SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 27, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5568 The People of the State of New York, Respondent, Ind. 4147/08

-against-

Jeffrey Capers,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Roger Hayes, J.), rendered on or about March 20, 2009, unanimously affirmed.

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

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of

the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Gonzalez, P.J., Saxe, Acosta, Abdus-Salaam, JJ.

2278-
2278A The People of the State of New York,
Respondent,

-against-

Christopher Sanchez,
Defendant-Appellant.

Ind. 1107C/05
90151/05

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

Robert T. Johnson, District Attorney, Bronx (Laura M. Trachtman of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Troy K. Webber, J.), rendered on or about October 24, 2006,

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

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

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3681 Jacqueline Neglia, as Administratrix of the Estate of Frank Vetrano, et al.,
Plaintiffs-Respondents,

-against-

James Maffucci, M.D., et al.,
Defendants-Appellants.

Index 23526/06

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Wilma Guzman, J.), entered on or about March 15, 2010,

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 July 28, 2011,

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, JJ.

3645 In re Edward Simmelkjaer, Index 403850/06
Petitioner,

-against-

Robert Doar, etc., et al.,
Respondents.

An appeal having been taken to this Court by the above-named petitioner from an order of the Supreme Court, New York County (Rolando T. Acosta, J.), entered on or about February 23, 2007,

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 filed September 20, 2011,

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5564 The People of the State of New York, Ind. 1948C/05
Respondent,

-against-

Terry Ephram,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Seth L. Marvin, J.), rendered on or about February 18, 2010,

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

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

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5569 The People of the State of New York, Dkt. 66395C/06
Respondent,

-against-

Margarita Ayala,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael R. Sonberg, J.), rendered May 23, 2008, convicting defendant, upon her plea of guilty, of operating a motor vehicle while under the influence of alcohol, and sentencing her to a conditional discharge and a fine of $500, unanimously affirmed.

The court properly denied defendant's motion to suppress breathalyzer test results. The two-hour limitation contained in Vehicle and Traffic Law § 1194(2)(a) applies only to deemed consent and does not apply where, as here, a defendant expressly and voluntarily consents to the test (*People v Atkins,* 85 NY2d 1007 [1995]). Defendant's challenge to the voluntariness of her consent is unpreserved and without merit.

The reliability of the test results was an issue for trial

and was not a proper issue for the suppression hearing. By pleading guilty, defendant forfeited appellate review of that issue (*see People v Parilla*, 8 NY3d 654, 659 [2007]).

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5570-
5570A James A. Clarke, Index 115178/07
103470/08
Plaintiff-Appellant,

-against-

Catamount Ski Area, et al.,
Defendants,

Catamount Development Corporation, et al.,
Defendants-Respondents.

[And Another Action]

Frekhtman & Associates, Brooklyn (Andrew Green of counsel), for appellant.

Roemer, Wallens, Gold & Mineaux, LLP, Albany (Matthew J. Kelly of counsel), for Catamount Development Corporation, respondent.

Quirk & Bakalor, P.C., New York (Richard H. Bakalor of counsel), for Zack Lang and Cari Lang, respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 3, 2010, which, to the extent appealed from as limited by the briefs, granted defendant Catamount Development Corporation's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court and Justice, entered June 10, 2011, which granted the Lang defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries he suffered when he and defendant Zack Lang collided while skiing at an area operated by defendant Catamount Development Corporation. This accident was the result of inherent risks in downhill skiing (*see* General Obligations Law § 18-101). Defendants made prima facie showings of entitlement to judgment as a matter of law based on the doctrine of assumption of risk; plaintiff admitted awareness of the inherent risks of downhill skiing and defendants submitted proof that they did not enhance such risks (*see Farone v Hunter Mtn. Ski Bowl*, Inc., 51 AD3d 601 [2008], *lv denied* 11 NY3d 715 [2009]; *Whitman v Zeidman*, 16 AD3d 197 [2005]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff's speculative deposition testimony as to the reckless nature of Zack's skiing at the time of the collision is insufficient to defeat the motion for summary judgment. Further, the court properly declined to consider the affidavit of plaintiff's expert, given that plaintiff failed to timely disclose the expert's identity (*see Harrington v City of New York*, 79 AD3d 545, 546 [2010]). In any event, the conclusory affidavit is insufficient to raise an issue of fact as to whether defendants unreasonably increased the risks to which plaintiff

was exposed (*see Bedder v Windham Mtn. Partners, LLC*, 86 AD3d 428 [2011]; *Bono v Hunter Mtn. Ski Bowl*, 269 AD2d 482 [2000], *lv denied* 95 NY2d 754 [2000]).

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5571-
5571A-
5571B In re Alexander John B. and Another,

Children Under the Age of
Eighteen Years, etc.,

Cynthia A.,
Respondent-Appellant,

Cardinal McCloskey Services, et al.,
Petitioners-Respondents.

_____

Andrew J. Baer, New York, for appellant.

Rosin Steinhagen Mendel, New York (Todd Shaw of counsel), for respondent.

George E. Reed, Jr., White Plains, attorney for the children.

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about May 13, 2010, which denied appellant mother's motion to vacate two orders of disposition of the same court (Douglas Hoffman, J.), entered on or about June 10, 2009, upon appellant's default, terminating her parental rights to the subject children on the ground of abandonment, and committing custody and guardianship of the children to the Commissioner for the Administration for Children's Services of New York City and petitioner agency for the purpose of adoption, unanimously

affirmed, without costs. Appeal from the orders of disposition, unanimously dismissed, without costs, as taken from nonappealable papers.

Family Court properly exercised its discretion in denying appellant's motion to vacate the orders terminating her parental rights upon her default because her moving papers failed to demonstrate a reasonable excuse for her absence from the court's May 13, 2009 proceeding and a meritorious defense to the abandonment allegation (*see Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541 [2010], *lv dismissed* 16 NY3d 818 [2011]). Appellant offered no evidence substantiating her claim that she was attending to "matters in the criminal court," or showing that she had apprised her counsel, the court, or the agency of her unavailability (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [2010], *lv dismissed* 15 NY3d 766 [2010]; *Matter of Devon Dupree F.*, 298 AD2d 103 [2002]; *Matter of Laura Mariela R.*, 302 AD2d 300 [2003]). Her explanation that the children's placement in the kinship foster home of her grandmother led her to believe that she would be able to have the children returned to her once she gets her life together inadequately explains why she was unable to attend the hearing.

Appellant also failed to substantiate her defense that she was unable to visit the children during the relevant six-month period because she was in a drug treatment program and her grandmother refused to let her see the children when she was in a better position to care for them (*see Matter of Derrick T.*, 261 AD2d 108 [1999]). The evidence submitted indicates that she started the drug treatment program on October 28, 2009, well after the relevant period of May 28, 2008 through November 28, 2008.

The post-termination change in the children's foster situation does not warrant remitting the matter to Family Court for a new dispositional hearing to consider whether terminating appellant's parental rights is still in the children's best interests (*cf. Matter of Arthur C.*, 66 AD3d 1009 [2009]). Nothing indicates that appellant had completed any of the drug, psychotherapy, and vocational training programs that she began in late 2009 and early 2010, and neither appellant nor the children's attorney has rebutted the agency's contention that appellant has not been in contact with the children for years. That none of appellant's relatives are in a position to adopt the children, and that the children are currently residing in a non-kinship foster home, does not alone warrant the conclusion

that returning them to appellant would serve their best interests.

To the extent appellant appeals from the two orders of disposition, no appeal lies from orders entered on default (*see Matter of Anthony M.W.A. [Micah W.A.]*, 80 AD3d 476 [2011]).

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5572 The People of the State of New York, Ind. 7152/03
Respondent,

-against-

Idress Hamby, etc.,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 19, 2009, resentencing defendant to six and one half years, to be followed by five years post-release supervision, unanimously affirmed.

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5573 The People of the State of New York, Ind. 7537/02
Respondent,

-against-

Alvaro Cumberbatch,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed 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 (Budd G. Goodman, J.), rendered on or about February 11, 2004,

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

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

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5574 In re Dynasia C.,

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

Domonique C.,
Respondent-Appellant,

Cardinal McCloskey Services, et al.,
Petitioners-Respondents.

_____

Howard M. Simms, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and DLA Piper LLP (US), New York (Cary B. Samowitz of counsel), attorneys for the child.

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Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about April 20, 2010, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent permanently neglected her daughter (Social Services Law § 384-b[7][a],[f]; § 384-b[3][g][i]). The agency exercised diligent efforts to encourage and strengthen the parental relationship by formulating a service plan, arranging regularly scheduled visitation with the child, and referring respondent to a parenting skills course, housing assistance, and a GED program. Despite the agency's efforts, respondent failed to maintain contact with the child through consistent and regular visitation, and failed to obtain adequate housing and a stable source of income. (*Matter of Aisha C.*, 58 AD3d 471 [2009], *lv denied* 12 NY3d 706 [2009].)

A preponderance of the evidence supports the finding that it is in the child's best interests to terminate respondent's parental rights so as to free the child for adoption by her foster mother, in whose home she has lived for most of her life

and has thrived (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Under the circumstances, a suspended judgment is not warranted (*see Matter of Isabella Star G.*, 66 AD3d 536, 537 [2009]).

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5575 The People of the State of New York, Ind. 700/99
Respondent,

-against-

Joseph Harmon,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 30, 2009, resentencing defendant to an aggregate term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5578 & M-3895 The People of the State of New York, Respondent,

Ind. 4451/07

-against-

Victor Perez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (James M. Kindler, J.), rendered May 11, 2009, convicting defendant, after a jury trial, of course of conduct against a child in the first degree, rape in the first degree (five counts), criminal sexual act in the first degree (three counts), predatory sexual assault against a child (eight counts), sexual abuse in the first degree, incest in the first degree (four counts), use of a child in a sexual performance (three counts) and endangering the welfare of a child, and sentencing him to an aggregate term of 95 years to life, unanimously modified, on the law, to the extent of vacating the convictions of rape in the first degree under counts 10, 16, 22 and 27 of the indictment, vacating the convictions of

criminal sexual act in the first degree under counts 9, 17 and 23 of the indictment, and dismissing each of the seven enumerated counts, and otherwise affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that the acts or omissions of counsel, either at trial or sentencing, that defendant challenges on appeal fell below an "objective standard of reasonableness" (*Strickland*, 466 US at 688). In any event, we also conclude that none of these acts or omissions, viewed individually or collectively, had a reasonable probability of affecting the outcome, depriving defendant of a fair trial, or obtaining a materially more lenient sentence (*id.* at 694).

"Counsel may not be expected to create a defense when it does not exist" (*People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv*

denied 86 NY2d 872 [1995]). There was virtually conclusive evidence of guilt, including the videotapes that defendant made of his own crimes. Viewed in that light, counsel's conduct of the trial was objectively reasonable, and different courses of action could not have produced a better result. Specifically, we find that defendant's attorney said nothing to the jurors that they might have construed as a concession of guilt.

Similarly, given the extreme heinousness of defendant's crimes, counsel provided effective assistance at sentencing under the same standards. Counsel informed the court of mitigating factors, as reflected in a forensic psychologist's report. Counsel employed a reasonable strategy at sentencing by acknowledging defendant's reprehensible conduct while arguing for such mitigation. In any event, defendant was not prejudiced.

The court properly denied defendant's suppression motion. The People established by clear and convincing evidence that defendant voluntarily agreed to permit the police to take a DNA sample and search his home (*see People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). There was no intimidating police conduct, defendant was fully cooperative and signed a consent form, and the length of time defendant was in custody was not unduly coercive.

The counts indicated are dismissed as lesser included offenses of the predatory sexual assault convictions.

We perceive no basis for reducing the sentences on the remaining counts.

M-3895 - *People v Perez*

Motion seeking reconsideration of motion to file a pro se supplemental brief denied.

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5579 The People of the State of New York, Ind. 2593/09
Respondent,

-against-

Francis Gill,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered on or about March 8, 2010, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5581- Ind. 424/10
5581A The People of the State of New York, 3052/09
Respondent,

-against-

Edgar Blanco,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of 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 (Charles Solomon, J.), rendered on or about April 27, 2010 and January 13, 2011,

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

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

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5582 The People of the State of New York, Ind. 1113/09
Respondent,

-against-

Benjamin Pleasant,
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 (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered December 14, 2009, as amended December 21, 2009, convicting defendant, after a jury trial, of two counts of attempted robbery in the second degree and two counts of assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 4½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports inferences that defendant intended to forcibly steal property

while aided by others, and that the victims were physically injured in the course of an attempt to take property.

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5583 Hallsville Capital, S.A., Index 650414/09
Petitioner-Respondent, 602802/09

-against-

Robert Dobrish, Esq., et al.,
Respondents,

Lucy Mimran,
Respondent-Appellant.

- - - - -

Lucy Mimran,
Petitioner-Appellant,

-against-

Hallsville Capital, S.A.,
Respondent-Respondent.

_____

William S. Beslow, New York, for appellant.

Meier Franzino & Scher, LLP, New York (Frank J. Franzino Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered July 9, 2010, inter alia, directing respondent HSBC Bank USA, N.A., to turn over to Hallsville Capital, S.A., the funds held in an escrow account pending the resolution of the divorce action between Lucy Mimran and David Mimran, up to a maximum of the amount of the judgment entered in favor of Hallsville against David Mimran, unanimously affirmed, without costs.

In the midst of a divorce action, Lucy Mimran and David Mimran sold a yacht that they owned, and the proceeds of the sale were placed in an escrow account held at HSBC. Subsequently, David defaulted on the repayment of a $10 million loan made to him in 2006 by Hallsville, and judgment was entered against him in favor of Hallsville in the amount of $11,853,874. Hallsville seeks the funds in the escrow account, pursuant to CPLR 5227, in partial satisfaction of the judgment. Lucy seeks to limit Hallsville's right of attachment to those escrow funds that represent David's share only. She claims a vested right in $6,513,808 of the funds, pursuant to the post-nuptial agreement between her and David, which provides that all property acquired during their marriage will be equally divided between them should the marriage end and that when the yacht is sold or otherwise disposed of or distributed she will receive an additional $2 million out of David's share.

To the extent Lucy argues that the prior order of the court (Saralee Evans, J.), was erroneous in finding that, in the absence of a final judgment of divorce, she did not have a vested right in any portion of the funds in escrow, the argument is unavailing. She never filed an appeal from the prior order, which thus became the law of the case, and she cannot challenge

its correctness in the context of this appeal (*see Prime Income Asset Mgt., Inc. v American Real Estate Holdings, L.P.*, 82 AD3d 550 [2011], *lv denied* __ NY3d __, 2011 NY Slip Op 76765 [2011]).

In any event, Lucy's argument that she has a vested interest in a portion of the escrow funds by virtue of the post-nuptial agreement and that that portion of the funds cannot be attached by a judgment creditor of David, is flawed. The funds in the escrow account represent marital property that is subject to equitable distribution. All that the post-nuptial agreement establishes is Lucy's and David's respective shares of that property. Domestic Relations Law § 236(B)(5)(a) provides that the court "shall provide for the disposition [of the parties' property] in a final judgment"; the statute does not "create any contingent or present vested interests, legal or equitable" at any point before judgment (*Leibowits v Leibowits*, 93 AD2d 535, 549 [1983, O'Connor, J., concurring]; *see White v Mazella-White*, 60 AD3d 1047, 1048 [2009]; *Musso v Ostashko*, 468 F3d 99, 107 [2006] ["A mere judicial declaration of equitable distribution, without entry, cannot give a spouse an interest in property superior to that of a creditor . . . holding a valid judgment lien."]).

Equally without merit is Lucy's argument that, pursuant to

the post-nuptial agreement, her share of the proceeds of the sale of the yacht became titled in her name pending conclusion of the divorce and thus that she is the owner of those proceeds and they cannot be attached by a creditor of David. Lucy has offered no proof that the proceeds from the sale of the yacht, a marital asset, were converted to her own separate property before the entry of a judgment of divorce. The post-nuptial agreement does not convert the proceeds of the sale of marital property into separate property.

Since there was no final judgment of divorce entered at the time of the order on appeal, Lucy and David were still married, and the funds in the escrow account were marital property subject to attachment by a judgment creditor (*see In re Matter of Cole*, 202 BR 356, 360 [1996]).

We have considered Lucy's remaining arguments and find them without merit.

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5584 The People of the State of New York, Ind. 7004/02
Respondent,

-against-

Miguel Couvertier,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered June 19, 2009, resentencing defendant to a term of 8 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find that term to be excessive.

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5585 The People of the State of New York, Ind. 4406/06
Respondent,

-against-

William Riley,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered November 16, 2007, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him to a term of 10 years, unanimously affirmed.

The court properly denied defendant's request for a missing witness charge. Defendant did not establish that the uncalled witness could have been expected to provide material and noncumulative testimony (*see e.g. People v Arnold*, 48 AD3d 239, 240-241 [2008], *lv denied* 10 NY3d 859 [2008]). Furthermore, the witness was, at most, a casual acquaintance of the victim; accordingly, the witness was not in the People's control for

purposes of such an instruction (*see e.g. People v Nieves*, 294 AD2d 152 [2002], *lv denied* 98 NY2d 700 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Andrias, J.P., Sweeny, Moskowitz, Richter, Román, JJ.

5586 The People of the State of New York, Ind. 4218/07
Respondent,

-against-

Jeanette Tait,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (James Yates, J. at plea; Mikki Scherer, J. at sentencing), rendered on or about April 15, 2008, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: SEPTEMBER 27, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5600 In re Lena I.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about December 9, 2010, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated her a juvenile delinquent and placed her on probation. Given the seriousness of the underlying assault, this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for

protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The record does not support appellant's claim that, in evaluating the seriousness of the offense, the court gave excessive weight to the allegations in the petition. The evidence presented at the dispositional hearing, viewed as a whole, established that appellant needed the duration and level of supervision that a term of probation would provide.

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

ENTERED: SEPTEMBER 27, 2011

CLERK