SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 7, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Sweeny, Kapnick, Gesmer, Singh, JJ.

7241 Louis Demetro, et al.,
Plaintiffs-Respondents,

-against-

Dormitory Authority of the State of New York, et al.,
Defendants-Respondents,

The Cannon Corporation doing business as Cannon Design,
Defendant-Appellant,

L.P. Gans Sales Company, Inc., et al.,
Defendants.

- - - - -

[And Third-Party Actions]

Index 16277/06
86001/07
83793/09
83990/10

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Donovan Hatem LLP, New York (Scott K. Winikow of counsel), for appellant.

The Noll Law Firm, P.C., Syosset (Beth S. Gereg of counsel), for Louis Demetro and Nancy Demetro, respondents.

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Kenneth J. Kutner of counsel), for Dormitory Authority of the State of New York, Bovis Lend Lease LMB Inc. and Center Sheet Metal, respondents.

Goldberg Segalla, LLP, White Plains (Jill C. Owens of counsel), for Martin Associates, Inc., respondent.

London Fischer LLP, New York (Brian A. Kalman of counsel), for Metal-Fab, Inc., respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about March 22, 2017, which, insofar as appealed from, denied defendant Cannon Corporation's motion for summary judgment dismissing the complaint and all claims and cross claims against it, unanimously modified, on the law, to grant the motion as to the complaint insofar as it is based on the alleged improper sizing of the breeching system or an improper connection between the breeching system and the chimney stack, and as to any cross claims for contractual indemnification asserted by defendants Martin Associates, Center Sheet Metal, Inc., or Metal-Fab, Inc., and otherwise affirmed, without costs.

Plaintiff Louis Demetro seeks to recover for injuries he sustained at work in the boiler room of Jacobi Medical Center when an angle iron that had been affixed to the cover of a cleanout port in the breeching system of a new boiler system became dislodged and struck him on the head. It is undisputed that vibrations in the breeching system led both to the need for the covers of the cleanout ports to be reinforced with angle irons and to the angle irons coming loose.

Defendant Dormitory Authority of the State of New York (DASNY), the building owner, retained defendant Cannon as its architect to provide programming, architectural and engineering design, including a schematic design for the boiler plant, and

production of construction documents. DASNY also retained defendant Martin Associates as the prime HVAC contractor. Cannon provided performance specifications for the breeching system to Martin, which designed the breeching system and selected the component parts. The selected components, including the cleanout ports, were then submitted to Cannon for review to determine whether they conformed with the design intent.

There is no evidence that defendant Cannon negligently sized the system to accommodate three boilers in operation so that it could be held liable for plaintiff's injuries (*see Domenech v Associated Engrs.*, 257 AD2d 403 [1st Dept 1999]; *see also Hussain v Try 3 Bldg. Servs.*, 308 AD2d 371, 372 [1st Dept 2003]; *see generally Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). There is testimony in the record about the problems that can result from a breeching system that is too small, but no evidence that the subject breeching system was too small. Moreover, since there is no evidence that any defect in the breeching system, as opposed to a problem with the boiler burners, caused the aforementioned vibrations, there is no support for a finding that any deficiency in the connection between the breeching system and the chimney stack was the proximate cause of the vibrations. Indeed, it is undisputed that the vibrations were resolved by a modification to the boiler burners.

However, there is a question as to whether Cannon was negligent in the performance of its architectural/engineering services, and whether any such negligence affirmatively created or contributed to the injury producing harm. Cannon had obligations to, inter alia, review "all shop drawings and samples" submitted to it "for adherence to the intent and requirements" of the contract and to visually inspect on a bi-weekly basis, or as required by DASNY, the work in progress for compliance with the contract drawings and specifications or shop drawings. Here, the record presents an issue of fact as to whether Cannon was negligent in approving or failing to detect problems with the manifold tee cleanout ports and their covers during its required bi-weekly inspections. Cannon's principal, Millard Berry, acknowledged that these were not proper ports or covers for the intended purpose, and that upon his February 2005 site visit he discovered that the covers used were not the covers included in Cannon's specifications.

Cannon argues that even if it was negligent, there could be no causal connection between any negligence on its part and plaintiff's injury because Cannon never approved the angle iron bracing that struck plaintiff, or the makeshift cleanout port covers. Moreover, when Cannon realized that the makeshift cleanout port covers were not in accordance with its

specifications and needed to be replaced, Cannon notified both DASNY and Martin; however, over the course of the eight months between Cannon's discovery and plaintiff's injury, DASNY and Martin failed to replace the makeshift covers and bracing system. Thus, according to Cannon, even if it was negligent in its review of the component list or in its inspections of the ongoing work, any such negligence was not a proximate cause of the accident, because the installation of angle irons, which it never approved, and the failure of DASNY and Martin to heed its remediation recommendation for eight months before the accident occurred were intervening superseding causes.

"When a question of proximate cause involves an intervening act, 'liability turns upon whether the intervening act is a *normal or foreseeable consequence* of the situation created by the defendant's negligence'" (*Hain v Jamison*, 28 NY3d 524, 529 [2016], quoting *Mazella v Beals*, 27 NY3d 694, 706 [2016]). "The mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because 'there may be more than one proximate cause of an injury'" (*id.*). Here, a jury could reasonably conclude that the effort to reinforce the cleanout port covers with angle irons was a normal and foreseeable consequence of the alleged inadequacy of the covers, which Cannon either approved or failed to detect, and

which Cannon's principal acknowledged were not the proper covers. Thus, under the circumstances presented in this case, there remain triable issues of fact as to whether, inter alia, the use of the angle iron bracing, as well as DASNY and Martin's failure to replace the covers, despite notice from Cannon, constituted superseding causes of plaintiff's injuries (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315-316 [1980]).

Defendants Martin Associates, Center Sheet Metal, Inc., and Metal-Fab, Inc. do not dispute that there are no contractual provisions that require Cannon to indemnify them.

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

ENTERED: MARCH 7, 2019

CLERK

Sweeny, J.P., Richter, Kern, Singh, JJ.

8110 Jason Flom, Index 305964/10
Plaintiff-Respondent-Appellant,

-against-

Wendy Flom,
Defendant-Appellant-Respondent.

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Greenspoon Marder LLP, New York (Brianne Copp of counsel), for appellant-respondent.

Law Offices of John A. Kornfeld, LLP, New York (John A. Kornfeld of counsel), for respondent-appellant.

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Judgment of divorce, Supreme Court, New York County (Michael L. Katz, J.), entered March 6, 2017, which, to the extent appealed from as limited by the briefs, distributed 40% of certain marital assets to defendant wife and 60% to plaintiff husband minus any withdrawals made by defendant since April 2014, determined that 13.5% of life insurance proceeds were marital property and distributed 40% of that portion to defendant, directed 40% in-kind distribution of Flomsky LLC to defendant, declined to distribute a collateral account related to certain investments and apportioned 40% of the assets and liabilities related to those investments to defendant and 60% to plaintiff, declined to distribute the value of an apartment in Guttenberg, New Jersey, a record collection, and golf memberships, awarded defendant $26,000 in monthly taxable maintenance for six years,

imputed annual income to defendant of $50,000, and included her future maintenance payments as additional income, for the purposes of calculating child support up to the then-statutory cap of $141,000, and directed defendant to sell a work of art, "John's Flag," through a private dealer for no less than the appraised value, unanimously modified, on the law and the facts, to strike the amount of basic child support in the third decretal paragraph and replace it with the sum of $4,250 per month retroactive to the date of entry of the judgment, to strike the allocation of the child's unreimbursed medical expenses in the fourth decretal paragraph and direct plaintiff to pay for 100% of these expenses, to strike the 40% allocation to defendant from the eighth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth and twentieth decretal paragraphs and instead distribute the marital property set forth therein equally between the parties, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly.

The court improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant. Although there is no requirement that each marital asset be divided evenly (*see Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]), "where both spouses equally contribute to the

marriage which is of long duration, a division should be made which is as equal as possible" (*Smith v Smith*, 162 AD2d 346, 347 [1st Dept 1990], *lv denied* 77 NY2d 805 [1991]). Here, although the referee found that defendant did not make direct contributions to the success of plaintiff's business, that was not the basis of his equitable distribution award and, in fact, the business was not distributed. Instead, the referee divided the marital property unequally solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage.

In our view, the referee's determination is not supported by the record. The parties were married for 18 years and had two children. Testimony adduced at trial established that defendant was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being "their mom." It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant "ever cooked a meal, dusted a table or mopped a floor" did not support the court's determination that

she was therefore entitled to only 40% of the parties' marital assets (*see generally Holterman v Holterman*, 3 NY3d 1, 7-8 [2004]).[1] There was no basis to reduce equitable distribution merely because the parties chose to hire domestic help. Accordingly, we find that the marital property subject to distribution should be divided equally.

The court providently exercised its discretion in determining that only 13.5% of the proceeds of a life insurance policy on plaintiff's father was marital property subject to distribution based on the contribution of plaintiff's separate funds versus marital funds in paying the insurance premiums (*see Popowich v Korman*, 73 AD3d 515, 519-520 [1st Dept 2010]). However, in accordance with the equal distribution discussed above, defendant should receive $68,859, or 50% of the marital portion.

The court providently exercised its discretion in apportioning liability to defendant for failed investments in Florida made during the marriage that plaintiff personally guaranteed with a collateral account (*see Mahoney-Buntzman v*

[1] The referee offered no other justification for the unequal equitable distribution award. Indeed, he explicitly stated that "had defendant been able to prove significant contributions as a homemaker and child-care provider, she would still have been entitled to the 50% of the marital assets that she claims."

Buntzman, 12 NY3d 415, 421 [2009]). Contrary to defendant's contention, plaintiff's conduct in guaranteeing the loans did not absolve defendant of joint liability. Since the investments were made during the marriage for the benefit of the parties, the parties should share in the losses (*see Capasso v Capasso*, 129 AD2d 267, 293 [1st Dept 1987], *appeal dismissed* 70 NY2d 988 [1988]). Pursuant to the 50/50 division in equitable distribution, defendant should be apportioned 50% of the liability instead of 40%, and any excess in the account after total liability is determined shall be divided equally.

The court also providently exercised its discretion in ordering an in-kind distribution of plaintiff's interest in Flomsky LLC (Flomsky). Although defendant expressed concern during the trial about the volatility of this asset and ongoing capital calls, she did not waive her claim. In fact, she requested distribution of Flomsky in both her Statement of Proposed Disposition and posttrial brief. Plaintiff's contention that his interest in Flomsky could not be distributed because defendant failed to value the asset is unavailing in light of his proposal prior to trial to distribute Flomsky in lieu of maintenance. He also failed to explain how Flomsky differed from his other private investments, which were readily distributed without formal valuations. Pursuant to the 50/50 division in

equitable distribution, defendant's in-kind distribution should be 50%.

Turning to the court's award of $26,000 in monthly taxable maintenance to defendant for six years, we find that the amount and duration were well within its discretion. The record supports that defendant was entitled to some maintenance based on the lavish lifestyle of the parties during the marriage, and the fact that she had not worked outside the home in over 20 years (*see Kohl v Kohl*, 24 AD3d 219, 220-221 [1st Dept 2005]). In light of her equitable distribution award, which we are now increasing, and the court's direction that plaintiff provide her with health insurance coverage until she qualifies for Medicare, we reject defendant's contention that she is entitled to at least 12 years, if not lifetime, maintenance. Thus, we find no basis to disturb the court's maintenance award.

However, the court made several errors in calculating the monthly basic child support award of $1,238.45 for the parties' unemancipated child. First, the referee had no basis to impute annual income to defendant of $50,000. While courts are afforded considerable discretion in imputing income, the calculation of a parent's earning potential "'must have some basis in law and fact'" (*Morille-Hinds v Hinds*, 87 AD3d 526, 528 [2d Dept 2011]). Here, the court's determination that defendant could earn $50,000

finds no credible support in the record.

Defendant also correctly points out that the court erred in including future maintenance payments as income to her for the purpose of calculating child support under the law then in effect (*see Simon v Simon*, 55 AD3d 477, 477 [1st Dept 2008]; *see also Lattuca v Lattuca*, 129 AD3d 1683 [4th Dept 2015], *lv dismissed* 26 NY3d 1095 [2016], *lv denied* 28 NY3d 1099 [2016]). Reducing defendant's income to zero, plaintiff is 100% responsible for the child's add-on expenses, including any unreimbursed medical expenses.

Finally, the referee, in considering the statutory factors (*see* Domestic Relations Law § 240[1-b][f]), found plaintiff had significantly greater financial resources and a gross income that greatly exceeded defendant's, and that the child enjoyed a "luxurious standard of living" during the marriage. Nevertheless, the court determined that no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp. This was an improvident exercise of discretion. The record does not support a monthly basic child support award of $1,238.50, given the factors considered, but subsequently disregarded, by the referee. Under the circumstances here, we find that a $300,000 income cap, which

would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of divorce, would satisfy the child's "actual needs" and afford him an "appropriate lifestyle" (*see Matter of Culhane v Holt*, 28 AD3d 251, 252 [1st Dept 2006]).

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

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8608 The People of the State of New York, Respondent, Ind. 2030/15

-against-

Alex Krahmalni, Defendant-Appellant.

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Christina A. Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

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Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about August 9, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court correctly assessed 20 points under the risk factor for relationship with the victim, because the People established by clear and convincing evidence that defendant, who was 39 years old, established a relationship with the 14-year-old victim for the purpose of victimization (*see e.g. People v Tejada*, 51 AD3d 472 [1st Dept 2008]). The evidence showed that defendant met the victim online, knew her to be underage, misrepresented his own age, asked her if she was a virgin and initiated sexual activity immediately upon meeting her in person. Notwithstanding the

facts that defendant's electronic communications with the victim were generally about nonsexual topics such as music and that the only sexual reference was defendant's inquiry about virginity, and regardless of the precise frequency or duration of the communications, there is no possible innocent explanation for defendant's attempt to get to know the victim.

The court's denial of defendant's request for disclosure of his electronic communications with the victim does not require a new risk level adjudication. Although these materials were relevant to defendant's relationship with the victim, they were not presented to or relied upon by the Board of Examiners of Sex Offenders or the court. Accordingly, these materials did not fall within the category where disclosure is required as a matter of law (*see People v Baxin*, 26 NY3d 6, 10-11 [2015]), and we find that the court providently exercised its discretion in denying defendant's request. This material would have had little or no value to defendant, because it was already undisputed that, as previously discussed, most of his communications with the victim were nonsexual. Moreover, as a party to the communications, defendant was not prejudiced by the failure to disclose them,

because he was aware of their contents. In any event, any error in failing to order disclosure of the requested documents was harmless (*see Baxin*, 26 NY3d at 11-12; *People v Lashway*, 25 NY3d 478, 484 [2015]; *People v Wells*, 138 AD3d 947, 952 [2d Dept 2016], *lv denied* 28 NY3d 902 [2016]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8609 Jose Fernandez, Index 161020/14E
Plaintiff-Respondent,

-against-

JPMorgan Chase Bank, NA, et al.,
Defendants-Appellants.

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Connell Foley LLP, New York (Christopher Abatemarco of counsel), for JPMorgan Chase Bank, NA, appellant.

Rubin, Fiorella & Friedman LLP, New York (Steward B. Greenspan of counsel), for United Building Maintenance Associates, Inc., appellant.

Law Offices of Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered June 4, 2018, which denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that he slipped and fell on a wet condition on the staircase between the first and second floor of defendant bank about a half hour after the bank opened. Defendants established their entitlement to judgment as a matter of law by submitting evidence showing that they did not create or have actual or constructive notice of any wet condition on the stairs. Defendants submitted surveillance video of plaintiff and

other customers going up and down the stairwell without incident during the half hour before the accident, as well as the testimony of the bank's branch manager that she did not receive any complaints and did not observe any liquid or water on the steps when she was on them during that period (*see Fellner v Aeropostale, Inc.*, 150 AD3d 598 [1st Dept 2017]; *Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571 [1st Dept 2014]).

Defendants also relied on plaintiff's testimony that, in the 15 minutes before his accident, he had gone up and down the stairs without incident and did not notice any liquid or water on the steps, demonstrating that the alleged dangerous condition was not visible and apparent for a sufficient time before the accident to provide constructive notice (*see Luna v CEC Entertainment, Inc.*, 159 AD3d 445 [1st Dept 2018]; *Rosario v Haber*, 146 AD3d 685 [1st Dept 2017]). Although plaintiff did testify that he saw a woman with a mop coming down the stairs as he was going upstairs the first time, implying that she could have caused the wet condition, he acknowledged that the surveillance video did not show any woman with a mop. Furthermore, defendants' witnesses stated that the daytime worker for defendant United Building Maintenance Associates, Inc. was only responsible for cleaning the area near the ATM machines on the first floor and never mopped, and that the staircase was

cleaned by night personnel.

In opposition, plaintiff failed to raise an issue of fact as to actual or constructive notice, and only speculated that the condition may have been created by the employee who had a mop in the area of the steps prior to his accident (*see Rainey v Frawley Plaza, LLC*, 112 AD3d 453 [1st Dept 2013]; *Morales v Foodways, Inc.*, 186 AD2d 407, 408 [1st Dept 1992]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8610 In re Ciaira C.,
Petitioner-Respondent,

-against-

Alvert R.,
Respondent-Appellant.

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Bruce A. Young, New York, for appellant.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 11, 2018, which, after a hearing, committed respondent father to the New York City Department of Corrections for a term of three months intermittent weekend incarceration, unless sooner discharged based upon a payment of $3,500 of child support arrears, confirming the findings of the Support Magistrate, entered on or about February 28, 2018, that respondent had willfully violated an order, dated June 16, 2013, which directed him to make monthly payments of $400 in child support, unanimously affirmed, without costs.

While petitioner presented prima facie evidence of respondent's willful violation of a lawful support order, respondent failed to rebut the showing with credible evidence of income, assets or means of support (*see Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]). We agree with the court's determination to order either three months of intermittent

incarceration on weekends or a purge payment of $3,500 (*Matter of Nancy R. v Anthony B.*, 121 AD3d 555 [1st Dept 2014]).

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

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8612- Index 25686/15E
8613 Maura Rivera,
Plaintiff,

-against-

Tribeca White Street, LLC, et al.,
Defendants,

Everest Scaffolding, Inc.,
Defendant-Respondent.

- - - - -

Tribeca White Street, LLC,
Third-Party Plaintiff,

-against-

R & S Construction Contracting, Inc.,
Second Third-Party Defendant.

- - - - -

Everest Scaffolding, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

R & S Construction Contracting, Inc.,
Second Third-Party Defendant,

State National Insurance Company,
Second Third-Party Defendant-Appellant.

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Gerber Ciano Kelly Brady LLP, New York (Joanna M. Roberto of counsel), for appellant.

Fuchs Rosenzweig, PLLC, New York (Alicia D. Sklan of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered March 29, 2018, declaring that second third-party

plaintiff (Everest) is an additional insured under the policy issued to second third-party defendant R & S Construction Contracting, Inc. by defendant State National Insurance Company (hereinafter, Clarendon) and that Clarendon is required to defend R & S in the underlying action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 22, 2017, which granted Everest's motion to renew its motion for summary judgment declaring in its favor and, upon renewal, granted the motion for summary judgment and so declared, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Given the merit of Everett's original motion for summary judgment (but for its technical defects) and the lack of prejudice to Clarendon, the motion court properly granted Everest's motion for renewal (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]).

The court correctly determined that Clarendon was obligated to defend Everett because the allegations of the underlying

personal injury complaint suggest "a reasonable possibility of coverage" (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37 [2010] [internal quotation marks omitted]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8615 The People of the State of New York, Ind. 1148N/15
Respondent,

-against-

Karee Hatchett,
Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil E. Ross, J.), rendered November 30, 2015,

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

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

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

ENTERED: MARCH 7, 2019

CLERK

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

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8616 Norma Loren, Index 651052/15
Plaintiff-Appellant,

-against-

Joseph E. Sarachek, et al.,
Defendants-Respondents.

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Law Office of Ethan A. Brecher, LLC, New York (Ethan A. Brecher of counsel), for appellant.

Izower Feldman, LLC, New York (Dennis Villasana of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about July 10, 2018, which denied plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The provisions of the note which required defendant Triax Capital Advisors, LLC (Triax) to make monthly interest payments to plaintiff, and the terms of the individual defendant's personal guarantee of payment were clear and unambiguous (*see Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]). Moreover, the note unambiguously provided that in the event of a default, which occurred, and upon notice from plaintiff, which was provided, Triax was required to repay the entire balance of the principal

plus interest accrued within 90 days (*id.*).

Plaintiff's failure to demand interest payments between the due date and the date of declaring a default did not constitute a waiver of plaintiff's right to declare a default (*see EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617-18 [1st Dept 2010]).

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

ENTERED: MARCH 7, 2019

CLERK

CORRECTED ORDER - APRIL 8, 2019

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8618 Lawrence A. Melniker, Index **350008/17**
Plaintiff-Respondent,

-against-

Eileen Melniker,
Defendant-Appellant.

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Larry M. Carlin, New York, for appellant.

Albert PLLC, New York (Craig J. Albert of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered August 30, 2018, which, insofar as appealed from as limited by the briefs, denied defendant wife's motion for a determination that the parties' pendente lite stipulation dated March 7, 2008, entered into in connection with the parties' discontinued first divorce action, is binding on plaintiff husband, summary judgment on her counterclaim in the second divorce action for arrears pursuant to the March 7, 2008 stipulation, and to consolidate this proceeding with the counterclaim in the first divorce action previously ordered to be transferred to Family Court, unanimously affirmed, without costs.

The doctrine of judicial estoppel does not apply to plaintiff's 2011 affidavit in *American Express Centurion Bank v Melniker* (Sup Ct, NY County, Index No. 113400/2008), and

therefore does not prevent plaintiff from arguing that the parties' March 7, 2008 stipulation terminated upon discontinuance of the first divorce action in 2008, because plaintiff did not obtain the relief he requested in the motion supported by the affidavit (*see MPEG LA, LLC v Samsung Elecs. Co., Ltd.*, 166 AD3d 13, 21 [1st Dept 2018], *lv denied* 32 NY3d 912 [2018]). The motion was denied.

Plaintiff's December 9, 2008 agreement to continue the March 7, 2008 stipulation is unenforceable under Domestic Relations Law (DRL) § 236(B)(3). The agreement was not "intended to settle" the matrimonial case (*compare Rubenfeld v Rubenfeld*, 279 AD2d 153, 156, 154 [1st Dept 2001]). It was an interim agreement expressly entered into as a stopgap measure pending a final settlement (which never came to pass) (*cf. Matisoff v Dobi*, 90 NY2d 127 [1997] [applying DRL § 236(B)(3) to invalidate unacknowledged property agreement entered into during marriage]).

Defendant objects to plaintiff's opposition to her motion for summary judgment, which was accompanied solely by an attorney affirmation. However, she failed to show that the court relied on any factual matters in the affirmation that were not within the attorney's personal knowledge. Moreover, the affirmation served as the vehicle for the submission of admissible evidence (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Moreover, the affirmation, based on counsel's own inquiries, establishes that the Supreme Court file in the parties' first divorce action was never transferred to Family Court, and defendant presented no evidence to the contrary. The specific notice procedures for dismissal of an action pursuant to CPLR 3216 are inapplicable, as there is nothing in the record to suggest that there ever was an action in Family Court.

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: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8619-
8620 John McCabe, Index 101565/15
Plaintiff-Appellant-Respondent,

-against-

Consulate General of Canada,
Defendant-Respondent-Appellant.

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John McCabe, appellant-respondent, pro se.

Alan J. Bennett, PLLC, Brooklyn (Alan J. Bennett of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 23, 2017, which, inter alia, granted defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered October 10, 2017, which denied plaintiff's motion to renew the motion to dismiss the complaint, and denied defendant's cross motion to renew its application for a protective order pursuant to CPLR 3103, unanimously affirmed, without costs.

The court properly granted defendant's motion to dismiss plaintiff's causes of action alleging sex and age discrimination under the State and City Human Rights Laws, as plaintiff failed to allege sufficient facts to establish a prima facie case for these causes of action (Executive Law § 296[1][a]; Administrative

Code of City of NY § 8-107[1][a]). Plaintiff sparingly alleges that he was terminated as part of a larger work force reduction while a younger man and woman were retained, which, standing alone, does not suffice to support either age or sex discrimination (*see Matter of Leka v New York City Law Dept.*, 160 AD3d 497 [1st Dept 2018]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). He similarly failed to elaborate on the nature of any complaints he made to establish that those complaints were "protected activity," and to establish any causal connection between those complaints and his later termination or any other adverse employment action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51 [1st Dept 2012]; *see* Executive Law § 296[7]; Administrative Code § 8-107[7]).

As plaintiff failed to address the breach of contract claim in opposition to the motion to dismiss, he may not appeal from its dismissal (*see Leader v Parkside Group*, 159 AD3d 523 [1st Dept]). In any event, he failed to allege sufficient facts to identify an enforceable contract and breach of its terms.

To the extent plaintiff challenges dismissal of the complaint on purported government immunity grounds, that was not the basis of the court's decision to dismiss the complaint. Moreover, to the extent he challenges the court's reliance on any

privileges or immunities in granting defendant's motion for a protective order pursuant to CPLR 3103(a), plaintiff's notice of appeal specified that he appealed from dismissal of his employment discrimination, retaliation, and contract claims, and did not mention the protective order. Therefore, this Court cannot consider that issue (*see* CPLR 5515[1]; *D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 453 [1st Dept 2013]).

The court properly denied plaintiff's motion to renew the motion to dismiss the complaint, and request for leave to amend the complaint. Plaintiff failed to state any reasonable justification for his failure to raise certain "new facts" in his original motion (CPLR 2221[e][2]). Although he asserts that he believed he could not use certain documents in the course of litigation due to an earlier preliminary conference order that limited disclosure of certain consular documents, he offers no justification for his failure to timely raise that argument, or why he then belatedly submitted an amended complaint containing those facts. In any case, the facts alleged in his amended complaint are largely barred by the three-year statute of limitations (*see* CPLR 214[2]; Administrative Code § 8-502[d]), and the remaining facts do not sufficiently support his claims to make a prima facie case.

The court properly denied defendant's cross motion to renew

its motion for a protective order pursuant to CPLR 3103(c) based on plaintiff's alleged retention of consular documents he obtained during his employment. In its original motion and motion to renew, defendant failed to specify which documents implicate which privilege and confidentiality concerns, and absent greater specificity, the court did not abuse its discretion in declining to undertake an in camera review.

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

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8621 The People of the State of New York, Respondent, Ind. 4714/11

-against-

Robert Cartagena, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered April 30, 2014, convicting defendant, after a jury trial, of murder in the second degree (two counts), burglary in the first degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

With two exceptions, the court providently exercised its discretion in admitting Facebook posts and text messages made by a separately tried codefendant. This evidence was relevant to the codefendant's state of mind (*see generally People v Reynoso*, 73 NY2d 816, 819 [1988]; Prince, Richardson on Evidence § 8-106 at 502 [Farrell 11th ed 1995]), which was in turn relevant to defendant's guilt under the circumstances of the case, including evidence of a shared motive. However, the codefendant's text

message announcing that the murder at issue was about to be committed, and his Facebook post boasting that it had succeeded, exceeded the proper bounds of state-of-mind evidence and should have been excluded. Nevertheless, we find that these errors, or any errors regarding evidence of the codefendant's declarations, were harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his claim regarding the court's failure to deliver a limiting instruction, as promised, regarding the state-of-mind evidence (*see People v Whalen*, 59 NY2d 273, 280 [1983]), and we decline to review it in the interest of justice. As an alternative holding, we find that the instruction should have been given, but that its absence was similarly harmless.

The court providently exercised its discretion in permitting the People to introduce a series of text messages between defendant and his girlfriend, while redacting a portion of these messages in which he denied that he had committed the murder. There was no violation of the rule of completeness (*see People v Dlugash*, 41 NY2d 725, 736 [1977]). The messages that were introduced did not contain any admissions, or anything else that needed to be explained by way of the redacted self-exculpatory messages; instead, the messages in evidence tended to establish other matters, such as a timeline of events. In any event, any

error in this regard was also harmless.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). The record does not support defendant's assertion that counsel's colloquies with the court on the matters underlying the ineffectiveness claims sufficed to establish the nature and unreasonableness of counsel's strategy. Accordingly, since defendant has not expanded the record by means of a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8624 In re Ghassem T.,
Petitioner-Respondent,

-against-

Kevin T.,
Respondent-Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about April 11, 2017, which, after a hearing, found that respondent son committed the family offenses of harassment in the second degree and criminal mischief in the fourth degree, and issued a one year order of protection in favor of petitioner father, unanimously modified, on the law, to vacate the finding that respondent committed acts constituting criminal mischief in the fourth degree, and otherwise affirmed, without costs.

A fair preponderance of the evidence established that respondent committed acts which constituted the family offense of harassment in the second degree (*see* Penal Law § 240.26[3]; *McGuffog v Ginsberg*, 266 AD2d 136 [1st Dept 1999]; Family Ct Act § 832). There exists no basis to disturb the court's credibility determinations (*see Matter of Peter G. v Karleen K.*, 51 AD3d 541

[1st Dept 2008]).

The evidence, however, failed to support a finding that respondent committed acts constituting criminal mischief in the fourth degree (*see* Penal Law § 145.00[1]). The property respondent allegedly damaged had been gifted to him by petitioner (*see People v Bertone*, 16 AD3d 710, 711-712 [3d Dept 2005], *lv denied* 5 NY3d 759 [2005]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8626-
8627 Ind. 4411/02

The People of the State of New York,
Respondent,

-against-

Benjamin Kelly,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (M. Callagee O'Brien of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about September 12, 2017, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

The court providently exercised its discretion in denying a modification of defendant's level two classification. Although defendant contends he has lived a law-abiding life for an extended period since his release, he had been free of parole supervision for only four years at the time of the petition. Defendant inadequately substantiated the other mitigating factors he cited. In any event, even if the mitigating factors were

established, they are outweighed by the seriousness of the sex crime, which was committed against a child over an extended period (*see e.g. People v Lopez*, 154 AD3d 531 [1st Dept 2017]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8628-
8629 In re The Shubert Organization Inc., Index 258951/07
259372/08
Petitioner-Appellant, 262003/09
263143/10
-against- 261555/11

The Tax Commission of the City
of New York, et al.,
Respondents-Respondent.

_____

Arnold & Porter Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Neil Schaier of counsel), for respondents.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 19, 2017, which granted respondents' motions to dismiss the tax certiorari petitions for the tax years 2007/2008 through 2011/2012, and dismissed the proceeding brought pursuant to article 7 of the Real Property Tax Law, and order, same court and Justice, entered December 22, 2017, which granted petitioner's motion for reargument, and upon reargument, adhered to its prior determination on different grounds, unanimously reversed, on the law, without costs, the petitions reinstated and the matter remanded for further proceedings.

The court erred in granting respondents' motion pursuant to RPTL 718(1) to dismiss the subject petitions on the ground that the proceedings had been abandoned as a matter of law due to

petitioner's failure to timely file the notes of issue. Pursuant to a January 26, 2016 so-ordered stipulation, the notes of issue pertaining to the subject petitions had to be filed "on or about September 1, 2016." Applying a "reasonableness" analysis to whether petitioner's filing of those notes of issue on December 6, 2016 satisfied the "on or about" provision (*see Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]; *Ben Zev v Merman*, 73 NY2d 781, 783 [1988]), we find that, under the circumstances, the filing constituted a reasonable time for performance, given the parties' course of conduct, including respondents' multiple stipulated extensions for completing discovery and the appraisal reports, and many interactions with petitioner and the court about the subject petitions after September 1, 2016 without raising the issue of abandonment until the eve of the scheduled trial, after extensive trial preparation had taken place.

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8630 The People of the State of New York, Respondent, Ind. 2644/04

-against-

David Garray, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about October 16, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's assessment of 20 points under the risk factor for relationship (stranger) with the victim was supported by clear and convincing evidence. The documents before the court, including the case summary, contained facts that would make no sense if defendant had been acquainted with the victims (*see People v Corn*, 128 AD3d 436, 437 [1st Dept 2015]).

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument and were outweighed in any event by the seriousness of the underlying offenses.

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8631 Michael N. Bogle, Index 22846/15E
Plaintiff,

Danisha Stephens,
Plaintiff-Appellant,

-against-

Jose Eugenio Paredes,
Defendant-Respondent.

_____

Yadgarov & Associates, PLLC, New York (Ronald S. Ramo of counsel), for appellant.

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 16, 2017, which to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint insofar as it alleges that plaintiff Danisha Stephens suffered a serious injury in the "permanent consequential" or "significant" limitation of use categories within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Stephens alleged that, as a result of an accident involving defendant's car, she suffered serious injuries to her cervical spine, lumbar spine, wrists and right knee for which she underwent three to six months of treatment. Defendant satisfied

his prima facie burden as to all the claimed injuries by submitting the reports of an orthopedist, a radiologist and a neurologist, who found, inter alia, that plaintiff had full range of motion and negative test results in her cervical and lumbar spine (*see Alverio v Martinez*, 160 AD3d 454 [1st Dept 2018]), that sprains and/or contusions to her spinal column, chest, wrists and knee were resolved, and no evidence of acute causally related injury (*see Hayes v Gaceur*, 162 AD3d 437, 439 [1st Dept 2018]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff submitted an affirmed report of a doctor who examined her one time, over four years after the accident, but did not address her prior accident (*Ogando v National Frgt., Inc.*, 166 AD3d 569, 570 [1st Dept 2018]) or provide admissible objective evidence of injuries (*see Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]). Moreover, plaintiff failed to explain her complete cessation of treatment three to six months after the accident even though she had health insurance and saw a regular primary care doctor (*see Pommells v Perez*, 4 NY3d 566, 576 [2005]; *Alverio*, 160 AD3d 455). The unexplained four-year period of time in which plaintiff failed to seek treatment for any accident-related injuries renders the opinion of her medical expert "speculative as to the permanency, significance, and

causation of the claimed injuries" (*Vila v Foxglove Taxi Corp.*, 159 AD3d 431, 432 [1st Dept 2018]; *see Gaddy v Eyler*, 79 NY2d 955, 957–958 [1992]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8632 In re Eugene Youngblood, Index 251642/15
Petitioner-Appellant,

-against-

Tina M. Stanford, etc.,
Respondent-Respondent.

_____

Justine M. Luongo, The Legal Aid Society, New York (Kerry Elgarten of counsel), for appellant.

Barbara D. Underwood, Attorney General, New York (**Amit** R. Vora of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about May 25, 2017, which dismissed petitioner's application brought pursuant to CPLR article 78 to review a determination of the Board of Parole imposing a 60-month time assessment following the revocation of parole, unanimously affirmed, without costs.

We find that the Hearing Officer neither abused her discretion nor imposed an excessive time assessment by issuing a determination to revoke petitioner's post-release supervision and impose a 60-month time assessment for petitioner's violations of a temporary order of protection, considering his criminal history, and the behavior underlying his parole violations, one

of which led to his conviction for second degree criminal contempt (*see Matter of Rosa v Fischer*, 108 AD3d 1227, 1228 [4th Dept 2013], *lv denied* 22 NY3d 855 [2013]; *Matter of Isaac v New York State Div. of Parole*, 222 AD2d 913, 913 [3d Dept 1995]).

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

ENTERED: MARCH 7, 2019

CLERK

Renwick, J.P., Manzanet-Daniels, Tom, Kahn, Gesmer, JJ.

8633N American Medical Alert Corp., Index 655974/16
Plaintiff-Respondent,

-against-

Evanston Insurance Company,
Defendant-Appellant,

Michael G. Kaiser, M.D., et al.,
Defendants.

_____

Tressler LLP, New York (Royce F. Cohen of counsel), for appellant.

Clemente Mueller, P.A., New York (Matthew H. Mueller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered July 30, 2018, which denied defendant Evanston Insurance Company's motion to compel the deposition of plaintiff's employee, unanimously affirmed, with costs.

Evanston sought to compel the deposition of an employee who was previously deposed in a related action to which Evanston was not a party. The motion court denied the motion on the ground that because the employee had been deposed in the related action, an examination by Evanston would be redundant. We decline to disturb the motion court's ruling (*see Reyes v Lexington 79th Corp.*, 149 AD3d 508 [1st Dept 2017]; CPLR 3101[a]).

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

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

ENTERED: MARCH 7, 2019

CLERK

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

8634 The People of the State of New York, Respondent, Ind. 1100/10 3410/12

-against-

Jose Espinal, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered May 7, 2013, as amended June 25, 2013, convicting defendant, after a jury trial, of burglary in the second degree and criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to an aggregate term of eight years, unanimously affirmed.

The court properly denied defendant's for cause challenge against a prospective juror who was acquainted with one of the testifying officers (*see* CPL 270.20[1][c]). The panelist first referred to the officer as her cousin's father, and then as her cousin's ex-husband. She said that she did not have a close relationship with the officer, but rather that they barely exchanged greetings when they saw each other at family functions. The relationship between the two was "little more than a nodding

acquaintance" that was unlikely to preclude her from rendering an impartial verdict, and was no basis for per se disqualification on the ground of implied bias (*People v Provenzano*, 50 NY2d 420, 425 [1980]).

The People's evidence showing that the drugs recovered from defendant remained in police custody and in identifiable containers provided reasonable assurances as to their identity and unchanged condition (*People v Julian*, 41 NY2d 340, 342-343 [1977]; *People v Miller*, 209 AD2d 187, 188 [1st Dept 1994], *affd* 85 NY2d 962 [1995]). The absence of testimony from the chemist who initially tested the drugs went only to the weight to be accorded the evidence, not its admissibility (*see People v Garces*, 158 AD3d 413, 414 [1st Dept 2018], *lv denied* 31 NY3d 1081 [2018]; *People v Adderley*, 105 AD3d 505 [1st Dept 2013], *lv denied* 22 NY3d 1154 [2014]). Any claim that the chemist failed to take the precautionary measures generally taken to avoid contamination of the substance is speculative.

Defendant's argument that the verdict convicting him of burglary was against the weight of the evidence is unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was

a chain of circumstantial evidence having no reasonable explanation except that defendant and his codefendant were the men who committed the burglary.

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

ENTERED: MARCH 7, 2019

CLERK

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

8635-
8636 In re Tiara Dora S., etc., and Another,

Children Under the Age of Eighteen Years, etc.,

Debbie S., et al.,
Respondents-Appellants,

St. Dominic's Family Services,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for Debbie S., appellant.

Law Offices of Helene Bernstein, Brooklyn (Helene Bernstein of counsel), for Victor Manuel Del C., appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

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Orders, Family Court, Bronx County (Robert Hettleman, J.), entered on or about November 3, 2017, bringing up for review an order, same court and Judge, entered on or about May 3, 2017, which denied respondent mother's motion to vacate a finding made on default that she abandoned the subject children, and which, upon a finding that respondent father's consent to the children's adoption was not required and that he permanently neglected the children, terminated the father's and the mother's parental rights and transferred custody of the children to petitioner

agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the court's finding that, during the period from July 2011 until July 2012, the father failed to maintain the requisite substantial and continuous contact with the children and to provide financial support for them and that therefore his consent to adoption was not required (*see* Domestic Relations Law § 111[1][d]). While the father was incarcerated during this period of time, he had no communication with his children or the agency, and failed to make any formal inquiries into his children's welfare or whereabouts (*see Matter of Joyelli Latasha M. [Charles M.]*, 159 AD3d 426 [1st Dept 2018], *lv denied* 32 NY3d 912 [2019]). This evidence also supports the court's finding that the father permanently neglected the children (*see* Social Services Law § 384-b[7][a][1]). The agency was not required to exercise diligent efforts to encourage and strengthen the father's relationship with the children, because the father failed for a period of six months to keep the agency apprised of his location (*see id.* § 384-b[7][e][i]; *Matter of Jackie Ann W. [Leticia Ann W.]*, 154 AD3d 459, 461 [1st Dept 2017]).

The mother failed to provide a meritorious defense to the petition alleging abandonment in support of her motion to vacate

her default (*see Matter of Noah Martin Benjamin L. [Frajon B.]*, 139 AD3d 593 [1st Dept 2016]). She left the children with their foster mother in February 2016 and had no further meaningful contact with them or with the agency until February 2017, six months after the petitions were filed (*see* Social Services Law § 384-b[4][b]).

The mother failed to demonstrate that she was prevented or discouraged from contacting the children by the agency. Her claim that the agency threatened her with kidnaping charges after she failed to disclose the children's whereabouts while they were out on a trial discharge with her does not establish that she was discouraged from contacting the agency (*see generally Matter of Bibianamiet L.-M. [Miledy L.N.]*, 71 AD3d 402 [1st Dept 2010]). The record shows that the mother relapsed into drug use and, when directed by the children's foster mother to reach out to the agency to arrange formal communication arrangements with the children, failed to do so.

A preponderance of the evidence establishes that terminating the mother's and the father's parental rights and freeing the children for adoption are in the children's best interests (*see* Family Court Act § 631). Their foster mother has provided a safe and stable home for the children, who have spent the majority of their lives with her (*see Matter of Michaellica W. [Michael W.]*,

166 AD3d 425 [1st Dept 2018]). The children "deserve permanency after this extended period of uncertainty" (*see Matter of Andrea L.P. [Cassandra M.P.]*, 156 AD3d 413, 414 [1st Dept 2017]). A suspended judgment in favor of the father is not warranted, because there is no evidence that further delay will result in a finding that terminating the father's parental rights is not in the children's best interests (*see Michaellica W.*, 166 AD3d at 426).

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

ENTERED: MARCH 7, 2019

CLERK

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

8637 In re MSK Realty Interests, LLC, Index 158386/16
Petitioner-Appellant,

-against-

Department of Finance of the City of New York,
Respondent-Respondent.

_____

Brill & Meisel, New York (Michael J. Willner of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Edan Burkett of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about May 1, 2017, denying the petition to annul Rules of Department of Finance of City of New York (19 RCNY) § 50-02 (effective January 26, 2014), which retroactively eliminated eligibility for a tax abatement for corporate and other non-individual owners of condominiums and cooperative apartments, and to prohibit respondent from seeking restoration from petitioner of erroneous abatements for four years, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The construction given RPTL 467-a by respondent, the agency responsible for the administration of the statute, is not irrational or unreasonable, and we therefore defer to it (*see*

Matter of Wai Lun Fung v Daus, 45 AD3d 392, 393 [1st Dept 2007]). Respondent's determination that the term "primary residence" refers to the dwelling place of individuals and does not apply to corporations, LLC partnerships or other entities is not arbitrary and capricious; it is consistent with other Real Property Tax Law provisions, dictionary definitions, and common usage of the term (*see generally Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001]; *Jericho Water Dist. v One Call Users Council, Inc.*, 10 NY3d 385, 390-391 [2008]). Respondent's determination is also consistent with the legislative history, which reflects that, after respondent had proposed new rules excluding corporations, LLC, partnerships and trusts from eligibility for the abatement, the legislature amended the statute to ensure that certain types of trusts would be eligible, but made no change to protect the other types of entities.

Petitioner failed to establish that the restoration of its erroneously abated taxes for four years violated its due process rights, was made in violation of a lawful procedure, or was arbitrary and capricious. Pursuant to RPTL 467-a(2) (as amended by L 2013, ch 4, §§ 18 to 20, eff Jan. 30, 2013, deemed eff June 1, 2012), the primary residency requirement was made retroactive,

and the period of retroactivity provided for in the statute was not excessive (*see James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 246 [2013]). Respondent had the authority to recover erroneously abated taxes pursuant to 19 RCNY 50-08, which was promulgated pursuant to RPTL 467-a(7).

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

ENTERED: MARCH 7, 2019

CLERK

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

8642 The People of the State of New York, Ind. 3608/15
Respondent,

-against-

Jordon Rodgers,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 15, 2016,

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

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

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

ENTERED: MARCH 7, 2019

CLERK

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

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

8643-
8644 Index 650109/14

Advanced Aerofoil Technologies, AG,
Plaintiff-Respondent-Appellant,

-against-

MissionPoint Capital Partners LLC,
Defendant-Appellant-Respondent.

_____

Law Office of William F. Sheehan, Barnesville, MD (William F. Sheehan, of the bar of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for appellant-respondent.

Grasso Bass P.C., Hinsdale, IL (Gary A. Grasso, of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent-appellant.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered May 7, 2018, and on or about August 17, 2018, to the extent they denied both parties summary judgment on the issue of whether Charles Byrd and Daniel Abbasi were acting as defendant's "representatives," within the meaning of the parties' non-disclosure agreement (NDA) at the time they directly or indirectly solicited plaintiff's employees, unanimously affirmed, with costs.

Section 10 of the NDA provides in relevant part that "[f]or the two-year period following the date of this agreement, no Party nor any [of] its Representatives shall, directly or indirectly, knowingly solicit for hire or engagement, or

knowingly hire or engage, any individual who is now or was during the six months prior to such proposed solicitation, hire, or engagement, engaged or employed by any of the other Parties or any of its Affiliates." The term "Representatives" is defined under NDA section 2 as "Affiliates," who are "directors, officers and employees" of a party and "Advisors," who are "accountants, attorneys and other confidential advisors."

Defendant argues that it should not be held liable for former employees Abbasi and Byrd, who acted on their own behalf, without defendant's knowledge, and against its interest (see *Maxine Co., Inc. v Brink's Global Servs. USA, Inc.*, 94 AD3d 53, 56 [1st Dept 2012]).

Several factual issues present here should await disposition at trial, especially since summary judgment is a drastic remedy, "which should only be granted where there is no doubt as to the existence of a triable issue of fact" (*Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 270 [1st Dept 1986]). Abbasi and Byrd were identified on defendant's website as "technical advisors," during the relevant time period, which, combined with testimony provided by defendant's co-founder that Byrd may have been working on investment opportunities to bring

to defendant, raises issues of fact as to whether he was a "confidential advisor" within the meaning of the NDA.

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

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

ENTERED: MARCH 7, 2019

CLERK

Friedman, J.P., Sweeny, Kern, Oing, Moulton, JJ.

8645 Steven Lisi, Index 160298/16
Plaintiff-Appellant,

-against-

Lowenstein Sandler LLP, et al.,
Defendants-Respondents.

_____

Newman Stehn LLP, Merrick (Adam T. Newman of counsel), for appellant.

Hinshaw & Culbertson LLP, New York (Philip Touitou of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 28, 2017, dismissing the complaint, unanimously affirmed, without costs.

In this legal malpractice action, plaintiff alleges that defendants were negligent in failing to advise him that the income realized from the exercise of his stock options would be taxed as ordinary income and that, had they so advised him, he would have sold his shares earlier or eliminated any market risk by shorting the shares in full or otherwise taking measures to eliminate risk. However, this theory of proximate cause is belied by the record and relies on gross speculation (*see Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405 [1st Dept 2016]; *Sherwood Group v Dornbush, Mensch, Mandelstam & Silverman*, 191 AD2d 292, 294 [1st Dept 1993]).

The complaint alleges that plaintiff shorted as much stock as possible; thus, he could not have shorted more stock before exercising his options. Moreover, plaintiff's trading decisions demonstrate that he intended to speculate on the stock; after he received his shares from his exercised stock options, plaintiff did not begin immediately to sell them off to achieve a profit, despite the volatility of the stock market and the fact that the stock price at that time greatly exceeded his perceived investment in the stock. Plaintiff therefore assumed the risk that the stock price would plummet without notice (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Christopher Assoc.*, 257 AD2d 1, 12 [1st Dept 1999]). The allegation that plaintiff would have stopped speculating on the stock at a time when its shares were selling for an amount greater than his actual investment thus depends on "a chain of gross speculations on future events" (*Phillips-Smith Speciality Retail Group II v Parker Chapin Flattau & Klimpl*, 265 AD2d 208, 210 [1st Dept 1999] [internal quotation marks omitted], *lv denied* 94 NY2d 759 [2000]). The speculative nature of the allegation is brought into sharper relief by the fact that the last time the stock sold for more than the amount of plaintiff's actual investment was November 11,

2015, less than two months after plaintiff received his 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: MARCH 7, 2019

CLERK

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

8646-
8647 The People of the State of New York,
Respondent,

-against-

Pablo Garcia,
Defendant-Appellant.

Ind. 2650/09

_____

Justine M. Luongo, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered March 28, 2014, convicting defendant, after a jury trial, of murder in the second degree and kidnapping in the first degree, and sentencing him to concurrent terms of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find the evidence to be overwhelming. The testimony of two witnesses deemed by the court to be accomplices was adequately corroborated (*see* CPL 60.22) by evidence that included a comparison of defendant's DNA profile with DNA recovered from duct tape used to bind the victim, testimony about the victim's body and the condition of the

apartment where her body was found, two bystanders' testimony about seeing two men in hooded sweatshirts in the lobby of the apartment building, and a nonaccomplice's testimony that the four alleged accomplices including defendant were friends with each other. The requirement of corroboration did not turn on the reliability of the DNA evidence, because the People were not required to corroborate defendant's identity, and the other evidence provided sufficient corroboration that the accomplices credibly testified about their planning of the offense with defendant and a codefendant (*see People v Reome*, 15 NY3d 188 [2010]).

Defendant's ineffective assistance of counsel claim based on counsel's failure to renew a request for a *Frye* hearing on the type of DNA evidence used in this case is unreviewable on direct appeal because it involves matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of this claim may not be addressed on appeal. Alternatively, to the extent the 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]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not established that the hearing would have been

granted, or that it would have led to the exclusion of any evidence (*see People v Gonzalez*, 155 AD3d 507 [1st Dept 2017], *lv denied* 31 NY3d 1148 [2018]). Insofar as defendant argues that the court should have granted a *Frye* hearing, this argument is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see id.*).

The court properly denied defendant's request for a subpoena for certain alleged "raw data" underlying the DNA analysis conducted by the Office of the Chief Medical Examiner, because all the data examined in conducting the analysis had already been provided to defense counsel, and defendant did not establish any need for the "raw data" (*see generally People v Gissendanner*, 48 NY2d 543, 548-551 [1979]). Defendant expressly waived any claim that the court should have permitted him to call an additional DNA expert. Defense counsel voluntarily chose to proceed with one defense expert, and the record refutes defendant's claim on appeal that the court "effectively" or "in essence" precluded the second expert. To the extent that defendant is raising constitutional claims regarding these issues, those claims are unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see Crane*

v Kentucky, 476 US 683, 689-690 [1986]).

Insofar as harmless error analysis applies to any of the issues on appeal, we find that any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 242 [1975]), as well as defense counsel's ample opportunity to question the People's DNA expert and elicit expert testimony for the defense.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 7, 2019

CLERK

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

8648 Paramount Insurance Company, et al., Index 650576/16
Plaintiffs-Respondents,

-against-

Federal Insurance Company,
Defendant-Appellant.

_____

Connell Foley LLP, New York (Jeffrey W. Moryan of counsel), for appellant.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Abraham E. Havkins of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Andrea Masley, J.), entered February 8, 2018, which, to the extent appealed from, granted plaintiffs' motion for summary judgment on their claims seeking a declaration that defendant Federal Insurance Company has a duty to defend plaintiff David Ellis Real Estate, L.P., in an underlying personal injury action on a primary basis and so declared, ordered Federal to reimburse Paramount for defense costs and attorneys' fees incurred therein, unanimously modified, on the law, to deny the motion insofar as it sought a determination that the Federal policy is primary, and to vacate the portion of the declaration holding the Federal policy to be primary and the direction that Federal reimburse Paramount, and otherwise affirmed, without costs.

In an underlying personal injury action, the plaintiff

alleges that she fell at or near premises owned by David Ellis and leased, managed and controlled by its tenant, nonparty Blue Water Grill. Plaintiff Paramount issued a policy to David Ellis, and defendant Federal issued a policy to Blue Water Grill, covering David Ellis as an additional insured. The court correctly concluded, upon review of the amended complaint in the underlying action, the lease between David Ellis and Blue Water Grill, and the Federal policy, that the allegations in the complaint triggered defendant's duty to defend since they "give[] rise to a reasonable possibility of recovery under the policy" (*Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 29 [1st Dept 2003]; *see Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]). Supreme Court properly declined to consider facts adduced in the underlying action, as "the courts of this State have refused to permit insurers to look beyond the complaint's allegations to avoid their obligation to defend" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 66 [1991]).

However, the determination that defendant's policy is primary to the policy that Paramount issued to David Ellis was premature, as discovery concerning policies issued to other parties to the underlying litigation, including Union Square Café, was still outstanding (CPLR 3212[f]), and such policies were not submitted for Supreme Court's consideration. To

determine the priority of coverage among different policies, "a court must review and consider all of the relevant policies at issue" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]). For this reason, the order directing defendant to reimburse Paramount for all its defense costs and attorneys' fees was also premature.

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

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

ENTERED: MARCH 7, 2019

CLERK

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

8649 The People of the State of New York, Ind. 5208/13
Respondent,

-against-

Lexie Peak,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered July 7, 2016,

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

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

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

ENTERED: MARCH 7, 2019

CLERK

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

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

8650 Jose Hernandez-Ortiz, et al., Index 158155/12
Plaintiffs-Appellants,

-against-

2 Gold, LLC, et al.,
Defendants-Respondents,

Gold/Pearl Parking Corp., et al.,
Defendants.

_____

Imbesi Law P.C., New York (Brittany Weiner of counsel), for appellants.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered September 27, 2017, which, in this action for property damage sustained by plaintiffs tenants during Hurricane Sandy, insofar as appealed from, granted the motion of defendants 2 Gold, 201 Pearl, LLC and TF Cornerstone, Inc. (collectively defendants) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The motion court exercised its discretion in a provident manner in excusing defendants' two-day delay in filing its summary judgment motion as they showed good cause for the delay based, inter alia, on the difficulties in obtaining an executed copy of their expert's affidavit, and plaintiffs were not

prejudiced by the minor delay (*see generally Brill v City of New York*, 2 NY3d 648 [2004]). Nor did the court improvidently exercise its discretion in excusing defendants for filing a motion that violated the page limitations set forth in the court's individual rules.

Defendants established entitlement to judgment as a matter of law. They submitted evidence showing that plaintiffs' damages, if any, were caused by an act of God. Further, that a storm of the magnitude of Superstorm Sandy would strike lower Manhattan, and that compliance with the Department of Buildings' mandated provisions for flood protection would be inadequate, were not forseeable.

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs assert that they presented sufficient evidence to raise triable issues including whether the buildings were adequately flood proofed and prepared for the storm; whether there was a deviation from the design drawings during construction that caused water to accumulate against the floodgate; whether it was unreasonable for defendants not to have an emergency plan; whether defendants should have trained their superintendent in flood preparation and not have permitted him to leave the buildings the weekend before the storm; and whether it was unreasonable for defendants not to call the emergency

services offered by their insurer. Plaintiffs, however, failed to provide evidence sufficient to support these theories since their experts' opinions were conclusory and unsupported by objective data or citations to the Building Code or industry standards (*see v Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]; *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]; *Etheridge v Marion A. Daniels & Sons, Inc.*, 96 AD3d 436, 437 [1st Dept 2012]). Moreover, the opinion of one of plaintiffs' experts was based on observations long after the storm and subsequent to the installation of new floodgates.

Contrary to plaintiffs' contention, the court did not improperly determine the credibility of the parties' experts and rely too heavily on defendants' expert. Rather, the court evaluated whether plaintiffs' experts' affidavits were sufficient to raise a triable issue of fact, and found them wanting.

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

ENTERED: MARCH 7, 2019

CLERK

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

8651 In re Luis Rodriguez, Index 100728/18
Petitioner,

-against-

New York State Department
of Motor Vehicles,
Respondent.

_____

Luis Rodriguez, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (David Lawrence III of counsel), for respondent.

_____

Determination of respondent, dated April 4, 2018, affirming a decision of the Administrative Law Judge, which, after a hearing, found that petitioner violated Vehicle and Traffic Law (VTL) § 1111 and § 1225-c, and imposed an aggregate fine of $240, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Carmen V. St. George, J.], entered July 19, 2018), dismissed, without costs.

The finding that petitioner drove through a red light, in violation of VTL § 1111, and used a hand-held mobile telephone while driving, in violation of VTL § 1225-c, is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The police officer testified at the hearing that he observed

petitioner turn left at a red traffic light, and use a hand-held cell phone close to his ear while the vehicle was in motion. The officer further testified that he inspected the traffic lights, before and after issuing the summonses and found that they were properly working. The ALJ's credibility findings in rejecting petitioner's testimony that he stopped for the red light at the intersection and used a hands-free cell phone system should not be disturbed (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

ENTERED: MARCH 7, 2019

CLERK

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

8652 The People of the State of New York, Respondent, Ind. 3743/15

-against-

Edward Cruz, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Dorea Silverman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered December 6, 2016, convicting defendant, after a jury trial, of attempted rape in the first degree and sexual abuse in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 18 years to life, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant intended to commit rape and that he came dangerously close to doing so (*see e.g. People v Jackson*, 11 AD3d 369 [1st Dept 2004], *lv denied* 3 NY3d 757 [2004]; *People v Tenden*, 232 AD2d 244 [1st Dept 1996], *lv denied* 89 NY2d 947

[1997]). Defendant chased the victim, knocked her down, crouched over her, grabbed her breasts and buttocks, and pulled down his pants. Under these circumstances, the absence of an explicit demand for sex does not undermine a finding of attempted rape. Defendant's arguments concerning the sexual abuse conviction are likewise unavailing.

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

ENTERED: MARCH 7, 2019

CLERK

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

8653 The People of the State of New York, Respondent, Ind. 4568/09

-against-

Guillermo Cisneros, Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about March 29, 2017, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant defendant's request for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by

the risk assessment instrument or that outweighed the seriousness of the underlying sexual conduct. Defendant's favorable score on the Static-99 test had only limited probative value (*see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]).

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

ENTERED: MARCH 7, 2019

CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Marcy L. Kahn
Justice of the Appellate Division

----------X

The People of the State of New York,

M-82
Indictment No.
2991/15

-against-

CERTIFICATE
DENYING LEAVE

Matthew Mulcahy,
Defendant.

----------X

I, Marcy L. Kahn, a Justice of the Appellate Division, First Judicial Department, do hereby certify that, upon application deemed timely made by the above-named defendant for a certificate pursuant to Criminal Procedure Law, sections 450.15 and 460.15, and upon the record and proceedings herein, there is no question of law or fact presented which ought to be reviewed by the Appellate Division, First Judicial Department, and permission to appeal from the order of the Supreme Court, New York County (Hon. Robert M. Mandelbaum), entered on or about September 18, 2018, is hereby denied.

Associate Justice

Dated: February 8, 2019
New York, New York

ENTERED:

MAR - 7 2018

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. Peter Tom
Justice of the Appellate Division

----------X

The People of the State of New York
Respondent,

-against-

M-6135
Ind. No. 5353/79

Stephen Azzollini,
Defendant-Appellant.

----------X

Defendant having moved for an enlargement of time in which to seek a certificate granting leave to appeal to the Appellate Division pursuant to CPL 460.15 and CPL 450.15 subd. 2 with respect to the order of the Supreme Court, New York County (Antignani, J.), entered on or about August 24, 2018, which denied defendant's application pursuant to CPL 440.10 and 440.30,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is,

Ordered that defendant's time in which to seek a certificate granting leave to appeal to this Court is enlarged to 30 days from the date of entry of this Order.

Dated: February 8, 2019

Hon. Peter Tom
Associate Justice

Entered: **MARCH - 7 2018**

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST JUDICIAL DEPARTMENT

BEFORE: Hon. David Friedman
Justice of the Appellate Division

----------X
The People of the State of New York
Respondent,

-against-

M-6236
Ind. No. 2763/01

Trevis L. Funches,
Defendant-Appellant.
----------X

Defendant having moved for an enlargement of time in which to seek a certificate granting leave to appeal to the Appellate Division pursuant to CPL 460.15 and CPL 450.15 subd. 2 with respect to the order of the Supreme Court, New York County (Bartley, J.), entered on or about June 4, 2018, which denied defendant's application pursuant to CPL 440.10 and 440.20,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, it is,

Ordered that the motion is denied.

Date: February 1, 2019

Hon. David Friedman
Associate Justice

Entered: MAR - 7 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Peter Tom
Ellen Gesmer, JJ.

7052
Ind. 6358/08

_____x

The People of the State of New York,
Respondent,

-against-

Rashid Bilal,
Defendant-Appellant.
_____x

Defendant appeals from an amended judgment of the Supreme Court, New York County (Arlene D. Goldberg, J.), rendered January 13, 2017, convicting him, after a jury trial, of criminal possession of a weapon in the second degree, and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow and David M. Cohn of counsel), for respondent.

RENWICK, J.P.

Defendant was convicted of criminal possession of a weapon in the second degree, with regard to a gun he discarded during a police pursuit. In this appeal, we must decide whether the circumstances existing when the police approached defendant, combined with defendant's flight, provided the police with the required reasonable suspicion to justify a police pursuit or whether defendant had the right to be let alone. For the reasons explained herein and upon proper application of the *De Bour* principles (*People v De Bour*, 40 NY2d 210, 223 [1976]), the police officers' action in pursuing defendant was inconsistent with our Constitution and our laws which seek to protect our citizens on their streets and in their public places from being seized by the police except where individualized suspicion of wrongdoing exists.

Detective Richard Pengel testified at the suppression hearing that on December 27, 2008, he, along with three other officers, were patrolling, in plainclothes, in an unmarked car, on 145th Street and Seventh Avenue. At approximately 9:20 P.M., they received a radio report of shots fired at 150th Street and Macombs Place. The report indicated that the incident had just happened, and a second report indicated that a man had been shot. The perpetrator was described a black man wearing a black jacket.

When the call was received, the officers were five blocks

south and one avenue away from the location where the shots were fired. The officers proceeded to an area a few blocks away from the location the radio report indicated; they went to the Dunbar Houses, located at 149th Street and Seventh Avenue. The officers knew that it was possible to cut through the Dunbar Houses to get to the subway station where a perpetrator could escape.

Several minutes later, the officers arrived at 149th Street and Seventh Avenue and saw two black men walking out of one of the entrances to the Dunbar Houses. One of the men was wearing a black bubble jacket, and the other man, defendant, who was taller than the man in the black jacket, wore a gray jacket. The officers decided to stop the two men because the man with defendant matched the description of the shooter and because the officers believed the men were coming from the area where the shots had been fired. They also surmised that the men could have witnessed the crime or could have been victims.

Pengel pulled his car up behind the men and stopped. His lieutenant got out of the car and said, "Hey, Buddy, ... come here." While the man in the black jacket stopped, defendant began running. The other officers got out of the car, and while the lieutenant stayed with defendant's companion, Pengel drove the car south to cut off defendant and turned on his siren. Defendant ran in front of Pengel's car at one point, then underneath scaffolding at a construction site, where he threw

something black over a fence. Defendant then let himself down and continued to run on 149th Street toward Eighth Avenue. Pengel continued to chase defendant in his car and repeatedly told him to stop. He finally stopped on 149th Street and was apprehended. Pengel went to the construction site and saw a gun lying on the ground. It was thereafter recovered by other officers.

At the conclusion of the suppression hearing, Supreme Court found that the police conduct was reasonably responsive to the situation presented. Further, even if the police pursuit was not justified, Supreme Court found that the recovery of the gun was proper because it had been abandoned by defendant. We now reverse on both grounds.

A police officer is limited to the degree of intrusion permitted by the circumstances of the case and may not exceed that level of intrusion absent a clear change in circumstances that would permit a greater intrusion (*see People v Hollman*, 79 NY2d 181, 185, 191-192 [1992]). In addition, not only can a citizen refuse to answer an officer's question, a citizen has the right to walk away. Likewise, should a citizen run from an officer, such flight, where there is no indication of criminal activity, is an insufficient basis for pursuit by an officer (*People v Holmes*, 81 NY2d 1056, 1057-1058 [1993]). "Flight alone, even if accompanied by equivocal circumstances that would

justify a police request for information, does not establish reasonable suspicion of criminality and is insufficient to justify pursuit, although it may give rise to reasonable suspicion if combined with other specific circumstances indicating the suspect's possible engagement in criminal activity" (*People v Reyes*, 69 AD3d 523, 525-526 [1st Dept 2010], *appeal dismissed* 15 NY3d 863 [2010]; *see People v Pines*, 99 NY2d 525, 527 [2002]; *People v Holmes*, 81 NY2d at 1058). "Police pursuit of an individual 'significantly impede[s]' the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed" *(Holmes*, 81 NY2d at 1058, quoting *People v Martinez*, 80 NY2d 444, 447 [1992]).

Applying these principles, we find that defendant's motion to suppress should have been granted. While the police may have had an objective credible reason to approach defendant and to request information -- based on the information the officers received from the radio report and their observations of defendant and his companion -- those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit.

Indeed, the radio report simply indicated a sole perpetrator with a vague description -- black man in a black jacket. There was nothing at all about defendant that matched any aspect of the

suspect in the radio report, except that he was black. Nor was defendant wearing a black jacket. He was wearing a gray jacket and was with a second individual, several minutes after the radio report of shots fired. The men did not appear to be fleeing the scene, but rather, were exiting an apartment complex. Thus, unlike the cases relied on by the People, defendant did not match any description, general or otherwise (*see e.g. People v Montilla*, 268 AD2d 270 [1st Dept 2000], *appeal dismissed* 95 NY2d 830 [2000]). Further, there was insufficient evidence to support the conclusion that defendant knew Pengel and his colleagues were police officers (*see People v Riddick,* 70 AD3d 1421, 1423 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]).

That defendant was with someone who matched an extremely vague, generic description of the suspect, which contained no information about the suspect's height or weight, was not sufficiently indicative of criminal activity on defendant's part (*see People v Beckett* 88 AD3d 898, 899-900 [2nd Dept 2011]; *Matter of* Rubin M., 271 AD2d 291 [1st Dept 2000] [finding no reasonable suspicion where "the police approached and stopped [defendant] only because he matched the generic description of the perpetrator[,] . . . a description which could just as easily have applied to countless Bronx and Manhattan residents]). Given that this incident took place in a densely populated area of Harlem in the early evening hours, many people could have fit

the vague description of a black man in a black jacket.[1]

Nor was the fact that police observed defendant and his companion walking out of one of the entrances to an area (Dunbar Houses) that the police considered a possible escape route sufficiently indicative of criminal activity on defendant's part. The police had no information concerning the shooter's flight path from the reported shots-fired location. Instead, the police acted on a hunch and drove over to the apartment complex two blocks away. Since defendant was not leaving a location specified by the radio call, but was simply walking out of the apartment complex, the police had no reason to suspect that he was the gunman, particularly because the area was not described as desolate (*compare Becket*, 88 AD3d at 899-900 *with People v Parker*, 32 NY3d 49 [2018] [reasonable suspicion of criminal activity to justify defendants' pursuit was supported by "specific circumstances observed by the officers during their initial encounter with defendants," namely seeing "defendants exiting private property, the scene of a suspected crime, combined with the defendants actively fleeing from the police"]; *People v Lovett*, 189 AD2d 696, 696 [1st Dept 1993] [police, who knew "the apparent perpetrator's flight path" had reasonable suspicion to chase defendant, the only person in the vicinity of

[1] The police approach and pursuit of defendant took place in Harlem, a neighborhood in Upper Manhattan populated predominantly by African Americans.

the shooting]).

If we were to endorse a police pursuit under the grossly equivocal circumstances here -- where the extremely vague, generic description of a "black [man in] a black jacket" is used to justify pursuit of the companion of someone matching that description -- this Court would be ignoring an extraordinary interference with a citizen's right to be left alone. "That is not, nor should it be, the law" (*People v Holmes*, 81 NY2d at 1058. While flight plus other specific circumstances may indicate that the suspect has engaged in criminal activity, "flight alone or in conjunction with equivocal circumstances that might permit a request for information is insufficient to justify pursuit" *(Beckett*, 88 AD3d at 899). Since there were no specific circumstances indicating that defendant had engaged in criminal activity, his flight did not justify the officer's pursuit (*id.*).

Each of my dissenting colleagues offers a different reason for voting to affirm the denial of defendant's motion to suppress and, accordingly, to affirm the conviction. Justice Tom's dissent primarily argues for the validity of the police pursuit. His dissent cannot and does not dispute that if a police officer initially does not have a founded suspicion that a particular person has engaged in criminal activity, the person's flight will not provide the reasonable suspicion necessary for a police pursuit (*see People v Martinez*, 80 NY2d 444, 448 [1992]).

However, in finding individualized founded suspicion against defendant, Justice Tom's dissent misinterprets the record. Contrary to the dissent's conclusion, the police officers did not testify at the suppression hearing that, upon their initial encounter with defendant and the other black man, they believed that either of the two black men could have been the shooter. Instead, the officers testified that "it was possible one of them could be the shooter." This reference by the officers obviously related to the man who matched the vague description of the shooter, as defendant was not wearing a black jacket, the only description of the shooter provided by the anonymous tipster. The dissent's suggestion that the person who did not match the description could have been an accomplice is pure speculation because the radio run clearly only referred to one person and did not indicate that any more than one assailant was involved in the shooting. Even as to the black man who matched the very vague description of the shooter, the police officers plainly found the description too equivocal as indicated by their admission that the men could have been witnesses to the crime or could have been victims.

Therefore, contrary to Justice Tom's dissent, the officers' inquiry did not begin with a founded suspicion of criminality as to defendant, but began with the lesser standard of objective credible reason. At this primary level of inquiry, the police

had at most a basis to approach defendant and the other man for information. Defendant, however, had the right to refuse to cooperate and walk or even run away, as he did. But, since the officers had no reason to suspect that he was the shooter, they had no basis to pursue or detain him. Under the circumstances, the officer's decision to pursue defendant could have been based upon nothing more than the fact that defendant chose to avoid them.

We are unwilling to overlook the very significant facts that the police officers had only a vague description of the shooter and defendant did not even match this vague description, simply because the police encounter with the two black men took place some minutes after the reported shooting and several blocks away from the scene. Unlike Justice Tom's dissent, we will not turn a blind eye to the character of this neighborhood or the normal evening hour at which the encounter occurred. That defendant and another black man were walking several city blocks from the crime scene, in the Harlem section of Manhattan, should have been unremarkable.

Ultimately, the principles of *De Bour* (40 NY2d at 223) and its progeny do not stand for the broad proposition apparently embraced by Justice Tom's dissent, that when police officers are confronted with the "urgent situation involving the firing of a gun and possible shooting victim," the police officers may pursue

a person, whom the officers had no reason to suspect was the shooter, simply because the police encounter happened "mere minutes after the reported shooting and in close spatial proximity to the shooting." Of course, "[a] police officer is entitled, and in fact is duty bound, to take action" in a proper manner in such a situation (*People v Benjamin*, 51 NY2d 267, 270 [1980]). We must not forget that *De Bour* and its progeny stand, in its general and indeed specific sense, for the principle that police action must be justified from its inception, and at any subsequent juncture, by a sufficient factual predicate even when the police are confronted with an "urgent situation of the firing of a gun and a possible shooting victim" (*People v Leung*, 68 NY2d 734, 736 [1986]; *People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]).

Nor are we persuaded by the cases relied on by Justice Tom's dissent. The dissent primarily relies upon *Matter of Robert R.* (231 AD2d 406 [1st Dept 1996]), in which police officers initially received a radio transmission of "shots fired" at a particular location. At the scene, the officers received further information from a civilian confirming that shots had been fired and providing a description and the direction of the flight of a male who had fled with other people; the arresting officers then encountered a group of males, 15 minutes later, four or five blocks away, one of whom, not the defendant, matched the

description provided.

This case, in contrast, involves a scant, vague description of the shooter by an anonymous informant, with no civilian confirmation at the scene and no "direction of flight." Under these circumstances, we cannot ignore the principle that the police cannot seize or pursue a defendant based upon an anonymous tip unless the surrounding circumstances or the nature of the information given in the tip itself provide *individualized* founded suspicion that the person has engaged in criminal activity (*Holmes*, 81 NY2d at 1056). In the instant case, the anonymous tip itself offered nothing more than an extremely vague description of the shooter, which did not match defendant. The unknown informant did not say that he or she witnessed the shooting. The only "surrounding circumstance" mentioned by the police as being indicative of defendant's criminality was that one of the two black men, present in a predominantly black neighborhood, wore a black jacket. Thus, defendant's attempt to evade the police by running from the scene was insufficient to validate the pursuit on the basis of the vague tip in this case.

Nor does the Court of Appeals' recent decision in *Parker* (32 NY3d at 49) support Justice Tom's position. In *Parker*, the police received a radio transmission of a burglary in progress, and their encounter with defendants at the reported address occurred a mere five minutes later (*id.* at 56). The officers

first saw defendants exiting a gated country club in a secluded, residential neighborhood, the actual scene of the suspected crime. The officers observed no other persons or cars in the secluded, residential area, and it was early in the morning on a federal holiday (*id.*). Thus, in *Parker*, the police made a proper common-law inquiry based upon an anonymous tip and the circumstances at the scene.

Accordingly, Justice Tom's conclusion that "[h]ere, officers had more information about the perpetrator than the police in *Parker*" is unfounded. In this case, defendant and the other black male were found walking several city blocks from the crime scene, in the Harlem section of Manhattan. It would not have been unusual to find two black men walking in a predominantly African-American neighborhood.

We are also unpersuaded by Justice Richter's dissent arguing that even if the initial pursuit was unlawful, defendant's act of throwing the gun was a calculated act of voluntary abandonment.[2] There is a presumption against the waiver of constitutional rights (*Howard*, 50 NY2d at 593), and therefore courts "should conclude that abandonment has occurred in only the clearest of cases" (*People v Torres*, 115 AD2d 95, 99 [1st Dept 1986]; *see also People v Pirillo*, 78 AD3d 1424, 1425-1426 [3rd Dept 2010]).

[2] Justice Tom also argues, with reasoning similar to Justice Richter's, that defendant's act of throwing the gun was a calculated act of voluntary abandonment.

Moreover, the People bear the burden of proof on this issue (*Howard, supra; People v Rojas*, 163 AD2d 1, 2 [1st Dept 1990]).

Within the context of an illegally initiated police chase, only when the defendant's act is independent and unrelated to the illegal police conduct is the abandonment voluntary (*see People v Boodle*, 47 NY2d 398, 403-404 [1979], *cert denied* 444 US 969 [1979]). If the defendant's act is spontaneous, and provoked by the illegality, the abandonment cannot be intentional or voluntary (*id.*). A spontaneous response is instinctual, rather than planned, and it is precipitated by the coercive nature of the illegality (*Howard*, 50 NY2d at 593; *see e.g. People v Holmes*, 181 AD2d 27, 32 [1st Dept 1992], *affd*, 81 NY2d 1056 [1993] [finding that the bag and its contents must be suppressed where defendant dropped the bag during officers' unlawful and "continuous hot pursuit"]). "[The] coercion negates the ability to make a thoughtful decision involving the conscious assumption of a risk" (*Torres*, 115 AD2d at 99). Conversely, a calculated and independent act is one that is the product of thought and reflection (*id.*). It is undertaken only after a defendant has had an opportunity to consider how to proceed, by weighing the risks involved in discarding the incriminating evidence (*id.*). Thus, the spontaneous act is an instinctive reaction to a confrontation with the police; the independent act is a reflective, intellectual formulation of strategy.

In this case, it is undisputed that immediately after the police command, defendant ran away, and two police officers chased him; one officer followed him on foot, while the other pursued him in a police vehicle while hitting the horn and using the siren. Defendant continued to run towards a construction site. Then, defendant ran under some scaffolding, climbed up a wooden fence, and threw a black object he had in his hand down into the construction site. Thus, it appears that the chase was a fast-paced, continuous event that lasted mere minutes. Under such circumstances, it can be fairly inferred that defendant's actions in the heat of the chase "were precipitated by an instinctive drive to escape his pursuers rather than a reflective, intellectual formulation of strategies" (*Torres*, 115 AD2d at 99). Contrary to the dissent's assertion, defendant's action of "running under a scaffold, climbing a fence" and "throwing a gun over the fence" is nothing more than an attempt to escape an unlawful pursuit by the police and does not indicate that defendant had ample time to contemplate his options and make a conscious choice to dispose of evidence.

Courts have consistently held that when, like here, the police are in "hot pursuit" of a defendant following an illegal attempt to seize the defendant, the defendant's act of discarding property during the continuous chase is not an abandonment. In *People v Howard* (50 NY2d at 593), the police had no reasonable

suspicion of criminal activity by the defendant; after he refused to answer their questions and fled, they unlawfully pursued him. After being chased into the basement of a building, the defendant threw a package he was holding to the ground; the package contained a gun (*id.* at 587). The Court of Appeals found that the defendant's actions were precipitated by a desire to elude capture; as a result, the defendant did not intentionally and voluntarily relinquish his expectation of privacy in the package (*id.* at 593).

Similarly, in *People v Torres* (115 AD2d at 99), this Court found that the police acted improperly in grabbing the defendant and pursuing him when he ran away. During an unlawful hot pursuit, the defendant ran into an alley and threw a gun over a fence (*id.* at 95). This Court concluded: "It is only realistic to assume that defendant's actions were precipitated by an instinctive drive to escape his pursuers rather than a reflective, intellectual formulation of strategies" (*id.* at 99). Thus, the weapon was suppressed because it was not abandoned.

Finally, in *People v Grant* (164 AD2d 170 [1st Dept 1990], *appeal dismissed* 77 NY2d 926 [1991]), the police observed the defendant exit the passenger side of a car they had followed for several blocks. When the defendant exited the car, he clutched his waist; although the officer could not see a weapon or even a bulge, he drew his weapon and ordered the defendant to stop (*id.*

at 172). The defendant began to run, and the officer gave chase with his weapon drawn. After being pursued for two blocks, the defendant threw the pistol to the ground. The gun was recovered, and the defendant was arrested (*id.*). This Court found that, although the officer would have been justified in approaching the defendant to request information or, at best, in approaching pursuant to the common-law right to inquire, the defendant had the right to walk or run away (*id.* at 173). In neither case was a pursuit permissible. Having found the police conduct unlawful, this Court concluded that the defendant's act of throwing the weapon was a spontaneous reaction to the illegal police conduct (*id.* at 174-176). This Court suppressed the gun, finding that the "frenetic activity of running two blocks while being chased by police cannot be said to have afforded time for a rational calculation of strategy, independent of the unlawful police action" (*id.* at 176).

The cases cited by the dissent involved lawful police conduct, during which the defendant had ample opportunity to contemplate his option and action to dispose of evidence, and not a situation, as here, and *as in Howard*, *Torres* and *Grant*, in which evidence was discarded under the pressure of an unlawful hot pursuit. For example, *in People v Fields* (171 AD2d 244 [1st Dept 1991], *lv denied* 79 NY2d 1000 [1992]) police officers, riding in an unmarked car, attempted to stop the defendant's car

by blocking the street. The defendant's car, however, swerved around the police vehicle and continued to proceed (*id*. at 246). It stopped two blocks away without police intervention, when it was immobilized by traffic congestion. Defendant was not directed to remain in the car at that point but rather immediately took flight with a white plastic bag, the object of initial suspicion (*id*.). Under these circumstances, this Court found the defendant's act of jettisoning the bag containing a kilogram of cocaine beneath a bus in the course of being pursued by the police to be a considered and calculated act undertaken to assist his effort to escape and to rid himself of incriminating evidence, independent of an earlier, legal but unsuccessful attempt by the police to stop the car from which he exited (*id*. at 248-249).

Similarly, in *People v Salva* (228 AD2d 344 [1st Dept 1996], *lv denied* 89 NY3d 867 [1996]), this Court found that the police officers' pursuit was justified because they had a reasonable suspicion that the defendant had committed or was about to commit a crime. Seconds after hearing a gunshot from somewhere in front of their patrol car, the officers noticed a group of people looking back and forth between the patrol car and the defendant, who was walking alone across the street and was the only person walking away from the area (*id*. at 345). When the defendant then looked back over his shoulder and suddenly started to run, these

actions elevated the police officers' founded suspicion to reasonable suspicion that defendant was connected with the gunshot (*id.*). As an alternative holding, this Court found that the defendant's decision to throw the gun over a chainlink fence, more than one and a half blocks away from the point where he began to run, while aware of the police officers' presence, was a calculated one, rather than a spontaneous response to the pursuit (*id.*). In *Salva*, the circumspect and calculated manner in which the defendant attempted to extricate himself from the scene was hardly the conduct indicative of coercive police pressure that could have provoked a defendant's spontaneous reaction.

We therefore conclude that the pursuit in this case was an unreasonable seizure within the meaning of the Fourth Amendment.

Accordingly, the amended judgment of Supreme Court, New York County (Arlene D. Goldberg, J.), rendered January 13, 2017, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of five years, should be reversed, on the law, the motion to suppress granted, and the indictment dismissed.

All concur except Richter, J. and Tom, J. who dissent in separate Opinions.

RICHTER, J. (dissenting)

Although the majority focuses on the validity of the police pursuit of defendant, I believe we do not need to resolve this issue. Rather, I would affirm because the record supports the motion court's determination that defendant made a calculated decision to discard the firearm and his actions were not provoked by any allegedly unlawful police chase.

The hearing testimony established that on December 27, 2008, officers on anticrime patrol received a radio run of shots fired on 150th Street and Macombs Avenue, with the following description: a black male wearing a black jacket. When the call was received, the officers were five blocks south and one avenue over from the location where the shots were fired. Because the officers believed that the perpetrator would no longer be at the exact location mentioned in the radio run, they decided to drive a few blocks to 150th Street and Seventh Avenue instead of responding to the direct location. They did so because the officers concluded based on their training that the perpetrator could easily get away by cutting through the Dunbar Complex and accessing the subway station directly across from the complex. They arrived approximately two to three minutes after receiving the radio run and saw two black men, one wearing a black jacket and the other, defendant, wearing a gray jacket. The men were exiting the complex. An officer stepped out of the police

vehicle and asked defendant and his companion to come over. Nothing in the record indicates that the officer had his gun drawn when he requested to speak with defendant.

Defendant did not comply with the officer's request and immediately ran away. Another officer followed defendant in the police vehicle and was "hitting the horn and the siren." When the officer made a right turn on the north side of 149th Street toward Eighth Avenue, defendant ran in front of the police vehicle, crossed over to the south side of 149th Street and proceeded to run towards Eighth Avenue. The officer in the vehicle saw defendant go under a scaffold, climb a fence, throw a black object over the fence into a locked construction site, climb back down the fence and continue to run. Defendant was subsequently arrested; the officers returned to the location where defendant had thrown the black object and retrieved the gun.

Defendant's evasive actions of running under a scaffold, climbing a fence, throwing a gun over the fence into a locked construction area, then coming back down the fence and continuing to run was not a "spontaneous reaction to a sudden and unexpected confrontation with the police" (*People v Boodle*, 47 NY2d 398, 404 [1979], *cert denied* 444 US 969 [1979]). Rather, defendant's decision to discard the gun was "a considered and calculated act undertaken to assist his effort to escape and to rid himself of

incriminating evidence, independent of the earlier attempt by police to stop the [defendant]" (*People v Fields*, 171 AD2d 244, 249 [1st Dept 1991], *lv denied* 79 NY2d 1000 [1992] ["defendant's act of discarding the bag (of cocaine beneath the bus in the course of police pursuit) could hardly be characterized as a spontaneous response thereto, but rather was attenuated from the (allegedly unjustified police stop)"]; *see People v Salva*, 228 AD2d 344, 345 [1st Dept 1996], *lv denied* 89 NY2d 867 [1996] ["defendant's decision to throw the gun over a chainlink fence, over one and half blocks away from the point where he began to run, while aware of the police officers' presence, was a calculated one"]; *see also People v Archer*, 160 AD3d 553 [1st Dept 2018], *lv denied* 31 NY3d 1144 [2018]; *People v Bush*, 129 AD3d 537 [1st Dept 2015]; *People v White*, 117 AD3d 425 [1st Dept 2014], *lv denied* 23 NY3d 1044 [2014] [all finding that discard of contraband was a calculated act]).[1]

Defendant's reliance on *People v Holmes* (181 AD2d 27 [1st Dept 1992], *affd* 81 NY2d 1056 [1993]) and *People v Grant* (164 ADd2d 170 [1st Dept 1990]), is misplaced. In *Holmes*, the

[1] The majority attempts to distinguish *Fields* and *Salva* based on the fact that the courts in those cases found the initial police conduct to be lawful. However, the courts also concluded, in the alternative, that regardless of the legality of the earlier police actions, the defendants had made a calculated decision to discard the contraband. Likewise here, I conclude that regardless of the lawfulness of the police pursuit, defendant abandoned the weapon.

officers were chasing the defendant on foot and were approximately 10 feet from the defendant when he discarded the evidence. In *Grant*, the officer was in hot foot pursuit with a weapon drawn when the defendant simply threw a gun to a sidewalk. In the instant case, as the officer pursued defendant in a police vehicle, defendant made a calculated decision to cross in front of the police vehicle and continued to run on the south side of the street to make it harder for the police to apprehend him. Defendant decided to go under a scaffold, climbed a fence, tossed the gun over the fence, came back down the fence and continued to run away from the police. The actions of defendant were not instinctual but rather a thought-out reaction to rid himself of incriminating evidence.

People v Howard (50 NY2d 583 [1980], *cert denied* 449 US 1023 [1980]) and *People v Torres* (115 AD2d 93 [1st Dept 1986]), cited by the majority, can be distinguished on their facts. In *Howard*, the defendant held on to the contraband during the entire foot chase and only dropped it when he attempted to open or break down the door and window in the basement to evade officers. Here, defendant did not hold on to the gun for the entire pursuit and continued to run even after making a calculated decision to discard the gun and to climb back down the fence. In *Torres*, during a brief police pursuit, the defendant ran into an alley, found himself blocked by a fence "with a number of policemen

breathing down his neck" (115 AD2d at 99), could run no further, and discarded a gun over the fence. Here, defendant was not similarly boxed-in, and thus his discarding the weapon was not "an instinctive drive to escape his pursuers" (*id.*), but rather a reflective formulation of strategy.

In conclusion, defendant's evasive and calculated actions support the motion court's finding that this was a calculated and independent act (*see Boodle*, 47 NY2d at 404).

TOM, J. (dissenting)

Because the pursuit of defendant by the police officers was reasonable and justified (*People v Martinez*, 80 NY2d 444, 448 [1992]; *see also People v Parker*, 32 NY3d 49 [2018]), I would find that the defendant's motion to suppress was properly denied, and accordingly would affirm the conviction.

At the suppression hearing, Detective Richard Pengel testified that at approximately 9:20 P.M. on December 27, 2008, he was in the area of 145th Street and Seventh Avenue in Manhattan in plainclothes with fellow officers when they received a radio report of shots fired at 150th Street and Macombs Place. Pengel was accompanied by Officer Mansfield, Officer Matos, and Lieutenant O'Neill. The report indicated that the incident had "just happened" and a second report indicated that a man had been shot. The perpetrator was described as a black man who was wearing a black jacket.

In these situations, the officers were trained not to respond to the "direct location" of the incident but to instead "go a few blocks out" because it usually took a few minutes for information from a 911 call to be transmitted to them, by which time "the perpetrators or perpetrator would no longer be at the scene." In this case, the officers immediately drove to the entrance of the Dunbar Houses at 149th Street and Seventh Avenue, approximately one block and one Avenue from the reported

shooting. They did so because they believed the perpetrator would no longer be at the scene and could have cut through the Dunbar complex to access the subway at 149th Street and Seventh Avenue in order to escape. They reached this location two or three minutes after the radio report of shots fired.

At that point, the officers observed two men walking together out of one of the entrances to the Dunbar Houses located between 149th and 150th Streets on Seventh Avenue across the Avenue from the subway entrance. One of the men fit the description of the perpetrator in that he was black and was wearing a "black bubble-type jacket." The other man - defendant - was taller, and wearing a gray jacket.

The officers decided to stop the two men because they were in the "vicinity" where the shots had been reported to have been fired, were coming away from a possible escape route of the shooting location and because the man with the defendant matched the description of the shooter. The officers believed either of the men could have been the shooter, or, alternatively, that the men could have witnessed the crime or could have been victims.

Pengel pulled his car up behind the men and stopped. Lieutenant O'Neill exited the car and said, "Hey, Buddy, ... come here." Although the man with the defendant stopped, the defendant began running. The other officers got out of the car to pursue defendant while the lieutenant stayed with the

defendant's companion. Pengel drove the car south to cut off defendant and turned on his siren. Defendant ran in front of Pengel's car at one point, then underneath scaffolding at a construction site where he climbed up a fence and threw something black over the fence. The defendant then dropped down from the fence and started running again towards Eighth Avenue.

Pengel continued to chase the defendant in his car and repeatedly told him to stop. He finally stopped on 149th Street and was apprehended by Pengel and Officer Mansfield. Pengel went to the construction site and saw a gun lying on the ground, which was later recovered by other officers.

Any analysis of police conduct we undertake must focus on whether the actions taken were reasonable in view of the totality of the circumstances (*see People v Batista*, 88 NY2d 650 [1996]). Indeed, it is well settled jurisprudence that the touchstone of any analysis of a governmental invasion of a citizen's person under the "Fourth Amendment and the constitutional analogue of New York State is reasonableness" (*People v Chestnut*, 51 NY2d 14, 22, n 7 [1980], *cert denied* 449 US 1018 [1980]; *see also People v Molnar*, 98 NY2d 328, 331 [2002]).

Here, the police conduct was reasonable in light of all the circumstances. The pursuit of the defendant and his arrest took place on a winter evening after dark in an area of Manhattan, and part of Harlem, that is not heavily commercial and nothing in the

record indicates it was heavily trafficked at that time. Reports of shots fired and that a person was shot was a serious and urgent matter and an ongoing threat to the safety of the area residents that warranted swift action by the police. Indeed, "[a] police officer is entitled, and in fact is duty bound, to take action on a radio call" (*People v Benjamin*, 51 NY2d 267, 270 [1980]).

Two or three minutes after the radio report when the officers arrived at Seventh Avenue between 149th and 150th they saw defendant and his companion, who were exiting the Dunbar housing complex, precisely the escape route their training taught them a perpetrator might take to reach the nearby subway from the scene of the shooting. Upon observing that defendant's companion matched the only description they were working with, the officers were authorized to exercise their common-law right of inquiry based on a founded suspicion that criminal activity was afoot (*see People v Moore*, 6 NY3d 496, 498 [2006] [officers observing individual matching description given over radio call were authorized to exercise common-law right of inquiry]).

Then, after Lieutenant O'Neill made a verbal inquiry of the men, defendant immediately began to run away. This, combined with all the circumstances, including the urgency of the situation, that this was mere minutes after the reported shooting, and the close spatial proximity to the shooting,

established the reasonable suspicion justifying and warranting pursuit by the officers (*see Martinez*, 80 NY2d at 448 [where police have common-law right to inquire, defendant's flight, and the time and location established the necessary reasonable suspicion]; compare *People v Moore*, 6 NY3d at 500-501 ["to elevate the right of inquiry to the right to forcibly stop and detain, the police must obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior. Had defendant, for example . . . actively fled from the police, such conduct, when added to the anonymous tip, would have raised the level of suspicion."]).

The fact that defendant was not the individual wearing a black jacket is of no moment. In *Matter of Robert R.* (231 AD2d 406 [1996]), we affirmed the denial of a motion to suppress a gun in analyzing circumstances similar to those raised here. In *Robert R.*, the police were told of shots fired in a particular location and given a description of a male suspect. Officers encountered a group of males, one of whom - not the respondent - matched the given description. We held that respondent's flight combined with the other circumstances "gave rise to reasonable suspicion justifying pursuit" (*id.* at 407; *see also People v Wider*, 172 AD2d 573, 574 [2d Dept 1991] ["the report of shots fired, the quick response time (the officers arrived at the

location within two or three minutes of receiving the report), the officers' observation of a group of men at the specified location, one of whom matched the description given in the report and the defendant's flight . . . all combined to provide justification for the pursuit of the defendant"]).

Further, contrary to the majority's contention, "the circumstances permitted the officers to reasonably conclude that the most likely explanation for defendant's behavior was that he had recognized them as the police" (*People v Collado*, 72 AD3d 614, 615 [1st Dept 2010], *lv denied* 15 NY3d 850 [2010]). Indeed, defendant ran the moment the Lieutenant addressed the pair, and continued to run even after Detective Pengel operated his police siren from the vehicle in pursuit.

The majority suggests that this dissent misinterpreted the record. Nothing could be further from the truth. The pursuit was justified based on the officers' testimony that one of the men could have been the shooter because defendant's companion matched the description they had, and the fact that they were the only people on the street during that winter night, together with the temporal and spatial proximity to the reported shooting, authorized them to exercise their common-law right of inquiry based on a founded suspicion that criminal activity was afoot (*see People v Moore*, 6 NY3d at 498; *Matter of Robert R.*, 231 AD2d 406).

The majority attempts a sleight of hand by focusing the attention on defendant's companion wearing the black jacket - ignoring the possibility that defendant could have been an accomplice or involved in the shooting and that defendant's companion matched the given description - and instead focuses on the fact that the officers also could have thought the men could be victims or witnesses. The majority improperly isolates the stopping of the two men on the street without regard to the other significant factors, including the urgency of the reported shooting, with a possible shooting victim and the interaction between the men and the officers, the fact that defendant's companion matched the description of the shooter, and the temporal and spatial proximity, thereby avoiding the context and totality of the circumstances facing the officers in this fast-moving dangerous exchange.

By ignoring the entire context of the encounter, the majority then finds that somehow the officers only had a level one right to request information at the inception of the encounter. However, to reach this conclusion the majority turns a blind eye to the information received by the police immediately before the defendant and his companion were stopped, and ignores controlling Court of Appeals precedent establishing that under these circumstances the officers *began* with a level two right to inquire (*see Moore*, 6 NY3d at 498). Accordingly, the majority's

suggestion that defendant had the right to run away is entirely erroneous. Rather, his flight combined with the other factors established the reasonable suspicion warranting pursuit.

It would be a dereliction of their official duties if the police did not pursue defendant under the circumstances and instead watched as defendant fled from the vicinity of a shooting. Once again, the cornerstone of the analysis is reasonableness and the majority's suggestion that the police did not have the right to pursue is not reasonable and is not the law.

In fact, the majority's analysis continually sidesteps the highly dangerous nature of a reported shooting and disproportionately highlights the character of the neighborhood. Critically, the police saw these men - one of whom matched the description - minutes after a reported shooting and possible shooting victim in the exact location their training taught them to search. This police action was both warranted and reasonable.

The Court of Appeals recent holding in *People v Parker* (32 NY3d 49 [2018]) is instructive. In *Parker*, the defendants were indicted and jointly tried for various crimes arising from the theft of several thousand dollars at a commercial establishment. The crime occurred in the morning hours at a country club in a residential neighborhood.

In *Parker*, the police had received a radio transmission

about a burglary in progress but were given no description of the perpetrator or perpetrators. Five minutes after the report, the police arrived at the club observed the defendants on the club's private driveway, but observed no other persons in the area. The Court of Appeals determined that at that point the police had a founded suspicion that defendants were involved with the burglary, warranting a level-two common-law inquiry.

The Court of Appeals further held that when the officers questioned the men and defendant Nonni ran and Parker made a "hurried" or "brisk" departure, the police had reasonable suspicion of criminal activity to justify the pursuit, forcible stop, and detainment of both defendants.

Here, the officers had more information about the perpetrator than the police in *Parker* in that they had a general description of the suspect. The majority erroneously denies this simple fact even though in *Parker* the police had no description of the suspects. The majority's reiteration that this incident took place in Harlem does not aid the analysis. As the majority recognizes, both here and in *Parker* an anonymous tip combined with other circumstances gave the police the right to make a proper common-law inquiry. However, the majority wrongfully focuses on the location of the incident rather than the relevant factual circumstances including the exigency of a shooting that justified the pursuit in this case. Indeed, the majority

erroneously states that the police stopped two black men without considering the various factors, and the urgent context of the situation, that led the police to make an inquiry of the men.

Significantly, the officers in this case were dealing with a much more urgent situation involving the firing of a gun and a possible shooting victim. In both cases, there is no indication that any other persons were around when the officers observed the defendants. Regardless, in both this case and *Parker* the officers clearly had sufficient information warranting a level-two common-law inquiry when they arrived at the scene within minutes and observed the defendants, and that fact, combined with flight, raised the level of the interaction such that the officers could pursue and stop the defendants.

It is separately noted that while it is always helpful for the police to receive a more detailed description of suspects, that is not always possible. However, particularly in situations where officers are faced with a report of gunshots, our holdings have made clear that a general description of a perpetrator is sufficient to warrant a common-law inquiry (*see People v Lacy*, 104 AD3d 422 [1st Dept 2013], *lv denied* 21 NY3d 1005 [2013] [where police received report of shots fired and description of suspect was "black man, wearing a blue and white shirt"]). And, once again, given the spatial and temporal proximity to the location where the report indicated that shots had been fired,

defendant's flight ripened the level to reasonable suspicion thus permitting police pursuit. Thus, the majority's holding is not strengthened by repeating the phrase "individualized founded suspicion" as the totality of the circumstances provided ample basis for the police to pursue defendant.

The majority describes the neighborhood as "densely populated" in order to imply that there were numerous black men in black jackets at the location where the police arrived minutes after the report of shots fired. The majority's position is without merit. The mere fact that the City of New York is highly populated does not ipso facto support the majority's implication that on a winter night in late December there were "many people" on the street of this residential neighborhood that "could have fit the vague description." This is pure speculation with no evidentiary support.

In fact, there is no record evidence that anyone else was near defendants or on the street at the time the police arrived. Based on the factual circumstances of this case, it is unlikely there would have been many people on the street who fit the given description, especially given that it was in a residential area and during a winter night after 9 P.M., as opposed to a summer evening or a morning rush hour, for example.

Contrary to the majority's contention, the circumstances here cannot be fairly described as "equivocal." Rather, given

the urgent and serious situation, the spatial and temporal proximity to the reported shots fired, that defendant's companion matched the general description given and the men were exiting the complex near the shooting and the subway, the lack of the evidence of others in the area, and defendant's immediate flight, all combined to reasonably justify the pursuit of defendant.

The majority misplaces reliance on cases in which flight from police was held insufficient to give rise to reasonable suspicion (*see e.g. People v Holmes*, 81 NY2d 1056, 1058, [1993]). The circumstances leading to the initial police approach in those cases — unlike the circumstances that prompted the police approach here - did not give rise to a founded suspicion of criminality. In *Holmes*, the police were patrolling near a known narcotics location and had "merely observed [the defendant] in the daytime, talking with a group of men on a New York City street." There was no report of a crime committed. Here, the officers were investigating a serious, life threatening crime which took place minutes earlier in that area, and defendant's companion matched the description they had been given.

People v Beckett (88 AD3d 898 [2d Dept 2011]), cited by the majority, is distinguishable in that the People there failed to establish the spatial proximity between the crime and the location of the defendant. In contrast, the spatial proximity - a short distance of one block and one avenue - was clearly

established in this case, and lined up with the police training about the likely path of the perpetrator.

Nor does this case bear any resemblance to *Matter of Rubin M.* (271 AD2d 291 [1st Dept 2000]). In *Rubin M.*, the police approached and stopped the respondent only because "he matched the generic description of the perpetrator contained in [a] hot sheet [given to the officers in connection with a number of incidents in the 42nd Precinct], a description which could just as readily have applied to countless Bronx and Manhattan residents." Critically, unlike the circumstances here, the police in *Rubin M.* were not searching for a particular suspect and there was no specific crime that had just been reported in the area. Moreover, the hot sheet described a black male with a wide range of heights and weights, thus potentially subjecting many people in the area and at any time to an approach by the police.

Further, cases such as *Holmes* are inapposite here because this case does not involve a violation of the "right to be let alone" or the unjustified targeting of individuals who reside in what police might describe as "high crime neighborhoods" (81 NY2d at 1058). In fact, this case bears no relation to the police pursuit of an individual under equivocal circumstances such as merely standing on a corner with others. Rather, this case involved exigent circumstances, a general description of a

perpetrator and the temporal and spatial proximity that warranted the officers' actions. Therefore, contrary to the majority's position, endorsing the pursuit in this case is not tantamount to permitting the pursuit of a black person matching a general description under "equivocal circumstances." The record evidence in this case clearly bears this out.

In sum, the police conduct was reasonable and all the circumstances justified the pursuit, during which defendant discarded a gun. Thus, there was no basis to suppress the weapon recovered. However, irrespective of the legality of the pursuit, defendant's independent abandonment of contraband as he fled was an intentional relinquishment of any privacy interest, and was a strategic and calculated decision rather than a spontaneous reaction to the police activity (*see People v Boodle*, 47 NY2d 398, 402-404 [1979], *cert denied* 444 US 969 [1979]).

Accordingly, I would affirm the conviction.

Amended judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered January 13, 2017, reversed, on the law, the motion to suppress granted, and the indictment dismissed.

Opinion by Renwick, J.P. All concur except Richter, J. and Tom, J. who dissent in separate Opinions.

Renwick, J.P., Richter, Manzanet-Daniels, Tom, Gesmer, JJ.

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

ENTERED: MARCH 7, 2019

CLERK