 [1978]). This factor weighs in favor of defendant and leads to a consideration of the second *Taranovich* factor, i.e., the reason for the delay.

The chronology of this case highlights some of the problems faced by the courts of this state in large metropolitan areas. These include overburdened courts, overcrowded jails, and overworked prosecutors and legal services defense counsel. Nevertheless, these issues must be considered in the context of this particular case as they affect, if at all, this particular defendant.

The dissent tends to minimize the defense side of the equation in determining the reason for the delay, choosing to focus on the prosecution's attempt to get Armstead to testify against defendant as the main reason for the delay in bringing him to trial. While the attempt to get Armstead to testify against defendant certainly played an important role in the delay, it is not the only reason and ignores the many other

causes for the delay.

The above chronology shows that much of the delay was occasioned by requests for adjournments by defendant and/or his codefendant for motion practice, change of counsel, discovery proceedings, unavailability of co-defendant's counsel and the like. In the analogous CPL 30.30 situation, adjournments granted with a codefendant's consent are not chargeable to the People (*see e.g. People v Kronberg*, 277 AD2d 182, 183 [1st Dept 2000], *lv denied* 96 NY2d 785 [2001]; *People v Delvalle*, 265 AD2d 174 [1st Dept 1999], *lv denied* 94 NY2d 879 [2000]), and they should not be chargeable here. Despite the dissent's conclusion to the contrary, the record supports the conclusion that these adjournments were not motivated by a goal on the part of the People to gain an unfair tactical advantage over defendant (*see People v Brown*, 138 AD3d 491 [1st Dept 2016], *lv denied* 27 NY3d 1129 [2016]).

Indeed, Armstead either requested or consented to several adjournments between January 9, 2009 and June 30, 2011. He also actively participated with counsel in meetings and discussions concerning the possibility of testifying against defendant. The dissent posits that the People should have abandoned such efforts after Armstead repeatedly refused to testify, and that the

continuation of these efforts are evidence of their overall bad faith in delaying bringing defendant to trial. To support this conclusion, the dissent contends that the People do not claim that Armstead's testimony was "essential to its case" and thus, by their continued attempts to obtain his cooperation, they demonstrated a lack of good faith. However, no precedent is cited for the proposition that, in order to demonstrate good faith, the testimony of a codefendant needs to be "essential" to the prosecution's case. Nor can such a rule be inferred from *People v Kelly*, (38 NY2d 633 [1976]), as cited by the dissent. While the Court of Appeals categorized the testimony of an incapacitated witness in that case as "essential" to the People's case in an essentially one witness case (*id.*, at 636), it did not make that term a requirement to demonstrate good faith efforts on the part of the People in attempting to obtain witness testimony. In point of fact, the Court was following its own precedent set out in *Taranovich* that, in analyzing a speedy trial claim, "no one factor or combination of the factors" set out there is determinative of the speedy trial issue, "but rather the particular case must be considered in light of all the factors as they apply to it" (*Taranovich*, 37 NY2d at 445). Indeed, to adopt such a rigid rule, as suggested by the dissent, would negate the

individual case analysis mandated by *Taranovich*.

Whether "essential" or not, it is clear from the result of the several trials of Armstead that his testimony would, as the People contend, "significantly enhance the overall nature and quality of the evidence against . . . defendant." The point is made by the fact that Armstead was acquitted on the murder count and that three separate juries were not able to reach a verdict on the two attempted murder counts in the indictment. Although the dissent contends this case, while serious, is not complex in light of the fact that the shooting took place in front of many witnesses who were available to the People, those same witnesses surely testified in Armstead's trials and were obviously not particularly convincing. Armstead's statements to the police implicating defendant in the shooting thus take on a heightened significance and justify the People's repeated attempts to obtain his testimony against defendant.

In any event, it is not for the courts to second guess "the significant amount of discretion that the People must of necessity have" in the prosecution of an indictment (*People v Decker*, 13 NY3d 12, 15 [2009]), so long as they act in good faith. Indeed, "a determination made in good faith to delay prosecution for sufficient reasons will not deprive [a] defendant

of due process even though there may be some prejudice to defendant" (*id.* at 14, quoting *People v Vernace*, 96 NY2d 886, 888 [2001]). There is nothing in this record to support the contention that the People acted in anything other than [in] good faith in seeking to obtain Armstead's testimony.

While it is true that the People changed the ADAs handling the case several times, these changes were made for valid reasons, such as maternity leave, and were not designed to delay the trial of either defendant, or to gain a tactical advantage thereby (*People v Brown,* 138 AD3d at 491).

Additionally, there were several incidents occasioning delay beyond the control of either party, such as a fire in the courthouse and Hurricane Sandy. On the whole, therefore, this factor favors the People.

It is uncontested that the third *Taranovich* factor – the nature of the underlying charge – clearly weighs in favor of the People. The defendant was charged, inter alia, with the murder of a 15-year-old bystander. It is expected that the People would "proceed with far more caution and deliberation" in such a case as opposed to a relatively minor offense (*People v Taranovich*, 37 NY2d at 446). Defendant contends however, that this does not justify the lengthy delay in this case. This overlooks the fact

that the People should not be faulted for trying to develop the strongest case possible against this defendant, the individual who actually fired the fatal shot. This is particularly true in light of the results of Armstead's jury trials, as noted above.

With respect to the fourth factor, there has been a significant period of pretrial incarceration, a factor that favors defendant. However, as noted above, during a significant portion of this time, defendant was also under indictment for two other assault charges, one of which resulted in a conviction and sentence of 4½ years. We have consistently held that the time during which a defendant is incarcerated on other charges is not charged to the People (*see People v Jackson*, 178 AD2d 305-306 [1st Dept 1991], *lv denied* 79 NY2d 948 [1992]; *People v Davis*, 197 AD2d 375, 376 [1st Dept 1993], *lv denied* 82 NY2d 893 [1993]; *People v Neal*, 208 AD2d 400, 400 [1st Dept 1994], *lv denied* 84 NY2d 1014 [1994]; *People v Allen*, 203 AD2d 97, 97-98 [1st Dept 1994],*lv denied* 83 NY2d 963 [1994]). The claim by defendant, adopted by the dissent, that perhaps defendant would not have been involved in these incidents had he not been incarcerated awaiting trial in the instant case is nothing more than sheer speculation and wishful thinking, particularly in light of the fact that he fired a weapon directly at an individual to avenge a

perceived slight to another person.

Finally, as to the fifth *Taranovich* factor, defendant has not shown any prejudice as a result of the delay to warrant a dismissal of this indictment. While the dissent disagrees with this conclusion, it should be noted that there is no claim that his incarceration made it difficult for him to participate in his defense, or confer with his counsel. General allegations that witnesses were "likely" to forget information or become unavailable is not sufficient to demonstrate the prejudice necessary to have this factor favor the defendant (*People v Romeo*, 12 NY3d 51, 58 [2009], *cert denied* 558 US 817 [2009]). Certainly "some degree of prejudice will result" from lengthy pretrial incarceration; however, general allegations of prejudice do not establish that the defense was "significantly impaired by the delay (*People v Decker*, 13 NY3d at 15-16).

The dissent distorts our writing by stating we "downplay[] society's interest in prompt prosecution" because this interest is not addressed in *Taranovich*. Nothing herein even suggests such a conclusion. Unjustified delays in prosecuting those accused of a crime inure to no one's benefit: not prosecutors, nor defendants, nor society as a whole. We take no issue with the fact that actual prejudice need not be shown except in

preindictment delay cases (*see People v Staley*, 41 NY2d at 792). The point here, as the dissent correctly notes, is that general claims of "presumptive prejudice cannot alone carry a Sixth Amendment claim[,] . . . it is part of the mix of relevant facts, and its importance increases with the length of delay" (*Doggett v United States*, 505 US 647, 655-656 [1992]). This, of course, is wholly consistent with *Taranovich's* mandate that all factors must be considered and applied to each individual case to determine if a defendant's right to prompt prosecution has been violated.

The dissent conflates two separate and distinct penal concepts in taking exception to our conclusion regarding the fifth factor. The prejudice required to meet the *Taranovich* factor is not the same as what can only be characterized as a claim of a lost opportunity for rehabilitation. *Taranovich* speaks to incarceration affecting a defendant's ability to defend against the charges brought against him or her and the impact such prejudice has on his or her chances for an acquittal. It does not address rehabilitation issues. Although the dissent uses generic studies and the like[2] to support the claim of bad

[2]Besides having no relevance to the issue before us, the conditions at Rikers Island and any related news reports are not part of the record and, hence, cannot be considered. Those concerns are more properly addressed in the public policy arena.

faith on the part of the People, these have no application to this defendant in this case since, as we noted at length above, there is nothing in this record to even remotely support the dissent's contention that the decision to try Armstead first and then continue to try him before this defendant, was based on anything other than prosecutorial discretion made in good faith. Thus, this factor favors the People.

We conclude, therefore, that the motion court properly denied defendant's constitutional speedy trial claim.

Defendant made a valid waiver of his right to appeal (*see People v Sanders*, 25 NY3d 337, 341 [2015]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

As the People concede, since defendant committed the crime before the effective dates of legislation increasing the mandatory surcharge and crime victim assistance fees, he is entitled to the modification indicated.

All concur except Moskowitz and Gesmer, JJ. who dissent in a memorandum by Gesmer, J. as follows:

GESMER, J. (dissenting)

I respectfully dissent.

The Sixth Amendment to the United States Constitution and the New York State Bill of Rights (Civil Rights Law § 12) guarantee the right to a speedy trial to an individual charged with a crime. Under the New York State Constitution's due process clause, the individual charged with a crime is guaranteed an even broader right to be prosecuted without unreasonable delay (NY Const, art I, § 6; *People v Singer*, 44 NY2d 241, 253 [1978]; *People v Staley*, 41 NY2d 789 [1977]; *People v Winfrey*, 20 NY2d 138, 143 [1967]; *People v Wilson*, 8 NY2d 391, 394 [1960]). It is the obligation of the People to bring the defendant to trial promptly (*Barker v Wingo*, 407 US 514, 529 [1972]; *People v Prosser*, 309 NY 353, 358 [1955]). The right to a speedy trial reflects both the right of the accused to "be treated according to decent and fair procedures" and "a societal interest in providing a speedy trial[,] which exists separate from, and at times in opposition to, the interests of the accused" (*Barker v Wingo*, 407 US at 519).

To determine whether a defendant's right to a speedy trial has been violated, the Court of Appeals directs us to examine five factors: "(1) the extent of the delay; (2) the reason for

the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445 [1975]). "Courts must engage in a sensitive weighing process of the diversified factors in the particular case" (*People v Vernace*, 96 NY2d 886, 887 [2001]).

Here, there is no dispute that the crimes with which defendant was charged, and the one to which he pleaded guilty, are serious.[1] There is also no dispute that his period of incarceration while awaiting a trial that never happened, which extended from his arrest at age 16 on May 28, 2008 until his entry of a plea on September 23, 2014, six years, three months and twenty five days later, is extraordinary. Indeed, while "there is no specific temporal duration after which a defendant

[1]On the other hand, the policy reason underlying this factor is the complexity of trying a serious case (*People v Johnson*, 38 NY2d 271, 277 [1975]), which was not a real factor here, where the case involved no complex legal theories and the police were already in contact with a substantial number of the many witnesses to the alleged crime (*cf. People v Brown*, 117 AD2d 978, 979 [4th Dept 1986] [although case involved five codefendants and numerous charges, it was not complex because the "required evidence and witnesses were available to the People at an early date"]; *People v Virgil*, 115 AD2d 286 [4th Dept 1985]).

automatically becomes entitled to release for denial of a speedy trial" (*People v Taranovich*, 37 NY2d at 444-445), the trial court's decision on defendant's first speedy trial motion found that his incarceration for the 5½ years from May 27, 2008 to December 5, 2013 was "extraordinary," and the majority concedes, as it must, that the six-plus years defendant ultimately awaited trial was extraordinary (*see Barker v Wingo*, 407 US at 533 [5 years "extraordinary"]; *People v Staley*, 41 NY2d at 792 [31 months "extraordinary"]; *People v Winfrey*, 20 NY2d at 143 [4½ years "unreasonable"]; *People v Moore*, 63 AD2d 602, 605 [1st Dept 1978, Sandler, J., dissenting], *revd on dissenting mem* 47 NY2d 872, 874 [1979] [18½ months "shocking"]). Accordingly, I will address the second, fourth and fifth *Taranovich* factors, the only factors at issue.

Where there has been "protracted delay, certainly over a period of years, the burden is on the prosecution to establish good cause" (*People v Singer*, 44 NY2d 241, 254 [1978]). In order to assess whether the People have done so, it is critical to lay out the sequence of events in detail. The majority's recitation of the history omits or obscures some critical facts and asserts at least three alleged facts that are not supported by the record. As to the latter, I can find no support in the record

for the following statements by the majority: 1) that the same witnesses to the shooting who would have testified at defendant's trial testified at the coefendant's trials, and that there is reason to believe that they would not have made convincing witnesses had they done so; 2) that defendant fired a weapon "directly" at an individual "to avenge a perceived slight" to another; the record does not show where, or even whether, defendant aimed the gun in his hand, and with what intent, if any; and 3) that defendant was "involved" in two prison assaults; no such inference can be drawn from the dismissed indictment for the alleged 2009 incident.

The majority does not make explicit the following very central facts: that the People began requesting adjournments to seek the codefendant's cooperation as early as January 9, 2009; that they continued to negotiate with the codefendant for his cooperation for over two years; and that defendant's severance motion was not decided until four years after it was made.

The critical points in the chronology include the following:

May 28, 2008: Defendant is arrested for a shooting which occurred on May 24, on a public street, in front of numerous witnesses.

July 7, 2008: Defendant is indicted, with a codefendant.

August 26, 2008: Defendant files an omnibus motion, including a motion for severance.

October 23, 2008: The court rules on defendant's omnibus motion, but holds in abeyance that portion of his severance motion based on his rights under *Bruton v United States* (391 US 123 [1968]), pending the codefendant's *Huntley* hearing seeking to suppress his statements, which implicated defendant.

January 9, 2009: The People request an adjournment to work toward a cooperation agreement with the codefendant.

January 2009 through June 30, 2011: Negotiations with the codefendant continue, delayed by repeated replacements of the assigned Assistant District Attorney.

June 2011: The codefendant rejects a cooperation agreement and fires his attorney; the case is adjourned to March 15, 2012, and then further adjourned.

October 5, 2011: After more than three years in Rikers, defendant is involved in a jailhouse fight, resulting in imposition of a 4½ year sentence on June 10, 2013.

August 28, 2012: Defendant's severance motion is granted, four years after it was filed.

October 2012: The codefendant's first trial begins, and ends in a mistrial on November 7, 2012.

April 22, 2013: The codefendant's second trial begins, and ends in a mistrial on May 15, 2013.

May 7, 2013: After more than 40 adjournments, defendant moves to dismiss the indictment, based on deprivation of his right to a speedy trial.

December 5, 2013: The court denies defendant's first speedy trial motion.

January 8, 2014: The codefendant's third trial begins and ends in a mistrial on January 31, 2014. The court schedules his fourth trial to begin on August 21, 2014.

June 11, 2014: Defendant files a second speedy trial motion, noting that his case had been adjourned more than 50 times.

September 23, 2014: The codefendant's fourth trial had not begun; the People had not yet filed any opposition to defendant's speedy trial motion. Defendant pleads guilty to manslaughter, and withdraws his second speedy trial motion.

The majority views the reasons for the delay, which encompassed all of defendant's adolescence from the age of 16 on, as being caused by a combination of neutral or benign factors, and holds that the People were not trying "to gain an unfair tactical advantage over defendant," which they acknowledge would have been improper (*see Barker v Wingo*, 407 US at 531 n 32,

quoting *United States v Marion*, 404 US 307, 325 [1971]; *see also People v Brown*, 138 AD3d 491). However, the majority overlooks that here, except for defendant's five adjournment requests,[2] the latest of which occurred on January 14, 2013, none of the other adjournments would have been necessary but for the People's insistence on delaying defendant's trial in order to seek his codefendant's cooperation. The People's continuation of this tactic for six years, even after the codefendant repeatedly refused to cooperate, and after the People had taken the codefendant to trial three times, each ending in a mistrial, was certainly a strategic decision, and ultimately created a tactical advantage for the People.

Moreover, by the time of the decision on defendant's first speedy trial motion, the People were certainly on notice that further delay could tip the scales in the direction of a constitutional violation. Instead of heeding this warning, the People attempted to try the codefendant twice more, creating nearly another year of delay. At the time defendant finally

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[2]According to the People's brief, defendant's counsel requested adjournments from March 2, 2009 to April 1, and then April 30, 2009; from December 3, 2009 to January 21, 2010; from November 18, 2010 to January 10, 2011; and from January 14, 2013 to February 14, 2013.

pleaded, his codefendant's fourth trial had been adjourned, and no end to the People's long unsuccessful tactic was in sight.

I disagree with the majority's view that the People have demonstrated that their decision to strengthen their case by obtaining the codefendant's cooperation and testimony against defendant was made in "good faith" (*People v Singer*, 44 NY2d at 254). While some time spent trying to gain the codefendant's cooperation might have been reasonable, the People concede that he refused their cooperation agreement and had "repeatedly indicated through his lawyer that he [would] *never* testify against the defendant" (emphasis added). Nonetheless, the People decided to try him first in an effort to induce his cooperation.

The People do not argue that the codefendant's testimony was essential to its case but merely that it "would significantly enhance the overall nature and quality of the evidence against the defendant." The majority adds that this "point is made by the fact that [the codefendant] was acquitted on the murder count and that three separate juries were not able to reach a verdict on the two attempted murder counts in the indictment." However, these facts could equally be understood to indicate that the prosecution's strategy of trying the codefendant first was unlikely to prove successful. Furthermore, it is difficult to

see how the testimony of a codefendant, who would have much to gain from cooperating, could significantly enhance the People's case when the People had disinterested eyewitnesses available to testify, including the intended target of the shooting. The majority's claim that these witnesses "surely" testified at the codefendant's trial and were "obviously not particularly convincing" is speculative and not supported by the record.

The majority also states that no precedent exists for the proposition that the evidence sought by the People and cited by them as a good faith reason for the delay must be essential, rather than merely helpful. I agree with the majority that *Taranovich* calls for a careful weighing of the factors in each case, rather than rigid rules. However consideration of the degree to which such evidence is necessary must be part of our "sensitive weighing process" (*People v Vernace*, 96 NY2d at 887). For example, in *Barker v Wingo*, where a codefendant's testimony was concededly necessary to convict the defendant (407 US 514, 516), the Supreme Court still held that a period of over four years during which the State repeatedly tried the codefendant first was "too long"[3] (*id.* at 534). Similarly, in *People v Kelly*

[3]The Supreme Court's determination in that case that there was no speedy trial violation has little relevance to this case

(38 NY2d 633, 636 [1976]), the Court of Appeals held that the fact that the testimony of an unavailable prosecution witness was "essential" made the resulting delay "excusable."

Although CPL 30.30 does not apply in this case because of the nature of the charges, as discussed later in this decision, the majority appears to view it as instructive in determining this case. That statute recognizes as excusable only delays caused by the People's pursuit of crucial evidence. Specifically, it provides that periods of delay shall not be counted against the People when they are: (1) "occasioned by exceptional circumstances," or (2) where the People are unable, after due diligence, to obtain evidence that is "material to the [P]eople's case" and there are "reasonable grounds to believe that such evidence will become available in a reasonable period" (CPL 30.30[4][g]). The desire of the People to have one codefendant testify against another is not exceptional. In the face of the codefendant's statement that he would not testify against the defendant, the People had no reason to believe that his testimony would be "material," and, even if it had been, the

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since Mr. Barker was incarcerated during only 10 months of the long delay and did not want a speedy trial (407 US at 520, 536). In contrast, Mr. Wiggins was incarcerated during the entire period, and repeatedly raised the speedy trial issue.

People had no "reasonable grounds to believe that [the codefendant's testimony would] become available in a reasonable period."

I also disagree with the majority's view that "much of the delay was occasioned by requests for adjournments by defendant and/or his codefendant." As discussed above, even the People admit that only five adjournments out of more than 50 are attributable to defendant, and all were before his first speedy trial motion. Both of the cases cited by the majority for the proposition that adjournments requested by, or granted with the consent of, the codefendant are not "chargeable to the People" were decided pursuant to CPL 30.30 (*People v Kronberg*, 277 AD2d 182, 183 [1st Dept 2000], *lv denied* 96 NY2d 785 [2001]; *People v Delvalle*, 265 AD2d 174 [1st Dept 1999], *lv denied* 94 NY2d 879 [2000]), which does not apply in this case. Even if this Court chooses to use that statute as guidance, it provides for "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial pursuant to this section has not run and good cause is not shown for granting a severance" (CPL 30.30[4][d]). In *Delvalle*, this Court held that one month was a reasonable period of time for the People to conduct plea negotiations with codefendants. The *Kronberg*

opinion does not discuss the length of delay attributable to the People's decision to try a codefendant first, and does not explicitly cite to CPL 30.30. However, it cites to *People v David* (253 AD2d 642, 644 [1st Dept 1998], *lv denied* 92 NY2d 948 [1998]), a CPL 30.30 case, which held that the People's delays totaling 22 days in connection with the codefendant's attorney's request to be relieved and a motion brought by the codefendant should not have been charged against the People. Here, defendant had shown good cause for granting severance, as we know, because his motion for that relief was granted four years after it was made, after the codefendant's suppression hearing. Four years is not a "reasonable" period of delay. Furthermore, in *People v David*, this Court also held that a 36-day delay in holding a suppression hearing was excessive and chargeable to the People under CPL 30.30 (253 AD2d at 644).

While I share the majority's concern about the multitude of problems our courts face, such as very large dockets, overcrowded jails, and overworked prosecutors and legal services defense counsel, I do not agree that these issues account for the extraordinary delay in this case. Even if they did, the U.S. Supreme Court has stated that "[a] more neutral reason [for delay] such as negligence or overcrowded courts should be

weighted less heavily [against the prosecutor] but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant" (*Barker v Wingo*, 407 US at 531; *see also People v Johnson*, 38 NY2d at 279; *People v Blakley*, 34 NY2d 311, 317 [1974]).

One adjournment was attributable to a fire in the courthouse in or about March 2010. Some of the delay resulted from personnel issues in the prosecutor's office, which has been held inadequate to justify a lengthy delay (*People v Moore*, 63 AD2d at 604-605 [Sandler, J., dissenting], *revd on dissenting mem*, 47 NY2d 872). However, the vast majority of adjournments were due to the People's repeated and unsuccessful attempts over four years to gain the codefendant's cooperation, and then, when that proved unsuccessful, the People's repeated and unsuccessful attempts over an additional two years to try the codefendant before defendant, in the "hope" that he would testify against defendant if convicted. Clearly, defendant was worn down by the delay. Even if the People's primary goal was to improve their case against defendant at trial, their delays were unreasonable and should not be counted against defendant when their conduct ultimately gave them a tactical advantage.

Finally, even if it was not the People's intent to gain a tactical advantage over defendant, it was certainly foreseeable that a teenager incarcerated at Rikers Island for a number of years would be likely to plead guilty, given the well known inadequacies of Rikers for long term incarceration, particularly for adolescents (*see e.g.* Findings of the U.S. Attorney's Office for the Southern District of New York into the Treatment of Adolescent Male Inmates at Rikers, dated August 4, 2014, available on the Department of Justice website at https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf [accessed Sept. 21, 2016]; William Neuman, *New York City Wants to Move 16- and 17-year-olds From Rikers Jail to Bronx Center*, NY Times, July 20, 2016, available at http://www.nytimes.com/2016/07/21/nyregion/rikers-jail-youths-bronx-center.html [accessed Sept. 21, 2016] [discussing the New York City Mayor's Office of Criminal Justice's announcement of a plan to move teens out of Rikers and into a separate facility, after a settlement with the Department of Justice called on New York City to do so]).[4] From the defendant's perspective, it makes little

[4]This Court may take judicial notice of "[d]ata culled from public records" (*Matter of Siwek v Mahoney*, 39 NY2d 159, 163 n 2

difference whether the prosecution intended this result, or merely disregarded the likelihood of its occurrence. Indeed, the coercive effect of the long delays is further suggested by defendant's agreement to withdraw his second speedy trial motion at the time of his plea, even though withdrawal of a speedy trial motion is an impermissible, "inherently coercive" condition of a plea agreement (*People v Blakley*, 34 NY2d at 313). Therefore, it is my view that the People have not shown good cause for the extraordinary delay in this case.

I also find that the fourth *Taranovich* factor, whether there has been an extended period of pretrial incarceration, favors the defendant. The majority suggests that this factor is mitigated by defendant's indictment and incarceration on other charges. I disagree for four reasons. First, there is no legal support for the proposition that defendant's time under indictment, prior to conviction and sentencing, is to be considered on a speedy trial motion. Second, even discounting the period of time after defendant's sentencing on assault charges for an incident which occurred on October 5, 2011, defendant had already been

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[1976]), and "material derived from official government web sites [sic]" (*Matter of LaSonde v Seabrook*, 89 AD3d 132, 137 n 8 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012]).

incarcerated awaiting trial in this case for over three years at that point. Third, the incident that led to defendant's assault conviction occurred while he was incarcerated awaiting trial on the 2008 indictment. Accordingly, he might well not have been involved in that incident if not for the delay in his trial on the initial charges. The majority characterizes this as "sheer speculation and wishful thinking." This misses the point. Defendant committed the assault in Rikers while he was incarcerated awaiting trial in this matter. There is no indication in the record that defendant had any criminal history prior to his arrest in the instant matter. Accordingly, it is hardly speculative to reason that, had he not been in Rikers awaiting trial on the instant matter, he would have been unlikely to have been there at the time that the incident leading to the assault charge took place. Similarly, in saying that "regardless of the proceedings under the instant indictment, defendant would undoubtedly have been incarcerated due to his indictment for entirely separate and violent felonies," the People ignore the fact that defendant had no criminal record until this incident, so there is no reason to think he would have become involved in other criminal incidents if he had not already been

incarcerated.[5] Fourth, the People's failure to bring defendant to trial is not excused by his being incarcerated within New York on a separate matter (*People v Singer*, 44 NY2d at 254 ["Certainly his incarceration within the State offers no excuse for delaying the prosecution on new charges"]; *People v Winfrey*, 20 NY2d at 141).[6]

Finally, as to the fifth *Taranovich* factor, the majority points out that defendant makes no specific claim of prejudice to his defense. However, under the New York State Constitutional

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[5]The majority also has no basis for asserting that defendant was involved in an assault in 2009, since there was no basis in the record to support that, except an indictment which was dismissed.

[6]The majority states that this Court has "consistently held that the time during which a defendant is incarcerated on other charges is not charged to the People." However, this is only true where defendant is being held in another jurisdiction and the People are unable to obtain defendant's transfer despite due diligence (*see People v Singer*, 44 NY2d at 254; *People v Winfrey*, 20 NY2d at 141-142). Indeed, *People v Jackson* (178 AD2d 305, 305-306 [1st Dept 1991], *lv denied* 79 NY2d 948 [1992]), cited by the majority, held that the 18 months "during which defendant was made available by Federal authorities but no efforts were made to secure defendant's return, should be charged to the People." The other cases cited by the majority for the same proposition give insufficient facts to draw a connection between the respective defendant's incarceration on other charges and the People's reason for delay, but all cite to *Jackson* (*People v Neal*, 208 AD2d 400, 400 [1st Dept 1994], *lv denied* 84 NY2d 1014 [1994]; *People v Allen*, 203 AD2d 97, 98 [1st Dept 1994], *lv denied* 83 NY2d 963 [1994]; *People v Davis*, 197 AD2d 375, 376 [1st Dept 1993], *lv denied* 82 NY2d 893 [1993]).

right to due process, "in a proper case, a lengthy and unjustifiable delay in commencing the prosecution may require dismissal even though no actual prejudice to the defendant is shown" (*People v Singer*, 44 NY2d at 253-254; *see also People v Staley*, 41 NY2d at 792); this is partly because "a defendant confined to jail prior to trial is obviously disadvantaged by delay" (*Barker v Wingo*, 407 US at 527). Indeed, a showing of actual prejudice to the defense is only required where the delay complained of is preindictment (*People v Singer*, 44 NY2d at 252; *People v Staley*, 41 NY2d at 792). Moreover, as the Supreme Court has explained, "[W]e generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim[,] . . . it is part of the mix of relevant facts, and its importance increases with the length of delay" (*Doggett v United States*, 505 US 647, 655-656 [1992]). Additionally, it is likely that the delay in bringing defendant's case to trial actually prejudiced his defense, since his incarceration would have made it "difficult for him to participate in his own defense, confer with counsel and contact witnesses" (*People v Romeo*, 12 NY3d 51, 58 [2009], *cert denied* 585 US 817 [2009]).

Another reason no actual prejudice to the defense is required where the delay is long enough is that "[s]ociety, as well as the defendant, has an important interest in assuring prompt prosecution of those suspected of criminal activity" (*People v Staley*, 41 NY2d at 792). The majority downplays society's interest in prompt prosecutions because the Court of Appeals did not specifically enumerate it as a factor in *Taranovich*. However, the *Taranovich* factors are derived from those identified by the U.S. Supreme Court in *Barker v Wingo* (*People v Taranovich*, 37 NY2d at 445), which notes that the speedy trial doctrine is based on both the right of defendants to be treated fairly and the public interest in deterrence and rehabilitation (*Barker v Wingo*, 407 US at 519-520). The Court of Appeals recognized this important principle in a case decided a mere five months after *Taranovich* (*People v Johnson*, 38 NY2d at 276; *see also People v Singer*, 44 NY2d at 254; *People v Staley*, 41 NY2d at 792). As relevant to this case, courts have consistently recognized that "seeking or obtaining convictions long after the offense was committed disrupts the rehabilitation process" (*People v Singer*, 44 NY2d at 254; *People v Johnson*, 38 NY2d at 276; *see also Barker v Wingo*, 407 US at 520 [lengthy exposure to conditions in local jail while awaiting trial is

destructive and makes rehabilitation more difficult]). The public's interest in rehabilitation of criminal defendants is of particular concern where the defendant is young; as the Court of Appeals held in dismissing an indictment after 31 months, "It is more than of passing significance that defendant at the time of his arrest was 17 years old, perhaps still within the age group when the probability of rehabilitation is greater than at a later age" (*People v Staley*, 41 NY2d at 792]).

Here, defendant was 16 at time of his arrest. There is no evidence that he had any criminal history prior to his incarceration in May 2008. He spent the majority of his adolescence, and more than a quarter of his life, behind bars awaiting trial. While in jail, he became involved in an incident that led to an assault charge and conviction. At Rikers, he would have had fewer opportunities to begin any meaningful process of rehabilitation. Even if the passage of time had not prejudiced defendant's ability to present a defense at trial (*but see e.g. Barker v Wingo*, 407 US at 533), I would argue that the long delay precluded him from engaging in meaningful

rehabilitation, thus causing enormous prejudice, both to defendant and to the people of this state, who have an interest in rehabilitation of all offenders, especially those as young as defendant.

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1823 Luis H.,
Petitioner-Respondent,

-against-

Latima P.,
Respondent-Appellant.

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Carol L. Kahn, New York, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child.

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Order, Family Court, New York County (Fiordaliza A. Rodriguez, J.), entered on or about July 10, 2015, which granted legal and physical custody to petitioner father, with visitation to respondent mother, unanimously affirmed, without costs.

The court had sufficient information to determine, without a plenary evidentiary hearing, that it was in the child's best interest to reside with the father during the pendency of this matter (*see Matter of Myles M. v Pei-Fong K.*, 93 AD3d 474 [1st Dept 2012]; *Rodman v Friedman*, 33 AD3d 400 [1st Dept 2006], *lv dismissed* 8 NY3d 895 [2007]). The record shows that the mother tested positive for drugs when the child was under her care, and she admitted to drug use in open court. There was also a neglect

proceeding commenced involving the mother's other child.

The determination that awarding custody to the father with visitation to the mother would be in the best interests of the child is supported by a sound and substantial basis and is entitled to deference (*see Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). The record demonstrates that the father has parented the child appropriately, has provided a loving and stable home environment and has made sure to obtain the services that the child requires.

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1824 The People of the State of New York, Ind. 597/72
Respondent,

-against-

Francis Harrison,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Patricia Nunez, J.), entered on September 3, 2015, which denied defendant's petition to modify his sex offender classification, unanimously affirmed, without costs.

Defendant failed to meet his burden under Correction Law § 168-o of presenting clear and convincing evidence that a downward modification of his risk level is warranted (*see People v Torres*, 120 AD3d 1126 [1st Dept 2014], *lv denied* 24 NY3d 911 [2014]). The factors cited by defendant, including his advanced age and the fact that he did not commit any additional sex crimes in the four years since his release from prison, are outweighed by his violent criminal behavior, his prior history of sexual misconduct, his unsatisfactory record while incarcerated, and his

parole violation, factors we noted on defendant's appeal from his original sex offender adjudication (74 AD3d 688 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1825 The People of the State of New York, Respondent,

Ind. 943/09

-against-

Sharmon Wade also known as Sharmon Howell, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered July 20, 2011, convicting defendant, upon his plea of guilty, of grand larceny in the second degree (9 counts), grand larceny in the third degree (6 counts), securities fraud (15 counts), grand larceny in the fourth degree, scheme to defraud in the first degree and failing to file a tax return, and sentencing him to an aggregate term of 9 to 18 years, unanimously affirmed.

Defendant's plea was not rendered involuntary by the fact that the court did not apprise defendant that, by operation of law, the nine months he served in federal custody between imposition of his concurrent federal and state sentences would not be credited against the maximum term of his state sentence.

Where the relationship between sentences is dictated by statute and the court has no choice, its silence on the issue is simply deemed compliance with the statute (*People ex rel. Gill v Greene*, 12 NY3d 1, 6 [2009]; *cert denied sub nom. Gill v Rock*, 558 US 837 [2009]). The court did not promise defendant that any particular time would be credited against his maximum sentence. It promised only that its sentence would run concurrently with the federal sentence, which it did, and defendant received credit for the nine months at issue, albeit on his minimum sentence, as opposed to his maximum, in accordance with the applicable statute.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1827 Karim R.,
Petitioner-Respondent,

-against-

Salamatou S.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Andrew J. Baer, New York, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Barbara H. Dildine of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about May 31, 2015, which, to the extent appealed from as limited by the briefs, awarded sole legal and physical custody of the parties' children to petitioner father with visitation to respondent mother, unanimously affirmed, without costs.

The Family Court's determination was based upon a thoughtful assessment of the parties' testimony and credibility, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). Although the mother was the primary caretaker of the children until August 2013, since that time, the children have lived with the father in a stable

and loving home, where they have thrived. The evidence establishes that the father has lived continuously in the same apartment, is gainfully employed and financially supports the children, has been active in their education, medical care and daily care, and has addressed their special needs (*see Matter of Charmaine L. v Kenneth D.*, 76 AD3d 910, 910 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

By contrast, the record is replete with concerns about the mother's lack of judgment and parenting skills, and the children's needs have suffered in her care. In addition, the mother has a history of neglect cases (*see Matter of Graves v Stockigt*, 79 AD3d 1170, 1171 [3d Dept 2010]). Unlike the mother, the father has placed the children's needs above his own, and has the capacity to fulfill those needs (*see Matter of Frances M. v Jorge M.*, 99 AD3d 407, 408 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]).

The Family Court properly considered the appropriate factors in making its determination, and gave appropriate weight to the court-appointed forensic expert's testimony and recommendations in favor of granting the father custody (*see Matter of Cisse v Graham*, 120 AD3d 801, 806 [2d Dept 2014], *affd* 26 NY3d 1103 [2016]); to the children's expressed preference that they wished

to remain with the father (*Eschbach*, 56 NY2d at 173); and to the evidence that the mother undermined and thwarted the children's relationship with the father, conduct clearly inconsistent with the children's best interests (*see William S. v Tynia C.*, 283 AD2d 327 [1st Dept 2001]).

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

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1828-
1829 Index 401889/12

Mary Beth Cordero,
Plaintiff-Respondent,

-against-

Sammi Yeung, D.D.S., et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Solomon of counsel), for appellants.

Joel M. Kotick, New York, for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about January 6, 2016, which granted plaintiff's posttrial motion to set aside the verdict and ordered a new trial, unanimously reversed, on the law and the facts, and the jury verdict reinstated. Appeal from interim order, same court and Justice, entered July 28, 2015, unanimously dismissed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

On October 4, 2009, plaintiff Mary Beth Cordero presented to defendants Drs. Sammi and Michael Yeung's dental practice, Yeung's Dental, P.C. Two years later, in December 2011, a tumor (an ameloblastoma) was discovered in the lower left side of plaintiff's mouth. Plaintiff alleges that the tumor should have

been detected on an October 2009 bitewing x-ray taken at defendants' office.

At trial, the jury was presented with conflicting evidence with respect to whether there were sufficient grounds to investigate and take further x-rays. It was further asked to determine the credibility of the defense expert, who plaintiff's trial counsel asserted lied about the issues in the case. The jury's verdict implicitly rejected that contention, and resolved the conflicting testimony in defendants' favor. "[I]n the absence of indications that substantial justice has not been done, a successful litigant is entitled to the benefits of a favorable jury verdict" (*Nicastro v Park*, 113 AD2d 129, 133 [2d Dept 1985]), with "particular deference" accorded to jury verdicts "in favor of defendants in tort cases" (*Nicastro*, 113 AD2d at 134; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]).

Here, the verdict was based on a fair interpretation of the evidence and should not have been disturbed. Moreover, there was ample evidence by appellants' expert and other witnesses from which the jury could fairly infer that the radiolucent area was not detectable in 2009, but only seen in hindsight (*see Nguyen v Dorce*, 125 AD3d 571, 572 [1st Dept 2015]; *and see Fernandez v*

Moskowitz, 85 AD3d 566, 568 [1st Dept 2011]).

The appeal from the interim order is dismissed as superseded by the order entered on or about January 6, 2016 (*see Gabriel v Board of Mgrs. of the Gallery House Condominium*, 130 AD3d 482, 483 [1st Dept 2015]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1830 The People of the State of New York, Respondent, Ind. 1558/95

-against-

Victor Manuel, Defendant-Appellant.

_____

Labe M. Richman, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Felice K. Shea, J.), rendered February 14, 1997, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

Defendant's claim that his plea of guilty to a class D felony, under an indictment that originally contained a class A-II felony, violated the plea bargaining restrictions set forth in CPL 220.10(5)(a)(i) is unpreserved, or forfeited by the plea (*see People v Vasquez*, 267 AD2d 118, 119 [1st Dept 1999], *lv denied* 95 NY2d 805 [2000]), and we decline to review it in the interest of justice. As an alternative holding, we reject the argument. The alleged failure to comply with the statute's directive does not

pose any jurisdictional impediment to enforcement of the plea. Defendant pleaded guilty to a crime that was a proper lesser included offense for plea purposes, there was no violation of his right to be convicted only upon indictment, and he freely entered into this beneficial agreement (*see People v Keizer*, 100 NY2d 114, 119 [2003]*; People v Foster*, 19 NY2d 150, 153 [1967]). Moreover, to the extent there was any statutory error, it was in defendant's favor (*see* CPL 470.15[1]; *People v Acevedo*, 17 NY3d 297, 302-303 [2011]).

Defendant's argument that he was entitled to a lesser sentence based on an alleged off-the-record conditional promise of further leniency is moot because he has completed his sentence. To the extent he claims his plea was rendered involuntary by this unrecorded promise, which he asserts was alluded to on the record, that claim is unsupported by the existing, unexpanded record.

The court met its obligations under *People v Peque* (22 NY3d 168, 196-197 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]) by warning defendant that his plea might result in deportation. We find nothing in *Peque* that would require a plea court to ascertain whether a particular conviction carries mandatory deportation under federal law and advise a

defendant accordingly.

Defendant's claim that his plea counsel was ineffective by failing to negotiate a plea with more favorable immigration consequences is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant made a CPL 440.10 motion, it did not encompass this claim, and in any event he did not obtain leave from this Court to appeal from the denial of the motion. Accordingly, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant's claim that a more

immigration-favorable plea might have been available is purely speculative (*see People v Olivero*, 130 AD3d 479, 480 [1st Dept], *lv denied* 26 NY3d 1042 [2015]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1831-
1832 The People of the State of New York,
Respondent,

Ind. 2462N/13
3616/12

-against-

Candido Baez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 20, 2014,

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

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

ENTERED: OCTOBER 6, 2016

CLERK

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

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1833-
1834 Index 111452/06

John D. Mastrobattista, et al.,
Plaintiffs,

-against-

Raquel Moura Borges, et al.,
Defendants,

Pier Head Associates Ltd.,
Defendant-Appellant,

Jacqueline LiCalzi, etc., et al.,
Defendants-Respondents.

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Gregory A. Tsonis of counsel), for appellant.

Sinnreich Kosakoff & Messina LLP, Central Islip (Michael Stanton of counsel), for Jacqueline LiCalzi and Luke LiCalzi, P.E., P.C., respondents.

Schwartzman, Garelik, Walker & Troy, P.C., New York (Donald A. Pitofsky of counsel), for Leila A. Hooper, respondent.

_____

Orders, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about November 12, 2014 and on December 9, 2014, which, to the extent appealed from, dismissed defendant Pier Head Associates Ltd.'s cross claims against codefendants Jacqueline LiCalzi as executrix of the estate of Luke LiCalzi, P.E., and Luke LiCalzi, P.E., P.C., and Leila A. Hooper as executrix of the estate of Karl I. Beitin, respectively,

unanimously affirmed, without costs.

In this action arising from the construction of a penthouse on top of defendants Raquel Moura Borges and A2B LLC's building, the general contractor, defendant Pier Head Associates, Ltd., appeals from so much of the orders of the motion court that dismissed its cross claims against the project engineers, defendants LiCalzi and Beitin. The dispute centers on Pier Head's decision to use the party walls on both sides to support the vertical extension, allegedly encroaching upon and affecting plaintiffs' abutting properties. Pier Head asserted cross claims for indemnification and contribution against the engineers, claiming that it was their plans that led to the use of the party walls.

Pier Head's cross claims against the engineers were properly dismissed. The engineers demonstrated that they were not involved in the decisions made by Pier Head to utilize the party walls to support the vertical extension. The record reflects that LiCalzi was cut out of the construction process after it

urged caution, including consultation with counsel, prior to the use of the party walls, and that Beitin was not retained as the project engineer until after the penthouse was substantially completed.

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1835 In re Anthony R. L. O.,
and Others,

Dependent Children Under Eighteen Years
Of Age, etc.,

Anthony L. O., etc.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Joseph T. Gatti, New York, for respondent.

Tennille M. Tatum-Evans, New York, attorney for the child Anthony R. L. O.

Karen Freedman, Lawyers for Children, Inc., New York (Ashleigh Hunt of counsel), attorney for the children Kasiyah O., Lexxi O., and Nathaniel O.

_____

Orders, Family Court, New York County (Jane Pearl, J.), entered on or about February 25, 2015, and order, same court and Judge, entered on or about September 1, 2015, which, to the extent appealed from as limited by the briefs, upon respondent father's consent to findings that he violated the terms of a suspended judgment entered on a finding of permanent neglect, terminated his parental rights to the subject children, and committed their custody to petitioner Catholic Guardian Services

and the Commissioner of the Administration for Children Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's conclusion that it was in the best interests of the three younger children to be freed for adoption. Those children have spent six years together in a preadoptive foster home, want to be adopted by their foster parents, who are equipped to handle their needs, and respondent had not addressed his cocaine addiction or demonstrated that he had the ability to care for them (*see Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502, 503 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]; *Matter of Tyshawn Jaraind C.*, 36 AD3d 564 [1st Dept 2007]).

A preponderance of the evidence also supports the court's conclusion that it was in the best interests of the oldest child to terminate respondent's parental rights, given the father's acknowledged failure to comply with terms of the suspended judgment, including twice testing positive for cocaine during the reopened dispositional hearing regarding this child (*see Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467, 467-468 [1st 2009], *lv dismissed and denied* 14 NY3d 870 [2010]). Although the child was 11 years old and expressed a strong preference to be reunited with his father, who had continued to visit him regularly, the

child's stated preference is not dispositive (*see* Domestic Relations Law § 111[1][a]; *Matter of Bianca R. [Anne Marie S.]*, 91 AD3d 560, 560 [1st Dept 2012]). The child had indicated a willingness to be adopted by his most recent foster parent, if he could not be returned to his father, so that adoption was a possibility after parental rights were terminated.

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

ENTERED: OCTOBER 6, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, JJ.

1836 The People of the State of New York, Ind. 616/10
Respondent,

-against-

Benjamin Roman,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Elizabeth B. Emmons of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered March 23, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level three. Clear and convincing evidence established aggravating factors that were not adequately taken into account by the risk assessment instrument, including the seriousness of the underlying crime, and the fact that, within a period of five years, defendant committed the underlying crime and two other crimes indicative of sexual recidivism (*see e.g. People v Faulkner*, 122 AD3d 539 [1st Dept 2014], *lv denied* 24

NY3d 915 [2015]).

Accordingly, defendant was properly adjudicated a level three offender based on the upward departure, regardless of whether his correct point score is 90, as the court found, or 60, as defendant asserts. In any event, the court correctly assessed points under the risk factor for relationship (strangers) between defendant and the victim, and under the risk factor for failing to accept responsibility.

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1837 The People of the State of New York, Respondent, Ind. 1061/13

-against-

Aramis Zapata, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 29, 2014, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, with three years' postrelease supervision, unanimously affirmed.

Defendant's challenge to his plea does not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375 [2015]; *People v Lopez*, 71 NY2d 662, 665 [1988], and we decline to review this unpreserved claim in the interest of justice. As an alternate holding, we find no basis for reversal. During the plea allocution itself, defendant admitted his guilt and said nothing that negated any element of the crime or raised any defenses (*see People v Toxey*, 86 NY2d 725

[1995]). Accordingly, the court had no obligation to conduct a sua sponte inquiry into defendant's postplea assertions of innocence, as reflected in the presentence report (*see e.g. People v Pantoja*, 281 AD2d 245 [1st Dept 2001], *lv denied* 96 NY2d 905 [2001]).

Regardless of whether defendant validly waived his right to appeal, we find that the court properly denied defendant's suppression motion. The record supports the court's finding of abandonment. We also perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1838 Paula Gerard, et al., Index 101150/10
Plaintiffs-Respondents,

-against-

Clermont York Associates LLC,
Defendant-Appellant.

_____

Horing Welikson & Rosen, P.C., Williston Park (Niles C. Welikson of counsel), for appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Matthew D. Brinckerhoff of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 9, 2012, which granted plaintiffs' motion for class certification, unanimously affirmed, without costs.

Plaintiffs in this action for rent overcharges are tenants at a rental apartment building owned by defendant. Plaintiffs seek to certify a class of current, former, and future tenants whose formerly rent-stabilized apartments were deregulated even though the building owner was receiving J-51 tax abatement benefits.

The motion court providently exercised its discretion in deeming the motion for class certification, which was filed 17 days after the stipulated deadline, timely filed. A court may in its discretion deem a late-filed class certification motion

timely upon a showing of good cause (*see Galdamez v Biordi Constr. Corp.*, 50 AD3d 357 [1st Dept 2008]; *Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842 [2d Dept 2010]; CPLR 2004; *compare Cruz v Town Sports Intl.*, 116 AD3d 539 [1st Dept 2014]). Here, plaintiffs explained that the motion was filed late due to counsel's involvement with urgent matters in other cases. Furthermore, the impact of the very brief delay was minimal, and defendant cannot claim that time was of the essence, given its history of both seeking and granting extensions; its admission that, had an extension been timely requested, it would have been granted; and the fact that there were no other pending deadlines. Defendant's assertion that it suffered prejudice because it would otherwise have engaged specialized class action counsel to oppose the motion is unavailing. It is not clear what value specialized counsel could have added in light of the admitted merit of plaintiffs' motion, as evidenced by defendant's

withdrawal of all other grounds for its appeal in response to the Court of Appeals' intervening decision in *Borden v 400 E. 55th St. Assoc., L.P.* (24 NY3d 382 [2014]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1839 The People of the State of New York, Ind. 5436/12
Respondent,

-against-

Ryan Abrahamsen,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered October 28, 2014,

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

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

ENTERED: OCTOBER 6, 2016

CLERK

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

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1844 The People of the State of New York, Respondent,

-against-

Michael Gillegbower, Defendant-Appellant.

Ind. 5281/12

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 28, 2013, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree, and sentencing him to a term of nine months, unanimously affirmed.

Defendant's challenges to his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made, even if the enumeration of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]) was incomplete (*see*

People v Sougou, 26 NY3d 1052 [2015]). Defendant's complaint about the sequence of events at his allocution, in which the court elicited factual admissions before advising defendant of his *Boykin* rights, is unavailing (*see Matter of Leon T.*, 23 AD3d 256 [1st Dept 2005]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1845 The People of the State of New York, Respondent,

Ind. 3444N/02

-against-

Miguel Dellos Santos,
Defendant-Appellant.

_____

Edward V. Sapone, LLC, New York (Edward V. Sapone of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 10, 2014, convicting defendant, after a jury trial, of murder in the second degree, kidnapping in the first degree, and unlawful imprisonment in the first degree (two counts), and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations.

Defendant did not preserve his claim that the verdict was

repugnant in convicting him of second-degree murder and first-degree kidnapping, but acquitting him of criminal sale of a controlled substance in the first degree or conspiracy to commit that offense (*see People v Muhammad*, 17 NY3d 532, 541 n 5 [2011]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, since the jury could have acquitted defendant of the drug and conspiracy counts for failure to prove beyond a reasonable doubt any of the elements of those offenses which were not also elements of the murder and kidnapping counts, as charged to the jury (*see id.* at 539-540). There is no merit to defendant's suggestion that repugnancy should be assessed based on the evidence in the particular case, or the evidentiary theory advanced by the People at trial (*see People v Bharath*, 134 AD3d 483 [1st Dept 2015], *lv denied* 26 NY3d 1143 [2016]).

Defendant failed to preserve his contention that the trial judge improperly responded to a jury note by reading back less than two pages of one witness's testimony on direct examination, instead of assigning that task to nonjudicial court personnel, and we decline to review it in the interest of justice. As an alternative holding, we find that the trial judge should not have participated in the readback, since that practice is generally

disfavored (*see People v Alcide*, 21 NY3d 687, 695 [2013]), but that this error was harmless in light of the overwhelming evidence of defendant's guilt and the brevity of the readback (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the admission of hearsay testimony and the People's opening statement and summation are unpreserved, and we decline to review them in the interest of justice. Were we to review them, we would find them unavailing. Moreover, any error in these matters was harmless in light of the overwhelming evidence of guilt (*see id.*).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1846 Three Boroughs, LLC, Index 652264/14
Plaintiff-Respondent-Appellant,

-against-

Endurance American Specialty Insurance Company,
Defendant-Appellant-Respondent.

_____

Churbuck Calabria Jones & Materazo PC, Hicksville (Nicholas P. Calabria of counsel), for appellant-respondent.

Tese & Milner, New York (Michael M. Milner of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered January 22, 2016, which denied defendant insurer's motion for summary judgment seeking a declaration that plaintiff is not a named insured or additional insured under the policy issued to plaintiff's general contractor, and that defendant is not obligated to defend or indemnify plaintiff in the underlying personal injury action, and denied plaintiff's cross motion for summary judgment seeking a coverage declaration, or alternatively, a declaration that the defendant insurer is estopped from disclaiming coverage, unanimously modified, on the law, to grant defendant insurer's motion for summary judgment to the extent of declaring that it has no obligation to defend or

indemnify plaintiff in the underlying personal injury action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment so declaring.

Since "[d]efendant insurers established that the blanket additional insured endorsement in the policy issued to plaintiffs' maintenance contractor provided coverage to any person or organization 'that the insured is required by written contract to name as an additional insured,' and that the contract between plaintiffs and the maintenance contractor did not contain such a requirement," plaintiff is not an additional insured under the policy (*West 64th St., LLC v Axis U.S. Ins.*, 63 AD3d 471, 471-472 [1st Dept 2009]; *ALIB, Inc. v Atlantic Cas. Ins. Co.*, 52 AD3d 419, 419 [1st Dept 2008]; *Nicotra Group, LLC v American Safety Indem. Co.*, 48 AD3d 253, 254 [1st Dept 2008]). Moreover, the certificate language stating that "this certificate is issued as a matter of information only and confers no rights upon the certificate holder [and that] this certificate does not amend, extend or alter the coverage afforded by the policies," was insufficient to establish additional insured status under the policy (*ALIB, Inc.*, 52 AD3d at 419; *Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]; *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 248 AD2d

420, 423-424 [2d Dept 1998]).

The record establishes that the contractor's broker lacked the authority to bind the carrier (*Tribecca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 199-200 [1st Dept 2004]). Thus, the defendant insurer here cannot be estopped on the basis of an inadequate disclaimer, since "[a]n additional insured endorsement is an addition, rather than a limitation, of coverage" (*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [1st Dept 2006], citing *Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 84 [1st Dept 1994]; *see also B.R. Fries & Assoc., LLC v Illinois Union Ins. Co.*, 89 AD3d 619, 621 [1st Dept 2011]; *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 407 [1st Dept 2010]). In any event, plaintiff is unable to demonstrate prejudice, as the disclaimer letter clearly stated that plaintiff

did not qualify as an additional insured under the policy, and set forth the endorsement language upon which the insurer relied (*see Bellefonte Re-Insurance Co. v Volkswagenwek AG*, 102 AD2d 753 [1st Dept 1984]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ

1847 The People of the State of New York, Docket 90497/11
Respondent,

-against-

Jorge Egues,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 29, 2012, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: OCTOBER 6, 2016

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Kapnick, JJ.

1848N Tyson Jones, et al., Index 308688/11
Plaintiffs-Respondents,

-against-

Richard V. Seta, et al.,
Defendants-Appellants.

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Penino & Moynihan, LLP, White Plains (Henry L. Liao of counsel), for appellants.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 2, 2015, which, insofar as appealed from, in this action for personal injuries sustained in a motor vehicle accident, denied defendants' motion to vacate the note of issue and to compel plaintiff Tyson Jones to appear for a supplemental independent medical examination (IME) and deposition regarding prior injuries, unanimously modified, on the law and the facts, to the extent of directing Jones to appear for a supplemental deposition concerning only the prior injuries and related treatment, and otherwise affirmed, without costs.

Defendants' discovery, after the filing of the note of issue, that Jones had been involved in prior accidents involving the same body parts alleged to have been injured in the subject accident, constitutes "unusual or unanticipated circumstances"

warranting further discovery (22 NYCRR 202.21[d]; *see Bermel v Dagostino*, 50 AD3d 303 [1st Dept 2008]). However, defendants have not articulated a need for a supplemental physical examination, as the IME doctor has already examined Jones, documented his or her findings, and can supplement the same upon receipt of the records relating to Jones' prior injuries and treatment (*compare Hartnett v City of New York*, 139 AD3d 506 [1st Dept 2016]).

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

ENTERED: OCTOBER 6, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1610 Magdalena Garcia, etc., et al., Index 161484/15
Plaintiffs-Petitioners-Respondents,

-against-

The New York City Department of Health
and Mental Hygiene, et al.,
Defendants-Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for appellants.

Siri & Glimstad LLP, New York (Aaron Siri of counsel), for respondents.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), denominated an order, entered December 16, 2015, affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Richard T. Andrias
David B. Saxe
Rosalyn H. Richter
Marcy L. Kahn, JJ.

1610
Index 161484/15

_____x

Magdalena Garcia, etc., et al.,
Plaintiffs-Petitioners-Respondents,

-against-

The New York City Department of Health and Mental Hygiene, et al.,
Defendants-Respondents-Appellants.

_____x

Defendants-respondents appeal from the judgment (denominated an order) of the Supreme Court, New York County (Manuel J. Mendez, J.), entered December 16, 2015, granting plaintiffs-petitioners' motion to permanently enjoin defendants-respondents from implementing and enforcing certain amendments to the New York City Health Code, and denying defendants-respondents' cross motion to dismiss the petition.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson and Cecelia C. Chang of counsel), for appellants.

Siri & Glimstad LLP, New York (Aaron Siri of counsel), for respondents.

RICHTER, J.

In this appeal, we are asked to decide whether the New York City Board of Health properly adopted regulations mandating the influenza vaccine for children attending certain child care, pre-kindergarten, and kindergarten programs. Unlike State immunization statutes, the regulations do not prohibit child care facilities and schools from admitting unvaccinated children. Instead, a facility or school can, in effect, opt out of the vaccination requirement by paying a monetary fine. Further, the regulations do not apply to all child care facilities, but only to a small fraction of those operating within the city. We hold that although the regulations are not preempted by State law, they are nevertheless invalid because the particular scheme adopted by the Board of Health exceeded the scope of its regulatory authority.

Defendant-respondent New York City Department of Health and Mental Hygiene (the Department of Health) is a city agency tasked with regulating all matters affecting health in New York City (New York City Charter § 556). The Department of Health has jurisdiction over, inter alia, reporting, controlling and providing services for communicable diseases affecting public health (New York City Charter §§ 556[c][2], [d][6]). Defendant-respondent New York City Board of Health (the Board of Health), a

part of the Department of Health (together respondents), "is empowered to amend the [New York City] Health Code with respect to all matters to which the power and authority of [the Department of Health] extend" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 110 AD3d 1, 4 [2013], *affd* 23 NY3d 681 [2014]; *see* New York City Charter §§ 553, 558).

Article 47 of the New York City Health Code gives the Department of Health regulatory authority over certain public and private child care programs for children under six years old. The Department of Health's authority under article 47, however, does not extend to "[a]ny State-regulated informal child care program, a group family or family day care home, or school age [after-school] child care program, or a foster care program" (24 RCNY 47.01[c][2][A]). Article 43 of the New York City Health Code contains health and safety standards for public and private school-based pre-kindergarten and kindergarten programs for children ages three through five (24 RCNY 43.03).

The New York State Department of Health is a State agency charged with, inter alia, "supervis[ing] the work and activities of the local boards of health" and "supervis[ing] the reporting and control of disease" (Public Health Law § 201[1][a], [c]). Public Health Law § 2164[2][a] requires all children, ages two

months to eighteen years, in public and private child care programs and schools, to be immunized against measles, mumps, rubella and other specified diseases. Exemptions exist if a vaccine is detrimental to the child's health or if the child's parent or guardian has sincere religious beliefs against vaccinations (Public Health Law § 2164[8], [9]). A school shall not permit any child to attend, in excess of 14 days, without proof of the required immunizations (Public Health Law § 2164[7][a]). Public Health Law § 2165 similarly requires that college students be immunized against measles, mumps and rubella. Both articles 43 and 47 of the New York City Health Code likewise require children covered under those articles to be immunized against those diseases specified in Public Health Law § 2164.

On December 11, 2013, following notice and a public hearing, the Board of Health adopted a resolution amending articles 43 and 47 of the New York City Health Code with respect to vaccinations for influenza (the flu). The amendments require that all children, between the ages of 6 and 59 months, who attend child care and school-based programs under the Department of Health's jurisdiction be vaccinated against the flu each year (24 RCNY 43.17[a][2][B][i]; 24 RCNY 47.25[a][2][B][i]). Like the State immunization law, the amendments contains exemptions if the vaccine adversely affects the health of the child or for

religious grounds.

Under the amendments, the child care provider or school may, but is not required to, refuse to allow a child who was not vaccinated against the flu to attend (24 RCNY 43.17[a][2][B][ii]; 24 RCNY 47.25[a][2][B][ii]). However, if a child care provider or school chooses to allow unvaccinated nonexempt children to attend, it would be subject to a fine for each child not meeting the vaccination requirement (24 RCNY 43.17[a][2][C]; 24 RCNY 47.25[a][2][C]). The amount of the fine ranges anywhere from $200 to $2,000 (24 RCNY 3.11[a]). The amendments also provide that all children shall have such additional immunizations as the Department of Health may require (24 RCNY 43.17[a][2][D]; 24 RCNY 47.25[a][2][D]).

In November 2015, plaintiffs-petitioners (petitioners) commenced this hybrid article 78 proceeding and declaratory judgment action against the Department of Health, its commissioner, and the Board of Health. Petitioners are five working mothers, suing individually and on behalf of their children, who are enrolled in New York City child care or preschool programs. Petitioners object to having to vaccinate their young children against the flu, and several have been advised by specific schools that their children would be barred from attending if they did not receive the vaccine.

The petition seeks, pursuant to article 78, to permanently enjoin respondents from implementing or enforcing those parts of the amendments that mandate the flu vaccination and permit child care providers and schools to refuse to allow unvaccinated children to attend (24 RCNY 43.17[a][2][B]; 24 RCNY 47.25[a][2][B])(the challenged amendments). In the alternative, the petition seeks a declaration that certain provisions of the New York City Charter violate the separation of powers doctrine and are unconstitutional, to the extent that they are found to have authorized respondents to promulgate the challenged amendments.

Petitioners moved, by order to show cause, for a preliminary and permanent injunction enjoining respondents from implementing or enforcing the challenged amendments, or, alternatively, for the declaration sought in the petition. Petitioners argued, inter alia, that the challenged amendments were preempted by the State Public Health Law, and that the Board of Health exceeded the scope of its regulatory authority and engaged in lawmaking by adopting the challenged amendments. Respondents cross-moved to dismiss for, inter alia, failure to state a cause of action.

In a decision entered December 16, 2015, the motion court denied the cross motion to dismiss, and granted petitioners' motion to permanently enjoin respondents from implementing and

enforcing the challenged amendments, finding that they conflicted with the Public Health Law. The court's decision did not address petitioners' argument that the Board of Health exceeded its regulatory authority.[1] Respondents now appeal and we affirm, although on different grounds.

The motion court improperly found that the Board of Health's adoption of the challenged amendments was preempted by state law. "The Court of Appeals has recognized two ways in which state law may preempt local law: through the doctrine of (1) field preemption, 'when a local government legislates in a field for which the State Legislature has assumed full regulatory responsibility,' or (2) conflict preemption, 'when a local government adopts a law that directly conflicts with a State statute'" (*Patrolmen's Benevolent Assn. of the City of N.Y., Inc. v City of New York*, 142 AD3d 53, 58 [1st Dept 2016], quoting *DJL Rest. Corp. v City of New York*, 96 NY2d 91, 95 [2001]).

Thus, "[w]here the State has demonstrated its intent to preempt an entire field and preclude any further local regulation, local law regulating the same subject matter is

[1] Because the motion court granted the permanent injunction requested by petitioners, which was the relief sought in the article 78 petition, it did not reach petitioners' plenary claim for declaratory relief, which was asserted in the alternative to the article 78 claim.

considered inconsistent and will not be given effect" (*Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 505 [1991]). Even where field preemption is absent, conflict preemption "'occurs when a local law prohibits what a state law explicitly allows, or when a state law prohibits what a local law explicitly allows'" (*New York State Assn. for Affordable Hous. v Council of the City of N.Y.*, 141 AD3d 208, 215 [1st Dept 2016], quoting *Matter of Chwick v Mulvey*, 81 AD3d 161, 168 [2d Dept 2010]).

There is no field preemption here because the State has not assumed full regulatory responsibility over the entire field of disease control and vaccination. The Court of Appeals has recognized that "'the main business of safeguarding the public health has always of necessity been done by local boards or officers through sanitary by-laws or ordinances'" (*Grossman v Baumgartner*, 17 NY2d 345, 351 [1966], quoting *People v Blanchard*, 288 NY 145, 147 [1942]). The New York State Constitution grants local governments the power to enact laws, not inconsistent with the provisions of the Constitution or any general law, relating to the "safety, health and well-being of persons . . . therein" (NY Const, art IX, § 2[c][ii][10]; *see also* Municipal Home Rule Law § 10[1][ii][a][12] [same]). This provision "confers broad police power upon local government relating to the welfare of its

citizens" (*New York State Club Assn. v City of New York*, 69 NY2d 211, 217 [1987] [footnote omitted], *affd* 487 US 1 [1988]).

Rather than demonstrating an intent to preempt the field of disease control and vaccination, the State legislature has recognized that local government plays an important role in those areas. Under Public Health Law § 308(d), local boards of health are empowered to make regulations "deem[ed] necessary and proper for the preservation of life and health." Public Health Law § 228(3) allows localities to enact laws and regulations, provided that they "comply with at least the minimum applicable standards set forth in the [State health] code." Thus, local governments have the authority to adopt local health regulations subject only to minimum statewide standards. In other words, state law sets the floor, not the ceiling, for local health regulations.

That the State did not intend to preempt the field is further evident from the legislature's enactment of section 17-109 of the New York City Administrative Code, which specifically deals with local authority over vaccinations. Subdivision (a) of that section gives the Department of Health the power to produce vaccines and antitoxins, and "add necessary additional provisions to the [New York City] health code in order to most effectively prevent the spread of communicable diseases." Subdivision (b) further permits the Department of Health to "take measures, and

supply agents and offer inducements and facilities for general and gratuitous vaccination." By enacting this provision, the legislature expressly delegated to the Department of Health some responsibilities in the field of disease control and vaccination.

Petitioners have failed to establish that the State has "clearly evinced a desire to preempt an entire field thereby precluding any further local regulation" (*Jancyn Mfg. Corp. v County of Suffolk*, 71 NY2d 91, 97 [1987]). Collectively viewed, the State Constitution, Municipal Home Rule Law § 10, Public Health Law §§ 228(3) and 308(d), and Administrative Code § 17-109 demonstrate that the State has not assumed "full regulatory responsibility" over the field of disease control and vaccination, and in fact has ceded some responsibility over those matters to the Department of Health (*Patrolmen's Benevolent Assn.*, 142 AD3d at 58). Thus, the adoption of the challenged amendments is not prohibited under the doctrine of field preemption.

Nor are the challenged amendments barred under principles of conflict preemption. Contrary to petitioners' contention, the Board of Health's regulations do not directly conflict with Public Health Law § 2164. As noted earlier, that section requires all children in New York State to receive certain enumerated vaccinations, and forbids unvaccinated children from

attending school. The absence of the flu vaccination from the mandated list does not present a conflict because the statute contains no language prohibiting localities from requiring additional vaccinations not mandated by the state (*see Patrolmen's Benevolent Assn.*, 142 AD3d at 62 ["no conflict exists where a local law prohibits something that might generally be considered permissible by virtue of state law's silence on an issue"]). Indeed, the mandating of an additional vaccine is consistent with the previously-noted authority granted to local governments, and poses no conflict with the floor the legislature set in section 2164 (*see Jancyn Mfg. Corp.*, 71 NY2d at 97 ["The fact that both the State and local laws seek to regulate the same subject matter does not in and of itself give rise to an express conflict"]).

Likewise, the challenged amendments do not directly conflict with Public Health Law §§ 206 and 613. Section 206 addresses the general powers and duties of the Commissioner of the State Department of Health, and section 613 authorizes the Commissioner to develop immunization and educational programs for, inter alia, the flu. Although both statutes state that "[n]othing in this [provision] shall authorize mandatory immunization of adults or children, except as provided in [Public Health Law §§ 2164 and 2165]," that prohibition applies, and is directed, to state

immunization efforts. Nothing in either statute expressly or impliedly limits the authority of local governments to implement additional vaccination requirements (*see Matter of Chwick v Mulvey*, 81 AD3d at 169 ["without a 'head-on collision' between the [state law] and the [local] ordinance, conflict preemption does not apply"], quoting *Matter of Lansdown Entertainment Corp. v New York City Dept. of Consumer Affairs*, 74 NY2d 761, 764 [1989]).

Although the challenged amendments are not preempted by state law, we find that the Board of Health exceeded the scope of its regulatory authority by adopting them. "'The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation'" (*Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 865 [2003], quoting *Matter of Nicholas v Kahn*, 47 NY2d 24, 31 [1979]). While the legislative branch may grant an administrative agency the authority to promulgate regulations in furtherance of a legislative mandate, it "may not constitutionally cede its fundamental policymaking responsibility to [the] agency (*id.* at 864; *see Boreali v Axelrod*, 71 NY2d 1, 9

[1987] [administrative agencies cannot engage in "inherently legislative activities"]).

In *Boreali*, the Court of Appeals set forth a framework for determining whether an administrative agency has crossed "the difficult-to-define line between administrative rule-making and legislative policy-making" (71 NY2d at 11). The *Boreali* factors, as recently described by the Court of Appeals, are

> "whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged regulation[]"

(*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 179-180 [2016] [internal quotation marks and citations omitted]; *see also Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 692-693 [2014]; *Boreali*, 71 NY2d at 12-14).

The four *Boreali* factors are not "discrete, necessary

conditions that define improper policymaking by an agency" (*New York Statewide Coalition*, 23 NY3d at 696). Nor should they be "rigidly applied" whenever an agency is alleged to have engaged in improper lawmaking (*id.*). Instead, they are "overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed" "the line into legislative territory" (*id.* at 696-697). The *Boreali* factors "are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power" (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 612 [2015]). Thus, an agency cannot turn back a challenge to a proposed regulation simply by showing that a *Boreali* factor is absent (*New York Statewide Coalition*, 23 NY3d at 697).

Applying these principles, we conclude that by adopting the challenged amendments, the Board of Health "cross[ed] the line into legislative territory" (*New York Statewide Coalition*, 23 NY3d at 696). With respect to the first *Boreali* factor, the Board of Health did not merely balance costs and benefits, but instead improperly made value judgments by creating a regulatory scheme with exceptions not grounded in promoting public health. As noted earlier, the challenged amendments do not prohibit a child who was not vaccinated against the flu from attending child

care or school, but provide only that the facility "*may*" refuse entry to the unvaccinated child (24 RCNY 43.17[a][2][B][ii] [emphasis added]; 24 RCNY 47.25[a][2][B][ii] [emphasis added]). Instead, the provider or school can, in effect, opt-out of the vaccination requirement and allow an unvaccinated child to attend, upon payment of a monetary fine (24 RCNY 43.17[a][2][C]; 24 RCNY 47.25[a][2][C]).

This opt-out provision stands in stark contrast to section 2164(7)(a) of the State's Public Health Law, which, logically, forbids children from remaining in school without proof of the immunizations required under that statute. The challenged amendments, on the other hand, allow a child care provider or school to make an economic choice to pay a fine rather than expel a student and lose a year's worth of tuition. Creating a policy whereby unvaccinated children are allowed to stay in child care or school flies in the face of respondents' claim that the challenged amendments are meant to promote the public health by reducing transmission of the flu virus. Not surprisingly, respondents are unable to point to any health-related reason supporting the opt-out provision.

That the Board of Health made improper policy choices is further evidenced by the fact that the flu shot requirement applies only to the 2,283 larger licensed child care facilities

in New York City that the Board regulates, and does not cover the 9,241 providers that fall under State regulation.[2] Thus, less than 20% of child care facilities in the city must abide by the flu vaccine mandate. Further, the vaccine requirement does not apply to more than 20,000 legally exempt child care providers.[3] Respondents maintain that the Board of Health targeted its efforts only on those child care providers it licenses because it already possesses regulatory expertise with respect to those facilities. But that rationale is based on administrative convenience, not health-related concerns. The decision to place economic burdens on only a fraction of licensed child care facilities, albeit the larger ones, while not placing the same burdens on other facilities shows that the Board of Health was "making policy, and therefore was operating outside of its proper sphere of authority" (*Matter of Ahmed v City of New York*, 129 AD3d 435, 440 [1st Dept 2015] [internal quotation marks omitted]; *see Boreali*, 71 NY2d at 12 [finding proper balance between health concerns and cost "is a uniquely legislative function"]).

The second *Boreali* factor — whether the agency "wrote on a

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[2] As noted earlier, the flu vaccine is required for children in only those child care facilities the Board of Health regulates under article 47 of the New York City Health Code.

[3] Respondents do not challenge any of petitioners' figures, which are supported by the record.

clean slate" (*Boreali*, 71 NY2d at 13) — tilts in favor of respondents. There is no basis to find that the challenged amendments were adopted "without benefit of legislative guidance" (*id.*). As noted earlier, section 17-109 of the New York City Administrative Code gives the Department of Health the power to "add necessary additional provisions to the [New York City] health code in order to most effectively prevent the spread of communicable diseases," and "take measures . . . for general and gratuitous vaccination." Because there is an express statutory delegation to the Department of Health of responsibilities for vaccination of city residents, it cannot be said that the Board of Health wrote on a "clean slate."

The third *Boreali* factor — whether the legislature has unsuccessfully tried to reach agreement on this issue — presents a close question, and does not clearly weigh in either petitioners' or respondents' favor. Although petitioners point to the legislature's rejection of a bill mandating the flu vaccination for children, respondents maintain that that sole piece of legislation is insufficient to show "repeated failures by the Legislature to [reach] an agreement" in the area where the Board of Health acted (*Boreali*, 71 NY2d at 13). We also note that neither party points to any effort by the New York City Council to pass a law requiring the flu vaccine. Nevertheless,

the subject of mandatory vaccinations for a different malady — meningococcal disease — has been before the legislature several times, and was approved only after years of repeated failures. Further, it took several years for the legislature to agree on a bill to merely *encourage* flu vaccination for children (L 2010, ch 36, § 1; Public Health Law § 613[1]).

The fourth *Boreali* factor — whether the agency used special expertise in its field — weighs in favor of petitioners. In developing the challenged amendments, the Board of Health unquestionably relied on its expertise in the health field to conclude generally that the mandatory vaccination of children furthers public health goals. The notice of adoption of the challenged amendments sets forth the scientific rationale for mandatory flu vaccination, and cites to a number of studies showing the safety and effectiveness of the flu vaccine in protecting the health of children, their families and communities. Further, the notice points out that, based on scientific evidence, the CDC's Advisory Committee on Immunization Practices recommends that everyone six months of age or older receive an annual flu vaccination. Nevertheless, this *Boreali* factor supports petitioners, because no special expertise was relied upon to develop the unique scheme that was adopted here. The notice of adoption does not contain any health-related basis

supporting either the opt-out provision or the decision to apply the vaccination requirement to only a fraction of the city's child care facilities. Likewise, the affidavit of the First Deputy Commissioner of the Department of Health, submitted before the motion court, is silent on these issues. Although we do not dispute that this type of health-related regulation can be based upon medical and scientific considerations, respondents have not established how this specialized knowledge led to this specific regulation.

In sum, two of the *Boreali* factors weigh in favor of petitioners, one leans in favor of respondents, and one does not support either party. As noted earlier, however, the factors are not "necessary conditions," should not be "rigidly applied" (*New York Statewide Coalition*, 23 NY3d at 696), and "need not be weighed evenly" (*Greater N.Y. Taxi Assn.*, 25 NY3d at 612). The *Boreali* factors, when viewed together, support the conclusion that by adopting the challenged amendments, particularly in view of the opt-out provision and the uneven application to the various city child care providers, the Board of Health was making policy and impermissibly crossed into the legislative sphere. By this decision, we do not conclude that Board of Health is powerless to require vaccination of city residents, including young children. Indeed, section 17-109 of the New York City

Administrative Code suggests otherwise. Our only holding is that the particular scheme adopted here was not primarily grounded in science or health, but involved improper policy decisions, and thus did not constitute appropriate rulemaking.[4]

Accordingly, the judgment (denominated an order) of the Supreme Court, New York County (Manuel J. Mendez, J.), entered December 16, 2015, granting plaintiffs-petitioners' motion to permanently enjoin defendants-respondents from implementing and enforcing certain amendments to the New York City Health Code (24 RCNY 43.17[a][2][B]; 24 RCNY 47.25[a][2][B]), and denying defendants-respondents' cross motion to dismiss the petition, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 6, 2016

CLERK

[4] The order appealed from, which is marked "Final Disposition," granted the relief sought in the article 78 petition in its entirety, enjoining the enforcement of the challenged amendments; thus, it is a final order, appealable as of right (CPLR 5701[a]; *see Matter of Pelaez v Waterfront Commn. of N.Y. Harbor*, 48 NY2d 1021, 1022-1023 [1980]).