COLLATERAL STATE PROCEEDINGS UNDER C.P.L §§ 440.10 AND 440.20

NYS Office of Indigent legal Services–Appellate Defender Council
CLE
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I. Criminal Procedure Law §440.10 (Collateral Attack on Judgment)

Overview

Criminal Procedure Law §440.10 is the vehicle through which off-record information can be brought to the court's attention in an attempt to vacate the judgment. The statute provides a remedy in cases where the appellate record is insufficient to demonstrate a wrong suffered by the defendant.

The Statute

C.P.L. §440.10(1) provides that "at any time after the entry of judgment, the court in which it was entered may upon motion of the defendant, vacate such judgment upon the ground that..."

TIMING

At any time after entry of judgment– this is an unusually generous provision for moving defendants, in contrast to many states which have distinct time periods for moving to vacate. Defendants can bring the motion at any time, even after they have finished serving, so long as the procedural bars in sections two and three can be negotiated.

The conventional wisdom is that, all things being equal, the best way to litigate a C.P.L. §440.10 is to bring it before you perfect the appeal. This approach has several strategic advantages–first, if the 440 motion is denied, the defendant can seek leave to appeal the denial of the motion and to consolidate the 440 claims with the direct appeal. This approach is particularly advantageous in raising claims of ineffective assistance of counsel because it provides the appellate court with a complete picture of what happened below and allows an examination of challenged defense strategies and decisions.

There is also a benefit in bringing the 440 motion before the appeal, because the pendency of the appeal acts as a check on both the prosecutor and the trial court to prevent them from treating the case summarily. A 440 motion brought after a defendant has had his or her conviction affirmed on direct appeal has a different feel to it than one that is brought while the appeal is pending.

Also, it is common, especially in the case of C.P.L. §440.10 motions alleging ineffective assistance, for the appellate court to review the claims to the extent possible as presented by the appellate record and conduct a merits analysis that makes bringing a subsequent motion more challenging. See, e.g., People v. Robinson, 168 A.D.3d 605 (1st Dept. 2019)(finding record insufficient to determine if counsel was ineffective for failing to request lesser included offense charge, but holding in the alternative that no reasonable view of the evidence supported the charge).

Included in the materials (Exhibit D) is a sample motion to extend the time to perfect the appeal while the motion is pending. Make sure to keep the appeal in good standing while undertaking any investigation and motion practice. There will be times when a moving defendant cannot delay the direct appeal either because the case is on the dismissal calendar or for some other reason and in those cases will have to perfect the direct appeal prior to filing a 440 motion.

Note that claims of newly discovered evidence under paragraph (g) must be made "with due diligence" after the discovery of that evidence.

PLACE BROUGHT

The motion must be brought in the court in which the judgment was entered. This provision means that the only court that has jurisdiction initially over the motion is the court which entered the judgment. In other words, the original trial or plea judge will consider the merits of the motion.

Often times because of the generous timing provisions, the original judge will no longer be available to consider the motion because he or she has retired. Where possible, consider carefully if there is a way to maneuver the motion to a sympathetic judge.

GROUNDS

C.P.L. §440.10(1) lists the potential grounds for relief. These include:

(a) the court did not have jurisdiction of the action or of the person of the defendant– People v. Hoffman Floor, 179 Misc.2d 656 (Sup. Ct. N.Y. Co. 1999)(granting motion due to insufficient accusatory instrument); People v. Calamara, 190 A.D.2d 643 (1st

Dept. 1993) (proper to proceed pursuant to C.P.L. §440.10 (1)(a) where there was a conflict between federal and state banking laws depriving the state court of jurisdiction over the action).

Probably the reason there are not a lot of cases brought under this section is that it remains an available avenue of relief for state habeas corpus which has the advantage of being directed not to court where judgment was entered but where the defendant is being held.

(b) judgment procured by duress, misrepresentation or fraud;

The hallmark of this type of claim is an allegation of malfeasance by the court or prosecutor. In People v. Ramos, 201 A.D.2d 78 (1st Dept. 1994) a motion was granted under this provision and several others in a case involving the withholding of exculpatory evidence. See also People v. Harper, 171 A.D.2d 468 (1st Dept. 1991)(defendant claimed that prosecutor had offered him, in exchange for foregoing indictment, a sentence of restitution and probation, then at sentence recommended and received jail time. Motion was ultimately granted under this provision.)

(c) material evidence adduced at trial resulting in judgment was false and was prior to entry known by prosecutor or court to be false.

Most often alleged in the context of cooperating witnesses who have been given promises of leniency and then get up on the stand and testify that they did not receive any such promises. The seminal state case is People v. Savvides, 1 N.Y.2d 554 (1956); see also Pyle v. Kansas, 317 U.S. 213 (1942);

Also under this section there is some case law supporting the idea that the government should be charged with knowledge of what reasonable inquiry would reveal. People v. Robertson, 12 N.Y.2d 355 (1966)(prosecution charged with knowledge of carelessly given false testimony by interrogating detective).

(d) material evidence adduced by the prosecution resulting in judgment was procured in violation of defendant's rights under constitution. People v. Howard, 127 A.D.2d 109 (1st Dept 1987) (affirming murder conviction but recognizing that motion alleging Brady violation could be brought under this section.)

(e) During proceedings resulting in judgment, defendant, by reason of mental disease or defect was incapable of understanding or participating in such proceedings.

See People v. Valdez, 264 A.D.2d 310 (1st Dept. 1999)(where emotionally disturbed defendant had absented himself from portion of trial and judge entertained issue relating to his competency to do so voluntarily in a C.P.L. §330.30 motion, appellate court held 330.30 was a procedurally improper manner to consider the claim and stated that the proper way to advance such an argument would have been via 440.10(1)(e))

(f)Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct if it had appeared in the record, would have required reversal of the judgement upon an appeal therefrom

This provision encompasses all types of claims, Brady, juror misconduct, court officer misconduct.

(g)–newly discovered evidence, requires:

new evidence discovered since entry of judgment;

could not have been produced with due diligence at trial;

reasonable probability verdict would have been more favorable;

provided that motion based upon such ground must be made with due diligence after discovery of new evidence. People v. Cooks, 67 N.Y.2d 100 (1986).

People v. Salemi, 309 N.Y. 208 (1955) is the seminal case listing factors that must be met for evidence to qualify as newly discovered. Note that evidence can be considered newly discovered where a witness was known before trial, but only agreed to come forward after trial. People v. Stokes, 83 A.D.2d 968 (2nd Dept. 1981)(not that witness newly discovered, but it is fact that since trial witness has made statements which make evidence newly discovered).

(g-1) forensic DNA testing performed since the entry of judgment; in case of guilty plea defendant has shown substantial probability that he or she was actually innocent;

in case of trial conviction, court has determined there exists a reasonable probability that the verdict would have been more favorable to the defendant.

Note this provision does not require due diligence in pursuing DNA testing. People v. Pitts, 4 N.Y.3d 303 (2005)(no time limit for requesting post-conviction DNA testing). But diligence is still important to maximize chance that evidence is not destroyed or misplaced.

C.P.L. §440.30(1-a) provides a mechanism to gain access to evidence for DNA testing. The court must grant this application if there is a reasonable probability that the verdict would have been more favorable had the results been admitted at trial. A defendant has an appeal as of right to the intermediate appellate court from a trial court's order denying a request for DNA testing. See C.P.L. §450.10(5), but if testing is granted and the motion is denied under §440.10(1-g) appeal is not as of right and must proceed via an application for leave to appeal, like all other C.P.L. §440.10 motions.

(h) judgment violates constitution of this state or of the United States –

This ground is very broad, catch all provision which encompasses Brady claims and perjured testimony claims. Due process is violated if prosecution introduces perjured testimony if testimony was material and court left with firm belief that but for perjured testimony, defendant would most likely not have been convicted. Sanders v. Sullivan, 863 F.2d 218, (2d Cir. 1988); Ortega v. Duncan, 333 F.3d 102 (2d Cir. 2003); People v. Deblinger, 179 Misc.2d 35 (Sup. Ct. 1998)(sex abuse case of child, prosecution introduces fraudulent report card to show that child's grades went down after incident to support inference of abuse).

Actual innocence claims are permitted in trial cases under this section if the defendant can prove by clear and convincing evidence that he is actually innocent based on admissible and inadmissible evidence. People v. Hamilton, 115 A.D.3d 12 (2d Dept. 2014).

But not permitted where client has pleaded guilty. People v. Tiger, 32 N.Y.3d 91 (2018). The Court of Appeals left open the issue of whether actual innocence claims exist in trial cases in Tiger.

A C.P.L. §440.10(1)(h) motion is the main vehicle for raising ineffective assistance of trial counsel, which is by far, the largest category of claims. Appellate courts are reluctant to consider such claims on direct appeal since counsel's strategic decision making will not be apparent from the record. See People v. Rivera, 71 N.Y.2d 705 (1988). There are exceptions to this rule such as where a blunder cannot be explained away as a rational strategic choice, People v. Brown, 45 N.Y.2d 852 (1978), or where counsel has stated on the record the reason for his strategic choices. See People v. Nesbitt, 20 N.Y.3d 1080 (2013).

(i) allows for vacating prostitution-related charges where the defendant was a victim of sex trafficking so long as the motion is made with due diligence after the defendant is no longer being victimized.

(j) NEW 2019 provisions, effective immediately--allows for vacating misdemeanor convictions where conviction resulted in unforeseen collateral consequences (intended to cover immigration/Padilla claims).

"the judgment is a conviction for a class A or unclassified misdemeanor entered prior to the effective date of this paragraph and satisfies provision (h) of this subdivision. There shall be a rebuttable presumption that a conviction by plea to such an offense was not knowing, voluntary and intelligent, based on severe or ongoing collateral consequences including potential or actual immigration consequences and there shall be a rebuttable presumption that a conviction by verdict constitutes cruel and unusual punishment. . ."

Creates a new subdivision 9 to statute relating to relief available under this section, whereby the court may with the consent of the People vacate or modify the judgment to reduce it to a lesser offense or vacate the judgment, order a new trial where the defendant enters a plea to the same offense in order to permit the court to resentence him in accordance with the amended provisions of Penal Law §70.15 (automatically reducing to 364 days sentences of one year).

Also, newly enacted Penal Law §70.15 (d) provides that any sentence for a misdemeanor imposed prior to the effective date of Penal Law §70.15, that is other than a definite sentence of imprisonment of one year, may be set aside upon motion of the defendant based on a showing that the imposed sentence is likely to cause severe collateral consequence, in order to permit the court to resentence the defendant

in accordance with the amendatory provisions.

THE PROCEDURAL BARS–

While the statute is generous in terms of its timing provisions and broad enough to cover most legal grounds supporting relief, the procedural bars significantly limit its applicability. It is very important that practitioners are familiar with these bars and know how to work around them. Almost always the prosecution will be relying on them in urging the court to summarily deny the motion.

Mandatory Procedural Bars–set forth in § 440.10(2). If these are met the court must deny the motion and has no discretion to grant or order a hearing into it; basically these are all aimed at preventing a motion to vacate from being used as a substitute for appeal which it was never meant to be.

a) issue has been determined on the merits on appeal, unless there's a retroactive change in the law;

b) the case is currently appealable or pending on appeal and the record is sufficient to permit review;

c) the record was adequate but not reviewed on appeal because no appeal or unjustifiable failure to raise on appeal

or the claim relates only to sentence;

Discretionary Bars: 440.10(3); court may, but does not have to deny the motion under these circumstances.

a) record insufficient, but facts could have been put on the record but were not due to defendant's lack of due diligence (not applicable to claims of ineffective assistance).

b) the merits of the claim have previously been determined by another court, not appellate court;

c) the defendant was in a position to raise the claim in a previous motion, but did not

do so;

although court can deny the motion for any of these reasons, it can grant the motion in the interest of justice and for good cause shown.

FORM OF THE MOTION–set forth in C.P.L§440.30

A 440 motion is drafted like any other motion, with a notice of motion, affirmation which acts like a statement of facts, numbered in paragraphs, and setting out the narrative, like an appellate brief– the memorandum of law is going to act like your legal argument portion of an appellate brief. See Exhibits A, B for samples.

The motion must be in writing, on reasonable notice to the prosecution and raise every ground a defendant is in the position to raise. C.P.L. §440.30(1).

it must contain sworn allegations of fact based on personal knowledge or on information and belief –must state sources and grounds for belief. While it is better to provide sworn affidavits from relevant witnesses, it is not always possible to do so. People v. Nicholson, 222 A.D.2d 1055 (4th Dept. 1995)(witness talked to attorney, gave some incriminating statements, refused to sign affidavit, trial court denied hearing, appellate court held counsel's detailed accounting of conversation was sufficient to warrant a hearing).

Note that in ineffective assistance of counsel claims, prosecutors often argue for denial because the defense has not provided an affirmation from counsel explaining his strategic decisions. There is no such requirement. People v. Radcliffe, 298 A.D.2d 533 (1st Dept. 2002)(recognizing it is unreasonable to require a defendant to obtain an affidavit from his trial attorney where his claims are adverse to counsel's interests).

the defendant may provide documentation, so want to annex to your motion relevant affidavits and documents as exhibits.

The prosecution may respond, but does not have to.

The court then decides motion. C.P.L. §440.30(4)

Can summarily deny– based on procedural default if it alleges no basis for relief, fails to contain sworn allegations tending to substantiate all essential facts, essential allegations are refuted by unquestioned documentary proof or essential allegations are supported solely by defendant's word or there is "no reasonable possibility" that they are true.

Sworn allegations of fact must come from someone (other than defendant) with personal knowledge of the facts; allegations without factual support will not suffice to obtain a hearing on the motion. People v. Brown, 56 N.Y.2d 242, 246-247 (1982).

Motion court can summarily grant– if motion states legal grounds supported by sworn allegations which are conceded to be true or substantiated by documentary proof;

or pursuant to C.P.L. §440.30(5) the court can order a hearing to determine contested facts:

Indigent defendants are entitled to assigned counsel at any hearing into claims. People v. Monahan, 17 N.Y.3d 310 (1966); see also People v. Richardson, 159 Misc.2d 167 (Sup. Ct. Kings Co. 1993)(even prior to determining whether a hearing is required, the court must assign counsel on the motion if there is a possible basis for relief on the merits and indigent defendant might be prejudiced by lack of counsel's advice).

The defendant has a right to be present, make sure he's is produced unless he waives in writing.

The defense has the burden of proof by preponderance of the evidence except in actual innocence hearings where burden of proof is by clear and convincing evidence;

Whether or not a hearing takes place the court must set forth findings of fact and conclusions of law so as to make appellate review possible. C.P.L. §440.30 (7).

DISCOVERY PROVISIONS

Set forth in C.P.L. §440.30 (1)(b)–available with significant limitations only in cases involving post trial felony convictions. Request for discovery must be based on credible allegations and a finding by the court that property requested if obtained

would be probative of defendant's actual innocence and the request is reasonable. Other limitations apply where there are concerns about the integrity of the property or safety of the public.

APPEALABILITY

Set forth in C.P.L. §450.15

not as of right, need a certificate granting leave– application is made to a single judge, according to rules of court; People can appeal as of right if the court vacates the judgment.

460.10 sets forth procedures which are time sensitive and it is important to track motion.

Within 30 days after service of order sought to be appealed defendant has to apply for certificate granting leave;

if granted, within 15 days defendant must file the certificate granting leave and notice of appeal in court in which order sought to be appealed was rendered.

Sample motions seeking leave to appeal (Exhibit E), notice of appeal (Exhibit F) and a motion granting leave (Exhibit G) are provided in the materials.

FACTUAL INVESTIGATIONS–practical tips for developing 440 claims.

BE FAMILIAR WITH YOUR CASE BOTH FACTUALLY AND LEGALLY–PREVENTS WASTING TIME ON FRUITLESS EFFORTS; MAKES WITNESS INTERVIEWS MORE PRODUCTIVE

in the vast majority of cases, you're going to need to conduct an investigation into the claims that you want to pursue in your motion. Before you begin a factual investigation into off- record information you want to be completely familiar with the appellate record in your case.

GATHER RELEVANT DOCUMENTS/TRIAL FILE

When you are considering doing a 440 motion, gather as many relevant records as possible. In most cases this requires obtaining not only the record on appeal but the trial file as well.

BUILD RELATIONSHIP WITH TRIAL ATTORNEY

The need to compile as complete a record as possible means that you are going to have to get access to the trial file of the defense attorney. Trial counsel is going to be an important source of information for you and a potential witness. Take the time to try to form some sort of working relationship with him or her. Get his file, photocopy and organize the materials into something coherent, while keeping the original intact as received. If you're doing a Brady claim, make sure the material you are claiming was suppressed was not turned over.

IDENTIFY RELEVANT WITNESSES/INTERVIEW IN PERSON

Where possible take along someone when conducting the interview. This approach prevents an attorney from becoming a witness if the need to impeach arises, also prevents claims of misconduct being lodged later on.

BUILD RELATIONSHIP/KEEP IN TOUCH IF YOU'RE GOING TO NEED THE WITNESS;

BE SENSITIVE TO PROBLEMS WITH CONTACTING CERTAIN TYPES OF WITNESSES:

Co-defendants–don't want to run afoul of ethical rules prohibiting attorneys from discussing matters on which a person is represented. This problem can come up if a co-defendant is appealing, particularly problematic where witness is incarcerated. Also, keep in mind potential for conflicts of interest in this area, if you have an attorney/client relationship with a potential witness, your obligation to the witness may conflict with obligation to present client.

Complainants–prosecutors can become upset if they feel you are harassing witnesses.

Jurors-juror identifying information is confidential, also there are prohibitions against impeaching a verdict based on post-trial juror claims about nature of their deliberations.

KEEP RECORDS OF EFFORTS – prevents repetition of efforts and to make due diligence arguments on newly discovered evidence claims.

IF HEARING ORDERED, DETERMINE WHO YOU NEED TO CALL AND PREPARE THEM FOR TESTIFYING.

CHECKLIST FOR BRINGING A C.P.L. §440.10 MOTION

1. FULLY FAMILIARIZE YOURSELF WITH RECORD ON APPEAL;

2. INVESTIGATE RELEVANT FACTS/GATHER RELEVANT DOCUMENTS/INTERVIEW NECESSARY WITNESSES;

3. CONSIDER FILING MOTION TO ENLARGE TIME TO PERFECT APPEAL;

4. DRAFT AND FILE 440.10 MOTION;

5. CONTACT COURT, PROSECUTOR TO FIND OUT HOW THE MOTION IS GOING TO BE DEALT WITH IN TERMS OF PROSECUTOR'S RESPONSE TIME, NECESSARY APPEARANCES, ETC;

6. TRACK MOTION'S PROGRESS;

7. IF MOTION SUMMARILY DENIED:

a. Apply for certificate granting leave to appeal within thirty days of your being served with order denying motion (sample motion in materials);

b. If certificate granting leave is issued, file it and notice of appeal within 15 days of leave grant in court which issued order denying motion (sample in materials);

c. If certificate granting leave is denied, there is no further action you have to take– it is not an appealable order to Court of Appeals.

8. IF HEARING GRANTED–PREPARE WITNESSES, HAVE CLIENT PRODUCED;

9. IF YOU LOSE AFTER HEARING, SEE 7 ABOVE.

10. IF YOU WIN HEARING DETERMINE IF PROSECUTOR WILL BE APPEALING; IF NOT, AND APPEAL IS MOOT, FILE STIPULATION WITHDRAWING APPEAL.

II. C.P.L. §440.20 Motions (Illegal Sentence)

A defendant may challenge a sentence under C.P.L. §440.20 if it is "unauthorized, illegally imposed or otherwise invalid as a matter of law." The motion may be made at any time after the entry of judgment in the court in which the defendant as sentenced.

The motion potentially provides a quick fix up of an illegally high sentence. Even if such relief is denied it can be raised again on appeal, either through an appeal via permission to appeal the motion itself or if supported by the direct appeal record.

There are a variety of issues that may be raised including:

- denial of the right to effective assistance of counsel at sentencing. People v. Crippa, 245 A.D.2d 811 (3d Dept. 1997);

- illegally imposed consecutive sentences. People v. Fernandez, 262 A.D.2d 170 (1st Dept. 1999);

- denial of defendant's right to speak before imposition of sentence. People v. St. Clair, 99 A.D.2d 982 (1st Dept. 1984);

- a probationary sentence was improper or contained unenforceable terms. People v. Myers, 241 A.D.2d 705 (3d Dept. 1997);

- The correctness of a ruling that the defendant is a predicate felon. People v. Lopez, 216 A.D.2d 148 (1st Dept. 1995).

Claims that a legal sentence is harsh or excessive cannot be challenged via the statute. Challenges to the legality of the sentence cannot be waived and are cognizable even where illegality were not subject to objection or defendant has waived his right to appeal.

PROCEDURAL BARS

The motion court must deny the motion if the claims raised have already been

determined adversely on direct appeal, unless there has been a retroactive change in the law. C.P.L. §440.20(2). But note that the claim can be raised even if the issue can be raised on direct appeal, or could have been raised on direct appeal with due diligence, but was not. Id.

If the claim has already been the subject of an adverse ruling, in a prior motion or proceeding by other than an appellate court such as a federal habeas corpus, the court may denied the motion, unless there has been a retroactive change in the law. C.P.L §440.20(3). The court can grant the motion even under these circumstances if it is meritorious.

Criminal Procedure Law §430.10, which provides that sentences of imprisonment not be changed after commencement, does not bar the granting of relief under 440.20. People v. Turner, 47 A.D.2d 564 (2d Dept. 1975).

APPEALABILITY

An appeal to the intermediate appellate court from an order denying a §440.20 motion is authorized providing permission to appeal is granted by a judge of the appellate court. C.P.L. §460.15. As with 440.10, the procedures for obtaining leave to appeal are contained in C.P.L. §460.10(4) and 460.15, and the particular rules of the appellate court.

Note that if the motion is granted (and the defendant re-sentenced) prior to the direct appeal being heard, if the defense still wants to appeal it will have to file a new notice of appeal and move to amend the court's order of assignment to include the re-sentence.

Exhibit "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: I.A.S. TERM PART 35

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

[redacted], :

Defendant-Appellant. :

NOTICE OF MOTION
Bronx County
Indictment Number [redacted]

PLEASE TAKE NOTICE that upon the affirmation of CLAUDIA S. TRUPP, the prior proceedings had herein, and the exhibits attached hereto, the undersigned will move this Court, at a term for motions thereof, to be held on [redacted], at 10:00 a.m. or as soon thereafter as counsel may be heard, at the Courthouse, 851 Grand Concourse, Bronx, New York, 10451, for an order pursuant to C.P.L. §440.10 (1) (c), (f), (g) and (h) vacating the judgment of the Supreme Court Bronx County, rendered on December 23, 1999, convicting [redacted] of sodomy in the first degree (P.L §130.50) and sentencing him to 20 years' to life imprisonment.

Dated: New York, New York
October 22, 2001

Yours, etc.,

ROBERT S. DEAN
Attorney for Defendant-Appellant
Center for Appellate Litigation
74 Trinity Place
New York, New York 10006

TO: MOTION CLERK
Supreme Court: Bronx County
851 Grand Concourse
Bronx, New York 10451

HON. ROBERT T. JOHNSON
District Attorney
Bronx County
215 East 161st Street
Bronx, New York 10451

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: I.A.S. TERM PART 35

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

[redacted], :

Defendant-Appellant. :

AFFIRMATION IN SUPPORT
Bronx County
Indictment Number 4071/98

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CLAUDIA S. TRUPP, an attorney admitted to the practice of law before the Courts of this State, affirms under the penalties of perjury:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by an order of the Appellate Division: First Department, to represent appellant on his appeal from a judgment of the Supreme Court, Bronx County, rendered on [redacted], convicting appellant, after a jury trial, of sodomy in the first degree (P.L. §130.50) and sentencing him to 20 years' to life imprisonment.

2. I make this affirmation in support of [redacted]'s motion for an order pursuant to C.P.L. §440.10(c), (f), (g) and (h) vacating the judgment against him due to: 1) the prosecution's suppression of Brady material which violated [redacted]'s state and federal constitutional rights to due process; 2) the discovery of new evidence which would have likely resulted in a more favorable verdict; 3) the introduction of material evidence which was false and which the prosecution should

have known was false; and 4) the obtaining of the judgment in violation of [redacted]'s state and federal constitutional rights.

THE PRE-TRIAL PROCEEDINGS

3. Mr. [redacted] and his co-defendant [redacted] were accused of participating in a [redacted], sexual assault of [redacted], a fellow inmate on Rikers Island. Mr. [redacted] was represented by Patrick Bruno, Esq. during the pendency of the charges. See Exhibit A (Bruno Affirmation). Discovery was conducted pursuant to the voluntary discovery policy adopted by the Bronx District Attorney's office. See Exhibit A; see also Receipt from Office of The District Attorney, Bronx County Domestic Violence and Sex Crimes Bureau (Exhibit B) and letter from Assistant District Attorney Robert Gonzalez to Pat Bruno dated March 4, 1999 (Exhibit C).

4. The defense believed it was receiving all the reports in the possession of the Department of Corrections and all Brady material to which it was constitutionally entitled. See Exhibit A. The trial court's decision on the omnibus motion reminded the People that their Brady responsibility "is a continuing one, and that the court expects full, proper and timely compliance with all the obligations for disclosure." The Court's decision is being annexed as Exhibit D.

5. While several reports prepared by the Department of Corrections were provided to defense counsel, an Unusual Incident Report prepared on February 25, 1998, was never disclosed to the defense. See Bruno Affirmation, Exhibit A; see also Exhibit B and Exhibit C. A copy of the Unusual Incident Report is being provided as Exhibit E.

6. The Unusual Incident Report contained several pieces of exculpatory information including:

a) an inmate statement submitted by [redacted] reflecting that the

complainant, [redacted], told [redacted] at approximately 8:20 p.m., on the night of the alleged sexual assault, that [redacted]s "was upset about him and his partner being found together inside of a cell and was complaining about the other inmates on the northside getting involved in his business. . . [and] that inmate [redacted] told [redacted] that he [redacted] was going to get a transfer for him and his partner by implicating several inmates in a sex scandal." Exhibit E at p. 3(emphasis added).

b) Reports prepared by several corrections officers on duty on the cell block during the alleged incident all of which reflected that [redacted] had never complained of being raped or attacked in any manner on February 8, 1998. These reports included those of:

i. Corrections Officer RENA WAXTER, the "meal relief" officer;

ii. Corrections Officer LOUIS ALMODOVAR, the regularly assigned officer; and

iii. Corrections Officer ROBERT BRIGGS, reflecting that he had never been informed of any type of incidents taking place in the housing area on February 8, or the morning of February 9, 1998.

c) A report prepared by Captain SENA McMILLAN, dated February 22, 1998, which referenced inmate [redacted]'s statement and concluded "it is possibl[e] that [redacted]s concocted this accusation in order to be transferred from 6 lower north. . . There is absolutely no evidence medical or otherwise to substantiate the sexual assault or sexual activity of inmate [redacted] on 2-8-98." Exhibit E.

d) the conclusion of the Assistant Deputy Warden investigating the case that "it appears inmate Davis may have wanted a transfer from the area and alleged that he was sexually assaulted. All evidence points to that fact. No staff members witnessed this incident taking place nor did any staff report they were apprized of an incident taking place. It is only after over twelve (12) hours after the alleged occurrence that inmate [redacted] notified any staff of his allegation, and it is highly unlikely that any staff member would have ignored inmate [redacted] allegation." Exhibit E at p. 4.

7. Months before the trial began, the defense sent an investigator to speak with inmates who were housed in C-74, 6 lower north, the cell block where the alleged sexual assault occurred. See Exhibit A. The investigator spoke to inmate [redacted], who did not want to cooperate with the defense investigation because he believed doing so was not in his best interest. See Exhibit A.

8. No defense investigator spoke with [redacted]. He was not housed on the north side but rather on the south side of the cell block. See Exhibit D. The prosecution disclosed statements from 15 inmates, but not [redacted]'s. See Exhibit B (listing under "voluntary statements" the names of fifteen inmates, but not Shawn Patterson). On information and belief, based upon my discussions with [redacted], and my review of diagrams and pictures of the cell block, inmates lodged on the north side could only speak with those lodged on the south side through the gates.

THE TRIAL PROCEEDINGS

9. On December 2, 1999, the parties appeared before the Honorable David Stadtmauer in Bronx Supreme Court, Trial Term Part 35. See Minutes of December 2, 1999.[1] At that time the Assistant District Attorney, Robert Gonzalez, made several in limine applications, requesting that the scope of the defense's cross-examination of the complainant be limited. Id. at pp. 13-24. First the prosecutor requested that the defense be precluded from questioning [redacted] about his psychiatric hospitalizations and history of mental illness. Id. at p. 16. Justice Stadtmauer denied this application, observing that the defense had to be given "leeway" that might reflect on [redacted] reliability as a witness. Id. The court observed that these were "serious charges" that could result in lengthy prison terms if the defendants were convicted. Id. at p. 18.

10. Next the prosecutor sought to preclude the defense from questioning [redacted] about his homosexual history. Id. at p. 19. Defense counsel informed the court that it was the defense's

[1]A complete set of the minutes in this case is being provided to the court and served on the People. Unless otherwise noted, references are to the trial transcript. References preceded by "S." refer to pages of the sentencing minutes dated December 23, 1999.

theory that [redacted]'s accusation may have been made to cover up his being caught "with his pants down" in his cell with another inmate. Id. at p. 221-22. Counsel further explained that the defense believed that [redacted] had made the accusation in order to protect the relationship between himself and [redacted]rs. Id. at p. 23. When counsel asserted that [redacted]s was [redacted] boyfriend, and that there was "clear reference and acknowledgment of their having a relationship," the prosecutor did not contest this characterization. Id. at pp. 19-20. Ultimately, the court reserved on the issue. Id. at p. 24.

11. During the course of the prosecutor's motion, Mr. Bruno requested the prison infraction records for [redacted] and [redacted]. The prosecutor responded that he would "call up DOC and as soon as they fax it to me, I will hand them over." Id. at p. 25. There was no suggestion that the prosecutor's office was not enjoying the complete cooperation of the Department of Corrections with respect to the investigation of this case.

12. On information and belief, based upon my review of the discovery turned over to Mr. Bruno, the New York City Police Department never investigated this incident. The entire investigation was conducted by members of the Department of Corrections. The People's Witness List mentioned not a single New York City Police Officer, but named numerous members of the Department of Corrections. See "Witness List/Information Sheet" annexed as Exhibit F. Included as potential witnesses were Corrections Officer Waxter, Corrections Officer Almodovar, Corrections Officer Briggs and Captain McMillan. Id.

The Trial Evidence

13. The trial commenced on December 13, 1999, before Justice Stadtmaur (1). Assistant District Attorney Gonzalez informed the jury during his opening statement that the prosecution

would base its "entire case" on the testimony of [redacted] (207). Mr. Bruno informed the jury that the evidence would show that seminal fluid recovered from Mr. Davis could not have come from [redacted] and asked "then who had sex with who where?" (213).

14. [redacted] was the sole witness called on behalf of the prosecution at trial (219). [redacted] had an extensive criminal record dating back 10 years which included felony convictions for forgery, larceny and drug offenses (215-216, 306). In November 1997, [redacted] was arrested for robbery and taken to Rikers Island (216-217). In late January 1998, after being beaten up on a different cell block, [redacted] was transferred to cellblock C-74 (217).

15. [redacted] claimed that he immediately met [redacted] and [redacted] and became friendly with them (219). He consistently denied having any problems whatsoever with [redacted] until February 8, 1998 (219, 259, 260, 262).

16. Between 7:00 and 8:00 p.m. on the night of February 8, 1998, according to [redacted]' trial account, [redacted] called him back to cell 30 (225). This testimony conflicted with both [redacted]' grand jury testimony where he insisted that [redacted] had called him back, and the prosecutor's opening statement which also reflected that [redacted] had called [redacted] back to the cell (209, 274).

17. According to [redacted], [redacted] was propping open his cell with a bucket which blocked the gate and prevented it from closing (226). [redacted] then dragged [redacted] into the cell and [redacted] threw him on the bed (226). [redacted] claimed to have hit his head on the wall with such great force that his forehead was noticeably bruised (227, 255).

18. At the criminal trial, [redacted] repeatedly asserted that there were four men in the cell during the alleged attack (232, 233, 309). Davis insisted that the other two men in the cell were [redacted] and [redacted] (309). He insisted that he had never accused [redacted] of being

present during the attack and that [redacted] was not there (309, 310, 328, 330).

19. [redacted] testified that Mr. [redacted] ordered him to "suck [redacted]'s dick" and [redacted] put a pillow over [redacted]' head when he tried to scream (229). Then, according to [redacted], his sweatpants were pulled down and Mr. [redacted] poured some liquid over [redacted]' anus before forcefully penetrating [redacted]' anus with his penis (233-234). [redacted] did not wear a condom and [redacted] did not know if Mr. [redacted] had ejaculated (257). [redacted] brandished a scalpel during the attack (230).

20. While the attack was going on, and Mr. [redacted] was penetrating [redacted] anally, [redacted] allegedly entered the cell and ordered Mr. [redacted] to get off of [redacted] (235, 236, 332). [redacted] brandished the scalpel at [redacted] and threatened to kill him (235). According to [redacted], Mr. [redacted] also threatened to kill [redacted] if he interfered with Mr. [redacted]'s "business" (235). While this confrontation was going on, [redacted] jumped off the bed and ran into his own cell, number 13 (237).

21. [redacted]'s cell, which was ordinarily locked, was open at that time because it was "option" on the cell block, meaning that the inmates had the option to go into their cells for a short period of time (237). [redacted] followed [redacted] into the cell to see if he was hurt (237).

22. [redacted] claimed that he was crying and hysterical after the attack when a female corrections officer whose name he did not know found him in the cell (239-240, 282). The officer was not the "steady officer." (239-240). The officer had been told to close cell 13 by [redacted] (239). Although it was a violation of the prison rules to be in a cell with another inmate, the female corrections officer did not write up a ticket, but merely let [redacted] and [redacted] out in the corridor (239-240). According to [redacted] this female corrections officer "came down to [his] cell. [redacted] came to the gate of [his] cell, tears on [his] face, and she looked in there and she knew it was more to it than that." (240). Counsel's objection to what the corrections officer surmised, was sustained (240).

[redacted] explained that this corrections officer had seen both [redacted] and [redacted] in the cell, which was dark (240).

23. After [redacted] and [redacted] were removed from the cell, the female corrections officer walked back towards the security bubble, located at the other end of the block (240). In the corridor, [redacted] and [redacted] again encountered [redacted] and appellant (241). Another angry confrontation ensued in which [redacted] again threatened [redacted] life (241-242). [redacted] again took out the scalpel and came towards [redacted] and [redacted] who walked away towards the security bubble (243-244).

24. [redacted] and [redacted] then told [redacted] that [redacted] was cheating on him with [redacted] (244-245). It was [redacted] who [redacted] repeatedly insisted was his romantic interest on the cell block (244, 245, 265, 270).

25. [redacted] adamantly denied that he was in any way romantically involved with or interested in [redacted] (265, 266, 267, 270). Even when confronted by hospital records reflecting that he referred to "[redacted]" as his male companion, Davis insisted that he was in no way romantically involved with [redacted] (265, 266, 269, 270, 271).

26. Following the ugly confrontation in the corridor between [redacted] and Mr. [redacted], [redacted] approached another corrections officer named [redacted] near the security bubble (245-246). [redacted] claimed that he informed [redacted] that "something severe just happened in the back" and asked to immediately speak with a captain (246). But, according to [redacted], Almodovar did not report the incident because [redacted] told Almodovar everything was all right (246). Nonetheless, Almodovar later came back to [redacted]'s cell and told him that a Captain was going to come down to his cell (247). No captain arrived (248).

27. The next morning, [redacted] saw [redacted] and [redacted] in [redacted]' cell threatening him with a scalpel (249). When [redacted] was called out to go to court, [redacted] reported the entire incident "in detail" to Captain Briggs (248, 249). [redacted]s recounted his detailed outcry for the jury as follows "I said, listen, those two inmates so forth and so on and I told him the whole thing that had happened in detail that they tried to rape me back there and what happened in detail" (249).

28. [redacted] repeatedly denied that he first reported the incident at 11:30 a.m. (290). When confronted with a report which listed the time of the report as 11:30 a.m., [redacted] explained that the official report might have been prepared at 11:30 a.m., but insisted that he had first reported the incident to Briggs at 5:30 a.m. and that he had told the other officers about the situation on the night it happened. (298-300). [redacted]s explained "my statement was early that morning" and dismissed the 11:30 a.m. report as a totally "different one" (300).

29. [redacted]s was subsequently taken to receive medical attention at the clinic on Rikers Island (252). Although his entire body was examined, and [redacted]s insisted that he had noticeable bruises on his head and back, no medical records from Rikers Island were admitted into evidence by the prosecution (252).

30. [redacted]s also received medical treatment at Bellvue Hospital (253). While there he was subjected to a rape kit test during which his anus, penis and mouth were swabbed (253-255). No medical records were introduced from Bellevue Hospital (253).

31. No D.N.A. evidence substantiated [redacted]s' claim that he was sexually assaulted. The parties stipulated that if a member of the medical examiner's office were called, he would testify that semen found on the penal swab taken from [redacted]s belonged to [redacted]s and could not have come from either defendant (357, 364).

32. The prosecutor concluded his direct examination of [redacted] by eliciting that: 1) [redacted] had never been asked to be transferred off of the cell block; 2) that [redacted] was friendly with the inmates on the block and that nobody there had any problem with him; and 3) that [redacted] was friendly with the guys "across the block" also. [redacted] was specifically asked if up until the time of the incident he had "any problems with him, [redacted]?" and he responded "no I did not" (260).

33. The prosecutor also asked [redacted] whether he had filed a lawsuit against the Department of Corrections: "Did you ever file a lawsuit against the Department of Corrections because whatever happened to you?" [redacted] responded "no I did not. No, I have not" (260)(emphasis added).

The Defense Requests a Missing Witness Charge Relating to [redacted]

34. Before the summations, Mr. Bruno requested a missing witness charge relating to [redacted] (350). Mr. Bruno observed that he had "no doubt whatsoever that [redacted] would not wish to cooperate with the defendants" (350). The court declined to issue the charge observing that [redacted] was incarcerated and could be called by either side (351). According to the court, "there were no grounds to conclude that the witness would not testify on behalf of the defense if called" (351).

Summations

35. The defense argued that [redacted] was a liar with his own agenda, his own plans and his own needs to satisfy (380). Counsel pointed out the numerous inconsistencies in [redacted] account and its inherent incredibility (381, 386). It was not believable, counsel argued, that all of the corrections officers would ignore [redacted]'s complaint (384). The allegation here, counsel submitted, arose because [redacted] was caught in his cell with [redacted] and was angry that Mr. [redacted] had interfered in his relationship with [redacted] and [redacted] (386, 396, 398).

36. The prosecutor acknowledged on summation that this entire case came "down to [redacted]

[redacted]." (399-400). Repeatedly the prosecutor returned to the theme that [redacted] had no motive to lie about being raped:

> I submit it comes down to whether or not [redacted] had a motive to lie, whether or not [redacted] had a reason to come up here and testify and lie about what happened that day. . . I looked for a motive. I said why would this individual come before the jury and lie (400).
>
> * * *
>
> And then I said, well maybe he's got a problem with [redacted]. So what did I do? I asked him, do you have a problem with [redacted]? And what was his response? No. No, he doesn't (401).
>
> So I said well, if he doesn't have a problem with these two individuals maybe he's trying to scam the system. So I asked him: "Are you trying to sue the City of New York for this? What was his answer? No. He says no, no, he wasn't trying to scam the city, doesn't have a lawsuit filed. He's not one of those guys trying to make a dime on the citizens of New York, that we know (401).
>
> * * *
>
> He has nothing to gain. . . What possible motive does he have to come in here and lie? Does he want to get moved to another cellblock maybe? Well, I asked him about that. No because if he wanted to get moved out, he would have been moved out. I mean it just doesn't make any sense (404-405)(emphasis added).[2]
>
> * * *
>
> I'm asking you , ladies and gentlemen, think about it. What does he have to gain? He was humiliated on the stand by the defense attorneys. Humiliated. He was humiliated when this happened to him . . . and he was humiliated when he testified before this jury about what happened in that cell.
>
> * * *
>
> If you believe him, I want you to come back here with a verdict of guilty, but if you don't believe him, then come back here and acquit these defendants (409-410).

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[2]Because the defense did not have access to the [redacted] statement there was no suggestion by the defense attorneys that [redacted] was seeking a transfer off the block. Rather, the theory of the defense was that [redacted] had been angry because he had been caught in his cell with [redacted].

Deliberations and Verdict

37. The jury asked how many people were in cell #30 when [redacted] was called there and the court responded that the parties agreed there were four people in the cell (434). The jury asked to see the reports with which [redacted] was confronted, the one reflecting that he had reported [redacted] as being a perpetrator and the one reflecting the timing of the initial complaint. But those reports had not been introduced into evidence, and the court responded that they could not be reviewed by the jurors (434, 435). The jury's final note asked at what point [redacted] entered the cell and the court reporter read the testimony concerning the timing of [redacted]' entry (435). The jury then returned a verdict convicting [redacted] and [redacted] of sodomy in the first degree (438).

Sentence

38. The parties appeared before the court for sentence on December 23, 1999 (S. 1). Mr. Bruno moved to set aside the verdict because [redacted]' testimony was per se incredible (S. 3). The court observed that issues of credibility were for the jury and denied the motion (S. 3). Mr. [redacted] was adjudicated a persistent violent felony offender based upon two previous attempted second-degree burglary convictions -- class D violent felonies (S. 6). Before the imposition of sentence counsel again stressed the inherently questionable nature of [redacted]' testimony (S. 9).

39. Mr. [redacted] also addressed the court prior to being sentenced and pleaded innocence (S. 11). Mr. [redacted] handed up to the court records of his telephone calls which reflected telephone calls made by [redacted] from Rikers Island to [redacted]'s home number matle on Mr. [redacted]'s account (S. 12). [redacted] had taken money from him, Mr. [redacted] explained, to buy drugs, but had not delivered them as promised (S. 12). The phone records, Mr. [redacted] asserted, proved that Mr. [redacted] was on the phone at 7:17 p.m. on the evening that the alleged incident occurred (S. 12). (The phone records

and a corresponding page of [redacted]vis's medical records listing his home telephone number are being provided as Exhibit G).

40. Mr. [redacted]y also referenced a note from [redacted]s to him that read "Yo, [redacted], I respect the again. I am really involved with [redacted]" and blamed Mr. Westly for interfering with his relationship with [redacted](S. 13) Appellant pleaded that he was innocent and warned that the court would be sentencing two innocent men (S. 14).

41. The court agreed to look over the papers supplied by the defense, but explained that the sentencing was not the trial and that the jury chose to believe [redacted] (S. 16). Since the evidence was available during the trial, it could not be considered after the verdict, the court explained (S. 12-13, 14).

42. The court then imposed the minimum permissible sentence of 20 years to life (S. 17).

THE POST TRIAL INVESTIGATION

[redacted]vis Files A Civil Lawsuit

43. Less than a month after [redacted]y was sentenced, on January 20, 2000, Jon L. Norinsberg, an attorney for [redacted]vis swore out a civil complaint. That complaint, which is being provided as Exhibit H, was filed in the Southern District of New York on January 31, 2000. The complaint named the City of New York and numerous corrections officers as defendants and alleged that [redacted]s had been wrongfully imprisoned and then denied his civil rights when he was raped on Rikers Island on February 8, 1998. See Exhibit H. [redacted] demanded one million dollars ($1,000,000) in compensatory damages and three million dollars ($3,000,000) in punitive damages. On information and belief, based upon my conversations with members of the Corporation Counsel's Office of the City of New York and my review of the file relating to the

federal lawsuit, no notice of claim was filed with the City of New York prior to [redacted] testimony.

44. On information and belief, based on conversations with [redacted]'s civil attorney, [redacted]berg conducted on June 26, and June 27, 2001, [redacted] had consulted with Norinsberg before testifying in the criminal trial. Moreover, Mr. Norinsberg had spoken to Assistant District Attorney Robert Gonzalez about the case before the criminal trial. In fact Assistant District Attorney Gonzalez spoke with Mr. Norinsberg approximately three days before the trial when [redacted] was scheduled for a pre-trial witness preparation meeting but failed to appear. Thus, Assistant District Attorney Robert Gonzalez knew that Davis had consulted a civil attorney concerning the possibility of filing a civil lawsuit relating to this incident on Rikers Island. Because of his ongoing representation of [redacted], Mr. Norinsberg refused to provide me with an affirmation reflecting the substance of our discussions. See Norinsberg affirmation, Exhibit I. Assistant District Attorney Gonzalez did not disclose to [redacted]'s trial attorney that a civil attorney was considering filing a civil lawsuit on behalf of [redacted] relating to the alleged attack. See Exhibit A.

45. In August 2000, I was designated by my office to handle this case. Although the record was not complete and did not become complete until April of 2001, I read [redacted]' testimony and became immediately suspicious of his account. I decided to investigate the case further.

[redacted] Post Trial Statement

46. In April 2001, I located [redacted]. I met with Mr. [redacted] to speak about the case and he advised me that [redacted]'s allegations about the attack were entirely false. Thereafter he executed an affidavit explaining that on or about February 9, 1998, he was questioned by members of the Department of Corrections about an alleged attack on [redacted]. See Exhibit J, Affidavit

of B[redacted]s dated April 18, 2001. [redacted]s, who had been found with [redacted]is in a cell the night before, became concerned that he would be being implicated as [redacted]'s attacker. Id. He gave a statement implicating other inmates, including M[redacted]y. Id. [redacted] subsequently informed [redacted]s that they could become rich if [redacted]s would agree to back up his story of being raped by several inmates Id. [redacted] did not agree to do so, but he did not provide information to the defense because he was afraid of being implicated in the attack. Id. Only after learning that M[redacted]y and M[redacted] had been convicted and sentenced to lengthy prison terms, did M[redacted]rs agree to come forward with this information. Id.

Forensic Document Evidence

47. Also in April 2001, I contacted a forensic document examiner to ascertain whether the note referenced by Mr. [redacted] during the sentencing proceeding had really been written by [redacted]s. I obtained the original of the note which reads:

> [redacted]t. Yo. I respect the game. But i am really in love with Bruce. And its your fault that he played with my feelings. Now say fuck him. Let him suffer. Don't buy him shit tomorrow. Don't do shit for him. And when we come out, we will call you wife and my sister and do our power moves. We will try to get you and Dray down tomorrow. Let's keep shit REAL. Me and you. okay. peace. Romeo (emphasis added).

48. I provided the original note and the three- page handwritten "inmate statement" executed by [redacted]s following the alleged incident to Paul A. Osborn, an expert on handwriting analysis. Mr. Osborn confirmed that the note and [redacted]is's inmate statement had been written by the same person. See Report of Paul A. Osborn, which is being provided as Exhibit K.

49. Not only was Mr. Osborn able to confirm that [redacted]vis wrote the note acknowledging his romantic involvement with "[redacted]e" and blaming M[redacted]y for the problems

with that relationship, but Mr. Osborn, by using an Electrostatic Detection Apparatus (ESDA) was able to retrieve latent indentations on the original note. These indentations revealed a letter from [redacted] to [redacted]e" stating "I don't understand. First of all our business is not your homeboys. Since its between us." See Exhibit K and the annexed copy of the ESDA test (emphasis added).

Post Trial Statements By [redacted] and [redacted]

50. I also contacted [redacted], who executed an affidavit reflecting that the allegations against Mr. [redacted] were not true. Mr. [redacted] recounted that on February 8, 1998, [redacted] and [redacted] were caught in a cell together having sex. At the time they were caught, [redacted] believed that he was playing cards with Mr. [redacted], [redacted] and [redacted][3] in the day room or the gallery. The following day, [redacted] was accused of being involved in a sexual assault upon [redacted]. He never witnessed a sexual assault on [redacted]. [redacted] did not know that Mr. [redacted] had been convicted of this offense. He never spoke with an attorney for [redacted] or [redacted]. On September 4, 2001, [redacted] executed an affidavit reflecting his recollections of the incident. That affidavit is being provided as Exhibit L.

51. I also visited and spoke with [redacted]. Like [redacted] and [redacted], [redacted] insisted that there had never been a sexual attack on [redacted]. Rather [redacted] recounted that on February 8, 1998, [redacted] and [redacted] were found in a cell having sex. Immediately before then [redacted] had been playing cards with [redacted] and [redacted]. [redacted] remembered that Mr. [redacted] and [redacted] had been playing cards outside of [redacted]'s cell. The following day, [redacted] was accused of raping [redacted] and was asked to give a sample of his semen. [redacted] was subsequently

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[3]My investigator has been attempting to locate [redacted] for several months but has been unable to do so.

interviewed by a member of the Bronx District Attorney's office and informed that person that there had never been a sexual assault on [redacted]. [redacted] believed that conversation had been tape recorded. [redacted] had never been involved romantically with [redacted] in any fashion. On June 21, 2001, [redacted] executed an affidavit reflecting his recollection of these incidents. That affidavit is being provided as Exhibit M. On information and belief based on my review of the trial file, no audiotapes were ever disclosed to the defense. See Exhibits B and C.

Discussions with Lawyers from the Department of Corrections and New York City's Office of the Corporation Counsel

53. On April 23, 2001, I visited Rikers Island in an attempt to view the crime scene. I had earlier spoken with members of the Department of Corrections Legal Department who had advised me to arrange the visit with the Assistant Deputy Warden for Security. When I arrived at the facility I was told that the crime scene viewing had been conducted the previous week. Thereafter, I was referred to Rhonda Leita, who works for the Legal Division of the Department of Corrections. Ms. Leita told me about the civil suit [redacted] had filed and advised me that the investigation of the scene had been related to that pending proceeding. Ms. Leita further advised me that both the Department of Corrections and the Corporation Counsel's Office of the City of New York were highly skeptical concerning [redacted]'s account of the incident.

54. On Tuesday May 8, 2001, I met with attorneys from the Corporation Counsel's Office of the City of New York and Ms. Leita who provided me with all of the discovery conducted in the civil lawsuit. This discovery included the depositions of several corrections officers and [redacted] and the Unusual Incident Report. See Defense Exhibit E.

55. Based upon my review of the unusual incident report, I immediately began searching for

[redacted]on, the inmate who had reported that on the night of the incident, at about 8:20 p.m., [redacted] had told him he was going to fabricate a sex scandal in order to get a transfer off the cell block. See Exhibit E. According to Davis's trial account, the alleged attack occurred between 7:00 p.m. and 8:00 p.m. Thus, this conversation occurred after the alleged incident.

56. After the May 8, 2001, meeting I spoke with Patrick Bruno and asked him if he had ever heard of [redacted]son and he told me that he had not. Mr. Bruno also advised me that he had never received any reports prepared by the corrections officers to whom [redacted] claimed he had promptly complained about the attack. See Exhibit A. On May 23, 2001, I met with Mr. Bruno and provided him with a complete copy of the Unusual Incident Report. See Exhibit A. At that time, I also returned Mr. Bruno's trial file, which I had personally reviewed to ascertain whether the documents contained in The Unusual Incident report had ever been disclosed. Mr. Bruno's file did not contain the report. Nor were there any other documents contained therein that mentioned [redacted]. The reports prepared by Corrections officers Waxter, Almodovar and Briggs, were also not in Mr. Bruno's trial file.

Corrections Officer Rena Waxter's Deposition Testimony

57. In her deposition, Rena Waxter testified under oath that she had been the meal relief officer on February 8, 1998 on C-74. See Deposition of Rena Waxter dated April 16, 2001, provided as Exhibit N. Waxter assumed her post that evening to relieve corrections officer Almodovar at approximately 7:00 p.m. Id. at p. 16.

58. Before she could conduct a complete tour of the cell block, an inmate advised her to check a particular cell. Id. at p. 20. Waxter walked down the block to a cell and when the officer controlling the cell doors popped open the cell, more than one inmate came out, including [redacted]

[redacted]s. Id. at p. 21. Waxter told [redacted]is she should write him up because he knew that he was not supposed to be in his cell with another inmate. Id. at p. 22. According to [redacted]'s trial testimony, he was distraught when the female relief officer discovered him in the cell with [redacted]s. But Waxter explained that [redacted]was not distraught; rather, he apologized and "kind of made a joke about it". Id. at p. 23.

59. When [redacted]s came out of the cell, Waxter continued to talk to him as she walked back towards the bubble. Id. at p. 36. [redacted]is walked down the tier with Waxter; she was still yelling at him. When they reached the pantry area, which was near the security bubble and on information and belief near the "c gates" [redacted] was standing to Waxter's right side. Id. Waxter recalled that [redacted] "was talking to someone in the pantry area and he turned to [her] and said `Ms. Waxter. You so nosy. It's girl talk." After this exchange Waxter and [redacted]is "both laughed" and that was the end of the encounter. Id. Waxter did not learn of any allegation of sexual abuse until days later when she was asked by Captain McMillan to issue a report. Id. at p.40. Waxter was certain that she had observed cell 30 during her tour of the block and that "nothing unusual" had occurred there. Id. at p. 28-29.

Corrections Officer Luis Almodovar's Deposition Testimony

60. Corrections Officer Luis Almodovar testified during his deposition that he left his post on C-74 for his meal break at 6:20 p.m. on February 8, 1998. See Almodovar's deposition dated April 16, 2001 which is being provided as Exhibit O. It was Almodovar's practice to conduct walking tours every 20 minutes in order to continuously monitor the block. Id. at p. 13-14. If there were ever seven inmates in one cell, Almodovar would have noticed it. Id. at p. 17. Almodovar inspected every cell while he was on duty, including cell 30 and observed nothing unusual about it.

Id. at p. 17.

61. [redacted] never spoke to Almodovar on February 8, 1998 to complain about an attack. [redacted] never requested that a captain be sent to his cell so that he could report an incident. [redacted] never asked to speak to a Captain on February 8, 1998. Id. at p. 34. If [redacted] had made such a request Almodovar would have noted it in his report and the log book. Id. at p. 35.

[redacted] Deposition Testimony

62. On April 27, 2001 [redacted] was deposed in connection with his civil lawsuit. A copy of [redacted] deposition is being provided as Exhibit P.[4] Despite his earlier claims that he had "no problems" with anybody on the cell block, [redacted] testified at his deposition that before February 8, 1998, [redacted] had asked him to smuggle drugs into the cell block and [redacted] pretended to "go along with the scheme" so that [redacted] would not know that [redacted] was afraid. See Exhibit P, [redacted] I, at p. 68. Finally, after Mr. [redacted] had asked [redacted] a few times, [redacted] refused to smuggle the drugs. Id. at p. 68.

63. [redacted] also claimed during his deposition testimony that Mr. Westly, before February 8, 1998, threatened to "scrape" or rape him on several occasions. Exhibit P, [redacted] II, at p. 14-15. According to [redacted]'s deposition testimony, he began feeling threatened and afraid after a few days on the cell block. Id. at p. 14-15.

64. [redacted] also claimed that [redacted] had been in the cell during the attack and that he had been told about [redacted]'s presence by [redacted] after the incident when [redacted] visited [redacted] on Rikers Island in May 1998, several months before he testified in the criminal trial. Id. at p. 51; [redacted] III at p. 40.

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[4] [redacted] deposition is composed of three sections and will be referred to as [redacted] I, II, or III.

65. [redacted]s continued to insist throughout his deposition that he had no romantic interest in [redacted]. Exhibit P, Davis II at p. 64.

[redacted]son's Post Trial Statement

66. On June 26, 2001, I met with [redacted][5], who recounted to me his conversation with [redacted]vis at approximately 8:20 p.m. on February 8, 1998 – a time after the alleged attack. [redacted]son recounted that [redacted] had been upset – not because he had been attacked – but because other inmates were constantly getting involved with his "business." [redacted] told [redacted]n that he was going to make up a "sex scandal" to gain a transfer off the block for him and his lover. [redacted]n immediately reported this conversation. [redacted]n executed an affidavit which is being provided as Exhibit Q.

67. [redacted]n told me that he was friends with [redacted]vis because, as fellow homosexuals on Rikers Island, they could talk about issues with each other that they could not discuss with the other inmates. But [redacted]son felt that [redacted]'s plans to concoct a sex scandal and implicate other inmates were malicious and [redacted]n reported his conversation with [redacted]s to the Corrections officials because he believed it was the right thing to do.

Other Potentially Exculpatory Evidence

68. I recently visited Mr. [redacted]y at Southport Correctional Facility where he is serving his sentence under 23 hour a day lock down conditions. He has not once wavered in his insistence that he is innocent and never assaulted [redacted]vis in any manner at any time.

69. Based on my discussions with [redacted]y, and Corrections Officers on Rikers Island, Rhonda Leita at the Department of Corrections Legal Department, and attorneys at the Corporation

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[5]To avoid confusion, [redacted]vis will be referred to hereafter as [redacted]on.

Counsel's office, I believe that there is other evidence in existence that might further prove [redacted] innocence. [redacted] has a seizure disorder for which he takes Depokate. Inmates from C-74 were taken to medication at approximately 7:15 p.m on February 8, 1998, and did not return until a little before 8:00 p.m. A clinic log is kept documenting which prisoners receive their medication at what time. This log might reveal that [redacted] was in medication at the time of the alleged incident. I have obtained copies of [redacted]'s medical records but they do not reflect the time that he received his medication on February 8, 1998.

70. Based on my discussions with Rhonda Leita and members of the Corporation Counsel's office, I believe that a Suicide Prevention Aid log book is also maintained by the Department of Corrections, which would reflect that a suicide aid was touring the block every fifteen minutes, rendering it further implausible that the attack on [redacted] would have gone undetected.

71. I also believe that pictures of [redacted] were taken on the day of this alleged attack. These photographs, photocopies of which are annexed to the Unusual Incident Report (see Exhibit E) were not disclosed to the defense. See Exhibits B and C (listing photographs of [redacted] and [redacted] as being provided). On information and belief, these photographs would further demonstrate that [redacted] was not injured on that day.

72. I have not yet perfected [redacted]'s criminal appeal.

WHEREFORE, I respectfully request, for the reasons set forth above and in the accompanying memorandum of law, tha[redacted]tly's [redacted]9, judgment convicting him of sodomy in the first degree, be vacated.

Dated: New York, New York
October 22, 2001

CLAUDIA S. TRUPP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: I.A.S. TERM PART 35

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent, :

-against- :

[redacted]TLY, :

Defendant-Appellant. :

MEMORANDUM OF LAW
IN SUPPORT
Bronx County
Indictment Number 4071/98

PRELIMINARY STATEMENT

This memorandum of law is submitted in support of [redacted]y's motion to set aside his December 23, 1999, Bronx County judgment because: 1) the Bronx District Attorney's Office suppressed Brady material thus violating Mr. [redacted]ly's state and federal Due Process rights under the Fourteenth Amendment; 2) new evidence has been discovered which would have likely resulted in [redacted]y's acquittal at trial; 3) material false testimony which the prosecution with due diligence could have ascertained was false was introduced at the trial; and 4) the conviction violates [redacted]'s state and federal constitutional rights.

[redacted] was convicted of first-degree sodomy based entirely upon the uncorroborated testimony of the complainant, J[redacted]vis, a three time felon with a history of mental illness. According to [redacted]'s account, the attack took place on a crowded cell block on Rikers Island, with corrections officers and other inmates nearby. [redacted]s also claimed that his close friend [redacted] had interrupted the attack. Although [redacted]s sought medical treatment at two separate hospitals and

had submitted to a rape test kit, no medical evidence was introduced at trial. No D.N.A. evidence supported [redacted]'s allegations. Not a single witness came forward to corroborate [redacted] account.

The reason for the prosecution's failure to introduce a single piece of corroborating evidence is simple. None existed. Appellate counsel's post trial investigation has revealed that every aspect of [redacted]'s account is demonstrably false and that important information reflecting [redacted] numerous motives to fabricate his account was kept from the jury. The verdict, obtained through the complainant's lies, does not comport with fundamental due process principles and is not one in which society can have confidence. Accordingly, the judgment must be vacated pursuant to C.P.L. §440.10.

POINT I

THE PROSECUTION'S FAILURE TO DISCLOSE: A) THE UNUSUAL INCIDENT REPORT; B) ITS AWARENESS THAT THE COMPLAINANT WAS CONSIDERING FILING A CIVIL LAWSUIT BECAUSE HE WAS SEXUALLY ASSAULTED WHILE IN PRISON AND C) A TAPE RECORDED INTERVIEW WITH [redacted] DENYING THAT THE COMPLAINANT WAS EVER SEXUALLY ASSAULTED–EXCULPATORY EVIDENCE MATERIAL TO THE JURY'S DETERMINATION OF GUILT OR INNOCENCE -- VIOLATED MR. [redacted]'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS AND WARRANTS VACATING THE JUDGMENT. U.S. CONST., AMEND. XIV; N.Y. CONST. ART. I, §6; BRADY V. MARYLAND, 373 U.S. 83 (1963); C.P.L. §440.10(1)(f)(h).

The outcome of this case depended entirely upon whether the jury credited the testimony of the complainant, J[redacted]s, concerning his account of being sodomized while incarcerated on Rikers Island on February 8, 1998. No physical evidence was introduced to support [redacted] account. No medical records bolstered his claims. The D.N.A. evidence recovered could not have come from either defendant. The alleged attack, which took place on a crowded cell block, was, according to [redacted] trial testimony, interrupted by [redacted]'s friend [redacted] and immediately reported to three corrections officers. None of these witnesses were called by the prosecution to corroborate [redacted]'s account. Thus, the prosecution was forced to argue that [redacted] was credible because he had no motive to lie about being sexually assaulted. Yet, while the Assistant District Attorney advanced these claims before the jury, records within his control conclusively refuted their validity. The Unusual Incident Report reflected that [redacted] had told a fellow inmate, [redacted], on the night of the alleged incident that he was going to fabricate a sex scandal to effect a transfer off the cell block for himself and his lover. Reports prepared by the corrections officers on duty that night reflected that [redacted] had never complained about being attacked on February 8, 1998, but waited twelve hours to come forward with his allegations. Moreover, it appears that while the prosecution

elicited that Davis had not "filed" a lawsuit prior to testifying, Assistant District Attorney Robert Gonzalez had had repeated contact with [redacted]s civil attorney and that Gonzalez was aware that [redacted] was contemplating such a suit. Under these circumstances, the conviction violates state and federal due process standards and must be vacated.

Criminal Procedure Law §440.10(1) provides, in relevant part:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:
>
> (f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or
>
> (h) the judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

The prosecution has an affirmative duty to disclose to the defense evidence in its possession that is favorable to the defense and relevant to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). New York has long recognized this prosecutorial duty and that the failure to disclose Brady material violates a defendant's state and federal constitutional rights to Due Process. People v. Wright, 86 N.Y.2d 591, 595 (1995).

Under federal constitutional standards there are three components to a Brady violation: 1) "the evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching"; 2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and 3) "prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999). Under this standard "favorable evidence is material, and constitutional error results from its suppression if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419,

433 (1995).

New York's rule differs from the federal standard only in that where there has been a specific request for Brady material, that evidence is deemed material if there is a "reasonable possibility" that the outcome would have been more favorable to the accused. See People v. Wright, 86 N.Y.2d at 596, citing People v. Vilardi, 76 N.Y.2d 67 (1990). Where a prosecutor professes to comply with his Brady obligations through an open file, voluntary disclosure policy, the defense may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady and its progeny. Strickler v. Greene, 527 U.S. at 283, fn. 23.

The mandate to disclose material, exculpatory evidence extends beyond an individual prosecutor's actual knowledge and imposes upon him the duty to learn of any favorable evidence known to others acting on the government's behalf during the investigation of the case. Kyles v. Whitley, 514 U.S. 419, 437-438 (1995); People v. Wright, 86 N.Y.2d at 598; see also People v. Simmons, 36 N.Y.2d 126, 132 (1975)("negligent as well as deliberate non-disclosure may deny due process"); People v. Benard, 163 Misc. 2d 176, 183 (Sup. Ct. N.Y. Co. 1994)(where exculpatory material is in the files of the agency involved in the investigation, the prosecution can be charged with its constructive possession).

A. The Unusual Incident Report Constituted **Brady** Material and Its Suppression, Standing Alone, Warrants Vacating the Judgment.

Here, the Bronx District Attorney's office failed to comply with these well-established principles that ensure the accused due process and society the right to a verdict worthy of confidence. That the Unusual Incident Report contained material, exculpatory information cannot be disputed. The suppression of S[redacted]n's statement, in and of itself, warrants vacating the judgment.

That statement reflected that at approximately 8:20 p.m. on February 8, 1998, [redacted] is told [redacted], a fellow inmate, that he intended to fabricate a sex scandal in order to secure a transfer off the block for himself and his lover. According to [redacted]'s trial account, by 8:20 p.m on February 8, 1998, he had already been sodomized. Thus, if [redacted]'s statement is credited there is simply no way [redacted]'s trial testimony can be true.

Morevoer, this evidence was not merely impeaching, but directly demonstrated that from the outset [redacted] had a motive to fabricate his account of being sexually attacked. As such, the defense would not have been limited to confronting [redacted] with his statement to [redacted], but would have also been permitted to call [redacted] as a witness to offer extrinsic proof of the conversation. See People v. Hudy, 73 N.Y.2d 40, 57 (1988)(in trial for sexual abuse of young boy, defense should have been permitted to offer extrinsic evidence concerning witnesses' motives for fabricating their accounts of abuse). Indeed, a trial court's discretion to preclude such evidence "is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers." Id. citing Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississipi, 410 U.S. 284 (1973).[1]

Nor can there be any doubt that [redacted] would have made a convincing witness as demonstrated by the conclusions of the Assistant Deputy Warden and Captain Sena McMillan, who were responsible for investigating this case. Both officers credited [redacted]'s statement in concluding that [redacted] had made up his allegations. [redacted], unlike [redacted], had no reason to lie.

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[1]The prosecution's suppression of [redacted]'s statement and information concerning [redacted]'s retention of a civil attorney, both of which established motives to fabricate, adversely impacted upon Mr. [redacted]'s rights to present a defense under the Fifth Amendment of the United States Constitution and to confront his accuser under the Sixth Amendment of the United States Constitution. Thus, the conviction was obtained in violation not only of Mr. [redacted]'s due process rights, but these constitutional rights as well.

But The Unusual Incident Report contained more exculpatory information than [redacted]'s statement, as it also contained exculpatory statements by the correction officers patrolling the block on the evening of the alleged incident. According to [redacted], a female corrections officer observed him almost immediately after the attack distraught and hysterical. But the report prepared by Corrections Officer Rena Waxter and contained in the Unusual Incident Report reflected that she had observed nothing unusual during her tour when she provided meal relief to Corrections Officer Louis Almodovar.

While according to [redacted] he had complained to Almodovar shortly after the incident, Almodovar's report reflected that [redacted] had never approached him to complain of the attack. Similarly, Corrections Officer Briggs' report reflected that he had not heard of the attack when his shift ended at 7:30 a.m., despite [redacted] insistence that he had provided a detailed account of the incident to Briggs at approximately 5:30 a.m.

[redacted] failure to promptly report the incident was also of obvious significance to the defense. Indeed, it was the twelve hour delay in outcry which also prompted the Department of Corrections investigators to discredit [redacted]'s account. In New York State, evidence that a victim of a sexual assault promptly complained about the incident is admissible to corroborate the allegation that the assault occurred. See People v. McDaniel, 81 N.Y.2d 10, 16 (1993). This policy recognizes the likelihood that "some jurors would likely doubt the veracity of a victim who failed to promptly complain of a sexual assault." Id. Indeed, to bolster [redacted]'s account, the prosecutor specifically elicited that [redacted] had promptly complained about the incident to Almodovar and Briggs. But while eliciting this evidence, the prosecution denied the defense access to evidence that could have conclusively rebutted it.

Nor can there be any question that the evidence contained in the Unusual Incident Report was "suppressed" by the prosecution for Brady purposes. See Strickler v. Green, 527 U.S. at 281-282. The defense did not receive the report. It is not listed on the voluntary discovery statements provided by the prosecution. See Exhibits B and C. The voluntary discovery prepared by the prosecution reflected the disclosure of approximately 15 inmate statements, but did not mention one from [redacted]. See Exhibit B. The Unusual Incident Report was not contained in Mr. Bruno's trial file. Mr. Bruno himself provided an affidavit that he did not receive the report. There was no mention of [redacted] during the entire trial. .

That the prosecution had actual or constructive knowledge of the report is also undeniable. The prosecution disclosed numerous reports from the Department of Corrections. That agency was the sole arm of the government investigating this incident. When, during the course of the pre-trial proceedings Assistant District Attorney Gonzalez needed to obtain records, he called the Department of Corrections. The prosecution's witness list reflected that Waxter, Almodovar, Briggs and McMillan were all potential witnesses for the People. See Exhibit D.

As the Bronx District Attorney's office was enjoying the cooperation of the Department of Corrections, the sole investigatory agency involved in this case, it had the obligation to locate and turn over any exculpatory information contained in the Department of Corrections' files. See Kyles v. Whitley, supra.; see also People v. Smith, 63 N.Y.2d 41, 65-68 (1984)(assuming that log book entry maintained by the Department of Corrections was in control of the prosecutor for Brady purposes in prosecution arising out of murder that occurred in a correctional facility). Indeed, the First Department recognized the prosecution's obligation under such circumstances to search investigatory files for exculpatory information even before the Supreme Court decided Kyles v.

Whitley, supra. See People v. Rutter, 202 A.D.2d 123, 131-132 (1st Dept. 1994)(Bronx District Attorney violated his Brady obligations by failing to disclose exculpatory materials within files of the Philadelphia Police Department where those authorities cooperated closely with the New York murder investigation). Under these circumstances, even if by some administrative error the Unusual Incident Report was not in the actual possession of the Bronx District Attorney's office, it was nonetheless suppressed for Brady purposes.

Nonetheless, there is evidence suggesting that the information contained in the report was known to the Assistant District Attorney prosecuting the case. As mentioned above, it is difficult to understand how the prosecution would have had access to numerous voluntary inmate statements but not [redacted]'s. Moreover, the prosecutor specifically argued on summation that [redacted] had no reason to fabricate his account in order to gain a transfer off the cell block. The defense, unfamiliar with the information contained in the Unusual Incident Report, had never alleged that [redacted] was seeking a transfer off the block. The Assistant's District Attorney's desire to address the possibility that [redacted]s had fabricated his account in order to gain a transfer from the cell block was, thus, most likely based on his knowledge of the information contained in the Unusual Incident Report.

Regardless of whether the Report was in the actual possession of the prosecutor, the failure to disclose it to the defense prejudiced the defense and undermined the validity of Mr. [redacted] conviction, see infra at pp. 11-14.

B. The Complainant's Intent to File a Civil Lawsuit, Which the Prosecutor Knew About But Did Not Disclose, Before Eliciting That No Such Lawsuit Had Been "Filed" And Then Arguing That The Complainant Was Not Trying To Make Money Due to The Sexual Assault, Denied Mr. Westly Due Process.

J[redacted]is testified during the trial, under direct examination by Assistant District Attorney Robert Gonzalez that he had not "filed" a lawsuit against the Department of Corrections as a result of being sexually assaulted while incarcerated on Rikers Island. The prosecutor then explicitly argued that [redacted] was not trying to scam the city by filing a lawsuit and was not trying to make a "dime on the citizens of New York" (401). While it was technically true that [redacted]is had not "filed" a lawsuit, he had consulted with a civil attorney prior to testifying against [redacted]y. Moreover, that civil attorney spoke with Assistant District Attorney Gonzalez only days before the trial. Thereafter, [redacted]is filed a four million dollar lawsuit against the Department of Corrections and the City of New York based upon the alleged rape. Under these circumstances, the prosecution's failure to disclose that [redacted] was contemplating filing a civil suit and that a civil attorney had entered the case, violated the precepts of Brady v. Maryland.

The First Department's decision in People v. Wallert, 98 A.D.2d 47 (1st Dept. 1983) controls. In Wallert, the complainant testified that the defendant had raped her shortly after they met. Id. at 48. On summation, the prosecutor argued that the complainant had no reason to fabricate the allegations against Wallert or to falsely accuse him of rape. Id. at 50. But two days after Wallert's conviction, the complainant filed an 18 million dollar lawsuit against him for damages arising out of the rape incident. Id. at 47-48. Although the prosecutor knew that the complainant had consulted a civil attorney prior to trial, that fact was not revealed to the defense. Id. at 48. The First

Department reversed Wallert's conviction holding "the failure of the prosecutor to inform defendant of the civil suit was a clear Brady violation `inasmuch as [that fact] had the possibility of assisting the defendant and raising a reasonable doubt.' Plus, the additional wrong of the prosecutor's arguing that which wasn't, denied Wallert a fair trial in violation of his right to due process." Id. at 50-51, quoting, People v. Kitt, 86 A.D.2d 465, 467 (1st Dept 1982).

Here, as in Wallert, the jury was left with the impression that [redacted] had no financial motive to fabricate his allegations about being sexually attacked. The prosecutor carefully elicited that [redacted] had not "filed" a civil lawsuit. On summation, the prosecutor then stressed that [redacted] had no motive to lie, that he was not trying to "scam" anybody or make any money by lodging false accusations. But [redacted] had consulted a civil attorney, Jon Norinsberg, prior to testifying at the criminal trial. Norinsberg had spoken to Assistant District Attorney Gonzalez approximately three days before the trial began. In fact, the prosecutor contacted Norinsberg when [redacted] failed to appear for a pre-trial preparation session. The civil complaint demanding four million dollars in damages was sworn out less than a month after the judgment was entered. While Mr. Norinsberg would not execute a detailed affirmation because of his ongoing representation of [redacted], appellate counsel's conversations with him detailed in the affirmation in support are sufficient to warrant a hearing into this issue. See People v. Nicholson, 222 A.D.2d 1055 (4th Dept. 1995)(where witness refused to execute an affidavit because doing so would be against her interest, sworn allegations set forth by defense counsel were sufficient to warrant a hearing).

C. The Tape-Recorded Conversation With [redacted]

[redacted] provided a sworn affidavit that he had been interviewed by a member of the Bronx District Attorney's office and that during that interview a tape recorder was operating. According to [redacted]'s sworn statement, he told the Bronx District Attorney's office that there had been no sexual assault on [redacted]. [redacted]'s statement also reflected that he had seen [redacted] having sex in [redacted]'s cell on the night of alleged incident. That this tape recorded conversation was exculpatory and should have been disclosed to the defense is beyond dispute. See generally People v. Nikollaj, 155 Misc.2d 642 (Sup. Ct. Bx. County 1992)(Bronx District Attorney's office failure to disclose 16 minute tape recorded interview with a principle eyewitness prejudiced the defense and warranted reversal). But no audiotapes were disclosed to the defense. See Exhibits B and C.

D. The Suppression of the **Brady** Material Prejudiced The Defense Where It Allowed the Prosecution To Mislead The Jury By Arguing That the Complainant Had No Motive To Fabricate His Allegations of Sexual Abuse

The prosecution readily admitted during the trial that the outcome of this case depended entirely upon the jury's assessment of the complainant's credibility, particularly whether [redacted] had any motive to lie about being sodomized. Under these circumstances, regardless of the standard of materiality which is applicable, the judgment must be vacated. While this case should be analyzed under the "reasonable possibility" standard because the defense requested voluntary disclosure and the prosecution represented that it had disclosed all that it was required to, applying the more rigorous "reasonable probability standard" would still mandate vacating the conviction. In determining whether undisclosed evidence is "material," that evidence must be viewed

cumulatively, not item by item. Kyles v. Whitley, 514 U.S. at 436.

Here the undisclosed evidence would have impacted upon virtually every aspect of the complainant's testimony. At trial [redacted]s portrayed himself as an innocent victim, with no grudge against the defendants, who, distraught after the brutal assault, was observed crying, then promptly complained to every corrections officer who would listen. The prosecution argued that [redacted]s also lacked any financial motive to fabricate his account as he was not trying to "scam" anybody to make money as a result of the alleged sodomy.

[redacted]n's statement demonstrated that [redacted] on the evening of the attack was upset about being found in his cell with his lover and that [redacted]dmitted that he was going to concoct a sex scandal in order to gain a transfer off the block. Nothing could have been more relevant and helpful to the defense. As Mr. Bruno set forth during the pre-trial proceedings, it was the defense theory that [redacted]s had concocted the allegations, at least initially, because he was angry about being found with "his pants down" in his cell with his boyfriend. When the defense sought to confront [redacted]s about his relationship with [redacted]s, he insisted that they were not romantically involved and that he was upset because he was attacked, not because he was discovered in his cell with his lover.

Thus, [redacted]'s testimony, standing alone, would most likely have changed the outcome of Mr. Westly's trial. See, e.g., People v. Bond, 95 N.Y.2d 840 (2000)(single prior undisclosed statement by eyewitness that she did not witness the shooting warranted reversal). Tellingly, the investigators for the Department of Corrections relied upon [redacted]n's statement in concluding that the sexual assault had not occurred. Their reliance on [redacted]n's statement was understandable. He had no discernible motive to make up this conversation with [redacted]s. He reported the conversation immediately to the authorities. Moreover, [redacted], unlike other inmates who would have known

about the alleged attack, had no fear of being implicated as one of [redacted]'s assailants. [redacted] was not on the same side of the cell block as [redacted].

But the undisclosed report contained numerous other pieces of relevant exculpatory information including reports by the Assistant Deputy Warden concluding that Davis's account was untrue, a conclusion which Captain Sena McMillan also reached. Their conclusions were based, in part, on the reports of Corrections Officers Waxter, Almodovar and Briggs all of which contradicted [redacted]'s account of the incident. While [redacted] claimed Waxter observed him crying and hysterical, her report reflected that she had observed nothing unusual during her tour. During her deposition Waxter recounted that [redacted] was actually joking when he came out of the cell and accompanied her as she walked down the tier. [redacted] had testified that immediately after he exited his cell there was an angry confrontation between himself, [redacted] and [redacted]. Waxter's report contradicted this representation.

Almodovar's report also undercut [redacted]'s account because it reflected that [redacted] had never approached him to report any attack and never asked to see a captain. Similarly Briggs report reflected that [redacted] had not reported the incident early in the morning of February 9, 1998, as [redacted] insisted he had at trial. Again, the information in the reports, the delay in outcry of twelve hours, was another factor relied upon by the Department of Corrections investigators in concluding that [redacted] was lying about being the victim of a sexual assault.

Still there was more information withheld that called into question [redacted]'s motives for alleging that he was sexually attacked. For while the prosecutor explicitly argued that [redacted] was not trying to make money by filing a lawsuit against the Department of Corrections, by the time of his testimony [redacted] had consulted a civil attorney and was plainly contemplating civil action based on

his imprisonment and alleged victimization on Rikers Island. Indeed, it was suppression of this type of evidence, standing alone, that the First Department ruled mandated reversal in Wallert, supra.

Additionally, the tape recorded conversation with [redacted] Reed would have put the defense on notice that he possessed material information that could undercut [redacted]'s account. [redacted] became a particularly important witness as the trial proceeded and as [redacted] denied that he was present during the attack, even when confronted with Department of Corrections' Reports reflecting Reed's status as a participant in the alleged attack.

Thus, viewed cumulatively, the suppressed evidence could not have been more material to the defense here. It called into question virtually every aspect of [redacted]'s testimony. Under these circumstances, [redacted]'s conviction must be vacated. In the alternative, in the event that the People's response raises a factual issue, a hearing should be conducted pursuant to C.P.L. §440.30(5).[2]

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[2]There is no basis upon which the motion can be summarily denied pursuant to C.P.L §§440.10(2) or (3). There is no mention in the appellate record of any of the undisclosed materials which would permit review of these claims in the pending appeal. See C.P.L. §440.10(2)(b). Moreover, the suppressed evidence was omitted from the record as a result of the prosecution's misconduct, not any lack of due diligence by the defense which was entitled to rely upon the prosecution's representations that it had complied with its Brady obligations through its voluntary disclosure policy. See Strickler v. Green, supra.

POINT II

NEWLY DISCOVERED EVIDENCE CONSISTING OF: A) [redacted]'S STATEMENT THAT THE COMPLAINANT TOLD HIM OF HIS PLANS TO CONCOCT A SEX SCANDAL IN ORDER TO EFFECT A TRANSFER OFF THE BLOCK; B) THE COMPLAINANT'S INTENT TO FILE A MULTIMILLION DOLLAR LAWSUIT AS THE RESULT OF THIS ALLEGED INCIDENT; AND C) [redacted]' STATEMENT THAT HE NEVER WITNESSED AN ASSAULT ON THE COMPLAINANT WARRANTS VACATING MR. WESTLY'S FIRST-DEGREE SODOMY CONVICTION. C.P.L. §440.10(1)(G).

After [redacted] was sentenced on December 23, 1999, several new pieces of evidence were uncovered that cast substantial doubt upon [redacted]'s account of being sexually attacked. About a month after [redacted] was sentenced, the complainant filed a multimillion dollar lawsuit against the Department of Corrections alleging that he was falsely imprisoned and raped while on Rikers Island in February 1998. During the course of the civil lawsuit reports were disclosed that reflected that on the night of the alleged incident, the complainant informed a fellow inmate, [redacted], of his intention to concoct a sex scandal to gain a transfer off the cell block. Also as a result of the lawsuit, appellate counsel contacted the complainant's civil attorney, who stated that he had consulted with [redacted] before the criminal trial concerning representing him in a civil lawsuit. Additionally, after [redacted] had been sentenced, [redacted] agreed for the first time to cooperate with the defense and provided a notarized statement reflecting that the complainant had lied when he testified that [redacted] had interrupted the alleged attack. Had this evidence been introduced at trial, there can be little doubt that the outcome would have been more favorable to the defense. Accordingly, [redacted]'s conviction must be vacated pursuant to C.P.L. §440.10(1)(g).

Criminal Procedure Law §440.10 (1)(g) provides that a criminal judgment may be vacated

upon the ground that:

> (g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence;

In order to prevail under this section, the new evidence must : (1) be such that it will probably change the result of a new trial; (2) have been discovered since the previous trial; (3) not have been discoverable before the trial with the exercise of due diligence; (4) be material to the issue; (5) not be cumulative; and (6) not be merely impeachment evidence. People v. Salemi, 309 N.Y. 208, 215-216 (1955). All of the newly discovered evidence meets these requirements.

A. [redacted]'s Statement

(1) As set forth above, at pp. 13-14, inmate [redacted]'s statement, standing alone, would have probably changed the result of this trial. [redacted]'s statement undercut [redacted]'s trial testimony that he had been the victim of a sexual assault and the prosecution's consistent argument that [redacted] had no motive to lie about his alleged victimization. [redacted]n reported that on the night of the alleged incident, [redacted] told him of his plans to concoct a sex scandal in order to gain a transfer off the block for himself and his partner. This evidence was credited by Department of Corrections investigators when they concluded that [redacted] had fabricated his account of the incident. It is easy to understand why [redacted]on's statement was credited. He immediately reported his conversation with [redacted] to the appropriate authorities. He had no motive to lie about this conversation. Moreover, this conversation occurred at approximately 8:20 p.m., at a time, according to [redacted]'s trial testimony, that he had already been the victim of a sexual assault.

No evidence could have been more damaging to the prosecution's sole witness. As [redacted] was the only witness to testify and his account was not corroborated by medical evidence, D.N.A. evidence or prompt outcry evidence, there can be little doubt that the outcome of this case would have been different if Patterson had testified.

(2) [redacted]'s statement was discovered after Mr. [redacted]'s trial by appellate counsel with the cooperation of the office of the Corporation Counsel of the City of New York. It was attorneys at the Corporation Counsel's office that finally disclosed the Unusual Incident Report containing [redacted]'s statement to appellate counsel on May 8, 2001.

(3) [redacted] statement was not discoverable with due diligence before trial. The defense dispatched an investigator to interview inmates who were potential witnesses and who were housed on the same cell block as [redacted]. [redacted] was housed on a separate side of the block and was physically separated from the side of the block in which the alleged attack occurred. Accordingly, there was nothing to put the defense on notice of the information [redacted] possessed as a result of his conversation through the gates with [redacted] on the night of the alleged incident. The report containing [redacted]'s statement was never disclosed to the defense. [redacted] himself never informed [redacted] about the information he had provided to the appropriate authorities. Accordingly, [redacted]'s failure to testify at trial cannot be attributed to any lack of due diligence on the part of the defense.

(4) [redacted]'s statement was highly material to the sole issue at trial of whether [redacted] had been sodomized by [redacted] and [redacted] on February 8, 1998, or whether he was, as the defense claimed, a lying schemer with his own needs and agenda. According to the prosecution, this case came down to whether [redacted] had any motive to lie for any reason. [redacted]'s statement

established that, from the beginning, [redacted] planned to lie about his alleged victimization in order to manipulate the system and gain a transfer for himself and his lover.

(5) P[redacted]'s statement was not cumulative. There was no direct evidence introduced at the trial which proved that [redacted] had a motive to fabricate these allegations. [redacted] consistently denied having any problems with anybody on the block, including [redacted]y. He denied that [redacted]rs was his lover or that he had any reason to want to transfer off the block. The prosecution actually argued that if [redacted]s had wanted to transfer off the block he would have been transferred simply by asking. Thus, P[redacted]on's statement was not cumulative.

(6) Nor is the evidence merely impeaching. Evidence which establishes a complainant's motive to fabricate can be proved by extrinsic proof. See People v. Hudy, supra.; Justice v. Hoke, 90 F.3d 43, 48 (2d Cir. 1996); see, e.g., People v. Smith, 6 Misc. 2d 601 (New York Co. Ct. 1957)(judgment vacated due to newly discovered evidence that complainant told witness of his intent to fabricate allegations in order to bribe the defendant). Indeed, where the prosecution's case depends upon the jury's assessment of a single witness, even newly discovered impeaching evidence has been found sufficient to warrant a new trial. See, e.g., People v. Marzed, 161 Misc.2d 309, 316 (Crim. Ct. N.Y. Co. 1993), citing Napue v. Illinois, 360 U.S. 264, 269 (1959)(courts assess impeachment evidence in a much different light where the outcome is dependent on the jury's assessment of a single witness's credibility); People v. Ramos, 132 Misc. 2d 609 (Sup. Ct. Kings Co. 1985)(new evidence relating solely to complainant's criminal history warranted reversal where it established motive to lie).

Finally, this motion was pursued with due diligence only weeks after [redacted]n was located by appellate counsel. See People v. Maynard, 183 A.D.2d 1099, 1103-1104 (3rd Dept. 1992). Thus,

as [redacted]'s statement meets all of the criteria for newly discovered evidence pursuant to C.P.L. §440.10(1)(g), Mr. [redacted]'s conviction should be reversed in light of the discovery of this key witness.

B. The Complainant's Intent To File A Multi-Million Dollar Lawsuit

At trial, [redacted]vis testified that he had not "filed" a lawsuit against the Department of Corrections because of the alleged sodomy. Thereafter, the prosecution argued that [redacted] had no motive to fabricate because he was not "trying to sue the City of New York for this" and was "not one of those guys trying to make a dime on the citizens of New York" (401). But by the time of his criminal trial, [redacted] had already retained a civil attorney in anticipation of filing a multimillion dollar lawsuit against the City of New York. These facts only came to light after [redacted]s had filed that lawsuit and appellate counsel had spoken with [redacted]'s civil attorney to ascertain when his representation of [redacted] commenced. [redacted] intention to file this lawsuit also constitutes newly discovered evidence under C.P.L. §440.10(1)(g).

(1) The complainant's plan to file a large lawsuit provided him with a strong motive to fabricate his claims. The jury's awareness of this plan and [redacted]s financial incentive to lie about the sexual assault would have probably changed the outcome of this case. See People v. Wallert, 98 A.D.2d at 50-51, citing Napue v. Illinois, 360 U.S. at 269 (reversing for failure to disclose complainant's intention to file a civil lawsuit based on allegations that the defendant raped her because "it was fundamentally obvious that the complainant's credibility and motive for testifying would be a crucial issue."); People v. Smith, supra, 6 Misc.2d at 602-603 (vacating conviction due to newly discovered evidence reflecting complainant's financial motivation for fabricating allegations of abuse).

(2) the existence of the civil lawsuit, which was filed in federal court in the Southern District of New York in January 2000, was discovered by chance during appellate counsel's attempts to visit the crime scene on Rikers Island on April 23, 2001. The original record suggested that no such lawsuit was being pursued by [redacted]

(3) Nor was [redacted]'s intention to file the lawsuit capable of being discovered before the original trial. The lawsuit had not yet been filed. No notice of claim had been filed against the City of New York to preserve the state civil rights claims. [redacted]'s trial testimony affirmatively suggested that no such lawsuit was being pursued. Thus, the defense had no way to refute [redacted]s testimony – affirmatively elicited by the prosecution – that he was not pursuing a civil lawsuit. The defense attorneys should not have been required to question [redacted] blindly and risked reinforcing before the jury the impression that [redacted] lacked any financial motive to fabricate his allegations.

(4) [redacted]'s motive to fabricate, his belief that he could become wealthy by lying about being sexually assaulted, was highly material to the outcome of this case. As the prosecutor explicitly argued, the outcome of this entire case came down "to whether or not [redacted] is had a motive to lie, whether or not [redacted] is had a reason to come up here and testify and lie about what happened that day" (400). The prosecutor recognized the relevance of a potential financial motive and affirmatively suggested that [redacted] did not have one (401).

(5) Evidence that [redacted] intended to file a civil lawsuit would not have been cumulative. [redacted] and the prosecution affirmatively misrepresented that [redacted]s was not pursuing a lawsuit as a result of the alleged sexual assault. The existence of the lawsuit and the evidence that [redacted] had retained a civil attorney prior to testifying in this criminal case would have undercut the prosecution's repeated arguments that [redacted] had no motive to lie. There was no evidence introduced

suggesting the existence of this financial motivation.

(6) Nor was [redacted] intention to pursue a civil lawsuit merely impeaching evidence, as it affirmatively established his motive to testify falsely about the alleged sexual attack. See, e.g. People v. Smith, supra, 6 Misc. 601 (vacating conviction due to newly discovered evidence that complainant was attempting to bribe the defendant and offered to drop the charges for money).

Finally, the motion to vacate on this ground has been pursued with due diligence by [redacted]. The existence of the civil lawsuit was discovered in April 2001. Appellate counsel spoke with [redacted]'s civil attorney in June 2001 to ascertain when exactly he had been retained by [redacted]. The motion is being filed within weeks of the defense obtaining this information.

C. [redacted]rs' Statement

Following [redacted]y's conviction, [redacted]rs for the first time provided information contradicting Jo[redacted] account of the incident. This evidence is also "newly discovered" and warrants vacating the judgment.

(1) [redacted] testimony that he never saw anybody sexually assault Jo[redacted] on February 8, 1998, would have probably resulted in [redacted]'s acquittal. According to [redacted], it was [redacted] who interrupted the attack, and witnessed [redacted]lly and [redacted]y in the very act of sodomizing [redacted]s. [redacted] also testified that [redacted] was threatened verbally and physically by [redacted]y and [redacted]y on the night of the incident and the next morning.

But [redacted]rs' statement entirely contradicts [redacted] testimony. [redacted] explicitly swore that at no time on the date in question did he see [redacted]s being attacked or harassed in any manner. Not only did [redacted] deny that he witnessed an attack on [redacted], [redacted]' sworn statement reflected that [redacted] informed him that if [redacted] would corroborate [redacted]s account of the attack they could both become rich.

There can be no doubt that this evidence would have fatally undermined the prosecution's case. [redacted] -- who was portrayed as a hero and had no motive to lie in favor of the defendants if [redacted]s account were true -- was a critically important witness. In fact, the jury during the course of its deliberations asked for a read back of the testimony concerning the timing of [redacted]' entry into the cell.

(2) [redacted]s statement was "discovered" since the original trial. While [redacted] testified about [redacted]s' actions on the night of the alleged incident, [redacted] himself agreed to come forward with

exculpatory information only after learning that M[redacted]y had been convicted of sodomizing J[redacted]s and sentenced to 20 years to life in prison. See [redacted] statement, Exhibit J, at paragraph 7. Thus, this evidence is considered "newly discovered" within the meaning of C.P.L. §440.10(1)(g) See People v. Stokes, 83 A.D.2d 968 (2nd Dept. 1981), citing People v. Shilitano, 218 N.Y. 161, 170-171 (1916)("it is not that the 'witness' is newly discovered, but it is the fact that since the trial, the witness has, for the first time, made statements which makes such evidence newly discovered"); accord People v. Staton, 224 A.D.2d 984 (4th Dept. 1996)("the proffered testimony of the codefendant, who did not testify at trial and now seeks to exculpate defendant, constitutes newly discovered evidence within the meaning of C.P.L §440.10(1)(g)"); People v. Smith, 6 Misc. 2d at 602 (treating as newly discovered evidence information that had not been disclosed to defense investigator during his interview of the witness prior to the original trial because the witness feared the accused would harm her children).

(3) [redacted]s' statement was not discoverable during the original trial proceedings, even with the exercise of due diligence. [redacted] was interviewed by an investigator for the defense before the trial. He explicitly told that investigator that he did not want to cooperate with the defense. See Bruno Affirmation, Exhibit A, at par. 9. During the trial, Mr. Bruno stated on the record that he had "no doubt whatsoever" that M[redacted]vers did not want to cooperate with the defense (350). R[redacted]s was concerned that if he cooperated with the defense, [redacted]is would turn on him and accuse him of being part of the assault. See Rivers Statement, Exhibit J, at par. 6.

(4) [redacted]s testimony would have been highly material to the issue of what occurred on the cell block on February 8, 1998. R[redacted] was uniquely positioned to corroborate or refute [redacted] testimony. [redacted] claimed that it was [redacted] who allegedly interrupted the attack, actually witnessed

the sodomy, was threatened, then followed [redacted] to his cell, before allegedly being confronted again by [redacted] and [redacted] and threatened in the corridor. [redacted] affirms that none of this is true. [redacted] also has independent knowledge that [redacted] believed he could get rich by fabricating charges that he had been sexually abused, information which further undercut the prosecution's argument that [redacted] had no motive to lie about his alleged ordeal.

(5) This evidence would not have been cumulative. Rather it would have provided an entirely different picture of the events about which [redacted] testified. It contradicted every aspect of [redacted]'s account, demonstrating that [redacted] was lying about his alleged ordeal.

(6) [redacted] statement was not merely impeaching. Rather, it was direct evidence of these events which demonstrated that [redacted]'s account was false. The information contained in [redacted] sworn affidavit also reveals an additional motive for [redacted] to fabricate his account of being sodomized, as [redacted] explicitly told [redacted] that they could both become rich if they claimed that [redacted] had been attacked.

Nor is there any question that the defense has pursued this motion to vacate with due diligence after locating [redacted]ers and discovering that he was willing for the first time to come forward with helpful information. [redacted]s provided a sworn affidavit on April 18, 2001 (see Exhibit J) and this motion is being pursued within months of the defense's obtaining that statement.

In sum, there are numerous pieces of newly discovered evidence which standing alone and certainly cumulatively would change the outcome of this case. This evidence is not reflected in the record on appeal and its absence is not due to a lack of due diligence by the defense. Accordingly, summary denial of the motion to vacate the judgment pursuant to C.P.L. §440.10(1)(g) would be erroneous. See C.P.L. §§440.10(2)(b) and (3)(a). As such, [redacted]'s motion to vacate his Bronx

County first-degree sodomy conviction based on newly discovered evidence should be granted. In the alternative, a hearing should be held into these claims pursuant to C.P.L. §440.30(5).

POINT III

THE PROSECUTION'S KNOWING USE OF MATERIAL, FALSE TESTIMONY TO SECURE MR. [redacted]'S CONVICTION DENIED HIM DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE STATE CONSTITUTION AND WARRANTS VACATING THE JUDGMENT. C.P.L. §440.10 (1)(C), (H); U.S. CONST., AMEND. XIV; N.Y. CONST., ART. I, §6.

The sole evidence offered against [redacted] at trial was the uncorroborated testimony of the complainant [redacted]. Although the alleged attack took place on a crowded cell block, was allegedly witnessed by at least three inmates, and was supposedly promptly reported to at least three corrections officers, the prosecution did not call a single witness to corroborate [redacted] story. No medical evidence or D.N.A. evidence corroborated [redacted]'s allegations of being subjected to a brutal sodomy. The simple explanation for the prosecution's failure to offer any corroboration of [redacted] story is that none existed and that the prosecution's own investigation revealed that none of the corrections officers or the inmate witnesses would have supported [redacted]'s account. As even the most superficial prosecutorial inquiry would have demonstrated the falsity of [redacted] allegations, the use of [redacted]'s false testimony must be deemed "knowing." As such, [redacted]'s conviction does not comport with due process and must be vacated.

Criminal Procedure Law §440.10(1)(c) provides that a criminal judgment may be vacated if:

> (c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false.

It has long been recognized that the "knowing" use of perjured testimony by the prosecution violates due process. See Pyle v. Kansas, 317 U.S. 213 (1942)(allegations that prosecution knowingly used false testimony to secure conviction sufficiently set forth a due process violation); Mooney v. Holohan, 294 U.S. 103, 112 (1935)(recognizing federal constitutional requirements for due process violated by the state's knowing use of perjured testimony); People v. Savvides, 1 N.Y.2d 554, 556(1956) (reversal due to prosecution's failure to correct witness's false testimony that he had not been promised any consideration for his testimony; use of false testimony, standing alone, warranted reversal regardless of quantum of proof, because trial could not be considered fair).

Moreover, the prosecution must be considered to have known what reasonable inquiry would reveal. See People v. Robertson, 12 N.Y.2d 355 (1963)(prosecution charged with knowledge of false testimony given by investigating detective because the giving of "carelessly false testimony is in its way as much of a fraud on the court as if it were deliberate"); United States v. Vozzella, 124 F.3d 389 (2d Cir. 1997)(government charged with knowledge of falsity of certain records where its ignorance was due to its decision not to fully investigate their authenticity); People v. Attiya, 128 Misc.2d 452, 458 (Sup. Ct. Kings Co. 1985), reversed on other grounds, 126 A.D.2d 733 (2d Dept. 1987); accord People v. Velez, 118 A.D.2d 116, 119 (1st Dept. 1986)(due process violated by prosecution's use of evidence that it knew or "should have known" was false).

Here, from the outset of this trial, the prosecution sought to shield any meaningful probing of [redacted]'s story and knowingly permitted him to misrepresent the facts. Before the trial even began, the prosecutor sought to limit any inquiry of [redacted] concerning his history of mental illness and romantic involvements while in prison. When defense counsel argued that [redacted]'s involvement with [redacted]rs was relevant because [redacted]rs was [redacted]'s boyfriend and thus had a reason to corroborate

[redacted]'s account, the prosecution did not contest that [redacted] and [redacted]s were romantically involved. Having failed to dispute the defense's factual allegation concerning the existence of a romantic relationship between [redacted]s and [redacted], the People are deemed to have conceded the truthfulness of that allegation. See People v. Wright, 86 N.Y.2d 591, 595-596 (1995)(People deemed to have conceded complainant's status as a police informant where they did not dispute it).

But when [redacted]s testified, he repeatedly and vehemently denied that he was in any way romantically linked to [redacted]. Even when confronted with medical records reflecting his concern for his "male companion" [redacted]e," [redacted] insisted that he had never been in any way interested in [redacted]s romantically. That this aspect of [redacted]s's testimony was false and should have been known by the prosecution to have been so, is plain. The medical records contained references to the romantic involvement of the two men. Inmates named on the prosecution's witness list, such as [redacted]ore and [redacted]eed actually saw the two men having sex in [redacted]s cell on the night of the alleged attack. See Exhibits L, M. Indeed, [redacted]d provided a sworn statement reflecting that he spoke with a member of the District Attorney's office. See Exhibit M. The note written by [redacted] to [redacted] reflected that [redacted] was "really in love with Bruce." See Exhibit K.

While the prosecution actively sought to prevent the jury from learning of the romantic relationship between the two men in the misguided belief that [redacted] homosexual relationships while in prison were not relevant, the existence of this relationship was indeed important to the jury's assessment of whether [redacted]s had any motivation to fabricate the allegations. [redacted]'s statement reflected that at least at the outset, it was [redacted]'s desire to get off the block to avoid further interference in his relationship with [redacted]s that drove [redacted] to allege that he was raped.

The prosecution's apparent lack of concern with [redacted]s lies about the nature of his

involvement with [redacted] does not comport with the law which mandates the prosecutor to correct any misrepresentation by a witness. "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." People v. Savvides, 1 N.Y.2d at 556. Here, rather than correct the lie, the prosecutor affirmatively sought to sustain it.

That [redacted] lied when he insisted that he had promptly reported the attack to numerous corrections officers was also plainly false and known by the prosecution to be so. The prosecution's proposed witness list cited Captain McMillan, Corrections Officer Rena Waxter, Corrections Officer Louis Almodovar and Corrections Officer Briggs as potential witnesses. All of these witnesses had prepared reports reflecting that Davis had never complained about being raped on the night of the incident. Unless the Bronx District Attorney's office failed to conduct any investigation into [redacted] allegations, that office knew that none of the corrections officer could corroborate [redacted] account and would in fact undercut it.

According to Waxter's sworn deposition testimony, [redacted] was not distraught on the night of the incident after being discovered in his cell with [redacted]. Rather, he was actually joking and happy, as he accompanied Waxter as she walked back to the security bubble. [redacted] insisted at trial that after he was let out of his cell, he was confronted and threatened by [redacted].

Similarly, the prosecution knew that [redacted] had been accused initially of being present during the attack. The prosecution disclosed reports reflecting [redacted] status as a perpetrator. [redacted] was apparently interviewed by someone in the district attorney's office. But when [redacted] consistently denied [redacted] involvement or presence in the cell, the prosecution objected to the introduction of the report demonstrating [redacted] status as a suspect.

The prosecution's argument that [redacted]s had no financial motive to fabricate his allegations was also a knowing prosecutorial misleading of the jury. The prosecutor, having spoken to [redacted] civil attorney days before the trial began, knew that [redacted] was contemplating filing a civil lawsuit based on his imprisonment on Rikers Island and the alleged rape. Thus, the prosecution was not at liberty to represent that [redacted] had no financial motive to fabricate his allegations. See People v. Wallert, 98 A.D.2d 47, 51 (1st Dept. 1983)(prosecution's arguing that complainant had no motive to fabricate allegations although aware of her intention to file a civil lawsuit, served to deny defendant due process).

In sum, virtually every aspect of [redacted]'s account was false and even a limited prosecutorial inquiry would have revealed it to be so. But instead of correcting [redacted]'s misrepresentations, the prosecution actively sought to suppress the truth in this case and actively aided [redacted] in misleading the jury. Such knowing use of false testimony is virtually never excusable and constitutes a per se violation of a defendant's right to a fair trial. See People v. Savvides, 1 N.Y.2d at 555-556.

The appellate record is inadequate to demonstrate that [redacted]s trial testimony was false and known to be so by the prosecution. Accordingly, this aspect of [redacted]ly's motion to vacate cannot be summarily denied pursuant to C.P.L. §440.10(2)(b). Moreover, as set forth in Point I, supra, the defense was hindered in its efforts to reveal [redacted] false testimony by the prosecution's suppression of material exculpatory evidence. Any deficiency in the record is not the result of a failure to exercise due diligence, but the misconduct of the prosecution. Accordingly, denying this aspect of [redacted]y's motion would be improper. See C.P.L. §440.10(3)(a). [redacted] is entitled to a hearing into these claims. See C.P.L §440.30(5).

POINT IV

MR. [redacted]'S CONVICTION, BASED ENTIRELY UPON THE PERJURED TESTIMONY OF J[redacted]VIS, DOES NOT COMPORT WITH DUE PROCESS REQUIREMENTS GUARANTEED BY BOTH THE STATE AND FEDERAL CONSTITUTION. U.S. CONST., AMEND. XIV; N.Y. CONST., ART. I, §6; C.P.L. §440.10(H).

"The greatest crime of all in a civilized society is an unjust conviction. It is truly a scandal which reflects unfavorably on all participants in the criminal justice system." People v. Ramos, 201 A.D.2d 78, 90 (1st Dept. 1994)(reversing first-degree rape conviction due to Brady violations committed by the Bronx District Attorney's office). Accordingly a due process violation occurs "if a state allows an innocent person to remain incarcerated on the basis of lies." Sanders v. Sullivan, 863 F.2d 218, 224 (2d Cir. 1988). Even if the prosecution did not know of the perjury at the time the witness testified, once it is revealed that the witness's testimony is untrue, the conviction cannot stand. Id.; accord People v. Deblinger, 179 Misc.2d 35, 41 (Sup. Ct. Kings Co. 1998), aff'd, 267 A.D.2d 395 (2d Dept. 1999), lve denied, 94 N.Y.2d 946 (2000)(vacating rape conviction pursuant to C.P.L. §440.10(h) because complainant's testimony authenticating exhibit was, after trial, proven to be false, which called into question the reliability of her entire testimony and "a criminal conviction based upon such suspect evidence violates due process under the New York and United States Constitution," even though prosecution did not know about the testimony's falsity); People v. Figueroa, 167 A.D.2d 101, 104 (1st Dept. 1990)("a conviction which is obtained based on evidence which is known to be false impairs a defendant's due process rights requiring reversal of that conviction").

The facts and holding of People v. Deblinger, supra, are instructive here. In Deblinger, the

defendant was convicted of numerous sex offenses based primarily on the testimony of his infant daughter. 179 Misc.2d at 35. The prosecution introduced the child's report card to raise an inference that her decline in academic performance was a result of the sexual abuse. Id. at 39. Although the defense initially challenged the admission of the report card on authenticity grounds, it ultimately withdrew the objection during trial and the report card was omitted. Id. at p. 35. After trial, through the use of forensic document analysis, it was demonstrated that the report card was a forgery and the court found that the complainant's testimony authenticating it was false. Id. at p. 35, 39. The court also found that the prosecution did not know about the evidence's falsity during the trial. Id. at pp. 38-39.

Nonetheless, the court vacated the conviction pursuant to C.P.L. §440.10(1)(h) finding that the crux of the case was the complainant's credibility because she was the sole witness to the abuse; there was no physical corroboration of the abuse, and the complainant's outcry was delayed. Id. at p. 39. Under these circumstances, the Deblinger court found that in a "single eyewitness case, consisting almost entirely of the uncorroborated testimony of the complainant, a finding that the complainant testified falsely about one aspect of the case calls into question the reliability of her entire testimony." Id. at pp. 40-41.

In this case virtually every aspect of [redacted]'s account of the sodomy has been proven to be false.

1) [redacted] Testified Falsely About Not Having Any Problems With Anybody On The Cell Block (Particularly [redacted]) And Thus No Motive To Lie About The Attack

At trial, [redacted] testified that he was friendly with the entire cell block and had never had any problems with anybody on the block until February 8, 1998. Specifically, [redacted] denied bearing any grudge against [redacted] and explicitly testified that they were friends until the attack.

[redacted]'s testimony is demonstrably false. It is undercut by [redacted]'s statement reflecting that [redacted] was upset after being found in his cell with his lover and was angry about the other prisoners "getting involved in his business." See Exhibit E, Unusual Incident Report at p. 3; Exhibit Q, [redacted] Statement. That [redacted] was upset about other inmates interfering in his "business" prior to lodging his charges, was further demonstrated by the note he sent to [redacted], stating that he [[redacted]] was in love with "[redacted]" and blaming [redacted] for interfering with his relationship with [redacted]. See Exhibit K. Similarly, the latent letter to [redacted] recovered through forensic testing of the original note to [redacted], demonstrates [redacted] concern that other "homeboys" were interfering with [redacted]'s and [redacted] "business." See Exhibit K. During his civil deposition [redacted] changed his previous testimony, and now claims that [redacted] was pressuring him to smuggle drugs into the cell block and had repeatedly threatened him before February 8, 1998. See Exhibit P, Davis I, at p. 68; Davis II, at pp. 14-15.

2) [redacted] Testified Falsely About the Nature of His Relationship with [redacted], A Material Fact In Light Of The Defense Position that These Allegations Were Made In Retaliation for the Defendants Interfering With that Relationship.

At trial [redacted] repeatedly insisted that he was never romantically interested in [redacted].

[redacted]'s testimony is demonstrably false. In the note he wrote to [redacted] admitted that he was "in love" with [redacted] and blamed Mr. [redacted] for interfering in their relationship. See Exhibit K. [redacted] and [redacted] romantic involvement was common knowledge to the inmates on the cell block as demonstrated by [redacted]'s and [redacted]'s affidavits. See Exhibits L and M. The existence of this relationship is further demonstrated by [redacted]son's statement reflecting that [redacted] was upset about "him and his partner being found together inside of a cell" See Exhibit E, and Exhibit Q. There was no dispute at trial that [redacted] was the person found in the cell with [redacted].

Under the facts of this case, where it was the defense theory that the allegations had been falsely made to retaliate for the defendants' interference in [redacted]'s relationship with [redacted], [redacted]'s lies about the nature of that relationship constituted a material misrepresentation.

3) [redacted] Testified Falsely About His Condition at the Time He Was Discovered in His Cell With [redacted] and The Timing Of His Outcry

At trial [redacted] claimed that when he was discovered in his cell with [redacted], he was crying hysterically and visibly distraught. He also claimed that he immediately reported the attack. Waxter's report prepared shortly after February 8, 1998, reflected that nothing unusual had happened during her meal relief tour that day. This aspect of [redacted]'s testimony is further refuted by Waxter's sworn deposition testimony which established that [redacted] "kind of made a joke" of being caught in his cell with a fellow inmate. Exhibit N at p. 23. Also, Waxter testified that [redacted] accompanied her as she walked away from his cell towards the security bubble. Shortly thereafter, she observed [redacted] chatting with another inmate in the pantry area at which time [redacted] accused her of being "nosy" and interfering with his "girl talk." Id. at p. 36. Waxter and [redacted] both laughed at this joke. Id. Of

course, according to [redacted]'s trial testimony, immediately after coming out of the cell he was confronted once again by [redacted] and engaged in an angry argument.

Similarly Corrections Officer Louis Almodovar's report and deposition testimony reflect that [redacted] never complained to him on the evening of the alleged attack, despite [redacted]'s assertions to the contrary. The report prepared by Corrections Officer Briggs also reflects the delay in [redacted]'s outcry as does the Unusual Incident Report. See Exhibit E. The investigators for the Department of Corrections concluded that "it is only after over twelve (12) hours after the alleged occurrence that inmate [redacted] notified any staff of his allegation, and it is highly unlikely that any staff member would have ignored inmate [redacted]'s allegation."See Exhibit E, at p. 4.

4) [redacted] Testified Falsely About Being Confronted by [redacted] and [redacted] After Being Discovered in His Cell With [redacted].

According to [redacted]'s trial testimony, immediately after he was discovered in his cell by the female meal relief corrections officer, he was again confronted and threatened by [redacted] and [redacted]. This aspect of [redacted]'s testimony is belied by the sworn deposition testimony of that corrections officer, Rena Waxter, who remembered that [redacted] accompanied her as she walked down the tier and who observed [redacted] engaging in "girl talk" with a fellow inmate in the pantry area after coming out of his cell. See Exhibit N, at p. 36. At his deposition [redacted] testified that the attack took place shortly after 7:00 p.m. [redacted]'s telephone records reflect that he was speaking on the telephone at 7:17 p.m.. The telephones are located near the security bubble, near the pantry area, a good distance from the place where [redacted] was allegedly confronting [redacted]. See Exhibit G. There is also a clinic log that exists that could potentially demonstrate that [redacted] was not on the cell block for a substantial amount of time between 7:00 p.m. and 8:00 p.m.

5) Davis Testified Falsely About Being the Victim of A Sexual Attack

At trial, not a single witness came forward to corroborate [redacted]'s account. The reason for this utter lack of corroborating evidence is simple. There was no attack. Virtually every single person on the cell block who was in a position to verify [redacted]'s claims, has provided statements refuting them. [redacted]vers has provided a sworn statement that [redacted] lied about being attacked. [redacted] has provided a sworn statement that [redacted] lied about being attacked. [redacted] has also provided such a statement. Sworn statements by Corrections Officers Rena Waxter and Louis Almodovar reflect that [redacted] lied about his condition when he was discovered in his cell with [redacted] and the timing of his outcry. [redacted] has provided a sworn statement reflecting that [redacted] admitted he was going to "concoct a sex scandal" to gain a transfer off the block. Documentary evidence conclusively demonstrates that [redacted] lied when he denied any romantic interest in [redacted]. That same evidence demonstrates that [redacted] lied when he testified he bore no grudge against [redacted] before he made these allegations.

Thus, this conviction is based on nothing but lies. "It is simply intolerable" for New York state to allow [redacted] to remain incarcerated on the basis of such testimony. See Sanders v. Sullivan, 863 F.2d at 224. The failure of New York's courts to investigate these claims would violate the "fundamental fairness essential to the very concept of justice" which underlies the federal and state constitutional due process guarantees. Id. Under these circumstances, the summary denial of this claim would constitute an abuse of the court's discretion and would not further "the interest of justice". See C.P.L. §440.10(3); accord People v. Deblinger, supra. (although during trial defense withdrew its original objection to the authenticity of the forged report card, trial court conducted hearing into whether its introduction denied the defendant due process).

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, [redacted]'S DECEMBER 23, 1999, BRONX COUNTY CONVICTION SHOULD BE VACATED PURSUANT TO C.P.L. §440.10(1)(C)(F)(G)AND(H); IN THE ALTERNATIVE, A HEARING SHOULD BE CONDUCTED INTO THESE CLAIMS PURSUANT TO C.P.L. §440.30(5).

Respectfully Submitted,

ROBERT S. DEAN
Attorney for [redacted]

Claudia S. Trupp
Of Counsel
October 22, 2001

Exhibit "B"

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

[redacted],

Defendant.

NOTICE OF MOTION

New York County
Ind. No. 1152/01

PLEASE TAKE NOTICE, that upon the annexed affirmation of David J. Klem, Esq., the annexed exhibits, the annexed memorandum of law, and upon all the prior proceedings herein, the undersigned will move in the Supreme Court, New York County, before the Hon. Micki Scherer, at 100 Centre Street, New York, New York 10013, at 10:00 a.m., on August 25, 2003, or as soon thereafter as counsel can be heard, for an order to vacate defendant's plea pursuant to C.P.L. § 440.10(1)(h), and granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 28, 2003

ROBERT S. DEAN
Center for Appellate Litigation
Attorney for Defendant
74 Trinity Place - 11th Floor
New York, NY 10006
(212) 577-2523

DAVID J. KLEM
Of Counsel
(212) 577-2523 (ext. 43)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

[redacted]

Defendant.

AFFIRMATION OF DAVID J. KLEM, ESQ. IN SUPPORT OF § 440.10 MOTION TO VACATE DEFENDANT'S PLEA

New York County
Ind. No. 1152/01

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID J. KLEM, an attorney at law, duly admitted to practice in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following statements are true or, if stated on information and belief, that he believes them to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by the Appellate Division, First Department, on January 23, 2003, to represent defendant on appeal from a judgment of the Supreme Court, New York County, rendered on June 6, 2001 (Scherer, J., at plea and sentence). (The Appellate Division's Order of Assignment is attached hereto as Exhibit A).

2. I make this affirmation in support of defendant's motion, pursuant to C.P.L. § 440.10(1)(h), to vacate his guilty plea as unknowing and involuntary because he was neither informed of nor otherwise aware of the five-year period of post-release supervision, which he automatically received pursuant to C.P.L. § 70.45, when he entered his plea of guilty.

3. By indictment number 1152/01, [redacted] was charged with attempted second-degree murder, first-degree assault, and reckless endangerment in the first degree, arising out of a February 17, 2001, incident.

4. On May 23, 2001, [redacted] entered a plea of guilty to first-degree assault with a promised sentence of 10 years' incarceration to cover the indictment. No transcript of that plea is available. (The affidavit of Court Reporter Claudine Davidson is attached hereto as Exhibit B.)

5. On June 6, 2001, Your Honor sentenced Mr. [redacted], as a first-felony offender, to a term of 10 years' incarceration. (A copy of the June 6, 2001, transcript is attached hereto as Exhibit C.) During the sentencing proceedings, the prosecutor stated that the "People rely on the promised sentence of ten years." (Exhibit C, at 3). Defendant's counsel, Lorraine Brown, Esq., similarly relied "on the promise." (Exhibit C, at 3). Defendant stated that he "believe[d] the sentence [to be] uncalled for . . . but [he agreed to] accept the ten years." (Exhibit C, at 3). Your Honor then recounted how the Court had offered defendant a sentence of "ten years" despite the People's recommendation of 12 years and that defendant had plenty of opportunity to discuss the plea with his attorney and that the plea had been entered knowingly and voluntarily. (Exhibit C, at 3-4). The Court imposed "a determinate sentence of ten years" "as . . . promised." (Exhibit C, at 4).

6. [redacted] swears that no mention was made on the record at the time of plea or sentence of the five-year period of post-release supervision that would automatically be included with his determinate sentence. ([redacted] sworn affidavit is attached hereto as Exhibit D). The minutes of the sentencing show no mention of any

period of post-release supervision. (Exhibit C). Even the Sentence and Commitment sheet makes no mention of post-release supervision. (A copy of the Sentence and Commitment sheet is attached hereto as Exhibit E).

7. Not only was [redacted] never informed on the record of any period of post-release supervision, but [redacted] swears that he never learned of post-release supervision until long after his plea and sentence (Exhibit D, at ¶¶ 4-6).

8. Lorraine Brown (now Lorraine McEvilley) and Robert Bigelow, attorneys with the Legal Aid Society, represented Mr. [redacted] at his plea and sentence. I have spoken with both Ms. McEvilley and Mr. Bigelow, who have informed me that they have no specific recollection of having spoken with Mr. [redacted] about post-release supervision.

9. My office has contacted Bonnie Goldburg, the Managing Attorney of the Criminal Appeals Bureau of the Legal Aid Society. Ms. Goldburg reviewed her office's case file on this case and informed my office that no reference to post-release supervision exists in the file.

10. Despite the Court not specifying the fact, the defendant not being informed of the fact, and the defendant never learning of it from any other source, [redacted] received a sentence that included five years of post-release supervision in addition to the agreed upon determinate sentence. See Memorandum of Law (discussing C.P.L. § 70.45).

11. Had [redacted] known of the term of post-release supervision, he would not have pleaded guilty. (Exhibit D, at ¶ 7). Having now learned of that term of post-release supervision and now knowing that the amount of time he could be incarcerated as well as the amount of time he is under parole supervision is longer than he had originally believed,

Mr. Feehan seeks to have his plea vacated. (Exhibit D, at ¶ 1).

12. Post-release supervision is a direct consequence of pleading guilty and thus a defendant must be aware of it at the time of his plea in order for the plea to be considered knowing and voluntary. The record here is silent on post-release supervision, and because [redacted] was not advised about it by his attorney, the Assistant District Attorney, or the Court, and because [redacted] did not learn of it from any other source, his plea must be vacated. (See Memorandum of Law).

WHEREFORE, it is respectfully requested that defendant's guilty plea to first-degree assault be vacated. Alternatively, it is requested that a hearing be held on the matter.

Dated: New York, New York
July 28, 2003

DAVID J. KLEM, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 81

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

[redacted],

Defendant.

MEMORANDUM OF LAW

NY Ind. No. 1152/01

ARGUMENT

DEFENDANT'S GUILTY PLEA WAS UNKNOWING AND INVOLUNTARY BECAUSE HE WAS NEVER INFORMED OF THE POST-RELEASE SUPERVISION PERIOD. (U.S. Const. amend. XIV; N.Y. Const. art. 1 § 6).

Although [redacted] agreed to, was informed of, and pleaded guilty in return for a determinate sentence of 10 years, by operation of statute he was also sentenced to an undisclosed period of five years of post-release supervision. No mention of post-release supervision was made at either the plea or sentence. The defendant had no actual knowledge that the five-year period of post-release supervision would automatically be included with his agreed-upon determinate sentence, and he would not have accepted the plea bargain had he known of the supervisory period. The failure to inform defendant of his post-release supervision, and its attendant risks of five additional years of incarceration, renders defendant's plea unknowing and involuntary. Therefore, defendant's guilty plea must be vacated. U.S. Const., amend. XIV; N.Y. Const., art. I, § 6; Bousley v. United States, 523 U.S. 614 (1998).

A. Background

During the plea discussions no mention was made of post-release supervision by defendant's attorneys, the Court, the prosecutor, or anyone else (Exhibit D, at ¶¶ 4-6; Klem's Affirmation, at ¶¶ 6-9). At sentencing, the Court again made no mention of post-release supervision. The Court merely reiterated that it would impose its "promised" sentence of "a determinate sentence of ten years" (Exhibit C, at 4). Never once was Mr. [redacted] told that the promised determinate sentence included a five year period of post-release supervision. (Exhibit C; Exhibit D, at ¶¶ 4-6).

Despite the fact that no mention was ever made of post-release supervision, by operation of statute, such a sentence was in fact imposed. Section 70.45 of the Penal Law states, in relevant part, that "[e]ach determinate sentence also includes, as a part thereof, an additional period of post release supervision." For a class B violent felony, such as assault in the first degree, the mandatory supervision period is five years, unless a shorter period of not less than two and a half years is specified by the court at sentencing. P.L. §70.45(2). Notably, despite [redacted]'s eligibility for a shorter period of post-release supervision, counsel made no such request. Sentencing courts do not have discretion to exclude the post-release supervision period from a determinate sentence.

Post-release supervision can increase [redacted]'s agreed-upon sentence. The period of post-release supervision will not begin to run until [redacted] is released from imprisonment. P.L. § 70.45(5)(a). A violation of the conditions of post-release supervision "shall subject the defendant to a further period of imprisonment of at least six months and up to the balance of the remaining period of post-release supervision, not to exceed five years." P.L. § 70.45(1)(3). Post-release supervision is unlike parole, mandating six-

months reincarceration for a violation of the conditions of supervision. As a result, it poses a far greater likelihood of reincarceration than parole.

While no statistics are yet available for post-release supervision, the re-incarceration rate for parolees tops 40% in the three years after their release. Jennifer Gonnerman, Life Without Parole?, N.Y. Times Magazine, May 19, 2002; U.S. Dep't of Justice, Bureau of Justice Statistics, Trends in State Parole, 1990-2000, at 10 (Oct. 2001). In 1999 in New York State, 31½% of all admissions to the prison system, were parole violators. Trends in State Parole, 1999-2000, at 13. The New York State Division of Parole acknowledges that "more parolees are being returned to prison for parole violations than ever before." New York State Division of Parole, Reducing the Number of Parole Violators in Local Correctional Facilities in New York State (available at <http://www.parole.state.ny.us/jailpopmaninit.html>). In New York, 13% of parolee's are locked up every year for technical violations alone. Gonnerman, Life Without Parole? In 1998-99, 10,619 out of 67,571 parolees were returned to prison. New York State Division of Criminal Justice Services, Coordinated Parole Case Management Program - Program Abstract (available at <http://www.criminaljustice.state.ny.us/ofpa/pdfdocs/coorparolecase.pdf>). Thus, despite Mr. Feehan only agreeing to a term of ten years' incarceration, he faces a realistic possibility of being kept in custody much longer than that term.

B. Post-Release Supervision is a Direct Consequence of Pleading Guilty.

Due process requires that a defendant's plea be a voluntary and knowing choice made with a full understanding of the attendant ramifications. See People v. Ford, 86 N.Y.2d 397, 402-03 (1995) (citing Boykin v. Alabama, 395 U.S. 238, 244 (1969)). While

a court cannot foresee and inform a defendant of all of the collateral consequences that arise out of the defendant's unique personal situation, the court has a constitutional duty to inform the defendant of the direct consequences of accepting a guilty plea. People v. Ford, 86 N.Y.2d at 403. The "direct" consequences of which a defendant must be informed are those having a "definite, immediate and largely automatic effect" on the defendant's punishment. Id. at 403.

Courts have repeatedly distinguished direct consequences from those that are merely collateral. Examples of such collateral consequences to a guilty plea include deportation, the discontinuance of work release and college programs for inmates, loss of civil service employment, loss of a driver's license, loss of a passport, and an undesirable discharge from the armed services. These have been deemed collateral because they are generally the result of an action taken by an agency outside of the court's control and are not "definite, immediate and largely automatic." Id.; People v. Berezansky, 229 A.D.2d 768, 770 (3d Dept. 1996); United States v. Crowley, 529 F.2d 1066, 1072 (3d Cir. 1976); Moore v. Hinton, 513 F.2d 781, 782-83 (5th Cir. 1975); Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964); Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963).

Statutorily mandated post-release supervision that automatically appends to a determinate sentence cannot be considered merely a collateral consequence to pleading guilty. Rather, the five-year supervisory period imposed in the instant case amply satisfies the Ford criteria for the type of direct consequence to a guilty plea that a defendant must be made aware of at the time of pleading. Such a consequence cannot possibly be dismissed as comparable to the loss of the right to have a passport or a driver's license. A class B violent felony, such as assault in the first degree, automatically includes post-

release supervision by statute in every determinate sentence as a "part thereof," and commences automatically upon release. P.L. §§ 70.45(1), (5). The sentencing court lacks the discretion to exclude the supervision from a defendant's sentence. Thus, in the absence of court specification reducing the supervisory period (to no less than two-and-one-half years), a five year period is automatically applied immediately upon sentencing. Consequently, the period of post-release supervision has a "definite, immediate and largely automatic effect" on the defendant's punishment.

Not surprisingly, every court that has ruled on this issue has agreed that post-release supervision has an automatic, direct, and definite effect on a defendant's punishment. In People v. Goss, 286 A.D.2d 180 (3d Dept. 2001), the Third Department concluded that post-release supervision is a direct consequence of a plea that if not told to a defendant renders the plea involuntary. Id. at 183-84. The Goss court considered a defendant who pleaded guilty on the understanding that he would receive a twelve-year determinate sentence, but who was not advised during his plea colloquy that five years of post-release supervision would automatically follow that determinate sentence. The Third Department held unequivocally that "postrelease supervision in this context is a direct consequence of defendant's plea. Since defendant was not advised of it prior to entering the plea, he should have been permitted to withdraw his guilty plea." Id. at 311 (citations omitted). The Goss decision emphasizes the trial court's constitutional duty to ensure that a defendant has a full understanding of the connotations and consequences of his guilty plea, and the prerequisite that a defendant be informed of each essential component of his sentence for a guilty plea to be deemed knowing and voluntary.

The other published opinions in this State have agreed with Goss. The Second

Department, for example, has explicitly held that "under New York's statutory scheme [post-release supervision] has a 'definite, immediate and largely automatic effect on [a] defendant's punishment' and is therefore a direct consequence of a plea about which a defendant must be informed before the plea is entered." People v. Melio, 304 A.D.2d 247 (2d Dept. 2003). The "failure to advise a defendant of the statutorily required postrelease supervision requires that he be permitted to withdraw his guilty plea." People v. Jachimowicz, 738 N.Y.S.2d 770, 770 (3d Dept. 2002); see also People v. Vahedi, ___ A.D.2d ___, 758 N.Y.S.2d 874 (3d Dept. 2003); People v. Jaworski, 296 A.D.2d 597 (3d Dept. 2002); People v. Rawdon, 296 A.D.2d 599 (3d Dept. 2002); People v. Yekel, 288 A.D.2d 762 (3d Dept. 2001); People v. Owens, 192 Misc. 2d 101 (Richmond Cty. Sup. Ct. 2002). Reviewing courts have, therefore, uniformly agreed that post-release supervision is a direct consequence of pleading guilty without knowledge of which a defendant's plea cannot be considered knowing and voluntary.

Although the First Department has yet to specify that post-release supervision is a direct consequence, see People v. Ammarito, ___ A.D.2d ___, 2003 WL 21357327 (1st Dept. 2003) ("not reach[ing] the issue of whether PRS is a direct consequence of certain guilty pleas"),[1] this Court is not free to simply reject the holdings of the numerous courts that have so found. As this Court undoubtedly recognizes, New York has a unified court system. Under that system "[t]he Appellate Division is a single statewide court divided into departments for administrative convenience." Mountain View Coach Lines, Inc. v. Storms,

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[1] See also People v. Rosenthal, ___ A.D.2d ___, 760 N.Y.S.2d 460 (1st Dept. 2003) (avoiding issue by reducing defendant's sentence, in the interest of justice, from five years' incarceration plus two years' PRS to three years' incarceration plus two years' PRS).

102 A.D.2d 663, 664 (2d Dept. 1984). Because those appellate departments are part of a single system, "the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." Id. Therefore, because the cases cited above are the only appellate decisions on point, this Court must follow "the correct procedural course in holding those cases to be binding authority." Id.; see also People v. Shakur, 215 A.D.2d 184, 185 (1st Dept. 1995) ("Trial courts within this department must follow the determination of the Appellate Division in another department until such time as this court or the Court of Appeals passes on the question.").[2]

As with the defendants in Goss and its progeny, [redacted] had no knowledge that his guilty plea would result in the direct consequence of five years of post-release supervision. [redacted] believed that he would be incarcerated for no more than 10 years. Because the five years of post-release supervision automatically added to his sentence without his knowledge, he faces an additional period of incarceration. He has thus been denied the benefit of his bargain. See People v. Jachimowicz, 738 N.Y.S.2d at 771 (finding that defendant who received a twelve-year determinate sentence lost the benefit of the bargain when given four years of post-release supervision in addition to the

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[2] Those State court decisions finding that post-release supervision is a direct consequence of a plea are consistent with federal court rulings. Federal courts have considered the nearly identical issue of "special parole" – a period immediately following defendant's release wherein a violation would result in defendant's reconfinement for the entire length of the parole term – and have uniformly classified such a period of statutorily "mandatory" or "special" parole as a direct consequence of a guilty plea, without knowledge of which a defendant has the right to have his plea vacated. See Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974) (stating that defendant should be advised that special parole will be imposed and he must be asked by the court if he understands that fact); Ferguson v. United States, 513 F.2d 1011, 1011-12 (2d Cir. 1975) (vacating drug plea where sentencing court did not inform defendant of non-discretionary special parole period of supervised release).

agreed upon four-year prison term). As in Jachimowicz, [redacted] bargained for a known, determinate sentence and subsequently received an additional unbargained for period of post-release supervision, causing him to lose the benefit of the bargain.

C. Defendant Would Have Opted for Trial Had He Been Informed of PRS

[redacted] would not have accepted the plea had he known about the five years of post-release supervision. To the extent that a retroactive hypothetical analysis of Mr. Feehan's subjective state of mind is appropriate – and defendant maintains that it is not – a hearing on the issue would be appropriate if the People dispute [redacted]'s sworn allegations.

Several courts have seemingly considered the issue of the effect that knowledge of post-release supervision would have had on a defendant's decision to plead guilty. See, e.g., People v. Ammarito, ___ A.D.2d at ___, 2003 WL 21357327 (agreeing with the motion court's finding, after a hearing, "that knowledge of the PRS component of the sentence would not have affected defendant's decision to plead guilty"); People v. Melio, 304 A.D.2d at ___ (applying "harmless error analysis" to such claims and directing that a hearing be held to determine whether the defendant would have pled guilty despite the imposition of PRS). Other courts, however, have rejected that analysis. See, e.g., People v. Jaworski, 296 A.D.2d 597; People v. Jachimowicz, 738 N.Y.S.2d 770; People v. Goss, 286 A.D.2d 180; People v. Owens, 192 Misc. 2d 101. Defendant maintains that such an inquiry is only relevant when the claim concerns ineffectiveness of counsel, not where – as here – the claim is solely that the defendant was not informed or otherwise aware of a direct consequence of his plea. Defendant would object to any ruling that the hypothetical

effect knowledge would have had on defendant's decision to plead is relevant to this claim or otherwise an appropriate matter for a hearing.

An analogy may help elucidate defendant's position. If a defendant were to enter a plea with an understanding that he would be sentenced to two years' incarceration, but thereafter he received a sentence of three years' incarceration (perhaps because that was the minimum allowable sentence), we maintain that such a result is violative of due process. The defendant in that situation would be entitled to get his plea back regardless of whether he might have pleaded guilty in exchange for a three year sentence. See People v. Selikoff, 35 N.Y.2d 227, 238-39 (1974); Santobello v. New York, 404 U.S. 257, 260 (1971). The fact remains that the defendant in that hypothetical pled guilty in exchange for a two year sentence and he could not, absent his consent, be sentenced to three years under that plea. Similarly, here, Mr. Feehan entered a plea to a ten year sentence, yet he received a sentence in excess of ten years. Whether or not he might have accepted that longer sentence is immaterial to his claim that his current sentence in excess of his agreed upon sentence is violative of due process.

To the extent that the effect, if any, that knowledge of post-release supervision would have had on Mr. Feehan's decision to plead guilty is relevant – and, again, we submit that it is not – that issue is, at most, one of harmless error. See People v. Melio, 304 A.D.2d at ___. Because the requirement that a plea be both knowing and voluntary is a rule of constitutional magnitude, if any rule of harmless error would be applicable, it would be a constitutional harmless error analysis. Pursuant to that standard, once a defendant establishes that he was unaware of a direct consequence of his plea, the burden would shift to the prosecution to establish beyond a reasonable doubt that there is no

reasonable possibility that had he timely been made aware of that direct consequence, he would not have pleaded guilty. See generally Chapman v. California, 386 U.S. 18 (1967); Fahy v. Connecticut, 375 U.S. 85 (1963); People v. Crimmins, 36 N.Y.2d 230, 237 (1975). In any event, if the People dispute [redacted]'s sworn contention that he would not have entered a guilty plea had he been informed of post-release supervision and if this Court overrules defendant's objections to that inquiry, then a hearing on the issue must be held. See People v. Ammarito, ___ A.D.2d at ___, 2003 WL 21357327 (affirming after a hearing); People v. Melio, 304 A.D.2d 247 (remanding for a hearing).

C. A § 440 Motion Is the Appropriate Vehicle in Which to Raise this Claim

This claim is properly before the Court on a C.P.L § 440.10 motion. "The voluntariness of a plea is challenged prior to sentencing by a motion to withdraw the plea under CPL 220.60, or after sentencing by a motion to set aside the plea under CPL 440.10." People v. Latham, 90 N.Y.2d 795, 798 (1997) (emphasis added); see also People v. Ford, 86 N.Y.2d 397 (considering voluntariness issue on merits after motion to vacate conviction had been converted into a C.P.L. § 440.10 motion); People v. Higgins, 304 A.D.2d 773 (2d Dept. 2003) (ruling that issue of PRS cannot be raised in the first instance on direct appeal but should be brought by way of a motion to vacate in the trial court); People v. Wilson, 296 A.D.2d 430 (2d Dept. 2002) (same); People v. Jachimowicz, 738 N.Y.S.2d at 771 (vacating plea, on direct appeal, in the interest of justice but holding that defendant should have pursued a post-conviction motion in county court).

* * * *

In sum, post-release supervision is a direct consequence of pleading guilty about which a defendant must be informed in order to render his plea knowing and voluntary. The record here is silent on post-release supervision, and [redacted] was not so informed by his attorney. [redacted] had no actual knowledge of the supervisory period at the time of pleading, and he lost the benefit of his plea bargain. That alone requires this Court to grant his motion to vacate his plea. To the extent that this Court determines that an inquiry into [redacted]'s state of mind is necessary, defendant maintains that a hearing should be held at which time the People would have the burden to establish that the error in failing to inform [redacted] of a direct consequence of his plea was harmless beyond a reasonable doubt.

CONCLUSION

FOR THE REASONS STATED HEREIN, DEFENDANT'S PLEA MUST BE VACATED.

Respectfully Submitted,

Robert S. Dean
Attorney for Defendant

DAVID J. KLEM
Of Counsel
July 28, 2003

Exhibit "C"

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 52

- X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : NOTICE OF MOTION

-against- : Ind. Nos. [redacted]
and [redacted]

[redacted], :

Defendant. : New York County

- X

PLEASE TAKE NOTICE that upon the annexed affirmation of DAVID J. KLEM and the exhibits thereto; the annexed memorandum of law; the transcript of the sentence herein; and all prior proceedings had herein; the undersigned will move this Court, at a Criminal Term thereof (Budd G. Goodman, J.), at the Courthouse, 100 Centre Street, Part 52, New York, New York, on the 13th day of April 2000, at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, for an order, pursuant to C.P.L. § 440.20(1), directing that defendant's sentence be set aside and resentencing held.

Dated: New York, New York
March 20, 2000

ROBERT S. DEAN
Attorney for Defendant
Center for Appellate Litigation
74 Trinity Place
New York, New York 10006

DAVID J. KLEM
Of Counsel
(212) 577-2523 (ext. 22)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 52

- X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- : AFFIRMATION

[redacted], :

Defendant. :

- X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID J. KLEM, an attorney at law, duly admitted to practice in the Courts of the State of New York, hereby affirms, under penalty of perjury, that the following statements are true, or, if stated on information and belief, that he believes them to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by the Appellate Division, First Department, on July 1, 1999, to represent defendant on appeal from two judgments rendered in this Court, on August 11, 1998, convicting him after a consolidated trial of robbery in the second degree and bail jumping in the second degree and sentencing him, as a second violent felony offender, to consecutive prison terms of eight years determinate and one-and-one-half to three years

indeterminate. (The Appellate Division's Order of Assignment is attached hereto as Exhibit A).

3. Defendant has not perfected his direct appeal pending the outcome of this motion.

4. I make this affirmation in support of defendant's motion, pursuant to C.P.L. § 440.20(1), to set aside his sentence as unlawful and to order a resentencing.

5. On June 3, 1998, a jury returned a verdict of guilty against defendant for robbery in the second degree and bail jumping in the second degree based on allegations that the defendant shoplifted from a Conway's department store on May 19, 1996, and that on May 12, 1997, while out on bail in the robbery case, he did not return to court voluntarily and was bench warranted. The robbery and bail jumping charges had been consolidated for trial.

6. On August 11, 1998, this Court sentenced the defendant on the robbery and bail jumping charges to consecutive terms of imprisonment of eight years determinate and one-and-one-half to three years indeterminate, respectively. Prior to sentencing, the prosecutor stated that the bail jumping and robbery sentences had to be run "consecutive, as it must by law." (See Aug. 11, 1998, sentencing transcript, attached hereto as Exhibit B, at 3).

In imposing sentence, the Court stated "that sentence must run consecutive." (Exhibit B, at 6).

7. For the reasons set forth in the accompanying memorandum of law, defendant maintains that the Court misconstrued its authority. It had the authority to impose a concurrent sentence. However, because of its misunderstanding, the Court improperly felt obligated to sentence the defendant to consecutive terms. Thus, the sentence should be set aside and a new sentencing proceeding held.

WHEREFORE, it is respectfully requested that defendant's sentence be set aside and resentencing ordered.

Dated: New York, New York
March 20, 2000

DAVID J. KLEM

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM: PART 52

- X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, : MEMORANDUM OF LAW

-against- : Ind. Nos. [redacted] and [redacted]

[redacted], :

New York County

Defendant. :

- X

ARGUMENT

DEFENDANT'S SENTENCE MUST BE SET ASIDE AND RE-SENTENCING ORDERED BECAUSE THE COURT MISUNDERSTOOD ITS POWER TO IMPOSE EITHER A CONCURRENT OR A CONSECUTIVE SENTENCE

Although [redacted] was convicted of bail jumping as well as robbery, the Court had authority to run the sentences either concurrently or consecutively. Because the Court failed to appreciate its authority in that respect, [redacted] sentence must be set aside and a new sentencing procedure held.

The Court's authority to run additional sentences concurrently or consecutively is fully governed by statute. Penal Law Section 70.25 controls the situation at issue here. Subsection 2-c of that statute states that "[w]hen a person is convicted of bail jumping in the second degree . . . and while released on recognizance or bail in connection with a pending

indictment . . . of which he is subsequently convicted, and if an indeterminate sentence of imprisonment is imposed in each case, such sentences shall run consecutively." (Emphasis added). Mr. Green, however, received a determinate sentence of imprisonment for the underlying felony (second-degree robbery), and therefore that statutory requirement that the sentences be consecutive does not apply. Instead, under subsection 1 of that statute, the Court had the authority to impose either consecutive or concurrent sentences.

Judge Donnino is his practice commentaries to that statute highlighted the differing rules that govern when a defendant is subject to a determinate as opposed to an indeterminate sentence on the underlying felony:

> [I]f an indeterminate sentence is imposed for the bail jumping . . . and a determinate sentence of imprisonment is imposed on the other felony, the court is not required to make the sentences consecutive. On the other hand, the only way a determinate sentence could be imposed under the 1995 legislation would be if the underlying felony was a violent felony offense and the defendant was a second or persistent violent felony offender. In that case, even concurrent sentences would be substantial.
>
> [William C. Donnino, Practice Commentaries, to N.Y. Penal Law § 70.25, at 472(McKinney 1998) (emphasis added).]

Here, [redacted]n was arraigned and sentenced as a second violent felony offender on the second-degree robbery charge

and was thus properly subject to a determinate sentence. See P.L. § 70.04(3). Accordingly, the Court had full discretion to sentence him on the bail jumping conviction to an indeterminate prison term that would run either concurrently or consecutively to the determinate sentence that was set on the robbery conviction.

The Court, following the prosecution's misapprehension, misconstrued its authority. During the sentencing proceeding, the prosecutor recommended that the Court impose on [redacted] a sentence for bail jumping to run "consecutive, as it must by law." Exhibit B, at 3. The Court in imposing consecutive sentences similarly misapprehended its authority and stated that "[o]f course, that sentence must run consecutive." Exhibit B, at 6.

When sentencing courts misconstrue their sentencing discretion, the remedy is a new sentencing proceeding. E.g., People v. Yant, 223 A.D.2d 747 (2d Dept. 1996) ("The sentencing court's misapprehension regarding its discretion . . . to impose a sentence of imprisonment that is to run concurrently with a sentence previously imposed . . . requires that the defendant be resentenced."); People v. Jimenez, 209 A.D.2d 719 (2d Dept. 1994) (same); People v. Vega, 181 A.D.2d 635 (1st Dept. 1992) ("[A] misapprehension by the sentencing court regarding its discretion . . . to impose a term

concurrent . . . requires a resentencing of defendant."); People v. Jeffries, 166 A.D.2d 665 (2d Dept. 1990) ("[T]he court apparently believed that the Penal Law mandated consecutive sentencing. Because the sentence may have been based on the court's misapprehension of the law, we remit to the Supreme Court for resentencing . . ."); People v. Carrelero, 107 A.D.2d 588 (1st Dept. 1985) (same and noting that the remand was "to allow a complete exercise of sentencing discretion by the trial court").

In sum, because the Court misapprehended its authority to impose a concurrent sentence, [redacted]'s sentence must be vacated, see C.P.L. § 440.20(1), and resentencing ordered, see C.P.L. § 440.20(4). While this issue could have been raised on defendant's direct appeal, C.P.L. § 440.20(1) also permits the claim to be made in the first instance to the sentencing court so long as the defendant has not yet had his claim decided by an appellate court. See C.P.L. § 440.20(2). Because [redacted] has not yet perfected his direct appeal, this Court has authority to correct the illegally imposed sentence. At resentencing, defendant will present argument as

to why a lower sentence than originally given should be imposed.

CONCLUSION

FOR THE REASONS STATED, DEFENDANT'S SENTENCE MUST BE SET ASIDE AND A NEW SENTENCING PROCEEDING ORDERED.

Respectfully submitted,

ROBERT S. DEAN
Attorney for Defendant

DAVID J. KLEM
Of Counsel
March 2000

Exhibit "D"

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK, : NOTICE OF MOTION FOR AN ORDER GRANTING

Respondent, : AN ENLARGEMENT OF TIME IN WHICH TO PERFECT

-against- :

Bronx Cty.

[redacted] : Ind. [redacted]

Defendant-Appellant. :

----------X

PLEASE TAKE NOTICE that upon the annexed affirmation of DAVID J. KLEM, and upon all the prior proceedings herein, the undersigned will move this Court, at a term for motions thereof at the Courthouse, 27 Madison Avenue, New York, New York 10010, on October 21, 2002, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order enlarging appellant's time in which to perfect until the May 2003 Term.

Dated: New York, New York
October 7, 2002

Yours, etc.,
ROBERT S. DEAN
CENTER FOR APPELLATE LITIGATION
Attorney for Defendant-Appellant
Center for Appellate Litigation
74 Trinity Place - 11th Floor
New York, New York 10006
(212) 577-2523

TO: MOTIONS CLERK
Appellate Division
First Department
27 Madison Avenue
New York, New York 10010

HON. ROBERT JOHNSON
District Attorney
Bronx County
215 East 161st Street
Bronx, New York 10451

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK	:	
Respondent,	:	
-against-	:	AFFIRMATION
[redacted],	:	Bronx Cty. Ind. 7708/98
Defendant-Appellant.	:	

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

DAVID J. KLEM, an attorney duly admitted to practice in the Courts of this State, does hereby affirm under the penalties of perjury that the following statements are true, except those made upon information and belief, which he believes to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by this Court on January 10, 2002, to represent appellant on appeal from a judgment rendered in the Supreme Court, Bronx County, on December 21, 2000, convicting him of manslaughter in the first degree and sentencing him to a prison term of ten years (Donnino, J., at plea and sentence). Appellant is presently confined pursuant to that judgment.

2. I make this affirmation in support of appellant's motion to enlarge the time in which to perfect his direct appeal in order to complete the pending litigation on his C.P.L. § 440.10 motion.

3. I have been authorized by the Bronx District Attorney's Office to state that they do not oppose this motion. [That authorization was placed on the record during a calendar call in Part 8, Bronx County Supreme Court, Criminal Term, on September 26, 2002.]

4. This Court has previously extended appellant's time to file his points and note of issue to 120 days from June 12, 2002, the date my office received the complete record on appeal. [The initial record on appeal that was filed in the Court on April 9, 2002, and received by my office on April 15, 2002, was incomplete as we so notified the Court on April 18, 2002.]

5. An extension of time in which to perfect this appeal is necessitated by the pendency of C.P.L. § 440.10 motion. Appellant filed that motion on July 8, 2002. To date, the prosecution has not filed their response. That § 440.10 motion is likely to render this appeal moot. Had the prosecution timely responded to that motion, this enlarge of time would not be necessary. In any event, the motion is likely to be granted and/or a new disposition to the case negotiated. Therefore, awaiting the disposition of that motion would conserve judicial resources by not unnecessarily forcing us to litigate a soon-to-be moot appeal.

WHEREFORE, we respectfully request that this Court enlarge appellant's time in which to perfect the appeal until the May 2003 Term of the Court.

Dated: New York, New York
October 7, 2002

DAVID J. KLEM

Exhibit "E"

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

[redacted]

Defendant-Appellant.

NOTICE OF MOTION

Ind. No. [redacted]

New York County

PLEASE TAKE NOTICE that upon the annexed affirmation of David J. Klem and the exhibits thereto and the prior proceedings had herein, the undersigned will move a Justice of this Court, at a term for motions thereof, to be held on Monday, August 25, 2003, at the Courthouse, 27 Madison Avenue, New York, New York 10010 at 10:00 a.m., or as soon thereafter as counsel can be heard, for a certificate granting appellant permission, pursuant to C.P.L. § 460.15, to appeal from an order of the Supreme Court, New York County, filed July 25, 2003, denying his motion to vacate judgment under C.P.L. § 440.10; and for such other and further relief as this Court deems just.

Dated: New York, New York
July 31, 2003

ROBERT S. DEAN
Attorney for Defendant-Appellant
Center for Appellate Litigation
74 Trinity Place
New York, New York 10006
(212) 577-2523

DAVID J. KLEM
Of Counsel
(212) 577-2523 (ext. 43)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,	AFFIRMATION
Respondent,	Ind. No. [redacted]
-against-	New York County
[redacted],	
Defendant-Appellant.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID J. KLEM, an attorney duly admitted to practice before the courts of this State, hereby affirms under penalty of perjury, that the following statements are true, except those made upon information and belief, which he believes to be true:

1. I am associated with the office of Robert S. Dean, Center for Appellate Litigation, who was assigned by the Appellate Division, First Department, on June 22, 2000, to represent defendant on appeal from a judgment rendered in this Court, on November 1, 1999, convicting him after a trial of possession of a controlled substance in the first and third degrees and sentencing him, as a first felony offender, to concurrent indeterminate prison terms of 15 years to life and 6 to 18 years, respectively. (The Appellate Division's Order of Assignment is attached hereto as Exhibit A.)

2. I make this affirmation in support of defendant's application, pursuant to C.P.L. §§ 450.15(1), 460.10(4), and 460.15, for permission to appeal from the trial

court's denial of defendant's C.P.L. § 440.10 motion. No prior application for a certificate granting leave to appeal has been made.

Procedural Posture

4. On July 10, 1997, appellant [redacted], and [redacted] were arrested and charged in a criminal court felony complaint with criminal possession of a controlled substance in the first and third degrees after a car in which they were driving was stopped for a traffic violation, searched, and found to contain a kilogram of cocaine in the trunk. They were subsequently jointly charged in New York County Indictment Number 5728/97 with those offenses.

5. On March 31, 1999, [redacted] after jumping bail, bench warranting, and getting re-arrested in Florida for conspiracy to commit murder, pleaded guilty to third-degree possession and was sentenced to one to three years' incarceration.

6. On November 1, 1999, defendant was tried, found guilty, and sentenced to 15 years' to life incarceration for first-degree and third-degree possession.

7. On February 2, 2000, [redacted] pleaded guilty to attempted third-degree possession and received a sentence of probation.

8. Only defendant appealed. On appeal he argued that the search of the vehicle was improper and that his right to be present at jury selection had been violated. On September 13, 2001, the First Department affirmed, over a dissent, his conviction.[1] [redacted]. After granting leave to appeal, on

1. This Court modified the conviction by vacating, as a matter of discretion and in the interest of justice, [redacted]'s conviction for criminal possession of a controlled substance in the third-degree.

November 19, 2002, the Court of Appeals affirmed, again over a dissent, his conviction. [redacted] do never argued any conflict of interest issue on appeal.

9. On March 25, 2003, appellant filed a motion, pursuant to C.P.L. §§ 440.10(f), (h), alleging that his original trial attorney had labored under an actual conflict of interest that had an effect upon his representation of [redacted]. [A copy of the notice of motion, affirmation in support of motion, memorandum of law, and the annexed exhibits is attached hereto as Exhibit B.]

10. On June 13, 2003, the People submitted their response to that motion. [A copy of the affirmation in response, the annexed exhibits, and the response memorandum of law is attached hereto as Exhibit C.]

11. On July 3, 2003, appellant submitted a reply memorandum of law. [A copy of that reply memorandum of law is attached hereto as Exhibit D.]

12. In a written decision filed on July 25, 2003, the trial court (Bruce Allen, J.), denied the motion without holding a hearing. [A copy of the court's decision is attached hereto as Exhibit E.]

The Conflict of Interest Claim

13. At the July 11, 1997, criminal court arraignment, defendant (while represented by unconflicted and independent counsel), alone amongst the three codefendants, provided notice of his intention to testify in the grand jury. His case was adjourned for him to testify in the grand jury.

14. Within the next day or two, each of the three defendants retained the same attorney – Osvaldo Gonzalez, Esq. – to represent them. Upon his entry in the case, Mr. Gonzalez told [redacted] that he had worked out a plea arrangement with the prosecutor prior to the grand jury action. The global deal involved [redacted] pleading guilty to third-degree possession and receiving a sentence of two to six years' incarceration. Pursuant to that plea deal, the charges against [redacted] and [redacted] were to be dismissed.

15. According to the prosecutor's response affirmation, after working out that plea deal, "Gonzalez advised [redacted] that inasmuch as the plea agreement . . . was being worked out, he should not testify before the grand jury and [redacted] agreed." Exhibit C (Abrams' aff. at ¶ 13). Therefore, when [redacted] was produced on July 16, 1997, to testify before the grand jury, he followed his attorney's advice and withdrew his notice to testify. In a sworn affidavit, [redacted] maintained that he would have testified in the grand jury absent Gonzalez' assurances that the charges against him were going to be dismissed under the plea deal. Exhibit B (Mundo aff. at ¶ 7).

16. Thereafter, a grand jury returned an indictment against defendant, [redacted], and [redacted], charging them with acting-in-concert to possess a controlled substance in the first and third degrees; Lopez was also charged with reckless driving.

17. [redacted] then retained independent counsel, who advised him against accepting the global plea deal that [redacted] had negotiated whereby [redacted] would "take the fall" for all three defendants.

18. Although Gonzalez continued to represent appellant and Medina until September 29, 1997, he eventually asked to be relieved from representing defendant after finally recognizing the conflict of interest.

19. At no point prior to that date did Gonzalez discuss the conflict of interest with [redacted]. No court ever explored the conflict with [redacted] or asked him to waive that conflict. In fact, neither Gonzalez nor anyone else had ever explained to [redacted] the consequences and risks of Gonzalez' joint representation of the three codefendants.

20. In his moving papers, defendant alleged that Mr. Gonzalez labored under an actual conflict of interest when he jointly represented [redacted] and his two co-defendants in plea negotiations where his clients' interests dramatically diverged. That conflict acted upon his representation of [redacted] when, on the basis of the alleged global plea, Mr. Gonzalez advised [redacted] to waive his right to testify before the grand jury. See Exhibit B (memorandum of law); Exhibit D (reply memorandum of law).

The Trial Court's Decision

21. The trial court ruled that "'[t]o prevail on an ineffective assistance of counsel claim, [first] a defendant must first demonstrate the existence of a potential conflict of interest [and] [t]hen the defendant must show that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation.'" Exhibit C, at 3 (quoting People v. Harris, 99 N.Y.2d 202 (2002)) (other internal quotations and citations omitted).

22. As for the first part of that test, the trial court acknowledged that "[t]he People do not dispute that Mr. Gonzalez's representation of all three defendants constituted a potential conflict of interest." Exhibit C, at 3. The trial court did not rule on defendant's claim that the potential conflict of interest blossomed into an actual conflict of interest due to his clients' divergent interests when Gonzalez attempted to negotiate a plea whereby one of his clients would "take the fall" for his other two clients.

23. The trial court did not rule on whether that conflict operated upon the representation. Acknowledging that the conflict led to Mr. Gonzalez' advice to Mr. [redacted] not to testify in the grand jury, the trial court noted that there are other "tactical reasons why an attorney might advise a defendant not to testify before a grand jury." Exhibit C, at 4. "As set out in the People's affirmation," the Court wrote, "Mr. Gonzalez cited several reasons why he would have advised the defendant in this case not to testify even if the defendant had been his only client." Exhibit C, at 4. Concluding that "[t]hus it is questionable whether there was an actual conflict which operated on the conduct of the defense," the court made no concrete ruling. Exhibit C, at 4.

24. The basis of the trial court's ruling appears not to rest on the two part test that the court detailed, but rather on some sort of alleged procedural default. According to the trial court, defendant was obligated to raise this issue at some "earlier stage" and not "after an unfavorable verdict at trial and denial of his appeal." Exhibit C, at 4. The trial court also concluded that, despite defendant's arguments to the contrary, the claim was governed, not by the standard that the trial court had earlier detailed in its decision, but by the Court of Appeals' decision in People v. Wiggins, 89 N.Y.2d 872 (1996).

Discussion

25. Appellant now seeks permission to appeal from the order denying his motion to vacate the judgment. Contrary to the lower court's ruling, the governing standard is the one initially set forth by the trial court and not the standard set forth in Wiggins. Also, contrary to the trial court, no procedural bar exists to the bringing of such a claim. In any event, all of those issues are important ones that are worthy of this Court's review.

26. The right to effective assistance of counsel "encompasses the right to conflict-free counsel." People v. Ortiz, 76 N.Y.2d 652, 656 (1990), citing People v. McDonald, 68 N.Y.2d 1 (1986). The standard by which conflict cases are evaluated is the two-prong test set forth by the United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335, 350 (1980), and by the Court of Appeals in People v. Abar, 99 N.Y.2d 406 (2003); People v. Harris, 99 N.Y.2d 202 (2002); People v. Ortiz, 76 N.Y.2d 652, 657 (1990); People v. Alicea, 61 N.Y.2d 23, 31 (1983), among other cases. Those cases require that a defendant establish the existence of a conflict of interest and that the conflict "operated on" the representation. The "operation on" prong is not a prejudice showing (as the People below argued). The United States Supreme Court has clearly stated that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cyler v. Sullivan, 446 U.S. at 349-50. New York's Court of Appeals has agreed with that: "the requirement that a potential conflict have affected or operated on, or borne a substantial relation to the conduct of the defense – three formulations of the same

principle – is not a requirement that defendant show specific prejudice." People v. Ortiz, 76 N.Y.2d at 656 (emphasis added), citing People v. Alicea, 61 N.Y.2d at 30.

27. The trial court was indisputably correct in accepting the People's concession that a conflict of interest existed. Exhibit E, at 3. The People admitted that Gonzalez had worked out a plea agreement wherein the confession of one defendant would result in the dropping of charges against the other two co-defendants. The interests of Mr. Lopez were obviously different from those of [redacted] and [redacted]. While, "a possible conflict of interest inheres in almost every instance of multiple representations," where the multiple representation involves defendants with differing and mutually antagonistic defenses, an actual conflict exists. Cuyler v. Sullivan, 446 U.S. at 348; see also Wheat v. United States, 486 U.S. 153, 159 (1988) ("multiple representation of criminal defendants engenders special dangers"), Holloway v. Arkansas, 435 U.S. 475, 489 (1978) ("Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."); see generally People v. Gonzalez, 30 N.Y.2d 28, 34 (1972) (holding that a conflict exists in joint representation when individual defenses "run afoul of each other"). Here, where one defendant was admitting his guilt to the possession of the drugs and exonerating his colleagues, an actual conflict existed. See United States v. Blount, 291 F.3d 201, 211 (2d Cir. 2002) ("An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action.").

28. The trial court erred in not then reaching the second-prong of the conflict test: whether or not the conflict operated upon the representation. Exhibit C, at 4

(finding it "questionable" whether the conflict "operated on the conduct of the defense" but not resolving issue). In fact, the evidence is undisputed that the conflict did operate on the representation. According to the affirmation the prosecutor submitted below, "Gonzalez advised [redacted] that inasmuch as the plea agreement as outlined above was being worked out, he should not testify before the grand jury, and [redacted] agreed." Exhibit C (Abrams' aff. at ¶ 13; see also id. at ¶¶ 10, 12). The trial court's reference to "several reasons why [Gonzalez] would have advised the defendant in this case not to testify even if the defendant had been his only client," Exhibit E, at 4, is unavailing. What counsel might have or even "would have" done in the absence of the conflict does not change what counsel did in fact do because of the conflict. The trial court was wrong to focus solely on the ultimate advice counsel "would have" given (i.e. not to testify before the grand jury) instead of on what counsel in fact told defendant and how defendant reacted to that advice. Defendant's uncontradicted affidavit specifically stated that but for that advice and the concurrent promise by counsel that all the charges against defendant were going to be dismissed, [redacted] "would have testified in the grand jury." Exhibit B (Mundo aff'd, at ¶ 7). The trial court was not free to ignore that sworn allegation or reach a contrary conclusion without holding a hearing.

29. The trial court erred in concluding that the decision in People v. Wiggins, 89 N.Y.2d 872 (1996), is instructive, much less controlling. Wiggins and its progeny involve non-conflict deficient performance of counsel claims. The standard for such claims is markedly different. In contrast to conflict of counsel claims, those types of claims require a defendant to establish harm and prejudice from the deficient performance. See People v. Wiggins, 89 N.Y.2d at 873; see generally Strickland v.

Washington, 466 U.S. 668, 694 (1984); People v. Baldi, 54 N.Y.2d 137, 147 (1981). The trial court confused two completely different types of ineffective assistance of counsel cases and found Wiggins, with its attendant prejudice standard, to govern this claim, despite the United States Supreme Court's holding that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cyler v. Sullivan, 446 U.S. at 349-50; see also People v. Ortiz, 76 N.Y.2d at 656 ("the requirement that a potential conflict have affected or operated on, or borne a substantial relation to the conduct of the defense – three formulations of the same principle – is not a requirement that defendant show specific prejudice") (internal citations omitted). Defendant's claim was never that his "claim of ineffective assistance should not be governed by normal standards," Exhibit E, at 5, but was rather that the claim should be governed by the standards for conflict cases not for non-conflict deficient performance cases.

30. Lastly, the supposed procedural bar tentatively invoked by the trial court does not in fact exist. Notably, although the People cited a bevy of procedural bars in their response brief, see Exhibit C (memorandum of law, at 5-6), none of the cases or the statutory section they cited is applicable, see Exhibit D, at 9-11. Instead, the trial court relied upon a statutory section and a case that was never argued by the People. See Exhibit E, at 4-5 (citing to C.P.L. § 440.10(3)(a) and People v. Ramos, 26 N.Y.2d 272 (1970)). There was a reason the People refused to rely on that supposed procedural bar – by its very language, it does not apply. See C.P.L. § 440.10(3)(a) ("This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such

right"). In any event, the bar is discretionary, and not mandatory and should not be used by the trial court in the absence of such a request by the People and the opportunity to respond by the defense. Similarly, People v. Ramos, a case dealing with the supposed failure of the defendant to understand English, offers no support for the court's apparent invocation of a procedural bar that on its face does not apply to "right to counsel" claims.

31. This Court should grant leave to consider the issue of what standard applies to this type of claim – the Strickland/ Baldi standard as applied in People v. Wiggins or the standard set forth in Cuyler v. Sullivan, People v. Abar, and People v. Harris. Also, this Court should grant leave to consider what, if any, procedural hurdles exist to the bringing of this claim and if such a procedural hurdle exists (which defendant disputes) whether such a discretionary, non-mandatory, bar should have been invoked. For those reasons, and for all the other reasons set forth in the briefs submitted to the trial court, see Exhibit B (memorandum of law); Exhibit D (reply memorandum of law), appellant asks this Court to grant leave to appeal the denied of his C.P.L. § 440.10 motion.

32. If leave to appeal is granted, it is requested that appellant be granted permission to appeal as a poor person and that Robert S. Dean be assigned as counsel. Appellant is incarcerated and there is no reason to believe that his financial circumstances have changed since this Court granted poor person relief on the direct appeal.

WHEREFORE, appellant respectfully requests this Court to: (i) issue a certificate granting him leave to appeal the denial of his C.P.L. § 440.10 motion; (ii) grant him leave

to appeal as a poor person on the original papers and appoint Robert S. Dean as counsel; (iii) grant such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 31, 2003

DAVID J. KLEM, Esq.

Exhibit "F"

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

[redacted]S,

Defendant-Appellant.

NOTICE OF APPEAL
N.Y. Co. Ind. No. [redacted]

PLEASE TAKE NOTICE, that the above-named defendant-appellant hereby appeals to the Appellate Division: First Department, from the Order of the Supreme Court, New York County, entered on or about April 28, 2003, denying appellant's motion to vacate his judgement pursuant to CPL §440.10.

Dated: New York, New York
July 23, 2003

ROBERT S. DEAN
Attorney for Defendant-Appellant
74 Trinity Place - 11th Floor
New York, New York 10006

By_____

TO: District Attorney
New York County
One Hogan Place
New York, New York 10013

Exhibit "G"

----------X

The People of the State of New York,
Respondent,

-against-

[redacted],
Defendant-Appellant.

----------X

M-2734

[redacted]

CERTIFICATE
GRANTING LEAVE

I, Eugene L. Nardelli, a Justice of the Appellate Division, First Judicial Department, do hereby certify that in the proceedings herein questions of law or fact are involved which ought to be reviewed by the Appellate Division, First Judicial Department, and, pursuant to Section 460.15 of the Criminal Procedure Law, permission is hereby granted to the above-named defendant to appeal to the Appellate Division, First Judicial Department, from the order of the Supreme Court, New York County, entered on or about April 28, 2003.[1]

Dated: New York, New York

ENTERED JUL 10 2003

Hon. Eugene L. Nardelli
Associate Justice

NOTICE: Within 15 days from the date hereon, an appeal must be taken, and this certificate must be filed with the notice of appeal. An appeal is taken by filing, in the Clerk's office of the criminal court in which the order sought to be appealed was rendered, a written notice in duplicate that appellant appeals to the Appellate Division, First Judicial Department (Section 460.10, subd. 4, CPL), together with proof that another copy of the notice of appeal has been served upon opposing counsel. The appeal (or consolidated appeals; see footnote) must be argued within 120 days from the date of the notice of appeal, unless the time to perfect the appeal(s) is enlarged by the court or a justice thereof.

[1]In the event defendant has an existing (direct) appeal from a judgment, such appeal shall be consolidated with the appeal from the aforesaid order; and any poor person relief granted with respect to the appeal from the judgment shall be extended to cover the appeals so consolidated.