

of a controlled substance in the second degree. This was defendant's first felony conviction. On August 6, 2003, the court imposed a sentence of 6 years to life imprisonment.

On February 8, 2005, defendant made a pro se motion for resentencing pursuant to the 2004 Drug Law Reform Act (DLRA) (L. 2004, Ch. 738, §§ 1-41). This law, effective January 13, 2005, amended the Correction Law, the Criminal Procedure Law, the Penal Law and the Executive Law to ameliorate the severity of the Rockefeller Drug Laws (see Memorandum in Support, New York State Assembly, L 2004, Ch. 738, Purpose or General Idea of Bill). Pursuant to the original enactment, defendants serving indeterminate terms for Class A-I drug felonies could apply to be resentenced to determinate terms pursuant to Penal Law 70.71 (L. 2004, Ch. 738, section 23).

In an order entered April 7, 2005, the court denied the motion because defendant had pleaded guilty to second degree criminal sale and the 2004 DLRA did not provide for resentencing of these "class A-II" felons. However, in August of 2005, the Governor signed additional legislation extending the resentencing right to certain class A-II felony drug offenders serving indeterminate terms (see L. 2005, Ch. 643, section 1). This legislation became effective October 29, 2005, 60 days after the Governor signed it (*id.*). Under the 2005 DLRA, defendant, a

first felony offender, could be eligible to receive a determinate sentence ranging between 3 to 10 years, plus five years post-release supervision, provided he met certain conditions, including that he make an application not less than three years from his earliest parole date (see *id.*; PL 70.71[2][b]; 70.45).

In October 2005, defendant submitted a second pro se application for resentencing pursuant to the 2005 DLRA. Defendant mailed his pro se application on October 26, 2005, three years and one day before he was eligible for release, and three days before the law became effective. Supreme Court received it and stamped it "filed" two days after the law became effective and 2 years and 361 days before defendant became eligible for parole. Defendant received appointed counsel to represent him on the motion, and, through that counsel, submitted a petition for resentencing and supporting affirmation, both dated March 8, 2006. Counsel stated that NYS Department of Correctional Services records indicated that defendant's earliest release date was October 27, 2008.

The People opposed the motion on the ground that defendant was not eligible for resentencing because he made the motion less than three years prior to his parole eligibility date. The People alternatively argued that the court should deny the motion

under the "substantial justice" standard¹ because defendant was involved in the sale of \$2,390 worth of cocaine, weighing approximately 70 grams, and had an additional 120 grams of cocaine in his possession.

By order entered on or about May 23, 2006, the court denied the motion for resentencing. The court reasoned that defendant had moved on October 31, 2005, the date Supreme Court received defendant's application. As this date was less than three years from defendant's parole eligibility date, the court reasoned that Price was not eligible for resentencing.

On October 27, 2006, defendant was released on "supplemental merit parole." After we initially heard this appeal, we directed counsel to file supplemental briefs on two issues: (1) the time at which defendant's motion for resentencing should be deemed made and (2) the effect of merit time reductions on defendant's release date (51 AD3d 405 [2008]). The parties have filed their supplemental briefs and we now render our decision.

Before we can reach the issue of whether merit time reductions affect defendant's release date, we must analyze

¹ The 2005 DLRA states that an eligible inmate convicted of an A-II drug felony shall be resentenced by the court unless "substantial justice dictates that the application should be denied." This allows for a court also to consider factors such as a defendant's prior criminal history or the nature of the crime in determining whether resentencing is appropriate.

whether defendant's motion was timely.

The 2005 DLRA provides that a defendant convicted of a class A-II felony drug offense may move for resentencing if: (1) defendant had an indeterminate term of imprisonment with a minimum period of not less than three years, (2) defendant is more than twelve months from being an "eligible inmate" as Correction Law section 851(2) defines that term and (3) defendant meets the merit time eligibility requirements of section 803(1)(d) of the Correction Law. Correction Law § 851(2) defines "eligible inmate" as "a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within two years." This court has interpreted these statutes to allow resentencing when an inmate is more than three years (adding the "two years" from parole from section 851[2] and the "twelve months" provision of the DLRA-2 itself) away from his or her parole eligibility date (see *People v Bautista*, 26 AD3d 230 [2006], appeal dismissed, 7 NY3d 838 [2006]).

New York State Department of Correctional Services records indicated that defendant's earliest release date (without counting merit time) was October 27, 2008. Defendant mailed his pro se petition on October 26, 2005. The DLRA became effective on October 29, 2005. Supreme Court received defendant's motion

and stamped it "filed" on October 31, 2005, two days after the law became effective and 2 years and 361 days before defendant became eligible for parole. In denying defendant's application, the lower court used the later date, October 31, 2005, rather than the date that defendant mailed his application, October 26, 2005, and therefore held that his application was filed less than three years in advance of defendant's parole eligibility date.

The People concede that an application for resentencing under the DLRA is a motion within an existing proceeding for an order vacating the indeterminate life sentence that a court previously imposed. Thus, the People do not appear to contest that defendant could have properly initiated his motion simply by mailing it. After all, under CPLR 2211 a motion is made when the moving party serves it and it is permissible to serve by mail (see *People v Van Deusen*, 228 AD2d 987 [1996]). However, as the People rightly observe, the 2005 DLRA did not take effect until October 29, 2005. By that date, defendant was no longer an "eligible inmate" because he was less than three years away from his earliest parole eligibility date of October 27, 2008. Although defendant has the misfortune of being one of those few for whom the statute became effective too late, to allow him the benefit of the statute would be an end run around its initial requirement that he be less than three years away from parole.

It would also contravene the statute's intention to benefit those serving the longest sentences (see *Bautista*, 26 AD3d at 230).

Defendant's fallback argument claims that his actual parole date is November 2, 2008, a date that would render him eligible because it is after the effective date of the statute and within the three years from either his mailing the application or the date Supreme Court filed it. Defendant reaches this date by counting from what he claims was his incarceration date.

However, defendant did not preserve the argument that his real parole date was November 2, 2008, because he did not argue that date before the motion court, and we decline to review it in the interest of justice.

In view of this determination, we need not reach defendant's argument as to the effect of merit time reductions on his release date.

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and the court's denial of recusal, without a hearing, was an appropriate exercise of discretion, as was its referral of such allegations to the appropriate authorities for immediate investigation.

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We find the sentence excessive to the extent indicated.

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personal injuries sustained by plaintiff (see *Bailey v City of New York*, ___ AD3d ___, 2008 NY Slip Op 8003; *Perez v City of New York*, 41 AD3d 378 [2007], *lv denied* 10 NY3d 708 [2008]).

We have considered plaintiff's remaining arguments, including that we reconsider our decision in *Perez*, and find them unavailing.

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that her estranged husband completed an Income Certification Form (ICF) stating that the annual household income for the subject apartment for the years 1994 and 1995 exceeded \$250,000, was rationally based (see e.g. *Matter of Plaza Mgt. Co. v City Rent Agency*, 48 AD2d 129, 131 [1975], *affd* 37 NY2d 837 [1975]). The record, including, inter alia, an affidavit from the husband, establishes that the husband, who was served with the ICF in April 1996, had vacated the apartment in the spring of 1995, and thus, his income should not have been considered in the calculation of the total household income (see *Matter of A.J. Clarke Real Estate Corp. v New York State Div. of Hous. & Community Renewal*, 307 AD2d 841 [2003]; see also *Matter of Doyle v Calogero*, 52 AD3d 252, 252-253 [2008]). The determination was also rationally based on the independent ground that the New York City Department of Taxation and Finance was unable to ascertain whether the income threshold for the subject apartment had been met (see Rent Stabilization Code [9 NYCRR] § 2531.5)

Contrary to the landlord's contention, the doctrine of inconsistent positions, which precludes a party from assuming a position in a legal proceeding that is contrary to a position that was taken in a prior proceeding (see e.g. *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [1995]), is inapplicable. Although the husband stated that he was a tenant

in the subject apartment when he completed the ICF and then took a different position in the PAR, he was not a party to the PAR, and thus, the position taken by him cannot serve as grounds for estoppel, particularly where to do so would adversely affect a party's rights. The doctrine is also inapplicable inasmuch as the husband did not secure a benefit from his completion of the ICF (see e.g. *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [2007]; *Matter of Bianchi v New York State Div. of Hous. & Community Renewal*, 5 AD3d 303, 304 [2004], *lv denied* 3 NY3d 601 [2004]).

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

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plaintiff condominium sponsor failed to allege adequately.
Moreover, defendant's motion papers reasonably explained the
basis for asserting the six affirmative defenses unconditionally
dismissed by the court.

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Lippman, P.J., Gonzalez, Moskowitz, Acosta, Renwick, JJ.

4653 In re Ashanti A.,

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

 Christina A.,
 Respondent-Appellant,

 Catholic Home Bureau,
 Petitioner-Respondent.

Patricia W. Jellen, Eastchester, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Susan
Clement of counsel), Law Guardian.

Order of disposition, Family Court, Bronx County (Sidney
Gribetz, J.), entered on or about May 11, 2007, which, upon a
finding of mental illness, 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 Social Services for the purpose of adoption,
unanimously affirmed, without costs.

While respondent has made noteworthy progress in many areas,
clear and convincing evidence supports the finding that she is,
by reason of mental illness, presently and for the foreseeable
future, unable to provide proper and adequate care for her child

(Social Services Law § 384-b[4][c], [6][a]; *Matter of Lashawn Shanteal R.*, 14 AD3d 467 [2005]).

Contrary to respondent's contention, Family Court properly credited the opinion of the court-appointed psychiatrist over that of respondent's experts, and the court's determination regarding credibility of the witnesses is entitled to great weight on appeal (*see Matter of Amanda Ann B.*, 38 AD3d 537 [2007]). Moreover, respondent's experts were focused only on her immediate problems, rather than her longstanding personality issues, and their testimony was based largely on respondent's self-reporting (*see Matter of Evelyn B.*, 37 AD3d 991, 993 [2007]).

A dispositional hearing was not necessary to find that termination of parental rights is in the best interests of the child (*Matter of Leomia Louise C.*, 41 AD3d 249, 250 [2007]; *see also Matter of Joyce T.*, 65 NY2d 39, 49 [1985]).

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Lippman, P.J., Gonzalez, Moskowitz, Acosta, Renwick, JJ.

4654-

4654A Samuel Parker, et al.,
Plaintiffs-Appellants,

Index 101346/07

-against-

Paula Marglin, et al.,
Defendants-Respondents.

Samuel Parker, appellant pro se.

Mary Parker, appellant pro se.

Ahmuty, Demers & McManus, New York (Deborah Del Sordo of
counsel), for respondents.

Order, Supreme Court, New York County (Leland DeGrasse, J.),
entered December 5, 2007, which, in an action by
tenants/shareholders against a cooperative board and its
officers/directors for breach of fiduciary duty, breach of the
covenant of quiet enjoyment, and concealment of corporate records
and other documents, denied plaintiffs' motion for a preliminary
injunction and granted defendants' cross motion to dismiss the
complaint, unanimously affirmed, with costs. Appeal from order,
same court and Justice, entered March 21, 2008, which denied
plaintiff's motion to reargue, unanimously dismissed, without
costs, as taken from a nonappealable paper.

Plaintiffs disagree with the board's decisions as to the costs, means, allocation and methods employed in making repairs to the building, but fail to adduce evidence of self-dealing, fraud, or other acts constituting a breach of fiduciary duty sufficient to overcome the business judgment rule (see *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]; *Konrad v 136 E. 64th St. Corp.*, 254 AD2d 110 [1998], *lv denied and dismissed* 92 NY2d 1042 [1999]). Plaintiffs waived their claim for breach of the covenant of quiet enjoyment by refusing to pay assessments for major structural repairs (see *Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117 [1958]). Moreover, the proprietary lease gives the cooperative an easement for the purpose of making repairs (*cf. Jackson v Westminster House Owners Inc.*, 24 AD3d 249 [2005], *lv denied* 7 NY3d 704 [2006]). The record also establishes that the board supplied the records and documents requested by plaintiffs. In any event, plaintiffs fail to show how the alleged concealment caused them

the money damages they seek to recover. No appeal lies from denial of a motion for reargument (*Trexler v Kahanovitz*, 41 AD3d 161, 162 [2007]).

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Lippman, P.J., Gonzalez, Moskowitz, Acosta, Renwick, JJ.

4655-

Index 103533/07

4655A In re Irving Jochelman,
Petitioner-Appellant,

-against-

The New York State Banking Department, et al.,
Respondents-Respondents.

Karen Wohlforth, New York, for appellant.

Andrew M. Cuomo, Attorney General, New York (Sasha Samberg-
Champion of counsel), for respondents.

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), entered September 7, 2007, which, in an article 78 proceeding seeking to annul respondents' determination denying petitioner a promotion to the position of Principal Bank Examiner I, granted respondents' cross motion to dismiss the petition as a matter of law, unanimously reversed, on the law, without costs, to the extent that the petition seeks damages under the Americans with Disabilities Act (ADA), the ADA claim reinstated and deemed to be brought in the form of a plenary action, and the remainder of the appeal dismissed as moot. Appeal from order, same court and Justice, entered October 23, 2007, which, to the extent appealable, denied petitioner's motion to renew the petition, unanimously dismissed, without costs, as moot.

Prior to this appeal, petitioner was promoted to the

position at issue, rendering moot that portion of his appeal seeking back pay (see *Szipcek v Safir*, 291 AD2d 269 [2002]). Nevertheless, petitioner's separate claim for damages related to respondents' allegedly discriminatory behavior has not been rendered moot by petitioner's promotion, and his ADA claim is not without merit as a matter of law (see Americans with Disabilities Act of 1990, § 2 et seq., 42 USCA § 12101 et seq.). The record raises factual issues as to whether respondents failed to make reasonable accommodations for petitioner's request, based on medical grounds, for alternative workspace. We therefore remand the matter for further proceedings.

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apparently placing it in his buttocks. This unusual and furtive behavior was highly suspicious (see generally *People v Jones*, 90 NY2d 835 [1997]), particularly since defendant's behavior on the prior occasion had similarities to this incident, and the police accordingly had reasonable suspicion justifying a forcible stop and detention. When defendant told the officer that he had drugs in his buttocks, this provided probable cause for his arrest (see *People v Hall*, 10 NY3d 303 [2008], cert denied ___ US ___, 2008 US LEXIS 6216 [2008]).

Defendant did not preserve his claim that the evidence failed to establish a valid consent to the removal by police of drugs from his buttocks area, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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Lippman, P.J., Gonzalez, Moskowitz, Acosta, Renwick, JJ.

4657 Kevin Magee, Index 20708/05
Plaintiff-Respondent, 84907/05
85167/06

-against-

438 East 117th Street LLC, et al.,
Defendants-Appellants.

[And Other Actions]

Fishman & Callahan P.C., Suffern (Mitchell B. Levine of counsel),
for 438 East 117th Street LLC, appellant.

Tarshis Catania Liberth Mahon & Milligram, PLLC, Newburgh (Paul
S. Ernenwein of counsel), for Cava Construction Co., Inc.,
appellant.

John O'Gara, New York, for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),
entered on or about September 14, 2007, which granted plaintiff's
motion for partial summary judgment on the issue of liability
under Labor Law § 240(1), unanimously affirmed, without costs.

The accident occurred while plaintiff was on the fifth floor
of a building under construction, laying brick for a wall of the
elevator shaft. In order to perform his work, plaintiff had to
stand near to, and step over, the plywood covering a two feet by
three feet garbage chute that was approximately one foot from the
elevator shaft wall. As plaintiff stepped onto the plywood, it
broke or shifted, giving way, causing him to fall several

stories. It is undisputed that no safety devices, such as harnesses, ropes or nets had been furnished or made available to plaintiff. Given this failure to provide proper protection against a fall into the garbage chute, even if plaintiff, notwithstanding the proximity of the chute to the shaft, could somehow be considered negligent in stepping over the plywood rather than walking around it, or in staging his materials near the chute, any such negligence would not have been the sole proximate cause of the accident, and thus would not provide a defense (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290 [2003]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [2002]). Nor is a defense raised by evidence that on the day of the accident plaintiff was supposed to be working on the parapet rather than the elevator shaft wall, where there is no evidence that plaintiff defied his supervisor by working on the elevator shaft wall or that he had expressly been instructed not to work on the elevator shaft wall.

M-4890 - Magee v 438 East 117 St LLC, et al.,

Motion seeking stay and for other related relief denied.

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Buckeye Retirement Co., L.L.C., Ltd. v Lee, 41 AD3d 183, 184
[2007]). We have reviewed plaintiff's submissions on the motion
and find them sufficient for purposes of CPLR 3215.

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Lippman, P.J., Gonzalez, Moskowitz, Acosta, Renwick, JJ.

4659 Gerald Hirschberg,
Plaintiff-Appellant,

Index 400604/06

-against-

Linda Hirschberg,
Defendant-Respondent.

Rosenbaum & Rosenbaum, P.C., New York (Adam L. Dileo and George D. Rosenbaum of counsel), for appellant.

Vincent M. Lentini, Garden City, for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 23, 2007, which granted defendant's motion for summary judgment dismissing the complaint and for attorneys' fees and denied plaintiff's cross motion to amend his pleadings, to void the stipulation of settlement, and for attorneys' fees, unanimously modified, on the law, to deny that portion of defendant's motion that sought attorneys' fees, and otherwise affirmed, with costs in favor of defendant.

Even assuming defendant failed to cooperate with plaintiff in executing the documents necessary for plaintiff to obtain a get (a Jewish religious bill of divorce), the record demonstrates that plaintiff ratified the parties' settlement stipulation after defendant's alleged anticipatory breach by choosing to continue

behaving as though it were still in operation (see *Fixler v Fixler*, 290 AD2d 482 [2002]). He cannot now be heard to say that after the alleged anticipatory breach he “consider[ed] the contract at an end” (see *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 [1995] [internal quotation marks and citations omitted]).

There is no basis in the settlement stipulation for an award of attorneys’ fees to either party. Article XVII(b) of the agreement provides, “Nothing herein contained shall be deemed or construed as a waiver or denial of either party’s right to secure payment of counsel fees, for any breach by the other party of the terms of this Stipulation. In the event of such breach, the party found to be in breach shall be responsible for any and all legal fees and costs arising from same.” Here there was no breach of the stipulation.

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

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drugs, constituted direct evidence. From this direct evidence, the jury could infer defendant's possession of the drugs on either or both of the theories submitted by the court: constructive possession and the automobile presumption. This was not the type of constructive possession case where the jury would have to draw an additional inference in order to find the underlying facts upon which constructive possession would be based (see *People v Moni*, 13 AD3d 262 [2004], *lv denied* 4 NY3d 833 [2005]; *People v Perez*, 259 AD2d 274 [1999], *lv denied* 93 NY2d 976 [1999]; compare *People v Brian*, 84 NY2d 887, 889 [1994]).

Defendant's remaining contentions concerning the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Viewed as a whole, the court's charge conveyed the appropriate principles (*People v Fields*, 87 NY2d 821 [1995]).

We find the sentence excessive to the extent indicated.

We have considered and rejected defendant's remaining claims, most of which are similar to arguments we rejected on the

codefendants' appeals (*People v Rodriguez*, 52 AD3d 319 [2008], *lv denied* 11 NY3d 741 [2008]).

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failed to raise a triable issue of fact. Although plaintiff claimed to be afflicted with continuing pain, and submitted evidence, in the form of MRIs performed two months after the accident, of the existence of herniated and bulging discs, he acknowledged that he only missed a few days from work, did not seek medical treatment for any disabling condition, but instead, underwent a limited period of physical therapy and acupuncture treatment (see *Rossi v Alhassan*, 48 AD3d 270 [2008]).

Proof of a bulging or herniated disc, in the absence of "additional objective medical evidence establishing that the accident resulted in significant physical limitations," is insufficient to demonstrate a serious injury (*Pommells v Perez*, 4 NY3d 566, 574 [2005], and plaintiff offered no competent medical proof that substantiated his contention that he could not perform his daily tasks (see *Arjona v Calcano*, 7 AD3d 279, 280 [2004])). Furthermore, the radiologist who interpreted the MRIs made no representation that plaintiff's injuries were caused by, or related to, the accident, and plaintiff's expert, who examined plaintiff more than three years after the accident, stated his

opinion in a conclusory manner without explaining why he believed the injuries were the result of the accident (*id.*).

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attorney, he agreed to comply with the prosecutor's request for a DNA sample without requiring the prosecutor to make a CPL 240.40(2) discovery motion. Defendant's agreement to provide discovery voluntarily where he would have, in any event, been required by law to provide it was devoid of probative value as to his asserted consciousness of innocence (see *People v Jardin*, 154 Misc 2d 172, 174-175 [1992], *affd* 216 AD2d 105 [1995], *affd* 88 NY2d 956 [1996]; see also *People v DiMaria*, 22 AD3d 229 [2005], *lv denied* 6 NY3d 775 [2006]; *People v Torres*, 289 AD2d 136 [2001], *lv denied* 97 NY2d 762 [2002]).

The imposition of mandatory surcharges and fees by way of court documents without mention in the court's oral pronouncement of sentence was lawful (see *People v Washington*, 51 AD3d 521 [2008], *lv granted* 10 NY3d 965 [2008]).

We perceive no basis for reducing the sentence.

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information about defendant's psychiatric background that was undisputed at the classification proceeding would have been sufficient to support the court's upward departure.

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the truck. The fourth man remained in the driver's seat. Another officer testified that he saw defendant walking back to the minivan with the other two men, one of whom was carrying the bag. A fourth officer testified that he recovered a box cutter from defendant's pocket during a search incident to his arrest.

After the grand jury returned indictments against the two men who actually removed the bag from the truck, the prosecutor informed them that defendant wished to testify. Defendant testified that he was inside the minivan when two of the men saw the truck and instructed the driver to pull over. Defendant told them to "leave it alone" but the two men ignored him and got out of the minivan. After they failed to immediately return he got out of the minivan to see what they were doing. When he saw them remove a bag from the truck he told them to "leave that alone" and went back to the minivan, where he was arrested.

The prosecutor asked the grand jury at that point to indict defendant; however, the grand jury asked if it could delay its decision until after it heard from the man who was driving the minivan, since that "would certainly potentially - be quite relevant to our decision on defendant." The prosecution assented to that request. The driver testified that defendant and another one of the men were in the minivan when they approached him and the fourth man. He was asked to drive the minivan, and, at some

point, the three other men all exited the minivan at the same time, and, upon their return, were arrested. The motion court characterized certain questions asked of the driver by the grand jury as focusing on inconsistencies between his own testimony and that of defendant. This led the court to believe that the grand jury intended to rely on the driver's testimony as a factor in their deliberations regarding the defendant.

The grand jury indicted defendant on the charges of burglary in the third degree, grand larceny in the fourth degree and 10 counts of possession of burglar's tools. It declined to indict the driver. The court dismissed the indictment on the ground that the prosecutor should have instructed the jury that the driver's testimony could only be considered if there was corroborating evidence.

We agree that the prosecution should have instructed the grand jury that the driver's testimony was legally sufficient to support an indictment only if corroborated. The concurrence is incorrect that Criminal Procedure Law Section 60.22, which requires accomplice testimony to be corroborated, does not apply to this case. It applies, albeit indirectly, pursuant to CPL 190.65(1), which provides that:

"Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such offense *provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent,* and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense."
(emphasis added).

Prior to the testimony of the driver, the grand jury was apparently unsatisfied that the testimony of the four police officers provided a legally sufficient basis for indicting defendant. Indeed, the motion court, which reviewed the grand jury minutes and was in a far better position to assess the degree to which the grand jury relied on the driver's testimony, found that the grand jury considered the testimony a significant factor in whether it should indict. At the time the grand jury deliberated concerning defendant and the driver, the driver was an "accomplice" as that term is defined by CPL 60.22(2)(a); that is, "a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in the offense charged." As such, his testimony, if used to convict, would have had to be corroborated. Moreover, that the driver may have been testifying in his own behalf, as

opposed to for the People, is irrelevant (see *People v Diaz*, 19 NY2d 547, 549 [1967]).

CPL 190.25(6) provides, in pertinent part, that “[w]here necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it.” Here, because the circumstances were such that an indictment based on the driver’s uncorroborated testimony would have been in contravention of CPL 190.65(1), we find that it was both necessary and appropriate for the prosecution to instruct the grand jury that it could not rely on the driver’s testimony to indict defendant unless it also found there to be evidence which corroborated the testimony. Indeed, if, under the concurrence’s theory, it was not necessary and appropriate to so instruct the grand jury in this case, we can think of hardly any case in which it would be necessary and appropriate to instruct a grand jury. This would render CPL 190.25(6) purposeless.

Nevertheless, we reverse the order appealed, because we find that the failure to instruct did not rise to the level of impairing the integrity of the grand jury (see *People v Darby*, 75 NY2d 449, 455 [1990]); cf. *People v Schwartz*, 21 AD3d 304, 307 [2005], lv denied 6 NY3d 845 [2006]). Defendant’s own testimony and the testimony of the four police officers provided sufficient

evidence tending to connect defendant to the crimes with which he was charged (see *People v Johnson*, 32 AD3d 761 [2006], lv denied 7 NY3d 902 [2006]).

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

CATTERSON, J. (concurring)

Because I believe that the majority's dicta to the effect that the accomplice liability instruction must be given in the grand jury is a radical departure from this Court's precedent, I must concur separately for the reasons set out below. I believe that the majority's dicta articulates for the first time the dubious proposition that instructions intended for petit juries must be given to grand juries on the possible pain of dismissal of the indictment.

I would reinstate the indictment because the standard for grand jury instruction is far less stringent than the standard for instructing petit juries, and because the provision for an accomplice corroboration instruction on which the defendant relies is one that only applies, but for the very rare case, to a petit jury and not a grand jury.

The defendant was arrested, along with three co-defendants (David Alache, Leopaldo Morales, and Luis Nunez), in the commission of a burglary of a parked truck. The undisputed facts are as follows: On November 29, 2005, Alache, Morales, Nunez and the defendant parked a minivan near a white box truck. Alache and Nunez got out of the minivan. The defendant got out either at the same time or a short time later. Morales, the driver, stayed in the minivan. Alache removed a bag from the box truck, joined

the defendant, who had been looking up and down the block, and the three returned to the minivan. The four men were arrested. The same grand jury deliberated the indictments of all four co-defendants. Following the testimony of the four police officers on February 14, 2006, the grand jury voted to indict David Alache and Louis Nunez on burglary and other charges. Alache and Nunez later pleaded guilty.

The instant dispute arose out of the defendant's subsequent indictment for third-degree burglary, fourth-degree larceny and 10 counts of possession of burglar's tools. On February 16, 2006, the grand jury was informed that defendant would testify on his own behalf. The defendant testified that he told Nunez to "leave that alone" (referring the white box truck) as they were driving past the white truck, and then went to see what the co-defendants were doing. After the defendant testified, the prosecutor requested the grand jury to vote on whether to indict defendant. This exchange ensued between the ADA and members of the grand jury after they were told that co-defendant Morales would also testify:

"GRAND JUROR: Since the testimony of defendant Morales would certainly potentially - be quite relevant to our decision on defendant Pacheco can we hold off on considering the charges until we heard from that witness?"

"[ADA]: That's a good question. Since I am not certain of the answer, I am going to step out and I will get right back to you.

"(ADA... AND GRAND JURY REPORTER LEAVE GRAND JURY CHAMBER AND RETURN SHORTLY THEREAFTER)

"[ADA]: Sir, the answer to your question is, as with any other case, you can decide to vote or you can decide that you don't wish to vote at this time and you wish to hear additional evidence, so it's in your hands.

"GRAND JUROR: Would we take a vote on whether we want to take a vote? Is that how it's done?

"[ADA]: Yes.

"(ADA... AND GRAND JURY REPORTER LEAVE GRAND JURY CHAMBER AND RETURN SHORTLY THEREAFTER)

"FOREPERSON: We would like to abstain from voting today and vote tomorrow after hearing from Morales."

Morales testified on February 17, 2006. The record shows that the testimony of the defendant diverged from the testimony of Morales in two key areas. The first is that while the defendant testified that he exited the van shortly after Nunez and Alache, Morales testified that all three exited at the same time. The second area concerned Morales' interactions with the other men in the van. At the completion of testimony, the grand jury returned a no true bill as to Morales, but indicted the defendant.

On March 2, 2006, the defendant moved to dismiss the

indictment under CPL 210.20(1)(c) and 210.35 on the grounds that the grand jury's integrity was impaired as a result of the prosecution's failure to give adequate instructions to the jury. The record does not show that he specified what instruction should have been given.

On April 19, 2006, the court dismissed two of the charges against defendant for possession of burglar's tools, found that the integrity of the jury was not impaired by questions to the defendant regarding his criminal history, and raised the issue, sua sponte, of the People's failure to give instructions regarding co-defendant testimony. The court stated, "[Not giving] any instruction as to whether or not [the grand jury] could consider the testimony of a co-defendant . . . in this case . . . [is] a problem." The court ultimately granted defendant's motion to dismiss the indictment.

The court concluded that the grand jury's questions and the deferral of its vote made it clear that the grand jury intended to use Morales's testimony in its deliberations regarding defendant's indictment. "[I]t was incumbent upon the People, at a minimum, to provide a limiting instruction with respect to the use of Morales' testimony as against defendant Pacheco."

On appeal, the People argue that the court erred in dismissing defendant's indictment on the basis that a limiting

instruction is required in order for a grand jury to consider the testimony of a codefendant. The People argue that they were not required to give an instruction because Morales testified on his own behalf; not for the purpose of inculcating defendant. Further, the People argue that the testimony of four police officers adequately established a sufficient basis for an indictment of defendant without reference to anything Morales said.

The defendant asserts that the court properly held that the grand jury's integrity was impaired when it considered Morales' testimony without a limiting instruction. Specifically, the defendant now argues - for the first time - that the People erred in failing to give the accomplice instruction pursuant to CPL 60.22(1). That section provides that a "defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."

In my opinion, the court and the majority in dicta both erred in requiring a limiting instruction on codefendant Morales's testimony. Nor does the defendant improve his position by now relying on CPL 60.22, a provision that applies to instructing trial juries. It is well-established that the standard for dismissing an indictment is "a very high hurdle of

impairment of the integrity of the Grand Jury process, plus prejudice." People v. Darby, 75 N.Y.2d 449, 455, 554 N.Y.S.2d 426, 428, 553 N.E.2d 974, 976 (1990). An indictment can only be dismissed when a defect in the grand jury proceeding is so egregious that "the integrity thereof is impaired and prejudice to the defendant may result." CPL 210.35[5]; see also People v. Morales, 183 A.D.2d 570, 572, 583 N.Y.S.2d 845, 847 (1st Dept. 1992), lv denied, 80 N.Y.2d 896, 587 N.Y.S.2d 927, 600 N.E.2d 654 (1992). In my view there was no such egregious impairment here.

In my view it was clear error for the court to rule that an accomplice corroboration instruction must be provided to the grand jury for *codefendant* testimony. The People correctly assert that the practice of a grand jury considering codefendant testimony is so universally accepted and uncontroversial that there does not appear to be any appellate decision directly addressing it. The grand jury has the right to call as a witness anyone believed "to possess relevant information or knowledge." CPL 190.50(2) and (3). Indeed, the People are entirely correct that the principle is axiomatic.

In my view, CPL 60.22 would be erroneously applied since the provision applies to the instruction of trial juries, not grand juries. (See CPL 60.22: a defendant may not be *convicted* on the basis of uncorroborated accomplice testimony.) Thus, while an

accomplice corroboration instruction is mandated for a jury trial, it is not required in a grand jury proceeding.

This is entirely consistent with well-established criminal jurisprudence, viz., standards applied to grand jury instructions are less stringent than those applied to instructions to a trial jury. In People v. Calbud, Inc., (49 N.Y.2d 389, 426 N.Y.2d 238, 402 N.E.2d 1140 [1980]), the Court of Appeals made plain that the prosecution only needs to provide the grand jury with enough information to enable it "intelligently to decide whether a crime has been committed and to determine whether there exists legally sufficient evidence to establish the material elements of the crime." Id. at 394-395, 426 N.Y.2d at 241. In Calbud, the Court held that

"it would be unsound to measure the adequacy of the legal instructions given to the Grand Jury by the same standards that are utilized in assessing a trial court's instructions to a petit jury. Indeed, the difference in the extent and quality of the legal instructions that must be given to the two bodies is reflected in the Criminal Procedure Law, which, on the one hand, directs the court or District Attorney to give legal instruction to the Grand Jury only "[where] necessary or appropriate" (CPL 190.25, subd. 6), but, on the other hand, requires a Judge presiding over a trial before a petit jury to state in detail "the fundamental legal principles applicable to criminal cases in general" as well as "the material legal principles applicable to the particular case" and "the application of the law to the facts" (CPL

300.10, subd. 2)... [We] hold that a Grand Jury need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law." Id. at 394.

See also People v. Valles, 62 N.Y.2d 36, 476 N.Y.2d 50, 464 N.E.2d 418 (1984) (prosecutor's failure to give mitigating defense instructions did not render grand jury proceeding defective); People v. Goetz, 68 N.Y.2d 96, 506 N.Y.2d 18, 497 N.E.2d 41 (1986) (prosecutor's erroneous charge on the defense of justification did not prejudice defendant so as to render proceeding defective); People v. Darby, 75 N.Y.2d at 455, 554 N.Y.2d at 428 (lack of evidentiary instruction to grand jury did not meet the "unquestionably high prong" of impairment of integrity).

New York's accomplice corroboration rule is an unusual one. "Although many States, and the Federal courts, permit a conviction to rest solely on the uncorroborated testimony of an accomplice, our Legislature requires that accomplice testimony be corroborated by evidence tending to connect the defendant with the commission of the crime." People v. Steinberg, 79 N.Y.2d 673, 683, 584 N.Y.S.2d 770, 774, 595 N.E.2d 845, 849 (1992) (citations and internal quotation marks omitted). As is evident, this "persistently unique" rule (People v. Breland, 83 N.Y.2d 286, 293, 609 N.Y.S.2d 571, 574, 631 N.E.2d 577, 580 [1994]) reflects

a legislative judgment that a defendant's guilt beyond a reasonable doubt cannot be established reliably absent some evidence that satisfies the less than exacting requirements of the rule. See People v. Besser, 96 N.Y.2d 136, 143, 726 N.Y.S.2d 48, 51, 749 N.E.2d 727, 730 (2001) (accomplice corroboration rule requires "some basis for the jury to conclude the accomplice testimony is credible"). Today, without any support for its position, the majority in dicta expands this "persistently unique" rule by extending it to grand jury proceedings, even though a defendant's guilt or innocence is emphatically not at issue and even though the standard for returning an indictment is far lower than the standard for finding a defendant guilty.

The majority's citation to CPL 190.65(1) does not alter this conclusion. That section merely stands for the proposition that a defendant may not be indicted for an offense which requires corroboration without such evidence being presented to the grand jury. To transmogrify this section into a requirement that the People charge accomplice liability flies in the face of Calbud and its progeny.

"When the District Attorney's instructions to the Grand Jury are so incomplete or misleading as to substantially undermine this essential function, it may fairly be said that the integrity of that body has been impaired ... where, as here, the District Attorney omits information which

would be essential for the petit jury's determination of guilt but which is not essential to the Grand Jury's less exacting responsibility of determining whether a prima facie case exists, it is inappropriate to dismiss the indictments on the ground specified in CPL 210.35(5)." Calbud, 49 N.Y.2d at 396.

The majority fails to demonstrate that the accomplice liability charge to a petit jury is necessary to a prima facie case.

Finally, I find no merit in the defendant's contention that pursuant to CPL 190.30, the provisions of CPL article 60 are in this case applicable to grand jury proceedings. CPL 190.30(1) states that they are applicable "where appropriate." In my view, this was not a case where it was appropriate to instruct the grand jury. The defendant urges the court to apply the standard of trial jury instruction cited in People v. Leon (121 A.D.2d 1, 6, 509 N.Y.S.2d 1, 3 (1st Dept. 1986), lv denied, 69 N.Y.2d 830, 513 N.Y.S.2d 1037, 506 N.E.2d 548 (1987)) where the Court held that harmful error resulted because a jury was not instructed on accomplice testimony. The defendant asserts that, similarly, "the grand jury must be properly instructed in the use of [accomplice] testimony or the integrity of the proceedings will have been impaired." In my opinion, the defendant misapplies Leon. In fact, the Court in Leon concluded that the jury must be instructed when "the undisputed evidence establishes that a

witness is an accomplice." Id. Further, the Court held that "when the case against the defendant rests substantially on the testimony of a witness who is an accomplice as a matter of law, or who may be one as a matter of fact, *it is best* that the court offer to charge the accomplice-corroboration rule if not requested by the defendant." Id. at 6, 509 N.Y.S. at 4 (emphasis added). This is hardly the mandatory "requirement" for accomplice instruction that defendant seeks to apply. The Leon Court goes on to explain that where there is a question of proof regarding a purported accomplice's complicity, the question should be left to the jury. Id. at 6, 509 N.Y.S.2d at 3-4.

That is exactly what happened in this case. Not only did the grand jury decide that Morales was not an accomplice and return a no true bill, but, unlike the circumstances in Leon where the defendant's conviction for second-degree murder rested almost entirely upon the witness's testimony, here there was ample testimony beyond that of Morales. There is no indication that the grand jury relied solely on Morales's testimony to indict the defendant.

For all the foregoing reasons, I find that the integrity of the grand jury proceedings was not impaired to an extent that mandates dismissal of the indictment.

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was one of the two perpetrators of the robbery and burglary. The alternative explanation that defendant posits on appeal not only is farfetched (see e.g. *People v Texeira*, 32 AD3d 756 [2006], *lv denied* 7 NY3d 904 [2006]), but also is inconsistent with defendant's statement to the police. Defendant's challenge to the reliability of fingerprint evidence in general is unsupported by anything in the record (see *People v Akili*, 289 AD2d 55, 56 [2001], *lv denied* 98 NY2d 635 [2002]).

Defendant's challenge to the People's summation is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. To the extent that any of the remarks at issue may have been inappropriate, the court's curative instructions were sufficient to prevent any prejudice.

We perceive no basis for reducing the sentence.

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the record (CPL 440.10[2][c]; *People v Cooks*, 67 NY2d 100 [1986]), and we see no reason to distinguish between issues of law and issues that seek to invoke this Court's interest of justice jurisdiction. To the extent that defendant's 440.10 motion may be construed as seeking to elicit additional facts that were not part of the evidence before the suppression court, we reject that branch of the motion pursuant to CPL 440.10(3)(a). We also note that we have previously denied a motion by defendant claiming ineffective assistance of appellate counsel. Accordingly, defendant's motion to vacate judgment was procedurally defective except to the extent it asserted ineffective assistance of trial counsel, a claim we reject on the merits.

Trial counsel provided 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]), and the court properly denied, without a hearing, those branches of the CPL 440.10 motion claiming ineffective assistance (see *People v Satterfield*, 66 NY2d 796, 799-800 [1985]). While defendant adequately explained her inability to obtain an affirmation from trial counsel, and her motion should not have been denied on that basis (see *People v Gil*, 285 AD2d 7, 11-12 [2001]), defendant's papers still do not contain sworn

allegations sufficient to substantiate the essential facts of her claims, and we thus reject her claims on the merits.

Defendant asserts that her trial counsel failed to interview and make use of potential defense witnesses. Regardless of the extent of counsel's interview of a codefendant who had pleaded guilty prior to defendant's trial, and regardless of whether this codefendant could have provided exculpatory testimony, it would have been reasonable for counsel to decline to call him as a witness. His testimony would have been unhelpful and potentially damaging because he would inevitably have been impeached by means of his plea allocution in which he had incriminated defendant (*see People v Green*, 27 AD3d 231, 232 [2006], *lv denied* 6 NY3d 894 [2006]). While defendant claims her counsel should have interviewed defendant's daughters as possible witnesses, there is nothing to indicate they were alibi witnesses or could have provided any other type of exculpatory testimony (*see People v Nichols*, 289 AD2d 605 [2001], *lv denied* 98 NY2d 639 [2002]).

Next, defendant argues that her trial counsel's communications with her throughout the representation were inadequate and impaired by a language barrier. However, the motion court correctly determined that this contention is contradicted by the record, which reveals frequent and appropriate attorney-client consultations, in which counsel used

an interpreter or his own knowledge of Spanish.

We also reject defendant's claim that her attorney mishandled the suppression hearing by failing to elicit evidence and make arguments concerning coercive circumstances and pre-*Miranda*-warnings custodial interrogation. Defendant has not shown that such a strategy would have had any reasonable likelihood of success. The factual assertions she now claims her attorney should have pursued were contradicted by police testimony at the hearing, and there is no reason to believe that the suppression court would have been persuaded to discredit the police testimony and credit that of defendant.

Finally, even assuming that trial counsel's performance was deficient in all the ways cited by defendant, these deficiencies did not deprive defendant of a fair trial, affect the outcome of the proceedings, or cause her any prejudice (*see People v Caban*, 5 NY3d 143, 155-156 [2005]; *People v Hobot*, 84 NY2d 1021, 1024 [1995]).

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Mazzarelli, J.P., Friedman, Nardelli, Buckley, Freedman, JJ.

4670-

4670A Madeline Cicale,
Plaintiff-Respondent,

Index 22089/06

-against-

Wachovia Bank N.A.,
Defendant-Appellant,

Linda Cicale,
Additional Defendant-Respondent.

Noreen M. Giusti, Kew Gardens, for appellant.

Legal Services N.Y.C.-Bronx, Bronx (Jonathan Levy of counsel),
for Madeline Cicale, respondent.

Pillsbury Winthrop Shaw Pittman LLP, New York (Priscilla S. Ng of
counsel), for Linda Cicale, respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.),
entered June 9, 2008, which denied defendant Wachovia Bank's
motion for summary judgment dismissing the complaint, unanimously
affirmed, without costs. Appeal from order, same court and
Justice, entered April 3, 2008, which granted said defendant's
motion for summary judgment only to the extent of ordering a
framed issue hearing, unanimously dismissed, without costs.

In opposition to Wachovia's motion, plaintiff averred that
her grandson had testified in a proceeding in another
jurisdiction that he forged her name on the subject loan and
mortgage documents. She also submitted documents containing her

signature for purposes of comparing it with her alleged signature on the mortgage documents. This evidence raises an issue of fact as to the authenticity of plaintiff's signature (see *Seaboard Sur. Co. v Earthline Corp.*, 262 AD2d 253 [1999]; *Diplacidi v Gruder*, 135 AD2d 395 [1987]).

We have considered defendant's remaining contention and find it unavailing.

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ENTERED: NOVEMBER 25, 2008

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Mazzarelli, J.P., Friedman, Nardelli, Buckley, Freedman, JJ.

4671 The People of the State of New York Index 75124/07
 ex rel. Albert Bell,
 Petitioner-Appellant,

-against-

 Warden, Rikers Island, et al.,
 Respondents-Respondents.

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

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder
of counsel), for respondents.

 Order, Supreme Court, Bronx County (Albert Lorenzo, J.),
entered or about October 24, 2007, which denied petitioner's
application for a writ of habeas corpus and dismissed the
petition, unanimously affirmed, without costs.

 There was no violation of the 15-day time limit for
scheduling a preliminary parole revocation hearing (Executive Law
§ 259-i[3][c][iv]), where the hearing was originally scheduled to
take place 7 days after the warrant's execution, but, due to
petitioner's hospitalization for serious illness, was re-
scheduled to take place and did take place 18 days after the
warrant's execution, without prejudice to petitioner (*see Matter
of Emmick v Enders*, 107 AD2d 1066, 1067 [1985], *appeal dismissed*
65 NY2d 1050 [1985]). Petitioner was not entitled to counsel at

the hearing where he made no request for counsel, the issue to be decided at the hearing was not complex, and petitioner had counsel for the final hearing (see *People ex rel. Calloway v Skinner*, 33 NY2d 23 [1973]).

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with mild tenderness in the cervical and lumbar spine. An orthopedic surgeon concluded that the patient had suffered sprains of the neck, back and right knee, and made a complete recovery. A radiologist reviewed MRIs taken seven and eight months after the accident, which he said showed longstanding degenerative conditions in the cervical spine and right knee, not causally related to the accident. This evidence was sufficient to sustain defendant's initial burden of establishing that the injured plaintiff had not suffered a serious injury, and the burden then shifted to plaintiffs to demonstrate a triable issue of fact by coming forward with evidence to overcome defendant's submissions (*Gaddy v Eyles*, 79 NY2d 955, 956-957 [1992]; *Shinn v Catanzaro*, 1 AD3d 195, 197 [2003]).

Although plaintiffs submitted reports of numerous experts, all but one were unsworn and not affirmed. Statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment (*McLoyrd v Pennypacker*, 178 AD2d 227, 228 [1991], *lv denied* 79 NY2d 754 [1992]). The only report in admissible form reflected findings made almost four years after the accident, and stated in conclusory fashion that the conditions noted were causally

related to the accident. However, it did not address the findings of defendant's experts, which were supported by the patient's MRIs, that the conditions were degenerative in nature. Conclusory assertions tailored to meet statutory requirements are insufficient to raise a triable issue of fact concerning serious injury (*Gaddy*, 79 NY2d at 958). In the absence of admissible contemporaneous evidence of a serious injury, the proffered conclusions of plaintiffs' expert are insufficient (*Petinrin v Levering*, 17 AD3d 173 [2005]).

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order, stipulates to an apportionment of liability of 30% to HHC and 70% to himself, and to entry of an amended judgment in accordance therewith.

The decedent was killed when a car driven by O'Brien collided with the rear corner of a disabled ambulance owned by HHC. There was sufficient evidence to support the jury's conclusions that HHC was negligent in failing to expeditiously remove the disabled ambulance from the traffic lane and in failing to adequately warn other vehicles of its presence and that HHC's negligence was a proximate cause of the accident (see *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

The trial court correctly charged the jury on provisions of the Vehicle and Traffic Law and the Traffic Rules and Regulations of the City of New York governing the parking, standing and stopping of vehicles (see Vehicle and Traffic Law §§ 1200[a], [d]; 1201; 1202(a)(1)(f); 34 RCNY 4-08 [a][1], [4], [8]). Contrary to HHC's contention, these provisions were relevant to the issues in this case.

The court improperly denied HHC's request for a charge that a rear-end collision with a stationary vehicle creates a presumption of negligence on the part of the driver of the moving vehicle (see generally *Russo v Sabella Bus Co.*, 275 AD2d 660 [2000]). However, in our view the error was harmless.

The court improperly permitted plaintiff's expert to render an opinion whether the placement of the disabled ambulance in the right lane was negligent (see *Ayala v Kaestner*, 224 AD2d 266, 267 [1996]). However, the error was remedied by the court's prompt and thorough curative instructions, which the jury is presumed to have followed (see e.g. *Ortiz v Variety Poly Bags, Inc.*, 19 AD3d 239, 239-240 [2005]).

HHC's argument that the jury's finding that the decedent was negligent but that his negligence was not a proximate cause of his injuries should be set aside as irreconcilably inconsistent is unpreserved (see *Barry v Manglass*, 55 NY2d 803, 806 [1981]). Moreover, it does not avail HHC to characterize its failure to preserve the inconsistency argument as an argument addressed to the weight of the evidence (see *Sims v Comprehensive Community Dev. Corp.*, 40 AD3d 256, 258 [2007]). In any event, the jury did not find that the decedent's negligence was not a proximate cause of his injuries. It found that the decedent's negligence was not a proximate cause of the accident. Since it is undisputed that there was no evidence that the decedent caused the accident, the verdict was not inconsistent. HHC's objection to the wording of the verdict sheet is unpreserved (see *Al Malki v Krieger*, 213 AD2d 331, 334 [1995]).

The jury's apportionment of fault is against the weight of

the evidence. In light of O'Brien's admissions that although he saw the disabled vehicle from at least 50 to 100 feet away he failed to slow down and that his judgment was impaired due to intoxication, his conduct was a greater cause of the accident than the jury found (*see Ivezic v Tully Constr. Corp.*, 47 AD3d 480 [2008]).

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Mazzarelli, J.P., Friedman, Nardelli, Buckley, Freedman, JJ.

4678 In re Enrique S.,
 Petitioner-Respondent,

-against-

Genell M.D.,
 Respondent-Appellant.

[And Another Action]

Carol Lipton, Brooklyn, for appellant.

John J. Marafino, Mount Vernon, for respondent.

Karen Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), Law Guardian.

Order, Family Court, Bronx County (Tandra L. Dawson, J.), entered on or about May 8, 2006, which, to the extent appealed from as limited by the brief, after a hearing, granted petitioner father's motion for custody of the subject child, unanimously affirmed, without costs.

The determination to award custody to the father was not against the weight of the evidence and was warranted in the best interests of the child by the totality of the circumstances (see *Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). The evidence demonstrated, inter alia, that, while respondent mother lacked insight into the child's needs and had never been able to provide a stable residence for her, the father was deeply involved in the

child's life and the child flourished in his care.

The court properly rejected the portions of the court-appointed evaluator's testimony and reports that were based upon hearsay and information from unidentified sources (see *State of New York ex rel. H.K. v M.S.*, 187 AD2d 50, 53 [1993], *appeal dismissed* 81 NY2d 1006 [1993], *lv denied* 82 NY2d 654 [1993]). Respondent's contentions concerning the evaluator's credentials and methodology are unsupported by the record.

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

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limitations and the accident. Moreover, plaintiff did not adequately explain the 14-month gap in her treatment (see *Pommels v Perez*, 4 NY3d 566, 574 [2005]).

Plaintiff's submissions were also insufficient to raise an issue of fact as to her 90/180-day claim (see *Grimes-Carrion v Carroll*, 17 AD3d 296, 297 [2005]; *Thompson v Abbasi*, 15 AD3d 95, 100-101 [2005]).

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accusation of wrongful conduct.” We decline to make defendants’ invocation of this rule dependent on plaintiff’s demonstration of a prima facie case of defendants’ liability (see Justice Stallman’s later ruling on a related matter in this case, 18 Misc 3d 673, 683 [December 17, 2007]).

The issue of whether plaintiff was defendants’ client is to be tried (see *id.* at 684), so Gramercy should not assume that plaintiff is a non-client. Even if plaintiff were not defendants’ client, DR 4-101(C)(4) does not require the non-client’s allegation of wrongful conduct to involve criminal or regulatory charges rather than malpractice (see Restatement [Third] of Law Governing Lawyers § 64, Comment c).

Gramercy’s argument that the motion court should have deferred decision until after summary judgment (even though neither plaintiff nor defendants have moved for summary judgment) is without merit. It is not for Gramercy to dictate the litigation decisions of the parties.

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merits. The police had probable cause to search defendant's car, as well as his valid consent.

However, we note that the respondent's brief should, in addition to addressing the validity of the waiver, have discussed the merits of defendant's suppression claims. The use of a bifurcated brief pursuant to the rules of this Court (22 NYCRR 600.16[b]) was "inefficient and highly burdensome on this Court and the parties" (*People v Hoover*, 37 AD3d 298, 299 [2007], *lv denied* 9 NY3d 845 [2007]). We do not find this to be an "exceptional case" warranting such an approach (*id.*).

We perceive no basis for a further reduction of the sentence beyond the relief already granted pursuant to the Drug Law Reform Act.

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and definiteness (CPLR 7511[b][1][iii]; see *Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]; *Matter of Solow Bldg. Co. v Morgan Guar. Trust Co. of N.Y.*, 6 AD3d 356, 356-357 [2004], *lv denied* 3 NY3d 605 [2004], *cert denied* 543 US 1148 [2005]; *Purpura v Bear Stearns Cos.*, 238 AD2d 216 [1997], *lv denied* 90 NY2d 806 [1997]).

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was the wife's former boyfriend, defendant Beard. In the action against Beard, the husband alleges fraud and aiding and abetting fraud. Patently, the two actions involve common questions of law and fact (CPLR 602[a]); a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs, and prevent the injustice that would arise from divergent decisions based on the same facts (see *Phoenix Garden Rest. v Chu*, 202 AD2d 180 [1994]).

Beard failed to demonstrate that a joint trial will unduly prejudice a substantial right because the matrimonial action is to be tried by the court, while the fraud action is to be tried by a jury (see *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 [2005]). So long as the fraud action is decided first, the jury will not be unduly influenced by any decision made by the court in the matrimonial action. Furthermore, to the extent that evidence is offered in the matrimonial action that is relevant to that action only, the court can reserve to itself those issues, and the jury need not hear evidence that does not bear on the issues in the fraud action. The potential

impracticality and unwieldiness identified by Beard can be prevented by the court's instructions to the jury (see *Hopper v Regional Scaffolding & Hoisting Co.*, 272 AD2d 242 [2002]).

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

ENTERED: NOVEMBER 25, 2008

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Saxe, J.P., Gonzalez, Nardelli, Catterson, JJ.

3355 In re Petition to Vacate an Adoption
Decree, in the Adoption of John Doe,
Adoptee.

File 2875/06

- - - - -

L.M.B.,
Petitioner-Respondent,

-against-

E.R.J.,
Respondent-Appellant.

Cohen Lans LLP, New York (Mara T. Thorpe of counsel), for
appellant.

Cohen Hennessey Bienstock & Rabin P.C., New York (Bonnie E. Rabin
and Tim James of counsel), for respondent.

Order, Surrogate's Court, New York County (Kristin Booth
Glen, S.), entered October 11, 2007, affirmed, without costs.

Opinion by Catterson, J. All concur except Nardelli, J. who
dissents in an Opinion.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
NOVEMBER 25, 2008

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5238 Van Deventer v CS SCF Management Limited

Appeal, previously perfected for the September 2008 Term, withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5233 Nabi Biopharmaceuticals v Inhibitex, Inc.

Appeal, previously perfected for the December 2008 Term, withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5239 Alexander v Katz

Appeal, previously perfected for the December 2008 Term, withdrawn.

Lippman, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-5008 People v Montes, Oscar, also known as Hilerio, Oscar

Appeal deemed withdrawn.

Lippman, P.J., Mazzairelli, Williams, Buckley, Renwick, JJ.

M-4617A People v Sparber, Daniel also known as Sparber, Deniel

Leave to prosecute appeal as a poor person granted, as indicated. Order of this Court entered on November 13, 2008 (M-4617) recalled and vacated.

Lippman, P.J., Andrias, Williams, McGuire, JJ.

M-4961 People v Parra, Jose

Leave to prosecute appeal as a poor person granted, as indicated.

Lippman, P.J., Mazzairelli, Williams, Buckley, Renwick, JJ.

M-4768 Board of Managers of the 195 Hudson Street Condominium v 195 Hudson Street Associates, LLC - K&J Construction Co., LP - Gonzalez Construction, LLC

Time to perfect and cross appeal enlarged to the June 2009 Term.

Lippman, P.J., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4806 People v Brown, Janette

Enlargement of time to file notice of appeal and other relief denied, as indicated.

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

M-3530 The People of the State of New York by Andrew M. Cuomo,
Attorney General of the State of New York v Coventry
First LLC

Leave to appeal to the Court of Appeals granted, as
indicated.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4738 Bleecker Street Tenants Corp. v Bleecker Jones LLC

Appeal dismissed unless perfected for the April 2009
Term, as indicated.

Tom, J.P., Andrias, Friedman, Catterson, Acosta, JJ.

M-4948 Rivera v Casilla

Appeal dismissed.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4887 People v Campbell, Conica

Leave to prosecute appeal as a poor person granted, as
indicated.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4894 People v Kelly, Benjamin

Leave to prosecute appeal as a poor person granted, as
indicated.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4854 People v Rudder, Anthony

M-4883 People v Janish, Christopher R.

M-4891 People v Brown, Kenneth

Notice of appeal deemed timely filed; leave to prosecute appeals as poor persons granted, as indicated.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4862 People v Jannestil, Kersey, also known as Jannestil, Kersey K.

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4888

M-4892 People v Carandang, Gilbert

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Mazzairelli, Saxe, Nardelli, Buckley, JJ.

M-4893 People v Chatman, Donna, also known as Chatman, Donna E.

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

M-4916 Mickens v Khalid

Time to perfect appeal enlarged to the February 2009 Term.

Tom, J.P., Mazzarelli, Gonzalez, DeGrasse, JJ.

M-3507 Certain Underwriters at Lloyds, London v Millennium Holdings LLC - AIU Insurance Company - Employers Mutual Casualty Company
(And another action)

Leave to appeal to the Court of Appeals denied.

Tom, J.P., Andrias, Friedman, Catterson, Acosta, JJ.

M-4944 People v Lewis, Kenneth

Leave to file pro se supplemental brief granted to the March 2009 Term, to which Term the appeal adjourned, as indicated.

Tom, J.P., Andrias, Friedman, Catterson, Acosta, JJ.

M-4945 People v Henderson, James

Leave to file supplemental pro se brief granted to the March 2009 Term, to which Term appeal adjourned, as indicated.

Tom, J.P., Nardelli, Sweeny, McGuire, DeGrasse, JJ.

M-4907 George V Restauration S.A. v Little Rest Twelve, Inc.

Appeals consolidated; Clerk directed to calendar same for hearing together in the December 2008 Term, as indicated. Motion otherwise denied, as indicated.

Tom, J.P., Nardelli, McGuire, Acosta, JJ.

M-5101 Holt v O'Porto Holding Company, Ltd.

Stay denied.

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

M-4939 Diallo v Grand Bay Associates Enterprises, Inc.

Stay of proceedings granted on condition appeal perfected for the March 2009 Term and appellant pays a certain amount of monthly use and occupancy to commence December 1, 2008, as indicated.

Mazzarelli, J.P., Friedman, Gonzalez, Buckley, Sweeny, JJ.

M-5248 Brantley v Municipal Credit Union

Stay granted on condition appeal perfected for the March 2009 Term, as indicated.

Saxe, J.P., Nardelli, Renwick, Freedman, JJ.

M-5121 Lasker v Kanas - Fisher

Appeal dismissed.

Saxe, J.P., Nardelli, Renwick, Freedman, JJ.

M-3852 Levy v Endicott - Estate of Tobin, also known as
Endicott

Stay denied, with leave to renew, as indicated. The interim relief granted by an order of a Justice of this Court, dated August 7, 2008, vacated.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-4932 People v Mendez, Lawrence

Stay continued on condition appeal perfected for the June 2009 Term.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-4928 People v Freeman, Rodney

Leave to file supplemental pro se brief granted for the April 2009 Term, to which Term appeal adjourned, as indicated.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-4514 The Bank of New York Trustee Under the Pooling and
Servicing Agreement Series 1995-L v White - Estate of
Reid

Time to perfect appeal enlarged to the March 2009 Term, as indicated.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-4827

M-4901 In the Matter of V., Ralph v A., Elizabeth

Time to perfect appeal enlarged to the March 2009 Term (M-4827). Motion to compel (M-4901) denied, with leave to renew, as indicated.

Saxe, J.P., Nardelli, Moskowitz, Renwick, Freedman, JJ.

M-4976 Fernandez v Riverdale Terrace - Action Chutes, Inc.

Appeals and cross appeals consolidated; time to perfect same enlarged to the April 2009 Term.

Saxe, J.P., Williams, Buckley, Sweeny, JJ.

M-2810 People v Gonzalez, Lionel

Writ of error coram nobis denied.

Friedman, J.P., Gonzalez, McGuire, Moskowitz, JJ.

M-4476 Bautista v David Frankel Realty, Inc.

Reargument and related relief denied.

Friedman, J.P., Williams, Catterson, Acosta, JJ.

M-3819 McNeill v LaSalle Partners - G.C.T. Venture, Inc.
(And other actions)

Reargument or other relief denied.

Gonzalez, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

M-4804 People v Nelson, Jeffrey

M-4807 People v Carvajal, Mario

M-4813 People v White, Lawrence

M-4819 People v Boynton, John

Notice of appeal deemed timely filed; leave to prosecute appeals as poor persons granted, as indicated.

Buckley, J.P., Sweeny, McGuire, DeGrasse, JJ.

M-4951 People v Ramales, Erik

Leave to prosecute appeal as a poor person granted, as indicated.

Friedman, J.

M-5119 In the Matter of Peters v Horn

Leave to appeal to this Court denied.

Nardelli, J.

M-4597 People v Wilson, Junior, also known as Nesmith, Kevin

Leave to appeal to this Court denied.

Catterson, J.

M-2166 People v Vega, William

Reargument denied.

Catterson, J.

M-3917 People v Anonymous
Reargument denied.

Moskowitz, J.

M-4674 People v Jackson, Ronald
Leave to appeal to this Court denied.

Mazzarelli, J.P., Saxe, Friedman, Nardelli, Williams, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-5218 Donald W. Anderson, admitted on 1-29-1973,
at a Term of the Appellate Division,
First Department

Respondent reinstated as an attorney and counselor-at-
law in the State of New York, effective the date hereof. No
opinion. All concur.

The following orders were entered and filed on November 20, 2008:

Tom, J.P., Saxe, Friedman, Buckley, JJ.

M-5246 In the Matter of G., Isabella Star - Episcopal Social Services

Dismissal of appeal denied; time to perfect respondent-appellant father's appeal enlarged to the March 2009 Term, as indicated.

Tom, J.P., Saxe, Sweeny, Catterson, DeGrasse, JJ.

M-4985

M-5178 People v Jeffries, Andre, also known as Miles, Jerry

Leave to prosecute appeal as a poor person granted to the extent indicated; time to perfect appeal enlarged to the February 2009 Term. Dismissal of appeal denied.

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

M-5056 H., Debra v R., Janice

Stay granted to the extent of equitable estoppel hearing; motion otherwise denied.