SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 9, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Freedman, Kapnick, JJ.

12711 The People of the State of New York, Respondent, Ind. 4861/10

-against-

Michael Williams,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 2, 2012, as amended July 18, 2012, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second felony offender, to a term of six years, unanimously reversed, on the law, the conviction vacated and the indictment dismissed.

There is an indictment in the record, dated September 30, 2010 accusing defendant of second degree assault in violation of Penal Law § 120.05(1). In addition, the minutes of proceedings conducted on September 30, 2010, indicate that an indictment was served and filed with the court. However, Penal Law § 120.05(1)

requires proof that the complainant suffered a serious injury, and the parties do not dispute that the facts of this case do not support the elements of that crime.

The minutes of defendant's first trial indicate that another indictment, charging defendant with second degree assault under Penal Law § 120.05(2) was in the court's file, and was given to defense counsel. However, this indictment is no longer in the record and it is unclear when it was filed with the court. Penal Law § 120.05(2) criminalizes assault with a dangerous instrument, and the defendant was convicted of this crime. The origin of the Penal Law § 120.05(2) indictment would be within the unique knowledge of the People, and on the limited record before us, the People have not refuted defendant's contention that defendant was convicted under an indictment that was not properly considered and voted by a grand jury (*see People v Perez*, 83 NY2d 269 [1994]). Accordingly, we are constrained to reverse defendant's conviction, and dismiss the indictment, without prejudice to re-presentation to a new grand jury.

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13159 In re Autumn P.,

A Child Under the Age of
Eighteen Years, etc.,

Brandy P.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 30, 2013, which, following a hearing, determined that respondent father derivatively neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding of derivative neglect. Although respondent completed batterers' services pursuant to an order of disposition issued in 2010, after a finding that he neglected the subject child's older sister by committing an act of domestic violence against the mother in the presence of that child, the record supports the

findings that in January and March 2012, respondent committed additional acts of domestic violence against the mother of his children, including an incident that resulted in respondent pleading guilty to a charge of menacing. Based on these incidents of domestic violence, the record supports the finding that respondent suffers from an impaired level of parental judgment sufficient to create a substantial risk of harm to any child in his care (*see Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566, 567 [1st Dept 2013]). That the subject child was not present when respondent abused the mother does not preclude a finding of derivative neglect (*see Matter of Joseph P. [Cindy H.]*, 112 AD3d 553, 553-554 [1st Dept 2013]).

Contrary to respondent's argument, neither res judicata nor collateral estoppel precludes litigation of the allegations of derivative neglect in the subject petition. Although a prior petition against respondent alleging derivative neglect of the subject child was dismissed, that petition was filed in December 2011, prior to the incidents of domestic violence and the guilty plea noted above. Thus, they were not included in that petition and were not previously litigated (*see In re Stephiana UU.*, 66 AD3d 1160 [3d Dept 2009]; *Matter of Mercedes R.*, 300 AD2d 664 [2d

Dept 2002]). Although respondent asserts that the agency should have amended the prior petition to include the subsequent incidents, it was not required to do so.

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13160 The People of the State of New York, SCI 1090/11
Respondent,

-against-

Travis Wright,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Eugene Oliver, J. at sentencing), rendered on or about April 26, 2012,

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

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

ENTERED: OCTOBER 9, 2014

CLERK

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

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13161 The People of the State of New York, Respondent, Ind. 4600/10

-against-

Robin Singer, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 15, 2011, convicting defendant, after a jury trial, of criminal trespass in the second degree, and sentencing her to a term of one year, 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. Defendant's lack of a license to enter the apartment where her estranged niece resided, and defendant's knowledge that her entry was unlawful, were established by both the niece's testimony that she never gave defendant permission to enter and by the totality of the circumstances (*see People v Jackson*, 118 AD3d 635 [1st Dept 2014]*; People v Midgette*, 115 AD3d 603, 604 [1st Dept 2014], *lv*

denied 23 NY3d 965 [2014]). These circumstances included defendant's estrangement from her niece (*see People v Schneiderman*, 295 AD2d 137, 139 [1st Dept 2002], *lv dismissed* 98 NY2d 702 [2002]), the deception defendant used to gain access by conveying the impression to building personnel that she was a resident of the apartment (*see People v Aaron*, 233 AD2d 231 [1st Dept 1996], *lv denied* 89 NY2d 983 [1997]), the unusual hour and egregious circumstances of the entry (*see People v White*, 276 AD2d 287 [1st Dept 2000], *lv denied* 96 NY2d 740 [2001]) and defendant's statements evincing her knowledge that her entry was unlawful and her consciousness of guilt (*see Jackson*, 118 AD3d at 636).

Since defendant never alerted the court to the specific claim she raises on appeal, defendant's challenge to the prosecutor's summation is unpreserved (*see People v Romero*, 7 NY3d 911 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. By referring to the niece as the "tenant" of the apartment, the prosecutor did not act as an unsworn expert witness regarding the niece's right to occupy the apartment. Instead, the prosecutor used the term colloquially and not in a

technical legal sense (*see People v Martinez*, 95 AD3d 462 [1st Dept 2012], *lv denied* 19 NY3d 975 [2012]). In any event, the prosecutor's conduct did not deprive defendant of a fair trial.

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13162 In re Dallas C.,
Petitioner-Appellant,

-against-

Katrina J.,
Respondent-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

_____

Appeal from order, Family Court, New York County (Douglas E. Hoffman, J.) entered on or about March 16, 2012, which, to the extent appealed from as limited by the brief, denied petitioner's objections to an order of the Support Magistrate, dated November 29, 2011, declining to make downward modification of support payments retroactive, unanimously dismissed, without costs.

Petitioner's objections, which were denied by the court on the ground that he failed to file proof of service of a copy of the objections on respondent mother, are not reviewable on appeal (*see* Family Court Act § 439(e). Failure to file proof of service of a copy of the objections on respondent, a condition precedent to filing timely written objections to the Support Magistrate's order, is a failure to exhaust the Family Court procedure for review of the objections. Accordingly, the Family Court lacked jurisdiction to consider the merits of the objections and

petitioner waived his right to appellate review (*see Hamilton v Hamilton*, 112 AD3d 715, 716 [2d Dept 2013]).

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

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13163 The People of the State of New York, Ind. 3175/08
Respondent,

-against-

Carlos Rodriguez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Efrain Alvarado, J.), rendered on or about October 21, 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 [1st Dept 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 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13166 TIMAC Realty, Index 652370/11
Plaintiff-Appellant,

-against-

G&E Tremont LLC,
Defendant,

Commonwealth Land Title
Insurance Company, et al.,
Defendants-Respondents.

_____

Kordas & Marinis, LLP, Long Island City (Isidoros Ross Kordas of counsel), for appellant.

Fidelity National Law Group, New York (Paul Kleidman of counsel), for Commonwealth Land Title Insurance Company, respondent.

Law Office of Lawrence W. Boes, Westbury (Lawrence W. Boes of counsel), for Kensington Title Agency LLC and Kensington Vanguard National Land Services, LLC, respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered April 1, 2013, which granted defendant Commonwealth Land Title Insurance Company's and defendants Kensington Title Agency LLC and Kensington Vanguard National Land Services, LLC's motions to dismiss the complaint as against them, unanimously affirmed, with costs.

The complaint alleges that defendants failed to indemnify and reimburse plaintiff, pursuant to a title insurance policy, for charges on a water meter not disclosed in the title report. However, the policy excepts from coverage liability for "water

rates ... which are not shown as existing liens by the public record," and records of the New York City Department of Environmental Protection show that the subject water charges were not reflected in its records until February 28, 2006, after the insurance policy was issued and after plaintiff closed on the property. This documentary evidence establishes a conclusive defense to this cause of action as a matter of law (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-271 [1st Dept 2004]). That the water charges arose from use predating the closing is immaterial (*see Giacalone v City of New York*, 104 Misc 2d 405 [Sup Ct, Queens County 1980]; *see also Metropolitan Life Ins. Co. v Union Trust Co.*, 283 NY 33 [1940]).

Plaintiff's claim that defendants breached their contractual obligations under the title report by providing a negligent survey is conclusively refuted by the title report, which states, "This certificate shall be null and void ... upon the delivery of the policy" (*see Citibank v Chicago Tit. Ins. Co.*, 214 AD2d 212, 217 [1st Dept 1995], *lv dismissed* 87 NY2d 896 [1995]).

Further, title reports function to apprise title insurers of defects in title; they do not serve to warn prospective purchasers of every risk facing the property (*see id.* at 219). If plaintiff relied on the title report for a list of water

meters on the property, it did so at its own risk (*see id.*). Moreover, plaintiff's attorney stated in an affidavit that he expressed concern about protecting plaintiff against unpaid water charges, but never finalized a new agreement, instead accepting the "assurances of Kensington's representative at the Closing," and that "plaintiff eventually acquiesced to proceed with the Closing."

In view of the foregoing, the cause of action seeking to recover the interest levied on the subject water charges must also be dismissed.

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

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13167 In re East 51st Street Crane Collapse Litigation — Index 769000/08, 150063/10

- - - - -

East 51st Street Development Company, LLC, et al.,
Plaintiffs,

-against-

Lincoln General Insurance Company,
Defendant-Respondent,

Axis Surplus Insurance Company, et al.,
Defendants,

Interstate Fire and Casualty Company,
Defendant-Appellant.

_____

Lawrence, Worden, Rainis & Bard, P.C., Melville (Roger B. Lawrence of counsel), for appellant.

Ruberry Stalmack & Garvey LLC, Chicago, IL (Richard M. Kuntz of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 4, 2013, which granted the motion of defendant Lincoln General Insurance Company (Lincoln) for leave to amend its answer and cross claim against defendant Interstate Fire and Casualty Company (Interstate), unanimously affirmed, with costs.

The motion was properly granted as Lincoln's proposed amended answer and cross claim was not "palpably insufficient or patently devoid of merit" (*MBIA Ins. Corp. v Greystone & Co.*,

Inc., 74 AD3d 499, 499 [1st Dept 2010]). Contrary to Interstate's contention that this Court declared in its February 5, 2013 order that Interstate has no obligation to pay any costs incurred in the defense of plaintiff East 51st Development Company LLC in underlying litigation and dismissed Lincoln's cross claim against Interstate seeking to recover such costs, this Court explicitly held that the Lincoln and Interstate policies are both primary and refused to dismiss Lincoln's cross claim against Interstate seeking to recover costs incurred in the defense of plaintiff (*see Matter of East 51st St. Crane Collapse Litig.*, 103 AD3d 401, 402 [1st Dept 2013]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13168 The People of the State of New York, Ind. 2614/12
Respondent,

-against-

Kevin Rosado,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered January 10, 2013, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of two years, with three years' postrelease supervision, unanimously affirmed.

We conclude that the court did not abuse its discretion in denying defendant's request for youthful offender treatment. We also perceive no reason to reduce the term of postrelease supervision.

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13169-
13170 Paul Kleinberg, et al.,
Plaintiffs,

Index 109371/09
591008/09
590362/10

-against-

516 West 19th LLC, et al.,
Defendants,

The J Construction Company, LLC,
Defendant-Appellant.

- - - - -

[A Third-Party Action]

- - - - -

The J Construction Company, LLC,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Interstate Industrial Corp., et al.,
Third-Party Defendants,

Delta Testing Laboratories Inc.,
Third-Party Defendant-Appellant,

JAM Consultants Inc.,
Third-Party Defendant-Respondent.

_____

Nesenoff & Miltenberg, LLP, New York (Robert D. Werth of counsel), for The J Construction Company, LLC, appellant/appellant-respondent.

Litchfield Cavo LLP, New York (Joseph E. Boury of counsel), for Delta Testing Laboratories Inc., appellant.

Zeichner Ellman & Krause LLP, New York (Greg Michael Bernhard of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about January 27, 2012, which, to the extent

appealed from as limited by the briefs, granted the cross motion of third-party defendant JAM Consultants Inc. for summary judgment dismissing the third-party complaint of defendant/third-party plaintiff The J Construction Company, LLC (J Con) as against it, denied the cross motion of J Con to amend its pleadings against JAM, and denied the cross motion of third-party defendant Delta Testing Laboratories, Inc. to the extent it sought summary judgment dismissing J Con's claim for breach of contract against Delta, without limiting the measure of damages on that claim, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 4, 2014, which denied Delta's motion for reargument, unanimously dismissed, without costs, as nonappealable.

Given the lack of a contract between J Con and JAM, the court properly dismissed J Con's contractual claims. J Con's claim for contribution was also properly dismissed, since contribution is unavailable where, as here, the underlying contractual claims seek purely economic damages (*see* CPLR 1401; *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 323 [1st Dept 2009]).

The court properly refused to permit J Con to amend its pleadings to assert claims of negligence and professional malpractice against JAM, in addition to its claim of breach of

implied warranty, since the proposed third-party complaint fails to adequately allege facts upon which the functional equivalent of privity can be found (*see Beck v Studio Kenji, Ltd.*, 90 AD3d 462, 462-463 [1st Dept 2011]).

We decline to reach Delta's argument that the court failed to limit its damages to the cost of its contract, as it never raised the issue in its original motion (*see Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [1st Dept 2011]). Further, no appeal lies from the denial of Delta's motion to reargue (*see Healthworld Corp. v Gottlieb*, 12 AD3d 278, 279 [1st Dept 2004]).

We have considered the appealing parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13171 The People of the State of New York, Ind. 6527/10
Respondent,

-against-

Melvin Johnson,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about March 15, 2011, 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 [1st Dept 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 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13172 The People of the State of New York, Respondent, Ind. 2503/10

-against-

James Margulies, Defendant-Appellant.

_____

Robert DiDio & Associates, Kew Gardens (Danielle Muscatello of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 9, 2011, as amended October 11, 2011, convicting defendant, after a jury trial, of grand larceny in the first degree (two counts), scheme to defraud in the first degree, violations of General Business Law § 352-c(5) and (6), conspiracy in the fourth degree, and falsifying business records in the first degree (24 counts), and sentencing him to an aggregate term of 7 to 21 years, with restitution in the amount of $7 million, unanimously affirmed.

The trial court properly exercised its discretion in denying defendant's request for a further adjournment of the trial for the purpose of trial preparation (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]; *People v Arroyave*, 49 NY2d 264, 271 [1980]). Although there were voluminous discovery materials,

defense counsel had already received sufficient time to review them. We also note that defendant was represented at trial by a team of three lawyers. Furthermore, the People made a showing of potential prejudice to their case if the court were to grant the requested adjournment. There is nothing in the record to suggest that the court's denial of the adjournment deprived defendant of a fair trial or affected the outcome.

On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown "the absence of strategic or other legitimate explanations" for the challenged aspects of counsel's performance (*People v Rivera*, 71 NY2d 705, 709 [1988]), or that these alleged deficiencies deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice, particularly in light of the overwhelming evidence of guilt.

The evidence established the geographic jurisdiction of New York State and New York County over each of the offenses, based on defendant's acts and those of his accomplice, notwithstanding that defendant was physically located in Ohio during most of the events in question (*see People v Carvajal*, 6 NY3d 305, 313

[2005]; *People v Kassebaum*, 95 NY2d 611, 620 [2001], *cert denied* 532 US 1069 [2001]). The evidence established that defendant and his accomplice controlled a Manhattan-based company, and stole millions of dollars from it through illegal stock transactions. Among other things, the accomplice falsely represented the status of the company in a New York presentation, in press releases issued in New York, and in public filings. Defendant also wired illegally obtained funds into banks in New York, sent fraudulent documents to the accomplice in New York, and communicated with him in New York numerous times.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the convictions of falsifying business records (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). With regard to each document, the evidence established all of the elements of the crime (*see* Penal Law § 175.10), including the requirement that the false documents were actually

business records (*see People v Bloomfield*, 6 NY3d 167, 171 [2006]).

We have considered defendant's remaining claims, and find that none of them warrant reversal.

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13175 The People of the State of New York, Respondent, Ind. 2452/10

-against-

Michael Pratt, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about December 13, 2011, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Since defendant never objected to his designation as a sexually violent offender, which was based on his underlying conviction for sexual abuse in the first degree, his present challenge to that designation is unpreserved (*see People v Gillotti*, __NY3d__, 2014 NY Slip Op 04117, *11, n 5 [2014] [and cases cited therein]), and we decline to review it in the interest of justice. Accordingly, on this appeal, we need not decide whether a court has discretion regarding a sexually violent offender designation.

The balance of the order on appeal adjudicates defendant a level one offender. As defendant does not dispute, he qualifies as a level one offender regardless of the number of points assessed by the court. Nevertheless, he asks this Court to adjust his point score to eliminate certain points that he claims were improperly assessed. "We find no basis for such relief, because the contested points were not essential to the court's determination and do not affect the validity of the order on appeal" (*People v Lucas*, 118 AD3d 415, 416 [1st Dept 2014]). "[T]he concept of aggrievement is about whether relief was granted or withheld, and not about the reasons therefor" (*Mixon v TBV, Inc.*, 76 AD3d 144, 149 [2d Dept 2010]). Defendant's claim that his point score might potentially prejudice him rests on speculation. In any event, we find that the contested points were properly assessed (*see People v Mingo*, 12 NY3d 563, 572-574, 576-577 [2009]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13176 In re Diane T.,
Petitioner-Appellant,

-against-

Lydia Tamelka T., et al.,
Respondents-Respondents.

_____

Larry S. Bachner, Jamaica, for appellant.

Douglas H. Reiniger, New York, for Lydia Tamelka T., respondent.

Steven N. Feinman, White Plains, for Shaw Michael N., respondent.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for municipal respondent.

_____

Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about February 27, 2013, which, after a hearing, dismissed petitioner grandmother's article 6 petition for visitation of the subject children, unanimously affirmed, without costs.

Initially, we reject petitioner' contention that she had a right to assigned counsel pursuant to Family Ct Act § 262 (*see Matter of Randolph W. v Commissioner of Social Servs.*, 105 AD3d 414 [1st Dept 2013], *lv dismissed* 21 NY3d 1034 [2013]).

Petitioner failed to demonstrate that she had standing to pursue visitation, or that visitation would be in the subject children's best interests (*see* Domestic Relations Law § 72[1];

Matter of E.S. v P.D., 8 NY3d 150, 157 [2007]). Petitioner visited the subject children twice after their births, and was unable to demonstrate a sufficient existing relationship with them. She also failed to show that conditions exist where "equity would see fit to intervene" (Domestic Relations Law § 72[1]; *see Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182-183 [1991]).

Even assuming petitioner had standing, the evidence shows that the Family Court properly determined that the children's best interests would be served by denying the petition, particularly as petitioner lacked any meaningful relationship with the children (*see Matter of Wilson v McGlinchey*, 2 NY3d 375, 380 [2004]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Gonzalez, P.J., Saxe, Richter, Clark, JJ.

13177 In re Joseph Modlin, Index 103427/12
Petitioner,

-against-

Raymond Kelly, etc., et al.,
Respondents.

_____

Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Keith M. Snow of counsel), for respondent.

_____

Determination of respondent Board of Trustees, dated May 10, 2012, denying petitioner's application for accidental disability retirement benefits, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Eileen A. Rakower, J.], entered February 11, 2013), dismissed, without costs.

This proceeding was improperly transferred to this Court because the determination was not made pursuant to an administrative hearing. However, in the interest of judicial economy, we address the merits of the petition (*see e.g. Matter of DeMonico v Kelly*, 49 AD3d 265 [1st Dept 2008]).

Respondents overcame the Heart Bill presumption of General Municipal Law § 207-k based on the Medical Board's opinion that

petitioner's obstructive hypertrophic cardiomyopathy was a genetic disorder, and not stress-related. The Medical Board reviewed petitioner's medical records, noting that he had no history of severe hypertension, and that the echocardiogram finding of left ventricular outflow tract obstruction as well as the suspicion of a systolic anterior motion of the mitral valve and mitral regurgitation, were consistent with its diagnosis, and were not found in hypertensive left ventricular hypertrophy that resulted from hypertension. Contrary to petitioner's contention, the Medical Board's report on remand was detailed and specific and addressed the conflicting conclusions of petitioner's doctors.

Accordingly, based on the evidence cited by the Medical Board and its medical judgment, it cannot be said as a matter of law that petitioner's disability was the result of job-related stress, rather than a genetic disorder *(see Matter of Goodacre v*

Kelly, 96 AD3d 625 [1st Dept 2012], *lv denied* 20 NY3d 860 [2013]; *Matter of Higgins v Kelly*, 84 AD3d 520 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11300 The People of the State of New York, Ind. 1378/96
Appellant,

-against-

Edwin Quezada,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for appellant.

Ross & Asmar LLC, New York (Steven Ross of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Denis J. Boyle, J.), entered on or about January 17, 2013, which granted defendant's CPL 440.10 motion to vacate a judgment of conviction rendered November 18, 1997, unanimously reversed, on the law, and the judgment reinstated.

The judgment of conviction was vacated under *Padilla v Kentucky* (559 US 356 [2010]). However, it has since been decided that the rule announced in *Padilla* will not be accorded retroactive application in this state to cases which became final

on direct review prior to the Supreme Court's decision (*People v Baret*, 23 NY3d 777 [2014]). Accordingly, we reverse the order granting defendant's CPL 440.10 application and reinstate the judgment.

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

ENTERED: OCTOBER 9, 2014

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

13017 Vanessa DiPini, Index 305655/11
Plaintiff-Appellant,

-against-

381 E. 160 Equities LLC, also known as
563-569 Cauldwell Realty LLC,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Rubin, Fiorella & Friedman LLP, New York (Stewart B. Greenspan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 31, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was allegedly injured when she fell down a flight of stairs in defendant's apartment building. She alleges that the accident was caused by a loose handrail that she was holding while descending the stairs. The looseness of the handrail was confirmed by the deposition of defendant's superintendent who checked it shortly after plaintiff was injured. Defendant failed to satisfy its initial burden of establishing a lack of notice of the defect inasmuch as it offered no testimony as to when the admittedly loose handrail was last inspected or repaired prior to

the accident (*see e.g. Moore v 793-797 Garden St. Hous. Dev. Corp.*, 46 AD3d 382 [1st Dept 2007]). We nonetheless reject plaintiff's other theory that the allegedly worn marble tread on the stairway constituted an actionable defective condition (*see Sims v 3349 Hull Ave. Realty Co. LLC*, 106 AD3d 466, 467 [1st Dept 2013]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13136 The People of the State of New York, Respondent, Ind. 1954/08

-against-

Nikko Simmons, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jill K. Sanders of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about April 25, 2013, 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.

Defendant was properly assessed 30 points for being armed with a dangerous instrument at the time of the underlying sex crime (*see People v Pettigrew*, 14 NY3d 406, 408-409 [2010]). Defendant's other challenges to the court's assessment of points are unavailing, except that we find that the assessment for defendant's criminal history should have been 15 points. In any event, the record supports the court's alternative finding that even if defendant's point score was only at level two, a discretionary upward departure was warranted, particularly in

light of the heinous nature of the underlying crime *(see e.g. People v Guasp*, 95 AD3d 608 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]). Likewise, the court properly exercised its discretion when it declined to grant a downward departure.

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13137 In re Pierino Anastasio, Index 101014/11
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel) for appellant.

Zachary W. Carter, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered May 7, 2013, which denied the petition to annul respondents' determination, dated October 14, 2010, denying petitioner's application for World Trade Center (WTC) accidental disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner challenges respondents' determination that he did not establish that his disabling condition, chronic fatigue syndrome (CFS), is a "qualifying physical condition," as defined by Retirement and Social Security Law § 2(36)(c)(v). Although petitioner's physicians opined that his CFS, which was diagnosed in about 2007, was related to his WTC exposure, credible evidence supports respondents' conclusion that it was causally related to

two other physical conditions, mononucleosis and an acute viral infection caused by the Epstein-Barr virus, both unrelated to his WTC exposure (*see* Administrative Code of City of NY § 13-252.1[1][a]; *Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268 [2012]; *Matter of Quinn v Kelly*, 92 AD3d 589 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; *see also Matter of Brennan v Kelly*, 111 AD3d 407 [1st Dept 2013], *lv denied* __NY3d__ , 2014 NY Slip Op 76669 [2014]). Furthermore, even assuming that petitioner's condition was considered a "qualifying" condition, the evidence supports the finding that his past viral infections were sufficient to rebut any presumption of causation.

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

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Gische, Kapnick, JJ.

13138 In re Delybe C., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Sonia S.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Carol Kahn, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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

_____

Order, Family Court, New York County (Douglas E. Hoffman, J., pursuant to CPLR 9002, upon a decision by Jody Adams, J.), entered on or about August 8, 2013, which denied respondent mother/grandmother's motion to vacate an order of fact-finding entered upon her default, which determined that she had neglected the subject children, unanimously affirmed, without costs.

Regardless of whether respondent failed to provide a reasonable excuse for her default, she failed to set forth a meritorious defense to the neglect petition (*see* CPLR 5015[a]; *Matter of Samuel V.S. [Shamea L.]*, 89 AD3d 566, 567 [1st Dept 2011]). Petitioner agency demonstrated by a preponderance of the

evidence that the children's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of respondent's long-standing untreated mental illness (Family Ct Act § 1012[f][i][B]). The record shows that respondent resisted treatment, despite attempting suicide a month before the filing of the neglect petition, and that she continued to have suicidal thoughts until her involuntary hospitalization (*see Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 937 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). Further, there was evidence that respondent repeatedly left her young grandson in the house without appropriate supervision, and was unable or unwilling to provide appropriate guardianship for her teenage daughter, who has now reached the age of majority. Respondent's contention that she was actively planning for the children's safety before she was admitted to the hospital is insufficient because it rests solely upon her counsel's affirmation (*see Matter of Samuel V.S.*, 89 AD3d at 567).

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13139 The People of the State of New York, Ind. 5298/11
Respondent,

-against-

Damaryliz Gutierrez,
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 (Yuval Simchi-Levi 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 (Thomas Farber, J.), rendered on or about May 1, 2012,

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

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

ENTERED: OCTOBER 9, 2014

CLERK

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

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13142 The People of the State of New York, Ind. 1110/12
Respondent,

-against-

Selwin Wilkes,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Edward J. McLaughlin, J.), rendered on or about January 17, 2013,

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

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

ENTERED: OCTOBER 9, 2014

CLERK

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

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13144 Kenny Mason, Index 102068/10
Plaintiff-Respondent, 590356/10
590741/10

-against-

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

Enviro & Demo Masters, Inc.,
Defendant-Appellant.

- - - - -

WGHA Harriet Tubman Apartments
Housing Development Fund Corp.,
Third-Party Plaintiff-Respondent,

-against-

Enviro & Demo Masters, Inc.,
Third-Party Defendant-Appellant.

[And A Second Third-Party Action]

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler and Dawn C. DeSimone of counsel), for appellant.

Law Offices of Michael S. Lamonsoff, PLLC, New York (Joseph E. Gorczyca of counsel), for Kenny Mason, respondent.

Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP, Melville (Elizabeth Gelfand Kastner of counsel), for The City of New York, The New York City Department of Housing Preservation and Development, WGHA Harriet Tubman Apartments Housing Development Fund Corp., and SP Contractors of New York, Inc., respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 9, 2013, which denied defendant/third-party defendant-appellant Enviro & Demo Masters, Inc.'s (Enviro) motion for summary judgment dismissing all claims and cross

claims asserted against it, unanimously affirmed, without costs.

Enviro's motion for summary judgment is premature, given that the issues raised require further discovery, which has not yet been completed (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 506 [1993]; *Blech v West Park Presbyt. Church*, 97 AD3d 443, 443 [1st Dept 2012]). In any event, the submissions raise triable issues of fact, precluding summary judgment.

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13146 The People of the State of New York, Ind. 1694/01
Respondent,

-against-

Anthony Hill,
Defendant-Appellant.

_____

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

Anthony Hill, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered June 1, 2009, convicting defendant, after a jury trial, of rape in the first degree (three counts), rape in the second degree, rape in the third degree (two counts), sodomy in the first degree (five counts), sodomy in the second degree (two counts), sodomy in the third degree (three counts), sexual abuse in the first degree (three counts), assault in the second degree, assault in the third degree (two counts), and endangering the welfare of a child, and sentencing him to an aggregate term of 185 5/6 years, unanimously affirmed.

The evidentiary rulings challenged on appeal were proper exercises of discretion, and in each instance the probative value of the evidence exceeded any prejudicial effect. Uncharged

violent acts committed by defendant in the victim's presence were properly admitted to establish the victim's fear of defendant as relevant to both the element of forcible compulsion and her delay in reporting defendant's criminal conduct against her (*see People v Bassett*, 55 AD3d 1434, 1436 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]). The victim's characterization of the manner in which defendant wielded a stick during the incident of second-degree assault appropriately conveyed the victim's impression, and did not constitute improper opinion testimony on the ultimate question of whether defendant intended to cause physical injury. The victim's testimony about her psychological condition at the time of trial was directly relevant to rebut defense attacks on her credibility. To the extent any of these evidentiary rulings could be viewed as erroneous, we find the error to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Smith*, 18 NY3d 588, 593-594 [2012]). The ruling placed appropriate limitations on the scope of the People's inquiry into defendant's criminal record.

To the extent that defendant is raising constitutional claims regarding the court's evidentiary and *Sandoval* rulings, those claims are unpreserved and we decline to review them in the

interest of justice. As an alternative holding, we reject them both on the ground that defendant is essentially raising state-law issues that are not of constitutional dimension, and on the ground that these claims lack merit in any event.

Defendant did not preserve his claims that the court should have delivered an intoxication charge regarding the second-degree assault charge, and that the court should have conducted an inquiry as to a juror's purportedly potential bias, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence, which we note is capped at 50 years by operation of law.

We have considered and rejected defendant's pro se claims.

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13147 The People of the State of New York, Respondent, Ind. 3619/12

-against-

Kevin Williams, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about October 2, 2012, 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 [1st Dept 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 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13150 In re Kerry Ann P.,
Petitioner-Respondent,

-against-

Dane S.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

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

_____

Order of filiation of the Family Court, Bronx County (Peter Passidomo, J.), entered on or about July 16, 2013, which denied respondent's request for genetic marker testing and declared him to be the father of the subject child, Kymanie S., unanimously affirmed, without costs.

The evidence supports the Family Court's finding that the presumption of legitimacy was overcome based on the mother's testimony that she and her ex-husband, although still married at the time of the subject child's birth, had been separated for several years, and that she was in an exclusive sexual relationship with respondent during the relevant period prior to the child's birth (see *Matter of Bristene B.*, 102 AD3d 562 [1st Dept 2013]). The court's determination that this testimony was "credible" is entitled to great weight (*id.*).

The evidence presented at the hearing established that the six-year-old child considers respondent to be her father, she misses visiting with him, and has formed a familial bond with several of his relatives, including his two other children whom she identified as her brother and sister (*see Matter of Commissioner of Social Servs. v Victor C.*, 91 AD3d 417, 418 [1st Dept 2012]). It further established that she calls him "daddy," he introduced her to relatives as his daughter, and he did not dissuade her from forming relationships with his children and other relatives. Thus, the court properly determined that the best interests of the child require that respondent be equitably estopped from denying paternity (*see Glenda G. v Mariano M.*, 62 AD3d 536 [1st Dept 2009], *lv denied* 13 NY3d 708 [2009]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13151 The People of the State of New York, Ind. 5439/10
Respondent,

-against-

Nolan Munoz,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about April 19, 2012, 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 [1st Dept 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 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13152 The People of the State of New York, Respondent, Ind. 4266/08

-against-

Silvino Martinez, Defendant-Appellant.

_____

John R. Lewis, Sleepy Hollow, for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 20, 2010, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

Although a nurse practitioner's opinion testimony on the subject of the alleged sexual abuse exceeded the proper bounds of such testimony, the court's curative actions were sufficient to

prevent prejudice, and reversal is not warranted. There is no significant probability that, but for the improper opinion testimony, defendant would have been acquitted (*see People v Diaz*, 15 NY3d 40, 49 [2010]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13153 Dushyant Kuruwa, et al., Index 101159/13
Petitioners-Appellants,

-against-

130E. 18 Owners Corp., et al.,
Respondents,

Milton L. Meyers, et al.,
Respondents-Respondents.

_____

Dushyant Kuruwa, appellant pro se.

Monica Arguelles-Correa, appellant pro se.

Law Offices of Mitchell Troyetsky, New York (Mitchell Troyetsky of counsel), for Milton L. Meyers and Esther Altaras Meyers, respondents.

Hodgson & Russ LLP, New York (S. Robert Schrager of counsel), for M&T Bank Corporation, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Donna M. Mills, J.), entered December 13, 2013, which, to the extent appealed from as limited by the briefs, denied a petition for (1) a judgment declaring that petitioners' money judgment has a priority over respondent M&T Bank Corporation's perfected, secured interest and lien on the subject cooperative corporation's stock shares and proprietary lease; (2) a judicial sale of the Meyers respondents' cooperative apartment; and (3) damages under Judiciary Law § 487, unanimously affirmed, without costs.

The IAS court correctly found that respondent bank's perfected, secured interest in the subject property has priority over petitioners' unsecured money judgment (*see Chrysler Credit Corp. v Simchuk*, 258 AD2d 349 [1st Dept 1999]). The bank's false answers to the information subpoena, in which it denied having a mortgage on the Meyers respondents' apartment, did not prejudice petitioners; nor do they point to any detrimental reliance upon the statements (*cf. Leber-Krebs, Inc. v Capitol Records*, 779 F2d 895, 896 [2d Cir 1985]).

The court also correctly held that there could be no judicial sale of the cooperative apartment. The Meyers defendants had purchased the co-op before they were married, and they concede that they originally owned it as tenants in common (*see* EPTL 6-2.2). They refinanced the purchase money mortgage after they were married, and the bank required a name change on a newly issued stock certificate and proprietary lease. The change in title, made by the cooperative corporation, after the parties were married effectively changed ownership from tenants in common to tenants by the entirety.

The legal arguments made by the bank's counsel and the Meyerses' counsel do not give rise to claims under Judiciary Law § 487.

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13154 The People of the State of New York, Ind. 222/03
Respondent,

-against-

Robert Medina,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about March 20, 2012, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Substantial justice dictates denial of resentencing, based on consideration of all relevant facts and circumstances.

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13155 In re Delcia W.,
Petitioner-Respondent,

-against-

Carl S. W.,
Respondent-Appellant.

_____

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

Leslie S. Lowenstein, Woodmere, for respondent.

_____

Order, Family Court, New York County (Marva A. Burnett, Court Attorney Referee), entered on or about April 25, 2013, which, after a fact-finding determination that respondent committed the family offense of harassment, granted petitioner a one-year order of protection directing respondent to refrain from, inter alia, harassing or committing any criminal offense against petitioner, unanimously affirmed, without costs.

Although the allegation in the petition concerning August phone calls made by respondent father was not substantiated, a fair preponderance of the evidence supported the Family Court's finding that he committed an act on July 3, 2009 that constituted the family offense of harassment in the second degree, warranting the issuance of the order of protection (PL § 240.26[1]; Family Ct Act § 832; *see Tamara A. v Anthony Wayne S.*, 110 AD3d 560, 560

[1st Dept 2013]). There is no basis to disturb the court's credibility determinations (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]).

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

ENTERED: OCTOBER 9, 2014

CLERK

Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13156 In re Grant Springer, Index 104080/12
Petitioner-Appellant,

-against-

Board of Education of the City
School District of the City
of New York, et al.,
Respondents-Respondents.

Richard E. Casagrande, New York (Maria Elena Gonzalez of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondents.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 9, 2013, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed.

There is no question that petitioner failed to comply with the chancellor's regulations C-205(28) and C-205(29), which govern withdrawal of a resignation and restoration to tenure.[1] Hence, when petitioner was rehired by a principal, his tenure was

[1] We note that neither side has explained why petitioner could not still be restored to tenure if he followed the procedures of the chancellor's regulations.

not ipso facto restored. We reject petitioner's contention that his tenure was constructively restored by his rehiring. Accordingly, we affirm the order dismissing the petition.

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

ENTERED: OCTOBER 9, 2014

CLERK