SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 4, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5610

The People of the State of New York, Respondent, Ind. 3803/08

-against-

Donsha Jackson, etc., Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Richard Carruthers, J. at suppression decision; Analisa Torres, J. at plea and sentencing), rendered March 25, 2010, as amended May 6, 2010, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 4 years, unanimously affirmed. Defendant's suppression motion was properly denied in all respects. The police had a warrant, the validity of which is not

at issue, to search apartment 12A of a residential building. As the police came out of the elevators on the 12th floor, they saw defendant, who was holding keys in his hand, suggesting that he was connected to one to of the eight apartments on that floor. This provided the police with an objective, credible reason to ask defendant where he was coming from (*see generally People v Hollman*, 79 NY2d 181, 185 [1992]). This simple question was a level-one request for information, and while the large number of officers present may have created a crowded condition in the hallway, this was not so intimidating as to transform the encounter into a common-law inquiry.

Defendant responded that he was coming from Apartment 12A, the apartment that the officers were about to search. This answer, along with defendant's possession of keys, created reasonable suspicion that he was involved in the criminal activity that was the subject of the warrant. The fact that the officers were about to execute a warrant provided additional justification for detaining defendant for their safety and to ensure that he did not interfere with the search (*see People v Allen*, 73 NY2d 378, 379-80 [1989]; *see also Michigan v Summers*, 452 US 692 [1981]).

The level of suspicion increased when defendant yelled that he had "changed [his] mind," and that he had come from apartment

12C, not 12A. A woman later determined to be defendant's sister then opened the door to Apartment 12C, whereupon defendant immediately made statements to her that evinced a consciousness of guilt. At the time defendant made these statements, he was still being lawfully detained. In this fast-paced incident, defendant was detained no longer than necessary. Accordingly, defendant's statements or directives to his sister were not subject to suppression.

Similarly, the police were entitled to use defendant's statements to his sister as one of the bases for obtaining a search warrant for Apartment 12C. Defendant's remaining challenges to that warrant are without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5611 Cole, Schotz, Meisel, Forman & Leonard, P.A., Plaintiff-Respondent, Index 603167/09

-against-

Stanton Crenshaw Communications, LLC, et al., Defendants-Appellants,

Crenshaw Communications, et al., Defendants.

The Abramson Law Group, PLLC, New York (Robert F. Martin of counsel), for appellants.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Jed M. Weiss of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered March 21, 2011, which, insofar as appealed from, denied defendants Stanton Crenshaw Communications, LLC, Stanton Public Relations & Marketing and Alexander H. Stanton's (defendants) motion for summary judgment dismissing the first, second and third causes of action, unanimously affirmed, with costs.

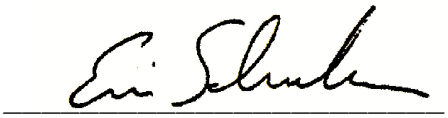
The stipulation on which defendants rely does not clearly and unambiguously manifest an intent on plaintiff's part to release defendants from future rent obligations under the lease (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968

[1988]; *NAB Constr. Corp. v City of New York*, 276 AD2d 388 [2000]).

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

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5612 In re Nasiim W.,

Keala M.,
Respondent-Appellant,

Administration for Children's Services,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about September 16, 2010, which, upon a fact-finding determination that respondent mother neglected her biological son, Nasiim W., released the child to his biological father, without supervision, unanimously affirmed, without costs.

Petitioner agency satisfied its burden of proving, by a preponderance of the evidence, that respondent neglected her child (*see* Family Court Act § 1012[f][i][B]; § 1046[a][iii]). The agency's witnesses personally observed respondent under the influence of alcohol to the extent that she was no longer in

control of her actions. On one occasion she approached the child and his stepmother at approximately 7:15 A.M., intoxicated and holding an open 24-ounce can of beer. She screamed and cursed at the stepmother and attempted to grab the child away from her. On another occasion, respondent appeared at the residence of the stepmother and the child's father under the influence of alcohol, demanding to see the child. When she was told to go away, she vandalized the lobby of the apartment building. On a third occasion, an agency caseworker observed respondent at a 1:00 P.M. family conference slurring her speech, smelling of alcohol, drooling from her mouth, and, as a result, being unable to participate in the conference. Moreover, the agency's case record, which was admitted into evidence, revealed that both the child and his father had told caseworkers that respondent was intoxicated during her visits with the child and that the child had reported that respondent drank alcohol from a glass bottle mixed with fruit juice.

This proof of impaired judgment and loss of self-control during respondent's repeated bouts of excessive drinking was sufficient to trigger the application of the presumption of neglect pursuant to Family Court Act § 1046(a)(iii), which

obviates the need to present proof of the child's physical, emotional or mental impairment or an imminent risk thereof as a consequence of the parent's behavior (*see Matter of Stefanel Tyesha C.*, 157 AD2d 322, 328 [1990], *appeal dismissed* 76 NY2d 1006 [1990]; *Matter of William T.*, 185 AD2d 413 [1992]). Thus, the facts that no evidence was presented concerning the impact of respondent's behavior on the child and that the child was not present during two of the three incidents relied upon by the court are of no consequence.

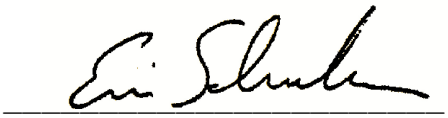
Moreover, the mother failed to rebut the presumption of neglect (*see* Family Court Act § 1046[a][iii]). She did not testify or otherwise offer any evidence on her own behalf, she denied any alcohol misuse and claimed that she drank alcohol "socially," and she presented no evidence that she was voluntarily and regularly participating in a recognized alcohol treatment program.

While respondent claims that the testimony of the stepmother was incredible, the court had the opportunity to observe her testify, and its assessment of her credibility is entitled to

great deference on appeal (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5613-
5613A

The People of the State of New York,
Respondent,

Ind. 15/09
5698/08

-against-

Isaac Maldonado,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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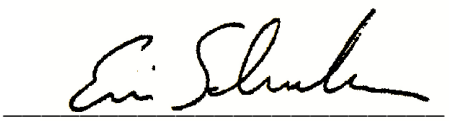
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about December 10, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

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

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels , JJ.

5614 The People of the State of New York, Ind. 3110/09
Respondent,

-against-

Adan Rosado,
Defendant-Appellant.

_____

Stillman, Friedman & Shechtman, P.C., New York (Nathaniel Z. Marmur of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered September 2, 2010, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him to a term of 5 years, unanimously modified, on the law, to the extent of reducing the conviction to assault in the third degree and remanding for resentencing.

The evidence was legally insufficient to establish that either the broken nose or the three chipped teeth sustained by the victim constituted serious physical injury, an element of gang assault in the second degree. Neither of these injuries "creat[ed] a substantial risk of death, or. . . caus[ed] death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any

bodily organ" (Penal Law § 10.00[10]).

It is uncontroverted that, following successful reconstructive surgery, neither the functioning of the victim's nose nor his general health was impaired as a result of the fracture. The indentation in the victim's nose following surgery, while qualifying as "disfigurement" (*see Fleming v Graham*, 10 NY3d 296, 301 [2008]), cannot be said to fall within the definition of "serious disfigurement." "Serious disfigurement" requires something more, and is established only upon proof that "a reasonable observer would find [the injured person's] altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315 [2010]). No such evidence was presented at trial.

The People also argue that the victim's three chipped teeth rise to the level of serious physical injury, based on testimony that the plastic material used to replace the chipped enamel had to be replaced approximately every 10 years and that darkening of the affected teeth and improper healing of the nerves was "possible." However, the need for maintenance at relatively long intervals does not constitute serious disfigurement, or an impairment to the victim's health or the functioning of his teeth. Finally, while a likelihood of adverse effects on

appearance, functionality, or overall health may qualify as serious physical injury, the mere possibility of such consequences does not.

In view of this determination, we need not reach defendant's remaining claims.

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5615- Charla Bikman, Index 115256/09
5616- Plaintiff-Appellant,
5616A-
5616B -against-

595 Broadway Associates,
Defendant-Respondent.

_____

Charla Bikman, appellant pro se.

Belkin Burden Wenig & Goldman, LLP, New York (Steven Kirkpatrick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered January 20, 2011, which denied plaintiff's motion to vacate orders, same court and Justice, entered on default on May 20, 2010 and May 24, 2010, granting defendant's motion for summary judgment dismissing the complaint and requiring plaintiff to seek the court's approval before bringing any further actions against defendant relating to these issues and claims, and denying plaintiff's motion to transfer the case to another Justice, and judgment, same court and Justice, entered June 2, 2010, dismissing the complaint, unanimously affirmed, with costs. Appeals from the aforesaid judgment and the May 20, 2010 and May 24, 2010 orders, unanimously dismissed, without costs, as taken from nonappealable papers.

Plaintiff cannot show a meritorious cause of action, as

required to vacate her default, because her claims have been fully litigated in prior proceedings and the doctrine of res judicata bars her from relitigating them (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Furthermore, given plaintiff's history of frivolous litigation, the court properly enjoined her from bringing any further actions against defendant relating to these claims without court approval (*see e.g. Matter of Sud v Sud*, 227 AD2d 319 [1996]).

We have reviewed plaintiff's remaining contentions and find them without merit.

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5617 The People of the State of New York, Ind. 3111/04
Respondent,

-against-

Anthony J. Manfredonia,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 6, 2010, resentencing defendant to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5618 The People of the State of New York, Respondent, Ind. 4342/08

-against-

Charles Emeribe, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about April 2, 2009, unanimously affirmed.

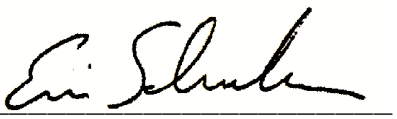
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5619 2281 First Realty, LLC, Index 111121/08
Plaintiff-Respondent,

-against-

Warminster Investors Corporation, etc.,
Defendant-Respondent,

Isa Brija, et al.,
Defendants-Appellants.

_____

Boris Kogan and Associates, New York (David Binson of counsel), for appellants.

Platte, Klarsfeld, Levine & Lachtman, LLP, New York (Jeffrey Klarsfeld of counsel), for 2281 First Realty, LLC, respondent.

Law Office of Chris Mills, P.C., New York (Chris Mills of counsel), for Warminster Investors Corporation, etc., respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered April 28, 2010, which, insofar as appealed from as limited by the briefs, denied defendants Isa Brija and John Brecevich's motion to dismiss the first, second and third causes of action for failure to join a necessary party and to dismiss defendant Warminster Investors Corporation's cross claim as identical to a claim pending in a prior action, and granted plaintiff's cross motion for summary judgment on its first and second causes of action, declaring, upon the second cause of action, that plaintiff has a permanent

easement through the gate in the party wall and onto Warminster's [Brecevich's] property, unanimously modified, on the law, to deny plaintiff's cross motion as to the first cause of action and to vacate the declaration upon the second, and otherwise affirmed, without costs.

Plaintiff failed to establish prima facie there ever was "a unity and subsequent separation of title" to its property and Brecevich's property, a prerequisite to its claim of an easement by necessity in the gate in the wall between the two properties (*see Simone v Heidelberg*, 9 NY3d 177, 182 [2007]). As to its claimed entitlement to an easement by prescription, even if plaintiff made a prima facie showing that it used the gate openly, notoriously, continuously for the statutory period, and adversely to Brecevich's interests, Brecevich raised a triable issue of fact through his affidavit stating that plaintiff had never used the gate, that the gate was always padlocked, and that only he had a key (*see Jhae Mook Chung v Maxam Props., LLC*, 73 AD3d 505 [2010]).

The motion court properly determined that the New York City Department of Parks and Recreation, which owns property adjacent to plaintiff's property, is not a necessary party to this action (*see* CPLR 1001; *Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 819-821 [2003], *cert denied* 540 US 1017 [2003]).

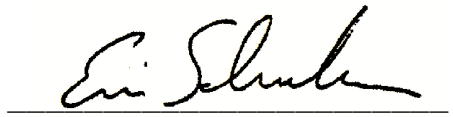
Since the issue is whether plaintiff has an easement in the gate in the wall between its property and Brecevich's property, plaintiff can be afforded complete relief without the participation of the Parks Department, and the Parks Department will not be affected by a judgment in this action.

The court also properly declined to dismiss Warminster's cross claim (*see Whitney v Whitney*, 57 NY2d 731 [1982]). At the time that defendants Brija and Brecevich moved to dismiss, Warminster had not submitted an answer in the prior action against it and thus had not asserted any counterclaim. Moreover, the court properly directed the parties to advise it of any decisions in the prior action that might affect the cross claim in this action.

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

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5620 & M-4096 The People of the State of New York, Respondent,

Ind. 309/99

-against-

Jason Phelps, also known as Michael McKinney, Defendant-Appellant.

_____

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

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

_____

Appeal from order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about June 29, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed, as moot.

This appeal is moot because Supreme Court has granted defendant's renewed motion for resentencing.

M-4096 - Motion to dismiss appeal as moot granted.

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5622 The People of the State of New York, Respondent,

-against-

Robert Sullivan, Defendant-Appellant.

Ind. 2415/03
3338/03
3340/03
3341/03
3342/03

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about March 2, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court met its obligation to offer defendant an opportunity for a hearing when defendant was twice "brought before the court and given an opportunity to be heard" (*see People v Anonymous*, 85 AD3d 414 [2011]). In any event, defendant, in his belated request for a hearing, failed to identify any disputed factual issue that would have required an evidentiary hearing (*see People v Alaouie*, 86 AD3d 462 [2011]).

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion, given defendant's egregious criminal history, including his repeated commission of new crimes upon his release from custody (*see e.g.*

People v Soler, 45 AD3d 499 [2007], *lv denied* 9 NY3d 1009 [2007]).

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5623 The People of the State of New York, Respondent, Ind. 3177/09

-against-

Donald Middleton, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Analisa Torres, J.), rendered on or about February 3, 2010, unanimously affirmed.

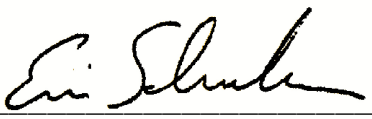
Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5624 Denise Schulman, Index 15120/07
Plaintiff-Respondent,

-against-

34th Street Partnership, Inc.,
Defendant-Appellant.

_____

Hoey, King, Epstein, Prezioso & Marquez, New York (Gregory Walthall of counsel), for appellant.

Peña & Kahn PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered January 3, 2011, which, in this action for personal injuries allegedly sustained when plaintiff tripped and fell due to a height differential in the sidewalk, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish its entitlement to judgment as a matter of law. The evidence, including that several years earlier defendant, as part of a business improvement district project, had the granite cornerstones installed on the sidewalk where plaintiff fell, was insufficient to show that defendant did not cause or create the dangerous and defective condition existing at the time of the accident (*see Lebron v Napa Realty Corp.*, 65 AD3d 436 [2009]).

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: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5625 The People of the State of New York, Respondent, Ind. 1937/92

-against-

Eric Spivey, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about February 9, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly imposed a presumptive override to risk level three, since defendant's commission of robbery in the first degree four years after his release on parole in connection with his sex offense conviction constituted "a recent threat to reoffend by committing a sexual or violent crime" (*see*

People v Woods, 45 AD3d 408 [2007], *lv denied* 10 NY3d 704 [2008]).

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

ENTERED: OCTOBER 4, 2011

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5627 In re Chartasia Delores H.,

A Dependent Child Under the Age
of Eighteen years, etc.,

Charles H.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 14, 2010, which, upon a fact-finding that respondent father had abandoned the subject child, terminated respondent's parental rights and committed custody and guardianship of the child to the petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the court's finding that respondent abandoned the subject child (*see* Social Services Law § 384-b[4][b]; [5]; *Matter of Annette B.*, 4 NY3d 509, 513-514 [2005]). Respondent admitted that he did not have any

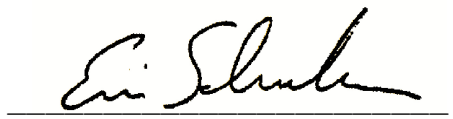
contact with the child, agency or court during the six-month period prior to the filing of the petition to terminate his parental rights (*see Annette B.*, 4 NY3d at 514; *Matter of Shavenon Edwin N. [Francisco N.]*), 84 AD3d 444, 444 [2011]). Under the circumstances, the father's subjective intent not to abandon the child does not preclude a determination that he abandoned the child (*see* Social Services Law § 384-b[5][b]). Moreover, no showing of diligent efforts by the agency to encourage the father's relationship with the child is necessary (*see id.*). The father's incarceration does not excuse his failure to maintain contact with the child (*see Annette B.*, 4 NY3d at 514). The agency's alleged failure to give the father notice that the child was placed in foster care is also insufficient to demonstrate that it was not feasible for him to contact the child (*see id.* at 514-515; *Matter of Ateshia Diamond W.*, 194 AD2d 367, 367-368 [1993]).

A preponderance of the evidence supports the court's determination that the child's best interests would be served by terminating the father's parental rights so as to free the child for adoption by her foster mother (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The father's prison sentence will not be complete until the child is an adult. In addition, the father's mother, who also sought custody of the child, expressed

reservations about her ability to care for the child. By contrast, the foster mother, with whom the child has resided for several years, is eager to adopt the child and has provided a stable and loving foster home in which the child has thrived.

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

ENTERED: OCTOBER 4, 2011



DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5628 The People of the State of New York, Ind. 29/08
Respondent,

-against-

Edgar Valette,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Richard D. Carruthers, J. at jury trial and sentencing), rendered January 28, 2009, convicting defendant of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of marijuana in the fourth degree and criminally using drug paraphernalia in the second degree (two counts), and sentencing him, as a second felony drug offender, to an aggregate term of 9 years, unanimously affirmed.

The court properly denied defendant's suppression motion. During a lawful car stop, the police detected the odor of marijuana emanating from the vehicle; moreover, defendant admitted that he and the codefendant had been smoking marijuana.

Accordingly, the police clearly had probable cause to search the vehicle under the automobile exception, and this included a search of the trunk (*see United States v Ross*, 456 US 798, 825 [1982]; *People v Langen*, 60 NY2d 170, 180-182 [1983], *cert denied* 465 US 1028 [1984]; *People v Hughes*, 68 AD3d 894 [2009], *lv denied* 14 NY3d 841 [2010]). Furthermore, the evidence sufficiently established the officers' familiarity with the smell of marijuana.

The court properly precluded defendant from introducing evidence that the codefendant told an officer that "everything in the trunk was his." This statement was not admissible as a declaration against penal interest (*see People v Settles*, 46 NY2d 154, 167-170 [1978]). Defendant failed to demonstrate that the codefendant, who had already pleaded guilty and been sentenced, still intended to invoke his Fifth Amendment privilege or was otherwise unavailable. Instead, defense counsel simply said she did not wish to call the codefendant. Furthermore, to the extent the statement asserted the codefendant's exclusive possession of the contraband, it did not bear sufficient indicia of reliability, particularly given the codefendant's sworn statement at his plea proceeding that he and defendant jointly possessed the drugs and weapon. Although defendant also sought to introduce the statement for a purpose

other than for its truth, he did not establish that it was relevant to impeach the credibility of the officer in question. Since this evidence was neither reliable nor critical to establish defendant's defense, there is no merit to defendant's argument that he was constitutionally entitled to introduce it (*see Chambers v Mississippi*, 410 US 284 [1973]; *People v Robinson*, 89 NY2d 648, 654 [1997]; *People v Burns*, 18 AD3d 397 [2005], *affd* 6 NY3d 793 [2006]).

Although defendant also sought to introduce a different statement, made by the codefendant to another officer, he did not present any of his current arguments for admissibility. Accordingly, those arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits for all of the same reasons that apply to the previously-discussed statement.

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

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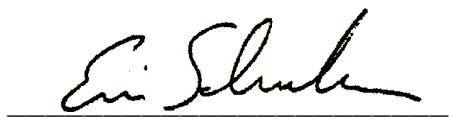

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Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5629N & M-3999 M-4109 Ning-Yen Yao, Plaintiff-Respondent, Index 311337/07

-against-

Karen Kao Yao, Defendant-Appellant.

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Chemtob Moss Forman & Talbert, LLP, New York (Nancy Chemtob of counsel), for appellant.

Blank Rome LLP, New York (Caroline Krauss-Browne of counsel), for respondent.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered October 29, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's cross motion for an award of interim counsel fees in this divorce action and sua sponte awarded plaintiff's counsel $10,000 in attorney's fees, unanimously modified, on the law and the facts, the award of attorney's fees to plaintiff's counsel vacated, and otherwise affirmed, without costs.

The court properly denied defendant's cross motion. "While it is true that a party may be awarded interim counsel fees even when the party possesses his or her own assets, here defendant wife has made no showing at this time that [she] is unable to

meet the cost of her counsel fees" (*Fisher v Fisher*, 208 AD2d 433, 433 [1994][internal quotation marks and citations omitted]).

Although that part of the court's order that sua sponte awarded attorney's fees to plaintiff's counsel is not appealable as of right (*Unanue v Rennert*, 39 AD3d 289 [2007]), in the interest of judicial economy, we deem the notice of appeal to be a motion for leave to appeal, and grant leave (*see Kremen v Benedict P. Morelli & Assoc., P.C.*, 80 AD3d 521 [2001]).

Although a court, in its discretion, may award attorney's fees during a pendency of a matrimonial action (*see* Domestic Relations Law § 237[a]), neither plaintiff nor his counsel sought such an award. Nor does the record contain any supporting documentation or other evidence establishing services rendered, fees paid, time expenditures or other relevant information (*see Horowitz v Horowitz*, 63 AD3d 1001 [2009]; *Diamond v Diamond*, 290 AD2d 270 [2002]). While a court may, upon its own initiative, impose attorney's fees under Rule 130, here the court did not explain the reasons why the amount

awarded was appropriate (22 NYCRR 130-1.2). Accordingly, the award of attorney's fees to plaintiff's counsel is vacated.

M-3999 &
M-4109 ***Ning-Yen Yao v Karen Kao Yao***

Motion to strike portions of reply brief and cross motion to dismiss notice of motion and for other relief denied.

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

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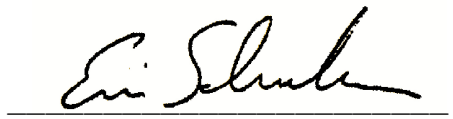

DEPUTY CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5630 The People of the State of New York, Ind. 6002/06
Respondent, 3641/09

-against-

Ian Cole,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Bruce Allen, J.), rendered on or about January 8, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

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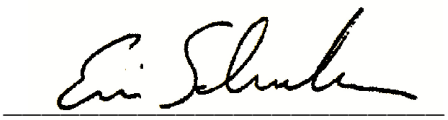

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Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.