SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 25, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

3543-
3544 The People of the State of New York, Ind. 7142/02
Respondent,

-against-

Lenford Price,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Order, Supreme Court, New York County (Brenda Soloff, J.), entered on or about May 23, 2006, which denied defendant's motion for resentencing pursuant to the 2005 Drug Law Reform Act, unanimously affirmed.

Because of the unusual circumstances of this case, we are constrained to affirm the lower court without reaching the issue of whether "merit time" should count to determine whether an inmate is eligible for re-sentencing pursuant to the 2005 Drug Law Reform Act.

On July 16, 2003, defendant pleaded guilty to criminal sale

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" standard[1] 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.

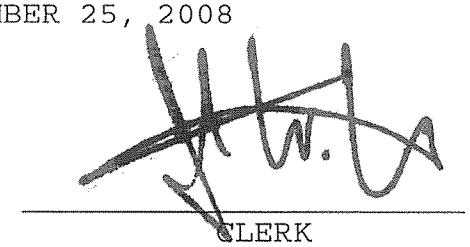
It would also contravene the statute's intention to benefit those serving the longest sentences (*see Bautista*, 26 AD3d at 230).

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

4365N R&R Capital LLC, et al., Plaintiffs-Appellants, Index 604080/05

-against-

Linda Merritt, etc., Defendant-Respondent.

Hogan & Hartson LLP, New York (Steven M. Edwards of counsel), for appellants.

Joseph M. Fioravanti, Media, PA, of the Pennsylvania Bar, admitted pro hac vice, of counsel, for respondent.

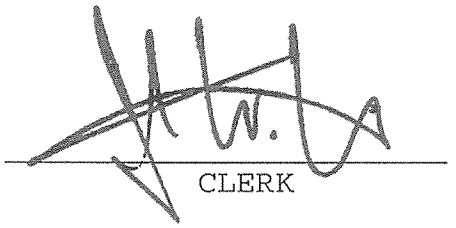
Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 13, 2008, which denied plaintiffs' motion for recusal, unanimously affirmed, without costs.

In the absence of statutory grounds, the decision upon a recusal motion is a discretionary one (*see People v Moreno*, 70 NY2d 403, 405 [1987]; *Conti v Citrin*, 239 AD2d 251 [1997]), and should not be disturbed "[u]nless the moving party can point to an actual ruling which demonstrates bias" (*Solow v Wellner*, 157 AD2d 459, 459 [1990]; *see also Scott v Brooklyn Hosp.*, 93 AD2d 577, 580 [1983]), which plaintiffs have failed to do. Given the lack of any support from the other participants for plaintiffs' allegations of impropriety at a meeting with a possible mediator, there is no evidence that an improper ex parte communication concerning the case took place between a nonparty and the court,

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4647 The People of the State of New York, Ind. 21/04
Respondent,

-against-

Andre Peak, also known as, Andre Pak,
Defendant-Appellant.

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

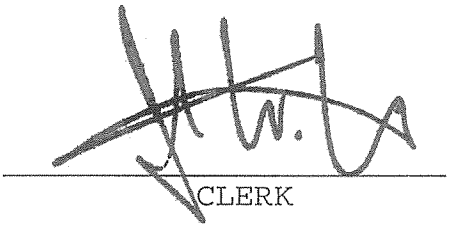
Robert M. Morgenthau, District Attorney, New York (Edward A. Jayetileke of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura Ward, J. at plea; Patricia Nunez, J. at sentence), rendered March 1, 2007, convicting defendant of attempted criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fifth degree, and sentencing him to concurrent terms of 4½ to 9 years and 3½ to 7 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the attempted third-degree possession conviction to 3½ to 7 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4648 Yaritza Corzino, a minor under the Age of Eighteen Years, by her Mother and Natural Guardian, Leticia Mejica,
Plaintiff-Appellant,

Leticia Mejica,
Plaintiff,

-against-

The City of New York,
Defendant-Respondent.

Index 15965/05

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered July 25, 2007, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained when infant plaintiff tripped and fell on public school grounds, granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion to find defendant the proper party to the complaint, unanimously affirmed, without costs.

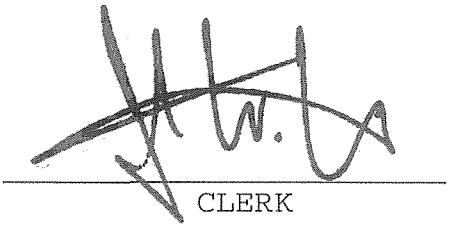
The complaint was properly dismissed since defendant is not a proper party to the action. Contrary to plaintiff's contention, the 2002 amendments to the Education Law (L 2002, ch 91), do not provide a basis to hold defendant liable for the

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 25, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Luis A. Gonzalez
Karla Moskowitz
Rolando T. Acosta
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 2903/06
Respondent,

-against- 4649

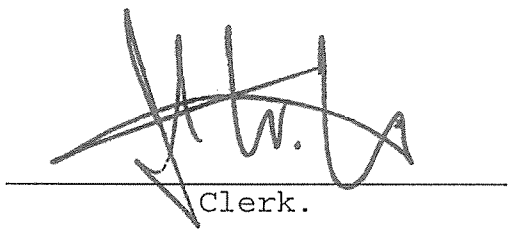
Erron Lofton,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about January 10, 2007,

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.

ENTER:



Clerk.

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

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

4650 In re Chatsworth Realty Corp., Index 105862/06
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Theresa Darwish,
Respondent-Intervenor-Respondent.

Kim S. Winn, Great Neck, for appellant.

Gary R. Connor, New York (Mark L. Tyler of counsel), for respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (William Gribben of counsel), for intervenor-respondent.

Order and judgment (one paper), Supreme Court, New York County (Herman Cahn, J.), entered November 13, 2007, which denied petitioner landlord's application brought pursuant to CPLR article 78 to annul the determination of respondent Division of Housing and Community Renewal (DHCR), dated March 7, 2006, denying the landlord's petition for administrative review (PAR) of the denial of its application to deregulate the subject apartment under the luxury decontrol law, and dismissed the proceeding, unanimously affirmed, without costs.

DHCR's determination, in this matter where the landlord sought to deregulate respondent tenant's apartment on the basis

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)

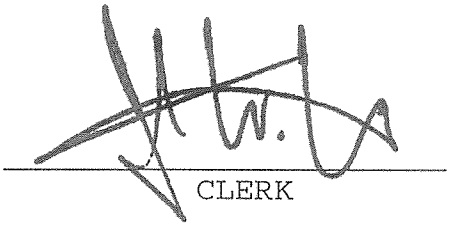
Contrary to the landlord's contention, the doctrine of inconsistent positions, which precludes a party from assuming a position in a legal proceeding that is contrary to a position that was taken in a prior proceeding (*see e.g. Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [1995]),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

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4651 170 West Village Associates, Index 116072/05
Plaintiff-Respondent,

-against-

G & E Realty, Inc.,
Defendant-Appellant.

The Rice Law Firm, PLLC, New York (Dan M. Rice of counsel), for appellant.

Allen H. Weiss, Lake Success, for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 10, 2008, which granted plaintiff's motion to strike seven affirmative defenses, and denied defendant's cross motion to replead them except for the first, if repleaded within 10 days, unanimously modified, on the law, the cross motion granted without limitation, and otherwise affirmed, without costs.

The commercial tenant's challenged affirmative defenses, which pleaded conclusions of law without supporting facts, were properly stricken as insufficient (*see generally Morgenstern v Cohon*, 2 NY2d 302 [1957]; *see also Petracca v Petracca*, 305 AD2d 566, 567 [2003]). Leave to replead is ordinarily freely granted (CPLR 3025[b]) absent a showing it would cause surprise or prejudice (*Arriaga v Laub Co.*, 233 AD2d 244 [1996]), which

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.

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

ENTERED: NOVEMBER 25, 2008

CLERK

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

4652 The People of the State of New York, Ind. 6053N/05
Respondent,

-against-

Barron Howell,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered March 5, 2007, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of 1 year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's possession of the drugs at issue could be readily inferred from the evidence.

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

ENTERED: NOVEMBER 25, 2008

CLERK

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

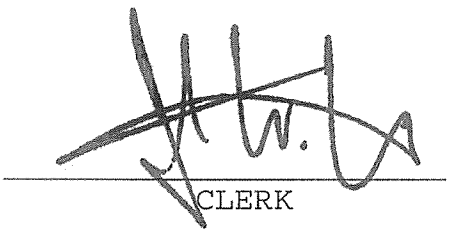
(Social Services Law § 384-b[4][c], [6][a]; *Matter of Lashawn Shanteal R.*, 14 AD3d 467 [2005]).

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]).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4654-
4654A Samuel Parker, et al., Index 101346/07
Plaintiffs-Appellants,

-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]).

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

ENTERED: NOVEMBER 25, 2008

CLERK

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

4655-
4655A Index 103533/07

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.

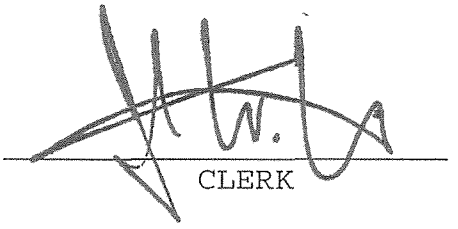
Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), entered September 7, 2007, which, in an article 78 proceeding seeking to annul respondents' determination denying petitioner a promotion to the position of Principal Bank Examiner I, granted respondents' cross motion to dismiss the petition 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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4656 The People of the State of New York, Ind. 1417/06
Respondent,

-against-

Derrick Lynah,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Karen M. Kalikow of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Amir Vonsover of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 29, 2006, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender, to a term of 2 years, unanimously affirmed.

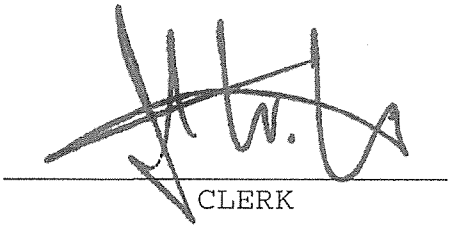
The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). At a particularly drug-prone location, an officer recognized defendant from a recent investigation into a possible drug transaction. Defendant was holding a plastic bag and counting something. When defendant saw the officer, he pushed the bag up his sleeve, and when the officer approached, defendant secreted the bag in his pants,

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

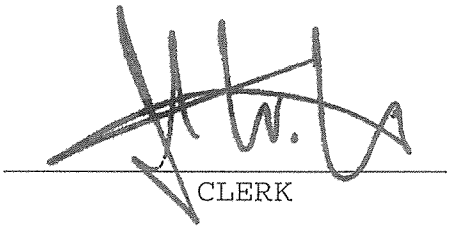
stories. It is undisputed that no safety devices, such as harnesses, ropes or nets had been furnished or made available to plaintiff. Given this failure to provide proper protection against a fall into the garbage chute, even if plaintiff, notwithstanding the proximity of the chute to the shaft, could 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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4658 Orix Financial Services, Inc., formerly known as Orix Credit Alliance, Inc., Plaintiff-Appellant, Index 109968/06

-against-

Macon T. Haynes, Defendant-Respondent.

Davidoff Malito & Hutcher LLP, New York (Lewis M. Smoley of counsel), for appellant.

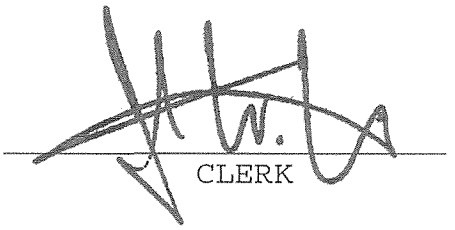
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 6, 2007, which, in an action on a "conditional sale contract note," denied plaintiff's unopposed motion pursuant to CPLR 3215 for a default judgment and sua sponte dismissed the complaint as barred by the statute of limitations, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings including entry of judgment.

The statute of limitations must be pleaded as an affirmative defense and cannot be asserted sua sponte by the court as a basis for denying an unopposed motion for a default judgment (*see*

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.

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

ENTERED: NOVEMBER 25, 2008



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

4659 Gerald Hirschberg, Index 400604/06
Plaintiff-Appellant,

-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

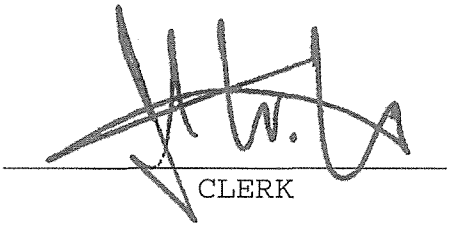
behaving as though it were still in operation (*see Fixler v Fixler*, 290 AD2d 482 [2002]). He cannot now be heard to say that after the alleged anticipatory breach he "consider[ed] the contract at an end" (*see Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 [1995] [internal quotation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

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4660 The People of the State of New York, Ind. 1990/06
Respondent,

-against-

Johann Vasquez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Patricia Curran of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Edward J. McLaughlin, J. at jury trial and sentence), rendered December 13, 2006, convicting defendant of criminal possession of a controlled substance in the first degree, and sentencing him to a term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 8 years, and otherwise affirmed.

The court properly declined to deliver a circumstantial evidence charge since the case against defendant did not rest exclusively on circumstantial evidence (*see People v Daddona*, 81 NY2d 990, 992 [1993]). The police testimony as to defendant's presence in a car, in close proximity to a large quantity of

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]).

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

ENTERED: NOVEMBER 25, 2008

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 25, 2008.

Present - Hon. Jonathan Lippman, Presiding Justice
Luis A. Gonzalez
Karla Moskowitz
Rolando T. Acosta
Dianne T. Renwick, Justices.

The People of the State of New York,
Respondent,

Ind. 2873/05

-against-

4661-
4662

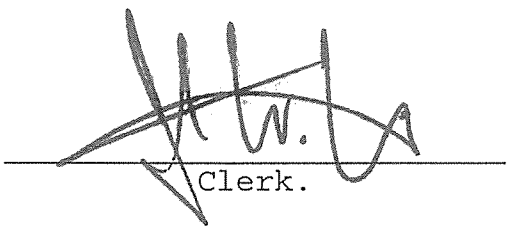
Kurell Brown, etc.,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about November 16, 2005,

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.

ENTER:



Clerk.

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

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

4663 Dumescas Innocent, Index 14041/06
Plaintiff-Respondent,

-against-

Seth A. Mensah, et al.,
Defendants-Appellants,

Ajab Glu Rasa, et al.,
Defendants.

Feinman & Grossbard, P.C., White Plains (Steven N. Feinman of counsel), for appellants.

Mitchell Dranow, Mineola, for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 4, 2008, which denied the motion of defendants Seth Mensah and Yahya Karogor for summary judgment dismissing the complaint as against them on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against Mensah and Karogor. The Clerk is directed to enter judgment accordingly.

Summary judgment dismissing the complaint as against Mensah and Karogor should have been granted where plaintiff's opposition to defendants' prima facie showing that the subject automobile accident did not cause plaintiff to sustain a serious injury

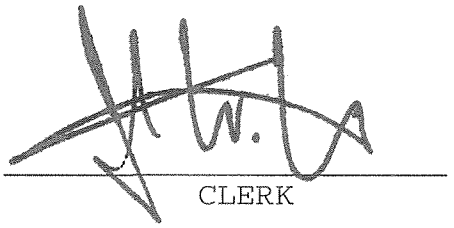
failed to raise a triable issue of fact. Although plaintiff claimed to be afflicted with continuing pain, and submitted evidence, in the form of MRIs performed two months after the accident, of the existence of herniated and bulging discs, he acknowledged that he only missed a few days from work, did 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.*).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4664 The People of the State of New York, Ind. 1285/06
Respondent,

-against-

Michael Ross,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Ann Donnelly of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered October 10, 2006, convicting defendant, after a jury trial, of two counts of criminal sexual act in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility, including its evaluation of inconsistencies in testimony and the victim's explanation for her prior inconsistent statements.

The court properly exercised its discretion in precluding defendant from offering, as evidence of his alleged consciousness of innocence, testimony that, after consultation with his

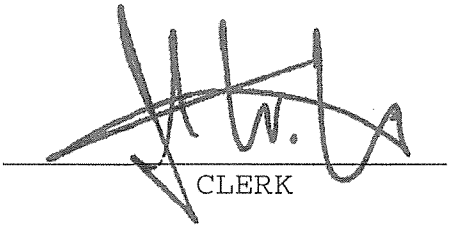
attorney, he agreed to comply with the prosecutor's request for a DNA sample without requiring the prosecutor to make a CPL 240.40(2) discovery motion. Defendant's agreement to provide discovery voluntarily where he would have, in any event, been required by law to provide it was devoid of probative 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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4665 The People of the State of New York, Ind. 2536/04
Respondent,

-against-

Danny Buford,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Martin J. Foncello of counsel), for respondent.

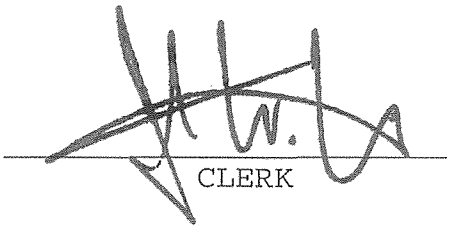
Order, Supreme Court, New York County (Charles H. Solomon, J.), entered April 25, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's upward departure to risk level two is based on clear and convincing evidence (*see generally* Correction Law § 168-n[3]). The court properly concluded that defendant's history of psychiatric illness and medication noncompliance enhanced his risk of reoffending. In making that finding, the court appropriately considered the report of a CPL article 730 examination prepared in connection with the underlying conviction, including statements made by defendant during his examination. There is nothing in the record to cast any doubt on the reliability of this information. In any event, the

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

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

ENTERED: NOVEMBER 25, 2008



Mazzarelli, J.P., Catterson, Moskowitz, Acosta, JJ.

3936 The People of the State of New York, Ind. 862/06
Appellant,

-against-

Rudy Pacheco,
Defendant-Respondent.

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel) for appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Jennifer Eisenberg of counsel), and Goldstein & Weinstein, Bronx (Barry Weinstein of counsel), for respondent.

Order, Supreme Court, New York County (Micki A. Scherer, J.), entered on or about May 10, 2006, which dismissed the indictment with leave to re-present, reversed, the indictment reinstated, and the matter remanded for further proceedings.

Defendant and three others were charged with burglarizing a truck. The police had been following a minivan in which the four men were riding, when it pulled up near the truck.[1] Two police officers testified to the grand jury that they witnessed defendant standing on the sidewalk and looking up and down the block while two of the other men removed a bag from the rear of

---

[1] Because of the secrecy attendant to grand jury minutes, the facts are taken from a summary provided by the motion court in the decision appealed. Defendant's previous motion to this Court to unseal the grand jury minutes was denied (2008 NY Slip Op 61439[u] [1st Dept. 2008]).

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 inculpating 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 a 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

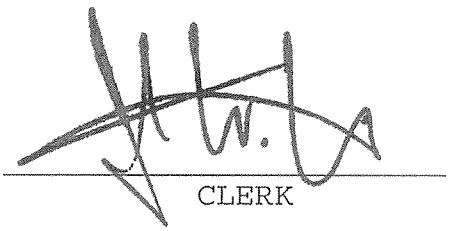
witness is an accomplice." Id. Further, the Court held that "when the case against the defendant rests substantially on the testimony of a witness who is an accomplice as a matter of law, or who may be one as a matter of fact, *it is best* that the court offer to charge the accomplice-corroboration rule 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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4588 The People of the State of New York, Ind. 5885/06
Respondent,

-against-

Roland Green,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered May 25, 2007, convicting defendant, after a jury trial, of robbery in the second degree and burglary in the third degree, and sentencing him, as a second violent felony offender, to concurrent terms of 13 years and 3½ to 7 years, respectively, unanimously affirmed.

The verdict was not against the weight of the evidence when the evidence is considered in light of the jury charge, including the supplemental charge explaining that a conviction on the robbery count could be based on a finding that defendant's conduct was "an actual contributory cause" of an injury inflicted during the robbery (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The only reasonable explanation for the presence of defendant's fingerprints on the vehicles in question was that he

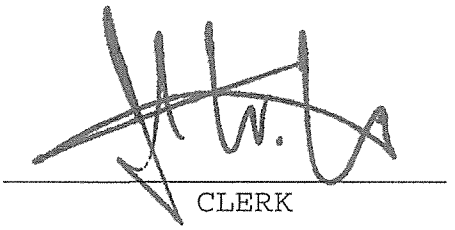
was one of the two perpetrators of the robbery and burglary. The alternative explanation that defendant posits on appeal not only is farfetched (*see e.g. People v Texeira*, 32 AD3d 756 [2006], *lv denied* 7 NY3d 904 [2006]), but also is inconsistent with defendant's statement to the police. Defendant's 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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4669 The People of the State of New York, Ind. 58/00
Respondent,

-against-

Eugenia Pedraza,
Defendant-Appellant.

Paul, Hastings, Janofsky & Walker LLP, New York (Richard C. Schoenstein of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Richard Lee Price, J.), entered on or about December 4, 2007, which denied defendant's CPL 440.10 motion to vacate a judgment, same court and Justice, rendered June 13, 2002, convicting her, after a jury trial, of kidnapping in the first degree, attempted murder in the second degree, and arson in the second degree, and imposing sentence, unanimously affirmed.

On direct appeal (25 AD3d 394 [2006], *lv denied* 7 NY3d 760 [2006]), defendant did not challenge the suppression hearing court's ruling denying her motion to suppress statements, and she may not challenge that ruling by way of a motion to vacate judgment. A CPL 440.10 motion may not be used as a device to obtain a second appeal on an issue that appears on the face of

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

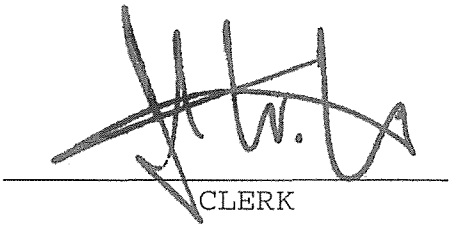
an interpreter or his own knowledge of Spanish.

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]).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4670-
4670A Madeline Cicale, Index 22089/06
Plaintiff-Respondent,

-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.

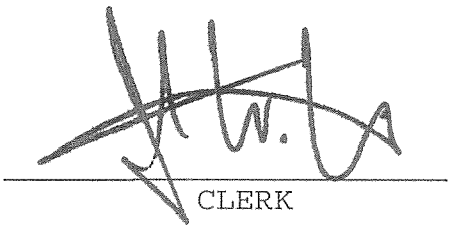
In opposition to Wachovia's motion, plaintiff averred that her grandson had testified in a proceeding in another jurisdiction that he forged her name on the subject loan and mortgage documents. She also submitted documents containing her

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

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

-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.

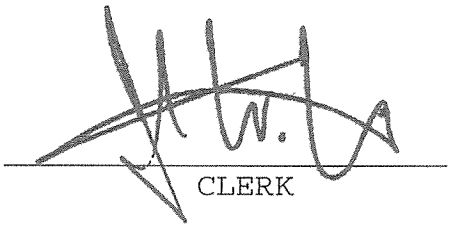
Order, Supreme Court, Bronx County (Albert Lorenzo, J.), entered or about October 24, 2007, which denied petitioner's application for a writ of habeas corpus and dismissed the petition, unanimously affirmed, without costs.

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]).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4672 Cathy Migliaccio, et al., Index 116916/05
Plaintiffs-Appellants,

-against-

Fatmir Miruku,
Defendant-Respondent.

Kerner & Kerner, New York (Kenneth T. Kerner of counsel), for appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered September 5, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The injured plaintiff alleged that a car driven by defendant backed into her in a crosswalk in Queens in March 2003. She testified that she missed one week from work immediately after the accident, and an additional two weeks over the course of the year. She stopped going for treatment in December of that year because she said it was not helping with the pain.

Defendant moved for summary judgment on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), submitting the reports of various medical experts. A neurologist reported a normal examination,

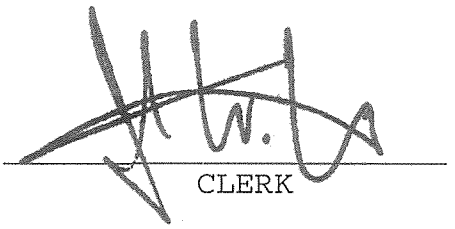
with mild tenderness in the cervical and lumbar spine. An orthopedic surgeon concluded that the patient had suffered sprains of the neck, back and right knee, and made a complete recovery. A radiologist reviewed MRIs taken seven and eight months after the accident, which he said showed longstanding degenerative 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 Eyler*, 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]).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4673 Judith Askin, etc., et al., Index 22719/95
Plaintiffs-Respondents,

-against-

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

New York City Health and
Hospitals Corporation,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for appellant.

Alexander J. Wulwick, New York, for respondents.

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered June 26, 2006, upon a jury verdict in plaintiffs' favor, to the extent it apportioned liability 60% to defendant New York City Health and Hospitals Corporation (HHC) and 40% to defendant Christopher O'Brien, and bringing up for review an order, same court and Justice, entered June 8, 2005, which, inter alia, denied HHC's motion for judgment notwithstanding the verdict or for a new trial on liability and apportionment thereof, unanimously modified, on the facts, to vacate the apportionment of liability and to direct a new trial solely on that issue, and otherwise affirmed, without costs, unless O'Brien, within 30 days after service of a copy of this

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]).

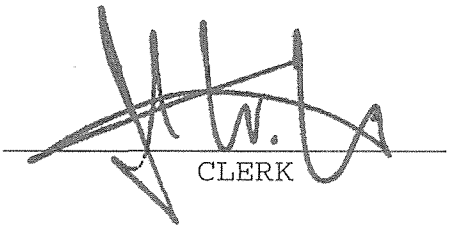
HHC's argument that the jury's finding that the decedent was negligent but that his negligence was not a proximate cause of his injuries should be set aside as irreconcilably inconsistent is unpreserved (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]). Moreover, it does not avail HHC to characterize 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]).

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

ENTERED: NOVEMBER 25, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 25, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Eugene Nardelli
John T. Buckley
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 9657C/05
Respondent,

-against- 4674

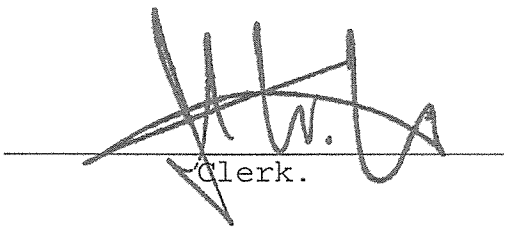
Mary Singleton,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Michael Sonberg, J.), rendered on or about November 15, 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 judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 25, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Eugene Nardelli
John T. Buckley
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 5504/97
Respondent,

-against- 4677

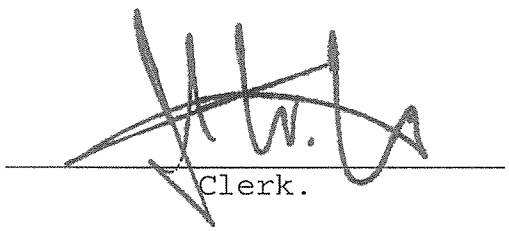
William Cardoza,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about September 22, 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 judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

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

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

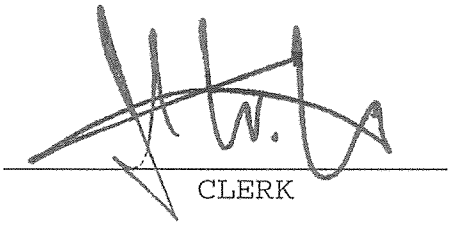
child's life and the child flourished in his care.

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on November 25, 2008.

Present - Hon. Angela M. Mazzarelli, Justice Presiding
David Friedman
Eugene Nardelli
John T. Buckley
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 3315/07
Respondent,

-against- 4679

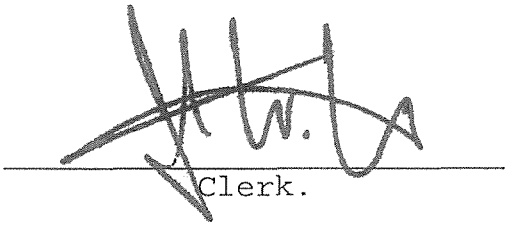
Jonathan McChriston,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (William A. Wetzel, J.), rendered on or about September 17, 2007,

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.

ENTER:



Clerk.

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

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

4680 Yvonne Dilone, Index 21398/05
Plaintiff-Appellant,

-against-

Tak Leu Cheng,
Defendant-Respondent.

Steven Siegel, P.C., Kew Gardens (Wendy Bishop of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 20, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

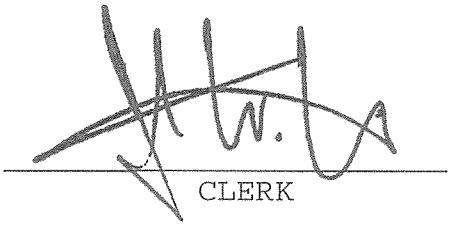
Defendants' experts' findings, upon objective testing, that plaintiff's injuries had resolved by the time of examination nine months after the accident demonstrated prima facie that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) (*see Brown v Achy*, 9 AD3d 30, 31 [2004]). As plaintiff's submissions address her condition within 92 days of the accident, plaintiff failed to rebut defendants' experts' findings (*see Hoisington v Santos*, 48 AD3d 333 [2008]). Her osteopath's report failed to establish an adequate causal connection between plaintiff's claimed continuing range of motion

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]).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4681 Marc Hélie, Index 108485/05
Plaintiff-Respondent,

-against-

McDermott, Will & Emery, et al.,
Defendants-Respondents,

Gramercy Financial Group LLC,
Non-Party-Appellant.

O'Shea Partners LLP, New York (Mark A. Weissman of counsel), for appellant.

Liddle & Robinson, L.L.P., New York (Christine A. Palmieri of counsel), for Marc Helie, respondent.

Patterson Belknap Webb & Tyler LLP, New York (Mark G. Young of counsel), for McDermott, Will & Emery and John J. Sullivan, respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 28, 2007, which, to the extent appealed from, permitted defendant Sullivan to testify at a deposition and ordered production of documents concerning certain topics even if his responses revealed information or communications that Gramercy Financial Group claimed were privileged and/or confidential, unanimously affirmed, without costs.

Code of Professional Responsibility DR 4-101(C) (22 NYCRR 1200.19[c]) provides: "A lawyer may reveal: . . . (4) Confidences or secrets necessary . . . to defend the lawyer . . . against an

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.

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

ENTERED: NOVEMBER 25, 2008

CLERK

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

4682-
4683 The People of the State of New York, Ind. 5391/02
Respondent,

-against-

Primitivo Guzman,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John A. Barone, J. at hearings; Efrain Alvarado, J. at plea, sentence and resentence), rendered April 7, 2004, as amended December 4, 2006, convicting defendant of criminal possession of a controlled substance in the second degree, and resentencing him to a term of 6½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]; *People Moissett*, 76 NY2d 909 [1990]). As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), after reviewing the sealed minutes of *the Darden-Castillo* hearing (*People v Castillo*, 80 NY2d 578 [1992]) and the evidence presented at the suppression hearing, we also reject defendant's suppression arguments on the

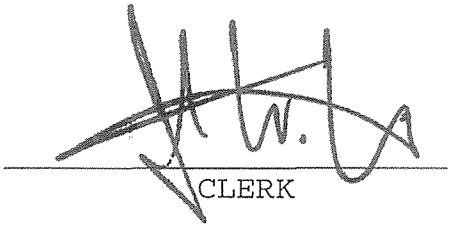
merits. The police had probable cause to search defendant's car, as well as his valid consent.

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.

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4685 In re Warren Wabst, Index 119024/06
Petitioner-Appellant,

-against-

Nicholas Scoppetta, as Commissioner of
the New York City Fire Department, et al.,
Respondents-Respondents.

Gordon, Gordon & Schnapp, P.C., New York (Kenneth E. Gordon of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondents.

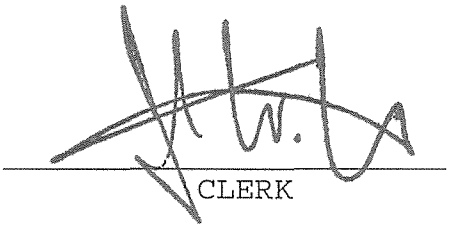
Order and judgment (one paper), Supreme Court, New York County (Edward H. Lehner, J.), entered February 4, 2008, to the extent appealed from, denying petitioner's application to vacate that portion of an arbitration award, dated November 16, 2006, which upheld certain disciplinary charges, unanimously affirmed, without costs.

The arbitrator's refusal to address petitioner's state law defenses to charges 9 and 10, based on his mistaken belief that he lacked jurisdiction, does not deprive the award of finality

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]).

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

ENTERED: NOVEMBER 25, 2008



CLERK

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

4688N Diane Cummin,
Plaintiff,

Index 350465/98
114663/06

-against-

Arch Cummin,
Defendant-Respondent.

- - - - -

Arch Cummin,
Plaintiff-Respondent,

-against-

Anson McCook Beard, Jr.,
Defendant-Appellant.

Schoeman, Updike & Kaufman, LLP, New York (Beth L. Kaufman of counsel), for appellant.

Stein Riso Mantel, LLP, New York (Gerard A. Riso of counsel), for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered May 23, 2008, which granted defendant husband's motion for a joint trial of his post-judgment matrimonial action and his action against defendant Anson McCook Beard, Jr., unanimously affirmed, without costs.

In the post-judgment matrimonial action, the husband alleges that, while, in accordance with the stipulation that amended their divorce agreement, he was reimbursing the wife $15,000 per month for the rental of an apartment from her "friend," the wife was not paying any rent to the "friend," who the husband learned

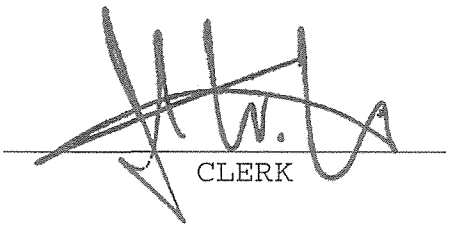
was the wife's former boyfriend, defendant Beard. In the action against Beard, the husband alleges fraud and aiding and abetting fraud. Patently, the two actions involve common questions of law and fact (CPLR 602[a]); a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs, 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



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
Luis A. Gonzalez
Eugene Nardelli
James M. Catterson, JJ.

3355
File 2875/06

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

- - - - -

L.M.B.,
Petitioner-Respondent,

-against-

E.R.J.,
Respondent-Appellant.

Respondent appeals from an order of the Surrogate's Court, New York County (Kristin Booth Glen, S.), entered October 11, 2007, which granted petitioner LMB's application for immediate visitation and for vacatur of a prior order, same court and Surrogate, granting respondent ERJ's application to re-adopt John Doe.

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

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

CATTERSON, J.

In this action, in which appellant ERJ claims she is the current, rightful adoptive parent of a Cambodian orphan, we find that the act of state doctrine may not be used in an adoption proceeding where the parties have invoked the jurisdiction of the State of New York, and all the parties including the child are domicilaries of this state. To find otherwise would be an unprecedented surrender of this Court's jurisdiction, and would allow a foreign sovereign to dictate parental rights and the legal status of New York domicilaries - even on a whim.

This case involves a bitter custody battle between ERJ and LMB, over a five-year old Cambodian orphan named John Doe. Both parties claim to have legally adopted John Doe.

ERJ is an heiress to one of the largest fortunes in America. Although she is a United States citizen who resides in New York, ERJ is a person of considerable influence in Cambodia, where she has made sizeable contributions to charitable endeavors. LMB, a man of considerably less wealth, is a citizen of both the United States and Trinidad and Tobago, and has residences in both Manhattan and Florida.

In 2003, ERJ and LMB entered into a romantic relationship and shortly thereafter, the couple began to discuss adopting a child. The record also reflects that as the relationship

developed, ERJ became increasingly involved with an orphanage she had established earlier that year in Cambodia.

While ERJ was on a trip to the Cambodian orphanage, she met John Doe. According to LMB, ERJ called him from Cambodia and stated, "I found your son." Although ERJ denies that she made this statement, there is no dispute that in June 2003, LMB flew to Cambodia and met John Doe. Thereafter, the parties decided that they would try to adopt the child.

Attempting to circumvent the U.S. visa restrictions on Cambodian orphans,[1] the parties planned that LMB, as a citizen of Trinidad and Tobago, would legally adopt John Doe and become his sole legal parent. Then, since LMB is also a U.S. citizen, John Doe would be granted U.S. citizenship as the child of a U.S. citizen. In the meanwhile, the parties obtained temporary legal status for John Doe in the U.S. by bringing him to New York[2] on a medical visa in August 2003. John Doe was granted a visa for a six-month stay in the United States to receive medical care.

---

[1]Normally, a U.S. citizen who adopts a foreign orphan can obtain an IR-3 or -4 visa for the child. Since December 2001, however, America has refused to issue such visas for Cambodian orphans due to concerns over allegations of widespread baby-selling occurring in Cambodia.

[2]The Cambodian government granted ERJ's request for permission to bring John Doe to the U.S. for medical treatment with the proviso that "[a]fter recovery from illness, he will be sent back to Cambodia."

Since the expiration of a six-month extension in August 2004, John Doe has resided in the United States without legal immigration status.

In May 2004, LMB applied to the Cambodian government to adopt John Doe pursuant to Article 10 of Sub-Decree 29. Sub-Decree 29 governs the procedures for adoption by foreign nationals of orphans under the jurisdiction of the Cambodian government. It was promulgated in response to concerns about trafficking and baby-selling. Among other things, the statute provides for a "Giving and Receiving" ceremony, during which a Cambodian official delivers the child to the adoptive parent in person. This provision in Sub-Decree 29 was designed to keep Cambodian orphans out of the hands of child traffickers.

On June 23, 2004, despite the fact that LMB did not participate in a "Giving and Receiving" ceremony, the Cambodian government issued an adoption certificate,[3] granting "final approval" on LMB's request to adopt John Doe. On July 2, 2004, the Chief of Commune and Registrar of Prek Eng Commune, Kien Svay District, Kandal Province, issued an amended birth certificate for John Doe listing LMB as John Doe's "Father."

---

[3]This certificate has been variously characterized as an "adoption permission certificate," a "certification Letter of Adoption," or a "certifying Letter of Adoption."

The parties' plan to obtain full legal status in the U.S. for John Doe failed after Trinidad denied LMB's application to re-adopt John Doe. Shortly thereafter, their romantic relationship soured and ERJ decided that she was going to adopt John Doe herself.[4]

At this point, the record reflects a classic case of "he-said/she-said." What is undisputed however is that, on March 14, 2005, LMB signed a letter addressed to the Cambodian government (hereinafter referred to as "the March 2005 Letter"), relinquishing the permission that Cambodia had granted him to adopt John Doe. The letter was drafted by ERJ's immigration attorney and was submitted to the Cambodian government on ERJ's behalf. It stated, in pertinent part:

> "In June of 2004, I was granted permission to adopt the orphan child named [John Doe], and to bring him up in Trinidad and Tobago. This permission was communicated in Letter of Approval No. 629 D.A., sent from the Office of the Council of Ministers on June 16, 2004, and Adoption Certificate No. 396 MOSALVY, issued on June 23, 2004 ... I am very grateful to the Kingdom of Cambodia for having granted this permission. It is no

---

[4]The ban on the issuance of IR-3 and IR-4 visas to Cambodian "orphans" does not extend to the issuance of an IR-2 visa to a Cambodian child who, in addition to being the subject of a full and final adoption, has lived with the adopting (unmarried) parent, as legal custodian, for two years. See 8 U.S.C. 1101[b][1][E].

Because John Doe resided with ERJ, she was the only person who would have had standing to obtain an IR-2 visa for John Doe.

> longer possible, however, for me to adopt the child and to bring him up in Trinidad and Tobago, as had been contemplated when this permission was granted. Therefore, I wish to relinquish the permission that was granted to me by the Kingdom of Cambodia to adopt the orphan child named [John Doe]."

After LMB signed the March 2005 Letter,[5] ERJ submitted it to the Cambodian authorities.

Six months later, in September 2005, ERJ wrote to the Cambodian Ministry of Social Affairs, Labor, Vocation and Youth Rehabilitation (hereinafter referred to as "the MOSAVY") and requested permission to adopt the child[6]. In October 2005, the Cambodian government issued an adoption certificate, granting "final approval" on ERJ's request to adopt John Doe. Notably, like LMB, ERJ never participated in a "Giving and Receiving" ceremony.

In January 2006, ERJ petitioned the New York County Surrogate's Court for permission to re-adopt John Doe. Her petition, signed by counsel, included ERJ's sworn statement that

---

[5]LMB claims that he acceded to this plan on the representation that he would obtain a second parent adoption here once ERJ was successful in her adoption of John Doe. ERJ denies any such promise or assurance.

[6]In July 2004, there was a governmental reorganization and MOSALVY was divided into two ministries, including the Ministry of Labor and Vocational Training (MOLVT), which is currently responsible for enforcement of child labor issues, and the Ministry of Social Affairs, Veterans and Youth Rehabilitation (MOSAVY).

she had adopted John Doe in Cambodia, a copy of her Cambodian adoption certificate dated October 11, 2005 evidencing that adoption, and a copy of John Doe's Cambodian passport. ERJ also submitted John Doe's *original* birth certificate which lists both father and mother as "Unknown", and not the recently issued one naming LMB as John Doe's father.

Because the Surrogate believed that this was a re-adoption, and because John Doe had already been determined an orphan, no notice to any other party was required, and none was given. On April 12, 2006, with no opposition, and no reason to doubt the bona fides of the petition, the Surrogate granted the readoption of John Doe by ERJ.

Four months later, in August 2006, LMB commenced this proceeding seeking, inter alia, vacatur of ERJ's order of adoption and immediate visitation with John Doe. LMB asserted that ERJ's "re-adoption" petition had been procured by a fraud on the court insofar as ERJ had not revealed the fact that the Cambodian authorities had listed LMB on John Doe's birth certificate as his adoptive father.

The Surrogate reopened the case. Then, after months of conflicting affidavits and memoranda of law as to, inter alia, whether Cambodia grants full and final adoptions, she concluded that a full-scale trial of those issues was necessary.

In the meantime, in December 2006, purporting to shed light on the issues before the Surrogate, ERJ submitted two documents from Cambodian governmental entities. The first document was issued by the MOSAVY (hereinafter referred to as "the MOSAVY Letter"), dated October 24, 2006. It stated, in pertinent part:

> "[T]here truly has been an appropriate and lawful decision of the Royal Government granting you permission to adopt [John Doe].
>
> "As for the case of [LMB], he also submitted an application to adopt [John Doe]. However, after the Royal Government issued its official decision, he failed to attend a handing over ceremony of [John Doe] which is required by Sub-Decree #29 and he also submitted a letter of refusal to adopt [John Doe]."

The second document, the Sor Chor Nor 1850 (hereinafter referred to as "the SCN"), dated December 1, 2006, was issued by the Council of Ministers.[7] The SCN repeats that ERJ had "properly and legally received an approval from the Royal Government of ... Cambodia to adopt a child name[d] [John Doe]..." It also states that because LMB did not participate in a Giving and Receiving ceremony, LMB's adoption of John Doe is "null and void." Notably, the SCN does not provide any explanation as to how ERJ's adoption was valid despite the fact that she also did not attend a Giving and Receiving ceremony.

---

[7]The Cambodian Council of Ministers is the highest level of Cambodia's executive branch.

After a trial lasting more than two weeks which began in March of 2007, the Surrogate granted LMB's motion to vacate ERJ's adoption of John Doe, but ordered that John Doe remain in ERJ's custody and permitted LMB to begin visitation with John Doe. First, the Surrogate noted that ERJ "made substantial, material misrepresentations, wholly aside from her non-disclosure of the confused legal situation involving LMB, in her petition for re-adoption." Specifically, she stated that ERJ "denied any substance abuse, when, in fact, she had recently returned from five weeks in a rehabilitation facility."

The Surrogate stated, "These serious misrepresentations would, themselves, be cause for vacating the adoption ..." The Surrogate further found that Cambodia grants full and final adoptions, as opposed to mere permission to adopt a Cambodian orphan in a foreign country.[8] She further determined that, the issuance of an adoption certificate, not the Giving and Receiving ceremony, finalizes adoption and thus LMB's adoption of John Doe was valid. Moreover, since LMB had been given an amended birth certificate naming him as John Doe's father the Surrogate found that fact tended to prove he had been granted a full and final adoption.

---

[8]ERJ does not attack this finding on appeal.

Aptly analogizing LMB's March 2005 renunciation letter to a natural parent's consent to the adoption of his/her child, the Surrogate then properly applied New York law. See Stubbs v. Weathersby, 320 Or. 620, 629-630, 892 P.2d 991, 997-998 [1995] (where the court applied the law of the forum state in determining whether a mother consented to the adoption of her child); In re Adoption of Hunter, 421 Pa. 287, 290-291, 218 A.2d 764, 766-767 (1966); Matter of Adoption of M.L.L., 810 N.E.2d 1088, 1095 (Ind. App. 2004); Matter of Adoption of Child by T.W.C., 270 N.J. Super. 225, 238-240, 636 A.2d 1083, 1090-1091 (App. Div. 1994). The Surrogate found that the March 2005 Letter complied with neither Domestic Relations Law § 115-b(2) and (4) nor Social Services Law § 384 and thus, since the proper procedures for surrendering parental rights had not been followed, she declared that LMB was John Doe's adoptive father. Even if the validity of the March Letter were governed by Cambodian law, the Surrogate credited trial testimony that under Cambodian law, no legal surrender of parental rights can occur without court involvement.

Finally, the Surrogate determined that the act of state doctrine did not apply to adoptions and that in any event, neither the MOSAVY Letter nor the SCN were acts completed by a foreign state completely within its own territory.

In her decision, the Surrogate noted that U.S. courts are not required to defer to a foreign country's judicial and, by parity of reasoning, executive interpretation of its own laws where "fundamental standards of procedural fairness" have not been observed. See Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999). The Surrogate stated,

> "At the time [the MOSAVY Letter and the SCN] were issued, the instant litigation was in full swing, and they were clearly sought for the purpose of influencing the outcome. The documents were obtained ex parte, through a 'procedure' previously unknown to LMB and his counsel, and nowhere prescribed in any written Cambodian authority submitted to this Court. To the contrary, to the extent that they purport to decide a controversy between two parties, they appear to be unconstitutional under the Cambodian separation of powers that reserves such resolution to the judiciary."[9]

On appeal, ERJ contends, that the MOSAVY Letter and the SCN are acts of the Cambodian government that fall within the act of state doctrine. These documents resolve this case because both: (1) interpret Sub-Decree 29 as creating a mandatory requirement that foreign nationals adopting Cambodian orphans participate in a "Giving and Receiving" ceremony; (2) conclude that LMB did not

---

[9]The Constitution of the Kingdom of Cambodia provides, at Chapter XI, Article 129: "Only judges shall have the right to adjudicate"; and at Chapter XI, Article 130: "Judicial power shall not be granted to the legislative or executive branches." In addition, with regard to complaints concerning the decisions of officials or official bodies, the "settlement of complaints and claims shall be the competence of the courts." Chapter III, Article 39.

adopt John Doe because he did not participate in the "Giving and Receiving" ceremony and also sent a letter relinquishing his right to adopt him; and (3) state that her adoption of John Doe was valid under Cambodian law and that LMB's was not. In other words, ERJ argues that under the act of state doctrine, the Surrogate was required to treat the MOSAVY Letter and the SCN as binding and therefore, LMB's petition to vacate the order of adoption should have been dismissed because ERJ had permission to adopt John Doe.

LMB argues that John Doe was not legally available for adoption by ERJ without his consent because he was the child's sole legal parent since the Cambodian government granted him a full and final adoption in June 2004. LMB further asserts that the act of state doctrine is completely inapplicable for the dual reasons that the MOSAVY Letter and the SCN do not constitute "acts" and that, in any case, the doctrine's territorial limitation precludes its application in the case at bar because the MOSAVY Letter and the SCN were directed at this Court and this country rather than being only applicable within Cambodian territory.

For the reasons set forth below, we agree with the petitioner and affirm the order of the Surrogate.

The act of state doctrine, now more than a century old, was

first enunciated by the U.S. Supreme Court in Underhill v. Hernandez (168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456, 457 [1897]):

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."

The doctrine is primarily premised on the principle of separation of powers; because the Executive is charged with conducting foreign relations, the Judiciary should not unnecessarily interfere with that power by sitting in judgment on the acts of a foreign sovereign. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed2d 804 (1964). The doctrine "requires that... the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. Intl., 493 U.S. 400, 409, 110 S.Ct. 701, 707, 107 L.Ed.2d 816, 825 (1990). This makes practical sense: "When another country's act has come to complete fruition within its dominion, it would be a waste of judicial resources for courts of the United States to condemn the result." Bandes v Harlow & Jones, Inc., 852 F.2d 661, 666 (2d Cir. 1988) (courts in one country should avoid inquiries respecting the validity of the acts executed by a foreign sovereign within its own territory). By contrast, "the foreign

sovereign is acting beyond its enforcement capacity when it involves itself within our nation's jurisdiction." Id.

We find that the Surrogate properly determined that the act of state doctrine is generally applicable in situations where a party seeks to prevent an American court from questioning the validity of a foreign government's expropriation of property located within that government's territory (See generally Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 [1964], supra; Perez v. Chase Manhattan Bank, 61 N.Y.2d 460, 474 N.Y.S.2d 689, 463 N.E.2d 5 [1984], cert. denied, 469 U.S. 966, 105 S.Ct. 366, 83 L.Ed.2d 302 [1984]), and that the question of whether the doctrine should be extended to foreign adoptions is one of first impression for New York courts.[10]

The act of state doctrine requires an American court to refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect

---

[10]The only case that appears to deal with the issue occurred outside of New York. In In re Adoption of McElroy, (522 S.W.2d 345 [Tenn. 1975], cert. denied, 423 U.S. 1024 [1975]) the petitioners in a transnational adoption invoked the doctrine in an attempt to prevent a Tennessee court's reexamination of a child's adoptability. The court flatly rejected the applicability of the doctrine since the decision that the child was suitable for adoption was made by municipal authorities, rather than the central government of the foreign nation and thus, there was no "act" completed by a sovereign state (only the political subdivision of a nation).

to its public concerns. See Restatement [Third] of Foreign Relations Law of United States § 443, Reporters' Notes 10 ("in general... the act of state doctrine is directed to acts of general application decided by the executive or legislative branches"). Since an adoption can be characterized as an administrative act which essentially involves a matter of *private* interests, we are reluctant to extend the act of state doctrine to foreign adoptions. See McMillian, International Adoption: A Step Towards a Uniform Process, 5 Pace International L. Rev. 137, 154 (1993) (commenting on how the act of state doctrine will seldom be applicable to adoptions).

In any event, because the MOSAVY Letter and the SCN cannot be considered "acts of state" within the meaning of the doctrine, and since the child was residing here in New York and thus beyond the reach of the coercive power of the Cambodian government at the time both documents were issued, we find that the doctrine is inapplicable.

First, there is no predicate sovereign act upon which to apply the act of state doctrine. The MOSAVY Letter merely declares that "there truly has been an appropriate and lawful decision of the Royal Government [of Cambodia] granting

[appellant] permission to adopt John Doe." See Gross v. German Foundation Indus. Initiative, 456 F.3d 363, 392 (3d Cir. 2006) (where a letter from the German Ministry of Finance which concluded that the defendant did not have to pay any more interest was not an "official act[] of a foreign sovereign"). Similarly, the SCN merely offers the conclusory statement that Cambodia's prior approval of LMB's request to adopt John Doe "is considered as null and void." Moreover, the determinations made in the SCN and the MOSAVY Letter simply involve an attempt to influence the competing interests of private litigants and thus do not qualify as an act of a sovereign state in its own public interests. See Restatement [Second] of Foreign Relations Law of United States § 41, Comment d. In fact, the penultimate sentence of each document is: "Therefore, please be informed and use this letter as you [ERJ] see fit for the best interest of [John Doe]."

Even assuming arguendo that the MOSAVY Letter and the SCN constituted "acts of state" within the meaning of the doctrine, the act of state doctrine's territorial limitation precludes its application to the MOSAVY Letter and SCN. The doctrine's territorial limitation requires that the doctrine apply to acts done by a foreign state within its own territory and applicable there. See Bandes, 852 F.2d at 666. A foreign government's act is not "done" or "committed" or "taken" within its own territory

simply because the government officials responsible for the act were physically located within that nation's boundaries at the time when they acted. Rather, the doctrine applies only when the subject matter of the act is located within the geographical boundaries of the foreign state. Allied Bank Intl. v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985), cert. dismissed, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985).

Here, the MOSAVY Letter and the SCN did not come to complete fruition within Cambodia, and indeed were designed to resolve the dispute between the parties in New York. See Bandes, 852 F.2d at 666. Moreover, there is no dispute that when the MOSAVY Letter and the SCN were issued, John Doe had been living in New York for more than three years. See Allied Bank Intl., 757 F.2d at 521 (the act of state doctrine does not apply when expropriated property is located outside the expropriating state).

It is true that in certain limited situations, even when an act of a foreign state affects property outside of its territory, the considerations underlying the act of state doctrine may still be present and the doctrine may be invoked. Here, however, the facts do not present such a scenario. Cf. In re Philippine Natl. Bank v. United States Dist. Ct. of Hawaii, 397 F.3d 768, 773 (9th Cir. 2005). Indeed, the policies underlying act of state cases-

international comity and respect for the sovereignty of foreign nations on their own territory- would hardly be served by finding that the Surrogate was under an obligation to defer to the MOSAVY Letter and the SCN. W.S. Kirkpatrick & Co., Inc., 493 U.S. at 408, 110 S.Ct. at 706, 107 L.Ed.2d at 824. At the time the MOSAVY Letter and the SCN were issued, John Doe had been domiciled in New York for more than three years and there was no plausible basis for Cambodia to exercise jurisdiction over the parties. See Barry E. v. Ingraham, 43 N.Y.2d 87, 90, 400 N.Y.S.2d 772, 774, 371 N.E.2d 492, 494 (finding that comity should not be afforded to the determination of a body "lack[ing] any foundation under Anglo-American concepts of jurisdiction to effect a change in [an] infant's status").

The dissent posits the question: why, if Cambodia possessed the authority to grant adoption to LMB after John Doe had left Cambodia, it lacked the authority to reconsider or revoke the adoption. However, there is nothing in the record to suggest that Cambodia *ever* revoked LMB's adoption. Certainly, the record does not indicate that LMB was ever provided with any notice that his name had been removed from John Doe's birth certificate. Neither was LMB ever asked to return his adoption certificate, or more importantly, to return the child.

Because John Doe, ERJ and LMB are all domicilaries of New

York, it remains to New York courts to determine the adoption status of John Doe. See Carlson, Transnational Adoption of Children, 23 Tulsa L. Rev. 317, 342 (1988) (commenting on how an adoption overseas does not relieve a state court of its concern over an immigrant child's adoptability because the state has a keen interest in the child's welfare).

Plainly, to allow the Cambodian government to intervene in New York matters years after it granted LMB the adoption would involve an unprecedented surrender of the jurisdiction of this Court. It would also leave adoptive parents like LMB "twisting in the wind" while they wait to see whether a foreign government would change its mind about the grant of a "full and final" adoption, potentially years after the adoption.

We have considered ERJ's remaining claims and find them unavailing.

Accordingly, the order of the Surrogate's Court, New York County (Kristin Booth Glen, S.), entered October 11, 2007, which granted petitioner LMB's application for immediate visitation and for vacatur of a prior order, same court and Surrogate, granting respondent ERJ's application to re-adopt John Doe, should be affirmed, without costs.

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

NARDELLI, J. (dissenting)

In early 2003, ERJ, a United States citizen who lives in New York, and LMB, a citizen of both the United States and Trinidad & Tobago, who resides in New York and Florida, began a romantic relationship. Also in 2003, ERJ established an orphanage in Cambodia, where she visited and met John Doe, an infant Cambodian orphan who was in need of medical care. ERJ obtained a U.S. visa and a Cambodian passport for John Doe in order to bring him to the United States for emergency medical treatment. Both parties grew progressively attached to the child, who stayed in ERJ's home; the parties dispute whether LMB was a cohabitant or merely an intermittent visitor. In any event, LMB applied to the Cambodian Ministry of Social Affairs, Labor, Vocation and Youth Rehabilitation (MOSAVY) to adopt John Doe, which was granted in June 2004; the next month, the boy's Cambodian birth certificate was changed to name LMB as his father. Thereafter, LMB attempted to adopt John Doe in Trinidad & Tobago, but was unable to do so because of certain Trinidadian laws.

The parties' romantic relationship terminated in July or August 2004, but John Doe continued to reside with ERJ, who wrote to LMB in November that she was going to try to adopt the child herself. LMB responded:

> "You asked me to stop working on [John Doe's] adoption about 2 months ago, I did as you asked ... I will stay out of [John Doe's] life, this will be in his best interest. I will no longer call him or come to see him ... Good luck with the adoption process, please let me know if there is anything I can do to help."

By letter dated March 14, 2005, LMB informed MOSAVY:

> "In June 2004, I was granted permission to adopt the orphan child named [John Doe] ... It is no longer possible, however, for me to adopt the child and bring him up in Trinidad and Tobago, as had been contemplated when this permission was granted. Therefore, I wish to relinquish the permission that was granted to me by the Kingdom of Cambodia to adopt the orphan child named [John Doe]."

ERJ then wrote to MOSAVY requesting permission to adopt the child "through a proceeding in the courts in the United States." In October 2005, MOSAVY officially granted ERJ permission to proceed with the adoption and issued an adoption permission certificate.

On January 11, 2006, ERJ filed a petition with the Surrogate's Court to adopt John Doe. LMB's attorney informed ERJ's attorney that "unless an arrangement" could be reached providing LMB with a visitation schedule, some decision-making consultation, and a "financial component ... to create a comfort zone for [John Doe] so that he is not directly aware of the vast disparity between the wealth of [LMB] and the wealth of [ERJ]," LMB was "prepared to contest her adoption, and if necessary, to show that without his presence she is an unfit single parent."

Nevertheless, LMB did not seek to intervene, and in April 2006, Surrogate's Court granted ERJ's adoption petition. In August 2006, LMB moved to vacate the adoption order, on the ground that it had been procured through fraud by not revealing that he was the child's adoptive father. Surrogate's Court appointed a guardian ad litem, who, after interviewing the parties and investigating the matter, determined that it was not in the child's best interests to vacate the adoption order. Surrogate's Court decided to hold a hearing on Cambodian law, but denied the guardian's request to participate in the hearing.[1]

During the hearing, ERJ submitted a clarification letter from the Minister of MOSAVY, dated October 24, 2006, stating that although LMB had originally applied to adopt John Doe, he had failed to attend a "handing over ceremony" as required by Cambodian law (Sub-Decree No. 29) "and he also submitted a letter of refusal to adopt [the child]"; the letter confirmed that ERJ had been granted permission "to complete the adoption of [John Doe] in the USA." On December 1, 2006, the Cambodian Council of Ministers, the highest level of that country's executive branch, issued a document, Sor Chor Nor 1850, declaring that ERJ had been granted permission to adopt the child and that LMB:

---

[1]No appeal has been taken from that order.

> "had previously received an [adoption] approval, but failed to participate in the handing over ceremony which is required by the Sub decree No 29, and additionally wrote a letter establishing and informing his intention to withdraw the right to adopt a child named [John Doe]. Therefore, the approval to [LMB's] request to adopt this child is considered, as null and void."

Cambodian Sub-Decree No. 29 provides that, in order to effect an adoption under Cambodian law, following approval, the orphan must be physically and formally handed over to the adoptive father or mother in the presence of a MOSAVY official. During the Surrogate's Court hearing, a Cambodian attorney and a United States attorney qualified as an expert in adoptions testified on behalf of LMB that a Cambodian adoption can be completed without a handing over ceremony; a Cambodian-American lawyer and the Director of Child Welfare Department of MOSAVY offered testimony to the contrary.

Under the act of state doctrine, Surrogate's Court should have given deference to the Cambodian government's determinations concerning the adoptive status of its citizen. The doctrine applies where a "suit requires the Court to declare invalid, and thus ineffective ... the official act of a foreign sovereign" (*W.S. Kirpatrick & Co., Inc. v Environmental Tectonics Corp., Intl.*, 493 US 400, 405 [1990]). Previously described as resting primarily on principles of international comity and expediency,

the Supreme Court has more recently characterized the doctrine as a "consequence of domestic separation of powers, reflecting the 'strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs" (*id.* at 404, quoting *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 423 [1964]). Also underpinning the doctrine is the notion that the judiciary, which by its nature depends on the fortuitous presentation of cases to it, must be careful not to embarrass the executive (political) branch in its more encompassing international negotiations or give offense to a sovereign nation (*see Sabbatino*, 376 US at 431-432).

According to the majority, the Cambodian government was without authority to revoke LMB's adoption (or accept his abandonment of the adoption, or declare that the adoption had never been completed) or grant ERJ permission to adopt John Doe because the infant was not physically within the territory of Cambodia at the time. However, the majority would give effect to the adoption granted LMB, even though John Doe was in New York at that time also. The majority fails to explain why Cambodia had authority to grant an adoption of a child outside its territory but lacked the power to reconsider that decision or express an opinion as to its validity, even when requested by the original

grantee. The majority implicitly concedes the point by arguing only that "there is nothing in the record to suggest that Cambodia *ever* revoked LMB's adoption," and that Cambodia should have asked LMB to return the child. However, the MOSAVY letter and the Sor Chor Nor, both contained in the record, do more than "suggest" that LMB's adoption was no longer valid. The need to request a return of the child was obviated by the adoption application by ERJ, *in whose care and physical custody the child had been in continuously*. By recognizing LMB's adoption, the majority is conferring act of state doctrine effect to an extraterritorial determination by Cambodia; by refusing to accord equal effect to Cambodia's nullification/acceptance of renunciation of that adoption and ERJ's adoption, the majority crafts a new rule: a foreign government is allowed one and only one act of state in a matter.

The majority's decision rests primarily on two faulty premises: that the Cambodian government seeks to intervene in New York proceedings and that it changes its mind on a whim. However, Cambodia never attempted to inject itself into United States territory or proceedings, but rather was petitioned by the parties. Specifically, ERJ sought permission to take John Doe to the United States for medical treatment; LMB asked to adopt the child; LMB requested that Cambodia accept his "relinquish[ment]"

of the adoption; ERJ then petitioned to adopt the child and later sought clarification of the boy's adoptive status. Moreover, "even when an act of a foreign state affects property outside of its territory, 'the considerations underlying the act of state doctrine may still be present'" (*In re Philippine Natl. Bank v United States Dist. Ct. of Hawaii*, 397 F3d 768, 773 [9th Cir 2005], quoting *Callejo v Bancomer, S.A.*, 764 F2d 1101, 1121 n 29 [5th Cir 1985]). "Although the fact that the property is located outside of the foreign state reduces the potential for offense," the doctrine may still be given effect "if doing so is consistent with United States public policy" (*Callejo*, 764 F2d at 1121 n 29). Indeed, the doctrine is a flexible one (*see First National City Bank v Banco Nacional de Cuba*, 406 US 759, 763 [1972]), and it is "evident that some aspects of international law touch much more sharply on national nerves than do others" (*Sabbatino*, 376 US at 428). The determination of the orphan/adoptive status of a country's own citizens can only be viewed as touching sharply on national nerves. Indeed, Surrogate's Court acknowledged that illegal trafficking in orphans is a real danger in Cambodia and was the very reason Sub-Decree No. 29 (requiring a handing over ceremony) was effected. To say, as Surrogate's Court did, that there is no allegation LMB is trafficking in orphans does not eliminate the Cambodian government's interest in deciding whether

and by whom its orphans may be adopted. It was not the Cambodian government that, in the words of the majority, "change[d] its mind," rather it was LMB who changed his mind. Far from acting capriciously or leaving the parties "twisting in the wind," as the majority contends, the Cambodian government acted reasonably by accepting LMB's abandonment of the adoption and, then faced with an newly orphaned child, by granting ERJ's request to adopt the boy. The only one to "change [his] mind" and leave others "twisting in the wind" was LMB, who first sought adoption, then relinquished it and agreed to ERJ's adoption, but then opposed her adoption and threatened to accuse her of being an unfit single parent unless a suitable financial settlement was forthcoming, a financial settlement which, remarkably, was not premised upon the needs of the child but, rather, on LMB's ego and his desire to make certain the child "is not directly aware of the vast disparity between the wealth of [LMB] and the wealth of [ERJ]."

Under the majority's construction, even if Cambodia erroneously approved an adoption, either through mistake or fraud, it would be powerless to speak on the issue once the subject child left the geographical confines of the country. Following the majority's logic, the Cambodian government would lose all authority to comment on the citizenship status of one of

its citizens, once such a person left the country's territory. However, a country's "interest in the enforcement of its laws does not always end at its borders" (*Callejo*, 764 F2d at 1121 n 29).

Whether viewed under notions of judicial deference to the executive or international comity, Surrogate's Court should have deferred to the Cambodian government's decrees concerning the status of its citizen, John Doe.

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

ENTERED: NOVEMBER 25, 2008