SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 7, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Tom, Singh, Moulton, JJ.

8452 In re The State of New York, Petitioner-Appellant, Index 30261/14 101413/14

-against-

Jerome A. (Anonymous), Respondent-Respondent.

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Barbara D. Underwood, Attorney General, New York (Scott A. Eisman of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Services, New York (Diane Goldstein Temkin of counsel), for respondent.

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered June 20, 2018, which dismissed the petition for civil management under Mental Hygiene Law article 10 and ordered respondent released from custody, upon a determination, same court and Justice that respondent does not suffer from a mental abnormality, and bringing up for review a ruling, same court (Daniel P. Conviser, J.), dated February 20, 2018, that the diagnosis of unspecified paraphilic disorder is not generally accepted in the relevant community, unanimously reversed, on the law, without costs, the order vacated, the petition reinstated, and the matter remanded for further proceedings in accordance

herewith.

In *Matter of State of New York v Hilton C.* (158 AD3d 707 [2d Dept 2018], *appeals withdrawn* 31 NY3d 1077 [2018]), the Second Department held that the evidence in the record before it, which is similar to the evidence in the record presently before us, failed to establish that "the diagnosis of unspecified paraphilic disorder [USPD] has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible" (*id.* at 709). In the absence of any other New York State appellate authority, Supreme Court (Conviser, J.), ruled, on constraint of *Hilton C.*, that USPD was precluded as a diagnosis in article 10 proceedings.

However, we find, contrary to the Second Department, and consistent with the decision in *Matter of Luis S. v State of New York* (166 AD3d 1550 [4th Dept 2018]) that the type of evidence presented at the *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) in this case – such as the evidence concerning the inclusion of USPD as a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which signals its general acceptance by the psychiatric community – is sufficient to satisfy the State's burden of showing that the USPD diagnosis meets the *Frye* standard.

Accordingly, the verdict that respondent does not suffer

from a mental abnormality, rendered after the article 10 trial, from which USPD evidence was excluded, must be vacated, the petition reinstated, and the matter remanded for further proceedings, including a determination whether the evidence meets the threshold standard of reliability and admissibility (*see Matter of State of New York v Nicholas T.*, 60 Misc 3d 522, 528 [Sup Ct, NY County 2018]; *Matter of State of New York v Jerome A.*, 58 Misc 3d 1202[A], 2017 NY Slip Op 51762[U], *15, *17-19 [Sup Ct, NY County 2017]).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8534 The People of the State of New York, Respondent, Ind. 3247/13

-against-

Raymond Teran, Defendant-Appellant.

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Law Office of Robert "Bob" Walters, Bronx (Robert "Bob" Walters of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack, for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered January 28, 2016, as amended March 17, 2016, convicting defendant, after a jury trial, of two counts of criminal sale of a controlled substance in the third degree and seven counts of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to an aggregate term of seven years, affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that on some occasions defendant personally sold drugs, and it also supported a reasonable inference that he was accessorially liable for other sales (*see* Penal Law § 20.00). There was no requirement that the indictment contain any language

about acting in concert, because "there is no legal distinction between liability as a principal or criminal culpability as an accomplice" (*People v Rivera*, 84 NY2d 766, 769 [1995]).

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The prosecutor exercised peremptory challenges against three African-American panelists who are the subject of the defendant's *Batson* claim, and two non-African-Americans, but not against a fourth African-American. The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question were not pretextual. One panelist had previously served on a hung jury, which we have found to be a valid race-neutral reason for a peremptory challenge *(People v Mitchell,* 216 AD2d 156 [1st Dept 1995], *lv denied* 86 NY2d 798 [1995]). An additional non-pretextual explanation for challenging this panelist was the prosecutor's association of her service as a coordinator at a soup kitchen with possible associations with drug users, which raised a concern with the prosecutor that she might have harbored sympathy towards a defendant charged with drug offenses. Somewhat analogously, we previously have found the absence of a racial pretext for peremptory challenges premised on a panelist's social service orientation, which might lead the panelist to sympathize with

someone in the defendant's position (*People v Wint*, 237 AD2d 195, 197 [1st Dept 1997], *lv denied* 89 NY2d 1103 [1997]). The second challenged panelist expressed reservations about accessorial liability indicating reluctance to find someone guilty unless he had directly sold drugs, a valid race-neutral basis in a case such as this. This panelist who, as a case manager for a community based organization, had worked with persons who were HIV-positive drug users, also supported the prosecutor's concern about sympathy for defendant (*People v James*, 282 AD2d 264 [1st Dept 2001], *affd* 99 NY2d 264 [2002]; *People v Wint*, 237 Ad2d at 197). The third *Batson* challenge pertained to a panelist who seemed unaware of the neighborhood where her mother lived, explained her disinterest as "I don't ask a lot of questions," and generally seemed disinterested in the entire process. We have previously found the absence of racial pretext in explanations for peremptory challenges that rest in the panelist's lack of interest (*People v Artis*, 262 AD2d 215 [1st Dept 1999], *affd sub nom. People v Jeanty*, 94 NY2d 507 [2000]; *People v Valentine*, 298 AD2d 126 [1st Dept 2002], *lv denied* 99 NY2d 586 [2003]) and in the demeanor presented during voir dire (*People v Mohammed*, 45 AD3d 251 [1st Dept 2007], conclusions that we also reach here. The trial court's findings in these regards are entitled to great deference (*see People v Hernandez*, 75 NY2d

350 [1990], *affd* 500 US 352 [1991]). Since each of the panelists at issue was challenged for a credible, race-neutral reason, the record does not warrant a finding of pretext in the prosecutor's exercise of peremptory challenges.

Defendant's arguments under *Brady v Maryland* (373 US 83 [1963]) are unavailing. The People made extensive and timely disclosures relating to civil cases filed against two police witnesses, and defendant had ample opportunity to use this material at trial but chose not to do so. Defendant's main complaint relates to a motion decision by a United States District Judge in one of the disclosed lawsuits, which defendant claims to have a bearing on the officer's credibility. Although the People did not disclose this particular decision, it was both a matter of public record and readily available to defendant by making an electronic search. Defendant's claim that additional lawsuits against the testifying officers came to light after defendant's trial is likewise outside the record before us.

All concur except Renwick, J.P. who concurs in a separate memorandum as follows:

RENWICK, J.P. (concurring)

I agree with the majority that the verdict was not against the weight of the evidence. I also agree that defendant's arguments under *Brady v Maryland* (373 US 83 [1963]) are unavailing. However, as to defendant's *Batson* claim, that the prosecutor challenged potential jurors because of their race, I am constrained to concur in the result reached by the majority. Peremptory challenges enable litigants to remove otherwise qualified prospective jurors from the jury panel without any showing of cause; consequently, they have been historically exercised based on race. In *Batson v Kentucky* (476 US 79 [1986]), the Supreme Court tried to remedy the most obvious abuses by requiring that strike proponents give a "race neutral" reason for their strikes and directing trial courts to assess the credibility of the explanation. Whether *Batso*n has proven successful in ending racial discrimination in jury selection and adequately safeguarding the rights of both defendants and the excluded jurors remains an open question. The facts of this case give reason to doubt.

Here, the record demonstrates, at best, that the challenges against two of the three African-American jurors, who were the subject of defendant's *Batson* claim, were the product of the prosecutor's questionable assumption that social service workers,

who volunteer in soup kitchens and work in HIV clinics, and persons who satisfy their civic duty as jurors in trials resulting in hung juries, are unduly sympathetic to criminal defendants. The majority, as well as the trial court, finds that these putative employment and civic related challenges were rationally based and did not give rise to an inference of discrimination. Unfortunately, other courts have come to the same conclusion that these questionable reasons are "race-neutral," shifting the burden to a defendant to establish that these dubious reasons are pretextual (*see e.g. People v Mitchell*, 216 AD2d 156 [1st Dept 1995], *lv denied* 86 NY2d 798; *People v Rodriguez*, 211 AD2d 275, 279, *appeal dismissed* 88 NY2d 917 [1996]). Consequently, at this third step of the *Batson* inquiry, defendant failed to meet the very tough burden of demonstrating that the putative race-neutral reasons for challenging these three prospective jurors were pretextual.

When explanations are based on absurd and implausible stereotypes, they should be rejected as plainly unacceptable race-neutral explanations. For instance, in this case, one targeted group was people who work in soup kitchens. During jury selection, the assistant district attorney (ADA) explained to the court that peremptorily challenging "a coordinator in a soup kitchen" was legitimate because "usually people that are servers

at soup kitchens are those that may be addicted to controlled substances." Apparently, realizing the absurdity of this invented stereotype, the appellate ADA now explains that what the trial ADA meant was that "as a coordinator at a soup kitchen, [the challenged black juror] might have extensive contact with people who were addicted to controlled substances." Still, this group stereotype based on mere speculation should be found to be inadequate rebuttal to a prima facie *Batson* case.

"[I]f the principle enunciated in *Batson v Kentucky* (476 US 79), that peremptory challenges may not be exercised in a racially discriminatory manner, is to have any meaning it cannot be applied in a manner which blindly accepts any articulated reason or excuse, however implausible . . ." *(People v Rodriguez*, 211 AD2d 275, 276 [1st Dept 1995]). Ultimately, given our precedents and because there were no obvious instances of

unchallenged, non-African-American jurors, with comparable social service and civic duty backgrounds, I am constrained to concur with the result reached by the majority.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8934- Index 301679/14
8934A Joseph V. Tropea, 84082/14
Plaintiff-Respondent,

-against-

Tishman Construction Corp., et al.,
Defendants,

USIS Systems, Inc.,
Defendant-Appellant.

- - - - -

[And a Third Party Action]

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Fleischner Potash Cardali Chernow Coogler Greisman Stark & Stewart LLP, New York (Daniel Stewart of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Michael H. Zhu for respondents-appellants.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about November 1, 2017, insofar as it granted plaintiff's motion for summary judgment on liability on his Labor Law § 240(1) claim, and denied the motions of defendants/third-party plaintiffs AECOM Technology Corporation (AECOM), Mack-Cali Realty Corporation and M-C 125 Broad C LLC (collectively, the AECOM defendants), and USIS Systems, Inc. for summary judgment dismissing the Labor Law § 240(1) claim, unanimously affirmed, without costs. Appeal from the foregoing order, insofar as it granted USIS Electric's motion for summary judgment dismissing the AECOM defendants' third-party claim for contractual

indemnification against USIS Electric, unanimously dismissed, without costs.

The cable tray that fell on plaintiff's head from atop two ladders was an object that required securing to prevent it from falling (*see Outar v City of New York*, 5 NY3d 731 [2005], *affg* 286 AD2d 671 [2d Dept 2001]; *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686 [1st Dept 2017]). The distance the tray fell was not de minimis and "the harm to plaintiff was the direct consequence of the application of the force of gravity" upon the unsecured cable tray (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]). Moreover, securing the cable tray against falling would not have been contrary to the purpose of the work (*see Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]; *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011]).

Supreme Court correctly concluded that USIS Systems was liable under Labor Law § 240(1) as an agent of the owner (*Russin v Louis N. Picciano & Scahill, P.C., Bethpage (of counsel), for & Son*, 54 NY2d 311, 318 [1981]). Here, the terms of the subcontract by which USIS Systems subcontracted the work to USIS Electric demonstrate that USIS Systems had been delegated authority to direct and control the work (*see Weber v Baccarat,*

Inc., 70 AD3d 487, 488 [1st Dept 2010]). Moreover, as premises lessee which contracted for the work, AECOM was an owner within the meaning of Labor Law § 240(1) (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [1st Dept 2005]. We dismiss the appeal from the order insofar as the order granted USIS Electric's motion to dismiss the third-party complaint, since the AECOM defendants did not serve USIS Electric with the appendix and brief (*see* 22 NYCRR 1250.9[2]).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9220-
9221 The People of the State of New York,
Respondent,

-against-

Juan Carlos Martinez-Herrera,
Defendant-Appellant.

Ind. 1619/12

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

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered January 20, 2016, as amended March 11, 2016, convicting defendant, after a jury trial, of murder in the second degree, manslaughter in the second degree, kidnapping in the first degree and robbery in the first degree (two counts), and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The verdict 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 determinations concerning credibility and the evaluation of conflicting expert testimony. In particular, the jury could have readily rejected defendant's implausible account of the victim's death and its aftermath. The

evidence supports the conclusion that the victim's death was caused by the actions of defendant and his codefendant, which were reckless as well as being in the course of the crimes of robbery and kidnapping. We have considered and rejected defendant's claims that the verdict was against the weight of the evidence regarding certain other elements of the crimes at issue. Furthermore, although defendant casts his arguments in terms of weight of the evidence, to the extent he is also claiming the evidence was legally insufficient to establish guilt beyond a reasonable doubt, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

The court providently exercised its discretion in precluding defense counsel from questioning the People's expert about matters that, under the circumstances, would have required defendant to lay an evidentiary foundation through other witnesses. As the court explained, no evidence had yet been presented that would justify the precluded questions. The court specifically invited the defense to recall the People's expert after laying a proper foundation through testimony by defendant or other witnesses. Thus the court's ruling was not essentially preclusive, but was addressed to the order of proof, which "is committed to the sound discretion of the trial court" (*People v*

Caban, 5 NY3d 143, 151 [2005]). However, even after defendant and his own expert gave testimony that may have warranted recalling the People's expert, defense counsel did not seek to do so. We find that the court's ruling did not violate defendant's right to cross-examine witnesses and present a defense (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

The admission of portions of the jointly tried, nontestifying codefendant's recorded telephone calls from Rikers Island, accompanied by jury instructions that they could only be used against the codefendant himself, did not violate defendant's confrontation rights under *Crawford v Washington* (541 US 36 [2004]) and *Bruton v United States* (391 US 123 [1968]). In these phone calls, the codefendant only referenced his own actions, without mentioning the presence, conduct or existence of an additional participant, identified or otherwise. Accordingly, the codefendant's statements did not facially implicate defendant, and therefore their admission at a joint trial, with proper limiting instructions, was permissible (*see Richardson v Marsh*, 481 US 200, 206-208 [1987]). Defendant's argument that, in the context of the case, the codefendant's admissions of his own criminality implicated defendant is similar to the "contextual implication" argument that the *Richardson* court

expressly rejected (*id.* at 209). Additionally, admission of the statements did not violate *Crawford* because the recorded calls were clearly not testimonial under the "primary purpose" test of *Davis v Washington* (547 US 813, 828 [2006]). Moreover, "[b]ecause it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to nontestimonial statements" (*United States v Johnson*, 581 F3d 320, 326 [6th Cir 2009], *cert denied* 560 US 966 [2010]).

The court, which charged second-degree manslaughter as a lesser included offense of depraved indifference murder, properly denied defendant's request to also charge criminally negligent homicide. Given the manner in which defendant bound the victim's face and other body parts with multiple, tight layers of duct tape and electrical cords, there was no reasonable view of the evidence that he acted with criminal negligence rather than, at least, recklessness.

Defendant failed to preserve the following arguments: that the People's bill of particulars effectively incorporated the autopsy report, thereby limiting the People to the theory of causation contained in the report; that the court's full response to a jury note was defective or inadequate; and that the kidnapping charge merged with the robbery charge. We find defendant's arguments on the subject of preservation unavailing,

and we decline to review any of these unpreserved claims in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9222-
9223 In re Harmon Frierson,
Petitioner-Appellant,

-against-

Joseph Ponte, etc., et al.,
Respondents-Respondents.

Index 101854/16
101685/16

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In re Dwayne Maynard,
Petitioner-Appellant,

-against-

Joseph Ponte, etc., et al.,
Respondents-Respondents.

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Koehler & Isaacs LLP, New York (Liam L. Castro of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for respondents.

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Judgments, Supreme Court, New York County (Nancy M. Bannon, J.), entered April 26, 2018, denying the petitions of Harmon Frierson and Dwayne Maynard to annul respondents' determinations, which terminated Frierson's and Maynard's employment as tenured correction officers pursuant to Public Officers Law § 30(1)(e), and granting respondents' cross motions to dismiss the proceedings brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioners were properly terminated from their positions as

tenured correction officers pursuant to Public Officers Law § 30(1)(e), as they were each charged and convicted of official misconduct in violation of Penal Law § 195.00 (*see Matter of Hodgson v McGuire*, 75 AD2d 763 [1st Dept 1980]). A conviction of official misconduct involves misconduct in the line of duty and necessarily involves a violation of petitioners' oath of office (Public Officers Law ¶ 30[1][e]; *Hodgson* at 763). Furthermore, a conviction under Penal Law § 195.00 requires not only a knowing act or failure to act, but also an intent to obtain a benefit or to deprive another of a benefit (*see People v Flanagan*, 28 NY3d 644, 656 [2017]), and is a crime that is indicative of a lack of moral integrity (*see Matter of Duffy v Ward*, 81 NY2d 127, 135 [1993]). Since petitioners' employment was terminated pursuant to Public Officers Law § 30(1)(e), they were not entitled to a pre-termination hearing pursuant to Civil Service Law § 75(1)(a).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9224 In re Timothy F.,
Petitioner-Appellant,

-against-

Melissa V.,
Respondent-Respondent.

Leslie S. Lowenstein, Woodmere, for appellant.

Karen Freedman, Lawyers For Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about October 31, 2017, which denied petitioner father's request for a forensic evaluation, and permitted the father to write letters to the subject child but with no requirement that the child read or respond to such correspondence, unanimously affirmed, without costs.

The record reveals that the father has failed to establish a meaningful relationship with his now 12-year-old daughter (*see Bougor v Murray*, 283 AD2d 695 [3d Dept 2001]). He only saw the child once during a 10-year period and waited until the child was approximately 11 years old to file a petition to establish contact. The child has no recollection of ever meeting the father, who is a virtual stranger to her. Under these circumstances, the court providently exercised its discretion in

providing for written communication with the child, which the child may read at her discretion (*see e.g. Matter of Craig S. v Donna S.*, 101 AD3d 505 [1st Dept 2012], *lv denied* 20 NY3d 862 [2013]).

The father's contention that the court erred in making the final determination without forensic evaluations is unavailing. The decision whether to obtain forensic evaluations to assist in reaching a custody determination rests within the sound discretion of the trial court (*see Matter of B.G. v A.M.O.*, 57 AD3d 246, 247 [1st Dept 2008], *lv denied* 12 NY3d 705 [2009]), and here the denial of the forensic evaluation was a provident exercise of such discretion.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9225 Luis Tiburcio, Index 303264/14
Plaintiff-Appellant,

-against-

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

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Raskin & Kremins, LLP, New York (Rhonda Katz of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about September 21, 2017, which, in this action alleging, inter alia, false arrest, false imprisonment, malicious prosecution and violation of constitutional rights under 42 USC § 1983, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant Officer Martinez's observations of plaintiff spray painting the gate of a church, the recovery of the same color spray paint from his person, and the existence of paint on plaintiff's hand established probable cause for the arrest, and thus provided defendants a complete defense to the claims of false arrest, false imprisonment and malicious prosecution (*see De Lourdes Torres v Jones*, 26 NY3d 742, 759-761 [2016]; *Batista v City of New York*, 15 AD3d 304 [2005]), notwithstanding the

subsequent dismissal of the criminal charges (*see Arzeno v Mack*, 39 AD3d 341 [2007]). Plaintiff failed to establish bad faith by the officers with respect to false arrest, or actual malice with respect to malicious prosecution (*see Jenkins v City of New York*, 2 AD3d 291 [1st Dept 2003]). Plaintiff's claims of assault and battery are also not viable since the act of handcuffing plaintiff pursuant to a lawful arrest was entirely reasonable (*see Fowler v City of New York*, 156 AD3d 512 [1st Dept 2017], *lv dismissed* 31 NY3d 1042 [2018]).

Furthermore, the existence of probable cause to arrest and prosecute plaintiff entitled Officer Martinez to qualified immunity under the circumstances (*see e.g. Amore v Novarro*, 624 F3d 522 [2d Cir 2010]).

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: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9226 Michael Djuric, et al., Index 151057/12
Plaintiffs-Appellants-Respondents,

-against-

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

Shaw Environmental & Infrastructure
Engineering of New York, P.C.,
Defendant-Respondent-Appellant.

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Shaw Environmental & Infrastructure
Engineering of New York, P.C.,
Third Party Plaintiff-Appellant,

-against-

Bidwell Environmental, LLC,
Third-Party Defendant-Respondent.

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Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for appellants-respondents.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellant/respondent-appellant.

Fabiani Cohen & Hall, LLP, New York (Allison A. Snyder of counsel), for The City of New York and the New York City Department of Environmental Protection, respondents.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for Bidwell Environmental, LLC, respondent.

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Order, Supreme Court, New York County (Gerald Lebovits, J.), entered May 14, 2018, which granted the motions of defendants Shaw Environmental & Infrastructure Engineering of New York PC (Shaw), The City of New York and the New York City Department of

Environmental Protection for summary judgment dismissing the complaint, denied plaintiffs' motion for partial summary judgment on their claims pursuant to Labor Law §§ 240(1) and 241(6), and granted the motion of third-party defendant Bidwell Environmental & Infrastructure Engineering of New York (Bidwell) for summary judgment dismissing Shaw's third-party complaint against Bidwell, unanimously affirmed, without costs.

The motion court correctly found that Labor Law § 240(1) was inapplicable here, because the pipe saddle that detached from an overhead ceiling pipe assembly and struck plaintiff was not an object that required securing for the purposes of the undertaking; rather it was a permanent part of the structure (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [2001]; *Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009]).

Similarly, plaintiffs' Labor Law § 241(6) claim was correctly dismissed, since neither of the pleaded violations of the Industrial Code apply. 12 NYCRR 23-1.7(a)(1) is inapplicable here, because plaintiff was not injured by debris that may have been falling from a ceiling demolition, but instead, from a fixture of the building which dislodged (*see Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825-826 [2d Dept 2009]). 12 NYCRR 23-3.2(b) is also inapplicable because it pertains to protecting

the stability of adjacent structures, not the stability of the building or structure allegedly being demolished (*see Perillo v Lehigh Const. Group., Inc.*, 17 AD3d 1136, 1138 [4th Dept 2005]).

Plaintiffs' claims of common-law negligence and Labor Law § 200 were also properly dismissed. Defendants made a prima facie showing of lack of notice of any problem with pipe saddles through the testimony of the construction manager's representative who regularly walked the site and saw no evidence of the alleged condition, and the evidence that there were no complaints or prior similar incidents at the property (*see Rodriguez v Dormitory Auth. of State of N.Y.*, 104 AD3d 529, 530 [1st Dept 2013]). Constructive notice is also inapplicable because the defective pipe saddle was latent, such that the construction manager's representative's inspections would not have alerted it to the potential hazard of the object becoming dislodged and falling (*see Lopez v Dagan*, 98 AD3d 436, 438-439 [1st Dept 2012], *lv denied* 21 NY3d 855 [2013]).

Even to the extent the accident could be characterized as occurring due to the work, as opposed to the condition of the premises, construction manager Shaw cannot be held liable because it did not have authority to supervise and control the work (*see Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1st Dept 2012]).

There is similarly no evidence that Bidwell had such authority, or that it was in any way negligent, and thus the third-party complaint was correctly dismissed.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9227 The People of the State of New York, Respondent, Ind. 5388/15

-against-

Victor Peralta, Defendant-Appellant.

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Justine M. Luongo, The Legal Aid Society, New York (David Crow of counsel), and Schulte Roth & Zabel LLP, New York (Randall T. Adams of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered September 13, 2016, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 6 months, with 5 years' probation, unanimously reversed, on the law, and the matter remanded for a new trial.

As the People concede, defendant is entitled to a new trial because the court provided written instructions to the jury, at its request, but over defendant's objection (*see People v Johnson*, 81 NY2d 980 [1993]).

Because we are ordering a new trial, we decline to reach any other issues, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the

evidence. The jury could have reasonably found that the hot liquid thrown by defendant qualified as a dangerous instrument (*see* Penal Law §§ 10.00[10],[13]; *see also People v Adolph*, 299 AD2d 257, 257 [1st Dept 2002], *lv denied* 99 NY2d 579 [2003]).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9228 BLT Steak LLC, et al., Index 151293/13
Plaintiffs-Respondents,

-against-

Liberty Power Corp., LLC doing business as Liberty Power New York, et al.,
Defendants-Appellants.

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Greenberg Traurig, LLP, Albany (Cynthia E. Neidl of counel), for appellants.

Wachtel Missry LLP, New York (Dani Schwartz of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered March 15, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff restaurant companies seek to recover damages resulting from defendant power suppliers' overcharging them for the supply of electricity. The relevant accounts were first opened with defendants in 2005 by nonparty ETA Restaurants Inc., a then affiliate of plaintiffs, for the supply of electricity for a 24-month term. After that initial term expired, the accounts, whose bills were paid by plaintiffs, were charged a variable rate set by defendants on a month-to-month basis until plaintiffs terminated their accounts in 2012. Plaintiffs contend that

defendants violated the contractual terms applicable to electricity buyers who continued to be charged a default variable rate set by defendants after the expiration of their contracts.

Defendants failed to demonstrate that electricity buyers like plaintiffs, who reached the end of an initial contract term before regulatory changes were made in 2009 and did not cancel their service, renew their contracts, or enter into new contracts but had the service continue at the default variable rate until cancelled, are not covered by the terms and conditions of the New York-Rollover Variable Rate Plan, and, at most, have contractual rights under the terms and conditions of the initial contract. Nor did defendants demonstrate that where, as here, the initial contract is not available for review years later (because it was properly deleted from the system), there can be no contractual claim to enforce any terms and conditions. Thus, the motion court correctly found that issues of fact exist as to whether there is an enforceable contract for electricity between the parties with applicable terms and conditions covering the variable rate. Further, issues of fact exist as to whether defendants breached any of those terms and conditions by charging an exorbitant, hidden "margin fee" not provided for in the rate term.

The court correctly rejected defendants' argument that the

evidence demonstrates that plaintiffs lack standing to bring the breach of contract claim.

The court correctly rejected defendants' argument based on the voluntary payment doctrine (*see Kirby McInerney & Squire, LLP v Hall Charne Burce & Olson, S.C.*, 15 AD3d 233 [1st Dept 2005]). The record does not demonstrate that plaintiffs made the payments with full knowledge of the facts that would have enabled them to conclude that they were being overcharged by defendants due to a hidden margin fee.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9229 The People of the State of New York, Respondent, Ind. 2020/16

-against-

Lee Almonte, Defendant-Appellant.

_____

Steven A. Hoffner, New York, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Michael Obus, J. at plea and sentencing), rendered July 20, 2017, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously dismissed.

In the exercise of our discretion (*see People v Taveras*, 10 NY3d 227, 232-233 [2008]), we dismiss this appeal because defendant is a fugitive. It is undisputed that defendant has absconded, that his bail pending appeal has been revoked, that a

bench warrant for his arrest on this case remains outstanding, and that he is also wanted by the police as a suspect in a murder investigation.

In any event, we find that defendant's suppression claims are without merit.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9230 Homeward Residential, Inc., Index 156730/17
Plaintiff-Appellant,

-against-

Thompson Hine, LLP,
Defendant-Respondent.

_____

Goulston & Storrs, PC, New York (Nicholas Cutaia of counsel), for appellant.

Thompson Hine LLP, New York (Richard A. De Palma of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered February 23, 2018, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, with costs.

Defendant demonstrated that there is no basis for asserting specific or general personal jurisdiction over it in New York because it is a limited liability partnership formed in Ohio, with a principal place of business in Ohio, and it rendered legal services to plaintiff in Georgia and Ohio only, not in New York (*see Daimler AG v Bauman*, 571 US 117 [2014]; *Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]). In opposition, plaintiff argued that defendant should be equitably estopped to assert the defense of lack of jurisdiction because it represented that it had a principal place of business in New York City, and

plaintiff's counsel relied on those representations in bringing suit in New York (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]; *Burrowes v Combs*, 25 AD3d 370, 372 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]). However, plaintiff failed to demonstrate that counsel's reliance on these purported representations was reasonable.

Plaintiff contends that its attorneys relied on defendant's filings as a foreign partnership with the New York Department of State (DOS), which identified a New York address as its "Principal Executive Office," and on a complaint filed by defendant in an unrelated action in which it alleged that its principal place of business was in New York. However, defendant presented evidence showing that any search for public information would disclose that it is an Ohio-based law firm, with its principal place of business in Cleveland, and, moreover, that plaintiff was aware of this, as it had dealt with the firm in Georgia and Ohio only and sent payments to the Cleveland office. Defendant also showed that it did not affirmatively misrepresent its place of business in its DOS filings, which disclose that it is a foreign limited liability corporation and provide its Cleveland address for service of process. Plaintiff's "timely awareness of the facts requiring [it] to make further inquiry" and failure to make such inquiry before bringing suit in New York

render equitable estoppel inappropriate as a matter of law (*Putter*, 7 NY3d at 553-554).

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: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9231 Susan Weinman Resch, et al., Index 161701/15
Plaintiffs-Appellants,

-against-

State of New York, et al.,
Defendants-Respondents.

_____

Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for appellants.

Letitia James, Attorney General, New York (Amit R. Vora of counsel), for State of New York, respondent.

Zachary W. Carter, Corporation Counsel, New York (Jamison Davies of counsel), for City of New York and Bill De Blasio, respondents.

_____

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about September 5, 2017, which, in this action seeking declaratory and related relief, granted defendants' motions to dismiss, unanimously modified, on the law, solely to declare that the employment exclusion contained in Vehicle and Traffic Law § 236(2)(d) is not unconstitutional under the New York State Constitution, and otherwise affirmed, without costs.

Plaintiffs have failed to state a claim that Vehicle and Traffic Law § 236(2)(d)'s provision that hearing examiners of a municipality's parking violations bureau "shall not be considered employees of the city in which the administrative tribunal has been established" is unconstitutional.

Since plaintiffs have not identified a State law or regulation independent of the Constitution that confers upon them a property interest in the employment status they seek, they have not stated a claim for violations of their right to due process of law (NY Const art I, § 6; *see Matter of Deas v Levitt*, 73 NY2d 525, 531 [1989], *cert denied* 493 US 933 [1989]; *Matter of Shelofsky v Helsby*, 32 NY2d 54, 61 [1973], *appeal dismissed* 414 US 804 [1973]; *Matter of Voorhis v Warwick Val. Cent. School Dist.*, 92 AD2d 571, 572 [2d Dept 1983]; *see also Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied* 523 US 1074 [1998]).

Similarly, plaintiffs have not identified a fundamental right of which Vehicle and Traffic Law § 236(2)(d) deprives them, since "there is no fundamental right to government employment for purposes of the Equal Protection Clause" (*Winkler v Spinnato*, 72 NY2d 402, 406 [1988], *cert denied* 490 US 1005 [1989] [internal quotation marks omitted]; *see* NY Const art I, § 11). Accordingly, we apply rational basis review (*see Maresca v Cuomo*, 64 NY2d 242, 250 [1984], *appeal dismissed* 474 US 802 [1985]), which Vehicle and Traffic Law § 236(2)(d) survives.

Plaintiffs also have failed to state a claim that Vehicle and Traffic Law § 236(2)(d) violates the labor-not-a-commodity clause (NY Const art I, § 17), since that provision "merely

guarantees to employees in New York the right to organize into trade unions free from prosecution under the antitrust laws as combinations or conspiracies in restraint of trade" (*Shapiro v City of New York*, 32 NY2d 96, 102 n 4 [1973], *appeal dismissed* 414 US 804 [1973]). The collective bargaining (NY Const art I, § 17) and merit-and-fitness (NY Const art V, § 6) clauses are equally inapplicable to plaintiffs' claimed property deprivations, and so they have failed to state a claim for violations of these clauses as well.

We modify solely to declare the rights of the parties in this action seeking, inter alia, declaratory relief (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9232 The People of the State of New York, Ind. 5201/14
Appellant,

-against-

Christopher Clark,
Defendant-Respondent.

_____

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

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J. at speedy trial motion; Abraham Clott, J. at plea and sentencing), rendered December 21, 2016, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

Defendant's speedy trial motion seeking dismissal of the indictment "made only a perfunctory reference to the constitutional right to a speedy trial, and relied exclusively on CPL 30.30" (*People v Llorems*, 133 AD3d 465, 465 [1st Dept 2015], *lv denied* 27 NY3d 1071 [2016]). Thus, defendant did not raise before the motion court any factors relevant to a constitutional speedy trial claim (*see People v Wiggins*, 31 NY3d 1, 11 [2018]). Accordingly, this claim is unpreserved, and we decline to review

in the interest of justice.

As an alternative holding, we find that the motion was properly denied (*see People v Taranovich*, 37 NY2d 442, 444-445 [1975]). Defendant demonstrated no articulable prejudice, and the charge was serious (*see People v Desselle*, 167 AD3d 418 [1st Dept 2018], *lv denied* 32 NY3d 1203 [2019]).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9233 The People of the State of New York, Ind. 3463/16
Respondent,

-against-

James Evans,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered June 8, 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: MAY 7, 2019

CLERK

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

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9234 Brenda Revella, Index 114967/10
Plaintiff-Appellant,

-against-

Metro North Commuter Railroad,
et al.,
Defendants-Respondents.

_____

Philip J. Dinhofer, Rockville Centre, for appellant.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 10, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured disembarking a train, when she slipped and fell on ice that was on the platform. The complaint was properly dismissed as against defendant Metropolitan Transportation Authority since "'[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility'" (*Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007], quoting *Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 681 [2d Dept 1984]; *see Noonan v Long Is. R.R.*, 158 AD2d 392 [1st Dept 1990]).

In any event, the action was properly dismissed as against both defendants since plaintiff's testimony, as well as certified meteorological records, established prima facie that plaintiff fell during an ongoing storm. In opposition, plaintiff failed to raise an issue of fact that the complained of icy platform condition was due to other than the freezing rain that was falling at the time that she was injured (*see Harbison v New York City Tr. Auth.*, 147 AD3d 693 (1st Dept 2017]; *Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [1st Dept 2005], *affd* 6 NY3d 734 [2005]).

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: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9235 Unclaimed Property Recovery Service, Inc., et al.,
Plaintiffs-Appellants,

-against-

Credit Suisse First Boston Corporation, et al.,
Defendants-Respondents.

Index 653009/13

Paul Batista, P.C., New York (Paul Batista of counsel), for appellants.

Bracewell LLP, New York (Joshua Klein of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 26, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment, and denied plaintiffs' cross motion for summary judgment, unanimously affirmed, with costs.

The court correctly found that the parties' agreement provided only for recovery of specific unclaimed funds, and defendants' failure or refusal to execute a subsequent document to expand the terms of the original agreement did not constitute breach of contract (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012]). Plaintiffs' speculation and conjecture that defendants had a secret plan to deprive them of their earned fees is unsupported

by the record and insufficient to defeat defendants' motion (*see Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270, 270 [1st Dep 2009]).

Finally, plaintiffs' claim that defendants' motion for summary judgment was impermissibly based on an attorney's affirmation and the affirmation of someone without personal knowledge is incorrect. An attorney's affirmation may be used to submit evidence in admissible form, such as documents and transcripts, which is precisely what the attorney's affirmation did here (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Moreover, the affirmation from the director of the New York State Office of Unclaimed Funds (NYSOUF) was properly admitted to demonstrate his knowledge of the procedures of NYSOUF.

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: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9236 Winston D. Vogel, Index 112665/08
Plaintiff-Appellant,

-against-

Ruth Vogel, also known as Ruth Vogel Lipkis,
Defendant.

- - - - -

Lisa Breier Urban,
Nonparty Respondent.

_____

Doron Zanani Law Office, New York (Doron Zanani of counsel), for appellant.

Kossoff, PLLC, New York (Matthew E. Eiben of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 10, 2018, which, insofar as appealed from as limited by the briefs, awarded nonparty Lisa Breier Urban a commission of $10,000 as receiver and compensation of $750 as successor referee, nonparty Miriam Breier (the original referee) compensation and disbursements of $3,869.66, and nonparty Kossoff, PLLC (Urban's firm) attorneys' fees and disbursements of $8,372.95, and directed that the above sums be paid out of the proceeds from the sale of plaintiff's share of a condominium unit, unanimously modified, on the law, to modify the commission award to Urban as receiver to $7,162.50, to vacate the award to Kossoff, and to direct that defendant pay the first $15,000 of

Breier's and Urban's fees and that the parties equally bear any amount over $15,000, and otherwise affirmed, without costs.

The order awards the amounts listed above without explanation. Apparently, the court issued a decision on the record on March 13, 2018, but the transcript is not part of the record. By submitting an invoice, which showed her time entries, Urban established that she performed receiver-related services worth $7,162.50, which should be the commission awarded to her.

The award of $3,869.66 to Breier (the original referee) was proper. CPLR 8003(a) permits the court "to set a Referee's fees beyond the statutory rate" (*Garay v Soling*, 169 AD2d 616, 618 [1st Dept 1991], *clarified on other grounds* 172 AD2d 342 [1st Dept 1991]). Breier submitted an invoice from which one can determine the work she performed and the expenses she incurred. Plaintiff does not claim that Breier's hourly rate was unreasonable or that her hours were excessive.

The award of $750 to Urban as successor referee was also proper. The June 2015 order appointing Urban as successor referee directed her to "prepare and file . . . a final report and application for the payment of all fees and disbursements incurred to date by [her], including all fees and disbursements previously incurred by . . . Breier." Kossoff's invoice shows that Urban performed $1,190 worth of referee-related (as opposed

to receiver-related) tasks.

Kossoff (as opposed to Urban) was not entitled to an award. The Rules of the Chief Judge provide, "No receiver . . . shall be appointed as . . . her own counsel, and no person associated with a law firm of that receiver . . . shall be appointed as counsel to that receiver . . . unless there is a compelling reason to do so" (22 NYCRR 36.2[c][8]). Unlike the situation in *David Realty & Funding, LLC v Second Ave. Realty Co.* (14 AD3d 450 [1st Dept 2005]), Urban did not move for permission to retain her own law firm. Even if the court had appointed Kossoff as Urban's counsel, Kossoff would not be entitled to compensation, because the services it rendered were not extraordinary in any sense (*see Strober v Warren Prop. Co.*, 84 AD2d 834, 836 [2d Dept 1981]; Rules of the Chief Judge [22 NYCRR] § 36.4[c][4] ["Appointees who serve as counsel to a . . . receiver shall not be compensated as counsel for services that should have been performed by the . . . receiver"]). Unlike the law firm in *David Realty*, Kossoff did not "perform[] extensive special and extraordinary legal services . . . which extended well beyond the customary legal duties connected with a receiver's tenure" (14 AD3d at 451). On the contrary, the tasks for which Kossoff billed (e.g., recording the correction deed, preparing and recording a receiver's deed, and disbursing part of the proceeds from the sale of plaintiff's

interest in the condominium unit to pay his former counsel) are exactly the tasks that the court appointed Urban – a lawyer – to perform.

Pursuant to the settlement agreement between the parties, defendant is responsible for the first $15,000 of Breier's and Urban's fees, and the parties shall bear any amount over $15,000 in equal shares. Urban lacks standing to argue that the settlement agreement was modified, because that argument will benefit defendant (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). Even if we were to consider the argument, we would find it unavailing.

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9237 In re GVS Properties LLC, Index 570655/17
Petitioner-Appellant, 78285/15

-against-

Raybblin Vargas, et al.,
Respondents-Respondents.

_____

Golino Law Group PLLC, New York (Santo Golino of counsel), for appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (Jesse Gribben of counsel), for respondents.

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Order, Appellate Term, First Department, entered April 2, 2018, which affirmed an order of Civil Court, New York County (Jean T. Schneider, J.), entered on or about August 2, 2017, after trial, dismissing the consolidated petitions, unanimously affirmed, without costs.

Nineteen nonpayment proceedings were joined for trial on respondent tenants' defense under Multiple Dwelling Law § 302 that no rent was due because the building lacked a valid certificate of occupancy (CO). Multiple Dwelling Law § 302(1)(b) prohibits the collection of rent during the period in which the dwelling lacks a valid CO under Multiple Dwelling Law § 301(1) (*see Chazon, LLC v Maugenest*, 19 NY3d 410, 415 [2012]). Petitioner's contention that *Chazon* is limited to Loft Law cases is belied by the Court's citation to Multiple Dwelling Law §

302(1)(b) (*see id.* ["the law's command is quite clear"]).

The trial court's conclusion that there was no valid CO for the building is supported by a fair interpretation of the evidence at trial. It was undisputed that several Environmental Control Board violations had been adjudicated after a hearing determining that the building's occupancy violated the Building Code and exceeded the use permitted by the September 22, 1970 CO. In addition, respondents' expert credibly testified that there were significant fire safety concerns at the building. Indeed, petitioner stipulated that only the A and B line apartments had access to two independent exits, and conceded that the Department of Buildings only lifted its vacate order as to one of the apartments on the condition that fire guards stand vigil against fire at the building. Petitioner landlord's evidence failed to rebut respondents' case or demonstrate that the September 22, 1970 CO fulfilled the requirements of Multiple Dwelling Law § 301(1) in light of the building's undisputed myriad violations of the CO.

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

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9238 Paul DeMercurio, Index 150167/16
Plaintiff-Appellant,

-against-

605 West 42nd Owner LLC, et al.,
Defendants-Respondents.

_____

Mischel & Horn, P.C., New York (Lauren E. Bryant of counsel), for appellant.

Camacho Mauro Mulholland, LLP, New York (Anthony J. Buono of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered August 13, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 241(6), 200 and common-law negligence claims, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff allegedly slipped and fell on protective brown paper that had been installed on the floor of an apartment unit under construction. Plaintiff testified that the paper in the area where he fell was torn, dirty, and not properly taped to the walls. He further testified that the paper was slippery because it was on top of a cleaning agent called "green dust," which was used to prevent dust from rising into the air while that company was sweeping.

The motion court improperly dismissed plaintiff's Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.7(d). The alleged presence of green dust on the floor created a triable issue as to whether a "foreign substance" created a slippery condition on the floor, in violation of this Code section, and whether such condition caused plaintiff's accident (*see Velasquez v 795 Columbus LLC*, 103 AD3d 541 [1st Dept 2013]; *Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146-47 [1st Dept 2012]).

Plaintiff's Labor Law § 200 and common-law negligence claims should similarly be reinstated as the court should not have analyzed plaintiff's accident under the manner and means standard, but should instead have applied the dangerous condition standard (*Prevost v One City Block LLC*, 155 AD3d 531, 534 [1st Dept 2017]). The green dust was a dangerous condition that existed prior to plaintiff's arrival at the job site it was not part of the work plaintiff was performing (*id.*). As such, there are triable issues of fact as to whether the general contractor, defendant Tishman Construction Corporation had notice of the hazardous condition of the floor, given the testimony that the company employed at least five superintendents on the project who broadly supervised and controlled the work site, and conducted multiple daily walk-throughs (*Rainer v Gray-Line Dev. Co., LLC*,

117 AD3d 634, 635 [1st Dept 2014]). In addition, the owner, defendant 605 West 42nd Owner LLC failed to demonstrate the absence of actual or constructive notice of the hazardous condition on its part, since it failed to point to any probative evidence on this issue (*see e.g. DePaul v NY Brush LLC*, 120 AD3d 1046, 1047 [1st Dept 2014]).

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

ENTERED: MAY 7, 2019

CLERK

Renwick, J.P., Richter, Tom, Kapnick, Kern, JJ.

9239-
9239A-
9239B The People of the State of New York, Ind. 2875/15
Respondent, 3574/15
3006/16

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Nashonme Johnson counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Laura Ward, J.), rendered November 2, 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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: MAY 7, 2019

CLERK

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

Renwick, J.P., Richter, Tom, Kern, JJ.

9240-
9241-
9242-
9243

Index 650921/12

Adam Brook, M.D., Ph.D.,
Plaintiff-Appellant,

Adam Brook, M.D., Ph.D., P.L.L.C.,
Plaintiff,

-against-

Peconic Bay Medical Center, et al.,
Defendants-Respondents,

_____

Adam Brook, M.D., appellant pro se.

Garfunkel Wild, P.C., Great Neck (Lauren M. Levine of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 16, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff Adam Brook's (plaintiff) motion for leave to renew to reinstate the defamation claim and for leave to amend the complaint to substitute George Keckeisen, M.D. and Paul Nataloni, M.D. for two of the "John Doe" defendants, unanimously affirmed, without costs. Order, same court and Justice, entered May 25, 2018, which, insofar as appealed from, denied plaintiff's motion to amend the complaint to add claims for negligence and gross negligence and for leave to renew to reinstate the defamation and breach of fiduciary duty

claims, unanimously affirmed, without costs. Order, same court and Justice, entered August 16, 2017, which, insofar as appealed from, denied plaintiff's motion to strike the answer, unanimously affirmed, without costs. Order, same court and Justice, entered April 13, 2018, which, insofar as appealed from, denied in part plaintiff's motion to compel, unanimously affirmed, without costs.

Plaintiff Adam Brook, M.D., Ph.D., a cardiothoracic and general surgeon, brings suit against his former employer, defendant Peconic Bay Medical Center (PBMC), and its employees, in connection with PBMC's filing of an Adverse Action Report (AAR) with the National Practitioner Data Bank.

This Court previously affirmed the dismissal of plaintiff's defamation and breach of fiduciary duty claims (*Brook v Peconic Bay Med. Ctr.*, 152 AD3d 436, 438-439 [1st Dept 2017]).

While plaintiff's first motion for leave to renew to reinstate the defamation claim was based on evidence that was apparently not available at the time of the prior motion to dismiss, the evidence does not alter this Court's prior conclusion that plaintiff failed to sufficiently allege malice to overcome the applicable qualified privilege (*see Brook*, 152 AD3d at 438-439). Plaintiff's second motion for leave to renew to reinstate the defamation and breach of fiduciary duty claims was

improper insofar as plaintiff failed to offer any new facts in support of the new arguments made (*see* CPLR 2221[e][2]-[3]; *Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], *lv dismissed* 15 NY3d 820 [2010]).

Plaintiff's motion for leave to amend to substitute George Keckeisen, M.D. and Paul Nataloni, M.D. for two of the "John Doe" defendants was properly denied because the claims against these new defendants are time-barred. Contrary to plaintiff's claim, "[t]he proposed new defendants are not necessary parties inasmuch as the determination of the court will not adversely affect their rights" (*C-Kitchens Assoc., Inc. v Travelers Ins. Cos. [Travelers Ins. Co.]*, 15 AD3d 905, 906 [4th Dept 2005]; *see also* CPLR 1001). The procedural device set forth at CPLR 1024 is also inapplicable because plaintiff was aware of both Keckeisen's and Nataloni's identities long before he sought to amend the complaint to add them as defendants. For the same reason, plaintiff has failed to demonstrate an "excusable mistake" as to these defendants' identities sufficient to support relation back (*see Buran v Coupal*, 87 NY2d 173, 178, 181 [1995]).

Plaintiff's motion for leave to amend to add new claims for negligence and gross negligence was properly denied because these claims are clearly devoid of merit (*see* CPLR 3025[b]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept

2010]). This Court has already rejected plaintiff's argument that PBMC owed him a duty - a necessary element of a negligence claim (*see Brook*, 152 AD3d at 439; *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]).

Plaintiff's new argument that defendants' violation of Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards establishes negligence per se is unavailing. The JCAHO standards do not impose a statutory duty. Plaintiff's reliance on a Tennessee case - *Kelley v Apria Healthcare, LLC* (232 F Supp 3d 983, 1000-1002 [ED Tenn 2017]) - is misplaced. *Kelley* was a dispute between a patient and a health care provider - a context in which it is already clear that a duty exists and the JCAHO standards merely established the standard of care. By contrast, the instant dispute is between a hospital and a physician employed thereby - a context in which no duty generally exists (*see Hernandez v Weill Cornell Med. Coll.*, 48 Misc 3d 1210[A], *2 [Sup Ct, Bronx County 2015]; *People v Conlin*, 2013 NY Slip Op 32895[U],*5-*6 [Sup Ct, NY County 2013]; *see also Brook*, 152 AD3d at 439).

Even if the JCAHO standards established a statutory duty, defendants' failure to raise them earlier, although they have been in existence throughout this litigation, constitutes a separate ground for denying leave to amend (*see Matter of Group*

for S. Fork v Town Bd. of Town of Southampton, 285 AD2d 506, 508 [2d Dept 2001]).

Spoliation sanctions were appropriately awarded due to defendants' failure to institute a litigation hold when the duty to preserve evidence arose in July 2010 (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). The motion court did not improvidently exercise its discretion in declining to strike the answer and instead awarding an adverse inference sanction because plaintiff was not deprived of the ability to litigate his claim as a result of this failure (*see Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609-610 [1st Dept 2016]). Nor did the motion court improvidently exercise its discretion is setting the date range of the adverse inference sanction.

The motion court also did not improvidently exercise its discretion insofar as it denied plaintiff's motion to compel.

The motion court appropriately ordered that the underlying patient medical records be produced subject to a HIPAA-compliant protective order (*see* 45 CFR 164.512[e][1][ii][B], [iv], [v]). Even if personally identifying information were removed from these records, outside parties may still be able to discern the identity of the patient in the context of the case (*see* 45 CFR § 164.514[b][2][ii]). Moreover, plaintiff has failed to set forth

any need for the records to be publicly available.

Plaintiff also failed to demonstrate a need sufficient to support his broad and burdensome requests to depose PBMC's Director of Network Services and Communications, for an affidavit detailing which documents were preserved and which were destroyed, and for metadata for all documents produced or logged - which requests constituted improper attempts to relitigate the prior spoliation motion.

Plaintiff's request that defendants provide a complete response to Interrogatory No. 13 was not yet ripe when the instant motion was made, as the deadline for defendants to serve their supplemental interrogatory responses had not yet elapsed.

Plaintiff's requests that defendants identify the names of individuals in distribution groups and of nonparty peer review participants are moot, as this Court has already ordered defendants to produce the latter (*see Brook v Peconic Bay Med. Ctr.*, 162 AD3d 503, 505 [1st Dept 2018]) and the order on appeal granted plaintiff's request for the former.

This Court has likewise already ruled on plaintiff's request that defendants produce unredacted versions of all documents submitted to HHS in connection with him (*see Brook*, 162 AD3d at 504-505). We see no basis to disturb that ruling.

We do not reach plaintiff's argument that defendants should

be compelled to identify the general subject matter of all documents on their privilege logs because it was not properly raised below.

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

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

ENTERED: MAY 7, 2019

CLERK

Richter, J.P., Manzanet-Daniels, Webber, Kern, JJ.

9307 FTI Consulting, Inc., Index 654062/16
Plaintiff-Respondent,

-against-

CT Miami, LLC,
Defendant.
- - - - -
CT Miami, LLC,
Third-Party Plaintiff-Respondent,

-against-

Akerman LLP formerly known as Akerman Senterfitt LLP,
Third-Party 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 (Melissa A. Crane, J.), entered on or about August 8, 2018,

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 April 24, 2019,

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

ENTERED: MAY 7, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rosalyn H. Richter, J.P.
Sallie Manzanet-Daniels
Peter Tom
Marcy L. Kahn
Anil C. Singh, JJ.

8268-8269

_____x

In re Zavion O.,
Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Donna O.,
Respondent-Respondent,

Ella M.,
Respondent.

- - - - -

Lawyers for Children and the Children's Law Center,
Amici Curiae.

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In re Serenity R.L. (Anonymous),
Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Johnny L., et al.,
Respondents.

- - - - -

Lawyers for Children and the Children's Law Center,
Amici Curiae.

_____x

Zavion O. appeals from the order of the Family Court, New York County (Jessica Brenes, Referee), entered on or about June 29, 2018, which

determined that his presence was required before the court and issued a warrant directing that he be produced. Serenity R.L. appeals from the order, same court (Clark V. Richardson, J.) entered on or about July 23, 2018, which ordered that a warrant of arrest be issued for her.

Dawne A. Mitchell, The Legal Aid Society, New York (Israel T. Appel of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown and Fay Ng of counsel), for Administration for Children's Services, respondent.

Center for Family Representation, Inc., New York (Maura A. Keating of counsel), for Donna O., respondent.

Karen Friedman, Lawyer's for Children, Inc., New York (Betsy Kramer of counsel), and Karen Simmons, The Children's Law Center, Brooklyn (Louise Feld of counsel), for amici curiae.

TOM, J.

These cases, consolidated for appeal, present the recurring issue whether Family Court Act § 153, relied on by Family Court, authorizes the issuance of a warrant for the protective arrest of a child who is neither a respondent nor a witness in a Family Court proceeding for purposes of ensuring the child's health and safety rather than to compel his or her attendance in court. Notwithstanding that such protective arrests may have become a practice of Family Court under very compelling circumstances, in the absence of more explicit statutory authority we cannot endorse the legality of the practice. In reaching our conclusion, though, we do not suggest any criticism of the respective Family Courts in this case nor do we impute improper motives to the Administration for Children's Services, various parties or even law enforcement, who, to all appearances, were operating on the best of motives. However, the issuance of an arrest warrant must proceed from explicit statutory authority. Such is lacking in this case, as is, notably, any authoritative decisional law.

The record clearly shows that the two children in these cases are at high risk of bringing harm to themselves or putting themselves in positions where others may harm them if they are left to their own choice of absconding from foster care

facilities to enter life on the streets. The behavioral issues are explained and supported by medical documentation. Both have significant vulnerabilities masked by aggressive and confrontational behavior. Both have displayed histories of absconding from home and placement settings, presenting the substantial risk that they would end up on the streets. This was the outcome that all parties wanted to prevent. Both children are marked by multiple mental illness diagnoses and neurological impairments requiring medication which they often will not take and apparently did not take when they absconded, leading to the inevitable downward spiral during which each engaged in risky behavior. Both have complicated family situations in which family members are unavailable as resources, or available family members who may be willing to be resources have had persistent difficulties controlling the children, and both children manifest severe behavioral problems. The record also clearly demonstrates the likelihood that they will run away again if not in a controlled setting of some nature, thereby repeating the cycle of being at risk on the streets.

In Serenity's case, her father executed a voluntary placement agreement, recognizing that he could not control her behavior, which then became the basis for the Petition for Approval of an Instrument filed by ACS. By Family Court order

dated March 6, 2018, Serenity was temporarily placed in foster care with Mercy First. Serenity left her foster care placement on or about May 11, 2018, after which ACS filed a Notice of Absconded Child on or about May 16, 2018, and the National Center for Missing and Exploited Children was notified. On May 16, 2018, Family Court in New York County issued a warrant of arrest for Serenity pursuant to Family Court Act § 153. The warrant imposed as a restriction that no handcuffs were to be used unless required by safety or security concerns. The warrant also directed that if it was executed outside of the hours during which Family Court was open, the child was to be brought to the ACS Children's Center at 492 First Avenue in Manhattan. By order of disposition dated June 8, 2018, Family Court approved the voluntary placement agreement executed by Serenity's father and transferred her care and custody to Mercy First for long-term placement.

Serenity subsequently left the facility again on or about June 25, 2018. Serenity was observed by an ACS search team on July 13, 2018, at which time she aggressively resisted returning to the facility. On July 16, 2018, ACS filed a second Notice of Absconded Child, which described some of the risky behavior in which she was engaging, including that Serenity may be "engaging in unsafe sexual behavior" and was not taking her prescribed

psychotropic medications. Family Court issued another arrest warrant, which was executed on July 18, 2018. Upon inquiry by the court, ACS indicated that it would return Serenity to Mercy First, but the attorney for the child predicted that she would "be out on the street again." On July 19, 2018, Serenity left the facility again, and ACS filed another Notice of Absconded Child on July 20, 2018. This notice advised that Serenity, an asthma sufferer, was without her inhaler and that she had not brought with her the psychotropic medication prescribed for her. ACS applied for another arrest warrant.

At the July 23, 2018 appearance in connection with the ACS warrant application, the attorney for the child objected to the warrant application. Family Court transferred the matter to Referee Jessica Brenes and adjourned it to the following day. The following day, the case worker assigned to Serenity repeated the concern that Serenity had absconded without her medication, which placed her at a substantial health risk, described the protocols that would be employed upon her return, including crisis counseling, but conceded that they had also been in place prior to prior runaway episodes. The warrant application was granted. This Court stayed execution of the arrest warrant by order entered August 1, 2018. Serenity was returned to foster care on July 24, 2018. By order entered August 7, 2018, Family

Court declined to vacate the warrant. Apparently, Serenity left Mercy First again prior to the hearing of the appeal.

In Zavion's case, his grandmother, who was his legal guardian, executed a voluntary placement agreement on or about January 25, 2017. In the ACS petition to approve the agreement, ACS described the neurological and behavioral issues that impeded his grandmother's ability to control his behavior. After a hearing, Family Court granted the petition and transferred his care and custody to ACS. Zavion's situation differed to a degree from that of Serenity in that he was in a placement proceeding and, indeed, his progress was reported during several placement hearings. There was an indication that he would be placed in a new school, he wanted to return home, and a trial discharge was anticipated. However, problems arose concerning cancellations of home visits - whether his grandmother or case worker cancelled the visits was disputed. Zavion resisted returning to ACS, and Zavion's progress started to deteriorate. He started to abscond, was reported by his grandmother to be "run[ning] the streets" at night, may have had a history of suicidal ideations, and may have been engaging in drug use.

ACS applied for an arrest warrant, to which the attorney for the child objected on jurisdictional and other grounds. The Family Court Referee, in issuing the warrant, concluded that it

"cannot allow the absence of any specific authority to paralyze it from acting in the best interests of the child." Although noting the need for legislative action insofar as "the statute is in fact silent . . . specifically where these types of cases are concerned," the Family Court's decision found that the arrest warrant as a means of protecting the child was consistent with Family Court's exercise of its jurisdiction to protect the child from the adverse health and safety consequences of absconding from foster care. Technically, the court in its subsequent written decision grounded its warrant jurisdiction in the need to ensure the child's presence in court - thereby at least touching on some of the phrasing in § 153 - so as to allow the court to assess the child's safety or the child's wishes regarding placement. By order entered July 2, 2018, this Court stayed the execution of this warrant as well, pending determination of the appeal. Apparently, Zavion has continued to abscond on multiple occasions.

Family Court Act section 153 authorizes Family Court to issue "in a proper case a warrant or other process to secure or compel the attendance of an adult respondent or child . . . whose testimony or presence at a hearing or proceeding is deemed by the court to be necessary. . . ." Section 153-a governs the execution of the arrest warrant, which, pursuant to subsection

(c) may include "such physical force as is justifiable" by reference to the Penal Law. Although the decision accompanying an arrest in this case contemplated the absence of handcuffs, the statute nevertheless allows for it and a restriction in one case has no effect, of course, in other similar cases. An arrest warrant allows for heightened coercion imposed on the arrestee with Fourth Amendment ramifications. An arrest record, even if not correlating with a criminal record, could have future adverse ramifications for employment or otherwise. Moreover, there is also the potential trauma that an arrest, especially if coupled with handcuffs or other restraints, may pose for an already fragile child. Hence, even if an arrest warrant were to be legislatively authorized for cases such as these, it should be carefully conditioned so as to be sensitive to these concerns. In any event, while the record for these particular cases amply demonstrates the need for a valid and binding legal instrument to secure the subject children, keep them off the streets, in a manner of speaking, for their own health and safety, and to provide a means for the children to be continually provided regular medical treatment and other services, no statutory device seems to fit the need in either of these cases.

Family Court relied on section 153 as a device to issue arrest warrants to facilitate these goals. As noted above, we do

not fault the court, law enforcement, the parties or the attorneys for each child in terms of their motivation, all of whom perceived themselves to be acting in the best interests of each child. However, the question presented to us is whether under these compelling circumstances the court could avail itself of section 153 to achieve the intended protective goal. We conclude that the statute does not authorize the arrest of a nonrespondent child who is not needed as a witness in a Family Court hearing or proceeding under these circumstances regardless of the seriousness of the concerns.

These are not juvenile delinquency cases, and notwithstanding the court's gloss about securing Zavion's attendance to inquire into safety issues and his desires regarding placement, neither child's attendance at a proceeding was required for testimonial purposes. Hence, a textual analysis of the statute does not support a conclusion that an arrest warrant may be issued as a protective rather than a coercive device for testimonial or quasi-prosecutorial purposes. The Practice Commentary notes the ambiguity of the phrasing and observes that "[c]ommon sense and elementary due process principles" militate against allowing a "non-respondent child [to] be dragged into court upon issuance of an arrest warrant" for protective purposes (Prof. Merril Sobie, Practice Commentary,

McKinneys Cons Laws of NY, Book 29A, Family Ct Act § 153, 2014 Supp.).

Other statutory tools, available for other purposes, are worth examining. Family Ct Act § 718 allows a peace officer under defined circumstances or a police officer to return a runaway child to home or, if appropriate, a facility certified to accept runaway children. However, this provision is located in Family Ct Act article 7 pertaining to persons in need of supervision. Although, in effect, § 718 authorizes the peace officer or police officer to take the runaway child into temporary custody and provides a basis for probable cause to that extent, it, too, does not authorize an arrest (*Matter of Bernard G.*, 247 AD2d 91 [1st Dept 1998]; *cf. Anonymous v City of Rochester*, 56 AD3d 139 [4th Dept 2008], *affd on other grounds* 13 NY3d 35 [2009]).

Rather, the temporary custodial detention contemplated by § 718 is civil in nature, in contrast to the heightened coercive custody manifest in a criminal arrest. As the Court of Appeals has cautioned, a PINS proceeding and the accompanying custody of the runaway child does not ripen into criminal delinquency even if the child resists (*Matter of Gabriela A.*, 23 NY3d 155 [2014]). Nor can this limited detention authority be bootstrapped to more coercive judicial powers for a chronic absconder (*id.; Matter of*

Edwin G., 296 AD2d 7 [1st Dept 2002]) notwithstanding "the frustration Family Court judges frequently feel while attempting to compel recalcitrant PINS to comply" with their orders (*Matter of Jennifer G.*, 26 AD3d 437, 438 [2d Dept 2006]), absent an independent basis to arrest the respondent child as a juvenile delinquent. Hence, this provision addressed to PINS runaways also cannot be the basis for an arrest warrant by a statutory sleight of hand.

Noting the statutory deficiency in providing tools for detaining serial absconders who need treatment and other services in a nonsecure facility, we have upheld Family Court determinations adjudicating some child respondents as juvenile delinquents rather than persons in need of supervision (*Matter of A.H.*, 149 AD3d 573 [1st Dept 2017]; *Matter of Kaylynn M.*, 143 AD3d 413 [1st Dept 2016]; *Matter of Amari D.*, 117 AD3d 522 [1st Dept 2014]), but they were responsible for acts that would constitute crimes if committed by adults.

We have also rejected a juvenile delinquency adjudication premised solely on contempt pursuant to Family Ct Act § 156 arising from a child's violation of a PINS dispositional order when he absconded from his ACS placement, also in the absence of statutory authority. In that case, we noted the irony that while Family Court may direct a child not to abscond, it lacked

effective enforcement power when the child nevertheless does abscond (*Matter of Edwin G.*, 296 AD2d at 10). While that is not the context of the cases before us at present, since these are not PINS dispositions and Family Court did not adjudicate either child a juvenile delinquent, nevertheless, it has become apparent that Family Court lacks effective statutory tools to address the broader problem of serial absconders.

For similar reasons, nor are 22 NYCRR 205.26 or 205.80, addressing children who abscond from facilities to which they have been remanded, available for present purposes. Family Ct Act § 1037, authorizing a warrant to bring a child's parent or guardian rather than the child before the court, also provides no authority relevant to the present cases.

The Referee in Zavion's case relied in part on its general parens patriae responsibility to "to do what is in the best interests of the children" (*Matter of Shinice H.*, 194 AD2d 444, 444 [1st Dept 1993]). However, this doctrine cannot create jurisdiction for Family Court that is not provided by statute (*Matter of Bonnie Michelle W.*, 76 AD2d 784 [1st Dept 1980], *affd* 54 NY2d 820 [1981]). As this Court noted, "While we are sympathetic to the court's concern for the welfare of the appellant, the Family Court is a court of limited jurisdiction. It has only such jurisdiction and powers as the Constitution and

the laws of the State expressly grant it" (76 AD2d at 785). Hence, well-intended goals cannot create jurisdiction not explicitly conferred on Family Court.

Returning the analysis to § 153, the absence of interpretive caselaw supporting the issuance of a warrant for what in effect is a protective arrest is telling. The legislative history of this century-old statutory provision also is unenlightening. Kings County Family Court analyzed the absence of authority to order the arrest on a nonrespondent child in the absence of a proceeding in *Matter of Jennifer R. (Tanya M.)* (42 Misc 3d 508 [Family Ct, Kings County 2013]). That court, also struggling with the statutory deficiencies, rejected as disingenuous the ACS theory equating the notice of the absconded child with a "proceeding" as a manufactured device to justify the issuance of a warrant. While the cases before us present a different problem, we, too, decline to interpret § 153 in a contrived manner in order to justify the issuance of a warrant.

It seems clear that ACS, with effective judicial backing, needs tools in cases such as this to maintain children, who have not been adjudicated juvenile delinquents but who chronically abscond, in controlled settings where they can be administered medically prescribed medication and receive appropriate therapeutic and other services without which there is the

significant and demonstrated likelihood that they will be a danger to themselves or others but who, by regularly absconding, are likely to end up on the streets vulnerable and unprotected. Multiple courts over the years have identified the deficiencies in the Family Court Act regarding this and similar problems. Family Court is constitutionally and statutorily constrained from undertaking what may seem to be a middle ground of issuing an arrest warrant under § 153 for protective purposes in what is essentially a civil context. As was noted by our sister court in *Matter of Jennifer G.*, regarding a somewhat different problem, "[T]he resolution of this dilemma rests with the [l]egislature" (26 AD3d at 438). The appropriate vehicle for providing Family Court with the means to achieve the goals commensurate with the problem would seem to be either an amendment to section 153 or other statutory provisions, but it is in the legislative realm, and we would encourage that undertaking.

Accordingly, the order of the Family Court, New York County (Jessica Brenes, Referee), entered on or about June 29, 2018, which determined that the child Zavion O.'s presence was required before the court and issued a warrant directing that he be produced, and the order, same court (Clark V. Richardson, J.) entered on or about July 23, 2018, which ordered that a warrant of arrest be issued for the child Serenity R.L., should be

reversed, on the law, without costs, and the warrants of arrest vacated.

All concur.

Order, Family Court, New York County (Jessica Brenes, Referee), entered on or about June 29, 2018, and order, same court (Clark V. Richardson, J.) entered on or about July 23, 2018, reversed, on the law, without costs, and the warrants of arrest vacated.

Opinion by Tom, J. All concur.

Richter, J.P., Manzanet-Daniels, Tom, Kahn, Singh, JJ.

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

ENTERED: MAY 7, 2019

CLERK