SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 25, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

13016 In re Shayolanda M.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Karen M. Griffin of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 25, 2014, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed her with the Administration for Children's Services' Close to Home Program for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing her with the Close to

Home Program rather than ordering an adjournment in contemplation of dismissal. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant had already received an ACD and a juvenile delinquency adjudication as the result of prior arrests. Furthermore, among other things, appellant has a history of violent and aggressive behavior, she demonstrated a pattern of truancy and absconding from placement facilities, her home life was unstable and lacking proper adult supervision, and she was not compliant with regard to taking psychiatric medications.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Richter, JJ.

3829 2350 Fifth Avenue LLC, Index 113827/06
Plaintiff-Respondent,

-against-

2350 Fifth Avenue Corporation,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Edward Lehner, J.), entered on or about February 13, 2009,

And said appeal having been stayed at the call of the calendar, and correspondence from counsel having been filed on September 8, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn.

ENTERED: SEPTEMBER 25, 2014

CLERK

Tom, J.P., Friedman, Renwick, Gische, Clark, JJ.

12720 Lexington Building Co. LLC, et al.,
Plaintiffs-Respondents,
-against-

Precision Glass & Metal Works Co., Inc., et al.,
Defendants,

The Phoenix Insurance Company,
Defendant-Appellant.

Index 105971/10

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered on or about April 15, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 22, 2014,

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13015 The People of the State of New York, Ind. 53/11
Respondent,

-against-

Johnny Suarez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Richard Carruthers, J.), rendered on or about July 5, 2011,

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: SEPTEMBER 25, 2014

CLERK

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

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

13018-		Ind. 5799/01
13019-		2401/02
13020-		2402/02
13021	The People of the State of New York, Respondent,	2403/02

-against-

Ronald Scrima, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from judgments of resentence of the Supreme Court, Bronx County (William I. Mogulescu, J.), rendered on or about January 9, 2013,

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

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

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

13022-
13023 In re Marquise B.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

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

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for presentment agency.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about July 10, 2013, which denied appellant's motion to dismiss the petition; and order, same court and Judge, entered on or about September 4, 2013, which found, after a hearing, that appellant had violated the terms and conditions of his probation, vacated an order of disposition entered on or about September 6, 2012 that had placed him on probation for 18 months upon a prior violation of probation, and placed him with the Administration for Children's Services Close to Home program for a period of 12 months, unanimously affirmed, without costs.

The petition sufficiently alleged a prima facie case that appellant violated the terms and conditions of his probation (*see generally Matter of Jahron S.*, 79 NY2d 632, 639 [1992]; *see also*

Family Court Act § 360.2[2]; *Matter of Rayshawn P.*, 103 AD3d 31, 40 [1st Dept 2012]). The petition alleged that appellant failed to appear at six weekly meetings with his probation officer, and appellant received fair notice that such meetings were a condition of his probation. Attached to the petition was an order placing appellant under probation supervision and an order of conditions, which contained a written acknowledgment from appellant that he received it, and which expressly required appellant to report to his probation officer as directed as a condition of his probation. Accordingly, appellant received fair notice of this condition.

Contrary to appellant's contentions, the order of conditions merely supplemented, rather than contradicted, the order of disposition, which did not expressly list such meetings as a condition of his probation, but, consistently with the language in the order of conditions, ordered appellant to be placed under probation supervision. Thus, there is no conflict that could have deprived appellant of fair notice of the conditions of his probation. Appellant merely speculates that the court signed the

order of disposition after it signed the order of conditions. Thus, there is no merit to appellant's argument that the court intended to nullify the order of conditions.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13024 Maila Hermina et al., Index 303259/11
Plaintiffs-Appellants,

-against-

2050 Valentine Avenue LLC., et al.,
Defendants-Respondents.

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Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for appellants.

Gallo Vitucci & Klar, LLP, New York (Kimberly A. Ricciardi of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered July 1, 2013, which, in this action for personal injuries sustained when the window in plaintiff Malia Hermina's apartment suddenly fell while her hands were on the window sill, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Triable issues of fact exist as to whether defendants, the owners and managers of the building, had constructive notice of the defective condition of the window. Defendants were aware of problems with the building's windows staying in an upright position, based on the replacement of balances on a number of plaintiff's own windows, including the subject window, and on many of those elsewhere in the building prior to the accident

(*see Radnay v 1036 Park Corp.*, 17 AD3d 106, 107-108 [1st Dept 2005]; *see also Lisbey v Pel Park Realty*, 99 AD3d 637 [1st Dept 2012]).

Defendants' argument that there was no requirement to periodically inspect the window balances in the apartment, is unconvincing. Once defendants knew that an appreciable number of the windows in the building required attention, they had an obligation to inspect all of them (*see Candela v New York City Sch. Const. Auth.*, 97 AD3d 507, 511 [1st Dept 2012]).

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13026 The People of the State of New York, Ind. 2857/11
Appellant,

-against-

Demetrius Lathon,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Center For Appellate Litigation, New York (Robert S. Dean of counsel), and Kaye Scholer LLP, New York (Aaron H. Levine of counsel), for respondent.

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Order, Supreme Court, Bronx County (Darcel D. Clark, J.), entered on or about October 9, 2012, which granted defendant's CPL 30.30 motion to dismiss the indictment, unanimously reversed, on the law, the motion denied, the indictment reinstated and the matter remanded for further proceedings.

Defendant's speedy trial motion turns on the preindictment period from April 15, 2011 through August 15, 2011, during which the People were awaiting the results of DNA testing of samples taken from defendant and his codefendant pursuant to a court order. Under the circumstances of this case, this period was excludable as a "delay occasioned by exceptional circumstances" resulting from the "unavailability of evidence material to the people's case" (CPL 30.30[4][g][i]; *see People v Robinson*, 47

AD3d 847, 848 [2d Dept 2008], *lv denied* 10 NY3d 869 [2008]). The fact that the automobile presumption (Penal Law § 265.15[3]) was available to the People to establish defendant's possession of the pistol did not mean that the DNA analysis was not "material" to the People's case, since defendant had expressed his intention to testify before the grand jury for the purpose of disclaiming any connection with the pistol and rebutting the presumption (*see People v Verez*, 83 NY2d 921, 924 [1994]). Moreover, the materiality and necessity of the DNA analysis had already been determined in the court order compelling defendant and his codefendant to provide saliva samples, and defendant does not contend that the People failed to act diligently to obtain the DNA analysis.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13027-
13028-
13029 In re Mandju S.K.,

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

Aliyah B.D.,
Respondent-Appellant,

Good Shepherd Services,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Law Offices Of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

_____

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Monica Drinane, J.), entered on or about April 15, 2013, which, to the extent appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The

evidence shows that the agency made diligent efforts to strengthen the parental relationship by, among other things, providing the mother with referrals to drug treatment programs, repeatedly attempting to contact her, holding meetings with her to discuss how she could complete her service plan, encouraging her to complete the necessary services, and scheduling regular visitation between her and the child (*see Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 562-563 [1st Dept 2012]; *Matter of Jordane John C.*, 14 AD3d 407, 407-408 [1st Dept 2005]). The evidence also shows that, during the statutorily relevant time period, the mother failed to plan for the child's return, as she never completed a drug treatment program or an anger management class, even though she was aware of those requirements, and she failed to remain drug-free (*see Matter of Destiny S. [Hilda S.]*, 79 AD3d 666, 666 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]). Moreover, the mother never produced proof to support her contention that she had received the required mental health examination.

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interests of the child (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has been in a kinship foster home for over three years, since he was seven years old, and has developed

a stable and positive bond with the foster mother, who has provided excellent care and wishes to adopt him (*see Matter of Harold Ali D.-E. [Rubin Louis E.]*, 94 AD3d 449, 450 [1st Dept 2012]). A suspended judgment is unwarranted, given the mother's significant delay in addressing the problems that remained unresolved at the time of disposition, including completion of a drug treatment program (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 699 [1st Dept 2012]). Given the record before it, the Family Court properly treated the child's expressed preference to return to the mother's care as nondispositive.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13030 Marisol Santiago, Index 309204/11
Plaintiff-Respondent

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger, Uniondale (Christine Gasser of counsel), for appellant.

Burns & Harris, New York (Judith Stempler of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 3, 2013, which, to the extent appealed from as limited by the briefs, denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a tenant in a building owned by NYCHA, allegedly sustained injuries when she slipped and fell on the fourth floor landing of a stairwell in the 14-story building. NYCHA established prima facie entitlement to summary judgment through the testimony of the building's caretaker who stated that he inspected the stairwell, including the fourth floor landing, within two hours prior to plaintiff's accident and did not see any urine on the floor (*see Vilomar v 490 E. 181st St. Hous. Dev.*

Fund Corp., 50 AD3d 469 [1st Dept 2008]).

In opposition, plaintiff raised a triable issue of fact by submitting an affidavit from her neighbor stating that she observed urine on the fourth floor landing the day before plaintiff's accident and again the following morning before the accident occurred. The motion court properly considered the affidavit and plaintiff's supplemental bill of particulars. Although both were served after plaintiff filed the note of issue, the court subsequently vacated the note of issue at NYCHA's request. We reject NYCHA's contention that it is entitled to the benefit of vacating the note of issue to conduct further discovery while precluding plaintiff from engaging in further discovery.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

Corrected Order - January 21, 2015

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

13031 Fidelity National Title Insurance Company, Plaintiff,

-against-

Altshuler Shaham Provident Funds Ltd., formerly known as Perfect Provident Fund Ltd., Defendant.

- - - - -

Altshuler Shaham Provident Funds Ltd., formerly known as Perfect Provident Fund Ltd., Third-Party Plaintiff-Respondent,

-against-

Jaeckle Fleischmann & Mugel LLP, Third-Party Defendant-Appellant.

- - - - -

Perfect Provident Fund Ltd, etc., Plaintiff-Respondent,

-against-

Jaeckle Fleischmann & Mugel, LLP, Defendant-Appellant.

Index 651916/10
I-003244/10

Zdarsky, Sawicki & Agostinelli, LLP, Buffalo (Joseph E. Zdarsky of counsel), for appellant.

Milberg LLP, New York (Kent Andrew Bronson of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 21, 2013, which granted Altshuler Shaham Provident Funds Ltd.'s motion to transfer the Erie County action

to New York County, granted Altshuler's motion to consolidate the actions to the extent of consolidating the actions for discovery and other pretrial proceedings and deferring a determination as to whether to consolidate the actions for trial until after the completion of discovery and the determination of any dispositive motions, and denied Jaeckle Fleischmann & Mugel LLP's motion to dismiss the amended third-party complaint in the New York County action, unanimously reversed, on the law and the facts, with costs, Altshuler's motion to transfer and consolidate denied, and Jaeckle's motion to dismiss granted without prejudice to the continued prosecution of the Erie county action. The Clerk is directed to **transfer the file in the Erie County action to the Clerk of Erie County and further directed to** enter judgment dismissing the amended third-party complaint in the New York County action.

This action stems from a failed loan relating to commercial real estate in Syracuse, New York (*see generally Altshuler Shaham Provident Funds, Ltd. V GML Tower, LLC*, 21 NY3d 352 [2013]). Fidelity National Title Insurance Company issued a policy to Altshuler. In the New York County action, plaintiff Fidelity seeks a declaration that it properly denied coverage to defendant Altshuler. In the amended third-party complaint against Jaeckle, Altshuler asserts that Jaeckle committed legal malpractice by failing to, among other things, obtain adequate title insurance.

The amended third-party complaint should have been dismissed for failure to state a cause of action (CPLR 3211[a][7]), because Fidelity did not make a claim against Altshuler for which Jaeckle "is or may be liable" (CPLR 1007; *see Merchants Mut. Ins. Co. v Valilis*, 11 AD2d 324, 326 [1st Dept 1960]; *Ainspan v City of Albany*, 132 AD2d 911, 913 [3d Dept 1987]). Based on the foregoing determination, it is unnecessary to reach Jaeckle's other arguments in support of dismissal of the amended third-party complaint.

The motion court should have denied Altshuler's motion to consolidate the New York County and Erie County actions (*see County of Westchester v White Plains Ave., LLC*, 105 AD3d 690, 691 [2d Dept 2013]). As we are dismissing the amended third-party complaint in the New York County action, the two actions no longer present common questions of law or fact (*see* CPLR 602[a]). The issue in the New York County action is whether Fidelity properly disclaimed coverage; this will turn on the wording of the policy, not whether Jaeckle committed malpractice by obtaining the wrong type of policy.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13032 The People of the State of New York, Ind. 8431/99
Respondent,

-against-

Luis Ramirez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Patricia Nunez, J.), entered on or about April 4, 2013, which denied defendant's motion for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 243), unanimously affirmed.

The court properly determined that defendant is ineligible for resentencing because he had already been released to parole supervision for his class A-II drug felony conviction at the time he made the instant application (*see People v Mills*, 11 NY3d 527,

537 [2008]). Accordingly, this Court has no lawful basis upon which to reduce defendant's sentence of 6 years to life on that conviction to a term of 6 years. We have considered and reject defendant's remaining arguments.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13033 The People of the State of New York, Ind. 949/12
Respondent,

-against-

Enrique Adorno,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about December 11, 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: SEPTEMBER 25, 2014

CLERK

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

13034 The People of the State of New York, Ind. 409N/11
Respondent,

-against-

Victor Lee,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 26, 2012, as amended February 24, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 6 years, unanimously reversed, on the law, and as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

Defendant's constitutional right of confrontation was violated when the court read the transcript of the codefendant's guilty plea allocution to the jury. The codefendant's statements by which she inculpated defendant, were testimonial hearsay by a nontestifying declarant, whom defendant did not have a prior

opportunity to cross-examine (*see Crawford v Washington*, 541 US 36 [2004]).

The People's argument that the Confrontation Clause was inapplicable because defendant himself introduced the evidence is unavailing. Although defendant personally requested the introduction of the evidence, he was not appearing pro se. Defendant was represented by counsel throughout the case, and there was no form of hybrid representation. The decision to introduce evidence was not a fundamental decision reserved to defendant, but a strategic or tactical decision for his attorney (*see People v Jones*, 41 AD3d 242, 243 [1st Dept 2007], *lv denied* 9 NY3d 923 [2007]). Thus, defendant was deprived of his right to counsel when the court admitted the evidence solely based on his own request, over his attorney's vigorous and consistent opposition (*see People v Colville*, 20 NY3d 20, 32 [2012]). Likewise, since the decision to object to evidence is relegated to the attorney, the admission of testimonial hearsay in violation of the Confrontation Clause constitutes a preserved error here. On appeal, defendant also challenges the same evidence on the grounds that he was deprived of due process because the defense lacked an opportunity to comment on the evidence before the jury, and that the court improvidently exercised its discretion by untimely admitting the evidence after

the jury had begun deliberating. Although these additional arguments are unpreserved, reversal is further warranted based on those claims, in the interest of justice. New evidence may be admitted during jury deliberation only with "the utmost caution" (*People v Olsen*, 34 NY2d 349, 353 [1974]). That standard was not met under the circumstances of this case, given the risk that the evidence would receive "undue emphasis" as a result of "the drama of discovery" at the proverbial last minute (*id.* at 353-354).

The errors in admitting the evidence were not harmless, because the codefendant's admission to working with defendant to sell cocaine to an undercover police officer bore on the central issue at trial, namely whether he acted as the agent of the buyer (*see People v Crimmins*, 36 NY2d 230 [1975]).

Since we are ordering a new trial, we find it unnecessary to discuss defendant's other arguments, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13035-
13036-
13037 In re Alfredo J. T.,
Petitioner-Respondent,

-against-

Jodi D.,
Respondent-Appellant.

_____

Law Offices Of Lisa Beth Older, New York (Lisa Beth Older of counsel), for appellant.

Brian D. Perskin & Associates, P.C., Brooklyn, (Brian D. Perskin of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (David B. Cohen, J.), entered on or about August 30, 2013, which, inter alia, awarded petitioner father Alfredo J.T. sole legal and physical custody of the subject child, with visitation to respondent mother, unanimously affirmed, without costs.

The court's determination was based upon a thoughtful assessment of the parties' testimony and credibility, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Bubbins v Bubbins*, 136 AD2d 672 [2d Dept 1988]). The court properly considered the appropriate factors in making its determination, and gave appropriate weight

to the testimony and recommendations of the court-appointed forensic expert, which is but one factor to consider and is not a substitute for the court's own review of the relevant record evidence (*see State of New York ex rel. H.K. v M.S.*, 187 AD2d 50, 53 [1st Dept 1993], *appeal dismissed* 81 NY2d 1006 [1993]).

The court properly considered the evidence that, among other things, the mother deliberately and continuously disparaged the father in the child's presence, which caused the child to develop anxiety which was further fostered by the mother's conduct (*see Dodson v Dodson*, 77 AD3d 564 [1st Dept 2010]), and impeded the father's visitation with the child, conduct clearly inconsistent with the child's best interests (*see Matter of Xiomara M. v Robert M.*, 102 AD3d 581, 582 [1st Dept 2013]; *Matter of Howell v Lovell*, 103 AD3d 1229, 1232 [4th Dept 2013]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

In addition, the father was shown to be more stable and better suited to meet the child's medical and educational needs (*see Matter of Worowski v Worowski*, 95 AD2d 687 [1st Dept 1983]; *Matter of Sellen v Wright*, 229 AD2d 680, 681 [3d Dept 1996]). In the mother's care, the child developed advanced bottle rot requiring extensive dental treatment, and was still wearing diapers at the age of five. The mother changed the child's pre-

school repeatedly, sometimes without consulting the father, and moved to several different residences. The court properly considered the evidence supporting the mother's allegations of domestic violence, and concluded that the allegations were not credible.

The child, who now resides in the father's home with her father, stepmother, stepsister and an infant half-brother, would benefit from continued stability in the father's home, and will still be able to maintain contact with her older half-sister through visitation and modern communication technology (*see Matter of Brown v Marr*, 23 AD3d 1029, 1030 [4th Dept 2005]).

The attorney for the child acted properly in apprising the court of the then 5-year-old child's expressed preference to reside with the mother, but in advocating otherwise based upon her determination that the child lacked "capacity for knowing, voluntary and considered judgment" (22 NYCRR 7.2[d][3]; *see*

Matter of Rosso v Gerouw-Rosso, 79 AD3d 1726, 1728 [4th Dept 2010]).

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

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13038 The People of the State of New York, Respondent, Ind. 5928/12

-against-

Bruce Novello, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered on or about April 24, 2013, 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: SEPTEMBER 25, 2014

CLERK

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

13039 National Union Fire Insurance Company of Pittsburgh, PA, Plaintiff-Appellant, Index 301659/11

-against-

221-223 West 82 Owners Corp., et al., Defendants,

JRP Contracting, Inc., Defendant-Respondent.

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McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for appellant.

Law Offices of Alana Barran, P.C., New York (Alana Barran of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 13, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff National Union's motion for summary judgment against defendant JRP Contracting, Inc., with leave to renew, unanimously reversed, on the law, with costs, the motion granted, and it is declared that National Union has no duty to defend or indemnify defendant JRP Contracting, Inc. in the underlying personal injury action.

National Union was entitled to rely on the underlying plaintiff's bill of particulars to make a prima facie showing that the ligament and meniscal tears he allegedly sustained do not qualify as "grave injur[ies]" within the meaning of Workers'

Compensation Law § 11 (*see Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004]). Indeed, the underlying plaintiff failed to allege that he had lost the use of his knee, let alone the use of his leg (*see Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]). JRP produced no evidence indicating that further discovery will yield material and relevant evidence (*see id.*). Accordingly, National Union has no obligation to defend or indemnify JRP for the underlying common-law indemnification and contribution claims (*cf. Liberty Mut. Ins. Co. v Insurance Co. of State of Pa.*, 43 AD3d 666, 667-668 [1st Dept 2007]). Further, National Union is not obligated to defend or indemnify JRP for the underlying contractual indemnification claim, since its policy clearly excludes coverage for "liability assumed under a contract."

JRP's argument that it will be prejudiced if National Union withdraws from its defense is unavailing, as National Union

expressly reserved its rights to disclaim coverage, and JRP failed to demonstrate prejudice (*see General Acc. Ins. Co. v 35 Jackson Ave. Corp.*, 258 AD2d 616, 618 [2d Dept 1999]).

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

ENTERED: SEPTEMBER 25, 2014

CLERK

Corrected Order - October 8, 2014

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

13040 The People of the State of New York, Respondent, Ind. 89/11

-against-

Jonathan Hernandez, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sarah M. Zausmer of counsel), for respondent.

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 29, 2011, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts), attempted assault in the first degree and conspiracy in the third and fourth degrees, and sentencing him to three concurrent terms of 15 years to run consecutively to concurrent terms of 2⅓ to 7 years and 1⅓ to 4 years, unanimously modified, on the law, to the extent of vacating the fourth-degree conspiracy conviction and dismissing that count of the indictment, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The weapon and attempted

assault convictions were supported by police observations, which were corroborated by the recovery of cartridge cases at the scene. There was ample evidence to support the conspiracy convictions, including recorded telephone conversations.

The court properly exercised its discretion in denying defendant's motion to sever his trial from that of his codefendants. There were no antagonistic defenses, and the evidence relating to the acts of the codefendants was admissible against defendant and necessary to prove conspiracy (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]; *People v Council*, 98 AD3d 917, 918 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]).

As the People concede, the fourth-degree conspiracy count should have been dismissed as an inclusory concurrent count.

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13041 Yaniveth R., an Infant by her Mother and Natural Guardian, Ramona S., et al., Plaintiffs-Appellants, Index 2268/06

-against-

LTD Realty Co., et al., Defendants-Respondents,

Simone Damesek, etc., et al., Defendants.

[And a Third Party Action]

_____

Levy Konigsberg, LLP, New York (Alan J. Konigsberg of counsel), for appellants.

Furey, Furey Leverage, Manzione, Williams & Darlington, P.C., Hempstead (Thomas G. Leverage of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 28, 2013, which, to the extent appealed from as limited by the briefs, granted defendant LTD Realty Co.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant established prima facie that the infant plaintiff was cared for at the apartment, during the day, but resided

elsewhere, with her parents (*see* Administrative Code of City of NY former § 27-2013[h][1], now §§ 27-2056.3, 27-2056.5, 27-2056.6, 27-2056.18; *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]); *Hanlan v Parkchester N. Condominium, Inc.*, 32 AD3d 799 [1st Dept 2006]; *Michaud v Lefferts 750, LLC*, 87 AD3d 990 [2d Dept 2011]). In opposition, plaintiffs failed to raise an issue of fact as to the infant's residence at the premises.

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

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13042N North Shore Community Services, Inc., Plaintiff-Appellant, Index 650335/13

-against-

Community Drive LLC, Defendant-Respondent.

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Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellant.

Somer, Heller & Corwin, LLP, Commack (Stanley J. Somer of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia Kern, J.), entered December 23, 2013, as amended February 19, 2014, which granted defendant's motion for summary judgment on its counterclaims for use and occupancy and attorney's fees, unanimously affirmed, with costs.

Plaintiff's argument that defendant's acceptance of its tender of rent for the month following the expiration of the lease agreement created a new month-to-month tenancy under Real Property Law § 232-c is refuted by the unambiguous terms of the lease (*see Matter of Wallace v 600 Partners Co.*, 86 NY2d 543 [1995]; *101123 LLC v Solis Realty LLC*, 23 AD3d 107 [1st Dept 2005]). Real Property Law § 232-c provides that if the landlord accepts rent for any period subsequent to the expiration of the

lease term, the tenancy thereby created will be from month to month, "unless an agreement either express or implied is made providing otherwise." Article 61 of the parties' lease is such an agreement. It provides that, upon plaintiff's default of its obligation to surrender the premises at the end of the lease term, plaintiff's continued occupation of the premises, with or without defendant's consent or acquiescence, will be treated as a tenancy at will and "in no event" a tenancy from month to month.

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

ENTERED: SEPTEMBER 25, 2014

CLERK

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

13043 In re Louise Neathway, Ind. 1260/12
[M-3240 Petitioner,

-against-

Hon. Daniel Conviser, etc., et al.,
Respondents.

_____

Law Office of Lawrence P. LaBrew, New York (Lawrence P. LaBrew of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Anthony J. Tomari of counsel for Hon. Daniel Conviser, respondent.

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

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: SEPTEMBER 25, 2014

CLERK