SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 8, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7271 The People of the State of New York, Ind. 452/15
Respondent,

-against-

Roderick Prude,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Bonnie G. Wittner, J. at plea and sentencing), rendered December 3, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to three years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a conditional discharge for a period of three years, and otherwise affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v*

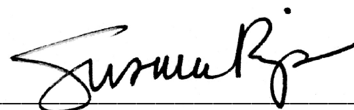
Prochilo, 41 NY2d 759, 761 [1977]). Defendant's argument that, even if credited, the testimony did not establish reasonable suspicion for stopping him for carrying a knife on the subway is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the officer's observation of "part of a knife" – which was attached by a clip to defendant's pocket, with the bulk of the knife inside the pocket – established reasonable suspicion that defendant was violating 21 NYCRR 1050.8(a), which prohibits the carrying of weapons or dangerous instruments on the subway. The officer's ensuing actions, in removing the knife from defendant's pocket, and arresting him after determining that the knife was a gravity knife, were also proper.

We find the sentence excessive to the extent indicated.

The Decision and Order of this Court entered herein on October 9, 2018 is hereby recalled and vacated (*see* M-5427 decided simultaneously herewith).

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

ENTERED: NOVEMBER 8, 2018



CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7384 In re Natalie Krodel, Index 152176/14
Petitioner-Respondent,

-against-

Amalgamated Dwellings Inc.,
Respondent-Appellant,

Abraham Bragin, et al.,
Respondents.

Anderson Kill P.C., New York (Elliot J. Coz of counsel), for appellant.

Gehring & Satriale LLC, New York (Joseph E. Gehring, Jr. of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 25, 2015, which, to the extent appealed from, denied the motion of respondent Amalgamated Dwellings Inc. for summary judgment on its counterclaim for attorneys' fees with respect to petitioner's first and third causes of action, and granted petitioner's cross-motion for summary judgment dismissing that part of the counterclaim, unanimously affirmed, without costs.

This case requires us to determine whether a provision in a lease agreement is enforceable where it provides for payment of attorneys' fees to a lessor even if the lessor is in default. We find that such a provision is unconscionable and unenforceable as

a penalty.

Respondent Amalgamated Dwellings Inc. is a residential cooperative corporation. In 2001, petitioner, a tenant-shareholder in respondent’s building, purchased shares to an apartment in the building and executed a proprietary lease with the following provision concerning attorneys’ fees (paragraph 6[7][c]):

> “If the Lessor [respondent] shall incur any cost, fee or expense . . . including reasonable legal fees . . . in connection with any action or proceeding brought by the Lessee [petitioner] against the Lessor . . . which is based on an alleged default of the Lessor hereunder or which is based on any other matter or thing relating to this lease, or to any alleged failure by the Lessor to perform any act which the Lessor is required to perform . . . or to the shares of the Lessor issued to the Lessee, or to the Lessor’s Bylaws, . . . such cost or expense shall be paid by the Lessee to the Lessor, on demand, as additional rent.”

In 2012, petitioner’s husband, who owned the shares to another apartment in the building, agreed to transfer his shares to petitioner. Petitioner paid a transfer fee to respondent so that it would transfer the shares to her. She later sued respondent for default of the lease agreement and for statutory violations because respondent had not transferred the shares to her husband’s apartment to her. Respondent answered petitioner’s complaint and asserted a counterclaim for attorneys’ fees under

paragraph 6(7)(c).

In 2014, respondent moved for summary judgment on its counterclaim. Petitioner cross-moved for summary judgment dismissing the counterclaim, arguing that paragraph 6(7)(c) was unenforceable. The motion court denied respondent's motion for summary judgment on its counterclaim and granted petitioner's cross-motion for summary judgment dismissing the counterclaim.

On appeal, respondent argues that the motion court erred in holding that petitioner was not subject to paragraph 6(7)(c), because New York courts have regularly enforced fee-shifting provisions.

We find that the motion court properly declined to enforce paragraph 6(7)(c) because it is unconscionable and unenforceable as a penalty. Parties to a lease may contract for attorneys' fees "provided [they are] reasonable and not in the nature of penalty or forfeiture" (*379 Madison Ave., Inc. v Stuyvesant Co.*, 242 App Div 567, 569 [1st Dept 1934], *affd* 268 NY 576 [1935]). Whether a provision is "an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536 [2014] [internal quotation marks omitted]). A finding of unconscionability requires "some showing of an absence of meaningful choice on the

part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]).

Although this Court has not previously addressed whether a fee provision in a residential lease is enforceable where it provides for payment of attorneys' fees to a party even when that party is in default, motion courts addressing similar fee provisions have found them unconscionable (*see Weidman v Tomaselli*, 81 Misc 2d 328, 334 [Rockland County Ct 1975], *affd* 84 Misc 2d 782 [App Term, 2d Dept 1975] [finding unconscionable a provision providing for payment of attorneys' fees upon the commencement of litigation based on party's default because "(t)he effect of such clause (was) to permit the petitioner (landlord) to exact tribute from the respondents (tenants) for the petitioner's legal proceedings, successful or not"]; *McClelland-Metz Mgt. v Faulk*, 86 Misc 2d 778, 781 [Nassau Dist Ct 1976] [denying attorneys' fees and holding that provision under which "landlord would be entitled to attorneys' fees whether he was successful or not" was "unconscionable and in the nature of a penalty"]; *see also East 55th St. Joint Venture v Litchman*, 122 Misc 2d 81, 85-86 [Civ Ct, NY County 1983] [observing that permitting a "landlord (to) s(eek) attorneys(') fees for a case

which it had lost" produces "an unconscionable result -- and to be avoided" and that "(a)n award of counsel fees to a nonprevailing party would be an absurd and oppressive result"], *affd* 126 Misc 2d 1049 [App Term, 1st Dept 1984]).

In the present case, we find that an attorneys' fees provision which provides that the tenant must pay attorneys' fees if it commences an action against the landlord based upon the default of the landlord is unconscionable and unenforceable as a penalty. Paragraph 6(7)(c) of the proprietary lease permits the landlord to recover attorneys' fees when the tenant brings an action against the landlord even when the landlord is in default. To enforce such a provision would produce an unjust result because it would dissuade aggrieved parties from pursuing litigation and preclude tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default.

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

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7548 The People of the State of New York, Ind. 3533/14
Respondent,

-against-

James Forbes,
Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Clinton W. Morrison of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at severance motion; Patricia M. Nuñez, J. at jury trial and sentencing), rendered September 15, 2015, convicting defendant of burglary in the third degree and four counts of grand larceny in the fourth degree, and sentencing him, as a persistent felony offender, to concurrent terms of 15 years to life, unanimously affirmed.

Defendant's severance motion was properly denied. The counts relating to the two incidents, both involving theft, were properly joined pursuant to CPL 200.20(2)(b) based on mutually admissible evidence to demonstrate identity, which was neither expressly conceded nor "clearly established" (*see People v Condon*, 26 NY2d 139, 142 [1970]). Although the two crimes did

not involve a unique modus operandi, the surveillance videotapes of the two incidents nevertheless provided strong evidence that they were committed by the same person and were highly probative of defendant’s identity under the circumstances of the case (*see e.g.* *People v Laverpool*, 267 AD2d 93, 94 [1st Dept 1999], *lv denied* 94 NY2d 904 [2000]). Furthermore, as the court implicitly determined, the probative value outweighed any potential for prejudice, and the court provided suitable limiting instructions. In any event, the counts were also properly joined as legally similar pursuant to CPL 200.20(2)(c), and defendant failed to make a sufficient showing for a discretionary severance pursuant to CPL 200.20(3). Finally, we conclude that any error in denying severance was harmless in light of the overwhelming evidence of defendant’s guilt as to both incidents (*see People v Crimmins*, 36 NY2d 230 [1975]).

Still photographs from a restaurant surveillance videotape, showing defendant present in the restaurant approximately two months before one of the charged crimes was committed there, were relevant to prove that defendant was familiar with the layout of the restaurant and that he did not mistakenly believe he was permitted to enter the “employees only” basement. However, the accompanying testimony of the restaurant owner, strongly suggesting that defendant had committed a crime on the earlier

occasion, should have been excluded. Nevertheless, this brief and limited testimony, the prejudicial effect of which was minimized by the court's appropriate limiting instructions, was similarly harmless.

The court providently exercised its discretion in sentencing defendant as a persistent felony offender, particularly in light of his very extensive criminal record.

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

ENTERED: NOVEMBER 8, 2018

CLERK

Richter, J.P., Kahn, Oing, Moulton, JJ.

7549-
7550 The Lansco Corporation, et al., Index 655743/16
Plaintiffs-Defendants-Respondents,

-against-

AB Marbec Realty Corp.,
Defendant-Appellant.

____

Law Offices of Jacob S. Feinzeig, Brooklyn (Jacob S. Feinzeig of counsel), for appellant.

Law Offices of Lionel A. Barasch, New York (Lionel A. Barasch of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 21, 2018, awarding plaintiffs a sum of money, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 15, 2018, which, inter alia, granted plaintiffs' motion for summary judgment on their claims and dismissed the counterclaims, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The only signatories to the brokerage agreement were defendant owner and plaintiff real estate brokers. The tenant did not sign the agreement. Even if, pursuant to the agreement, plaintiffs owed fiduciary duties to defendant (*see Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d 369, 374 [2001]), in the absence of an agreement with defendant to the contrary,

plaintiffs owed it no duty to refrain from showing the tenant other properties (*Douglas Elliman LLC v Tretter*, 84 AD3d 446, 449 [1st Dept 2011], *affd* 20 NY3d 875 [2012]).

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7551-
7552 In re Gabrielle G. (Anonymous), and Another,

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

Mike G. (Anonymous),
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

____

Larry S. Bachner, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

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

____

Orders of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about July 10, 2017, which, to the extent appealed from as limited by the briefs, determined that respondent's consent was not required for the adoption of the subject children, unanimously affirmed, without costs.

Respondent admitted that he did not provide the children with financial support after they were placed into foster care (*see* Domestic Relations Law § 111[1][d]; *Matter of Rickelme Alfredo B. [Ricardo Alfred B.]*, 132 AD3d 490 [1st Dept 2015]). Petitioner was not required to inform respondent of his financial

support obligation (Domestic Relations Law § 111[1][d]; *see Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545 [1st Dept 2014]).

Respondent failed to demonstrate that he received ineffective assistance of counsel (*see Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543, 544 [1st Dept 2014]). He contends that his attorney did not make a sufficient effort to show that he lacked the financial ability to support the children. However, counsel's decision not to question respondent about his financial circumstances may have been strategic (*see People v Sargsyan*, 71 AD3d 401 [1st Dept 2010]). Moreover, respondent presented no evidence that his proposed line of questioning had a realistic chance of succeeding (*see People v Stultz*, 2 NY3d 277, 287 [2004]).

Respondent's argument that Domestic Relations Law § 111(1)(d) violates the equal protection clause by imposing on unwed fathers a duty it does not impose on married fathers is improperly raised for the first time on appeal. In any event, respondent failed to show that the requisite notice of his constitutional challenge was provided to the Attorney General (*see* Executive Law § 71(3); CPLR 1012[b][3]; *Matter of Elijah Manuel V. [Ismanuel V.]*, 161 AD3d 665 [1st Dept 2018]).

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

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7553 The People of the State of New York, Respondent, Ind. 1210/16

-against-

Curtis Cromer,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

____

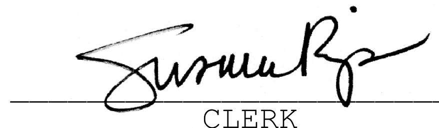
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Marc Whiten, J.), rendered June 29, 2016,

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

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

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

ENTERED: NOVEMBER 8, 2018



CLERK

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

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

7554 Andre Mauro, Index 155085/12
Plaintiff-Respondent,

-against-

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

The New York City Department
of Education, et al.,
Defendants.

____

Weiner, Millo, Morgan & Bonanno, LLC, New York (Richard A. Walker of counsel), for The City of New York and PS 85 LLC, appellants.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for Kenny Maraj and Kenneth Ramesh Maraj, appellants.

Law Office of David Scott, New York (Paul Biedka of counsel), for respondent.

____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 11, 2017, which, to the extent appealed from, denied defendants City of New York (City) and PS 85 LLC's (PS 85) motion for summary judgment dismissing the complaint as against them, and denied defendants Kenny Maraj and Kenneth Ramesh Maraj's (Maraj) cross motion for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to grant the cross motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Maraj.

Issues of fact exist as to whether plaintiff’s presence on the City and PS 85’s property was foreseeable (*see Scurti v City of New York*, 40 NY2d 433 [1976] [jury could find City failed to use reasonable care to avoid foreseeable injury to infant plaintiff who was electrocuted after entering railroad yard through one of several holes in fence on City-owned playground that were made and used by area children]; *compare Garcia v City of New York*, 205 AD2d 49, 52 [1st Dept 1994] [City not liable to plaintiff whose decedent illegally entered and drowned in public swimming pool after it had officially closed for the day, where City had taken “all reasonably necessary steps to secure the area and exclude illegal swimmers from its facilities after closing”], *lv denied* 85 NY2d 810 [1995]).

Although Maraj argues for the first time on appeal that the hole in his fence through which plaintiff was able to gain access to the City’s property was not a proximate cause of plaintiff’s accident, we will consider the argument, because the issue is a legal one that appears on the face of the record and could not have been avoided if raised before the motion court (*see Rojas-Wassil v Villalona*, 114 AD3d 517 [1st Dept 2014]). On the merits, we conclude that the hole in Maraj’s fence, “[a]t best, merely furnished the occasion for the accident to occur, rather than its proximate cause” (*Boltax v Joy Day Camp*, 113 AD2d 859,

861 [2d Dept 1985] [internal quotation marks omitted], *affd* 67 NY2d 617 [1986]).

We have considered the City and PS 85’s remaining contentions and find them unavailing.

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7555 Michael Keerdoja, Index 157010/15
Plaintiff-Appellant,

-against-

Legacy Yards Tenant, LLC, et al.,
Defendants,

Hudson Yards Construction,
LLC, et al.,
Defendants-Respondents.

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

London Fischer LLP, New York (Brian P. McLaughlin of counsel), for respondents.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 2, 2017, which denied plaintiff's motion for partial summary judgment as to liability on the Labor Law § 240(1) claim as against defendants Hudson Yards Construction LLC and Tutor Perini Building Corp. (collectively defendants), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff was injured when a metal shim plate affixed to a steel column, that was being installed as part of a temporary truss system, suddenly detached and hit him in the head. Plaintiff established that the accident was proximately caused by the undisputed failure of safety devices that were supposed to

afford proper protection against the elevation-related risks that plaintiff faced during the installation of the column being hoisted into place (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). The tack welds used to secure the metal shim plate to the column were "safety devices" for the purposes of Labor Law § 240(1) because they were intended to be a temporary measure to keep the shim plate attached to the column during installation (*compare Carlton v City of New York*, 161 AD3d 930, 933 [2d Dept 2018]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820 [2d Dept 2017]; *Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473 [4th Dept 2011], *lv dismissed in part, denied in part* 17 NY3d 843 [2011]). The welds were to be removed once the column was in place, at which time the plates would be permanently bolted into place. The evidence established that the accident occurred when the welds failed, inasmuch as the shim plate, which weighed between 200 and 400 pounds, was welded on only one side of the metal column (*see Matthews v 400 Fifth Realty LLC*, 111 AD3d 405 [1st Dept 2013]). Thus, the shim plate "fell because of the inadequacy of a safety device. . .[that was] put in place as to give proper protection for" plaintiff, entitling him to partial summary judgment (*Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 418 [1st Dept 2014] [internal quotation marks omitted]; *see Fabrizi v 1095 Ave. of*

the Ams., L.L.C., 22 NY3d 658, 662-663 [2014]).

The motion court should have considered plaintiff's reply argument that the one-sided tack welds were insufficient to safely secure the shim plate to the column because it was made in response to defendants' opposition to the motion (*see Rodriguez v Weinstein Enters., Inc.*, 113 AD3d 483, 484 [1st Dept 2014]).

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7556 The People of the State of New York, Ind. 3184/15
Respondent,

-against-

Juan Cabrera,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered on or about October 21, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law Article 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The alleged mitigating factors cited by defendant, such as his age and low Static-99 score, were either adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the seriousness of the underlying course of sexual conduct against a child (*see*

e.g. People v Rodriguez, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]). Moreover, defendant's point score was nearly enough for a level three adjudication.

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7557-
7558 SunGard Capital Corp., Plaintiff-Appellant,

Index 155042/15
155041/15

-against-

New York State Department of Taxation and Finance,
Defendant-Respondent.

- - - - -

SunGard Capital Corp.,
Plaintiff-Appellant,

-against-

New York City Department of Finance,
Defendant-Respondent.

____

Pillsbury Winthrop Shaw Pittman LLP, New York (Marc A. Simonetti of counsel), for appellant.

Barbara D. Underwood, Attorney General, New York (Scott A. Eisman of counsel), for New York State Department of Taxation and Finance, respondent.

Zachary W. Carter, Corporation Counsel, New York (Amy H. Bassett of counsel), for New York City Department of Finance, respondent.

____

Orders, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 19, 2016, which, inter alia, granted defendants' motions to renew, and, upon renewal, granted defendants' motions to dismiss the complaints, unanimously affirmed, without costs.

Having granted defendants' motions to dismiss on condition

that defendants completed audits of plaintiff within a specified time, the court properly granted renewal of the motion, as defendants presented new facts pertaining to the progress of the audit since the issuance of the conditional order (*see* CPLR 2221[e]; *see generally Kaszar v Cho*, 160 AD3d 501 [1st Dept 2018]).

Defendants did not waive their argument as to ripeness by not appealing from the orders. They sought and were granted unconditional dismissal, and therefore were not aggrieved by the orders (*see Murray, Hollander, Sullivan & Bass v HEM Research*, 111 AD2d 63, 66 [1st Dept 1985]). Defendants' ripeness argument was properly raised as an additional ground for affirmance (*see id.*).

Given that defendants had not completed audits of plaintiff, and plaintiff had not been assessed any tax, these actions were not ripe and should have been dismissed for that reason (*see Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 521 [1986], *cert denied* 479 US 985 [1986]). Nor did plaintiff face any direct or imminent harm from defendants (*see Lorillard Tobacco Co. v Roth*, 99 NY2d 316 [2003]).

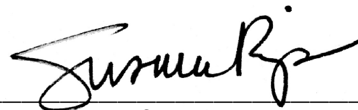
Plaintiff admittedly failed to exhaust its administrative remedies, and does not fall within the exception to the exhaustion doctrine for constitutional challenges (*see Matter of*

Schulz v State of New York, 86 NY2d 225, 232 [1995], *cert denied* 516 US 944 [1995]). In addition to the existence of factual issues (*see id.*), the complaint makes no mention of unconstitutionality (*see Genger v Genger*, 121 AD3d 270, 281 [1st Dept 2014]).

We decline to reach the merits of these actions for the additional reason that only defendants sought relief before the motion court. Plaintiff did not cross-move or seek relief. Given that there are factual issues to be determined, it would be inappropriate to afford plaintiff affirmative relief (*see Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011]).

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

ENTERED: NOVEMBER 8, 2018



CLERK

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

7560 The People of the State of New York, Ind. 3505N/08
Respondent,

-against-

William Candelario,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 21, 2011 convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to term of 12 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his plea. "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Defendant received a full opportunity to state his claims, with the assistance of newly assigned counsel. Defendant's claim that he did not understand his obligations under the plea agreement is contradicted by the record (*see People v Frederick*, 45 NY2d 520, 526 [1978]). The plea colloquy

and written plea agreement, both of which were translated for defendant by an interpreter, spelled out the conditions of the plea, and defendant acknowledged that he understood them.

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7563 In re Lisa Brown, Index 100978/16
Petitioner-Appellant,

-against-

Police Commissioner William
J. Bratton, et al.,
Respondents-Respondents.

____

District Council 37, AFSCME, AFL-CIO, New York (Aaron S. Amaral of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for respondents.

____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 16, 2016, denying the petition to annul and vacate respondents' determination, dated February 16, 2016, which suspended petitioner for 58 days for disobeying orders to sign HIPAA releases, and to adjudge respondents' decision requiring petitioner to submit to a fitness-for-duty evaluation without complying with Civil Service Law § 72 arbitrary and capricious and not supported by substantial evidence, and dismissing the proceeding brought pursuant to CPLR article 78 and Civil Service Law § 76, unanimously affirmed, without costs.

Petitioner failed to show that Civil Service Law § 72 was implicated upon respondents' decision to refer her for a fitness-for-duty evaluation. The statute plainly states that its

procedural protections are triggered when an employer has determined that an employee is unfit for duty, at which point the employee is entitled to written notice of the grounds for the determination and an opportunity to challenge those grounds at a hearing (*id.* § 72[1]). Respondents' witnesses testified that, at the time petitioner was referred for evaluation, respondent police department (NYPD) had not reached this threshold determination and that the purpose of the evaluation was to insure, petitioner's worrisome on-the-job conduct notwithstanding, that she remained fit for duty. The NYPD could not have provided petitioner with the written notice to which she claims she was entitled, because it had neither adjudged her unable to perform her duties nor placed her on leave (*cf. Laurido v Simon*, 489 F Supp 1169, 1177-1178 [SD NY 1980] [analyzing earlier version of Civil Services § 72 and holding that before placing employee on involuntary leave of absence based on finding of mental unfitness for duty, employer must provide written notice of facts relied on to suggest mental unfitness]; *Matter of Briggs v Scoralick*, 147 AD2d 694, 695 [2d Dept 1989] [employee placed on medical leave without written notice of reasons therefor]; *Matter of McShane v State of New York*, 43 Misc 3d 320, 330 [Sup Ct, NY County 2014] [same]; *Simulinas v City of New York*, 2013 NY Slip Op 30263[U] [Sup Ct, NY County 2013] [same]).

Nor did petitioner show that the 58-day suspension she received for disobeying orders to sign HIPAA releases was so disproportionate to her misconduct as to be shocking to one's sense of fairness (*see Matter of Pauling v Smith*, 46 AD2d 759, 760 [1st Dept 1974]). By requiring her to sign HIPAA releases, respondents endeavored to act in keeping with the protections that attach to medical records, and HIPAA "clearly authorizes employers to require disclosure of medical records in connection with a fitness exam" (*Sweeney v Department of Homeland Sec.*, 248 Fed Appx 179, 181 [Fed Cir 2007]). We do not find that, as petitioner contends, respondents' orders were arbitrary or overbroad. The orders were tailored to receive information from the medical providers that petitioner had identified and, moreover, were further limited by subsequent agreement. Respondents showed that the disclosure they ordered petitioner to provide was appropriate in light of public safety considerations. Petitioner's job as Supervisor Police Communication Technician, insuring that emergency 911 calls were immediately and accurately routed to the appropriate emergency responders, implicated public safety issues, giving the NYPD an interest in the records sufficient to outweigh petitioner's privacy rights (*see O'Connor v Pierson*, 426 F3d 187, 202-203 [2d Cir 2005]).

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: NOVEMBER 8, 2018

CLERK

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

7564 In re Daniela P.C., and Another,

Children Under Eighteen Years
of Age, etc.,

Maria C.A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

____

Carol L. Kahn, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jonathan Popolow of counsel), for respondent.

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

____

Order of fact-finding and disposition (one paper), Family Court, New York County (Jane Pearl, J.), entered on or about July 5, 2017, insofar as it determined, after a hearing, that respondent mother neglected the two subject children, unanimously modified, on the law and the facts, to vacate the finding that the mother neglected the child Arianny as alleged in paragraph 2A of the petitions by having an altercation with another person while the child was present, and enter a finding that the mother derivatively neglected Arianny as alleged in paragraph F of the petitions, and otherwise affirmed, without costs.

A preponderance of the evidence supports the Family Court's

finding that the mother medically neglected the younger subject child, Daniela, by not ensuring that she return for follow-up care for her behavioral issues and receive her prescribed medication after her February 2017 hospitalization, which resulted in the child being readmitted to the hospital three times in February 2017, and once in March 2017 (*see Matter of Joelle T. [Laconia W.]*, 140 AD3d 513, 514 [1st Dept 2016]; *Matter of Jadaquis B. [Sameerah B.]*, 116 AD3d 448, 448 [1st Dept 2014]). A preponderance of the evidence also establishes that the mother neglected Daniela by allowing the mother's adult daughter to assault her even after an order of protection was issued in Daniela's favor directing the adult daughter to refrain from assaulting her (*see Matter of Cheyenne S.*, 11 AD3d 362 [1st Dept 2004]). Daniela's out-of-court statement that on January 5, 2017, the mother's adult daughter had cut Daniela's arm with glass was corroborated by the caseworker observing the injury (*see Matter of Harrhae Y. [Shy-Macca Ernestine B.]*, 112 AD3d 512, 512 [1st Dept 2013]). In addition, caseworkers saw the adult daughter and Daniela having a physical altercation in the mother's home on March 6, 2017.

The court did not err in drawing a negative inference from the mother's failure to testify at the fact-finding hearing and it is of no moment that she testified at the status hearing or

that a criminal case was pending against her at the time of the fact-finding hearing (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]; *Matter of Rachel S.D. [Luis N.]*, 113 AD3d 450 [1st Dept 2014]).

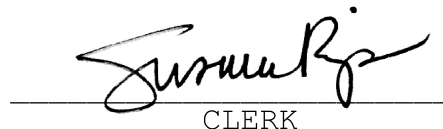
However, we find that the Family Court erred in entering a finding that petitioner Administration for Children's Services (ACS) demonstrated by a preponderance of the evidence that on October 12, 2016, the mother neglected Arianny by engaging in an altercation with another person while she was present, because there is no evidence that Arianny was present during that altercation. Instead, we enter a finding of derivative neglect against the mother as to Arianny as alleged in paragraph F of the petition and amended petition, because a preponderance of the evidence demonstrates that she was living in the home when the neglect of Daniela occurred and the mother's actions evince such a fundamental defect in parenting as to place Arianny in substantial risk of harm (*see Matter of Kyanna T. [Winston R.]*, 99 AD3d 1011, 1014 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]).

Although the mother purports to appeal from the March 8, 2017 and the June 21, 2017 oral decisions granting ACS's March 8, 2017 order to show cause for placement of Daniela into foster care pursuant to Family Court Act § 1027, no notice of appeal has

been filed from those decisions and we are, accordingly, without jurisdiction to address her arguments with respect thereto (*see Matter of Destiny R.*, 266 AD2d 101, 102 [1st Dept 1999]). We also note that even if the mother had filed a notice of appeal as to the aforementioned oral rulings and submitted an order or a "so-order transcript," we would find that the determination that Daniela should be temporarily removed from the mother's care during the underlying proceeding has been rendered moot by the subsequent finding of neglect against the mother (*see Matter of Jamil S. [Shaaniel T.]*, 156 AD3d 585, 586-587 [1st Dept 2017]).

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

ENTERED: NOVEMBER 8, 2018



____
CLERK

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

7565 The People of the State of New York, Ind. 1133/13
Respondent,

-against-

Ruben Figueroa,
Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered July 22, 2014, convicting defendant, upon his plea of guilty, of criminal contempt in the first degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant was properly adjudicated a second felony offender. Neither of the two 2006 convictions set forth in the predicate felony statement was unconstitutionally obtained.

With regard to one of the convictions, there was an allocution during which the court fully advised defendant of the rights he was waiving, but which did not result in a guilty plea. When defendant ultimately accepted the plea three weeks later, the court incorporated the prior allocution by reference, and defendant acknowledged that he remembered and understood its

contents. While, as the sentencing court observed, it would have been the better practice for the 2006 plea court to have conducted a second full allocution, the incorporation by reference did not render the plea unconstitutional (*see People v Jeudy*, 153 AD3d 1203 [1st Dept 2017], *lv denied* 30 NY3d 1020 [2017]; *People v Muir*, 134 AD3d 641 [1st Dept 2015], *lv denied* 26 NY3d 1147 [2016]).

Defendant also claims that the purported unconstitutionality of the above-discussed conviction likewise disqualifies the remaining conviction listed in the predicate felony statement, because he was sentenced for both convictions at the same time. This claim is rendered academic by our determination upholding the other conviction, and is without merit in any event.

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

ENTERED: NOVEMBER 8, 2018

CLERK

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

7566 In re Michaellica W.,

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

Michael W.,
Respondent-Appellant.

New York Foundling Hospital,
Petitioner-Respondent.

The Bronx Defenders, Bronx (Lauren Teichner of counsel), for appellant.

Andrew J. Baer, New York, attorney for the child.

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about February 24, 2017, which, upon a finding of permanent neglect, terminated respondent's parental rights to the subject child and transferred custody of the child to petitioner agency for purposes of adoption, unanimously affirmed, without costs.

The agency established by a preponderance of the evidence that it was in the child's best interests to terminate respondent's parental rights (*see* Family Court Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Latesha Nicole M.*, 219 AD2d 521 [1st Dept 1995]). The child has resided with the foster mother for virtually her entire life, bonded with her, is thriving in her care, and wants to be adopted by her (*see*

Matter of Selvin Adolph F. [Thelma Lynn W.], 146 AD3d 418, 418-419 [1st Dept 2017]; *Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 537 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]; *Matter of Arnel Ashley B. [Cynthia T.]*, 89 AD3d 504, 505 [1st Dept 2011], *lv denied* 2012 NY Slip Op 69116 [2012]). While the child is also bonded with respondent, she has not resided with him since she was less than two months old, and has never even had overnight visitation with him. Moreover, respondent has a history of inconsistent visitation, and continues to lack adequate housing.

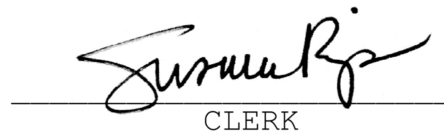
Respondent relies heavily on the court-appointed expert's opinions about the psychological harm of severing the parent-child relationship. However, the expert was steadfast in his recommendation that the child remain in the foster mother's care.

A suspended judgment is not appropriate, because there is no evidence that further delay will result in a finding that it is not in the child's best interests to terminate respondent's parental rights (*see Matter of Andrea L.P. [Cassandra M.P.]*, 156 AD3d 413, 414 [1st Dept 2017]; *Selvin Adolph F.*, 146 AD3d at 419). Throughout the 12 years that the child was in foster care, respondent failed to maintain a reliable presence in her life, to secure suitable housing, or otherwise to plan realistically for a future with her. The child "deserve[s] permanency after this

extended period of uncertainty” (*see Andrea L.P.*, 156 AD3d at 414; *Matter of Autumn P. [Alisa R.]*, 129 AD3d 519, 520 [1st Dept 2015]).

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

ENTERED: NOVEMBER 8, 2018



CLERK

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

7567 The People of the State of New York, Respondent, SCI 3593/14

-against-

Luigi Fernandez,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott 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 (Marc Whiten, J. at plea; Raymond Bruce, J. at sentencing), rendered November 12, 2015,

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

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

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

ENTERED: NOVEMBER 8, 2018

____
CLERK

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

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

7569 The People of the State of New York, Ind. 467/16
Respondent,

-against-

Travis Taylor, also known as
Kenmar Williams,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

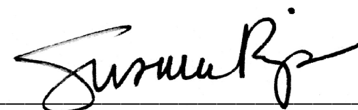
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam Best, J.), rendered March 20, 2017,

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

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

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

ENTERED: NOVEMBER 8, 2018



CLERK

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

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

7570 The People of the State of New York, Ind. 3882/13
Respondent,

-against-

Malik Bah,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

____

Judgment, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered February 24, 2015 , unanimously affirmed.

Application by defendant'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 defendant'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: NOVEMBER 8, 2018

CLERK

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

7571 The People of the State of New York, Ind. 747/14
Respondent,

-against-

Wing Lim also known
as Kent Lam,
Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson of counsel), for appellant.

Barbara D. Underwood, Attorney General, New York (Jodi A. Danzig of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 17, 2016, unanimously affirmed.

Application by defendant'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 defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

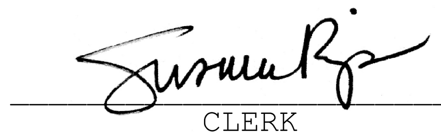
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: NOVEMBER 8, 2018



CLERK

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

7572N Steven Rosen, Index 160724/15
Plaintiff-Appellant,

-against-

MHM Realty LLC, et al.,
Defendants-Respondents.

____

Bartels & Feureisen, LLP, White Plains (Michael Fahey of counsel), for appellant.

Mischel & Horn, P.C., New York (Lauren E. Bryant of counsel), for MHM Realty LLC and Manhattan Skyline Management Corp., respondents.

Brody, O'Connor & O'Connor, New York (Magdalene P. Skountzos of counsel), for Francisco Medina, respondent.

____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered December 14, 2017, which, inter alia, denied plaintiff's motion for a protective order or, in the alternative for an in camera inspection of the subject records, and directed plaintiff to provide defendants with an unlimited authorization for all mental health records for treatment in connection with his alleged injuries sustained for the period from January 1, 2013 to the present, unanimously affirmed, without costs.

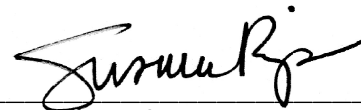
Plaintiff put his mental condition in issue by seeking to recover damages for emotional distress as a result of the actions alleged in the complaint (CPLR 3101[a]; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-57 [1983]; *Budano v Gurdon*, 97

AD3d 497 [1st Dept 2012]). He did not specify how he or any third party would be subject to "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice" as a result of the disclosure of the mental health treatment records at issue (CPLR 3103[a]). Nor did plaintiff otherwise establish that disclosure would be detrimental to himself or a third party (*cf. Cynthia B.* at 461-462). In any event, it is noted that plaintiff previously stipulated to unlimited disclosure of his mental health treatment records (*see Quilty v Cormier*, 115 AD3d 1229 [4th Dept 2014]).

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: NOVEMBER 8, 2018



CLERK