SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 29, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4856-4857 The People of the State of New York, Appellant,

-against-

Jamal Cox,
Defendant-Respondent.

Ind. 2944/11

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

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

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Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered September 8, 2015, resentencing defendant, as a second felony offender, to a term of 10 years, unanimously reversed, on the law, the judgment of resentence vacated, and defendant's original sentence, as a persistent violent felony offender, to a term of 16 years to life, reinstated.

The resentencing court granted defendant's CPL 440.20 motion to set aside his sentence as a persistent violent felony offender, on a ground later rejected by the Court of Appeals (*see People v Smith*, 28 NY3d 191 [2016]). The resentencing court did not reach the remaining claim raised in the motion, namely

whether defendant's 2003 Queens County conviction was unconstitutionally obtained because he was never informed during the plea proceeding of the term of his incarceratory sentence. We held this appeal in abeyance and remitted to the Supreme Court for a determination of that issue. On remittitur, the court (James M. Burke, J.) rejected defendant's argument.

Regardless of whether defendant's current argument is procedurally barred, on the merits, we find that defendant has failed to meet his burden to "prove the facts underlying the claim that the [2003] conviction was unconstitutionally obtained" (*see People v Harris*, 61 NY2d 9, 15 [1983]). It is undisputed that the court did not announce the promised sentence on the record at the plea proceeding in the 2003 case. However, the record unequivocally establishes that defendant was apprised of the terms of his sentence (*see e.g. People v Harrington*, 3 AD3d 737, 738 [3d Dept 2004]). Contrary to defendant's contention, the record is not ambiguous. The waiver of the right to appeal form stated that defendant agreed to a sentence of seven years, which was the sentence ultimately imposed. At the plea colloquy, defendant acknowledged that he had signed the document, understood it, and discussed it with counsel. Furthermore, the

fact that neither defendant nor his counsel called the court's attention to the fact that it had not announced the promised sentence lends further support to the conclusion that defendant already knew what the promise was.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Acosta, P.J., Friedman, Manzanet-Daniels, Webber, Singh, JJ.

7622 Panagiota Melis, Index 156637/16
Plaintiff-Respondent,

-against-

Hellenic Orthodox Community
of St. Eleutherios, Inc.,
Defendant-Appellant,

Hellenic Orthodox Community of
St. Eleftherios Church, Inc.,
Defendant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered on or about March 24, 2017,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 5, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Friedman, J.P., Richter, Kahn, Oing, Moulton, JJ.

7559 & M-5311 — Katherine Nelson, Plaintiff-Appellant, — Index 161624/14

-against-

Robert Rosenkranz, Defendant-Respondent.

Katherine Nelson, appellant pro se.

Bronstein Van Veen LLC, New York (Peter E. Bronstein of counsel), for respondent.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about May 31, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for reverse summary judgment in plaintiff's favor on her breach of contract claim and on his counterclaim for a permanent injunction, unanimously affirmed, without costs.

The record presents no triable issues of fact as to the breach of contract claim except whether defendant made the final payment of $45,500. Therefore, the court properly permitted defendant to withdraw so much of his verified answer as denied the breach, and granted summary judgment in plaintiff's favor on the claim.

Contrary to plaintiff's contention, rescission of the agreement was not warranted. The court correctly found that

monetary damages were an adequate remedy and that a return to the status quo was impossible, because plaintiff had already violated the terms of the agreement by communicating with defendant and his family and publicly disseminating information about her intimate relationship with him (*see Wyckoff v Searle Holdings Inc.*, 111 AD3d 546 [1st Dept 2013]).

The court correctly granted defendant summary judgment on his counterclaim for a permanent injunction that essentially mirrors the terms of the parties' agreement. Plaintiff's argument that the permanent injunction violates her First Amendment rights is not properly before this Court, because her causes of action raising similar constitutional claims were dismissed in a prior order from which plaintiff failed to appeal.

In any event, plaintiff's argument is without merit. Parties "may stipulate away statutory[] and even constitutional rights" so long as there is no affront to public policy and the waivers are not the product of fraud or duress (*Trump v Trump*, 179 AD2d 201, 204 [1st Dept 1992], *lv denied* 80 NY2d 760 [1992]; *see Speken v Columbia Presbyt. Med. Ctr.*, 304 AD2d 489 [1st Dept 2003], *lv denied* 100 NY2d 511 [2003]). Plaintiff does not argue that any of these exceptions applies here.

Contrary to plaintiff's further contention, the fact that the parties' one-page agreement does not specify injunctive

relief as a remedy does not bar the court from issuing a permanent injunction (*cf. Granite Broadway Dev. LLC v 1711 LLC*, 44 AD3d 594, 595 [1st Dept 2007] ["For there to be a complete bar to equitable relief there must be something . . . such as explicit language in the contract that the liquidated damages provision was to be the sole remedy"] [internal quotation marks omitted], *lv denied* 10 NY3d 702 [2008]).

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

M-5311 - *Katherine Nelson v Robert Rosenkranz*

Motion to supplement the record denied.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7738 The People of the State of New York, Respondent, Ind. 428/14

-against-

Darnell Holmes,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered August 3, 2016, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 10½ years, unanimously reversed, on the law and as an exercise of discretion in the interest of justice, and the matter remanded for a new trial.

The court should have granted defendant's request to charge third-degree robbery as a lesser included defense of first-degree robbery. The court's first-degree robbery charge, consistent with the indictment, required the People to prove that defendant used or threatened to use a knife; it is undisputed that a finding that defendant wielded some weapon or object other than a knife would not support first-degree robbery in this case. There was a reasonable view of the evidence, viewed in the light most

favorable to defendant, that he forcibly stole property from the victim, but did not use or threaten to use a knife in the course of doing so (*People v Rivera*, 77 AD3d 483 [1st Dept 2010]). On the facts presented, the jury could have reasonably reached these findings by generally crediting the victim's account, but finding that her testimony about seeing defendant using a knife was mistaken. Moreover, while this circumstance is not controlling, we note that the People joined in defendant's request for submission of third-degree robbery.

Furthermore, the court should also have granted defendant's request for an adverse inference charge as to surveillance photos taken in the victim's livery cab after other photos, introduced at trial, were taken. The photos in evidence showed defendant in the back seat before he left and allegedly returned to rob the driver. The Police Department collected the photos but destroyed all but a few of them, which were introduced at trial through a detective who alleged that other members of his team selected them as the most relevant. Defendant established that the missing photos were "reasonably likely to be material" (*People v Handy*, 20 NY3d 663, 669 [2013]), since they might have shown what type of weapon or object was used by the perpetrator. The record fails to support the People's assertion that the camera could not have recorded the incident because it recorded only when someone

sat in the back seat. The detective merely testified that he had seen such cameras in some unrelated cases, and the People did not establish that any witness was knowledgeable about how the particular camera in this case was activated. Under these circumstances, the adverse inference change was "mandatory upon request" (*People v Viruet*, 29 NY3d 527, 532 [2017]).

This error was not harmless (*see People v Crimmins*, 36 NY2d 230 [1975]), and it compounded the error in failing to submit the lesser included offense. Both of these errors affected the jury's opportunity to consider whether the People had met their burden of proving that defendant used or threatened to use a knife. Insofar as any of defendant's appellate arguments for the adverse inference charge are unpreserved, we reach them in the interest of justice.

Since we are remanding for a new trial, we do not reach defendant's remaining arguments on appeal.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7740 In re Joaquin C.,
Petitioner-Appellant,

-against-

Josephine I.-C.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

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

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

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about November 1, 2017, which, after a hearing, denied the petition to enforce a visitation order providing for unsupervised visitation, and instead provided for supervised visitation with the subject child, unanimously affirmed, without costs.

The testimony, medical records, and reports submitted to the court provide a sound and substantial evidentiary basis for Family Court's determination that it was not in the best interests of the subject child to have unsupervised visitation with the father. The record also supports a finding that a change in circumstances warranted a modification of the visitation order to provide for only supervised visitation (*see*

Matter of Wilson v McGlinchey, 2 NY3d 375, 380-381 [2004]; *Matter of Luis F. v Dayhana D.*, 109 AD3d 731 [1st Dept 2013]). The evidence showed that, although the father was engaged in treatment and had obtained housing, he continued to have difficulty controlling himself and had lost his temper with the child during an unsupervised visit. In light of his history of violence and the previous finding of neglect (*Matter of Angelina M. [Joaquin C.]*, 135 AD3d 651 [1st Dept 2016]), limiting the father to supervised visitation is in the child's best interests (*see Matter of James K.T. v Laverne W.*, 154 AD3d 471 [1st Dept 2017]; *Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]). Contrary to the father's argument, the court was not bound to enforce the visitation agreement, since the child's best interests are paramount (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7741 Isaac Eida, Index 156986/12
Plaintiff-Appellant,

-against-

Board of Managers of 135 Condominium,
Defendant-Respondent.

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Law Office of Robert L. Greener, New York (Robert L. Greener of counsel), for appellant.

Law Offices of Charles J. Siegel, New York (Bhavleen Sabharwal of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered October 16, 2017, which, to the extent appealed from as limited by the briefs, dismissed, after pretrial conference and memoranda, plaintiff's first and second causes of action for a declaratory judgment and related relief, and awarded defendant attorneys' fees, unanimously reversed, on the law, with costs, and the matter remanded for trial.

Plaintiff seeks a declaratory judgment to void defendant's alleged improper amendment of its bylaws due to failure to comply with meeting notice requirements. Defendant waived the defenses of statute of limitations and lack of standing by failing to raise them in either a pre-answer motion to dismiss or its answer (*see e.g. Dougherty v City of Rye,* 63 NY2d 989, 991-992 [1984]). Therefore, we reinstate the first and second causes of action,

which the IAS court dismissed on those respective grounds. The merits of these causes of action are not properly before us because the court (Schlomo Hager, J.) previously rejected defendant's summary judgment motion as untimely and denied its subsequent motion for leave to file a late summary judgment motion.

The court erred in granting defendant attorneys' fees since such award was not authorized by agreement between the parties or by statute (*see e.g. Chapel v Mitchell*, 84 NY2d 345, 349 [1994]), and defendant did not contend that plaintiff engaged in frivolous conduct.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7742 Ermenegildo Zegna Corporation, Index 655204/16
Plaintiff-Respondent,

-against-

L&M 825 LLC,
Defendant-Appellant.

_____

Herrick, Feinstein LLP, New York (Scott E. Mollen of counsel), for appellant.

Loeb & Loeb LLP, New York (Gil Feder of counsel), for respondent.

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Order, Supreme Court, New York County, (Barbara Jaffe, J.), entered March 8, 2018, which denied defendant's motion for summary judgment dismissing the complaint and granting its counterclaims, unanimously affirmed, without costs.

The parties entered into a commercial real estate contract for plaintiff to use three floors of defendant's building as retail space. Prior to the lease, the premises and an adjacent property were a single combined space, occupied by one retail store. The parties agreed that the defendant would divide the space into two retail stores. After the dividing wall was erected, the parties discovered that it eliminated one of the required exits for the upper two floors of plaintiff's store, invalidating the Certificate of Occupancy.

Plaintiff seeks, among other things, rescission of the lease

based on mutual mistake *(Eisenberg v Hall*, 147 AD3d 602, 604 [1st Dept 2017]). Defendant counters that plaintiff is precluded from invoking mutual mistake because of its conscious ignorance of the potential adverse impact that the construction of the wall would have on its anticipated use of the space (*P.K. Dev. v Elvem Dev. Corp.*, 226 AD2d 200, 201-202 [1st Dept 1996]). This record does not permit resolution of these issues as a matter of law.

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

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7743 The People of the State of New York, Respondent, Ind. 1496/11

-against-

Jeramie Rodriguez, Defendant-Appellant.

_____

Law Offices of Murray Richman, Bronx (Murray Richman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Alvin M. Yearwood, J.), rendered May 27, 2016, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

Defendant's motion for a trial order of dismissal lacked sufficient specificity to preserve his present legal sufficiency claim, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. To the extent that defendant's appellate argument can be viewed as a claim that the verdict was against the weight of the evidence, we reject that claim as well (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence does not cast doubt on the truthfulness or voluntariness of defendant's written and

videotaped admissions of guilt.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve 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]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7744 Francine Litwin, Index 157367/13
Plaintiff-Appellant,

-against-

Tri-State Consumer Insurance Company,
Defendant-Respondent.

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Wilkofsky, Friedman, Karel & Cummins, New York (Harry A. Cummins of counsel), for appellant.

Kaufman Dolowich Voluck LLP, Woodbury (Eric B. Stern of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered July 21, 2017, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, the complaint reinstated, and the matter remanded for trial.

Defendant failed to establish prima facie that it complied with the terms of the insurance policy in paying plaintiff's claim for damage to personal property due to a fire (*see Bardi v Farmers Fire Ins. Co.*, 260 AD2d 783, 785-786 [3d Dept 1999], *lv denied* 94 NY2d 839 [1999]). The policy provided for the submission of an initial claim and, within 180 days, proof of additional liability. For each damaged item, defendant would then pay the "least" of the amounts set forth for six categories

of settlement, including 400% of the actual cash value or replacement cost without depreciation or the applicable policy limit for that category. Although defendant submitted a spreadsheet detailing the settlement amounts for each item, it did not indicate how these amounts were calculated or which of the six alternative formulas were relied upon in reaching the amounts. The affidavit by a claims adjuster stating in a conclusory fashion that plaintiff was paid the least of the six category amounts for each item, in accordance with the policy, is insufficient. Nor can claimed reliance on an undisclosed algorithm meet defendant's burden of establishing that it complied with the policy.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7745 The People of the State of New York, Respondent, Ind. 3203/12

-against-

Richard Arroyo, Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered December 17, 2014, convicting defendant, after a jury trial, of assault in the first degree, menacing in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of seven years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the jury's credibility determinations.

The element of serious physical injury was established by evidence supporting an inference that the victim's injuries were life-threatening. As a result of multiple stab wounds to his arm, wrist and torso, the victim was weak, fainting, losing and

regaining consciousness, and experiencing dangerously low blood pressure upon admission to the hospital, which led to an emergency blood transfusion before his consent could be obtained and before all usual protocols could be followed. The evidence thus warranted the conclusion that the injury created a substantial risk of death (*see People v Montimaire*, 91 AD3d 436 [1st Dept 2012], *lv denied* 19 NY3d 865 [2012]; *People v Irwin*, 5 AD3d 1122 [4th Dept 2004], *lv denied* 3 NY3d 642 [2004]).

The evidence also disproved defendant's justification defense beyond a reasonable doubt. In the exercise of our factual review power, we find that the jury properly credited testimony that completely refuted defendant's claim of self-defense.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7746-
7747 In re Bunita B.,
Petitioner-Appellant,

-against-

Mark P.,
Respondent-Respondent.

- - - - -

In re Mark P.,
Petitioner-Respondent,

-against-

Bunita B.,
Respondent-Appellant.

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Douglas H. Reiniger, New York, for appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about March 9, 2017, which, after a hearing, inter alia, denied the mother's petition for custody of the subject child and granted respondent father's petition awarding him sole legal and physical custody of the child, unanimously affirmed, without costs.

A sound and substantial basis exists in the record for the court's determination, which was made after a full evidentiary

hearing, that the child's best interests will be served by awarding sole legal and physical custody to the father (*see generally Eschbach v Eschbach*, 56 NY2d 167 [1982]). After the parents separated, ACS removed the child from the mother's care. Following a time in foster care, in 2012, the child was released by ACS to the father's care. The record shows that the father was better able to provide a stable environment for the child, because he had lived in the same residence for many years, and had been the child's primary caregiver, after her return from foster care (*see Matter of David C. v Laniece J.*, 102 AD3d 542 [1st Dept 2013]). The father attended to all of the child's medical and educational needs, whereas the mother had no involvement with the child's medical care or education (*see Matter of Celina S. v Donald S.*, 133 AD3d 471 [1st Dept 2015]). The court considered all of the relevant factors, including the father's admitted history of domestic violence (*see Matter of Kougne T. v Mamadou D.*, 133 AD3d 455 [1st Dept 2015]), but found that there had been no further instances of domestic violence after 2012. The court also considered and weighed evidence that the mother's future living arrangements were "in flux" because she was looking to relocate with the child.

The court providently exercised its discretion in declining to conduct an in camera interview of the child because the

child's attorney stipulated that the child loved both parents and had no preference as to which parent she wanted to live with (*see Matter of Mohamed Z.G. v Mairead P.M.*, 129 AD3d 516, 517 [1st Dept 2015], *lv denied* 26 NY3d 906 [2015]). The child's purported change in her preference after the hearing from being neutral to wanting to live with the mother does not warrant a different determination, because her counsel does not explain what caused the child's change of heart and in light of the potential that the child has been influenced (*see Zelnik v Zelnik*, 196 AD2d 700 [1st Dept 1993]).

The mother failed to preserve her contention that the Family Court harbored a bias against her, and we decline to review it in the interest of justice. In any event, there is no support in the record for such a claim (*see Matter of Bianca J. v Dwayne C.A.*, 136 AD3d 450 [1st Dept 2016]).

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: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7748 The People of the State of New York, Respondent, Ind. 1940/10

-against-

Devon McGee, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Rena K. Uviller, J. at jury trial and sentencing), rendered May 1, 2013, as amended June 28, 2013, convicting defendant, after a jury trial, of five counts of rape in the first degree, seven counts of criminal sexual act in the first degree, three counts of sexual abuse in the first degree, two counts of robbery in the second degree and one count of assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Based on the factors discussed in *People v McBride* (14 NY3d 440, 446 [2010], *cert denied* 562 US 931 [2010]), we conclude that exigent circumstances justified the warrantless entry into

defendant's apartment. A visibly upset woman, in ripped and disheveled clothing with marks on her face, informed the police that she had just been repeatedly raped, robbed and beaten. She detailed the location and time that it occurred and descriptions of her three assailants, giving the police probable cause to believe that she had been raped, robbed, and beaten at defendant's apartment and that the men were still there. There was also a danger that the men would flee or destroy evidence of the rape, and the police ultimately entered the apartment peaceably.

Regardless of whether the police unlawfully entered defendant's apartment and arrested him without a warrant, he would not be entitled to the suppression of evidence that was not the product of that police action. A plastic bag of used condoms was abandoned, independently of any unlawful police conduct, because it was discarded from a window when the police had only knocked on the door and had not yet entered (*see People v Ramirez-Portoreal*, 88 NY2d 99, 110 [1996]). Furthermore, when the victim, who had accompanied the police to the hallway outside defendant's apartment, spontaneously identified him when she saw him through the doorway after the police entered, there was no exploitation by the police of the alleged illegality (*see People v Jones*, 2 NY3d 235, 241-242 [2004]). In any event, any error in

admitting any of the evidence at issue was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7749 Books for Less, LLC, Index 157328/13
Plaintiff-Respondent,

-against-

United National Insurance Company,
Defendant-Appellant.

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Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for appellant.

Law Offices of Allan Samuels & Associates, P.A., New York (Brian J. McCarthy of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Marcy Friedman, J.), entered August 21, 2017, which denied defendant's motion for summary judgment declaring that it has no coverage obligation to plaintiff with respect to the underlying property damage claim, and declared that defendant is obligated to make available in connection with that claim up to the entire limit of $3 million of its excess insurance policy subject to proof of actual business income loss suffered by plaintiff, unanimously affirmed, with costs.

The plain language of the excess insurance policy issued by defendant unambiguously requires that defendant provide coverage for business interruption loss suffered by plaintiff in excess of

$500,000 (*see Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]).

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: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7750 The People of the State of New York, Respondent, Ind. 2612/16

-against-

Matthew Hilton, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at consolidation motion; Abraham Clott, J. at severance motion, jury trial and sentencing), rendered May 5, 2017, convicting defendant of robbery in the second degree, and sentencing him, as a second felony offender, to a term of nine years, unanimously affirmed.

Defendant was not deprived of a fair trial by the fact that he was tried jointly with a codefendant. In opposing consolidation and moving for severance, the two defendants repeatedly changed their explanations of what their defenses would be, and never set these defenses forth with sufficient specificity. In any event, at no point did they offer defenses that would be in such irreconcilable conflict as to create "a significant danger ... that the conflict alone would lead the

jury to infer defendant's guilt" (*People v Mahboubian*, 74 NY2d 174, 183-184 [1989]), or cause either defendant to act as a "second prosecutor" against the other (*People v Cardwell*, 78 NY2d 996, 998 [1991]).

Furthermore, defendant has not shown that the joint trial deprived him of his right to testify. Defendant claims he chose not to testify due to fear that the codefendant would be permitted to conduct an unlimited cross-examination of defendant about his prior convictions. However, there was no showing that the codefendant would have had any reason to impeach defendant's credibility (*see People v Frazier*, 309 AD2d 534 [1st Dept 2003], *lv denied* 1 NY3d 571 [2003]).

In any event, the defenses ultimately presented at trial by the two defendants were not in irreconcilable conflict. The record, including the cross-examinations and summations presented by the respective attorneys, fails to support defendant's assertion that each defendant accused the other of committing the robbery. To the extent there was any conflict, it is unlikely that the existence of the conflict would have contributed to the verdict, given the strong evidence of guilt provided by the victim and the arresting officers (*see Mahboubian*, 74 NY2d at 186).

The trial court providently exercised its discretion in

precluding defendant from questioning the arresting officer on whether the officer had certain exculpatory "information." The question was plainly aimed at eliciting hearsay, consisting of defendant's own statement, and defendant did not establish any valid theory of admissibility (*see People v Hubrecht*, 2 AD3d 289, 289 [1st Dept 2003], *lv denied* 2 NY3d 741 [2004]).

Defendant did not preserve his claim that this ruling deprived him of his constitutional right to cross-examine witnesses and present a defense (*see People v Lane*, 7 NY3d 888, 889 [2006]), as well as his claim, raised at trial only by the codefendant (*see People v Buckley*, 75 NY2d 843, 846 [1990]), that the victim's entire testimony should have been stricken because he invoked the Fifth Amendment when asked about an immigration matter, and his claim that his sentence was unconstitutionally imposed, and we decline to review these claims in the interest of justice. As an alternative holding, we reject each of them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7751 The People of the State of New York, Ind. 3075/01
Respondent,

-against-

Ralph Hankerson,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about July 26, 2017, which adjudicated defendant a level three violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The underlying sex crime was committed under egregious circumstances, and defendant did not establish that his

health problems were so serious that they would minimize the likelihood of recidivism (*see e.g. People v Portalatin*, 145 AD3d 463 [1st Dept 2016]) or that his age warranted a downward departure.

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7752 Alexis Ogando, et al., Index 309337/12
Plaintiffs-Appellants,

-against-

National Freight, Inc., et al.,
Defendants-Respondents.

_____

Mitchell Dranow, Sea Cliff, for appellants.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (James E. Kimmel of counsel), for National Freight, Inc. and Anthony Stephen Ostopoff, respondents.

Russo & Tambasco, Melville (Yamile Al-Sullami of counsel), for Jael A. Vasquez, respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about June 7, 2017, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that neither plaintiff met the statutory serious injury threshold under the No-Fault Law (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]).

Plaintiff Ogando's medical records included an MRI report showing multilevel degenerative disc disease (*see Andrade v Lugo*, 160 AD3d 535, 536 [1st Dept 2018]), and his expert failed to sufficiently raise an issue of fact by challenging the findings

of degenerative disease or otherwise attempting to connect plaintiff's injuries to this accident (*Campbell v Drammeh*, 161 AD3d 584, 585 [1st Dept 2018]). Ogando's expert also failed to address a prior motor vehicle accident which resulted in claimed lower back and neck injuries or to negate any inference that that accident was the cause of plaintiff's current conditions (*see Moses v Gelco Corp.*, 63 AD3d 548, 548-549 [1st Dept 2009]). Finally, Ogando provided inconsistent explanations for his complete cessation of treatment after three months (*see Alston v Elliott*, 159 AD3d 575, 576 [1st Dept 2018]).

Plaintiff Aybar's claim was also properly dismissed, as she testified that she stopped treatment because her doctors told her it was no longer necessary, and her medical records indicated that she had normal range of motion when treatment ceased. Her later assertion that she stopped medical treatment after no fault benefits expired was in direct conflict with her earlier testimony and thus failed to raise an issue of fact (*see Vila v Foxglove Taxi Corp.*, 159 AD3d 431, 431 [1st Dept 2018]). Moreover, her expert physician only documented a five degree limitation in one plane of motion, which is insufficient for a finding of serious injury under the statute (*see Gaddy v Eyler*, 79 NY2d 955, 957 [1992]).

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

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7753- Ind. 3315/14
7754 The People of the State of New York,
Respondent,

-against-

Luis Alvarez,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered February 9, 2016, convicting defendant, upon his plea of guilty, of sexual abuse in the first degree, and sentencing him to a term of three years, unanimously affirmed. Order, same court and Justice, entered on or about April 19, 2017, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant made a valid waiver of his right to appeal, we perceive no basis for a reduction of his seven-year term of postrelease supervision.

As to defendant's civil appeal from his sex offender adjudication, in which he challenges his designation as a

sexually violent offender, we adhere to our prior holdings that the court lacked discretion to designate defendant otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014] *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7755 The People of the State of New York, Respondent, Ind. 1477/13

-against-

John Blum, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about September 28, 2016, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant an indefinite adjournment of the sex offender classification hearing in this case (*see People v Gordon*, 147 AD3d 988 [2d Dept 2017], *lv denied* 29 NY3d 910 [2017]). Defendant was automatically a level three offender because of the applicability of an automatic override, and the only material issue was whether the court should grant a downward departure, an issue on which defendant had the burden of proof. Under the circumstances, the possibility that the court would be in a

better position to decide that issue at the end of defendant's civil commitment, if any, is speculative. In any event, "defendant has the statutory right to seek a modification of his SORA risk level designation in the future" (*Gordon*, 147 AD3d at 988).

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

ENTERED: NOVEMBER 29, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Gische, Kapnick, Gesmer, JJ.

7756 The People of the State of New York, Ind. 2999/16
Respondent,

-against-

Raul Bravo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William I. Mogulescu, J.), rendered October 31, 2016,

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

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

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

ENTERED: NOVEMBER 29, 2018

CLERK

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

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Judith J. Gische
Barbara R. Kapnick
Ellen Gesmer
Cynthia S. Kern, JJ.

6982-6982A-6983
Ind. 5963/11
4251/13

_____x

The People of the State of New York,
Respondent,

-against-

Melvin Allison,
Defendant-Appellant.

_____x

Defendant appeals from judgments of the Supreme Court, New York County (Bonnie G. Wittner, J. at initial predicate felony determination; Marcy L. Kahn, J. at jury trial, plea and sentencing), rendered February 7, 2014, convicting him, after a jury trial, of possession of a forged instrument in the second degree, and upon his plea of guilty, of bail jumping in the second degree, and imposing sentence, and from an order of the same court (Kevin B. McGrath, J), entered on or about February 10, 2017, which denied his CPL 440.20 motion to set aside his sentence.

Davis Polk & Wardwell LLP, New York (Avi Gesser, Lina Peng and Connie Dang of counsel), and Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

RENWICK, J.P.

The primary issue on appeal is whether Supreme Court erred in sentencing defendant as a second felony offender based on his prior conviction in New Jersey of the crime of uttering a forged instrument. For a defendant to be sentenced as a predicate felon based on an out-of-state conviction, the other state's statute must have the same elements as the corresponding New York statute (*see People v Ramos*, 19 NY3d 417, 419 [2012]). For the reasons explained below, we find that the New Jersey crime of uttering a forged instrument did not require the same intent as the New York crime of uttering a forged instrument. Therefore, defendant is entitled to resentencing.

Initially, we reject the People's contention that defendant waived his right to challenge the equivalency of the New Jersey statute to the analogous New York statute. There was no waiver because defendant was only advised that he could controvert the predicate felony statement on two grounds: that he was not the person named in the statement and that the conviction was unconstitutionally obtained (*see People v Jurgins*, 26 NY3d 607, 611 n 1 [2015]; *cf. People v Thomas*, 53 NY2d 338, 342 n 2 [1987] [express waiver results from an intentional abandonment of a known right or privilege]). In addition, defendant moved pursuant to CPL 440.20 to set aside his sentence on the ground

that the New Jersey statute punishes a "wider range of mental states than the New York counterpart." Therefore there is no procedural impediment to addressing defendant's claim that he was improperly sentenced as a predicate felon.

Penal Law § 70.06 requires an enhanced sentence for those persons found to be second felony offenders. A second felony offender is a person "who stands convicted of a felony . . . after having previously been subjected to one or more predicate felony convictions" (Penal Law § 70.06[1][a]). An out-of-state offense will constitute a predicate felony conviction only when: (a) the sentence exposure for the out-of-state offense is in excess of one year; and (b) the out-of-state conviction is "for a crime whose elements are equivalent to those of a New York felony" (*People v Gonzalez*, 61 NY2d 586, 589 [1984]; *see also* Penal Law § 70.06[1][b][i]).

In determining whether an out-of-state conviction's elements are equivalent to a New York felony, "[the] inquiry is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes" *(People v Muniz*, 74 NY2d 464, 467-668 [1989]). This comparison of the statutes may not consider the factual allegations in the underlying indictments, as "[i]t is immaterial that the crime actually committed in the foreign jurisdiction may be the

equivalent of a felony in New York, if the foreign statute would have permitted a conviction for conduct that did not amount to a New York felony" (*People v Ramos*, 19 NY3d 417, 419 [2012]). The Court of Appeals has interpreted this test as one of "strict equivalency," and has observed that "technical distinctions between the [elements of the] New York and foreign penal statutes can preclude use of a prior felony as a predicate for enhanced sentencing" (*Ramos*, 19 NY3d at 419).

Here, defendant was convicted in New Jersey of the crime of uttering a false instrument, in violation of New Jersey's forgery statute (NJ Stat Ann § 2C:21-1[a][3]). The People relied on that conviction in their predicate felony statement. In New Jersey, the basic crimes of forgery and uttering a forged instrument are included under the broad category of "Forgery." That statute (of which uttering a false instrument is the third subsection) reads as follows:

> "A person is guilty of forgery if, with *purpose* to defraud or injure anyone, *or* with *knowledge* that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
>
> "(1) Alters or changes any writing of another without his authorization;
>
> "(2) Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act or of a fictitious person, or to have been executed at a time or place or in a numbered sequence other than was in

> fact the case, or to be a copy of an original when no such original existed; or
>
> "(3) Utters any writing which he knows to be forged in a manner specified in paragraph (1) or (2) [emphasis added]."

The People argue that the New York felony of criminal possession of a forged instrument in the second degree, as defined in NY Penal Law § 170.25, is the crime most analogous to subsection (a)(3) of the New Jersey forgery statute. The statute reads as follows:

> "A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10. . . ."

A comparison of the mental elements of the aforementioned New Jersey forgery statute and New York's criminal possession of a forged instrument statute, each of which includes "uttering" a forged instrument as one of the acts, among others, that constitutes a crime, reveals that the New Jersey crime of uttering a forged instrument is not strictly equivalent to its New York felony counterpart. The New York statute contains two mental state elements, namely that the person who utters a forged instrument acted: 1) with knowledge that the subject instrument was forged; and 2) with an intent to defraud (*see* Penal Law § 170.25). The New Jersey statute also contains two mental state

elements but allows the second to be satisfied in two different ways. The New Jersey Statute provides that the person who utters a forged instrument acted: 1) with knowledge that the subject instrument was forged; and 2) either with the intent to defraud (purpose to defraud or injure anyone) or with the knowledge that one is facilitating a fraud (*see* NJ Stat Ann § 2C:21-1[a]).

The first mens rea element of both New York and New Jersey's crime of uttering a forged instrument are the same: that the defendant had knowledge that the subject instrument was forged. However, the second mens rea element of the New Jersey crime of uttering a forged instrument is broader than the second mens rea element of the New York crime of uttering a forged instrument. Because the New Jersey statute uses the disjunctive "or," the second mens rea element of the NJ crime of uttering a forged instrument can be satisfied in two different ways: that one who utters a forged instrument must act either with the intent to defraud (purpose to defraud or injure anyone) or with the knowledge that one is facilitating a fraud. By contrast, the second mens rea element of the New York crime of uttering a forged instrument can be satisfied only one way: that the person who utters a forged instrument acted with the "intent to defraud." Since the New Jersey statute punishes a broader range of mental states than its New York counterpart, it fails New

York's strict equivalency test (*see People v Rota*, 245 AD2d 133 [1st Dept 1997]; *People v Hinton*, 50 Misc3d 1206[a] [Sup Ct, NY County 2016] *affd on other grounds*, 148 AD3d 545 [1st Dept 2017], *lv denied* 29 NY3d 1080 [2017]).

This broad reading of the second mens rea element of the New Jersey forgery statute is consistent with our prior holding in *People v Rota* (245 AD2d 133). In *Rota*, this Court addressed whether Pennsylvania's forgery statute, 18 Pa Cons Stat Annot § 4101, qualified as a predicate felony in New York when compared to Penal Law § 170.10's forgery statute. As the People here acknowledge, in *Rota* the Pennsylvania forgery statute, which includes "uttering" a forged instrument as one of the acts, among others, that constitutes forgery, and the New Jersey forgery statute at issue here, which also includes "uttering" a forged instrument as one of the acts that constitutes forgery, are virtually the same. Thus, like the New Jersey statute, the analogous Pennsylvania forgery statute also contains two mens rea elements, that the defendant acted 1) with knowledge that the subject instrument was forged and 2) either with the intent to defraud (purpose to defraud or injure anyone) or with the knowledge of facilitating a fraud.

In *Rota*, this Court found that the second mens rea element of the Pennsylvania forgery statute (purpose to defraud or injure

anyone or with the knowledge that one is facilitating a fraud) was much broader than the second mens rea element of the New York forgery statute (intent to defraud). Accordingly, in *Rota,* this Court found that the Pennsylvania statute was not sufficiently analogous to New York's forgery statute (Penal § 170.10) to render the Pennsylvania conviction a predicate felony under New York Penal § 70.06. This is so, *Rota* held, because New York's forgery statute, Penal Law § 170.10, "penalizes the false making, completion, or alteration of a written instrument 'with intent to defraud, deceive or injure another'" (245 AD3d 133). The Pennsylvania statute, on the other hand, allows for conviction even where there is simply "knowledge [on the part of the defendant] that he is facilitating a fraud or injury to be perpetrated by anyone (18 Pa Const Stat Annot § 4101[a]) which cannot be equated ... with *intent* to defraud" (*Rota* at 133).

The People concede that "at first glance," the New Jersey forgery statute "seems" to allow a conviction for uttering a forged instrument based upon a broader range of mental states: if a defendant acts with either the "purpose to defraud or injure anyone, or with the knowledge that he or she is facilitating a fraud or injury." However, the People reason that whether or not "knowledge of facilitating a fraud" could satisfy the second mens rea requirement of the New Jersey crime of uttering a forged

instrument is irrelevant as to whether the statute is the strict equivalent of its New York felony counterpart because uttering, by its nature, always involves intent to defraud. Essentially, the People's argument seems to be that we should ignore the plain statutory language of the second mens rea element of the New Jersey crime of uttering a forged instrument as superfluous, because the act of uttering can only be committed with specific intent to defraud.

The People's position is inconsistent with New Jersey's Model Criminal Jury Charge. First, the New Jersey Model Criminal Jury Charge for forgery (which includes the act of uttering a forged instrument) provides that "[t]o utter a writing means to put or send into circulation and includes displaying of a forged document even without having made or issued the document" (Model Jury Charges (Criminal), ("Forgery N.J.S.A. 2C:21-1.[a] [rev June 6, 2010]")). Accordingly, the New Jersey Model Criminal Jury Charge contradicts the suggestion that the New Jersey Forgery statute's use of "uttering" is intended to apply the Black's Law Dictionary definition of the common law (18th century) crime of "uttering," which includes an intent to defraud. Significantly, Black's Law Dictionary also defines "utter" to mean: "to say, express or publish or to put or send (a document) into circulation" (see Blacks' Law Dictionary, p. 1781 [10th

Edition]). It is this latter definition that the statute gives to the word "uttering," as the New Jersey Model Criminal Jury Charge plainly states.

Second, the New Jersey Model Criminal Jury Charge for forgery provides that "the second [mens rea] element that the State must prove beyond a reasonable doubt is that the defendant acted with the purpose to defraud or injure or with the knowledge that the defendant is facilitating a fraud or injury" (Model Jury Charges [Criminal] 2C:21-1a). The New Jersey Model Criminal Jury Charge does not exempt this alternative mens rea from the crime of uttering a forged instrument. Instead, it applies this alternative mens rea to all the acts that constitute a forgery as defined by the New Jersey statute (id.).

The New Jersey Model Jury Charge then goes on to explain the distinction between "purpose" to defraud or injure and "knowledge" of facilitating a fraud or injury, which demonstrates that there is a difference between the two:

> "A person acts purposely with respect to the nature of his/her conduct or the result of that conduct if it his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if the person is aware of the existence of such circumstances or believes or hopes that they exist. 'With purpose,' 'designed,' 'with design,' or equivalent terms have the same meaning.

> "A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a high probability of their existence. A person acts knowingly with respect to a result of his/her conduct if he/she is aware that it is practically certain that his/her conduct will cause such a result. 'Knowing,' 'with knowledge,' or equivalent terms have the same meaning (*id.*)."

This Court is not in a position to second guess the New Jersey Model Criminal Jury Charge. Indeed, as the New Jersey Supreme Court has reminded its trial court judges, "Insofar as consistent with and modified to meet the facts adduced at trial, model jury charges should be followed and read in their entirety to the jury. The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers" (*State v R.B.*, 183 NJ 308, 325, 873 A2d 511, 522 [2005]).

For the foregoing reasons, we find that Supreme Court erred in sentencing defendant as a second felony offender based on his prior conviction in New Jersey for uttering a forged instrument; his sentence should be set aside and the matter remitted to Supreme Court for resentencing.

Accordingly, the judgments of the Supreme Court, New York County (Bonnie G. Wittner, J. at initial predicate felony

determination; Marcy L. Kahn, J. at jury trial, plea and sentencing), rendered February 7, 2014, convicting defendant, after a jury trial, of possession of a forged instrument in the second degree, and upon his plea of guilty, of bail jumping in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 4½ to 9 years, and the order of the same court (Kevin B. McGrath, J), entered on or about February 10, 2017, which denied defendant's CPL 440.20 motion to set aside his sentence, should be modified, on the law, to the extent of remanding the matter to Supreme Court to resentence defendant as a first felony offender, and otherwise affirmed.

All concur.

Judgments, Supreme Court, New York County (Bonnie G. Wittner, J. at initial predicate felony determination; Marcy L. Kahn, J. at jury trial, plea and sentencing), rendered February 7, 2014, and order, same court (Kevin B. McGrath, J), entered on or about February 10, 2017, modified, on the law, to the extent of remanding the matter to Supreme Court to resentence defendant as a first felony offender, and otherwise affirmed.

Opinion by Renwick, J.P. All concur.

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

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

ENTERED: NOVEMBER 29, 2018

CLERK