

The testimony at the suppression hearing, which was credited by the hearing court, established that the police had probable cause to arrest defendant for unlawful possession of marijuana. The police witnesses testified that there was a strong odor of marijuana emanating from defendant's car when defendant opened the car door, and the officers observed a partially burned marijuana cigarette, in plain view, on the center console between the front seats of the car (see *People v Singleton*, 139 AD3d 208, 215 [1st Dept 2016]; *People v Smith*, 66 AD3d 514 [1st Dept 2009], *lv denied* 13 NY3d 942 [2010]). Defendant argues that the police testimony was incredible, particularly because the officers already were planning to arrest him for crimes involving possession of stolen property. Generally, credibility determinations are left to the hearing court, and the findings of fact by the hearing court are entitled to great deference on appeal (*People v Prochilo*, 41 NY2d 759, 761 [1977]; *People v Edwards*, 250 AD2d 442, 442-443 [1st Dept 1998], *lv denied* 92 NY2d 896 [1998]). Here, we see no reason to disturb the credibility finding of the hearing court. It is not implausible that the officers would find a partially burnt marijuana cigarette in defendant's car, and the record contains no basis to conclude

that the officers manufactured this testimony.¹

The critical issue in this case is whether the officers' search of the car, which was conducted back at the police district headquarters and not at the arrest location, was a legitimate inventory search. We conclude that it was.² The People introduced a copy of the relevant patrol guide section outlining the procedures for inventory searches. Everything was removed from the car, under the direction of a sergeant, and even items such as nail clippers were vouchered. A contemporaneous list was made of the items that were removed, and the list was introduced at the hearing. Copies of property clerk invoices also were admitted in evidence at the hearing. The testimony at the hearing established that the officers did not exercise discretion in removing items from the car, and that the search

¹ We need not decide whether the evidence adduced at the hearing, including the copy of the wanted poster for subway related larcenies, was sufficient to provide the arresting officer with probable cause independent of the observation of the marijuana cigarette.

² Although the dissent focuses on the officers' motivation in following defendant, this background information does not establish whether the officers had probable cause to arrest defendant when he was actually detained (see generally *People v Wright*, 98 NY2d 657, 658-659 [2002], citing *People v Robinson*, 97 NY2d 341, 349 [2001] [stating that "[i]n making that determination of probable cause, neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant"]).

was not a ruse to recover incriminating evidence³ (see *People v Padilla*, 21 NY3d 268 [2013], cert denied, - US -, 134 S Ct 325 [2013]).

Contrary to the argument of the dissent, the police complied with the third requirement of the NYPD Patrol Guide's inventory search guidelines. This section requires the officers to remove all valuables from the vehicle and voucher them on a "PROPERTY CLERK INVOICE" (P.G. 218-13[3]). The officers testified at the hearing that as the items were removed, they documented what was taken out of the car. This is one of the hallmarks of an inventory search. The fact that it was not on an "inventory" form does not undermine the evidentiary value of the list, nor alter the conclusion that the procedures employed effectively limited the discretion of the officers conducting the search (see *People v Black*, 250 AD2d 494 [1st Dept 1998], lv denied 92 NY2d 922 [1998]). Moreover, the Patrol Guide directs that valuables be listed on a property clerk invoice, and those invoices are in the hearing record.

The hearing court heard the testimony and determined that the search was lawful. There is nothing in the record that would

³ In light of our holding that this was a valid inventory search, we need not discuss the People's alternative argument that the officers had a right to search the car for narcotics or for stolen property.

support overturning that determination (see *Padilla* at 272). The minor discrepancies between the handwritten list and the property clerk invoices do not call into question the credibility of the officers who testified at the hearing (see *id.* at 272-273 ["The fact that the officer did not follow written police procedure when he gave some of the contents of the vehicle to defendant's sister without itemizing that property, did not invalidate the search."]; see also *People v Walker*, 20 NY3d 122, 126-127 [2012] [upholding an inventory search despite several deficiencies in the form and descriptions of items]; *Black* at 494, citing *People v Salazar*, 225 AD2d 804, 805 [2d Dept 1996], *lv denied* 88 NY2d 969 [1996]).

The dissent cites *People v Galak* (80 NY2d 715, 720-721 [1993]), to show that an inventory list created five hours after the search renders the list invalid and prevents a finding of a valid inventory search. However, in the instant case, the handwritten inventory list was made at the same time the items were removed and the procedure created a usable inventory. *Galak* is distinguishable because the list was created five hours after the search, while here, the record contains no information about when the typewritten property clerk invoices were created as opposed to when they were printed.

The officers' decision to delay defendant's arrest until he

had opened his car is not evidence that the arrest was merely a pretext to search the car. As explained above, when defendant returned to his car and opened the door, the officers smelled marijuana and noticed a marijuana cigarette, establishing probable cause to arrest defendant for unlawful possession of marijuana. It is important to note that both defendant, and the woman who was with him, were arrested, and therefore no one was available, except the police, to take possession of the car. The officer who conducted the search initially testified that it was "an inventory search," and that the purpose was "to safeguard all the property in the vehicle." In addition, the sergeant explained that there was an inventory search, and that they took anything of value out of the car. Although he also referred to it as a search for evidence, the procedures that were followed were more consistent with an inventory search than anything else, and support the hearing court's conclusion in this case. An inventory search is not invalid merely because incriminating evidence is recovered so long as that was not the primary purpose of the search (see *People v Johnson*, 1 NY3d 252, 256 [2003]).

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

GESMER, J. (dissenting)

I respectfully dissent.

The motion court should have granted defendant's motion to suppress the physical evidence recovered during the warrantless search of defendant's car. The motion court's conclusion that the police conducted a valid inventory search is inconsistent with both the police testimony that their motivation for the search was investigatory, and the documentary and testimonial evidence that the search did not comply with established procedure. In addition, the evidence failed to provide any reasonable alternative basis for the warrantless search of defendant's car at the time of his arrest.

The legality of the search on November 16, 2012 can only be evaluated by taking into account the events before that date. The relevant events began in June 2012, when NYPD Sergeant Jimmy Freyre, who worked for the Transit Manhattan Intelligence Division, read a report alleging that a grand larceny had taken place on June 10, 2012 at the 42nd Street and Eighth Avenue subway station. Although Sergeant Freyre was not assigned to the case -- indeed, his duties did not include crime investigation -- he decided to conduct his own investigation of the June 10 incident. He found a surveillance video for that date, which showed an individual taking a wallet from someone in the subway

station. Sergeant Freyre then looked through what he described as "a book of known grand larceny, pickpocket recidivists" that contained mug shots of individuals, including one of defendant Gregory Lee. Sergeant Freyre concluded that the individual from the surveillance video matched defendant's mug shot.¹

On October 25, 2012, the police arrested defendant and another individual at the Union Square subway station for attempting to commit grand larceny. Incident to the arrest, the police recovered a MetroCard on defendant's person. Sergeant Freyre was called to debrief defendant after the arrest, but defendant refused to speak to him.

The events following defendant's October arrest are not entirely clear. Sergeant Freyre testified that he was aware that defendant's October arrest led to a criminal proceeding, although Sergeant Freyre did not know how the proceeding concluded or whether defendant had been released. After the police released defendant for attempted grand larceny, Sergeant Freyre decided to conduct his own investigations of the circumstances surrounding the purchase of the MetroCard recovered during defendant's

¹ Sergeant Freyre testified that defendant was arrested on June 19, 2012 for the incident that occurred on June 10, 2012. However, it is unclear from the record if defendant's June 19 arrest was a result of Sergeant Freyre's investigation and with what offenses, if any, defendant was charged.

October arrest, even though he was not assigned to the case.²

As part of his investigation, Sergeant Freyre ran the MetroCard through the transit special investigations unit. Sergeant Freyre testified that he spoke to "a detective," who told him that he was already aware that the MetroCard had been purchased with a stolen credit card.³ Nevertheless, Sergeant Freyre moved forward with his own investigation, although he did not complete any formal reports. Sergeant Freyre informed Detective Larson, the assigned case detective, that defendant was in possession of a MetroCard purchased with a stolen credit card at the time of defendant's October arrest. Together, they recovered and watched a surveillance video that showed an individual, whom Sergeant Freyre identified as defendant, buying a MetroCard at a subway vending machine with a credit card.⁴ Sergeant Freyre then created a "wanted" poster for defendant, seeking his arrest for criminal possession of stolen property,

² It is unclear why the police were still in possession of the MetroCard after defendant had been released.

³ It is unclear whether the People charged defendant with any offenses related to the MetroCard during the criminal proceeding stemming from the October incident.

⁴ The record is silent on whether the MetroCard in the surveillance video was the same as the one recovered from defendant during his October arrest.

based on his possession of the MetroCard that was allegedly purchased with a stolen credit card.

On November 13, 2012, Sergeant Freyre was on patrol with a partner during rush hour, when he noticed defendant and a woman, later identified as Deion Grinds, waiting for a train at the 42nd Street and Seventh Avenue subway station. When the train arrived, Sergeant Freyre, without his partner, boarded the train one car behind defendant and Ms. Grinds. Sergeant Freyre continued to follow the pair after they disembarked at 125th Street and Lenox Avenue station. Sergeant Freyre observed defendant and Ms. Grinds enter a Starbucks, attempt to make a purchase, and exit the Starbucks. Sergeant Freyre then observed them walk to a white Yukon SUV with a Louisiana license plate, which was parked three blocks away at 123rd Street and Seventh Avenue, and drive off. Sergeant Freyre testified that he did not arrest defendant on that day for the criminal possession of stolen property, because he had been unable to reach his partner and did not want to take police action alone. The following day, Sergeant Freyre returned to the same Starbucks and spoke to the cashier, who informed him that defendant had attempted to purchase an item with a credit card with another person's identification.

On November 16, 2012, Sergeant Freyre, who was in plain

clothes in an unmarked police car, returned to 123rd Street and Seventh Avenue where he hoped to, and did in fact, find the white Yukon SUV.⁵ He called Officer Dones as backup. After Officer Dones arrived around 6:30 p.m., they surveilled the car for 45 minutes and then observed defendant and Ms. Grinds enter the car. The officers followed and observed them for approximately 100 city blocks: to a deli, which defendant entered and exited; then to a gas station at 145th Street, where defendant got gas; then on the highway, from which the car exited around 53rd Street; then to 55th Street between Third and Lexington Avenues, where defendant parked the car; and finally to a restaurant at 53rd Street and Third Avenue, which the pair entered.

Sergeant Freyre and Officer Dones stood outside the restaurant as defendant and Ms. Grinds ate. Sergeant Freyre contacted Lieutenant Callaghan and Sergeant Alfred Ricci and asked them to meet him and Officer Dones at the restaurant. When they arrived, Sergeant Freyre informed Sergeant Ricci and Lieutenant Callaghan that defendant was wanted for criminal possession of stolen property based on his possession of a MetroCard that had been bought with a stolen credit card. Sergeants Freyre and Ricci asked the restaurant's manager to

⁵ Sergeant Freyre testified that he never recorded the license plate of the SUV.

inform them whether defendant used a credit card or cash to pay the bill; the manager told the police that defendant paid in cash.

The police then decided that they would arrest defendant when he returned to his car. Sergeant Ricci stood by defendant's parked car on East 55th Street, between Third and Lexington Avenues, while Officer Dones waited across the street. In the meantime, Sergeant Freyre and Lieutenant Callaghan watched defendant and Ms. Grinds walk from the restaurant toward the car, and notified the other officers of the pair's approach. None of the officers approached defendant or Ms. Grinds while they were in the restaurant or during their 2½-block walk to the car.

Sergeant Ricci observed that Ms. Grinds entered the front passenger door and that defendant opened the driver's door. As defendant was about to enter the car, Sergeant Ricci walked from the front of the car toward the opened driver's door and stood inside the open door with defendant. Sergeant Ricci testified that, at that point, he smelled marijuana "coming out of" defendant's car and immediately saw a single, unlit, partially smoked, marijuana cigarette in plain view in the center console between the front passenger seats. Sergeant Ricci testified that he promptly reached inside the car, picked up the marijuana cigarette, and asked to whom it belonged. After defendant and

his companion denied that the marijuana belonged to them, the police arrested defendant and Ms. Grinds. It was then around 11 p.m., approximately five hours after Sergeant Freyre had started following defendant.

After arresting defendant, Officer Dones searched him and found a wallet, inside which Officer Dones found two envelopes of heroin. Following Sergeant Ricci's direction, Officer Dones moved Ms. Grinds to the back of the car, and then searched her handbag, which was located on the front passenger seat. Officer Dones recovered approximately 20 to 30 store cards from her handbag. Sergeant Ricci testified that he looked through the windows and observed a large quantity of designer-named shopping bags, garments, and garment bags in the passenger rows, while Officer Dones testified that the shopping bags and merchandise were not visible from the outside of the car.

Sergeant Ricci drove defendant's car to the police base at Columbus Circle around 11:15 p.m., where the police "lodged" defendant and Ms. Grinds and began searching the car. Under Sergeant Ricci's supervision, Officer Dones took everything out of the car, and described the items to Officer Marcello, who handwrote a list on a lined notepad, noting the general location in the car where each item had been located. The two-page handwritten list is untitled and undated. Parts of the list are

barely legible, but the legible portion states that the following items, among others, were recovered from the trunk: a black duffle bag, a black studio bag, a small black duffle bag with keys, a black Salvatore Ferragamo garment bag, a Macy's shopping bag, and a Coach shopping bag; from the front: five cell phones (in the center console), a cell phone charger, a brown wallet with a Louisiana ID, glasses, a Victoria's Secret bag, and a \$350 gift card; from the "middle row": a Cole Haan garment bag, Cole Haan shopping bags with shoes, a black umbrella, three CDs, and a phone charger; and from the "3rd row": a silver Saks Fifth Avenue bag, a black jacket, a Burberry garment bag, a black bag with miscellaneous papers, a dry-cleaned shirt, a football, and DVDs.

In addition to the handwritten list, the police completed three property clerk invoices, which show a print date of November 17, 2012 and print times of 6:33 a.m., 6:08 a.m., and 5:59 a.m., respectively. The invoices list Officer Dones as both the invoicing and arresting officer. On the header of each invoice, it lists the "Property Category" field as "investigatory," and the "remarks" field of the invoice printed at 6:33 a.m. states that "[T]he above is a complete list of items vouchered for investigatory purposes" (full capitalization

omitted).⁶

The People bear the burden to establish that the police conducted a valid inventory search of defendant's car (see *People v Padilla*, 21 NY3d 268, 272 [2013], cert denied - US -, 134 S Ct 325 [2013]). "Following a lawful arrest of a driver of a vehicle that is required to be impounded, the police may conduct an inventory search of the vehicle" in order to catalog properly the contents of the vehicle (*id.*). The People must show that (1) the search was conducted pursuant to an established procedure "clearly limiting the conduct of individual officers that assures that the searches are carried out consistently and reasonably" (*id.* [internal quotation marks omitted]); and (2) the officer's motive for conducting the search "must not be a ruse for a general rummaging in order to discover incriminating evidence" (*id.* [internal quotation marks omitted]). The People failed to meet their burden as to both elements.

The inventory list is the "hallmark of an inventory search" (*People v Johnson*, 1 NY3d 252, 256 [2003]). To determine whether an inventory list is valid and "usable," the courts have

⁶ The "remarks" field for the invoice printed at 6:08 a.m. contains the same language, except it does not include the word "purposes." The "remarks" field for the invoice printed at 5:59 a.m. states that "all items being vouchered for investigatory" (full capitalization omitted).

considered many factors, such as the length of time elapsed between the search and the listing of the property; what property, if any, was left in the car or returned to defendant; and whether the inventory list is "detailed and carefully recorded" (*People v Galak*, 80 NY2d 715, 720 [1993]). The NYPD Patrol Guide sets out two relevant procedures related to conducting a valid inventory search. The first procedure relates to the process of removing items from an impounded vehicle, which is outlined in a document titled "P.G. 218-13 Inventory Searches of Automobiles and Other Property" (search guideline). The second procedure relates to the process of creating an invoicing list, which is outlined in the "Invoicing Property (P.G. 218-01)."

Under the first procedure, the NYPD Patrol Guide's search guideline requires the police to do the following: (1) search the car's interior thoroughly; (2) force open a compartment, such as a trunk, only under certain conditions; and (3) remove all valuables from the vehicle, "voucher" the items on a form maintained by the NYPD entitled "PROPERTY CLERK INVOICE (PD521-141)," leave "[p]roperty of little value" inside the car, and, "within reason . . . list [it] in the uniformed member's ACTIVITY LOG (PD112-145) . . . cross referenced [sic] to the invoice number covering any valuables removed."

In this case, the People failed to meet their initial burden to prove that the police acted in accordance with established procedures, because they failed to show that the police complied with the third requirement of the search guideline. Although the police testified that they removed "everything" from the car, the police did not create an activity log as required by this third requirement of the NYPD Patrol Guide. The People did not offer any evidence that the police cross-referenced property of little value with the invoice number of any valuable property removed. In addition, the handwritten list, which was not completed on an official form and did not comport with any of the established procedures, also included apparently valuable items, such as a "Salvatore Ferragamo [sic]" garment bag, that do not appear on the property clerk invoices. Although the police testified that they removed property of little value, such as nail clippers, from the car, they also testified that they did not return anything to defendant, as required by the Patrol Guide.

Next, the search guideline lists the invoicing procedure as a related procedure. However, the People not only failed to submit a copy of the invoicing procedure into evidence at the suppression hearing, but also failed to elicit police testimony about the established procedure for invoicing items (*People v Gomez*, 50 AD3d at 409 [invalid inventory search where the People

failed to establish content of any standardized procedure for inventory searches]). The only testimony relating to the invoicing of the items is Officer Done's testimony that he removed items out of the car while Marcello listed the items on a "large note pad, and whenever I grabbed the property, he would list." Because the People failed to produce the content of the invoicing procedure, the People failed to meet their initial burden of showing that the police acted according to established procedure.

Moreover, the People failed to establish that the inventory list met the standards. First, the property clerk invoices were not a detailed and accurate list of the items removed from defendant's car. For example, the handwritten list shows that five cell phones were recovered, while the property clerk invoice printed at 5:59 a.m. lists seven recovered cell phones. Second, neither the handwritten list nor the property clerk invoices state whether any property was left in the car and, if so, whether the items were returned to defendant (*People v Galak*, 80 NY2d at 720 [invalid inventory list where inventory form did not indicate whether items in the car were returned to the defendant and where the defendant did not sign a receipt for any items delivered to him]). Third, the print time on the property clerk invoices show that more than five hours had elapsed between the

time when the police searched the car and when the invoice was printed. In *People v Galak*, as in this case, the inventory list was created five hours after the search. In that case, the Court concluded that the inventory list was invalid: “[I]t is obvious that a list made so long after the search which does not indicate the disposition of each item removed is of little use either to the police or to citizens who find themselves disputing the whereabouts of an item or the accuracy of the record” (*id.*). Finally, the invoices plainly describe the property category as “investigatory” and indicate that the items recovered from defendant’s car were “vouchered for investigatory” purposes (full capitalization omitted).

Even if the People had satisfied their initial burden of showing that the police complied with established procedure, the evidence adduced at the suppression hearing should be suppressed because the People failed to establish that the search was not a ruse for general rummaging in order to discover incriminating evidence. Although an inventory search may lead to incriminating evidence, that should not be its purpose (*People v Johnson*, 1 NY3d at 256). Here, the evidence suggests the contrary in three respects. Each police officer involved in the search testified that the search was “investigatory” and only added that the search’s purpose was also for “inventory” as an afterthought.

The majority ignores that each officer initially answered that the purpose of the search was investigatory. Specifically, Sergeant Ricci testified that, while looking at all the gift cards from Ms. Grind's handbag immediately after her arrest, he knew what "defendant was wanted for . . . put . . . two and two together, [and he] had a pretty good suspicion that the stuff in the car was stolen." Sergeant Ricci testified that "it was a search for evidence . . . because [they] found the drugs in the car," and that the items recovered from the car were vouchered as "investigatory evidence." He later added: "[A]nd also it was an inventory, inventory [sic]," and that the search was performed to "safeguard" defendant's possessions in his car while he was in custody, including "anything of value," and "to protect the officer[s] and the [police] department from any liability if the property does disappear." Similarly, Officer Dones testified initially that he "vouchered everything as investigatory evidence" but then later testified that the purpose of the search was to "safeguard" all property in defendant's car. The police testimony that the search was investigatory is corroborated by several notations on the property clerk invoices, both in the "remark" section and in the "property category" field, stating that the evidence was vouchered for "investigatory" purposes (full capitalization omitted.)

In addition, the officers' decision not to arrest defendant until he had opened the car door strongly suggests that the arrest was a pretext for searching the car. The officers had many prior opportunities to arrest defendant: as he approached the restaurant, while he was sitting in the restaurant, and during his two block walk to the car. Their decision not to arrest him until he had opened the car door provides strong circumstantial evidence that his arrest was merely a pretext for the officers to search the car for stolen property, which they were convinced they would find.

Moreover, the police testified that the initial criminal complaint stemming from defendant's arrest on November 16 did not charge defendant with criminal possession of stolen property. Instead, that complaint charged defendant with only two offenses: criminal possession of a controlled substance in the seventh degree and criminal possession of marijuana in the fifth degree.⁷

Consequently, even if some of the recovered items were not inculpatory, the abundant admissions that the items were recovered for investigatory or evidentiary purposes and the

⁷ According to the transcript from the suppression hearing, the criminal court complaint stemming from defendant's November 16 arrest was submitted into evidence and marked as defendant's exhibit D. However, that exhibit is not part of the record submitted to this Court.

circumstances of the search demonstrate that the purported inventory search was "a ruse for a general rummaging in order to discover incriminating evidence" (*Padilla*, 21 NY3d at 272 [internal quotation marks omitted]).

Since the testimony showed that the police did not conduct a valid inventory search, the motion court should have considered whether the grounds for defendant's arrest justified the warrantless search of defendant's car under any other theory. Generally, a police search without a warrant is per se unreasonable, "subject only to a few specifically established and well-delineated exceptions" (*Katz v United States*, 389 US 347, 357 [1967]). In *Arizona v Gant* (556 US 332 [2009]), the Supreme Court held that the police have the authority to search incident to an occupant's recent arrest, under the automobile exception, only 1) when the arrestee is "unsecured and within reaching distance of the passenger compartment at the time of the search"; or 2) when the police have reason to believe that "evidence relevant to the crime of arrest might be found in the vehicle" (*id.* at 343 [internal quotation marks omitted]). The scope of a valid warrantless automobile search is "defined by the object of the search and the places in which there is probable cause to

believe that it may be found" (*California v Acevedo*, 500 US 565, 579-580 [1991], quoting *United States v Ross*, 456 US 798, 824 [1982]). Absent "a substantial likelihood of a weapon being present in the vehicle which . . . poses an actual and specific danger to the officer's safety," it is unlawful for an officer "to invade the interior of a stopped car" without probable cause (*People v Newman*, 96 AD3d 34, 41-42 [1st Dept 2012][internal quotation marks omitted], *lv denied* 19 NY3d 999 [2012]). In determining "whether an officer has the requisite 'reasonable suspicion' to intrude into a stopped vehicle whose occupants have been removed and frisked, '[t]he court's focus must center on whether the police conduct was reasonable in view of the totality of the circumstances, for reasonableness is the touchstone by which police-citizen encounters are measured'" (*id.* at 42, quoting *People v Anderson*, 17 AD3d 166, 167-68 [citations omitted]).

Here, the motion court found that the police had grounds to arrest defendant for 1) possession of marijuana, based on the smell and recovery of the partial marijuana cigarette in defendant's car; 2) possession of stolen property, based on defendant's possession of a MetroCard bought with a stolen credit card; and 3) identity theft, based on defendant's attempt to purchase an item at Starbucks using a credit card that did not

belong to him.⁸ As to the first ground of arrest based on the marijuana, the police search of defendant's entire car was unreasonable, because they immediately found the marijuana cigarette and had no reason to believe that marijuana would be present in the rest of the car. The police testified that they smelled burnt marijuana emanating from defendant's car, but this case is distinguishable from others in which such an observation warranted a search of the car (see e.g. *People v Badger*, 52 AD3d 231, 232 [1st Dept 2008], *lv denied* 10 NY3d 955 [2008]); here, the police immediately saw a partially smoked marijuana cigarette in the ashtray in the center console. Under the circumstances, "the police did not have probable cause to believe that [marijuana] was hidden in any other part of the automobile," rendering the "search of the entire vehicle . . . unreasonable under the Fourth Amendment" (*California v Acevedo*, 500 US at 580; compare *People v Yancy*, 86 NY2d 239, 246 [1995] [searches of cars were justified by officers' observations, including of a large number of empty vials in plain view in the cars, "allow[ing] them to surmise that defendants possessed a large quantity of empty vials for something other than personal use"]).

Likewise, the other two grounds for which defendant was

⁸ The record does not include an arrest or charge sheet stemming from defendant's November arrest.

arrested provided no reasonable basis for the police to search defendant's car. First, defendant's possession of a subway MetroCard purchased using a stolen credit card, did not constitute criminal possession of stolen property, and thus could not support an arrest for that offense.⁹ Second, a warrantless car search based on defendant's use of another's credit card at Starbucks was unlawful, because police testimony failed to establish that the police had reason to believe that evidence of identity theft related to the Starbucks incident might be found in the car. Although the police may have had probable cause to believe that the car contained evidence of other property crimes, any other such crimes are immaterial under *Gant*, which authorizes a warrantless search of an automobile incident to an arrest only "when it is reasonable to believe that evidence of *the offense of arrest* might be found in the vehicle" (556 US at 335 [emphasis added]). Thus, the police had no reasonable justification to search defendant's car.

Because the People failed to show that the police had conducted a valid inventory search and because there was no reasonable basis to conduct a warrantless search of defendant's

⁹ The majority did not reach the issue of whether the police had probable cause to arrest defendant based on his possession of the MetroCard.

car incident to his arrest, the motion court should have granted defendant's motion to suppress the physical evidence recovered during a search of his car.

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

ENTERED: OCTOBER 27, 2016


CLERK

by defendant Precision Elevator. At the time, plaintiff was employed by the building's managing agent, defendant Sapir Realty Management, which was then called Zar Realty Management. The record demonstrates that Zar Realty and the building owner, defendant 260-261 Madison Avenue, LLC, functioned as one company; thus, as plaintiff's employers, both are entitled to the benefits of Workers' Compensation Law § 11 (see *Clifford v Plaza Hous. Dev. Fund Co., Inc.*, 105 AD3d 609 [1st Dept 2013]; *Ramnarine v Memorial Ctr. for Cancer & Allied Diseases*, 281 AD2d 218 [1st Dept 2001]).

Defendant 260/261 Madison Equities Corp., the former owner, cannot be held liable for any alleged dangerous condition on the premises since it conveyed the property more than three months before plaintiff's accident, thus giving the new owner, 260-261 Madison Avenue, a reasonable time to discover and/or cure any such alleged condition (see *Bittrolff v Ho's Dev. Corp.*, 77 NY2d 896 [1991]; *Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317 [1st Dept 2001]).

In opposition to defendants' prima facie showing that there is no such entity as "The Sapir Organization," plaintiff failed to raised an issue of fact. Plaintiff now relies on statements made in other cases involving that entity (see e.g. *GSO RE Onshore LLC v Sapir*, 29 Misc 3d 1234[A] [Sup Ct, NY County 2010] [affidavit by Alex Sapir stating that he is the president of the Sapir Organization, and that his father, Tamir Sapir, is the chairman]). However, the argument is raised for the first time on appeal and is not appropriately addressed in the absence of a fully developed factual record (see *Zimmerman v Gaines Serv. Leasing Corp.*, 249 AD2d 215, 216 [1st Dept 1998]). In any event, the available evidence indicates that the Sapir Organization is merely an informal name used for a group of corporate entities run by the Sapir family. Even accepting that "The Sapir Organization" is a brand name for other defendants named in this action, since those defendants have been dismissed from this action, "The Sapir Organization" is entitled to the same relief as it cannot be a viable defendant. Plaintiff did not argue or show any distinct basis for "The Sapir Organization" to be liable

in its own right, such as ownership or maintenance of the subject property.

The Decision and Order of this Court entered herein on June 23, 2016 is hereby recalled and vacated (see M-3583, 4537 decided simultaneously herewith).

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

ENTERED: OCTOBER 27, 2016



CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1977 Ernest Robinson, et al., Index 151679/14
Plaintiffs-Appellants,

-against-

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

Safirstein Metcalf LLP, New York (Peter Safirstein of counsel),
for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W.
Shweder of counsel), for the City of New York, respondent.

Eric T. Schneiderman, Attorney General, New York (Seth M. Rokosky
of counsel), for the State of New York, respondent.

Order, Supreme Court, New York County (Frank P. Nervo, J.),
entered April 21, 2015, which granted defendants the City of New
York and State of New York's motions to dismiss the complaint and
denied plaintiffs' cross motion for leave to amend the complaint,
unanimously affirmed, without costs.

In this action, plaintiffs, individually and as members of a
putative class of other similarly situated African-American and
Hispanic residents of rental apartment buildings with 11 or more
units in New York City, seek declaratory and injunctive relief in
connection with their allegations that New York City's real
property tax classification system creates a disparate impact on

African-American and Hispanic residents of larger apartment buildings.

Plaintiffs lack standing to challenge the tax classification system, as they have failed to show that they sustained an "injury in fact" (see *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991])). Plaintiffs failed to identify where they live, other than being in apartment buildings in the Bronx and Queens; how much rent they pay; and, what portion, if any, of their rent is attributable to their landlord's property tax obligation. Additionally, plaintiffs failed to allege that they in fact paid a higher rent rate than they would have had their landlords received a more favorable property tax rate.

Moreover, plaintiffs are not property owners and thus, they do not directly bear the costs of the property tax burden placed on larger buildings. The argument that plaintiffs nonetheless have standing, as they have been injured by the tax scheme, resulting in higher rents which would be reduced were real property taxes to be shared equitably among the different classes of real property, is speculative. At this juncture, plaintiffs'

allegations as to injury are nothing more than conjectural (see *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]).

Plaintiffs have also failed to state a cause of action under the Fair Housing Act (42 USC § 3601 *et seq.*), as they have not shown that the tax system, which is applied City-wide to all residential buildings, based upon their classification, has a disparate impact on them (*cf. Texas Dept. of Hous. & Community Affairs v Inclusive Communities Project, Inc.*, ___ US ___, 135 S Ct 2507, 2523 [2015]). Moreover, there is no allegation that plaintiffs have had housing denied or been made “unavailable” to them as a result of the tax scheme (42 USC § 3604[a]), and defendants are not involved in the “terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” (42 USC § 3604[b]; *Housing Justice Campaign v Koch*, 164 AD2d 656, 672-673 [1st Dept 1991], *lv denied* 78 NY2d 858 [1991]). The mere demonstration of a statistical imbalance, without “a showing that similarly situated members of nonminority groups will not be as adversely affected as members of minority groups or that segregation will be perpetuated” is not enough to establish a

violation of the Fair Housing Act (*Housing Justice Campaign*, 164 AD2d at 674-675; *cf. Huntington Branch, N.A.A.C.P. v Town of Huntington*, 844 F2d 926 [2d Cir 1988], *affd in part sub nom Town of Huntington, N.Y. v Huntington Branch, N.A.A.C.P.*, 488 US 15 [1988])).

Plaintiffs' section 1983 claim, which alleges a violation of federal Equal Protection Clause (US Const, 14th Amend, § 1), and their corresponding state law claim (NY Const, art I, § 11) fail in the absence of proof of racially discriminatory intent or purpose (see *Village of Arlington Hgts. v Metropolitan Hous. Dev. Corp.*, 429 US 252, 265-266 [1977]; *Matter of Esler v Walters*, 56 NY2d 306, 313-314 [1982])).

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

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

ENTERED: OCTOBER 27, 2016


CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2046 Tudor Insurance Company,
Plaintiff-Appellant,

Index 101713/12

-against-

Narayan Sundaresen, et al.,
Defendants-Respondents,

Everest Scaffolding, Inc., et al.,
Defendants.

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis &
Fishlinger, Uniondale (Richard J. Nicoletto of counsel), for
appellant.

Marco & Sitaras, PLLC, New York (George Marco of counsel), for
respondents.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered April 9, 2015, which denied plaintiff insurer's motion
for summary judgment declaring that it has no duty to defend or
indemnify the Sundaresen defendants in the underlying personal
injury action, unanimously reversed, on the law, without costs,
and the motion granted. The Clerk is directed to enter judgment
declaring that plaintiff has no duty to defend or indemnify the
Sundaresen defendants in the underlying personal injury action.

The "Contractor or Subcontractor Limitation" endorsement
within the insurance policy issued by plaintiff bars coverage of
the underlying personal injury action. That endorsement bars
coverage of "bodily injury" to, among others, "a contractor or

subcontractor of the insured" (the exclusion). The evidence shows that the injured worker who brought the underlying action was hired by either the Sundaresen defendants (the insureds and owners of the premises) or defendant Excell (the general contractor). Accordingly, he was a "contractor or subcontractor of the insured" for the purposes of the exclusion. That the injured worker might be an independent contractor does not preclude him from being considered a contractor or subcontractor for purposes of the exclusion, since the terms "contractor" and "subcontractor" are not mutually exclusive and can include independent contractors (see *Century Surety Co. v Franchise Contractors, LLC*, 2016 WL 1030134, *8, 2016 US Dist LEXIS 31271, *21-22 [SD NY, March 10, 2016, No. 14-Civ-277 (NRB)], citing *Matter of Johnson v Briggs*, 34 AD2d 1068, 1068-1069 [3d Dept 1970]).

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

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

ENTERED: OCTOBER 27, 2016


CLERK

ruled on the suppression motion (see *People v Gnesin*, 127 AD3d 652 [1st Dept 2015], *lv denied* 25 NY3d 1164 [2015]). While the court made a remark about a possible need to elicit additional facts, that cannot be construed as a final ruling. Moreover, the hearing was not over, and all the court allowed was an immediate continuation of the direct examination of a witness who was still on the stand and had not been asked a single question on cross-examination. The court struck an appropriate balance between the truth-seeking and finality concerns expressed in *People v Kevin W.* (22 NY3d 287, 296 [2013]), and defendant's argument that the court improperly interjected itself into the proceedings is without merit (see e.g. *People v Rodriguez*, 22 AD3d 412 [2005], *lv denied* 6 NY3d 758 [2005]). We also find no indication of "tailored" testimony. In any event, before the People elicited the additional evidence at issue, they had already established circumstantially that defendant was arrested on the basis of a specific and accurate description (see *People v Gonzalez*, 91 NY2d 909, 910 [1998]; *People v Mims*, 88 NY2d 99, 113-114 [1996]), and the additional testimony merely confirmed that fact by direct evidence.

At trial, the court properly admitted undercover officers' testimony regarding two statements made by a codefendant, namely that "[m]y boy only has [20s]" and that the officers should "wait

here" because "his boy was coming." These statements were not hearsay, but part of the crime (see *People v DeJesus*, 272 AD2d 61, 61-62 [1999], *lv denied* 95 NY2d 962 [2000]). The court also properly admitted these statements on the theory that even if they were hearsay, they were still admissible as statements made by a coconspirator in the course and furtherance of the conspiracy (see *People v Caban*, 5 NY3d 143, 148-151 [2005]; *People v Bac Tran*, 80 NY2d 170, 178-179 [1992]). The evidence amply supported a prima facie case of conspiracy without recourse to the coconspirator declarations. In particular, the simultaneous hand gestures of defendant and the codefendant, when viewed in context, clearly indicated a drug-related exchange, and prerecorded buy money was recovered from defendant.

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

ENTERED: OCTOBER 27, 2016


CLERK

"except . . . as may be expressly provided to survive the Closing or earlier termination of this Contract." However, section 10.2 expressly permits plaintiff to seek, in the event of a material breach by defendant, either termination of the contract and return of the deposit or specific performance. Moreover, the record does not conclusively establish whether defendant's breach was material or immaterial. Nor does the record establish that plaintiff's actions constituted a waiver of a condition precedent to closing.

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 27, 2016


CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2055-

2056 In re Matthew L., and Others,

Children Under the Age of Eighteen
Years, etc.,

Berly P.,
Respondent-Appellant,

Zeneida A.,
Respondent-Respondent,

Administration for Children's Services,
Petitioner-Respondent.

Daniel R. Katz, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for Zeneida A.,
respondent.

Zachary W. Carter, Corporation Counsel, New York (Damion K. L.
Stodola of counsel), for Administration for Children's Services,
respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar
of counsel), attorney for the children.

Order of disposition as to four of the subject children,
Family Court, New York County (Stewart H. Weinstein, J.), entered
on or about August 11, 2014, to the extent it brings up for
review a fact-finding order, same court and Judge, entered on or
about March 31, 2014, which found that respondent father had
neglected those children, unanimously affirmed, without costs.
Aforesaid order of fact-finding, unanimously affirmed, to the

extent it found that respondent father had neglected the fifth subject child, and the appeal therefrom otherwise unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The determination that the father had neglected the subject children is supported by a preponderance of the evidence, which showed that the father had committed acts of domestic violence against respondent mother in the children's presence and had inflicted excessive corporal punishment on the children (see Family Ct Act § 1012[f][i][B]). The evidence included the mother's detailed testimony concerning multiple incidents in which the father acted violently toward her, in front of the children, including dragging her by the hair and kicking her. The caseworker testified concerning out-of-court statements made by the children with respect to both the incidents of domestic violence and excessive corporal punishment, including the father's pulling of the children's hair and his hitting them with a belt and hands (see *Matter of Tavene H. [William G.]*, 139 AD3d 633, 634 [1st Dept 2016]). Those statements were amply corroborated since each child's account of the father's behavior was essentially similar to the other children's accounts, as well as to the mother's testimony, which included her observations of physical injuries, and to the father's admissions concerning his

punishment of the older three children by pulling their hair and ears (see *Matter of Clarence S. [Anthony H.]*, 135 AD3d 436, 436 [1st Dept 2016]). The record supported the conclusion that the father's conduct went well beyond the bounds of reasonable parenting, and petitioner agency was not required to present evidence of actual injury to the children (see *Matter of Adam Christopher S. [Deborah D.]*, 120 AD3d 1110 [1st Dept 2014]). There is no basis to depart from the court's credibility determinations (see *Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

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

ENTERED: OCTOBER 27, 2016


CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2057 Emmanuel Arreaga, Index 156297/14
Plaintiff-Respondent,

-against-

112 Dyckman Restaurant Inc., et al.,
Defendants,

114-118 Dyckman Realty LLC,
Defendant-Appellant.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross of counsel), for appellant.

Kreiger, Wilansky & Hupart, Bronx (Matthew H. Mishkin of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 25, 2016, which, inter alia, denied defendant-appellant's motion for summary judgment dismissing the complaint as against it as premature, and prospectively denied its motion for leave to renew at the conclusion of discovery, unanimously reversed, on the law and the facts, without costs, and summary judgment dismissing the complaint against defendant-appellant (defendant) granted. The Clerk is directed to enter judgment accordingly.

Defendant, an out of possession landlord, presented prima facie evidence establishing a meritorious defense - that it did not control the restaurant where plaintiff was injured and had no

knowledge of or opportunity to supervise the intoxicated patrons that allegedly assaulted plaintiff (see *D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *McGlynn v St. Andrew Apostle Church*, 304 AD2d 372 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]). The affidavit of defendant's property manager indicated, inter alia, that defendant had no employees on the premises at the time of the incident and no information concerning it prior to service of the complaint. Plaintiff failed to raise any disputed material issue of fact in opposition to summary judgment, nor did he show that discovery was necessary to oppose the motion.

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

ENTERED: OCTOBER 27, 2016


CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2058 Darrell Smith, Index 160712/13
Plaintiff-Appellant,

-against-

Extell West 45th Street LLC,
et al.,
Defendants,

Kone, Inc.,
Defendant-Respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Ansa Assuncao LLP, White Plains (Thomas O. O'Connor of counsel), for respondent.

Order, Supreme Court, New York County (Kathryn Freed, J.), entered May 15, 2015, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Kone, Inc. to the extent it sought dismissal of plaintiff's Labor Law § 240(1) claim and his Labor Law § 241(6) claim insofar as predicated on violations of Industrial Code (12 NYCRR) § 23-1.7, unanimously modified, on the law, to reinstate that portion of the Labor Law § 241(6) claim predicated on violation of Industrial Code (12 NYCRR) § 23-1.7(e), and otherwise affirmed, without costs.

Dismissal was properly granted with respect to plaintiff's Labor Law § 240(1) cause of action in that plaintiff

alleged that he was injured while riding in one of the building's elevators. In this case, the passenger elevator was not a safety device for protecting a construction worker from a risk posed by elevation as contemplated by Labor Law § 240(1) (see *Kleinberg v City of New York*, 61 AD3d 436 [1st Dept 2009]; *DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191, 192 [1st Dept 2005]; see also *Lindstedt v 813 Assoc.*, 238 AD2d 386 [2d Dept 1997], *lv dismissed* 90 NY2d 1007 [1997]).

The court erred, however, in dismissing that portion of plaintiff's Labor Law § 241(6) claim to the extent the claim was predicated on violations of Industrial Code (12 NYCRR) § 23-1.7(e). While there were no facts alleged to support a claim that plaintiff was injured as the result of a slipping hazard, plaintiff's complaint, as supplemented by his affidavit in opposition to defendant's motion, sufficiently alleged that

debris was one of the causes of his fall (see e.g. *Picchione v Sweet Constr. Corp.*, 60 AD3d 510 [1st Dept 2009]; *Scotti v Federation Dev. Corp.*, 289 AD2d 322, 323 [2d Dept 2001]).

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

ENTERED: OCTOBER 27, 2016


CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2060-

Index 654343/13

2061 Wachtell, Lipton, Rosen & Katz,
 Plaintiff-Respondent,

-against-

CVR Energy, Inc.,
 Defendant-Appellant,

Icahn Enterprises, L.P., et al.,
 Defendants.

Law Offices of Herbert Beigel, New York (Herbert Beigel of counsel) and Law Office of Robert R. Viducich, New York (Robert R. Viducich of counsel), for appellant.

Debevoise & Plimpton LLP, New York (John Gleeson of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 2, 2014, which, to the extent appealed from, denied defendants' motion to dismiss the claim for a declaratory judgment on the ground of another action pending, unanimously reversed, on the facts, with costs, and the motion granted.

Order, same court and Justice, entered February 24, 2015, which granted plaintiff's motion to dismiss defendant CVR Energy, Inc.'s counterclaim for legal malpractice, unanimously reversed, on the law, with costs, and the motion denied.

The court improvidently exercised its discretion in declining to dismiss the claim for a declaratory judgment against

defendant CVR Energy, Inc., since there is another action pending between the parties for the same cause of action (CPLR 3211[a][4]; see *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95 [1st Dept 2013]). CVR's choice of a federal forum for its earlier filed legal malpractice action against plaintiff (Wachtell) (see 28 USC § 1332 [diversity of citizenship]) is entitled to comity. Wachtell's "use of a declaratory judgment action to determine the viability of [its] defense, or the existence of merit, to [CVR's] legal malpractice claim" is an "unusual" practice (*White & Case, LLP v Suez, SA*, 12 AD3d 267, 268 [1st Dept 2004]), strongly suggestive of forum shopping, and does not warrant a deviation from the first-to-file rule (*cf. National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters.*, 205 AD2d 341, 344 [1st Dept 1994]).

The finding, made in related actions brought by CVR's financial advisers, that CVR ratified the engagement letters with respect to which CVR alleges that Wachtell failed to represent it competently does not collaterally estop a legal malpractice claim against Wachtell for conduct that allegedly caused and/or contributed to CVR's ratification and kept CVR from taking appropriate action to negate the effects of the ratification (see *e.g. Bishop v Maurer*, 9 NY3d 910 [2007]). The identical issue was not decided in the aforementioned related actions (see

D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664 [1990]). *Schwarz v Shapiro* (202 AD2d 187 [1st Dept 1994], *lv denied* 83 NY2d 760 [1994]) is inapposite, since the attorney's conduct in that case was not alleged to have contributed to the client's ratification.

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

ENTERED: OCTOBER 27, 2016


CLERK

warned him that it would sentence him to as much as seven years if he did not appear on time for sentencing (*see People v Marrero*, 246 AD2d 402 [1st Dept 1998], *lv denied* 91 NY2d 975 [1998]). We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 27, 2016



CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2065-
2065A-
2065B

In re Antoine R. A.,
Petitioner-Appellant,

-against-

Theresa M.,
Respondent-Respondent.

- - - - -

In re Theresa M.,
Petitioner-Respondent,

-against-

Antoine R. A.,
Respondent-Appellant.

Leslie S. Lowenstein, Woodmere, for appellant.

Andrew J. Baer, New York, for respondent.

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

Order, Family Court, Bronx County (Juanita E. Wing, Referee), entered on or about January 3, 2013, which dismissed the father's petition to modify an order of visitation, unanimously affirmed, without costs. Order, same court and Referee, entered on or about February 1, 2013, which granted the mother's application for an order of protection against the father, unanimously affirmed, without costs. Appeal from order, same court (Tracey A. Bing, J.), entered on or about May 9, 2014,

which suspended the father's visitation with the subject child, unanimously dismissed, without costs, as academic.

The court's order dismissing the father's modification petition, which sought an order directing that the exchange of the child take place at a police precinct, has a sound and substantial basis in the record. The court credited the mother's testimony that requiring her to bring the child to the precinct would be a hardship on the mother, and found that it would not be in the child's best interests to have exchanges take place at that location (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]).

The finding that the father committed the family offenses of harassment in the second degree (Penal Law § 240.26[1], [3]) and disorderly conduct (Penal Law § 240.20[3]) was supported by a fair preponderance of the evidence, including the mother's testimony that, *inter alia*, the father came to her place of employment and, when asked to leave, struck her in the chin, and that he frequently threatened violence against her and her family (*see Matter of Ronnie B. v Charlene G.*, 138 AD3d 605 [1st Dept 2016]; *Matter of Sasha R. v Alberto A.*, 127 AD3d 567, 568 [1st Dept 2015]).

It is undisputed that the order suspending visitation has

been superseded by subsequent orders providing for supervised visitation, which the father supported. Accordingly, the appeal from the May 2014 order has been rendered academic (see *Matter of Maria Raquel L.*, 36 AD3d 425 [1st Dept 2007]).

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

ENTERED: OCTOBER 27, 2016



CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2066 Gary K. Gaines, Index 401994/13
Plaintiff-Appellant,

-against-

1840 7th Avenue Housing Development
Fund Corporation,
Defendant-Respondent.

Gary K. Gaines, appellant pro se.

Barry Mallin & Associates, P.C., New York (Mariya Gurevich of
counsel), for respondent.

Order, Supreme Court, New York County (Barry R. Ostrager,
J.), entered October 14, 2015, which declared that plaintiff is
not the holder of unsold shares and granted defendant's motion
for summary judgment to the extent of dismissing any remaining
claims for money damages and other relief, unanimously affirmed,
without costs.

Section 4.03 of the proprietary lease between the parties
states, "The term 'Unsold Shares' means the shares of the
Corporation which are issued by the Corporation and are allocated
either to (i) the apartments of non-purchasing tenants or,
(ii) the apartments which are unoccupied at the time the Offering
Plan for the Building is declared effective." Under questioning
from the court, plaintiff admitted that he was not a "non-
purchasing tenant" and that his apartment was not unoccupied at

the time the offering plan for the building was declared effective. Accordingly, the court properly found that plaintiff is not the holder of unsold shares.

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

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

ENTERED: OCTOBER 27, 2016


CLERK

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 asserts that his counsel should have objected to a recording on hearsay and inaudibility grounds. However, on the existing record, defendant has not shown that counsel's failure to make either of these arguments was objectively unreasonable, that either objection would have resulted in exclusion of the recording, or that exclusion of the recording would have affected the outcome of the trial.

The court providently exercised its discretion in refusing to declare a mistrial after a police witness referred to defendant's "parole ID," which was recovered from his apartment. The court immediately delivered a curative instruction that the jury should disregard that testimony, thus alleviating any prejudice from the brief suggestion that defendant had a criminal record (see *People v Santiago*, 52 NY2d 865 [1981]). The jury is presumed to have followed the court's instruction (see *People v Davis*, 58 NY2d 1102, 1104 [1983]).

The particular portions of the prosecutor's summation to which defendant objected as misstatements of the law and evidence constituted reasonable inferences regarding the evidence, were generally responsive to defendant's summation and do not warrant

reversal. Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we similarly find no basis for reversal (see *People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: OCTOBER 27, 2016


CLERK

Friedman, J.P., Andrias, Moskowitz, Gische, Gesmer, JJ.

2068 In re 215 W 88th Street Holdings LLC, Index 100693/14
Petitioner-Appellant-Respondent, 100694/14

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Lennart Pehrson, et al.,
Respondents-Respondents-Appellants.

- - - - -

In re Lennart Pehrson, et al.,
Petitioners-Respondents-Appellants,

-against-

New York State Division of Housing and
Community Renewal,
Respondent-Respondent,

215 W 88th Street Holdings LLC,
Respondent-Appellant-Respondent.

Rappaport, Hertz, Cherson & Rosenthal, P.C., Forest Hills
(Jeffrey M. Steinitz of counsel), for 215 W 88th Street Holdings,
LLC, appellant-respondent.

Collins, Dobkin & Miller LLP, New York (Timothy L. Collins of
counsel), for Lennart Pehrson and Deirdre Downes, respondents-
appellants.

Mark F. Palomino, New York State Division of Housing and
Community Renewal, New York (Jack Kuttner of counsel), for New
York State Division of Housing and Community Renewal, respondent-
respondent.

Judgment, Supreme Court, New York County (Michael D.

Stallman, J.), entered February 6, 2015, denying the petitions

brought pursuant to CPLR article 78 seeking to annul so much of the determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated May 5, 2014, as denied tenants treble damages, granted landlord Rent Guidelines Board Order (RGO) increases in calculating the rent during the period of overcharge, applied the "default method" as prescribed in *Thornton v Baron* (5 NY3d 175 [2005]) and its progeny to determine tenants' base date rent, and denied landlord's assertion of laches to bar tenants' rent overcharge claim, unanimously modified, on the law, to vacate so much of the judgment as confirmed DHCR's grant of RGO increases to the owner, and remand to DHCR for further proceedings consistent herewith, and otherwise affirmed, without costs.

The court properly upheld DHCR's determination that the inclusion of a fraudulent nonprimary residence rider in the tenants' initial lease rendered it a legal nullity and required that the base date rent, for purposes of calculating the rent overcharge, be arrived at using the "default method" (see *Thornton v Baron*, 5 NY3d 175 [2005]; *Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397 [1st Dept 2005]). The court also correctly upheld DHCR's determination that the owner - which purchased the building twelve years after the initial illegal lease, and could not reasonably be deemed to have been aware of

it - did not act willfully, and thus treble damages were not warranted (see Rent Stabilization Code [RSC][9 NYCRR] § 2526.1[a][1]).

However, we disagree with the court that the agency acted within its legitimate powers when, in calculating the overcharge, it afforded the owner the benefit of the percentage increases it would have received, at each renewal, in accordance with the RGBO, had it been charging a legal, rent-stabilized rent. The practice of imposing a "rent freeze" when the default method applies - that is, calculating the overcharge based on the default method base rent, without adjustments, throughout the relevant period - is not a matter merely of customary practice that the agency may deviate from when equitable considerations so demand. Rather, it reflects a statutory requirement. RSC § 2528.4 provides that an owner who filed an improper rent registration is barred from collecting rent in excess of the base date rent, and is retroactively relieved of that penalty upon filing a proper registration only when "increases in the legal regulated rent were lawful except for the failure to file a timely registration." That clearly is not the case here. The statute makes no allowance for circumstances such as a successor owner's good faith or reliance on agency determinations in its favor that are later rescinded. Thus, notwithstanding the

arguably harsh result here, the agency did not have the discretion to add RGBO increases (see *Matter of Hargrove v Division of Hous. & Community Renewal*, 244 AD2d 241 [1st Dept 1997]).

The court did not abuse its discretion in rejecting the landlord's claim of laches. The landlord failed to demonstrate that the tenants gained any prejudicial advantage as a result of the delay (see *Capruso v Village of Kings Point*, 23 NY3d 631, 641-642 [2014]).

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

ENTERED: OCTOBER 27, 2016


CLERK

apartment building was constructed in 1905, prior to January 1, 1938, when certificates of occupancy began to be required. The inspection cards (I-cards) indicate that, as of January 1, 1938, the subject cellar apartment was in use as a dwelling, establishing the apartment's legal use for that purpose. As there is no evidence of any subsequent authorized change to the apartment's legal use, that remains its legal use today (see NY City Charter § 645[b][3][b]; Administrative Code §§ 28-118.3.2, 28-118.3.4).

The 1945 I-card, which indicates that the cellar apartment was not in use at the time of a November 1945 inspection, does not establish any change in the apartment's legal use. I-cards "provide evidence of the inspector's observations and thus of the nature of the use or occupancy, whether legal or not," but do not "amend or supercede the certificate of occupancy" or themselves "determine the legality of an existing use or occupancy" (*City of New York v 330 Cont. LLC*, 18 Misc 3d 381, 392 [Sup Ct, NY County 2007], *mod on other grounds*, 60 AD3d 226 [1st Dept 2009]). To the extent that, for some time after 1945, the building owner may have changed the use of the cellar apartment (rather than merely leaving it vacant for some time), that change was done without authorization and had no legal effect (see Administrative Code § 28-102.4.2). Furthermore, respondents' reliance on three letters

of no objection stating respondent Department of Buildings' opinion as to the apartment's legal status, as well as on ECB's own administrative precedent regarding the legal effect of I-cards, is unavailing, as all are based on the same fundamental legal error (see *Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519 [1985]).

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

ENTERED: OCTOBER 27, 2016


CLERK

We do not find that defendant made a valid waiver of his right to appeal, and we find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 27, 2016


CLERK

Dept 2015]). Defendants also relied on plaintiff's deposition testimony that she had been found to be disabled as a result of a neck condition more than six years before the subject accident, thereby shifting the burden to plaintiff to demonstrate a causal connection between the accident and her claimed cervical injury (see *Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

In opposition, plaintiff failed to raise an issue of fact as to causation or aggravation of the preexisting condition of her cervical spine. Her orthopedist acknowledged that an MRI of the cervical spine taken four years before the accident showed a preexisting condition, but he provided no objective basis, only the history supplied by plaintiff, for his opinion that the accident exacerbated the preexisting condition (see *Campbell v Fischetti*, 126 AD3d 472, 473 [1st Dept 2015]). Plaintiff offered no evidence of any injuries different from her preexisting condition, and her orthopedist failed to explain why her

preexisting conditions were ruled out as the cause of her current alleged injuries (see *Garcia v Feigelson*, 130 AD3d 498 [1st Dept 2015]; *Campbell v Fischetti*, 126 AD3d at 473).

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

ENTERED: OCTOBER 27, 2016


CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Troy K. Webber
Ellen Gesmer, JJ.

12645
Ind. 784N/10

x

The People of the State of New York,
Respondent,

-against-

Christian Williams,
Defendant-Appellant.

x

Defendant appeals from the judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 24, 2012, as amended on February 1, 2012 and February 28, 2012, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years.

Richard M. Greenberg, Office of the Appellate Defender, New York (Anita Aboagye-Agyeman and Alexandra Keeling of counsel), for appellant.

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

TOM, J.

The Court of Appeals, in its remittitur of this case (*People v Williams*, 27 NY3d 212 [2016], revg 123 AD3d 240 [1st Dept 2014]), asks this Court to decide whether defendant's unpreserved challenge to the validity of his plea should be reviewed as a matter of discretion in the interest of justice (*id.* at 224).

After his arrest and indictment on drug sale charges, defendant entered into a negotiated plea bargain. In exchange for his guilty plea, defendant was promised a three-year determinate sentence followed by a two-year period of postrelease supervision with the proviso that he not commit another crime before sentence was pronounced, among other conditions. The court and the parties mistakenly believed that the three-year sentence was the minimum permissible sentence.

During the plea colloquy, the court explicitly advised defendant that if he violated the conditions, "I don't have to give you the three years with the two years. I might, but I don't have to, and I could theoretically sentence you up to 12 years." In response to the court's questions, defendant stated that he understood and that he had spoken to his counsel about the plea deal and understood the conditions of the plea and the consequences of failing to fulfill them.

The three-year prison term was not a sentence lawfully

available to defendant, because of his predicate felony status. Because defendant was a second felony drug offender previously convicted of a violent felony, he faced a statutory sentencing range of 6 to 15 years in prison on his third-degree drug sale conviction (see Penal Law § 70.70 [4] [b] [i]). But, the court was not informed of this issue and never discovered it on its own.

Before the sentencing, defendant was arrested for marijuana and trespass offenses. The court held a hearing pursuant to *People v Outley* (80 NY2d 702 [1993]) to determine whether defendant had violated the terms of his plea agreement. After hearing testimony from a police officer and the parties' arguments, the court found that defendant had violated the terms of the plea by engaging in misconduct constituting criminal possession of marijuana in the fifth degree (see Penal Law § 221.10 [1]).

At the sentencing proceeding, the court reiterated that defendant had violated the terms of his plea deal, and the court noted that, based on the People's written submissions, it appeared that defendant had tried to suborn perjury and arrange for the presentation of false evidence of an alibi in connection with his postplea marijuana offense. At no point did defendant challenge the legality of the initial promised three-year

determinate sentence or the sentencing range. The court then stated, "So he's sentenced to 6 years [in prison], which is an appropriate enhancement in view of all of the things that went on related to this case." Subsequently, defendant appealed.

A divided panel of this Court reversed the judgment, on the law, vacated defendant's guilty plea and remanded the matter to Supreme Court for further proceedings (see *People v Williams*, 123 AD3d at 241-247). The majority concluded that the plea had violated due process because it was induced by an illegal sentence and that preservation therefore was not required (*id.* at 244). On the merits, the Court ruled that Supreme Court's error had affected the voluntariness of defendant's plea, and therefore vacatur of the plea was the only proper remedy (see *id.* at 245-247).

Two Justices dissented and voted to affirm (see *id.* at 247-250 [Tom, J.P., dissenting]). According to the dissent, defendant had to preserve his challenge to the legality of his guilty plea, and the court's imposition of a lawful six-year prison term was within the range of sentence promised in the event that defendant violated the terms of the plea agreement and therefore met his legitimate sentencing expectations (see *id.* at 248-250).

The Court of Appeals reversed this Court on preservation

grounds, holding that defendant was "obligated to preserve his claim" (27 NY3d at 225), and had a "reasonable opportunity to attack the legality of his guilty plea in the court of first instance" but did not "take advantage of that opportunity," and thus "failed to preserve his current claim for appellate review" (*id.* at 214).

The Court of Appeals remitted this case for consideration of the facts and issues raised but not determined on the prior appeal to this Court. Specifically, we are to consider whether to review defendant's unpreserved challenge to the validity of his plea as a matter of discretion in the interest of justice (*id.* at 224). We decline to do so.

Defendant contends that his guilty plea was not knowing, voluntary and intelligent because the initial promised sentence which induced the plea was illegal, and because the plea conditions were ambiguous. The dissent concludes that the plea violated defendant's due process rights because "the evident misunderstanding by the trial court and by the parties in this matter [regarding the correct sentencing range], result[ed] in defendant's incomplete understanding of the implications of entering a guilty plea" (quoting *Williams* at 247).

It is settled that when a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process

requires that the waiver be knowing, voluntary and intelligent (*People v Catu*, 4 NY3d 242, 245 [2005]). However, defendant's present due process claim is without merit. The Court of Appeals implied that the illegality of the promised sentence does not, in itself, render a defendant's guilty plea unknowing and involuntary (see *People v Williams*, 87 NY2d 1014, 1015 [1996]). In *Williams*, the Supreme Court, sua sponte, resentenced defendant to 3½ to 10½ years pursuant to a guilty plea to burglary in the second degree because the originally-imposed sentence of 3½ to 7 years was unlawful (*id.*). The Court of Appeals, in rejecting the defendant's attempt to vacate the plea on double jeopardy grounds stated, "That claim would be colorable only if the defendant's sentence had been increased beyond his legitimate expectations of what the final sentence should be" (*id.*). Since the sentencing court informed the defendant during the plea proceeding that he could receive a sentence of up to 15 years in prison, the sentence of 3½ to 10½ years was within his legitimate expectation of the final sentence (*id.*; see also *People v Collier*, 22 NY3d 429, 433-434 [2013], cert denied - US -, 134 S Ct 2730 [2014]). Indeed, in *Collier*, the Court of Appeals held that

"if the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations. Again, 'the reasonable understanding and expectations of the parties,

rather than technical distinctions in semantics, control the question of whether a particular sentence imposed violates a plea agreement'" (*id.* at 434, quoting *Gammarano v United States*, 732 F2d 273, 276 [2d Cir 1984]).

Here, defendant was told that he could receive up to 12 years' imprisonment if he failed to comply with the conditions set by the court. In fact, he was expressly warned during the plea proceedings that if he committed another crime before the sentence was pronounced he could be sentenced up to 12 years, that he would not get his plea back, and that the court would decide the appropriate sentence. Thus, the six-year statutory minimum sentence finally imposed after defendant violated the conditions of the plea was clearly within the legitimate expected sentencing range of up to 12 years (*Collier*, 22 NY3d at 434; see also *People v DeValle*, 94 NY2d 870, 871-872 [2000]). The dissent focuses on the promised sentence of three years. However, this was a conditional plea agreement and defendant violated the conditions of the plea. Thus, he was no longer entitled to the three-year sentence. Because the final sentence was lawful and within the expectations of the parties, defendant's plea did not violate his due process rights. More succinctly, because defendant violated the conditions of the plea, "there could be no expectation of finality on his part with respect to the lesser and illegal sentence" (*People v Williams*, 87 NY2d at 1015).

Notably, the Court of Appeals' binding rulings in *Williams*, *Collier*, and *DeValle* are controlling law and dispositive of defendant's due process claim. The dissent relies on the dissenting opinion to the Court of Appeals' decision remitting this case to us (see *People v Williams*, 27 NY3d at 225-235), to refute these rulings. However, even that dissenting opinion recognized that a sentencing court has the power to correct an illegal sentence (*id.* at 228). Further, that dissenting opinion addresses the situation where a defendant violates a condition of the plea, and citing *People v Murray* (15 NY3d 725 [2010]), recognizes that when a defendant is told a plea is conditional, and advised of the sentence to be imposed should the defendant violate the terms, the court may properly issue an enhanced sentence pursuant to the terms of the plea deal (27 NY3d at 230).

Even if defendant had fulfilled the condition to be entitled to receive the promised sentence, it is settled that a "[d]efendant cannot rely on a promise by the court to impose a sentence which it could not lawfully impose" (*People v Bullard*, 84 AD2d 845, 845 [2d Dept 1981]), and "[the] courts have the inherent authority to remedy an illegal sentence by permitting modification to bring the sentence within the . . . sentencing range that the defendant understood would be available upon conviction" (*People v Richardson*, 100 NY2d 847, 851 [2003]).

There is no basis to permit this defendant to withdraw his plea or to restore the parties to their status before the plea agreement was reached.

Further, defendant challenges the validity of the condition that he not commit a crime as unclear and nonspecific. He maintains that an objectively reasonable interpretation of that condition was that it meant not being convicted of a crime. Notably, however, after the court reviewed the conditions and the consequences of violating any of the conditions, defendant confirmed that he understood. That neither defendant nor his counsel expressed confusion or asked for clarification suggests that the meaning of that condition was clear. Further, the court in no way suggested that defendant would violate the plea agreement only if he pleaded guilty or was convicted of a crime after trial (see *People v Delgado*, 45 AD3d 496 [1st Dept 2007], *lv denied* 9 NY3d 1032 [2008]). Rather, the court made clear that it would not find a violation based upon an arrest, but would determine whether defendant had committed a crime, and it conducted a hearing for that purpose. Thus, the court properly enhanced defendant's sentence based on its finding that defendant had committed a crime, in violation of a specific, unambiguous condition of the plea agreement.

The dissent, relying on and quoting at length the dissenting

opinion to the Court of Appeals' decision remitting this case to us (see *People v Williams*, 27 NY3d at 225-235), concludes that we should exercise interest of justice review because this case raises "significant public policy concerns" concerning "public confidence in plea bargaining" and a system that "tolerates unenforceable bargains."

However, precedential cases involving interest of justice review make clear that such review applies on a case-by-case basis, and is not designed or intended to be used to resolve public policy concerns or for a system-wide fix (see *People v Harmon*, 181 AD2d 34, 36 [1st Dept 1992]; see also CPL 210.40). By way of analogy, the factors set forth in CPL 210.40 for considering whether to dismiss an indictment in the interest of justice reflect a "sensitive balance between the *individual* and the State" (*People v Clayton*, 41 AD2d 204, 208 [2d Dept 1973][emphasis added]; see *People v Reyes*, 174 AD2d 87, 89 [1st Dept 1992]). While there may be legitimate concerns about our criminal justice system, the appropriate remedy to improving our system lies with the legislature or must be raised in a proper case.¹

¹Indeed, in its decision remitting the case to this Court, the Court of Appeals noted that the legislature was "aware that illegal sentences may sometimes be imposed and has created a mechanism to address this problem. That mechanism, CPL 440.40,

The dissent relies on *People v Rosado* (96 AD3d 547 [1st Dept 2012]) to support the position that we can exercise interest of justice review to “examine an unpreserved question that has importance beyond the individual case.” However, the holding in *Rosado* deviates from our accepted and long established precedent regarding the extremely limited circumstances in which we should exercise interest of justice jurisdiction.

The numerous cases I cite below represent the long-standing precedent of this Court as to what circumstances warrant the exercise of interest of justice review notwithstanding the fact that CPL 470.15 does not set forth guidelines. *People v Ramos* (33 AD2d 344 [1st Dept 1970]) – relied on by the dissent – predates CPL 470.15 and is based on section 527 of the Code of Criminal Procedure, in effect at that time. In any event, even *Ramos* recognized that “our ultimate concern should be the interests of justice in this particular case” (33 AD2d at 348). Moreover, in line with the cases set forth below, it was because the defendant’s guilt in *Ramos* was unclear that we exercised interest of justice review, vacated the conviction and directed a new trial.

authorizes the court, upon the People’s motion, to vacate an illegal sentence within one year of imposition” (*People v Williams*, 27 NY3d at 225 n 3).

Indeed, it is settled that the discretionary act to vacate a conviction in the interest of justice is to be “exercised sparingly and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations” (*People v Harmon*, 181 AD2d at 36 [internal quotation marks omitted]; CPL 470.15 [6] [a]). In order to exercise our interest of justice jurisdiction, there must exist “special circumstances deserving of recognition” (*People v Chambers*, 123 AD2d 270, 270 [1st Dept 1986]). In other words, this Court will not exercise its interest of justice jurisdiction absent “extraordinary circumstances” (*People v Marshall*, 106 AD3d 1, 11 [1st Dept 2013][internal quotation marks omitted], *lv denied* 21 NY3d 1006 [2013]).

This case and this defendant do not present special or extraordinary circumstances that would warrant exercising our interest of justice review power. In *People v Kidd* (76 AD2d 665 [1st Dept 1980], *appeal dismissed* 51 NY2d 882 [1980]), we exercised our interest of justice jurisdiction to reverse a conviction and dismiss an indictment where there were many “troublesome” inconsistencies with respect to the identification of the defendant (*id.* at 666, 669). Although we concluded that the conviction was supported by legally sufficient evidence, we were “left with a very disturbing feeling that guilt ha[d] not

been satisfactorily established” and “that there [wa]s a grave risk that an innocent man ha[d] been convicted” (*id.* at 668). Accordingly, we could not let the conviction stand. Recognizing that we should not use our interest of justice review in a “capricious and whimsical” manner, we remarked “we think we do not overstep the line when we exercise our ‘interest of justice’ powers on the basis of so fundamental a consideration as guilt or innocence” (*id.* at 667). In sum, the exercise of interest of justice review must be warranted by the individual case in front of us, and must involve “special circumstances” such as the risk that an innocent defendant has been convicted. This is not such a case.

Moreover, defendant in this case is not a proper candidate for the Court to exercise our interest of justice review pursuant to CPL 470.15(3)(c). The defendant was previously convicted of a violent felony – attempted criminal possession of a weapon in the second degree. His current conviction of criminal sale of a controlled substance in the third degree came about after defendant and two codefendants sold crack cocaine to an undercover police officer in or near school grounds. Defendant’s factual allocution at the plea proceeding made clear that he was guilty of third-degree sale of a controlled substance and he never challenged his predicate felony status. Accordingly, there

is no risk that an innocent defendant has been convicted.

Defendant also violated the plea agreement by committing a crime during the period between the plea and sentencing proceedings. Even worse, recorded conversations from Rikers establish that, in an effort to avoid the consequences of his violation of the plea conditions, defendant sought to suborn perjury and arrange for the presentation of false testimony from friends and relatives of an alibi in connection with his postplea marijuana offense.

In sum, there is nothing rare or unusual about this case or this defendant. The plea proceedings do not raise a concern about defendant's guilt. Defendant was advised of the rights he was waiving by pleading guilty and affirmed he was pleading guilty of his own free will. Defendant was represented by counsel and received a favorable sentence. Finally, defendant violated the plea agreement by committing another crime and the final sentence imposed was both legal and within the range announced by the court. Nor has defendant presented anything to demonstrate that his case is extraordinary. These facts, coupled with defendant's failure to preserve the issue for review, fail to support the exercise of our discretion to review in the interest of justice, and militate against such exercise.

Accordingly, upon remittitur from the Court of Appeals, the

judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 24, 2012, as amended on February 1, 2012 and February 28, 2012, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, should be affirmed.

All concur except Renwick and Gesmer, JJ. who dissent in an Opinion by Renwick, J.

RENEWICK, J. (dissenting)

This appeal stems from a bargained-for plea, which was based on an illegal minimum incarceratory sentence, offered as an inducement for defendant's waiver of his constitutionally protected rights, including the right to a jury trial. A divided panel of this Court reversed the judgment of conviction, based upon the guilty plea, on the ground that the plea violated due process because it was induced by an illegal promise (*People v Williams*, 123 AD3d 240 [1st Dept 2014], *revd* 27 NY3d 212 [2016]). The Court of Appeals, however, reversed our determination on the procedural ground that defendant "failed to preserve his current claim for appellate review" (27 NY3d at 214). The Court of Appeals remanded the case "for [our] consideration of the facts and issues raised but not determined on the appeal to th[is] Court" (*id.* at 225). The question before us now is whether we should exercise our discretion to examine the merits of defendant's claim in the interest of justice. In my view, we should do so and find that the plea here violated defendant's due process rights. Accordingly, I respectfully dissent.

This case has its genesis in defendant's arrest on January 7, 2010, for allegedly selling drugs to an undercover police officer. On November 1, 2011, defendant entered into a plea agreement that required him to plead guilty to the top count of

the indictment, criminal sale of a controlled substance in the third degree, a class B felony. In exchange, the trial court promised to sentence defendant to a definite term of imprisonment of three years and two years of postrelease supervision (PRS). In addition, as part of the plea agreement, the trial court permitted defendant to remain at liberty pending sentence. This was done with the understanding that defendant's sentence could be enhanced to a maximum prison term of 12 years, at the discretion of the sentencing court, if he failed to return to court for sentencing, failed to cooperate with the Department of Probation, or committed a crime.

Neither the trial court nor the parties realized that the agreed upon sentence, to be imposed if defendant complied with the conditions of the plea, was illegal. Specifically, defendant had previously been convicted of attempted criminal possession of a weapon in the second degree and adjudicated a predicate violent felony offender (see Penal Law §§ 110.00/265.03[3]; 70.02[1][b]). Under the circumstances, the correct incarceratory sentence range, for the crime to which defendant pleaded guilty, was from a minimum of 6 years to a maximum of 15 years (see Penal Law § 70.70[4][b][i]).

After his plea, but prior to his sentence in this case, defendant was arrested in an unrelated matter. Soon thereafter,

on November 17, 2011, the trial court held an *Outley* hearing to determine whether defendant had violated the plea conditions (*People v Outley*, 80 NY2d 702 [1993]). At the hearing, a police officer testified that he arrested defendant after observing him smoking marijuana with two other men while inside a public housing building. The District Attorney's Office, however, declined to prosecute defendant because he was not found in possession of any marijuana. Nevertheless, finding the police officer's testimony credible, the trial court determined that defendant had committed the crime of misdemeanor criminal possession of marijuana. Accordingly, the trial court found defendant in violation of the plea agreement and sentenced him to six years in prison, as well as two years of PRS, which the court considered "an appropriate enhancement in view of all the things that went on related to this case." As indicated, on appeal, this Court sustained defendant's challenge to the validity of his plea but the Court of Appeals found the challenge unpreserved.

On remittitur from the Court of Appeals, we should find that the unpreserved issue should be considered as matter of discretion in the interest of justice. In civil cases (see *Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]), as well as in criminal cases (CPL 470.15[3][c]), it is within the power of the Appellate Division (unlike the Court of Appeals) as

a matter of discretion, to consider, "in the interest of justice," claims that have not been preserved for appellate review. Even though the Appellate Division possesses interest of justice jurisdiction, this Court should "exercise[] [it] sparingly and only in that rare and unusual case where it cries out for fundamental justice beyond the confines of conventional considerations" (*People v Harmon*, 181 AD2d 34, 36 [1st Dept 1992] [internal quotation marks omitted]; see also 11 Carmody-Wait 2d § 72:142 at 353).

This is one of those rare cases that not only presents a meritorious claim of a violation of due process during the plea process, but also raises a claim of significant public policy concerns. As Court of Appeals' Justice Rivera decisively expressed in her dissent to the majority's reversal of this Court's determination on the prior appeal, the "judicial practice employed in defendant's case jeopardizes the public confidence in plea bargaining and the criminal justice system as a whole" (*People v Williams*, 27 NY3d at 225).

Moreover, while the Court of Appeals obviously did not examine the merits of defendant's claim, the dissenting Justices did. The dissent completely agreed with our view that the plea here violated defendant's due process rights when "the judge at the plea hearing failed to ensure the defendant understood the

direct sentencing consequences of the plea, and wrongly informed defendant that the offer was a legal minimum rather than one precluded by law" (*id.* at 225-226). As Justice Rivera cogently explained in her dissenting opinion:

"The legitimacy of our 'bargain-for-sentence' criminal process is based on the assurance that where promises are made to induce a defendant's guilty plea, they are capable of being enforced. Without such assurances defendants would be loath to engage in a risky high-stakes negotiation involving trading personal liberty interests in exchange for no benefit at all. Thus, a criminal justice system that tolerates unenforceable bargains increases the potential 'detrimental effect on the criminal justice system that will result should it come to be believed that the State can renege on its plea bargains with impunity notwithstanding defendant's performance.' Similarly, because illegal sentencing promises can bear no assurance of enforcement, they undermine public confidence in plea bargains, and discourage defendants from entering these agreements. It is therefore crucial that 'the court in overseeing and supervising the delicate balancing of public and private interests in the process of plea bargaining' conduct its constitutional duty to ensure the lawfulness of promises leading to a defendant's incarceration. The judge here failed to fulfill his duty, and the sole remedy for the defect presented on this record is to vacate the plea" (*People v Williams*, 27 NY3d at 234-235) (citations omitted).

On the merits of defendant's due process claim, the majority utters the hyperbolic statement that "the Court of Appeals' binding rulings in *Williams*, *Collier*, and *DeValle* are controlling and dispositive of defendant's due process claim." Ironically, Court of Appeals' Justice Rivera also thoroughly refutes the

majority's argument:

"The People further argue that a sentencing court has the inherent power to correct an illegal sentence. True enough, but a court could not have corrected the sentence to coincide with the plea offer. Put another way, defendant could not be legally sentenced to three years' imprisonment for the crime to which he pleaded guilty.

"Nevertheless, the People contend that under *People v Collier* if the original promise could not be imposed, the sentencing court could impose another lawful sentence as long as it 'comports with defendant's legitimate expectations.' According to the People, under that principle, because defendant received the legal statutory minimum of six years, the ultimate sentence imposed fulfilled his expectations of a 'minimum' sentence. The People apparently ignore that the original sentencing offer was a minimum of three years, not six, and that three years was the number of consequence to defendant. As this Court has recognized, 'the overwhelming consideration for the defendant is whether he [or she] will be imprisoned and for how long'" (*People v Williams*, 27 NY3d at 228-229) (citations omitted).

Justice Rivera went on to state as follows:

"The Court's holding in *People v DeValle* (94 NY2d 870 [2000]) is not to the contrary. In that case, the Court held that the trial court had inherent power to correct an illegal sentence where defendant did not seek withdrawal of the plea, and also failed to establish detrimental reliance on the illegal sentence that could not be addressed by returning him to his preplea status, if he so desired. Here, defendant seeks the remedy the Court in *DeValle* recognized as appropriately available to the defendant on the facts of that case. Thus, unlike the defendant in *DeValle* who, in essence, demanded specific performance of an illegal sentence, defendant here seeks no more than what the law allows, namely to be returned to his preplea status" (*People v Williams*, 27 NY3d at 229 n 3).

Justice Rivera continued:

"In *Williams*, this Court rejected a defendant's challenge to a resentence that imposed an enhanced maximum period of incarceration directly within the period expressly explained to defendant at the time of the plea. As the facts of that case establish, defendant was originally sentenced to an illegal indeterminate prison term of 3½ to 7 years, and thereafter resented to a lawful term of 3½ to 10½ years' imprisonment. The Court concluded that defendant did not have a legitimate expectation of finality in the prior illegal sentence because the Judge had informed defendant in advance that he was pleading to a crime that, by law, allowed the Judge 'to impose a sentence of up to 15 years.' As relevant to the instant appeal, the defendant's minimum of 3½ years' imprisonment went unchanged from the illegal sentence to the resentence. Thus, this Court properly focused on the defendant's maximum sentencing exposure" (*People v Williams*, 27 NY3d at 230) (citations omitted).

Justice Rivera also stated as follows:

"The decisions in *Collier* . . . [and] *Williams* . . . presuppose that a defendant who pleads guilty while fully aware of the period of incarceration attached to the plea is making a choice to bargain away freedom for at least the minimum, and up to the maximum, as described by the court. In accordance with this guiding principle, defendant's plea must be vacated because it was based on a three-year illegal minimum sentence, which the court communicated as the lowest end of the applicable sentencing range" (*People v Williams*, 27 NY3d at 230-231).

Finally, contrary to the majority's allegations, it is appropriate for this Court to exercise interest of justice jurisdiction to examine an unpreserved question that has importance beyond the individual case. Indeed, this Court should not hesitate to review an unpreserved claim if this Court finds that the strong policy interest contained in the preservation rule should be tempered because of the unique policy public

concerns implicated in a case. The recent pronouncement in *People v Rosado* (96 AD3d 547 [1st Dept 2012]) illustrates an instance in which this Court exercised interest of justice jurisdiction to examine an unpreserved claim because the issue in the case had importance beyond the individual case.

Specifically, in *Rosado*, this Court exercised its interest of justice jurisdiction to review an unpreserved claim of error in a jury instruction relating to the so-called “drug factory presumption” (*id.* at 548), which creates a rebuttable inference of constructive possession of certain drugs in open view by each person discovered in close proximity to the drugs (*see id.*; Penal Law § 220.25[2]). The trial evidence in *Rosado* showed that, pursuant to the execution of a no-knock warrant, the police entered the defendant’s small apartment and immediately saw him coming out of the bedroom (96 AD3d at 549). Ignoring a call to stop, he ran into the bathroom and slammed the door shut (*id.*). After breaking open the door, the police found him “hovering” over the toilet (*id.*). The police found \$550 on his person in denominations of \$20 and \$100 dollar bills (*id.*). Then, upon entering the small bedroom from where defendant had fled, the police saw, in plain view, two plastic containers that held glassine envelopes encased in rice (*id.*). Looking into the open bedroom closet they saw an additional clear plastic container

with a see-through lid, also with glassine envelopes encased in rice (*id.*). A total of 95 glassines of cocaine and heroin were recovered (*id.*).

Without any objection from the defendant's counsel, the jury in *Rosado* was charged on the drug factory presumption with regard to the charge of criminal possession of a controlled substance in the third degree, which in this case required intent to sell, and seventh-degree possession, which required only simple possession (*id.* at 548). During its deliberations, the jury inquired whether the "definition of room presumption and constructive possession" applied "equally to the charges of possession in the third degree and the seventh degree," to which the court answered affirmatively (*id.*). The defense counsel not only did not object to the subsequent charge but even agreed with the court that the presumption applied to the third and seventh degrees (*id.* at 550). The jury convicted defendant of the seventh-degree possession counts, but acquitted him of the third-degree counts (*id.* at 548).

On appeal, the defendant argued that even if the instruction on the drug factory presumption was proper with regard to the charge of third-degree possession (intent to sell), the jury should have been instructed that the presumption did not apply to the charge of seventh-degree possession (simple possession) (*id.*

at 547-548). He argued that the presumption was only intended to apply to possession charges containing a weight or intent element, not simple possession charges (*id.* at 548). Although this issue was unpreserved, this Court nevertheless considered it "in the interest of justice in order to clarify the scope of the drug factory presumption" (*id.*). This Court reversed the defendant's conviction and granted a new trial on the ground that the drug factory presumption was not intended to apply to a seventh-degree possession charge requiring only simple possession, and thus, the jury instruction was erroneous:

"The underlying purpose of the drug factory presumption is to hold criminally responsible those participants in a drug operation who may not be observed in actual physical possession of drugs at the moment the police arrive. We note that defendant was acquitted of the third[-]degree possession counts. We do not believe that the drug factory presumption was intended to apply to seventh-degree possession, because implicit in the idea of a drug factory is that drugs are being prepared for sale. Therefore it should only apply to crimes requiring intent to sell, or crimes involving amounts of drugs greater than what is required for misdemeanor possession" (*id.*).

In this case, the policy concerns at issue are as strong or even stronger than those involved in *Rosado*. For this Court has the duty to assure "that where promises are made to induce a defendant's guilty plea, they are capable of being enforced" (*People v Williams*, 27 NY3d at 234-235).

The majority is wrong when it argues that *Rosado* deviates from the alleged "long established precedent regarding the extremely limited circumstances in which we should exercise [our] interest of justice jurisdiction." Indeed, contrary to the majority's suggestions, neither the CPL nor case law has established any rigid litmus test as to when we should exercise our interest of justice jurisdiction. "[I]nterest of justice" is nowhere defined in the statute (see CPL 470.15). Instead, as this Court expressed in *People v Ramos* (33 AD2d 344 [1st Dept 1970]), the Appellate Division's interest of justice power is "broad" and should be exercised "in accordance with the conscience of the court and with due regard to the interests of the defendant and those of society" (*id.* at 348). Accordingly, this Court explained, this Court has to look not only at the facts of the particular case but also to its "duty to correct any situation which casts a doubt upon the proper functioning of the courts in the administration of justice" (*id.*) -- a statement remarkably pertinent to this case.

Applying these broad principles in *People v Ramos*, this Court found that allowing the defendant's guilty verdict to stand would cast such a "doubt" on the justice system because of the inconsistency between the jury's verdict and the trial court's statements of the defendant's innocence (*id.*). Specifically, the

trial judge stated on the record that he believed the jury's guilty verdict was erroneous and the defendant was in fact innocent (*id.* at 346). However, because the Judge did not state his reasons on the record or set aside the verdict, there was nothing for this Court to review (*id.* at 346, 347-348). Nevertheless, this Court exercised its interest of justice review because in the absence of "clear and convincing evidence" of guilt that could remove the Judge's doubt, reversal was required (*id.* at 348).

Thus, here, we should similarly exercise our discretion in the interest of justice. We should find, as we held when the case initially came before us on appeal, that "in view of the evident misunderstanding by the trial court and by the parties in this matter, resulting in defendant's incomplete understanding of the implications of entering a guilty plea, the appropriate course is to permit defendant to withdraw his plea and restore

the parties to their status before the plea agreement was reached" (*People v Williams*, 123 AD3d at 247).

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

ENTERED: OCTOBER 27, 2016


CLERK